

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

CHESTER UPLAND SCHOOL	:	
DISTRICT, et al.,	:	
	:	
Plaintiffs,	:	No. 12-cv-132
	:	
v.	:	
	:	
COMMONWEALTH OF	:	
PENNSYLVANIA, et al.,	:	
	:	
Defendants.	:	(Baylson, J.)

PLAINTIFF CLASS’S MOTION FOR ENFORCEMENT

INTRODUCTION

This motion is brought pursuant to Paragraph II(H) of the Settlement Agreement approved by the Court on August 15, 2012, which provides in relevant part that after written complaint to the District and Commonwealth Defendants, and the passage of thirty calendar days to resolve the complaint, Class Counsel may make a filing with the Court to enforce this Agreement with respect to the specific matters addressed in the written complaint. For the most part, the parties have cordially cooperated through the 2012-2013 school year in an effort to improve the special education and related services for children in the District. A dispute has arisen, however, that the parties cannot resolve concerning Plaintiff Counsel’s access to Individual Education Plans and progress reports of the children. Thus, Plaintiffs’ Counsel brings this motion.

FACTS

The Department appointed Fran Warmkowski and Michael Marmen as Department Special Education Officers (“Department SEOs”). Since the fall of 2012, Class Counsel has regularly met with the Department SEOs to receive oral updates on the progress of improving

special education in the District. In accordance with the Settlement Agreement, the Department SEOs have issued monthly reports to Class Counsel providing information on the status of special education activities in the District.

Both orally and in the initial September, 2012 report, the Department SEOs openly admitted that they were in the process of obtaining all of the special education records, centralizing them in the District administration building, and then determining which children had IEPs. Ex. A (September 2012 Department SEO Report), at 2. Although the Department SEOs initially reported only 501 students receiving special education services, they knew that was subject to correction. In September, 12 IEP meetings were reported to have been held, and compensatory education to have been discussed at three of the 12 IEP meetings. Ex. A. (September 2012 Department SEO Report), at 2. The number of children receiving compensatory education is not disclosed, although it is noted that two settlements were closed out with an award of compensatory education. In October, November, and December 2012, and in January and February 2013, Exs. B-F, the Department SEOs similarly reported:

Date of Report	Number of Children Receiving Special Education	Number of IEP Meetings Held	Compensatory Education Discussed/Awarded
October 2012	649	37	3/0
November 2012	610	72	33/4
December 2012	622	28	20/2
January 2013	618	35	28/1
February 2013	618	54	46/2

Thus, the present data establish that while the number of children in special education is currently 618, only 226 children have been the subject of an annual IEP meeting, and only 9 children have been awarded compensatory education.

Throughout the year, in various meetings with the Department SEOs, and as the monthly reports were received, Plaintiff's Class Counsel has voiced concerns about whether annual IEP meetings have been held for all of the children, whether IEPs were explicitly in place as of the first day of school, September 4, 2012 as required and therefore children receiving appropriate programs, and whether the Plaintiff Class children are receiving sufficient awards of compensatory education. Most recently, Plaintiff's Class Counsel has also expressed a concern that with over 600 children in special education, and fewer than 100 IEP meetings per month, it will not be possible to even complete an annual IEP meeting for each child, including discussion of compensatory education, before the close of school in June 2013.

On January 25, 2013, Plaintiff Class Counsel specifically invoked Section II.H, and wrote to the District and Defendants and their counsel addressing this concern and others. Ex. G. (Letter of Plaintiff Class to District and Defendants.) In the letter, Class Counsel specifically stated:

IEP Meetings. The total estimated number of children in special education consistent with the December report is 622. The IDEA requires annual IEP meetings for each of those children. The total number of IEP meetings reported from all four reports is apparently 149; this is less than 24% of the entire number of students. Since every child must have an annual IEP meeting, it appears this is an area of significant concern as not even half of the children have had an annual IEP meeting. We are not aware of any plan to bring the District into compliance on this. (Ex. G, p. 3).

Progress Reports. The settlement anticipated appropriate progress reporting. While the monthly reports make reference to review of progress reports in January, it is not clear if progress reports were completed for the first marking period for all children on IEPs. (Ex. G, p. 3).

Class Counsel also inquired about the provision of Extended School Year during summer 2012 and requested documentation of the Department's assertion that ESY was provided during summer 2012. (Ex. G, p. 4)

Class Counsel raised an explicit concern about whether parents were being provided the opportunity to discuss compensatory education at IEP meetings, and the low number of awards of compensatory education, (Ex. G, p. 4), to wit:

7. Compensatory Education. As recommended by the Department of Justice, the settlement anticipated that children who were in the district last year would have compensatory education discussed at IEP meetings. If only 149 meetings have been held, then the majority of children have not had meetings where compensatory education could be discussed. The total number of IEP meetings where compensatory education was discussed is 61 with only 6-8 children apparently receiving compensatory education. Since the District was clearly out of compliance last year in providing FAPE to children, it seems unlikely that only 6-8 children are entitled to compensatory education. It is more likely that discussion has not occurred, at least in part, because IEP meetings have not been held with all families. (Ex. G, p. 4)

Finally, in an effort to confirm the Department's representations through records, Class Counsel made an explicit request for a review of IEPs and related records, stating:

We would like to have the opportunity to review the current IEPs, evaluations, and compensatory education agreements for students in the CUSD. If you can set aside a time for us to come to the CUSD offices to do that, we would appreciate that. (Ex. G, p. 4).

On January 31, 2013, Class Counsel and the SEOs met in person and discussed the concerns expressed. Class Counsel specifically raised the request to review records, and the Department SEOs did not object; and there was discussion about a time to return to review said records.

On February 7, 2013, Patricia Fullerton, Assistant Chief Counsel, responded, noting that the matter had been orally discussed between Class Counsel and the Department SEOs on January 31, 2013. (Ex. H.) The Department's responses were as follows:

IEP Meetings: As to the insufficient number of IEP meetings, the Department's response was that "most of the IEP meetings will occur in the spring." (Ex. H, p. 3).

Progress Reports: The Department's response to the progress report issue was that students received progress reports for the first marking period and would be receiving progress reports again on February 13, 2013. (Ex. H, p. 3)

Extended School Year. The Department's response about Extended School Year was simply that "ESY was provided over the summer of 2012 and is being addressed as IEPs are revised." (Ex. H, p. 4).

Compensatory Education. The Department's response is that compensatory education for services that were not provided by the District during the 2011-2012 school year "is addressed at IEP meetings. However, because most of the compensatory education involved related services such as speech and occupational therapy, which services were provided to many students over the summer of 2012, discussions related to compensatory education are not applicable to every IEP meeting."

Ms. Fullerton explicitly refused to allow Class Counsel access to review student records, unless Class Counsel stated "specific individuals who you represent." (Ex. H, p. 4).

In response to the Department's refusal, on February 21, 2013, there were further email exchanges in which Class Counsel explained that, based upon the Court's prior Order, Class Counsel represented the class of students certified in the case. (Ex. I., Emails).

On February 25, 2013, Ms. Fullerton forwarded an additional letter stating that the Department would not allow a review of student records because there is "no pending litigation within which such a request might have some legitimacy." (Ex. J.)

ARGUMENT

I. ACCESS TO RECORDS IS CONSISTENT WITH THE SETTLEMENT AGREEMENT.

This Court appointed Class Counsel to represent all of the children identified in the class certified by the Court on May 8, 2012 as "all parents of students who attend the Chester Upland School District who are obtaining or are eligible to obtain services under the IDEA and/or are

protected by the Rehabilitation Act . . .” Dkt. No. 155 and Settlement, at I.A, p. 1. The Settlement Agreement provides for six priority areas, which include timely and appropriate development of IEPs, with appropriate progress reporting and provision of ESY programming.” Settlement, at F, p. 6. The Department’s SEO was to serve “as a resource and respond without undue delay to Class counsel regarding the provision of FAPE.” Settlement, at F, p. 6. The Settlement allows Class Counsel to give written notice about the provision of FAPE or compliance with the Agreement on a Class-wide basis and allow the District and Commonwealth Defendants 30 days to resolve the alleged concerns. Thereafter, the Settlement allows Class Counsel to bring this matter to the Court.

The Department’s refusal to provide access to student records is two-fold. First, the Department wants Class Counsel to indicate “who they represent.” (Ex. H.) That question is answered by the Settlement itself—Class Counsel represent the class. (Ex. I.) Second, the Department objects that Class Counsel cannot have access to student records because the matter is “not in litigation.” (Ex. J). The Department is simply incorrect.

The clear intent of the appointment of Class Counsel and the right of Class Counsel to have direct access to the Department’s SEO was to ensure that Class Counsel would be able to get information “without undue delay” regarding the provision of FAPE including timely and appropriate IEPs. A review of the IEPs, progress reports, ESY documentation, and compensatory education awards for Class members is clearly within the contemplation of the parties and necessary for class counsel to discharge its obligation to determine if there is compliance with the provisions of the Settlement Agreement. The Settlement charges class counsel with the duty to seek resolution of ‘reasonably justified concerns’ with the provision of FAPE or compliance with the Settlement Agreement on a class-wide basis. To do that responsibly, counsel must have

access to the actual records to determine what is happening. There is no other way for counsel ultimately to know whether there is such a concern which it should bring to the attention of the Court. Without this ability to see records, Class Counsel has no ability to fulfil its role under Paragraph H. Nothing in the Agreement limits class counsel only to representing parents who have individual complaints, and in fact the Agreement provides different avenues of relief for those instances. Indeed the language in Section H is directed solely to “Class-wide, and not individualized” concerns. Consequently, the issue of whether counsel represents any specific class member, and the suggestion that they are limited to reviewing only those records, is entirely inappropriate. No other reason exists for not providing access to the records requested: counsel for the State and District have not asserted that the request are unreasonably burdensome, nor in the circumstances could they.

CONCLUSION

The Court should order the District and the Commonwealth to provide Class Counsel with access to IEPs, progress reports, ESY documentation and compensatory education awards for class members.

Respectfully submitted this 8th day of March, 2013.

/s/ Michael Churchill

Michael Churchill, Esq. (Pa. Bar # 4661)

Sonja D. Kerr, Esq. (Pa. Bar # 95137)

Public Interest Law Center of Philadelphia

1709 Benjamin Franklin Parkway, 2nd Floor

Philadelphia, PA 19103

Phone: (215)627-7100

Fax: (215)627-3183

Email: mchurchill@pilcop.org; skerr@pilcop.org

Counsel for the Class and Plaintiffs B.C., M.F.,

T.F., and the Pa-NAACP