

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

DISMISSAL

Student's Name: S.S.

Date of Birth: [redacted]

ODR No. 14764-1314KE

OPEN HEARING

Parties to the Hearing:

Representative:

Parent[s]

Pro se

Quakertown Community Sch. Dist.
100 Commerce Drive
Quakertown, PA 18951

Christina Stephanos, Esq.
331 Butler Avenue
New Britain, PA 18601

Dates of Hearing: 05/13/2014

Record Closed: 07/03/2014

Date of Decision: N/A¹

Hearing Officer: Brian Jason Ford

¹ This document is an order dismissing this special education due process hearing with an accompanying memorandum. As this represents the final disposition of this matter, it includes a standardized cover page for ODR final decisions and orders.

Memorandum

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* On May 22, 2014, I issued an interim order, directing the parties to clarify the issues and their positions in this matter.² In response to the interim order, the Parents submitted a brief, and the District submitted a brief with 15 exhibits. Upon consideration of the parties' briefs, and for reasons stated below, I now dismiss this matter *sua sponte*.

The history of litigation between the parties, and the extensive procedural history of this due process hearing, are documented in the five (5) prehearing orders and one (1) interim order issued in this matter. For context, a prior due process hearing between these parties was resolved by a Settlement Agreement and Release dated October 25, 2012 (Settlement or Agreement). The parties then engaged in litigation about the Settlement itself, resulting in a determination that the Settlement is binding on the parties. *A.S. v. Office for Dispute Resolution*, 2014 Pa. Commw. LEXIS 72 (Pa. Commw. Ct. Jan. 24, 2014).³ The Parents then initiated these proceedings, originally alleging that the District breached the Settlement, and seeking enforcement or specific performance. After explaining my lack of jurisdiction to hear such claims, the Parents amended their complaint twice. The Parents' Third Amended Complaint (Complaint) is before me.

In the various prehearing communications, and in the five prehearing orders issued in this matter, and during the hearing session, I have reiterated that I do not have authority to enforce private settlement agreements. In the lead up to this hearing, I generously read the Complaint to include a claim that the District breached its obligation to provide a free appropriate public education (FAPE) to the Student. More specifically, I determined that I could hear a claim concerning a denial of FAPE resulting from the District's alleged failure to implement the Settlement. My jurisdiction was premised on the alleged denial of FAPE, not the alleged breach of contract. I also determined that evidence of breach of the Settlement is not, by itself, evidence of a denial of FAPE. Rather, the Parents bore the burden to establish that the Student required specially designed instruction (SDI) and/or related services in order to receive a meaningful educational benefit, and that such SDI and/or related services were denied as a result of the District's breach of the Settlement.⁴ I explained all of this to the Parents countless times in many ways both before and during the hearing session.

² The need for the interim order is evidenced in the hearing transcript, *passim*. The moment of epiphany is found at NT 205-210.

³ The Commonwealth Court opinion is an appeal of Dr. Valentini's due process decision in *S.S. v. Quakertown Community Sch. Dist.*, ODR No. 13461-1213KE. It is captioned as if ODR were a defendant, which can be misleading.

⁴ In general, SDIs and related services constitute the whole substance of a student's special education. By definition, "special education" is SDI. See 20 U.S.C. § 1401(29). The Parents' burden of proof is more fully explained in the prehearing orders.

During the hearing session, and through their brief, the Parents abandoned all claims except for their claim that the District failed to comply with Paragraph 4 of the Settlement, and that such non-compliance resulted in a substantive denial of FAPE. See NT at 190-197.⁵

In its brief required by the interim order, the District concedes that it did not “fully comply” with Paragraph 4, but argues that this non-compliance did not result in a substantive denial of FAPE. The Parents, in their brief, aver a multitude of ways in which the District breached Paragraph 4. The Parents also aver a multitude of ways in which the Student was denied FAPE (some of which were raised for the first time in their brief). There are connections between the alleged violations of Paragraph 4 and the alleged denials of FAPE. However, these connections are tenuous and, more importantly, can be made only by stepping outside of the Parents’ only remaining claim.

Paragraph 4 reads as follows:

The parties agree that the Re-Evaluation Report discussed on September 7, 2012, together with other current evaluations including 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 IEP, and any IEP hereinafter for the Student, shall include a Notice of Recommended Educational Placement or Prior Written Notice.

On its face, Paragraph 4 does only three things: 1) it says how the *present levels* in the Student’s IEP must be updated; 2) it sets a timeline for the update and; 3) it requires issuance of a NOREP or PWN for both the update and any subsequent IEP. Paragraph 4 does *not* concern the SDIs or related services that the Student must receive. Further, Paragraph 4 does not require the District to do anything with the various evaluations other than include them as present levels in the IEP.

The core of the Parents’ argument is that if the District had updated the present levels in the Student’s IEP, then the District would have provided more and/or different SDIs and related services.⁶ But Paragraph 4 requires no such adjustment. If anything, Paragraph 4 suggests that whatever IEP was under consideration at the time of the agreement was appropriate and mutually-agreeable with the sole exception of the present education levels. Linking the District’s failure to update the present levels to a *subsequent* failure to adjust the Student’s programming requires not only an inquiry beyond Paragraph 4, but inquiry beyond the scope of the entirety of

⁵ The Parents’ averments during the hearing could also be construed to abandon all claims except for the District’s failure to abide by recommendations in various privately-obtained educational reports. As explained below, this claim falls outside the scope of the Parents’ Third Amended Complaint and, consequently, is not before me.

⁶ The Parents also argue that the District’s failure to include private testing results in the Student’s present levels also, somehow, resulted in a denial of instruction in the Student’s home. This argument falls well outside of the scope of the Parents’ remaining claim.

the Complaint. The claim that the District denied the Student a FAPE by failing to increase or change the Student's SDIs or related services – either in the absolute or after updating the Student's present levels as required by Paragraph 4 – is absent from the Parents' complaint. I can only decide issues that are plead. 20 U.S.C. § 1415(f)(3)(B).

Only the most exceedingly generous reading of the Complaint could yield a contrary result. A single sentence of the Complaint suggests that the purpose of updating the present levels was to “establish baselines and develop an appropriate IEP...” Complaint at page 1, ¶ 4. The Complaint does not say that an appropriate IEP would have included more or different SDIs or related services. In fact, the Complaint includes no allegations whatsoever concerning SDIs or related services. In more generic terms, the Complaint says nothing at all about the substance of the special education that the Student received or should have received. Further, as indicated above, the paragraph of the settlement that the Parents are so focused on strongly indicates that the only flaw in the Student's IEP at the time of the Settlement was the present levels, and that all other parts of the IEP (including SDIs and related services) were appropriate.

In sum, the Parents are asking me to determine that the District violated the Student's right to a FAPE for reasons that not only go beyond the scope of their only remaining claim, but also go beyond the scope of their Complaint. The issues that the Parents want me to resolve and remedy fall outside the scope of these proceedings. I cannot adjudicate such issues, and so this matter is dismissed.

An order consistent with the foregoing follows:

ORDER

Now, July 1, 2014, it is hereby **ORDERED** that this matter is **DISMISSED**.

/s/ Brian Jason Ford
HEARING OFFICER