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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHESTER UPLAND SCHOOL DISTRICT, *et al.*,	:	
Plaintiffs,	:	No. 12-cv-0132
v.	:	
COMMONWEALTH OF PENNSYLVANIA, *et al.*,	:	
Defendants.	:	(Baylson, J.)

COMMONWEALTH'S OPPOSITION TO
PLAINTIFF CLASS'S MOTION FOR ENFORCEMENT

The Commonwealth of Pennsylvania, Department of Education, Governor Thomas Corbett, and Secretary Ronald Tomalis (together, the "Commonwealth"), by their counsel, Michael A. Finio, Esquire and Saul Ewing, LLP, hereby makes this as their opposition to Plaintiff Class's Motion for Enforcement ("Motion"), which was filed March 8, 2013.[1] This

[1] This opposition was compiled and filed as quickly as possible in response to the Motion, which did not include a separate brief but instead included a section labeled "Argument" beginning at page 5 of the Motion, presumably in fulfillment of Plaintiff Class's obligations under Local Rule 7.1(c), and therefore giving the motion the appearance of being proper and complete under the Local Rules.

opposition will follow the structure of the Motion so as to keep the matter organized on a consistent basis.

INTRODUCTION

While the Motion may be brought pursuant to Paragraph II(H) of the Settlement Agreement, it reveals nothing of substance about an underlying dispute under the terms of the Settlement Agreement. While the Motion properly recites what the Settlement Agreement requires in terms of a written complaint and a period for reply and dialogue, it fails to reveal the operative threshold for some action under this Court's limited continuing jurisdiction. To trigger that kind of attention to a case which has been settled and dismissed with prejudice, Class Counsel ("PILCOP") must demonstrate

> a reasonably justified and colorable
> Complaint about the provision of FAPE or compliance with
> [the Settlement Agreement] on a Class wide, and not an
> Individualized, basis…

Settlement Agreement, Paragraph II(H). The Motion does not allege that FAPE has not been provided on a class-wide basis. The Motion only alleges that there is a dispute concerning PILCOP's "access to Individual Education Plans and progress reports of the children" (Motion at 1; emphasis supplied). Such access, as further explained below, is not something required by the Settlement Agreement. The "complaint" underlying this Motion is not "a reasonably justified and colorable" substantive dispute about special education efforts in the District under the Settlement Agreement. Rather, the "complaint" raises concerns and questions related to the progress made toward full implementation of the Settlement Agreement. The Motion is no more than a discovery request, and it should be denied because there is no discovery mechanism in the Settlement Agreement and no pending, active litigation to which it can attach.

FACTS

There is nothing particularly material to the issue to be decided by this Motion to warrant a detailed parsing of PILCOP's recitation of "facts." Nonetheless, the Commonwealth must highlight certain things.

The Settlement Agreement, executed in July 2012, and approved by the Court in August 2012, was virtually immediately implemented and its mechanical aspects (e.g., the sharing of information and reports, and the conduct of meetings) were put into action. The Department's Special Education Officers ("SEOs")[2], as anticipated by the Settlement Agreement, have worked vigilantly and diligently to achieve progress in the delivery of special education services in what the Court well knows was a very broken school district. The task before the SEOs was large, and they have attacked it with candor and transparency.[3]

PILCOP has, from time-to-time and culminating in a letter written in January 2013, expressed "concerns" about whether IEPs were being reviewed annually, whether required IEPs were in place when school began last fall, and whether necessary compensatory education was being identified and delivered, among other similar things. Information about overall progress on the matters complained of was given to PILCOP by the SEOs and the Department, at the macro

[2] The Settlement Agreement required the Department to place *one* "individual with significant experience in special education and Section 504 to serve in the District as the Department of Education's Special Education Officer (Department's SEO)" – and the Department doubled that effort, placing *two* SEOs in the District.

[3] The SEOs have been dealing directly with parents of children in the District's special education program, both on an individual, as needed basis, and generally to report on activities undertaken to improve the District's special education system in the wake of the settlement. Parents seem satisfied because parent attendance at Parent Council meetings, run by the SEOs and also attended by PILCOP, has virtually stopped. In fact, parents are dealing directly with the SEOs and are getting their problems resolved, and they are not taking issues to PILCOP. The Department believes, for example, that the class representative parents from the underlying litigation have had satisfactory results and have no continuing need for PILCOP's "help" as a result of the direct attention received from the SEOs.

level required by the Settlement Agreement, to show compliance with the settlement on a class-wide level.[4]

All PILCOP offers, as a premise for its access to student special education records, is an argument that only 24% of the District's IEPs have received their annual review (so far), and a belief that the amount of compensatory education deemed appropriate by IEP teams is too low. In addition, PILCOP claims that student progress reports were not timely issued. PILCOP maintains that it needs to review information concerning those matters "in order to discharge its obligation to determine if there is compliance with the provisions of the Settlement Agreement." Motion at 6. It makes that assertion without actually saying that any of them are in fact an indication of a denial of FAPE or non-compliance with the Settlement Agreement. It is very clear that the Motion is nothing more than PILCOP's effort to establish what it thinks is necessary "to do that responsibly" (id.) – as PILCOP says, "it must have access to the actual records to determine what is happening. There is no other way for counsel to know whether there is such a concern which it should bring to the attention of the Court." Motion at 6-7. What PILCOP is trying to do is change the terms of the Settlement Agreement to which it agreed, and the Court should not permit this.

The Department and the SEOs responded to the arguments made in PILCOP's January 25, 2013, letter, both in a meeting on January 31 and in a letter from the Department's Assistant

[4] PILCOP cites no examples of any actual special education issues concerning any child or children in its Motion. The Commonwealth suspects that PILCOP will argue that they are "Class Counsel" entitled to review special education records, period. Such a position puts the rabbit in the hat; PILCOP positions itself as the arbiter of whether the settlement is being fulfilled "class wide" – but they have no current evidence of any real issues. PILCOP presumably had previously, and ought to have now, an unhappy representative parent or student to use to illustrate some class-wide defect in FAPE of compliance with the Settlement Agreement. No such evidence is offered, most likely because the Settlement Agreement admonishes individuals with complaints to the pursuit of individual remedies, which the Settlement Agreement clearly preserved. Settlement Agreement at Paragraph IV(B). The Court is asked to recall that PILCOP fought hard for this preservation of individual rights. Absent some compelling reason to infer non-compliance, the SEOs ought to be permitted to continue to implement the settlement and operate special education programs without the kind of interference PILCOP's thinly-disguised discovery request would engender.

Chief Counsel, Patricia Fullerton, on February 7, 2013.[5] As evidenced by these communications PILCOP was advised that IEP reviews have been ongoing, fall progress reports had been issued and spring progress reports were forthcoming, and compensatory education matters were being properly addressed. PILCOP is not satisfied with those answers and it wants to fish its way through student records to reach its own conclusions.

Again, PILCOP wants to do this without offering up even one complaint from any Class parent because, as Ms. Kerr puts it, "We are class counsel." While the more accurate statement is "we were class counsel", either way, that fact is not a license to review student records unless it is part of the Settlement Agreement, which it is not. PILCOP has to plead a real controversy about implementation of the Settlement Agreement -- there has to be a reasonably justified and colorable basis for asserting the absence of FAPE and non-compliance with the Settlement Agreement. The only real controversy PILCOP's Motion pleads is that it is not getting access to student records it believes it has a right to review. That right was neither provided for in the Settlement Agreement nor is there an independent basis for it post-settlement.

ARGUMENT

There are several reasons to refuse PILCOP access to the special education records it wants. A proposed form of order denying the relief sought is attached.

1. The Motion Raises a Dispute about Access to Records, Not a Denial of FAPE or Non-compliance with the Settlement Agreement.

The Motion does not state a dispute over the provision of FAPE or compliance with the Settlement Agreement. The Motion states that there is just one complaint -- PILCOP's lack of access to student records. A dispute over access to records is not a proper subject of a Motion to Enforce under Paragraph II(H)..

[5] The operative correspondence is attached to the Motion, and it is not re-attached here.

The Motion posits only that such access is "consistent with" the Settlement Agreement – which implies that PILCOP is well-aware that such access is not provided for or required by the Settlement Agreement. The premise for PILCOP's Motion is its belief that such access is "clearly within the contemplation of the parties." PILCOP's belief, however, is wholly irrelevant to the matter, because the Settlement Agreement has to be interpreted by the Court reviewing its plain language. The Settlement Agreement is a simply a contract, to be interpreted by its clear terms. It is fully integrated, containing a merger clause, set forth at Paragraph VII. The purpose of such clauses, as a matter of hornbook law, is to make clear that all that the parties have agreed to is what is stated in the contract. If a right does not exist in the agreement, unless it otherwise exists as a matter of law, it does not exist because the parties to the contract have not agreed to it.

The Settlement Agreement does not give PILCOP a right of access, via the Department or the District, to student special education records.[6] What PILCOP got under the agreement was access to and information from the SEO under Paragraphs II(F) and II(G). The SEO is also required to "respond without undue delay to Class parents and Class counsel with reasonable objections and concerns." There is no allegation in the Motion of any "undue delay" in the SEOs' responding to "Class parents and Class Counsel" and their "reasonable objections and concerns." Key here is that the agreement says "Class parents and Class counsel" – which reasonably infers that the two are tied together and that Class counsel, PILCOP, can only make a permitted motion under Paragraph II(H) as a result of some deficiency – substantive or procedural – experienced by Class parents, contra the Settlement Agreement. The Motion alleges

[6] During the underlying litigation, the Department requested IEP records for the children of the class representatives. These are not records the Department maintains, they are records the District maintains. The District did not produce them to the Department, citing confidentiality concerns. However, those documents were obtained via PILCOP, who got them from their clients and who made appropriate redactions. What this illustrates now is that there is no class member providing the records PILCOP seeks access to to PILCOP, which ought to cause a skeptical assessment of PILCOP's motives with this Motion.

no such thing. In other words, PILCOP has made no allegation that the SEOs have not properly responded to "Class parents." PILCOP has only alleged that while the SEO has responded to PILCOP, PILCOP is not satisfied with the answer and, essentially, it wants access to student records so it can "see for itself." That is not PILCOP's role or right under the Settlement Agreement.

Again, curiously absent is any reference to any Class parent having any kind of a problem. The Settlement Agreement clearly requires that there must be some premise that Class parents have concerns not addressed by the SEOs – PILCOP's unilateral dissatisfaction is irrelevant – which amounts to a potential class-wide lack of FAPE or some allegation of non-compliance with the Settlement Agreement that has class-wide implications.. The agreement is not a mechanism or remedy for PILCOP; it is a mechanism and remedy for the parents of children with special needs.

Nonetheless, PILCOP believes that its access to the information is "necessary" for them to "fulfil (sic) its role under Paragraph H" – a rather self-aggrandizing perception of just what that role is given the kind of access PILCOP seeks. In other words, PILCOP clearly perceives itself as having some independent rights under the settlement – rights independent of any Class parent – which it simply does not have.

Any "rights" PILCOP might have exist *in pari materia* with those of Class parents; absent actual evidence of a potential class wide problem stemming from the issues faced by one or more class parents, PILCOP is simply positioning itself as "Class Cop" – which it is not, under the Settlement Agreement or otherwise. It plays an important role, but that role does not exist independent of the rights of Class parents and special education students.

2. The Settlement Agreement Does Not Provide Any Right of Access.

There are several reasons why the access to student records PILCOP seeks was not specifically provided for in the Settlement Agreement. As evidenced by the "Entire Agreement" clause, what the parties agreed to is what is stated in the agreement. The Settlement Agreement afforded PILCOP a "seat at the table" to assist Class parents in the process engendered by the settlement. The Department and the SEOs have gone to great lengths to keep PILCOP fully informed as to the progress being made in the District.

PILCOP makes much of its prior status as "class counsel" – forgetting that the case is closed, the matter settled and dismissed with prejudice, and what PILCOP got in that process was an ability to observe the special education process as it evolved and improved in the District. Presumably, because of its prior work as class counsel, class members would be the first place PILCOP would turn to get the records it seeks, but there is no mention of such an effort in the Motion. Nor is there any mention of any complaint made by a class member to PILCOP that there is any real problem in the District; instead, PILCOP draws its own inferences based on the information being transparently provided to them by the SEOs about "how it's going" -- and not on the basis of any potentially class-wide issue stemming from any particular problem experienced by one or more class members.[7]

The SEOs have been in place for months, and they are working very closely with parents to make things better in the District – they are addressing the issues those parents raise, and they are helping the District deliver special education services. There is no indication that there have been multiple, let alone any, individual complaints registered with PILCOP that could be

[7] Again, parents of children with special needs are doing what the Settlement Agreement contemplates: they are taking their issues to the SEOs and getting them resolved to their satisfaction.

aggregated to form even the most marginal inference that there is a larger problem with the provision of FAPE or compliance with the Settlement Agreement necessitating the filing of any motion, let alone this Motion.. PILCOP cannot point to any particular breach of the Settlement Agreement and its goal here is clear: PILCOP wants to engage in discovery to see if they can posture some larger argument and essentially start this case all over again.

Without real evidence in hand, this should not be allowed. It is nothing more than a fishing expedition pointed at relitigating a case that was fervently litigated and settled at great expense. Absent some outcry from the class or a representative thereof it is not proper to allow PILCOP to fish for a claim by accessing student special education records.[8]

3. PILCOP's Motion Completely Ignores Confidentiality Issues

Assuming, for the sake of argument only[9], that there is some reason and right on which to premise the access PILCOP seeks, direct access to student special education records raises significant confidentiality concerns under "FERPA," the Family Education Rights and Privacy Act and the IDEA, which clearly apply here, and HIPPAA, which may apply here.

Just by way of example, the IDEA, 20 U.S.C. §1417(c) mandates that "[t]he Secretary shall take appropriate action, in accordance with section 1232g of this title, to ensure the protection of the confidentiality of any personally identifiable data, information and records collected or maintained . .. by State . . . agencies . . . ." (emphasis added).

[8] Again, the Court should have a healthy skepticism as a result of the clear inference that PILCOP neither has, nor has indicated that it has even made any attempt, to get any of the student special education records it seeks from Class parents.

[9] The Commonwealth raises this issue as a result of its duty of candor to the Court. In other words, the Commonwealth's position is that PILCOP has no right of access to the records it seeks. If, however, the Court finds any basis on which to hold otherwise, no order granting such access can be entered without providing a mechanism for the protection of confidentiality under FERPA, the IDEA, and perhaps HIPPAA. Requiring redaction is not enough – there will have to be an opportunity for parents to object to disclosure, and potentially a hearing in which those objections are heard. PILCOP's failure to mention this issue to the Court is inexcusable.

The "§1232g" referenced in IDEA section 1417(c) is FERPA, and provides in pertinent part that:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing . . . any personally identifiable information in education records . . . unless—
>
> * * *
>
> (B) . . . such information is furnished in compliance with judicial order . . . upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

FERPA's requirements have been recognized in other class actions in which similar information has been sought in discovery.[10] In *Blunt v. Lower Merion School District, 2009 WL 1259100 (E.D.Pa.)*(attached as Exhibit A) class counsel requested, in discovery conducted relating to class certification, the disclosure – from the Department -- of educational records and data for Lower Merion students. The Court ordered the production of the information, but authorized redaction of information that could identify students. With that order in hand, the Department proceeded to give the required FERPA notice to parents.

In response, several parents objected and the Court ordered a stay of production until a hearing could be held to address the parents' concerns. Clearly, in the class certification process, FERPA rights and obligations were a force standing between class counsel's desire for the information and its disclosure. Similarly, in another class action, *C.G. et al. v. Commonwealth, Civ. Action. 1:CV-06-1523 (M.D.Pa.),* FERPA rights and obligations were imposed after the Commonwealth inadvertently disclosed personally identifiable information to class counsel. The

[10] The Commonwealth cannot overstress that the Motion is not and cannot be viewed as a discovery motion or dispute. There is no pending lawsuit. There is only a settled class action with a process for keeping PILCOP informed via the terms of a heavily negotiated Settlement Agreement, no provision of which allows the kinds of information disclosure and access PILCOP now seeks. The Settlement Agreement and its protocols were designed to allow PILCOP to be aware of what was happening and be in a position to be responsive to class parents in the process if it appeared that class-wide problems persisted. The silence of class parents' voices in connection with this Motion is telling.

Court's remedy there, in a March 16, 2009, Order (attached as Exhibit B), was to order the Commonwealth's counsel to personally retrieve all of the information from class counsel's offices, and to destroy it at the Commonwealth's expense, and to then produce the same information, properly redacted.

PILCOP presumes not only a right to access which does not exist under the Settlement Agreement, but also that Class parents would permit, and want them to have, such access. If Class parents are satisfied with the special education efforts of the District in the wake of the Settlement Agreement (which they appear to be given the absence of unresolved complaints), they may wish to be left alone and not to have their privacy rights threatened by PILCOP's intrusions, which Class parents may not wish to be a part of.

The Court should not create an access right and graft it on to the Settlement Agreement, after the fact, absent some truly compelling reason to do so – and PILCOP has not offered any.

CONCLUSION

PILCOP cannot point to any provision in the Settlement Agreement giving it the right of access it seeks. PILCOP cannot point to any one instance, let alone many, in which FAPE has been denied or the Settlement Agreement not complied with, on the required class-wide basis.. PILCOP has not mentioned any pending "harm" to any Class parent or special education student in the District. PILCOP's Motion makes no mention of any FERPA, the IDEA, or HIPAA related issue, and it offers no evidence that any parent or eligible student has consented to the disclosures it seeks. In sum, PILCOP's Motion makes no reference to one issue, let alone enough issues, to aggregate a reasonable and colorable inference of any problem with special education in the District, on a class-wide basis, as it is being delivered under the Settlement Agreement.

What PILCOP's Motion amounts to is nothing more than its apparent belief that it has some dynamic, inquiry-based police power to insinuate itself further into the special education process in the District than is permitted by the Settlement Agreement by engaging in some form of pre-complaint discovery. No such right was agreed to in the Settlement Agreement, and no such right should be created now. PILCOP has been provided all information to which it has any claim of entitlement under the Settlement Agreement. PILCOP has no compelling proof of the denial of FAPE or non-compliance with the settlement on any basis, let alone a class-wide basis, and there is no basis on which to open the kind of inquiry PILCOP's Motion seeks. The Motion should be denied.

The Commonwealth would be happy to present argument or otherwise discuss the matter with the Court, and at the Court's convenience, preferably in person.

Respectfully submitted,

BY: /s/ Michael A. Finio_____

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DATED: March 12, 2013

CERTIFICATE OF SERVICE

I, Michael A. Finio, do hereby certify that I caused the foregoing *Commonwealth's Opposition to Plaintiff Class's Motion for Enforcement* to be served upon all counsel and interested parties of record via this Court's ECF filing system.

Date: March 12, 2013

/s/ Michael A. Finio__
Michael A. Finio