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: S.S.
ODR #13461/12-13-KE

Date of Birth:
[redacted]

Dates of Hearing:
February 25, 2013
April 16, 2013

OPEN HEARING

Parties to the Hearing: Parents	Representative: Pro Se
Quakertown Community School District 100 Commerce Drive Quakertown, PA 18951	Christina Stephanos, Esquire Sweet, Stevens, Katz and Williams 331 Butler Avenue New Britain, PA 18601
Date Record Closed:	April 28, 2013
Date of Decision:	May 3, 2013
Hearing Officer:	Linda M. Valentini, Psy.D., CHO Certified Hearing Official

Background

Student is a resident of the District and is eligible for special education under the Individuals with Disabilities Education Act [IDEA]. Pursuant to a previous parental request for a due process hearing, the parties, both represented by counsel, entered into negotiations with the intent of reaching a settlement.

The District's former attorney drafted an agreement [Agreement One] that she believed contained the provisions she and the Parents' former attorney had negotiated, and sent it to the Parents' former attorney. The Parents' former attorney in consultation with the Parents[1] then revised, retyped and reprinted the agreement [Agreement Two], and after the Parents signed it Student's mother delivered the document to the District office. Believing that the document received from the Parents was the document prepared by their attorney, and unaware that it had been revised, the District put the document before the School Board which approved it. Only later did the fact that the agreement had been revised come to light.

The Parents hold that Agreement Two, executed by themselves and the School Board, is a valid settlement agreement and should be implemented. The District contends that because Agreement Two was a revision of Agreement One done without notification, it is not a valid settlement agreement, and that Agreement One is the only binding agreement that exists between the parties. Alternatively, the District posits that there is no valid settlement agreement.

For the reasons presented below I find that no settlement agreement exists between the parties, as neither Agreement One nor Agreement Two is valid.

Issue

Does a valid settlement agreement between the School District and the Parents exist?

---

[1] The plural "Parents" is used throughout unless there is a specific attribution to the father or the mother, Although Student's mother took primary responsibility for communicating with the District and with Parents' counsel, and represented the family at the hearing, she acted on behalf of both Parents. Student's father was present at both hearing sessions and the Parents consulted with one another at the hearing.

Findings of Fact

1. Student[2] is an elementary-school-aged eligible Student residing in the School District. In the spring of 2012 the Parents through their former counsel filed a due process complaint which was bifurcated[3] by the then-presiding hearing officer. The second part of the complaint, relevant to this decision, was assigned the ODR file #3209-11-12-AS.

2. The Parents retained their former attorney and authorized him to represent them in all matters pertaining to their due process hearing request made on behalf of Student. [NT 172-176]

3. The District retained its former attorney under the auspices of her firm and authorized her to represent the District in all matters related to the Parents' request for a due process hearing on behalf of Student. [NT 190, 192, 221-222, 233-234]

4. On September 14, 2012 Student's mother and Parents' former counsel met with the District's counsel. Parents' counsel asked if they could talk about a settlement. The director of special education was not present; this is not uncommon when an attorney is present on behalf of the District. [NT 123, 333-334]

5. The parties discussed settlement terms. Provisions of a settlement were discussed at the meeting.[4] [NT 126-127, 343-344]

6. Student's mother testified to her understanding that the September 14th meeting covered everything, or alternatively 95%, of what would become part of the settlement agreement. [NT 66-67, 338, 342]

7. The District's former attorney disagrees that 95% of the terms were discussed. She testified that the September 14th meeting resulted in general conceptual ideas of what the parties would agree to, the finer

---

[2] 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.

[3] The complaint, among other issues, also addressed ESY issues which necessitated an expedited hearing, hence the bifurcation.

[4] There had also been a dispute about services to Student's sibling, and this dispute was also discussed at the meeting. The matter involving the sibling did result in a signed and approved settlement agreement and is not at issue here.

points of which had to be negotiated by the parties' attorneys. [NT 344-345, 352-353]

8. Between September 20 and September 25, 2012 the parties' respective attorneys carried out multiple email communications negotiating the terms of the agreement. [NT 234, 347, 351-352; S 1, p 1-11] [5]

9. As the attorneys negotiated, not everything that was discussed on September 14th became a term in the agreement, and some terms that were put into the agreement had not been discussed on September 14th. The exact extent to which the Parents' attorney kept his clients apprised of each discrete step in the negotiations is not in the record. The former District attorney discussed "parameters" with the director of special education, but the exact extent of these conversations is not in the record. [NT 67-68, 189, 198]

10. On September 24, 2012 at 8:25 pm the Parents' former attorney emailed the District's former attorney, indicating among other things that for the Parents to accept the District's "final offer" the IEP must include [a specific service in a specific location[6]]. [P-1 p 48[7]]

11. On September 25, 2012 at 7:30 a.m. former counsel for the District emailed former counsel for the Parents stating, "The District has not offered [a specific service in a specific location] as part of its settlement discussions. I will assume that our counter offer is rejected and we will be moving forward to the hearing". The District's former counsel then adds, "To be clear, your additional criteria [a specific service in a specific location among other items] as stated below [in the Parents' former counsel's September 24th email] is rejected, however our counter-offer is on the table until the end of business on Wed [sic]." [P-1 p 47]

12. On September 25, 2012 at 9:51 a.m. former counsel for the Parents sent an email to former counsel for the District, wherein he noted that the Parents "are not pleased with the [District's] proposal", but for the

[5] The numbered exhibits are referenced as "S" for School District and "P" for Parents, followed by the page number designated as "p".
[6] The actual terms of the agreement are not germane to this decision.
[7] Because of the manner in which email chains print out, the same email may appear on several pages of an exhibit. Only one of the pages will be referenced.

sake of giving Student what Student needs now, "Parents accept the "final" settlement offer so long as the independent BCBA can observe [Student] in the classroom. Please confirm". [NT 55, 117; P-1, p 47]

13. Student's mother testified that Parents' former counsel did not tell them that he and District's former counsel had agreed on terms. However, the Parents' former counsel did copy both Parents on his September 25th 9:51 am acceptance of "final" settlement offer email to District's former counsel. Parents' former counsel copied both Parents on this email using each Parent's respective email address. [NT 34-36, 39, 55, 137-138; P-1 p 47]

14. On September 25, 2012 at 1:44 p.m. the District's former counsel wrote an email to Parents' former counsel transmitting the District's agreeing to a BCBA's observing Student in school pursuant to building and IU procedures and stated, "We have a deal". She also noted that Parents' former counsel needed to notify the previous hearing officer that the parties sought a Provisional Dismissal Order[8]. [NT 58-59; P-1, p 47]

15. On September 25, 2012 at 2:45 p.m. the Parents' former counsel emailed the previous hearing officer stating "The parties appear to have reached a settlement" and asked for a Provisional Dismissal Order. [NT 59-60; P-1, p 51]

16. Former counsel for the District then drafted the terms she and former Parents' counsel had negotiated, and on October 2, 2012 at 11:11 a.m. her office forwarded the resulting document, Agreement One, in PDF format marked "draft" to counsel for the Parents for his review. [NT 70; S-3, p 1-8; P-1 p 65]

17. The common practice among attorneys in Pennsylvania when negotiating a special education settlement agreement entails counsel for parents and district communicating by email or by telephone the essential terms of an agreement. Once the attorneys reach an agreement on the essential terms, the District's attorney will draft the agreement, and send it to opposing counsel for review. Opposing

[8] Provisional Dismissal Orders are issued at the mutual request of parties who, for example, have reached an agreement in principle but who need time to reduce the agreement to writing.

counsel will either agree to the draft on behalf of his/her clients and have his/her client execute the agreement or he/she will inform the District's attorney of proposed revisions, with continuing dialogue until a final draft agreement is reached.[9] [NT 315-318, 379-380, 414-415]

18. In her transmittal email, the District's former attorney asked the Parents' former attorney to have the Parents print and sign two copies of the document, and return two originals to her office. She noted, "We will then forward the originals of the Agreement to the District for final approval and execution". Former counsel for the District did not send a copy of the draft of Agreement One to the director of special education. [NT 200; P-1 p 65]

19. That same day, October 2, 2012, Parents' former counsel emailed a copy of Agreement One to the Parents. [NT 36-37, 61, 141-142]

20. On October 3, 2012 at 5:53 pm, the Parents' former counsel replied to the District's former counsel that he and the Parents could not address the draft agreement [Agreement One] until the Parents received Student's records. [NT 147-148; P-1 p 65]

21. On October 3, 2012 at 7:30 pm, the District's former counsel replied, advising Parents' former counsel that a copy of the records had already been mailed to his attention.[10] [NT 43; S-1 p 15]

22. On October 4, 2012 at 10:46 am, Parents' former counsel responded to the District's former counsel, copying the Parents, requesting an update on the delivery of Student's records and questioning the District's position on the draft agreement. [S-1 p 14]

23. On October 4, 2012 at 11:29 am, District's former counsel responded to Parents' former counsel stating the District had not reversed its position on any of the matters that were discussed or agreed upon. She requested that he identify what he thought the District was reversing

[9] On occasion a final agreement cannot be reached and the parties inform the Hearing Officer that a hearing needs to be scheduled.

[10] On or about October 4, 2012, Parents' former counsel received a FedEx package containing 400 pages of Student's educational records. [NT 161-162; S-6 p 14]

because the District was unaware of what he was referencing. [S-1 p 14]

24. Former counsel for the Parents did not respond to District's former counsel's October 4, 2012 email. [S-1 p15]

25. The Parents printed out Agreement One and together reviewed it in light of what they recalled being discussed at the September 14, 2012 meeting. They identified provisions that had been discussed that were not in Agreement One, as well as terms that were in Agreement One that they did not recall being discussed. They made handwritten changes to their printed-out copy of Agreement One. [NT 37-38, 62, 64-65; S-3, p 1-8]

26. The Parents dispute that the terms in Agreement One were "agreed upon" terms. They contend that they were only the terms of the District's former counsel and not their terms or their former counsel's terms. [NT 79-80]

27. On October 3rd or 4th Student's mother called Parents' former counsel on his cell phone and discussed the changes to Agreement One that the Parents wanted. She directed him to redraft the document and then send it back to her because she wanted to re-review it several more times. [NT 63-64, 69, 78]

28. Sometime between October 4th and 7th Parents' former counsel emailed the Parents a revised document, Agreement Two, which conformed to what Student's mother had discussed with him on the phone. Student's mother recalls that their former counsel "probably" told the Parents to "look it over and get back" to him. The email from their former counsel transmitting Agreement Two to the Parents was not entered into evidence. [NT 53, 79, 88, 141-144; S-6, p 2]

29. The document, Agreement Two, emailed to the Parents from their former counsel was a revised and re-typed version of Agreement One, was typed in a different font from Agreement One, did not contain the notation "draft" in the lower left hand corner of the pages as did Agreement One, and contained additions to Agreement One. Agreement Two also omitted some terms that had been in Agreement One. Agreement Two contained terms that were explicitly rejected by

the District in the September 14th meeting and during subsequent negotiations. [NT 39, 47-48, 74-75; Compare S-3 p 1-8 with S-3 p 9-15][11]

30. The Parents together reviewed the document, Agreement Two, that their former counsel had sent them and determined that it conformed with Student's mother's October 3rd or 4th telephone discussions with their former counsel. However, the Parents did not get back to their former counsel regarding their approval of Agreement Two. [NT 38-39, 71, 142; S-3, p 9-15]

31. On October 8th Student's father and Student's mother both signed Agreement Two. [NT 41, 71]

32. On October 8th Student's mother hand-delivered Agreement Two, signed by both Parents, to the District administrative office, giving it to the District registrar who also serves as the building receptionist. [NT 41-42, 71-73, 96, 200-201, 214; S-6, p2]

33. When she dropped off the signed document [Agreement Two] Student's mother did not tell the receptionist that the agreement drafted by District's former counsel had been changed by Parents' former counsel. [NT 74]

34. When she dropped off the signed document [Agreement Two] Student's mother did not leave a note for the director of special education noting that the agreement had been changed from that drafted by the District's former attorney after negotiations with Parents' former counsel. [NT 74, 202, 214]

35. Student's mother's past practice when dropping off material to the director of special education had been to wait for him to come and initial what she had dropped off. The director of special education testified that her not doing so on this occasion "struck [him] as puzzling" so he checked the document to be sure the dollar amount

[11] Deciding the issue of whether a valid settlement agreement exists is not affected by the specific terms that were expressed in Agreement One or Agreement Two, as each version of the agreements taken as a whole is in dispute. However, the parties hold that there is a substantial difference between the agreements. A list of the differences was presented by the District in its written closing statement, and this is reproduced in its entirety in APPENDIX I attached to this decision.

agreed upon was correct, and as the amount was correct he gave the document to the School Board secretary to be put on the Board's agenda. He did not read the document in any depth; this is not unusual because agreements are negotiated and finalized by attorneys acting on behalf of districts. [NT 203-207, 235, 241, 388-389]

36. The director of special education testified that he had no reason to believe that Parents' former attorney or Student's Parents or anybody else would have changed the terms of the agreement regarding what could be covered and not covered. [NT 213-214, 241]

37. The director of special education did not have a copy of Agreement One with which to compare Agreement Two so he thought what Student's mother had delivered was what the former District attorney had negotiated with Parents' former counsel. [NT 206-207]

38. Student's father did not inform the District's special education director that Agreement Two's terms were different from Agreement One's terms. [NT 41]

39. During this time the Parents' former attorney never communicated to the District's former attorney or the director of special education by phone or email that the Parents had disagreements with Agreement One and that his office had retyped and changed the terms of Agreement One. [NT 90-93, 203, 379-382, 413]

40. Student's mother testified that on October 8th Parents' former counsel e-mailed[12] Student's mother, asking her in reference to Agreement Two to "please get back to me with what you think…[about] this so that I can forward it to [District's former counsel]". [NT 90]

41. However, unbeknownst to Parents' counsel, Student's mother had already taken Agreement Two, signed by both Parents, to the School District. She did not tell her former counsel that she had already dropped off Agreement Two to the District until later, "Later I did because I didn't get back to him right away". [NT 91, 144]

[12] The Parents did not provide a copy of this email.

42. When the District's former counsel learned that Student's mother had dropped off the signed copies she did not ask the director of special education to send copies to her. In her experience it is not the norm but is not entirely unusual for parents to deliver agreements to a district; she has never had the experience of the documents being different from what she expected them to be. [NT 375-378, 391, 411]

43. Former attorney for the District did not hear from the Parents' former attorney again until October 11th at 6:35 pm when he sent her an email copied to the Parents stating "Please confirm when a written settlement agreement will be concluded." [P-1 p 67]

44. On October 11th at 6:50 pm, District's former attorney replied, copying the director of special education, "If you are asking when Board approval will occur, that will be at the October 25, 2012 meeting." [P-1 p 67]

45. On October 11, 2012 at 11:07 pm Parents' former counsel forwarded District's former counsel's email to the Parents, stating, "Looks like this is the wait & see until 10/25." This email chain does not contain a statement by the Parents' former attorney that the document delivered to the District [Agreement Two] had terms changed from the draft District's former counsel had prepared [Agreement One]. The District's former attorney was not copied on this email from the Parents' former counsel to the Parents. [NT 112-113, 413; P-1 p 67][13]

46. On October 10th or 11th Student's mother and the director of special education had a telephone conversation in regard to obtaining a signed document for BSE[14]. With regard to the settlement agreement itself, although Student's mother could not recall her exact words, she testified that in this conversation she did not directly inform the director of special education that her former attorney's office had

[13] Communications Parents' former attorney had with District/ District's former attorney after Agreement One was sent to him for which he billed were recorded on his invoice as follows:

October 3, 2012 email to SD – settlement. Email at S-1 p 16.
October 4, 2012 email to SD – records. Email at S-1 p 15.
October 11, 2012 email to SD – settlement. Email at S-2 p 11
[NT 96-97; S-7 p 3]

[14] The Parents had filed complaints with the Pennsylvania Department of Education Bureau of Special Education. There had been communication about a form for BSE being needed. [NT 202-203, 363-364, 397-398]

retyped the agreement and that the terms presented in the draft created by District's counsel had been altered. Student's mother testified that she spoke to the director of special education about the agreement she had dropped off being "more in line with what we had discussed". [NT 89-92, 139-140. 193, 202-204, 243-244]

47. Student's mother never specifically told the director of special education that the Parents had rejected the draft, Agreement One, and that their former counsel had revised it, producing Agreement Two. [NT 92]

48. The School Board was first notified an agreement was negotiated between the Parties when they received the agenda and update from the District superintendent one week prior to the October 25, 2012 scheduled Board meeting. As per usual procedure, the agenda and update did not include any of the specific terms of the agreement in order to protect the privacy of the Student. [NT 271, 282-284; P3 p 8-13]

49. The superintendent was not aware that the agreement she presented to the Board for approval on October 25, 2012 was Agreement Two, the revision of Agreement One. As is her common practice, she relies on the attorneys to negotiate the terms of an agreement and create the settlement agreement for Board execution and was only informed of the essential terms of the agreement. [NT 276-281, 289-290, 295-296]

50. In her years of experience the superintendent would never have expected to be given something in writing to put before the Board that had not been fully agreed to through completed negotiations. [NT 314-315, 321]

51. On October 25, 2012, without any discussion on the specific terms of the agreement in accordance with accepted practice and in reliance that the agreement placed before them contained the mutually agreed upon terms, the Board approved Agreement Two. To preserve Student's privacy, the terms were not read aloud at any time to the Board. The Board president signed the document. [NT 274-278, 283-285, 436-437]

52. On October 25, 2012, the Board President, pursuant to effective board practice as conveyed in trainings by the Pennsylvania School Boards Association [PSBA] and other organizations did not read the agreement before executing Agreement Two. [NT 274-276, 433-435]

53. During the first full week in November 2012, after the District had been closed for a week because of Hurricane Sandy [during this period email communication was disrupted because of power outages], the director of special education sent a copy of the executed document, Agreement Two to the Parents. [NT 208-209]

54. The Parents thereafter submitted a request for payment along with a copy of an invoice for [the service/service location specifically denied by the District during the September 14th meeting and during attorney negotiations] to the director of special education for reimbursement. [NT 209]

55. As he understood the monies provided for in Agreement One were not to be used for this particular service based on the emails exchanged between the attorneys when they were negotiating terms, the director of special education called Student's mother to discuss the matter. Upon learning that the Parents and he had different understandings of the negotiated terms, the director of special education called the District's former attorney for clarification. [NT 196-197, 209-210]

56. Upon inspecting the copy of Agreement Two the director of special education forwarded to her, the District's former attorney discovered it contained terms different from Agreement One which contained terms originally agreed upon between the attorneys during their negotiations. She contacted the Parents' attorney about this discrepancy. [NT 210-211, 230, 378-379]

57. Agreement One represents the District's final offer to the Parents related to settling the issues raised in the spring 2012 due process complaint [ODR file #3209-11-12-AS]. The District still stands by this offer. [NT 211-212, 218-219, 407]

58. Student's mother testified that her former attorney said "there was no agreement or something to that effect". She added, "I don't remember". [NT 108]

59. On November 9, 2012 the Parents' former attorney sent the then-presiding hearing officer an email asserting the District was rescinding Agreement Two. Accordingly, the then-presiding hearing officer permitted the Parents an extension to reopen ODR No. 3209-11-12-AS so that a hearing could be held. [S-8 p 12, p 3]

60. By the extension deadline of January 23, 2013 at 5 PM, the Parents and/or their former attorney failed to request reinstatement of ODR No. 3209-11-12-AS, so the then-presiding hearing officer relinquished jurisdiction. [NT 101-102; S-8 p 1]

Legal Basis and Discussion

As a threshold issue, the Parents posed a challenge to the hearing officer's authority to decide contract disputes. Although whether a hearing officer has jurisdiction to *enforce* resolution agreements appears to be an open question in this circuit [see for example *Baker v. Lower Merion School District*, 2010 U.S. Dist. LEXIS 142268 (ED PA 2010)] the jurisdictional issue raised by the Parents in the instant matter was decided when the Eastern District of Pennsylvania ruled that special education hearing officers have jurisdiction over disputes about whether an enforceable settlement agreement exists. In that case the court remanded the matter in question back to this hearing officer for hearing and disposition. *I.K. ex rel. B.K. v. School District of Haverford Tp.*, 2011 WL 1042311 at *5 (ED. Pa. Mar 21, 2011).

In its written closing argument the District invested considerable attention to alleging that fraudulent behavior on the part of the Parents and their former counsel rendered Agreement Two invalid. Similarly, in their closing argument the Parents allege that the District's former counsel's behavior was fraudulent. I decline to reach either conclusion in this forum, as there is a more parsimonious explanation for why the situation developed as it did. Giving all participants' actions the benefit of the most benign interpretation, this case represents a perfect storm of unreliable assumptions.

First, the Parents assumed that the terms discussed at the September 14th meeting constituted the sum total, or at least 95%, of the terms of the agreement; they assumed that it was appropriate to sign and deliver the

revised agreement to the District without checking to be sure their former attorney had notified the District's former attorney of the changes; they assumed that it was not necessary for them directly to notify the director of special education that they had signed and delivered a revision; they assumed that it was not necessary for them to tell their former attorney that they were going to, or had already, signed and hand-delivered the revised document to the District; and they assumed that because the District unknowingly submitted the revision to the School Board which approved it that the revision represented a valid settlement agreement that must be implemented. The Parents' former attorney may have assumed[15] that the Parents understood that he and the District's former attorney would be negotiating terms that might differ from those discussed at the September 14th meeting; he may have assumed that his communications with the Parents during negotiations with the District's former attorney had resulted in a final agreement; he may have assumed that when the Parents sought revisions and he supplied them the Parents would get back to him with their final approval; and he may have assumed that he would have the opportunity to then get back to District's counsel regarding the changes. The District's former attorney assumed that her negotiations with Parents' former counsel had resulted in a final agreement; she assumed that if there were changes or concerns the Parents' former counsel would notify her; she assumed that the concerns about the draft agreement Parents' former counsel referenced obliquely had been put to rest; and she assumed that the draft she had provided to Parents' counsel was the same agreement that the Parents signed and delivered to the District. The District's director of special education and superintendent assumed that the signed document delivered by Student's mother was the agreement drafted by its former counsel. The School Board assumed that the agreement it received and approved had been negotiated by the District and its counsel and represented all agreed upon terms.

It is not difficult to identify what each player should have done at each step along the way, and in hindsight less assuming and more assiduous follow through would have resulted in either a clear and valid settlement agreement or a due process hearing on the merits of the Parents' original claims. If this case serves any illustrative purpose for all concerned, it should stand as a caution against making assumptions.

---

[15] Parents' former attorney did not participate directly in this hearing and was not called by either party to testify, although he assisted the Parents in preparing some of their exhibits for this hearing and in finding case law for them. [NT 98-100, 105-106, 109, 253-254, 317-318, 351-352] The record reflects what may have been his assumptions.

Based on their assumptions, the parties now each ask that the hearing officer find their respective version of the agreement to be valid and enforceable. Unfortunately for both parties, neither party has persuaded me that its version of the settlement agreement is valid and enforceable. Applying the relevant law to the facts established through documentary evidence and credible testimony, I reach the conclusion that a valid enforceable settlement agreement between the District and the Parents does not exist.

Legal Basis

Burden of Proof

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the U.S. Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion, a component of the burden of proof, which also includes the burden of going forward with the evidence. The burden of persuasion is the more important of the two burden of proof elements, since it determines which party bears the risk of failing to convince the finder of fact that the party has produced sufficient evidence to obtain a favorable decision. This rule can be the deciding factor in a case when neither side produces a preponderance of evidence, *i.e.*, when the evidence on each side has equal weight, which the Supreme Court in *Schaffer* called "equipoise." When the evidence on one side has greater weight, it is preponderant in favor of that party, which has borne its burden of persuasion and prevails. When the evidence is equally balanced, the party with the burden of persuasion has produced insufficient persuasive evidence and cannot obtain a favorable decision.

This case, however, does not fit into the usual burden of persuasion analysis, primarily because the issues are a combination of law and fact that affect both parties equally. Although the District filed the due process complaint that initiated the case, the only issues in dispute were whether the parties entered into a contract and which party's view of the contract terms is accurate. Both parties, therefore, carried the burden of persuasion with respect to the existence of a contract and the meaning of the contract terms. Since I conclude that there is no binding contract, neither party bore its burden of persuasion. Consequently, in this case, the equal balance does not

support a decision in favor of either party because both parties were equally responsible for convincing the fact finder of their respective positions.

Credibility of Witnesses

Credibility: 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); See also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). I found all witnesses to be generally credible, all giving as best they could their recollections of/ interpretations of events that transpired over six months previously. However, I do not give weight to the Parents' written closing argument allegations that District witnesses committed perjury at the hearing.

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.[16] 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.[17]

Although it is common practice for an attorney representing Parents in a special education due process case to negotiate a settlement agreement on behalf of the Parents, the attorney does not have the power to bind the parent to an agreement.

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

[16] *School Dist. of Philadelphia v. Framlau Corp*., 15 Pa.Cmwlth. 621, 328 A.2d 866 (1974).
[17] *Id*.

directors in every school district 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)."[18]

Settlement Agreements and Contracts

The enforceability of settlement agreements is determined by general principles of contract law. [19] A contract is a legally binding agreement between parties creating obligations that are enforceable or otherwise recognizable at law.[20] Under Pennsylvania law, in order for a party to be bound by an agreement, there must be a mutual manifestation of intent to be bound, "a meeting of the minds."[21] A meeting of the minds requires the concurrence of both parties on all the terms in a contract, or they have failed to operate an enforceable contract.[22]

To be enforceable a settlement agreement must contain all the necessary elements of a contract.[23] 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.[24,25] If any of these elements is missing, a court in Pennsylvania will not enforce an agreement as a legal contract.[26]

An Offer may be either written or spoken, or implied by action.[27] 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.[28] Generally, an Offer must sufficiently establish the subject matter that the

---

[18] 24 P.S. §5-508, Public School Code.
[19] 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).
[20] *Black's Law Dictionary*, 8th Ed., (2004).
[21] See *Lackner v. Glosser*, 892 A.2d 21, 34 (Pa. Super. 2006); *See also Courier Times, Inc. v. United Feature Syndicate, Inc*., 445 A.2d 1288, 1295 (Pa. Super. Ct. 1982).
[22] *Onyx Oils Resins Inc. v. Moss*, 367 Pa. 416, 420, 80 A.2d 815, 817 (1951).
[23] *Mazzella v. Koken*, 739 A.2d 531, 536 (Pa. 1999).
[24] 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.
[25] *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); See also *Dept. of Transportation v. Pa Industries for the Blind*, 886 A.2d 706 (Pa Commw. 2005).
[26] *Schreiber v. Olan Mills.*
[27] *Northern Penna. Legal Servs., Inc. v. Lackawanna Cnty*., 513 F. Supp. 678, 683 (M.D. Pa. 1981).
[28] RESTATEMENT (SECOND) CONTRACTS §24.

contract will be based upon, and properly describe the parties to be bound.[29] 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.[30] An Offer cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.[31]

Discussion and Conclusions of Law

Agreement One: When the attorneys representing the parties believed they had concluded their negotiations, in the words of the District's former counsel, that they had "a deal", they moved to the next step, reducing the settlement to writing. Agreement One, drafted by the District's former attorney, represented the Offer, the first essential element of a contract.

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.[32] Upon reviewing the Offer, the Parents did not confer Acceptance as they disagreed with some of the terms contained in the Offer and identified other terms they wanted included that were not.

Agreement One was an Offer from the District without Acceptance from the Parents. Therefore Agreement One was not a valid settlement agreement, a contract.

Agreement Two: Rather than give Acceptance, the Parents and their former counsel produced a counter-offer in the form of Agreement Two. However, a fundamental principle of contract law is that the party proposing the Offer [in this case the Parents proposing a counter-offer] cannot suppose, believe, suspect, imagine or hope that an Offer has been made.[33] An Offer must be communicated to the offeree [at this juncture the District] in an intentional [and] definite manner.[34] The evidence is persuasive that neither the Parents nor the Parents' former counsel communicated the counter-offer to the

---

[29] *Detwiler v. Capone*, 55 A.2d 380, 385 (Pa. 1947).
[30] RESTATEMENT (SECOND) CONTRACTS §33.
[31] *Id*.
[32] *Pennsy Supply, Inc. v. Am. Ash Recycling Corp. of Pa*., 895 A.2d 595, 600 (Pa. Super. 2006).
[33] *Morosetti v. Louisiana Land & Exploration Co*., 564 A.2d 151, 152 (Pa. 1989).
[34] *Id.*

District and/or the District's former counsel in an intentional and definite manner. In Pennsylvania, if the party seeking to prove the existence of a contract does not show that a distinct Offer was made, then there is no contract.[35] The District was not aware that a counter-Offer had been made, and could not then freely and willingly confer Acceptance.

Agreement Two was neither a distinct Offer as it was not communicated in an intentional and definite manner, nor was there or could there be Acceptance, as the District did not understand what it was being asked to agree to. Therefore, Agreement Two was not a valid settlement agreement, a contract.

Conclusion: The District's written proposal of the terms negotiated by counsel for the parties [Agreement One] is not a contract without the Parents' Acceptance. The Parents' revised proposal of terms [Agreement Two] is not a contract without their making it an Offer in an intentional and definite manner. Once the Parents' proposal was eventually made clear, without the District's Acceptance, there is no contract. Moreover, case law in the Eastern District of Pennsylvania has clearly established that where offers have been made but rejected, or believed agreements repudiated, then there is no contract to enforce.[36] Neither Agreement One nor Agreement Two is a valid settlement agreement.

ORDER

It is hereby ordered that:

No settlement agreement exists between the parties.

Any claims not specifically addressed by this decision and order are denied and dismissed.

May 3, 2013
Date

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

[35] *Reed v. Pittsburgh Bd. of Pub. Educ*., 862 A.2d 131, 135 (Pa. Commw. Ct. 2004) (citing REST §33).
[36] *Morris v. School District of Philadelphia*, 1988 U.S. Dist. LEXIS 8680 (E.D. Pa. 1988).

APPENDIX I

[To the May 3, 2013 Hearing Officer Decision regarding ODR File #13461/12-13-KE]

When the Parents' former attorney's office retyped Agreement One the agreed upon terms were changed in Agreement Two as follows:[37]

- Omitted the waiver, from the beginning of time through the conclusion of the 2012-2013 school year or until such time the compensatory educational funds are depleted, whichever comes first. S-3 at 1, Para 1 of Agreement 1;
- Changed and expanded the definition of legitimate educational expenses to include: physical therapy, occupational therapy, sensory integration therapy, speech and language services, tomatis, provided by or at the direction of the behavior specialists, licensed instructors or highly qualified certified teachers, at the home of the Student. S-3 at 2, Para 1(a) of Agreement 1; S-3 at 9 Para 1(a) of Agreement 2.
- Added reimbursement to include road toll charges. S-3 at 10, Para, 1(a).
- Changed Para. 4 from Agreement 1 which stated "the Parents agree that the Student's April 16, 2012 Individualized Education Plan and proposed placement is an appropriate offer of "FAPE" *to* the Parties agree that the Re-evaluation Report discussed on September 7, 2012, together with other current evaluations including the Lindamood-Bell Test Results, shall be included as present levels for an updated Individualized Education Plan (IEP) for SY 2012-2013, which shall be concluded within ten (10) days of execution of this agreement. Thereafter the proposed placement stated in the IEP of April 16, 2012, will be accepted as an appropriate offer of FAPE. The aforementioned updated IEP, and any IEP hereinafter for the Student, shall include a Notice of Recommended Educational Placement or Prior Written Notice. S-3 at 4, Para. 4 of Agreement 1; S-3 at 11 Para. 4 of Agreement 2.
- Para. 5 of Agreement 1 was changed from "This should include but is not limited to the Due Process Matter captioned *In re S.S. a student in the [Redacted] School*

[37] Exhibit S-3 contains a copy of Agreement One and Agreement Two. The sections highlighted in orange in Agreement One at 1-8 are terms that were in Agreement One but taken out of Agreement Two. The sections highlighted in pink on Agreement Two at 9-15 are the changes and additions to Agreement One.

District, ODR File No. 3209/11-12 AS and all Compliance Complaints filed with the Bureau of Special Education, Division of Compliance and Monitoring, with the Pennsylvania Department of Education" *to* "namely the Due Process matter caption In re S.S. a student in the [Redacted] School District, ODR File No. 3209/11-12 AS (not italicized in this version), and shall not appeal the hearing officer decision of ODR File NO. 3208/11-12 AS, regarding ESY 2012. The decision in ODR file NO. 3208/11-12 AS shall not be used in any subsequent matter whatsoever." S-3 at 4, Para 5 of Agreement 1; S-3 at 12, Para 5 of Agreement 2.

- Omitted Para. 6 of Agreement 1 which stated "The Parents shall refrain from taking an appeal to either state or federal court of the Administrative Hearing Officer's Decision captioned, *In re S.S. a student in the [Redacted] School District*, ODR No. 3208-11-12-AS (Culleton, June 28, 2012)." S-3 at 4, Para. 6 of Agreement 1.
- Changed Para. 7 of Agreement 1 to narrow the waiver and consideration to only the claims that are "before the Special Education Hearing Officer" and changed the waiver from "beginning of time through the conclusion of the 2012-2013 school year, or until such time the compensatory educational fund is depleted, whichever comes first" *to* "from the beginning of time through the date of execution of this Agreement." S-3 at 4, Para 7 of Agreement 1, S-3 at 12, Para 6 of Agreement 2.
- Changed Para 8 of Agreement 1 from "The Parents specifically acknowledge that if they take any action on their own or through counsel, that has the effect of reinstating, reviving or initiating any administrative or judicial proceeding of any sort against the District regarding the Student during the 2012-2013 school year or until such time as the compensatory educational fund was established in Paragraph One (1) of this Agreement are depleted, whichever occurs first they will automatically forfeit any remaining compensatory educational funds. If any action is initiated by the Parents, on their own, or through counsel, the District will pursue remedies against the Parents and their attorney in all appropriate forum *to* "… if either party takes any action, on their own or through counsel, to

the effect of reinstating, revising or initiating any administrative or judicial proceeding of any sort that includes any issue presently before the Special Education Hearing Officer in ODR No. 3209/11-12. As, the obligations herein regarding the compensatory educational fund shall be suspended." S-3 at 5, Para. 8 of Agreement 1; S-3 at 5, Para 7 of Agreement 2.

- Changed the waiver in Agreement 1, Para 10 from "the conclusion of the 2012-013 school year or until at such time the compensatory educational funds are depleted, whichever comes first or a resolution of new filings is achieved" *to* "the date of the execution of this agreement or a resolution of new filings is achieved". S-3 at 6, Para 10 of Agreement 1; S-3 at 13, Para 9 of Agreement 2.
- Added to Para. 11 of Agreement 1 in effect permitting parents from being precluded from cooperating, testifying or otherwise assisting any governmental authority regarding any actions said governmental authority may undertake towards the District and its officers, directors, employees, agency's attorneys and insurers. S-3 at 6, Para. 11 of Agreement 1; S-3 at 13, Para. 10 of Agreement 2.
- Deleted Para. 13 of Agreement 1, the confidentiality clause. S-3 at 6, Paragraph 13 of Agreement 1.