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

C.H., a minor, by and through his Parent, **Kimberly Williams**, individually, and on behalf of all others similarly situated,	)	
and	)	
J.F., a minor, by and through his Parents, **Natalie Wieters and Larry Freedman**, individually, and on behalf of all others similarly situated,	)	Civil Action No. 2:14-cv-06210-MSG
Plaintiffs,	)	
v.	)	
The School District of Philadelphia,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF MOTION TO
ENFORCE THE SETTLEMENT AGREEMENT

Plaintiffs move to enforce the Settlement Agreement between the parties pursuant to the Court's Order, dated February 3, 2017, in which the Court retained limited jurisdiction through December 31, 2019, for the purpose of enforcing the Settlement Agreement. *See* Court Order, attached as Exhibit A.

I. THE UNDERLYING LAWSUIT AND SETTLEMENT AGREEMENT

Over 19,000 students in Philadelphia receive special education services.[1] For thousands of those students, school breaks significantly disrupt academic progress. As a result, federal and state law require that if a student with disabilities will lose ground or needs specific assistance during school breaks, the child must receive an individually determined program of services, known as Extended School Year ("ESY") services, beyond those provided during the typical school year and in accordance with the child's Individualized Educational Plan ("IEP"). *See* 34 CFR § 300.106; 22 Pa. Code § 14.132 (incorporating the federal requirements in 34 CFR § 300.106).[2]

Plaintiffs brought the underlying class action lawsuit on behalf of students with disabilities to change the one-size-fits-all practice by the School District of Philadelphia ("the District") in determining ESY services for children with disabilities. The complaint alleged that the District was shoehorning children into a summer "program" with a set number of dates, times, and locations, regardless of the child's needs, rather than making the individualized determinations required by law. (Dkt. No. 28, 2nd Am. Compl. ¶¶ 8, 35-44) Following extensive negotiations, the parties agreed to settle the case. *See* Settlement Agreement, attached as Exhibit B.

[1] The Pennsylvania Department of Education reported that 19,227 students were enrolled in the District's special education programs during the 2015-2016 school year. Pennsylvania State Data Center, BSE, SPECIAL EDUCATION DATA REPORT (May 26, 2017).

[2] The Third Circuit has recognized the necessity of ESY services in the provision of Free Appropriate Public Education ("FAPE") under the IDEA. *Armstrong v. Kline*, 476 F. Supp. 583 (E.D. Pa. 1979), *aff'd Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981) (holding state's refusal to provide more than 180 days of education was incompatible with individualized education plans required by the IDEA and prevented the proper formulation of appropriate educational goals for individual children).

Under the terms of the settlement, the District affirmatively agreed that "ESY services will not be predetermined or limited to those services that may be provided within the School District's planned ESY summer schedule for students who need additional or different services to receive FAPE." *Id.*, Section III.A, at 5. Accordingly, whatever anyone's understanding had been in the past, it was essential that all who are involved in ESY determinations—parents, teachers, special education professionals, and administrators—be informed that the one-size-fits-all ESY practice is not acceptable. To make sure that everyone understood that the past one-size fits all practice was no longer acceptable, the Settlement Agreement contained two core provisions: notice and training of parents and District personnel. *Id.*, Section II, at 2-4, and Section IV, at 5-8. The District breached critical obligations under both of these provisions.

II. BREACH OF THE SETTLEMENT AGREEMENT

A. <u>The District Did Not Notify Parents and Guardians as Required.</u>

Under the Settlement Agreement, the District agreed to distribute an "ESY Services Notice" to the parents and guardians of all students with disabilities during February report card conferences. Agreement, Exh. B, Section II.B, at 3-4, Exh. 3. This one-page ESY Services Notice alerts parents and guardians that ESY must be determined on an individualized basis; that there is no fixed limit on the type, amount, or duration of ESY services; that ESY must be discussed at every IEP Team meeting; and that parents and guardians also have the right to request an IEP Team meeting to discuss ESY. *Id.*

The negotiated February timing of the notice is critical. ESY planning ramps up in January. For children with serious emotional disturbances, autism, moderate and severe levels of retardation, or multiple disabilities, the law requires that an IEP meeting to discuss their ESY services occur no later than February 28 of each school year. 22 Pa. Code § 14.132(d). For the remaining students, no fixed deadline applies but ESY determinations must still be made in a timely fashion with the opportunity for parents or guardians to engage in an expedited due process hearing if they disagree with the District's determination. 22 Pa. Code § 14.132(e). The purpose of the February notice is to inform parents and guardians that the past practice of "one-size-fits-all" no longer applies, thereby equipping them to advocate for their children's needs in the IEP meeting when the ESY determinations are being made.

In letters dated June 2, 2017, and July 7, 2017, Plaintiffs' counsel informed the District's counsel that parents reported that they never received the February ESY Services Notice. *See* Letter from L. Awbrey, June 2, 2017, attached as Exhibit C; Letter from L. Awbrey, July 7, 2017, attached as Exhibit D. [redacted][3]

In addition to the District's obligation to distribute the ESY Services Notice in February, both parties were required to issue an agreed-upon joint statement about the settlement within five business days of the date of the execution of the Settlement Agreement. Agreement, Exh. B,

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[redacted]

Section XI, at 12, Exh. 8. The statement was another means to notify people involved in determining children's services—namely, parents and District personnel—that ESY services must be individualized for each eligible student and will not be predetermined or limited by the District's ESY summer schedule. The District failed to publish the joint statement within the five-day period and continues to refuse to do so despite letters from Plaintiffs' counsel on March 24, 2017, and August 8, 2017, which requested that the District comply with the Settlement Agreement. *See* Letter from J. Clarke, March 24, 2017, attached as Exhibit F, at 4,5; Letter from L. Awbrey, August 8, 2017, attached as Exhibit G, at 3; and Letter from B. Hoffman, March 31, 2017, attached as Exhibit H, at 3.

B. <u>The District Did Not Comply with the Training Requirements.</u>

1. The District's parent training served only to reinforce the past practices.

Under the Settlement Agreement, the District also agreed to provide training about ESY to parents. Agreement, Exh. B, Section IV, at 5-8. Although the training was to cover all aspects of ESY planning, a fundamental element was, again, to emphasize that the past practice of "one-size-fits-all" was no longer acceptable and, instead, that each IEP team was to consider the child's needs on an individualized basis. This was so important that the parties went to some lengths to spell out the content of that training in the Settlement Agreement, even drafting new slides to be added to pre-existing training slides that make clear that children may be entitled to more or different ESY services than those set out in the District's "program." *Id.*, Section IV.D, at 7-8 and Exhs. 5 and 6. To make sure that the training was provided by a neutral outsider—and not someone who had participated in the one-size-fits-all practices in the past—the Settlement Agreement required the District to use "best efforts" to have the training provided by a representative of the state training agency, the Pennsylvania Training and Technical Assistance Network (PaTTAN). *Id.*, Section IV.D, at 7-8.

Like the notice requirements, the purpose of the parent training is to ensure that everyone understood that the practices in the past were no longer acceptable: a child's needs for ESY were to be considered on an individualized basis, and not just shoehorned into pre-arranged dates, times and locations. Even if a teacher, special education professional, or other administrator had not absorbed the new requirements and was attempting to place a child into the District's pre-established program, a parent or guardian would be armed with the knowledge that ESY must be individually determined and, if their child needs more or different services, those services must be made available.

On Monday, March 20, 2017, Jennifer Clarke, Executive Director of the Public Interest Law Center, attended an ESY training for parents that was given by the District. Decl. J. Clarke, ¶ 2, attached as Exhibit I. That training violated the requirements as well as the spirit of the Settlement Agreement. The trainer was not from PaTTAN but instead was a special education professional employed by the District. *Id.*, ¶ 3. She began her presentation with a slide showing the fixed dates for the District's "program," encouraging participants to remember those dates, and then continued to repeat and emphasize the dates of the program throughout the presentation. *Id.*, ¶ 4. When discussing an agreed-upon slide that explained various options a child may have for ESY services with regard to dates, frequency, and type of services, the trainer minimalized the information on the slide, stating it was "just an example," and then reminded participants of the dates of the District's program. *Id.*, ¶ 5. This left the impression that a parent would not have the option to request services different from those offered in the program.[4] *Id.* In response

[4] The slide explained that common delivery modes of ESY services could include take-home instructional materials, behavioral or other training for parents and program staff, itinerant teacher services, consultation, tutorials, or services contracted through community or outside agencies or approved private schools. Decl. J. Clarke, Exh. I, ¶ 5.

to a question from a parent about whether the dates of the program are the only dates available for ESY services, the trainer responded "these are the dates of the ESY program." *Id.*, ¶ 6.

Perhaps most concerning, the District trainer concluded her presentation without showing or discussing two of the three negotiated slides that were required by the Settlement Agreement. *Id.*, ¶ 7. These omitted slides were the very documents that the parties worked hard to craft which spelled out the critical requirement that, if needed for a child, additional or different services must be provided: "If necessary ESY services cannot be provided within the District's typical six-week schedule, individual arrangements will be made to provide the additional or different services to the student.... It is important to remember that the District's typical ESY schedule does not limit the ESY services that may be provided." *Id.*; *see also* Agreement, Exh. B, Section IV.D, at 7-8 and Exh. 6. When a parent pointed out the omission,[5] the trainer eventually put the slides on the screen, but without explaining them.

Thus, far from serving its purpose of signaling a new approach to ESY services in which a child's needs come first, the parent training had the opposite effect of reinforcing the message that had been given in the past that there is a fixed ESY program, with fixed dates and times, and a child who needed more would have no options.

2. The District did not comply with essential elements of training for District Personnel.

For the same reason the Settlement Agreement required training for parents, the Settlement Agreement also required the District to provide training for its Special Education Directors and to use best efforts to have PaTTAN provide that training. Agreement, Exh. B, Section IV.A, at 5-6. This training ensures that the people who are most responsible for ESY

[5] Paper copies of the presentation were distributed to participants; those copies did not follow the order of slides presented on the screen, but did contain the two required slides that were omitted from the presentation. Decl. J. Clarke, Exh. I, ¶ 8.

planning understand that that teams assembling to determine each child's needs and related services are not limited to the days or hours of the District's "program" and are, instead, to determine the type, amount, and duration of services based on each child's needs.

Nine of the District's Special Education Directors attended the botched parent training, as did the top District official responsible for special education services. None interjected to clarify or correct the trainer and, instead, they heard and received the same incorrect information reinforcing the now-rejected idea that there is no flexibility for the school break services available to children with disabilities. Although the District informed Plaintiffs that the Special Education Directors attended a training conducted by PaTTAN [redacted] that training was superseded by the March 20, 2017 parent training, which served only to reinforce the District's past practices, thus thwarting the entire purpose of the January 13, 2017 training of Special Education Directors. The misinformation presented to Special Education Directors on March 20, 2017, in the presence of the top District official responsible for special education services, is particularly concerning because it is these same Special Education Directors who, under the terms of the Settlement Agreement, are to train the Special Education Liaisons (Agreement, Exh. B, Section IV.B, at 6) who then train the special education teachers and building administrators (*Id.*, Section IV.C, at 7). Thus, any misunderstandings at the Special Education Director level get passed down through the system.

3. The District's attempts to correct training deficiencies were not effective.

Plaintiffs notified the District of the training deficiencies by letter dated March 24, 2017, and requested that the District take specific steps to address the harms created, namely, the reinforcement of the past unlawful practices. Plaintiffs requested that the District hold a new training for parents and also a separate training for Special Education Directors with a PaTTAN trainer. *See* Letter from J. Clarke, March 24, 2017, Exh. F. Plaintiffs also requested that the District circulate a letter to the Special Education Directors which would include the initially-omitted slides and which would emphasize their significance by stating that the slides contain important information of which the directors should be aware. *Id.* at 5.

The District only partially responded and, by the time it did so, much of the ESY planning for 2017 was complete. The District did not schedule a separate additional training for Special Education Directors, as requested. Instead, the District promised to circulate the missing slides and advised Plaintiffs that it had created a video tutorial on ESY services. *See* Letter from B. Hoffman, March 31, 2017, Exh. H, and Letter from B. Hoffman, June 20, 2017, attached as Exhibit J, at 3.[6] (The District has declined to provide that video to Plaintiffs, absent an agreement that Plaintiffs keep the video confidential. *See* Letter from B. Hoffman, July 21, 2017, attached as Exhibit K, at 3). The District did schedule two additional parent trainings to be conducted by PaTTAN, but those trainings did not occur until April 4, 2017, well after ESY planning was underway. Thus, the District and parents lost a significant window of opportunity for 2017.

III. RELIEF

A. <u>The District's Summer 2017 Data is Alarming and Supports the Request for Relief.</u>

The violations described above mattered, as evidenced by ESY data that the Settlement Agreement requires the District to provide (Agreement, Exh. B, Section V, at 8-9). The first year's data, recently provided by the District, raises serious concerns. [redacted]

[6] The District represented that it did, in fact, eventually circulate the slides to Special Education Directors.

[redacted]

The Settlement Agreement was crafted to effect systemic change by which the District would, as agreed to and as required by law, provide individualized ESY determinations and services based on the needs of each child, as opposed to the convenience of the District's pre-planned program. Recognizing that the change from systemic practices of forcing students into a one-size-fits-all program would require a seismic shift in the understandings and practices of all stakeholders in a very large system, the parties agreed to straightforward settlement provisions requiring specific notices and detailed trainings of the people most intimately involved with

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[7] [redacted]

children's planning: their parents and the special education professionals. While it is impossible to calculate the extent to which the lack of notice and the botched training affected the provision of ESY services during the 2017 summer, two things are clear: the District did not comply with the Settlement Agreement's notice and training requirements and [redacted] Accordingly, Plaintiffs are entitled to relief.

B. <u>Plaintiffs Complied with the Alternative Dispute Resolution Mechanisms in the Settlement Agreement.</u>

Section VI.B. of the Settlement Agreement provides that after giving written notice to a party of a grievance regarding compliance with the agreement, and after the passage of sixty calendar days to resolve the complaint, a party may move to enforce the Settlement Agreement. Agreement, Exh. B, Section VI.B at 10. Plaintiffs' counsel notified the District of their breaches of the Settlement Agreement in letters dated March 24, 2017, June 2, 2017, July 7, 2017, and August 8, 2017.[8] While the District did make some effort to address Plaintiffs' grievances regarding compliance—[redacted] and scheduling two additional parent trainings on April 4, 2017—these remedial actions fail to address that children with disabilities lost the benefits of this Settlement Agreement for the planning and execution of their ESY services for the summer of 2017.

Plaintiffs in their four letters have reiterated three demands to the District to redress their breaches: (1) extend the term of the Settlement Agreement by one year to make sure that the sea-change intended to occur as a result of the notices and trainings does, in fact, occur; (2) issue

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[8] In addition to the breaches raised in this motion, Plaintiffs brought numerous other concerns to the District's attention, some of which were addressed by the District (such as Plaintiffs' complaint that the District failed to properly publish information on portions of its website) and some of which were not (such as anecdotal reports that IEP Teams were not discussing ESY and that parents were still being told that the Special Education Director, and not the IEP Team, made ESY programming decisions). *See* Letters between counsel, Exhs. C, D, F, G, H, J, and K.

the joint statement that was negotiated as part of the Settlement Agreement to communicate in yet another venue the fact that there is a new practice in place; and (3) provide Plaintiffs' counsel with a copy of the video tutorial regarding ESY viewed by District personnel so that counsel can ensure that the bungled March training is not being reproduced. The District has refused each of these requests.

C. <u>This Court Can and Should Issue the Requested Remedial Order.</u>

District courts may enforce, on motion, settlement agreements entered into with their approval. *Hobbs & Co. v. Am. Inv'rs Mgmt., Inc.*, 576 F.2d 29, 33 (3d Cir. 1978) (citing *Kelly v. Greer*, 365 F.2d 669 (3d Cir. 1966)), *cert. denied*, 385 U.S. 1035 (1967) and *Walther & Cie v. U.S. Fidelity & Guaranty Co.*, 397 F. Supp. 937 (M.D.Pa. 1975).

Here, the requested relief—the three simple steps rejected by the District—could begin to cure the District's wholesale violations of the core settlement provisions. First, the parties believed it would take several years to change the understandings of stakeholders based on years of District practice. For this reason, the parties negotiated a three-year settlement term. But by failing to tell parents of the changes via the negotiated notice (until months too late) and through the botched training, the District essentially lost a year, [redacted] Second, it is not entirely clear that the District fixed its trainings. By producing a video, which it refuses to share, it has circumvented the training requirements; whether that video is an improvement or not, Plaintiffs cannot know unless they see it. Third, the negotiated statement that the District has refused to issue, provides another vehicle through which the District can announce to all stakeholders that it wishes to, and will, comply with federal law.

Finally, Plaintiffs request attorneys' fees incurred in pursuing this enforcement action. Such fees are contemplated in the Settlement Agreement: Section X of the Settlement Agreement states that "Plaintiffs' counsel shall not be entitled to any additional fees or costs for monitoring or administering this Settlement Agreement *except to the extent it may be a prevailing party in any proceeding to enforce this Settlement Agreement*, as provided by federal or Pennsylvania law." Agreement, Exh. B, Section X, at 11 (emphasis added).

IV. CONCLUSION

The relief sought in this Motion gives the District another chance to get it right: to communicate with parents, teachers, and special education professionals in clear, unequivocal terms that planning for children with disabilities during school breaks must be based on the child's individualized needs, not based on the convenience of a pre-set summer "program," so that, at least in the future, children with disabilities will have opportunities for individualized planning of their education during school breaks. The relief sought in this motion is reasonable and the cost to the District is minimal, particularly where the District ostensibly shares the goal of following the mandates of federal and state law that children be provided with individualized ESY determinations and programming.

For the foregoing reasons, Plaintiffs respectfully requests that this Court **GRANT** the Motion to Enforce the Settlement Agreement and:

1. extend the duration of the Settlement Agreement and the Court's related limited jurisdiction for the purposes of enforcing it;
2. order the District to issue the agreed-upon joint statement and produce the video tutorial; and,

3. award costs and attorneys' fees incurred in pursuing this enforcement motion.

Respectfully submitted,

/s/ Lee Awbrey

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