

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Richard and Angela Smith,	:	
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Petitioners	:	
	:	
v.	:	No. 1428 C.D. 2014
	:	
Quakertown Community School	:	Submitted: December 26, 2014
District,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
          HONORABLE P. KEVIN BROBSON, Judge  
          HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE COHN JUBELIRER**

**FILED: April 29, 2015**

By Opinion and Order filed January 24, 2014, this Court held that an October 25, 2012 Settlement Agreement between Richard and Angela Smith (Parents) and the Quakertown Community School District (School District) was a valid settlement agreement. A.S. and R.S., individually and on behalf of S.S., and S.S. in his own right v. Office for Dispute Resolution (Quakertown Community School District), 88 A.3d 256, 267 (Pa. Cmwlth. 2014). This Settlement Agreement was intended to resolve a due process complaint filed by Parents on

behalf of their child (S.S.), who is eligible for special education services pursuant to the Individuals with Disabilities Education Act<sup>1</sup> (IDEA). *Id.* at 258. Parents now petition, pro se, for review of the July 1, 2014 Order of a Pennsylvania Special Education Hearing Officer (Hearing Officer) dismissing, *sua sponte*, Parents’ Third Amended Due Process Complaint alleging that the School District’s failure to comply with the Settlement Agreement resulted in S.S. being denied a free appropriate public education<sup>2</sup> (FAPE). On appeal, Parents argue that the Hearing Officer erred by dismissing their Third Amended Due Process Complaint for failure to state a claim without addressing the merits of their primary claim that the School District’s failure to comply with the Settlement Agreement resulted in the denial of a FAPE. Parents argue further that they established that the School District’s non-implementation of the Settlement Agreement denied S.S. a FAPE.

## **I. BACKGROUND**

### **A. Due Process Complaints/Pre-Hearing Orders**

The instant proceedings began on March 10, 2014 when Parents filed, pro se, a Due Process Complaint alleging that, because the School District had failed to implement the Settlement Agreement, numerous provisions of which Parents had drafted, S.S. was denied a FAPE from the time he entered the School District through the present. (Due Process Complaint at 2, R. Item 18.) The School

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<sup>1</sup> 20 U.S.C. §§ 1400 – 1482.

<sup>2</sup> A “free appropriate public education” is defined in the IDEA as special education and related services which: “(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate . . . education in the State involved; and (D) are provided in conformity with the individualized education program . . . .” 20 U.S.C. § 1401(9).

District filed a Motion to Dismiss and a Sufficiency Challenge to the Parents' Due Process Complaint. (Motion to Dismiss/Sufficiency Challenge, R. Item 17.) In response, Parents filed, pro se, an Amended Due Process Complaint. (Amended Due Process Complaint, R. Item 16.) On March 26, 2014, the Hearing Officer issued a Pre-Hearing Order denying the School District's Motion to Dismiss, accepting Parents' Amended Due Process Complaint, and directing the parties to provide a copy of the October 25, 2012 Settlement Agreement. (Pre-Hearing Order, March 26, 2014, R. Item 15.)

On April 2, 2014, Parents filed, pro se, a Second Amended Due Process Complaint (Second Amended Complaint) describing in more detail the nature of their claims and the facts related to the issues presented. (Second Amended Complaint, R. Item 14.) Based on their allegations, Parents requested declaratory and monetary relief, including "[a] demand for an increase in compensatory education fund/hours, due to the delay of home programming resulting from non-compliance" with the Settlement Agreement. (Second Amended Complaint, Proposed Relief, §§ 1-5.)

On April 8, 2014, the Hearing Officer issued a Second Pre-Hearing Order addressing the School District's: (1) objection to Parents' filing, without the Hearing Officer's permission, the Second Amended Complaint; (2) request for clarification as to whether the previously filed Amended Due Process Complaint or the Second Amended Complaint was the applicable complaint; and (3) combined

Motion to Dismiss, Motion to Limit and Sufficiency Challenge (Motion).<sup>3</sup> (Second Pre-Hearing Order, April 8, 2014, R. Item 13.) Upon review, the Hearing Officer accepted Parents' Second Amended Complaint as timely filed, ruled that this complaint entirely replaced all other complaints, and informed Parents that they should request permission before filing any more amended complaints. (Second Pre-Hearing Order at 2.)

With respect to the School District's Sufficiency Challenge, the Hearing Officer determined that the factual allegations in the Second Amended Complaint satisfied the IDEA's pleading requirements. (Second Pre-Hearing Order at 2.) With respect to the School District's Motion to Limit, the Hearing Officer determined that the Settlement Agreement barred "Parents from bringing claims or seeking relief for any period prior to October 25, 2012;" therefore, the Hearing Officer dismissed Parents' demand for a declaratory judgment from the time S.S. entered the School District through October 25, 2012. (Second Pre-Hearing Order at 3.) The Hearing Officer did not rule on the School District's Motion to Dismiss because it did not specifically ask for such relief in its combined Motion. (Second Pre-Hearing Order at 3-4.)

The Hearing Officer also addressed, *sua sponte*, his jurisdiction to award Parents the requested relief. (Second Pre-Hearing Order at 4.) Stating that he does not have the authority to award money damages, the Hearing Officer struck Parents' demands for monetary damages as set forth in the Second Amended

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<sup>3</sup> The School District's objection, request for clarification and combined Motion are not included in the record certified to this Court.

Complaint. (Second Pre-Hearing Order at 4.) The Hearing Officer ruled that it was not within his jurisdiction to enforce settlement agreements, but that it was within his jurisdiction to determine if the School District's failure to implement the Settlement Agreement resulted in the denial of a FAPE. (Second Pre-Hearing Order at 4.) However, the Hearing Officer held that the terms of the Settlement Agreement dictated to what extent he could make such a determination. (Second Pre-Hearing Order at 4.) Upon review of the Settlement Agreement, the Hearing Officer concluded as follows:

The Settlement creates a [monetary] compensatory education fund for [S.S.] to offset the costs of legitimate educational expenses obtained by the Parents. The Settlement is quite clear, however, that the fund is provided "as consideration for the waivers and releases provided in" the [S]ettlement. *Settlement* at ¶ 1. The fund is what the [School] District gave to the Parents in exchange for waivers and releases of all claims arising prior to the agreement. The agreement goes on to establish what services [S.S.] will receive as part of the [School] District[']s obligation to provide a FAPE to [S.S.] after October 25, 2012. Specifically, Paragraph 4 of the agreement explains what will constitute [S.S.'s] IEP [(individualized education plan)] going forward, and how that IEP "will be accepted as an appropriate offer of FAPE." *Settlement* at ¶ 4.

Based on the forgoing, the Parents waived their right to bring claims prior to October 25, 2012 in exchange for a compensatory education fund. The Parents and [School] District also reached an agreement as to what documents would control [S.S.'s] education after October 25, 2012. Critically, this means that any dispute concerning the compensatory education fund has no significance in regard to the current provision of FAPE to [S.S.]. Any alleged failure to implement the IEP as described in Paragraph 4 of the Settlement, resulting in a denial of FAPE, is properly in the Office for Dispute Resolution. Any alleged failure to establish or distribute the compensatory education fund is properly in a *court* of competent jurisdiction.

(Second Pre-Hearing Order at 4 (emphasis in original; footnote omitted).)

Accordingly, the Hearing Officer dismissed all claims in the Second Amended Complaint regarding the distribution of the compensatory education fund. (Second Pre-Hearing Order at 5.) The Hearing Officer ruled that the other claims and relief requested directly relating to the School District's obligation to develop an IEP<sup>4</sup> and provide a FAPE to S.S. after October 25, 2012 fell squarely within his jurisdiction. (Second Pre-Hearing Order at 5.)

On April 10, 2014, Parents filed, pro se, a Third Amended Due Process Complaint (Third Amended Complaint), which described in more detail the nature of Parents' claims and the facts related to the issues presented.<sup>5</sup> (Third Amended Complaint, R. Item 12.) Parents again included claims for monetary damages and

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<sup>4</sup> An IEP must include: (1) "[a] statement of the child's present levels of academic achievement and functional performance"; (2) "[h]ow the child's disability affects the child's involvement and progress in the general education curriculum"; (3) "[a] statement of measurable annual goals, including academic and functional goals"; (4) "a description of benchmarks or short-term objectives"; (5) a description of "[h]ow the child's progress toward meeting the annual goals . . . will be measured" and when periodic reports on the child's progress will be provided; (6) a statement of what special education services, programs and support will be provided to enable the child to attain annual goals, be involved and make progress in general education curriculum, participate in extra-curricular activities, and to be educated alongside both disabled and non-disabled children; (7) "[a]n explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class" and in other activities; (8) "[a] statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments"; (9) if necessary, a statement as to why the child cannot participate in regular assessments and the alternative assessments that will be provided; and (10) "[t]he projected date for the beginning of the services and modifications . . . , and the anticipated frequency, location, and duration of those services and modifications." 34 C.F.R. § 300.320; 22 Pa. Code § 14.131.

<sup>5</sup> It is unclear from the certified record whether Parents were granted permission by the Hearing Officer to file their Third Amended Complaint.

an increase in the compensatory education fund.<sup>6</sup> (Third Amended Complaint at 1-2.) In addition to monetary relief, Parents sought declaratory relief and demanded

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<sup>6</sup> The specific allegations of Parents' Third Amended Complaint are:

1. The Comp. Ed. [F]und was to allow a wraparound home program to address SS's educational needs, not given during his Kindergarten & 1<sup>st</sup> grade years. The School District has refused to implement the [S]ettlement [A]greement, thus by non-implementation of the [S]ettlement [A]greement, the School [D]istrict has not provided a F.A.P.E. from the beginning of school (SY 2010-11) until the present as the Settlement Agreement pertained to previous filings SS 3209 11/12 AS & 3208 11/12 decision to be appealed.

2. The agreement allowed for some legal costs and fees incurred by the [P]arents to be paid upon receipt, directly to their attorney.

3. Reimbursement of legitimate educational services within 30 days of receipt of statements [and] cancelled checks showing payment.

4. The Reevaluation Report to include the Lindamood-Bell test results of Sept. 10, 2012, thus, updating SS present levels. Sufficient Fact: Paragraph 4 of the [S]ettlement [A]greement specifically states that the Lindamood-Bell results will be included to update present levels. After repeated requests for the School District to update SS present levels in order to establish baselines, and develop an appropriate IEP, the [S]chool [D]istrict did not update the test results until the end of 2013 school year. Other evaluations to be included to update present levels and identify SS[']s needs were not included and did not control SS's education. Therefore, the IEP cannot be accepted as an appropriate offer of FAPE.

5. An IEP meeting for the School Year 2012-2013 to be concluded within ten days of execution of the [S]ettlement [A]greement, followed by a Notice of Recommended Educational Placement or Prior Written Notice. Sufficient fact: An IEP meeting was not conducted within 10 days of execution of agreement. Parents needed to request in writing to meet for an IEP meeting which took place 48 days after execution of agreement.

6. The 1/2/13 IEP NOREP was approved conditioned on the acceptance and implementation of the [S]ettlement [A]greement of 10/25/12.

*(Continued...)*

that the School District provide updated independent evaluations from specific evaluators and schedule re-evaluation review and IEP meetings within 30 days of obtaining the updated independent evaluations.<sup>7</sup> (Third Amended Complaint, Proposed Resolution, §§ 1-4.)

On May 2, 2014, the Hearing Officer issued a Third Pre-Hearing Order addressing the School District's Motion to Dismiss,<sup>8</sup> in part, Parents' Third Amended Complaint. (Third Pre-Hearing Order, May 2, 2014, R. Item 11.) The School District moved to strike the first, second, and third paragraphs set forth in the Nature of Problem section of Parents' Third Amended Complaint because these paragraphs sought relief with respect to the compensatory education fund and other monetary damages. In disposing of the School District's Motion to Dismiss, the

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7. The [School District] has denied [P]arents data/records of SS, as well as disregarded repeated direct orders by a hearing officer (Wm. Culleton) to provide [P]arents with SS[']s records to determine appropriate placement and supports thus, denying a FAPE.

(Third Amended Complaint, Nature of the Problem/Facts Related to the Issues (Nature of Problem), §§ 1-7.)

<sup>7</sup> The specific relief requested by Parents is: (1) "Demand for declaratory judgment that [School District] violated SS's right to a FAPE by non-compliance of the Settlement [A]greement, from October 25, 2012 to the present, or in the alternative, from October 25, 2012 to a specified date"; (2) "A demand for an increase in compensatory education fund/hours, due to the delay of home programming resulting from non-compliance to a settlement agreement"; (3) "A demand for the School District to provide updated Independent evaluations from 'A Total Approach', (OTR/L, SIPT), and 'International Institute for Behavioral Development' (ABA/VB), due to their delay in services, and need for updated present levels"; and (4) "A demand for an RR & IEP meeting within 30 days of obtaining updated independent evaluations, in order to identify needs, update present levels and incorporate recommendations." (Third Amended Complaint, Proposed Resolution, §§ 1-4.)

<sup>8</sup> The School District's Motion to Dismiss is not part of the record certified to this Court.



Hearing Officer again stated that his jurisdiction was limited and that he had no jurisdiction to enforce a private settlement agreement or to award money damages. (Third Pre-Hearing Order at 1.) The Hearing Officer reiterated that it was within his authority to determine if the School District's non-compliance with the Settlement Agreement resulted in the denial of a FAPE.<sup>9</sup> (Third Pre-Hearing Order at 2.) Accordingly, the Hearing Officer granted the School District's Motion to Dismiss and struck the first sentence of paragraph one and the entirety of paragraphs two and three of the Nature of the Problem/Facts Related to the Issues (Nature of Problem) section of Parents' Third Amended Complaint.<sup>10</sup> (Third Pre-Hearing Order ¶¶ 1-2.)

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<sup>9</sup> With respect to Parents' burden of proof, the Hearing Officer explained:

It is important for the Parents to understand that . . . evidence that the Settlement was violated is not necessarily evidence that FAPE was denied. The [School] District's alleged failure to stick with the agreed-to course [of] action for development and implementation of an IEP is separate and apart from any inquiry into [S.S.'s] substantive educational needs. In order to prove that [S.S.'s] right to a FAPE was violated, the Parents must prove that the [School] District either violate[d] the procedures required by the IDEA, or that the [School] District failed to provide an IEP that was reasonably calculated to provide a meaningful educational benefit to [S.S.] at the time it was issued. Evidence about the [School] District's compliance with the Settlement may be relevant to this inquiry, but is not likely to be outcome-determinative.

(Third Pre-Hearing Order at 3.)

<sup>10</sup> The Hearing Officer issued two more pre-hearing orders in this matter. The Fourth Pre-Hearing Order, denying Parents' requests for two subpoenas, was issued on May 7, 2014. (R. Item 10.) The Fifth Pre-Hearing Order, denying Parents' request to file a Fourth Amended Due Process Complaint, was issued on May 9, 2014. (R. Item 9.)

## **B. Due Process Hearing**

A due process hearing ensued before the Hearing Officer on May 13, 2014. Parents appeared on their own behalf and presented the testimony of the School District's Director of Pupil Services and a school based occupational therapist employed by the Bucks County Intermediate Unit. Both Parents and the School District submitted documentary evidence.

At the beginning of the due process hearing, the Hearing Officer advised the parties that he would not hear testimony regarding: (1) the development or negotiation of the Settlement Agreement; (2) whether the School District was legally bound by the Settlement Agreement; and (3) the distribution of the compensatory education fund. (Hr'g Tr. at 27, May 13, 2014, R. Item 6.) The Hearing Officer advised Parents that if they only proved that the Settlement Agreement was violated and nothing else, they would not prevail because they needed to prove that S.S. was denied a FAPE. (Hr'g Tr. at 27-28.) The Hearing Officer further advised Parents that the Settlement Agreement was an "agreed-to path forward" for Parents and the School District; therefore, regardless of the provisions of the Settlement Agreement, their burden was to show if there was a gap between the services that S.S. needed and what he received since the execution of the Settlement Agreement. (Hr'g Tr. at 28.)

During the hearing it was established by Parents and the School District that, in 2012, S.S.'s educational needs were reevaluated and S.S.'s current April 16, 2012 IEP was reopened, which resulted in an IEP being developed and

implemented for S.S. on December 12, 2012.<sup>11</sup> (Hr’g Tr. at 62-67.) However, no revisions were made in the December 12, 2012 IEP to the special education and related services that were being provided to S.S. pursuant to the April 16, 2012 IEP. (Ex. S-9 at 3, R. Item 8.) It was further established that there was a revision to the special education and related services being provided to S.S. in April of 2013<sup>12</sup> and that S.S.’s educational needs were reevaluated in May 2013, which resulted in an IEP being developed and implemented for S.S. on June 5, 2013.<sup>13</sup> (Hr’g Tr. at 121, 168-69, 205.)

During the course of the occupational therapist’s testimony, the School District requested to submit into the record a 114 page exhibit which the School District described as the entire record of S.S.’s progress.<sup>14</sup> (Hr’g Tr. at 189-90.)

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<sup>11</sup> See R. Item 8 (Ex. S-6 at 1-2 (Permission to Reevaluate (PTR) – Consent Form) (June 21, 2012); Ex. S-6 at 3-35 (Reevaluation Report (RR)) (August 29, 2012); Ex. S-7 at 1-2 (Invitation to Participate in the Individualized Education Program (IEP) Team Meeting or Other Meeting) (September 7, 2012); Ex. S-7 at 4-34 (April 16, 2012 IEP); Ex. S-7 at 37-40 (Notice of Recommended Educational Placement/Prior Written Notice (NOREP/PWN)) (September 7, 2012); Ex. S-8 at 1-2 (Permission to Evaluate (PTE) – Evaluation Request Form) (September 7, 2012); Ex. S-8 at 3-6 (PTR – Consent Form) (September 7, 2012); Ex. S-8 at 8-51 (RR) (November 6, 2012); Ex. S-9 at 1-2 (Invitation to Participate in the IEP Team Meeting or Other Meeting) (November 9, 2012); and Ex. S-9 at 3-55 (December 12, 2012 IEP)).

<sup>12</sup> See R. Item 8 (Ex. S-12 at 1-2 (Invitation to Participate in the IEP Team Meeting or Other Meeting) (April 10, 2013); Ex. S-12 at 53 (Email exchange between Parents and School District’s Director of Pupil Services (April 23, 2013); Ex. S-12 at 5-52 (Revised December 12, 2012 IEP)).

<sup>13</sup> See R. Item 8 (Ex. S-14 at 1-3 (Invitation to Participate in the IEP Team Meeting or Other Meeting) (May 20, 2013); Ex. S-14 at 4-50 (June 5, 2013 IEP)).

<sup>14</sup> See R. Item 8 (Ex. S-16 at 1-114) (The documents contained within this exhibit purport to show S.S.’s progress through April 2014).

Parents objected to the submission of this exhibit because the due process “hearing was to show that the School District did not implement the recommendations from the individual evaluations as of December 12<sup>th</sup>, 2012.” (Hr’g Tr. at 190-91.) In response to the Hearing Officer’s questioning on the scope of their claims, Parents appeared to state that they were not contending that the FAPE was denied for any other reason. (Hr’g Tr. at 191-92.) Although Parents stated that they were withdrawing their objection after the Hearing Officer began questioning Parents about the nature of their claims, the Hearing Officer continued to ask Parents for clarification and a discussion ensued between the Hearing Officer, Parents, and the School District. (Hr’g Tr. at 191-213.) Based on his understanding of Parents’ statements, the Hearing Officer stated that Parents’ claim was limited to the issue of whether the School District’s failure to comply with Paragraph 4 of the Settlement Agreement resulted in a denial of a FAPE. (Hr’g Tr. at 194-95.) Paragraph 4 of the Settlement Agreement provides:

The [p]arties 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 updated IEP, and any IEP hereinafter for the Student, shall include a Notice of Recommended Educational Placement or Prior Written Notice.

(Ex. P-3, R. Item 7.) Parents did not object at that time to the Hearing Officer’s statement regarding the limitation of their claim or the characterization of the issue.

The Hearing Officer then provided the parties with an opportunity to reach a stipulation as to whether the School District had complied with Paragraph 4; however, the parties were unable to come to a stipulation. (Hr’g Tr. at 196-97.) After further discussion, the Hearing Officer advised the parties that he was not going to take any additional evidence and, instead, he was going to order certain written submissions from the parties. (Hr’g Tr. at 210.) The Hearing Officer explained to the School District and Parents the questions he wanted answered in their written submissions. (Hr’g Tr. at 210-13.) Thereafter, the Hearing Officer adjourned the due process hearing and issued an Interim Order.

### **C. Interim Order/July 1, 2014 Order**

With respect to the School District, the Interim Order directed the School District to state whether or not it complied with Paragraph 4 of the Settlement Agreement and to include the facts, if proven, that would show substantial compliance. (Interim Order at ¶ 1(a), May 22, 2014, R. Item 5.) The Interim Order further ordered that, if it was the School District’s position that it did not comply with Paragraph 4, the School District was required to state how such non-compliance did not result in a substantive denial of a FAPE or how non-compliance was legally excused. (Interim Order at ¶ 1(b), (c).) With respect to Parents, the Interim Order directed them to “state their position both as to how the [School] District failed to comply with Paragraph 4 the Settlement [Agreement] and how that non-compliance resulted in a denial of FAPE.” (Interim Order at ¶ 2.) The Interim Order further directed Parents to include in their statement, “all of the facts that the Parents intend to prove to show that Paragraph 4 was violated

[and] . . . to show that FAPE was denied.” (Interim Order at ¶ 2(a), (b).) As ordered, the parties submitted written responses.

In their response, Parents set forth detailed and extensive explanations regarding how the School District failed to comply with all of the provisions of Paragraph 4 of the Settlement Agreement and how its non-compliance resulted in the denial of a FAPE. (Parents’ Response, R. Item 4.) Parents set forth what current test results/evaluations the School District was supposed to include as S.S.’s present levels for an updated IEP, when these test results/evaluations were provided to the School District, the steps Parents took to have these test results/evaluations included in an updated IEP, and why they believed the School District did not include these test results/evaluations when developing an updated IEP. (Parents’ Response at 1-5.) Parents also explained how the School District did not update S.S.’s present levels to identify S.S.’s needs in order to develop an IEP moving forward since the execution of the Settlement Agreement. (Parents’ Response at 6.) Parents explained further that S.S.’s December 12, 2012 IEP neither included, nor was the IEP changed to add, his present levels or areas of need as reflected in the current evaluations that the School District was required to include pursuant to Paragraph 4. (Parents’ Response at 6.) In support of this allegation, Parents set forth a detailed explanation of S.S.’s needs as set forth in evaluations conducted by, *inter alia*, A Total Approach and the International Institute for Behavioral Development. (Parents’ Response at 6-13.) Parents also set forth the documents they provided to the School District on September 7, 2012 as part of the Re-Evaluation Report that they allege were not included in the December 12, 2012 updated IEP or the June 5, 2013 IEP. (Parents’ Response at

13-17, 38.) Parents further alleged that: (1) an IEP meeting was neither concluded within ten days of the execution of the Settlement Agreement as required by Paragraph 4 nor was an IEP meeting concluded within ten days of this Court's January 2014 decision that the Settlement Agreement was valid; (2) the proposed placement stated in the April 16, 2012 IEP could no longer be accepted as an appropriate offer of FAPE because the compensatory education agreed upon in the Settlement Agreement was denied by the School District; and (3) that a Notice of Recommended Educational Placement was not issued after every IEP meeting as required by Paragraph 4 of the Settlement Agreement. (Parents' Response at 17-19.)

Finally, Parents explained how the foregoing non-compliance with Paragraph 4 resulted in a denial of FAPE. (Parents' Response at 19.) Specifically, Parents contended that "[i]n failing to identify [S.S.'s] present levels of performance & individual needs, the [S]chool [D]istrict failed to identify the foundation on which the IEP team must build upon to reasonably calculate appropriate goals and services to address [S.S.'s] individual needs." (Parents' Response at 19 (emphasis in original).) As support for their contention, Parents set forth a detailed recitation of S.S.'s current academic and functional needs and what goals and special services, including a home program, are required to address these needs. (Parents' Response at 19-37.)

In its response to the Interim Order,<sup>15</sup> the School District conceded that it did not fully comply with Paragraph 4; specifically, the School District conceded that it did not include in the updated December 12, 2012 IEP the present levels set forth in some of the current evaluations provided by Parents, it did not conclude an IEP meeting within ten days of the execution of the Settlement Agreement, and it did not issue a Notice of Recommended Educational Placement with every IEP after the Settlement Agreement was executed. (School District's Response at 3-10, R. Item 3.) However, the School District stated that its non-compliance did not result in a denial of a FAPE because S.S. made progress. (School District's Response at 7.) As support for this assertion, the School District attached, *inter alia*, S.S.'s progress reports from November 2012 to the present. (School District's Response, Ex. H.) The School District asserted that its non-compliance resulted in, at most, a procedural violation and that this violation did not result in a substantive denial of a FAPE. (School District's Response at 12.)

On July 1, 2014, the Hearing Officer issued a Memorandum and Order dismissing, *sua sponte*, Parents' Third Amended Complaint. (Memorandum and Order, July 1, 2014, R. Item 2.) Although the Hearing Officer recognized that the School District admitted non-compliance with Paragraph 4 of the Settlement Agreement, the Hearing Officer determined that Parents were requesting that he find that the School District violated S.S.'s right to a FAPE for reasons that go beyond the scope of Parents' only remaining claim and the Third Amended Complaint. (Memorandum and Order at 4.) The Hearing Officer stated that "[t]he

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<sup>15</sup> It appears from the certified record that the School District filed its response to the Interim Order one day before Parents filed their response.



issues that the Parents want me to resolve and remedy fall outside the scope of these proceedings.”<sup>16</sup> (Memorandum and Order at 4.) Parents now petition this

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<sup>16</sup> The Hearing Officer determined as follows:

On its face, Paragraph 4 does only three things: 1) it says how the *present levels* in [S.S.’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 [(Specially Designed Instruction)] or related services that [S.S.] 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 [S.S.’s] IEP, then the District would have provided more and/or different SDIs and related services. 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 [S.S.’s] programming requires not only an inquiry beyond Paragraph 4, but [an] inquiry beyond the scope of the entirety of the Complaint. The claim that the District denied [S.S.] a FAPE by failing to increase or change [S.S.’s] SDIs or related services — either in the absolute or after updating [S.S.’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 [S.S.] 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 [S.S.’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.

(Continued...)

Court for review of the Hearing Officer's July 1, 2014 Order dismissing their Third Amended Complaint.<sup>17</sup>

## II. PARENTS' APPEAL

The salient issue before this Court is whether the Hearing Officer erred by dismissing Parents' Third Amended Complaint. In this regard, Parents argue that they were confused during the due process hearing and did not state at any time that they were abandoning all claims. Parents argue that the Hearing Officer is inconsistent as to what he states Parents' last remaining claim is in the July 1, 2014 Memorandum and Order dismissing the Third Amended Complaint and what he directed Parents to address in his Interim Order issued after the impartial due process hearing. Parents also contend that their Third Amended Complaint explains why the School District denied S.S. a FAPE. First, Parents contend that the Hearing Officer erred by stating that they did not allege that an appropriate IEP would have included more or different special education and related services. Parents argue that they alleged that the School District's non-compliance with the Settlement Agreement resulted in S.S. not being provided, in a timely manner, with

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In sum, the Parents are asking me to determine that the District violated [S.S.'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.

(Memorandum and Order at 3-4 (emphasis in original) (footnotes omitted).)

<sup>17</sup> This Court's scope of review "is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether the necessary findings of fact are supported by substantial evidence." E.N. v. M. School District, 928 A.2d 453, 461 n.13 (Pa. Cmwlth. 2007).

the agreed upon compensatory education in the form of a wraparound home program. Second, Parents assert that non-implementation of the Settlement Agreement denied S.S. a FAPE because the December 12, 2012 IEP was not updated using certain independent evaluations. Therefore, Parents assert, the School District did not reasonably evaluate S.S.'s needs to provide S.S. with meaningful benefits when developing the IEP. Parents contend further that, by not including the evaluations that Parents secured, the School District did not permit Parents to participate in the decisionmaking process. Parents argue that although they were not permitted to present their case in chief, the evidence submitted at the shortened due process hearing and in their response submitted to the Hearing Officer is sufficient to prove that S.S. was substantively denied a FAPE.

In response, the School District argues that the Hearing Officer did not abuse his discretion by dismissing Parents' Third Amended Complaint. Relying on the provisions of the IDEA governing the filing of a due process complaint and the mandated hearing process, the School District asserts that Parents bore the burden to prove the allegations of the Third Amended Complaint. Without specification, the School District argues that Parents were not permitted to raise or present evidence during the due process hearing on issues that were not identified in their Third Amended Complaint, or at the start of the hearing, without first providing notice to the School District. Thus, the School District contends that the Hearing Officer was within his powers to dismiss Parents' Third Amended Complaint and, because it was dismissed without prejudice, Parents have the right to revise their due process complaint and refile at the administrative level. The School District further argues that, because Parents did not refile an amended complaint, Parents

have failed to exhaust their administrative remedies resulting in this Court lacking jurisdiction to rule on the merits of Parents' Third Amended Complaint.

Initially, we note that, contrary to the School District's contention, Parents have not failed to exhaust their administrative remedies. It would have been futile for Parents to attempt to file a fourth amended complaint after the Hearing Officer had previously denied Parents' request to file a Fourth Amended Complaint. (Fifth Pre-Hearing Order, R. Item 9.) In addition, although the Hearing Officer's July 1, 2014 Order does not specifically state whether Parents' Third Amended Complaint was dismissed with or without prejudice, there is no indication in the Hearing Officer's Memorandum that an amended complaint would be accepted.

Turning to the merits of Parents' appeal, we conclude, based upon our review of the record in this matter in conjunction with the mandated hearing provisions of the IDEA, that the Hearing Officer should not have dismissed, *sua sponte*, Parents' Third Amended Complaint. We begin with a review of the process by which parents may challenge whether their child is receiving a FAPE.

A school district, "[u]nder the IDEA, as implemented by the Pennsylvania Department of Education's regulations, . . . must provide a child with a disability a free appropriate public education based on his or her unique needs." A.S., 88 A.3d at 258 n.1 (citing 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(1); 22 Pa. Code § 14.102; Big Beaver Falls Area School District v. Jackson, 615 A.2d 910, 911–12 (Pa. Cmwlth. 1992)). "To satisfy this obligation, a school district is required to develop an individualized education plan (IEP) to address and meet a disabled child's

educational needs that results from his or her disabilities.” Id. (citing 20 U.S.C. §§ 1401(9), (14), 1414(d); 34 C.F.R. §§ 300.320–300.324; 22 Pa. Code § 14.102; Big Beaver Falls, 615 A.2d at 911–12). A child’s IEP is developed by an “IEP Team” that consists of the child’s parents, the child’s educators, representatives of the school district, and specialists. 34 C.F.R. §§ 300.321, 300.322.

Because the IEP is the tool that determines whether a child is receiving a FAPE, an assessment of the IEP “must focus on both procedural safeguards and substantive goals.” Big Beaver Falls, 615 A.2d at 914. “The procedural safeguards refer to how the IEP is developed and includes a multidisciplinary evaluation as the basis for the IEP, the required participants on the IEP team, the statements which the IEP must contain, and the time requirements . . . .” Id. “The substantive goals of the IEP refer to whether or not the IEP provides an individualized program that confers meaningful benefit.” Id. “If a parent disagrees with his or her child’s IEP, the parent may file a due process complaint and request an impartial due process hearing.” A.S., 88 A.3d at 258 n.1 (citing 20 U.S.C. § 1415(f); 22 Pa. Code § 14.162(b)).

A due process complaint may be filed “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.” 20 U.S.C. § 1415(b)(6)(A). The party filing the due process complaint must give notice of the complaint. 20 U.S.C. § 1415(b)(7)(A)(i). The due process complaint notice must include, *inter alia*: (1) “a description of the nature of the problem of the child . . . including facts relating to such problem”; and (2) “a proposed resolution of the

problem to the extent known and available to the party at the time.” 20 U.S.C. § 1415(b)(7)(A)(ii)(III)-(IV). “The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice . . . unless the other party agrees otherwise.” 20 U.S.C. § 1415(f)(3)(B); In the Matter of R.C. and L.C. v. Byram Hills School District, 906 F. Supp. 2d 256, 269 (S.D. N.Y. 2012) (holding that, pursuant to 20 U.S.C. § 1415(f)(3)(B), alleged procedural deficiencies that were not raised in due process complaint precluded parents from raising the defects during the impartial due process hearing). The party filing the due process complaint bears the burden of persuasion. Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 57-58 (2005).

Pursuant to the IDEA, a hearing officer may find that a child did not receive a FAPE if the alleged procedural inadequacies: (1) “impeded the child’s right to a [FAPE]”; (2) “significantly impeded the parents’ opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents’ child”; or (3) “caused a deprivation of educational benefits.” 20 U.S.C. § 1415(f)(3)(E)(ii)(I-III). Thus, “a school district’s failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes substantive harm to the child or his parents.” C.H. v. Cape Henlopen School District, 606 F.3d 59, 66 (3d Cir. 2010) (quoting Knable ex rel. Knable v. Bexley City School District, 238 F.3d 755, 765 (6th Cir. 2001)); see also DiBuo v. Board of Education of Worcester County, 309 F.3d 184, 190 (4th Cir. 2002) (“[A] violation of a procedural requirement of the IDEA (or one of its implementing regulations) must actually interfere with the provision of a FAPE.”).

The current controversy between Parents and the School District is not isolated, but part of an ongoing dispute over whether the School District is providing S.S. with the required FAPE based on his unique needs. This Court previously held that the Settlement Agreement executed by the parties was binding, notwithstanding the School District's argument that they executed the Settlement Agreement by mistake. The School District has admittedly not complied with the Settlement Agreement; nonetheless, the School District argues that their failure to comply has not resulted in S.S. being substantively denied a FAPE. Parents have set forth in their various complaints, in the truncated hearing that was held, and in their extensive written response to the Interim Order of the Hearing Officer, their arguments regarding how the School District's failure has resulted in S.S. being substantively denied a FAPE. Although we appreciate the difficulty presented by this case, the issue of whether the School District's non-compliance with the Settlement Agreement has resulted in the substantive denial of a FAPE is a question of fact. As such, the Hearing Officer should not have prematurely truncated the due process hearing and then dismissed, *sua sponte*, the Third Amended Complaint as if there had been no due process hearing where issues of fact were raised.

The Hearing Officer issued several pre-hearing orders correctly explaining that he *did* have jurisdiction over whether S.S. had been denied a FAPE.<sup>18</sup>

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<sup>18</sup> The Hearing Officer also correctly stated that Parents should bring an action in the court of common pleas to recover any monetary damages they allege resulted from the School District's failure to comply with the Settlement Agreement, including their claim for monetary relief due to the School District's alleged failure to pay for the compensatory education that was to be provided to S.S. pursuant to the Settlement Agreement.

However, the Hearing Officer confused the jurisdiction to award monetary relief for breach of contract (which he does not have) with the jurisdiction to order that the School District provide additional compensatory education, if necessary, for S.S. to receive a FAPE as a result of the School District's failure to comply with the Settlement Agreement.<sup>19</sup> Parents did allege in the Third Amended Complaint, albeit unartfully, that the School District's refusal to implement the Settlement Agreement resulted in a delay of the agreed upon wraparound home program for S.S. and they demanded an increase in the compensatory education hours as a result. (Third Amended Complaint, Nature of Problem, ¶ 1; Third Amended Complaint, Proposed Resolution, ¶ 2.) However, the Hearing Officer struck the first sentence of Paragraph 1 of the Nature of Problem section of Parents' Third Amended Complaint in the mistaken belief that Parents were only seeking monetary damages for the School District's non-compliance. (Third Pre-Hearing Order ¶¶ 1-2.)

Accordingly, we conclude that the Hearing Officer's dismissal of Parents' Third Amended Complaint misunderstood Parents' arguments in support of their claims regarding how the School District's non-compliance impeded S.S.'s right to a FAPE, significantly impeded Parents' participation in the decisionmaking process, or deprived S.S. of any educational benefits. 20 U.S.C. § 1415(f)(3)(E)(ii)(I-III). Given the extensive history between the parties, there is no

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<sup>19</sup> "Compensatory education is a remedy to compensate a student for a violation of statutory rights while he or she was entitled to those rights." Big Beaver Falls, 615 A.2d at 915 (citations omitted). "Compensatory education is an appropriate relief in the context of the IDEA because such an order 'merely requires [the defendants] to belatedly pay expenses that [they] should have paid all along.'" Id. (quoting Miener v. State of Missouri, 800 F.2d 749, 753 (8th Cir. 1986)) (alterations in original).



question that the School District is fully aware of Parents' claims and the relief they are seeking. The Hearing Officer commented that the Settlement Agreement set out the path to follow to provide S.S. a FAPE. Given this finding, it would appear that the burden should be on the School District to prove why failure to follow that path did not result in a substantive denial of a FAPE.

For the foregoing reasons, the Hearing Officer's July 1, 2014 Order dismissing Parents' Third Amended Complaint is vacated. Given the posture of this case, we have no choice but to remand this matter for the Hearing Officer to reconvene the due process hearing in accordance with this opinion. However, we realize that this ongoing dispute over S.S.'s educational needs has resulted in delay, and that every year during which the parties are in disagreement and in litigation is another year that S.S. may not be receiving the special education and related services that he has a right to receive under the IDEA. We hope for the sake of S.S. that the parties are able to reach a consensus.

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**RENÉE COHN JUBELIRER, Judge**

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Richard and Angela Smith,	:	
	:	
Petitioners	:	
	:	
v.	:	No. 1428 C.D. 2014
	:	
Quakertown Community School	:	
District,	:	
	:	
Respondent	:	

**ORDER**

**NOW**, April 29, 2015, the July 1, 2014 Order of the Pennsylvania Special Education Hearing Officer, entered in the above-captioned matter, is **VACATED** and this matter is **REMANDED** for proceedings consistent with the foregoing opinion.

Jurisdiction relinquished.

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**RENÉE COHN JUBELIRER, Judge**