APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 24-1030

JENN-CHING LUO,
Appellant
v.
OWEN J. ROBERTS SCHOOL DISTRICT;
GEOFFREY BALL; SHARON W. MONTANYE;
SWEET STEVENS KATZ WILLIAMS LLP;
PENNSYLVANIA DEPARTMENT OF EDUCATION

(D.C. Civil Action No. 2-16-cv-06568)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge; JORDAN, HARDIMAN, SHWARTZ, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, and CHUNG, Circuit Judges

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is

denied.

BY THE COURT,

s/ Tamika R. Montgomery-Reeves
Circuit Judge

Dated: October 17, 2024
kr/cc: Jenn-Ching Luo
Karl A. Romberger, Jr., Esq.
Carol A. VanderWoude, Esq.
Claudia M. Tesoro, Esq.

APPENDIX B

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
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JENN-CHING LUO,
Appellant
v.
OWEN J. ROBERTS SCHOOL DISTRICT;
GEOFFREY BALL; SHARON W. MONTANYE;
SWEET STEVENS KATZ WILLIAMS LLP;
PENNSYLVANIA DEPARTMENT OF EDUCATION

On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil Action No. 2-16-cv-06568) District Judge: Honorable Harvey Bartle, III

Submitted Pursuant to Third Circuit LAR 34.1(a)
September 9, 2024
Before: BIBAS, PORTER, and MONTGOMERY-REEVES, Circuit Judges
(Opinion filed: September 16, 2024)

OPINION*

PER CURIAM

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Appellant Jenn-Ching Luo appeals from orders of the District Court dismissing the claims in his civil suit and denying his motion for reconsideration. For the following reasons, we will vacate the District Court's judgment in part, affirm in part, and remand for further proceedings.

Luo is the parent of B.L., a special needs student in the Owen J. Roberts School District. In December 2016, Luo filed a complaint in the District Court alleging that he filed an administrative due process complaint under the Individuals with Disabilities in Education Act (IDEA), 20 U.S.C. § 1411, which was denied by a hearing officer. He sought the District Court's review of the hearing officer's decision pursuant to the IDEA. See 20 U.S.C. § 1415(i)(2) (providing a party aggrieved by a hearing officer's decision under the IDEA the right to bring a civil action in a district court). The complaint also alleged civil claims against the School District and its Special Education Supervisor, Geoffrey Ball ("the District defendants"); the School District's counsel during the administrative hearings, Sharon Montanye, and her law firm, Sweet Stevens Katz Williams LLP ("the attorney defendants"); and the Pennsylvania Department of Education (PDE).

In May 2021, the District Court consolidated the matter (Luo IV), for administrative purposes only, with four other matters (Luo I, Luo II, Luo V, and Luo VI) in which Luo had filed complaints against the School District and various defendants. The District Court entered an order on October 30, 2023, addressing outstanding motions and claims in Luo I, Luo IV, Luo V, and Luo VI. As relevant here, the District Court dismissed with prejudice "[a]ll claims

in Luo IV." ECF No. 40 at 2. Luo filed a motion for reconsideration arguing, inter alia, that the District Court failed to address his "appeal[ ] of hearing officer's decision[ ]" (i.e., his § 1415(i)(2) claim), as well as a number of his civil claims, in Luo IV, and therefore that it was "premature" "to dismiss the [c]omplaint entirely and close the case." ECF No. 41 at 2, 22. The District Court granted the reconsideration motion in Luo IV only as to the civil claims it overlooked; it then addressed the outstanding claims, and dismissed them with prejudice in an order entered December 8, 2023. Luo appealed.

We have jurisdiction under 28 U.S.C. § 1291. We exercise plenary review over the District Court's dismissal under Federal Rule of Civil Procedure 12(b)(6), and will affirm if the complaint fails to state a claim for relief that is plausible on its face. See Burtch v. Milberg Factors, Inc., 662 F.3d 212, 220 (3d Cir. 2011); see also Jonathan H. v. The Souderton Area Sch. Dist., 562 F.3d 527, 529 (3d Cir. 2009) (observing that an IDEA action pursuant to § 1415(i)(2) "is an original civil action rather than an appeal," and thus is "governed by the Federal Rules of Civil Procedure").

We reject Luo's primary argument on appeal that the District defendants' motions to dismiss were "void," and that he was entitled to default judgment against all defendants. See Fed. R. Civ. P. 55(a) (providing that a default judgment is warranted where a party "failed to plead or otherwise defend" the claims against him or her). He claims that the deadline for the defendants to answer the complaint expired on January 26, 2017, 21 days after

summonses were issued, and more than four years before motions to dismiss were filed. Not so. The matter was stayed on January 4, 2017, pending an appeal to this Court in another of Luo's cases, see E.D. Pa. Civ. No. 15-cv-04248 (Luo III). And, as the District Court explained in denying Luo's motions for default judgment, Luo's cases have a complicated procedural history which further delayed the proceedings.[1] See ECF No. 39. The defendants were not required to respond to the complaint until after the stay was lifted, and, under the circumstances, the District Court did not abuse its discretion in deeming the motions to dismiss as timely filed, and determining that there was no basis for default

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[1] After this Court's mandate issued in the appeal in Luo III, in July 2018, Luo immediately filed motions for default judgment. In November 2020, he filed a motion to lift the stay. In an order entered February 9, 2021, the District Court lifted the stay, and directed Luo "to consolidate his claims as per [the November 29, 2016 order] by filing a second amended consolidated complaint in [Luo I] so that litigation can proceed." ECF No. 17 (emphasis added). Luo filed a timely motion for reconsideration, which sought clarification as to whether he was required to replead his claims in Luo I, Luo IV, and Luo V in one amended consolidated complaint case, and, if so, arguing that it was improper, and asserting that he would stand on his initial complaint. See ECF No. 18 at 2. In May 2021, the District Court denied that motion and consolidated the matters for administrative purposes only, obviating the need for an amended complaint. See ECF Nos. 24 & 26. Luo sought reconsideration, which was denied, and then an appeal. We dismissed the appeal for lack of jurisdiction. See C.A. No. 21-2569, 09/07/22 Order (dismissing appeal for lack of jurisdiction).

judgment against any defendant.[2] See generally In re Fine Paper Antitrust Litig., 685 F.2d 810, 817 (3d Cir. 1982) (noting that "matters of docket control . . . are committed to the sound discretion of the district court"). Moreover, we note that Luo responded to the motions to dismiss and took every available opportunity to argue his case.

Luo next argues that the District Court erred in dismissing his claim against the PDE (Claim 15) on immunity grounds. He notes, correctly, that Congress abolished sovereign immunity for violations of the IDEA. See M.A. ex rel. E.S. v. State-Operated Sch. Dist. of City of Newark, 344 F.3d 335, 351 (3d Cir. 2003). But his claim was grounded in § 1983,[3] not the IDEA, and as an "arm of the state," the PDE is immune from such a claim. See Fitchik v. N.J. Transit Rail Operations, Inc., 873 F.2d 655, 658 (3d Cir. 1989) (noting that a state agency or department is an "arm of the state" when a judgment

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[2] The PDE did not file a motion to dismiss the claim against it, which was filed pursuant to 42 U.S.C. § 1983. However, in its response in opposition to Luo's motion for default judgment, PDE noted that, given the procedural posture of the case at that point, it was unclear whether a responsive pleading was required, and indicating "[i]f it is, PDE will promptly provide one." ECF No. 37 at 2. Moreover, PDE argued in that response that it was entitled to absolute immunity under the Eleventh Amendment, and that the District Court could raise the issue *sua sponte*, which the Court subsequently did.

[3] To state a claim under § 1983, a plaintiff must allege that a person acting under color of state law deprived him of rights, privileges, or immunities secured by the Constitution or laws of the United States. West v. Atkins, 487 U.S. 42, 48 (1988).

against it "would have had essentially the same practical consequences as a judgment against the State itself" (citation omitted)); see also Downey v. Pa. Dep't of Corr., 968 F.3d 299, 310 (3d Cir. 2020) (noting that Pennsylvania has not waived the immunity defense and Congress has not abrogated Eleventh Amendment immunity under § 1983). The District Court therefore lacked jurisdiction to consider it.

Luo's remaining claims largely stem from the following events, as alleged in the complaint. First, defendant Ball terminated B.L.'s bus aide. Luo filed an administrative due process complaint under the IDEA, seeking the bus aide's reinstatement. The bus aide was restored, which Luo alleged "mooted" the proceeding. ECF No. 1 at 9, ¶44. On Montanye's motion, however, the hearing officer (HO), Charles W. Jelley, continued the proceeding to determine whether a bus aide was "necessary for the delivery of [a] FAPE to the child." Id. at 9, ¶49 (emphasis in original). Ultimately, HO Jelley "denied Montanye's collateral issue," citing Montanye's lack of evidence, and directed the parties to address the issue at an Individualized Education Plan (IEP) meeting. Id. At 13, ¶65.

Second, at an IEP meeting in 2016, which was scheduled to discuss B.L.'s Individualized Education Evaluation (IEE), defendant Ball allowed an evaluator to participate by phone conference, without giving Luo notice. The parties did not reach an agreement about a revised IEP at the meeting, but, afterwards, Ball arbitrarily revised it and falsely claimed that Luo agreed with the revisions. Luo filed another due process complaint, challenging

the IEP meeting and the revised IEP. The HO, Jake McElligott, ruled in favor of the School District.

Luo brought numerous claims under § 1983 against the various defendants. His claim against the attorney defendants for abuse of process (Claim 6) fails because they are not liable as state actors for performing their functions as attorneys for the School District. See Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268, 277 (3d Cir.1999) (holding that "[a]ttorneys performing their traditional functions will not be considered state actors solely on the basis of their position as officers of the court"). A person acts under color of state law "only when exercising power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." Polk Cty. v. Dodson, 454 U.S. 312, 317-18 (1981). Their representation of the School District was not by virtue of state law.[4]

The District Court properly determined that Luo failed to state a claim for relief against the District defendants, and that leave to amend would be futile. Luo did not adequately plead a substantive due process claim (Claim 1) because none of the District defendants' alleged conduct regarding the bus aide, the IEP meeting, or the IEP revisions, would "shock

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[4] The District Court properly dismissed the only other claim against the attorney defendants, which was for "Malicious Prosecution (The Dragonetti Act)" (Claim 9) for "maintaining the mooted hearing [before HO Jelley] to prosecute the collateral issue." ECF No. 1 at 32, ¶241. Luo cannot prevail on this claim because, according to the complaint, the attorney defendants neither initiated the administrative proceeding nor prevailed in it. See U.S. Express Lines Ltd. v. Higgins, 281 F.3d 383, 394 (3d Cir. 2002); see also 42 Pa. Con. Stat. § 8351.

the conscience" and thereby rise to the level of a constitutional violation. See Miller v. City of Philadelphia, 174 F.3d 368, 374-75 (3d Cir. 1999) (recognizing that to state a substantive due process claim under § 1983, the plaintiff must allege conduct by a government actor that "shocks the conscience").

Nor did Luo state a viable procedural due process claim, which required alleging that the District defendants deprived him of an individual interest that is "encompassed within the Fourteenth Amendment's protection of life, liberty, or property," and that the available procedures did not provide due process of law. In re Energy Future Holdings Corp., 949 F.3d 806, 822 (3d Cir. 2020) (quoting Hill v. Borough of Kutztown, 455 F.3d 225, 234 (3d Cir. 2006). First, Luo failed to allege the deprivation of a constitutionally protected interest stemming the first administrative hearing (Claims 2, 7 & 8), where he maintains that the administrative due process complaint was "mooted," and HO Jelley denied Montanye's "collateral issue." See ECF No. 1 at 14 (stating that "the matter restored back to the original state, e.g., before Defendant Ball terminated bus aide"). "maintaining the mooted hearing [before HO Jelley] to prosecute the collateral issue." ECF No. 1 at 32, ¶241. Luo cannot prevail on this claim because, according to the complaint, the attorney defendants neither initiated the administrative proceeding nor prevailed in it. See U.S. Express Lines Ltd. v. Higgins, 281 F.3d 383, 394 (3d Cir. 2002); see also 42 Pa. Con. Stat. § 8351.

Second, Luo claimed that the District defendants violated his due process rights by implementing HO McElligott's decision from the second administrative

hearing before the time to appeal the decision had expired (Claim 14). The procedural safeguards governing the provision of a FAPE are set forth at 20 U.S.C. § 1415, including the right to challenge a revised IEP by filing a due process complaint, and the right to a hearing on that complaint. As relevant here, the statute also provides that Luo, as the party aggrieved by McElligott's decision upholding the IEP, had 90 days to bring a civil action in the District Court pursuant to 20 U.S.C. § 1415(i)(2) with respect to the due process complaint. But the statute does not provide any protections against implementation of the HO's decision during the appeal period, and Luo could have moved in the District Court to stay implementation of the IEP while his § 1415(i)(2) claim was pending. Accordingly, he has failed to sufficiently plead that the District defendants denied him any process that was due.

Finally, we agree with the District Court that Luo's claims that the District defendants violated his "liberty right" to "direct" B.L.'s education (Claims 3, 5, 10-13 & 16) and his "property" right to a bus aide (Claim 4) were not actionable under § 1983. Luo's various allegations regarding the bus aide, a bullying incident on the bus, and the IEP or IEP meetings are related to B.L.'s education and services under the IDEA, and, as such, any perceived violations of Luo's rights cannot be remedied under § 1983. See A.W. v. Jersey City Public Schools, 486 F.3d 791, 802 (3d Cir. 2007).

We now turn to Luo's argument that the District Court failed to address his claim, brought pursuant to § 1415(i)(2), which sought review of HO

McElligott's decision. See ECF No. 1 at 20-23. Although the District Court recognized the claim, and purported to grapple with it, the Court misconstrued it "as an IDEA claim against the School District," and conflated it with several of Luo's § 1983 claims. ECF No. 39 at 9-11. We will therefore remand this matter for proper consideration of the § 1415(i)(2) claim. We note that, when, as here, a plaintiff brings a civil action under the IDEA, a district court "shall receive the records of the administrative proceedings," "shall hear additional evidence at the request of a party," and, "basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C).

Based on the foregoing, we will vacate the District Court's judgment to the extent it dismissed the § 1415(i)(2) claim, and remand for further proceedings.[5] We will otherwise affirm.

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[5] Luo's motion to dismiss for lack of jurisdiction is denied. His request for a sanction is denied without prejudice to his raising the issue in the District Court, where Appellees' alleged conduct occurred.

APPENDIX C

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

CIVIL ACTION
NO. 14-6354
NO. 16-6568
NO. 17-1508
NO. 21-1098

JENN-CHING LUO
v.
OWEN J. ROBERTS SCHOOL
DISTRICT et al.

Filed: October 30, 2023

MEMORANDUM

Bartle, J. October 30, 2023

Plaintiff Jenn-Ching Luo has sued defendants Owen J. Roberts School District ("School District"), the Pennsylvania Department of Education, and a variety of School District employees in multiple cases, alleging claims arising out of the Individual Education Plan ("IEP") process for B.L., his son, a special needs student at the School District. Mr. Luo challenges the resolution of multiple administrative due process complaints he made against the School District over the past ten years. Mr. Luo alleged that defendants violated his constitutional rights and

that procedural failures meant that B.L. was not provided with a free appropriate public education ("FAPE"), which the Individuals with Disabilities in Education Act ("IDEA") requires. 20 U.S.C. § 1400, et seq. In total, Mr. Luo has filed seven related lawsuits: Civil Action 14-6354 (Luo I); Civil Action No. 15-2952 (Luo II)[1]; Civil Action No. 15-4248 (Luo III); Civil Action No. 16-6568 (Luo IV); Civil Action No. 17-1508 (Luo V); and Civil Action No. 21-1098 (Luo VI). Luo II, Luo III, and Luo VII are all at an end after appeals.

Before the court is the motion of Mr. Luo for entry of default pursuant to Federal Rule of Civil Procedure 55(a) in Luo I, Luo IV, and Luo V against all defendants who have not filed answers on currently outstanding claims. There also remains pending motions to dismiss in Luo IV, Luo V, and Luo VI.

I

The court turns first to the motion of Mr. Luo for entry of default in Luo I, Luo IV, and Luo V. He urges this court to direct the clerk to enter a default pursuant to Rule 55(a) of the Federal Rules of Civil Procedure which provides:

> (a) Entering a Default. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

These actions have recently been transferred to

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[1] In Luo II, Mr. Luo filed a counter-claim and a third-party complaint in a case initiated by the School District.

the undersigned, the third judge of this court to preside over these actions over their long history as a result of judicial retirements. These actions have also been prolonged by appeals taken by Mr. Luo of non-appealable orders. The complicated procedural history of these cases is outlined later in this memorandum.

Suffice it to say that defaults and default judgments are not favored. It is generally in the interest of justice to proceed to the merits. See United States v. $55,518.05 in U.S. Currency, 728 F.2d 192, 194-95 (3d Cir. 1984). The plaintiff here will not be prejudiced if default is denied. Based on the history of these cases, defendants have litigable defenses. Finally, the court finds no culpable conduct on the part of the defendants. Id. At 195.

Many of the claims in these actions have already been resolved. Now that the Court of Appeals has recently remanded these actions, this court is deciding the outstanding motions to dismiss, allowing renewed or supplemental motions to dismiss to be filed or otherwise requiring the docketing of answers.

The motion of Mr. Luo for entry of default will be denied in the interest of justice.

II

Mr. Luo filed Luo I, his first complaint in this court, on November 5, 2014. In Luo I, Mr. Luo originally sued the School District, Geoffrey Ball (Special Education Supervisor at the School District), and Hearing Officer Cathy A. Skidmore. Mr. Luo then amended his complaint to include claims against Keri Kolbay (psychologist at the School District), and Sharon W. Montanye (counsel

for the School District).

On October 31, 2016, Judge Thomas N. O'Neill, Jr. dismissed certain claims in Luo I with prejudice, dismissed other claims without prejudice with leave to file an amended complaint (which would have been the second amended complaint), and with respect to still other claims, denied without prejudice the motion to dismiss. Judge O'Neill dismissed with prejudice: (1) all claims against Hearing Officer Skidmore; (2) all claims against Ms. Montanye; (3) all Fifth Amendment claims against the School District; and (4) all IDEA claims against the remaining individual defendants.

Judge O'Neill dismissed without prejudice all other claims against the School District in Luo I, which consisted of a Section 1983 claim that the School District violated Mr. Luo's due process rights and an IDEA claim requesting that the court review the administrative due process hearing pursuant to 20 U.S.C. § 1415(i)(2)(A). Judge O'Neill granted Mr. Luo the opportunity to file a second amended complaint within thirty days. Mr. Luo failed to do so by the deadline set by the court.

On November 28, 2016, Judge O'Neill reset Mr. Luo's deadline to file a second amended complaint to December 23, 2016. The court stated: "Failure to file this document by that date shall result in the dismissal with prejudice of all claims dismissed without prejudice in [the court's] October 31, 2016 amended order." Luo v. Owen J. Roberts Sch. Dist., Civ. A. No. 14-6354, 2016 WL 6962548, at *1 (E.D. Pa. Nov. 28, 2016). Mr. Luo appealed this order and the orders in other Luo cases on December 29, 2016. As a result, Judge O'Neill stayed Luo I while the

case was on appeal. On September 13, 2017, during the pendency of these appeals, the Luo actions were reassigned to Judge Petrese B. Tucker. Luo I was ultimately remanded as the appeal was interlocutory.

Mr. Luo has chosen to stand on his first amended complaint in Luo I rather than file an additional amended complaint. As a result, all claims in Luo I against the School District will be dismissed with prejudice in accordance with Judge O'Neill's November 28, 2016 order.

On October 31, 2016, Judge O'Neill denied without prejudice the motion of Ms. Kolbay to dismiss the Section 1983 claim against her. Judge O'Neill directed her to "reassert her arguments" in a motion to dismiss if Mr. Luo filed a second amended complaint. As noted above, Mr. Luo decided not to do so. Nonetheless, Ms. Kolbay filed a renewed motion to dismiss on June 9, 2021. On March 18, 2022, Judge Tucker granted her motion.

This leaves one remaining claim in Luo I. On October 31, 2016, Judge O'Neill denied without prejudice the motion to dismiss of Mr. Ball as to the Section 1983 claim against him. He was similarly directed to reassert his arguments in a motion to dismiss Mr. Luo's second amended complaint. No second amended complaint was filed. Since Mr. Ball did not file a renewed motion to dismiss, our Court of Appeals determined that the "[Section] 1983 claims against [Mr.] Ball in Luo I remain outstanding." Luo v. Owen J. Roberts Sch. Dist., No. 22-1632, 2023 WL 5600965, at *3 (3d Cir. Aug. 30, 2023). Due to the factual overlap between the claims against him and Ms. Kolbay, Mr. Ball will be given an opportunity to

file a renewed motion to dismiss the Section 1983 claim against him as pleaded in Luo I[2] within twenty days of this order. If Mr. Ball decides not to file a renewed motion to dismiss, he shall file an answer within twenty days.

III

On May 20, 2021, Judge Tucker consolidated Luo I, Luo IV, Luo V, and Luo VI. Mr. Luo moved for reconsideration of this order. When Judge Tucker denied his motion on August 19, 2021, Mr. Luo appealed this decision the following day. This appeal was dismissed for lack of appellate jurisdiction on September 7, 2022 because the orders were neither final nor appealable interlocutory or collateral orders under 28 U.S.C. § 1291.

In Luo IV, Mr. Luo sued the School District, Mr. Ball, Ms. Montanye, Sweet Stevens Katz Williams LLP ("Sweet") (outside counsel for the School District), and the Pennsylvania Department of Education. In this action, Mr. Luo brought Section 1983 claims against all defendants. Against Ms. Montanye and Sweet, Mr. Luo alleged abuse of process and wrongful use of civil proceedings, which Mr. Luo described as malicious prosecution under the Dragonetti Act. 42 Pa. Cons. Stat. § 8351, et seq. Finally, Mr. Luo claimed that the School District violated the IDEA.

On March 18, 2022, Judge Tucker decided motions to dismiss in Luo VI and Luo VII. While Judge Tucker addressed claims brought in Luo IV in her accompanying memorandum, the Court of Appeals

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[2] The Section 1983 claim against Mr. Ball consists of Claims 1-3 and 5-8 of Mr. Luo's first amended complaint in Luo I

ruled that the order did not actually dismiss these claims, "nor did the District Court indicate that it was considering that case." Luo, 2023 WL 5600965, at *4 n.7.

The court will adopt Judge Tucker's reasoning related to Luo IV as to the abuse of process and wrongful use of civil proceedings claims against Ms. Montanye and Sweet, which she discussed in her memorandum accompanying her order, dated March 18, 2022.[3]

Regarding the abuse of process claims against Ms. Montanye and Sweet, Mr. Luo failed to "allege facts reflecting any conduct undertaken by the Attorney Defendants" that would demonstrate an improper aim, such as extortion or blackmail toward him. Luo v. Owen J. Roberts Sch. Dist., Civ. A. No. 14- 6354, 2022 WL 837031, at *10 (E.D. Pa. Mar. 18, 2022). Therefore, Mr. Luo did not state a claim for abuse of process against either defendant. This claim will be dismissed.

The claims for wrongful use of civil proceedings against Ms. Montanye and Sweet also fail. Mr. Luo's claim under the Dragonetti Act can be viable only if he can show that he prevailed as a defendant in an underlying action and that Ms. Montanye and Sweet acted with gross negligence as plaintiffs pursuing an underlying action. See 42 Pa. Cons. Stat. § 8351(a); see also Schmidt v. Currie, 470 F. Supp. 2d 477, 480 (E.D. Pa. 2005). As Mr. Luo brought the underlying claim, he cannot state a claim for liability under the Dragonetti Act, and therefore, this claim will be

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[3] In the memorandum, Judge Tucker stated she intended to dismiss both claims with prejudice.

dismissed.

Although Mr. Luo only alleged violations of Section 1983 against the School District in Luo IV, Mr. Luo also sought remedies available under the IDEA, such as review of the decision at the due process hearing. Therefore, the court reads his complaint to include an IDEA claim against the School District. The IDEA imposes a variety of procedures to ensure a student receives a FAPE through a proper IEP creation process. When a school district fails to adhere to its obligation, a parent may bring an IDEA claim. See C.H. v. Cape Henlopen Sch. Dist., 606 F.3d 59, 65-66 (3d Cir. 2010). The School District filed a motion to dismiss as to this claim. Judge Tucker addressed some of these procedural deficiencies in her memorandum accompanying her March 18, 2022 order but did not address the merits of the IDEA claim in full. The court will outline the claim and resolve the pending motion to dismiss.

Mr. Luo's allegations under IDEA in Luo IV are composed of the following claims. First, Mr. Luo alleged that the due process hearing concerning the need for a bus aide for his son, B.L., should not have occurred at all because the School District had temporarily reinstated the bus aide for B.L. (claim 7). Although it was Mr. Luo's position that the School District no longer needed to adjudicate the necessity of a bus aide, the parties had not in fact resolved whether or not the School District was required to provide a bus aide. In the memorandum accompanying her March 18, 2022 order, Judge Tucker noted the IDEA "requires the hearing officer to hear claims brought by any party concerning[] the

provision of a FAPE under the IDEA." Luo, 2023 WL 837031, at *13. Therefore, as the necessity of the bus aide was still in dispute, the School District did not violate B.L.'s right to a FAPE by continuing to hold a hearing on this issue. Mr. Luo has no right under IDEA to determine whether or not an administrative due process hearing is convened. Claim 7 fails.

Claims 10 and 12 alleged that Mr. Luo was denied the ability to have B.L.'s evaluator present at the IEP meeting and that he was not asked to consent to whether the evaluator could subsequently appear by phone conference. While Judge Tucker did not explicitly address this point, the court will do so now. The IDEA does not require a specific manner of attendance by participants in an IEP meeting. In fact, IDEA encourages alternative means of participation. 20 U.S.C. § 1414(f). This subsection does not require written consent to alternative means of participation. Rather, it states that such alternative means may be considered as an option by the IEP team. Therefore, claims 10 and 12 failed to plead a cognizable claim for relief.

Claim 14 alleged that Mr. Ball inappropriately "demand[ed] [Mr. Luo] comply with hearing officer's decision before the expiration of the applicable appeal period[.]" Mr. Luo has not specifically described what would constitute compliance to this decision. He claimed that this request infringed on his right to appeal within ninety days. Judge Tucker rightly concluded Mr. Luo had not presented a cognizable claim because under the IDEA, as "no procedure exists that ties implementation of an IEP to the appeal timeline." Luo, 2022 WL 837031, at *14. Mr. Luo's ability to appeal the decision is

independent of the implementation of B.L.'s IEP, and Mr. Ball's actions in requesting Mr. Luo's compliance did not run afoul of Mr. Luo's right to appeal under IDEA. For these reasons, the court will dismiss the IDEA claim against the School District in Luo IV.

Finally, Mr. Luo alleged a Section 1983 claim against the Pennsylvania Department of Education in Luo IV. As Judge Tucker noted in her memorandum accompanying her March 18, 2022 order, the Department of Education is not a "person" subject to suit under Section 1983, as state agencies are not considered "persons" under the statute. Will v. Mich. Dep't of State Police, 491 U.S. 58, 64, 70-71 (1989). Additionally, the Eleventh Amendment precludes Mr. Luo's suit, as Congress has not specifically abrogated the Department of Education's immunity, and the Commonwealth has withheld its consent to suit in federal court. 42 Pa. Cons. Stat. § 8521(b). Therefore, the Section 1983 claim against the Department of Education will be dismissed.

Consequently, Luo IV will be dismissed in its entirety.

IV

In Luo V, Mr. Luo sued the School District and the Department of Education for violating his due process rights under Section 1983. Both defendants were properly served and appeared in this action.

While the School District was named in the complaint, none of the claims attributed the due process violations to actions by the School District. As a result, the court will dismiss all claims against the School District in Luo V.

As discussed above, the Department of Education is immune to suit under the Eleventh Amendment

for the Section 1983 claim against it.

As no claims remain in Luo V, this action will be dismissed.

V

In Luo VI, Mr. Luo sued the School District, Ms. Montanye, Sweet, Hearing Officer James Gerl, and the Department of Education. Judge Tucker dismissed all claims against Ms. Montanye, Sweet, Mr. Gerl, and Section 1983 claims against the School District and the Department of Education on March 18, 2022. The only claims remaining in this case are IDEA claims against the School District and the Department of Education. Our Court of Appeals highlighted these claims. It noted that although Mr. Luo did not explicitly state a claim under the IDEA for relief, his request that the court vacate a hearing officer's decision "apparently rais[ed] an IDEA claim under [Section] 1415." Luo, 2023 WL 5600965, at *3.

The IDEA claim in Luo VI challenged to the School District's procedural process as outlined in the Notice of Recommended Educational Placement ("NOREP"), which Mr. Luo alleged the Department of Education and the School District developed in tandem (claim 11). The NOREP stated that if a parent does not request a due process hearing, the NOREP will be implemented. Mr. Luo alleged that this process deprived him of his right to decline consent by requiring him to object to the decision through requesting administrative review.

The School District, liberally construing Mr. Luo's complaint, identified this as an IDEA claim and filed a motion to dismiss it on April 1, 2021. The motion remains pending as Judge Tucker did not rule on it. While it is true that parents are members of the IEP

team and are therefore entitled to participate in the process, they may not control it. See G.K. ex rel. C.B. v. Montgomery Cnty. Intermediate Unit, Civ. A. No. 13-4538, 2015 WL 4395153, at *15 (E.D. Pa. July 17, 2015) (citing K.C. ex rel. Her Parents v. Nazareth Area Sch. Dist., 806 F. Supp. 2d 806, 829 (E.D. Pa. 2011)). The School District may establish its own procedure for objections and has done so by requiring objections be formally lodged through a due process complaint. Therefore, the School District did not violate IDEA by requiring Mr. Luo to file due process complaints via its established process. This claim against the School District will be dismissed.

The Department of Education filed a motion to dismiss the Section 1983 claims against it in Luo VI, which Judge Tucker subsequently granted in her March 18, 2022 order. However, the Department of Education did not liberally construe the complaint to include an IDEA claim, and therefore, did not address in its motion to dismiss what appears to be an IDEA claim against it. In the interest of justice, the Department of Education will be given an opportunity to file a motion to dismiss against this claim within twenty days of this order. If it fails to do so, it shall file an answer within twenty days.

VI

In summary, the motions of Mr. Luo for entry of default in Luo I, Civ. A. No. 14-6354, Luo IV, Civ. A. No. 16- 6568, and Luo V, Civ. A. No. 17-1508, will be denied.

Pursuant to Judge O'Neill's order, dated November 28, 2016, all claims against the School District in Luo I, Civ. A. No. 14-6354, will be dismissed with prejudice.

Defendant Geoffrey Ball may file a renewed motion to dismiss in Luo I, Civ. A. No. 14-6354, to the Section 1983 claims against him within twenty days of this order. Otherwise, he shall file an answer within twenty days.

All claims in Luo IV, Civ. A. No. 16-6568, will be dismissed with prejudice.

All claims in Luo V, Civ. A. No. 17-1508, will be dismissed with prejudice.

The IDEA claim against defendant Owen J. Roberts School District in Luo VI, Civ. A. No. 21-1098, will be dismissed with prejudice.

Defendant Pennsylvania Department of Education may file a supplemental motion to dismiss in Luo VI, Civ. A. No. 21- 1098, to the IDEA claim against it within twenty days of this order. Otherwise, it shall file an answer within twenty days.

APPENDIX D

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

CIVIL ACTION
NO. 14-6354
NO. 16-6568
NO. 17-1508
NO. 21-1098

JENN-CHING LUO
v.
OWEN J. ROBERTS SCHOOL
DISTRICT et al.

Filed: December 7, 2023

MEMORANDUM

Bartle, J. December 7, 2023

Plaintiff Jenn-Ching Luo has sued defendants Owen J. Roberts School District ("School District"), the Pennsylvania Department of Education, and a variety of School District employees in multiple cases, alleging various constitutional and other claims arising out of the Individual Education Plan ("IEP") drafting process for B.L., his son, a special needs student at the School District. These cases have a long and complex history, originally before Judge Thomas N. O'Neill, Jr., then before Chief Judge Petrese Tucker, and now before the

undersigned. Before the court is the motion of Mr. Luo for reconsideration of court's order, dated October 30, 2023 (Doc. # 123). This order ruled on pending motions to dismiss in Luo IV, Civ. A. No. 16-6568, Luo V, Civ. A. No. 17-1508, and Luo VI, Civ. A. No. 21-1098, as identified by our Court of Appeals, and denied Mr. Luo's motion for entry of default pursuant to Federal Rule of Civil Procedure 55(a) in Luo I, Civ. A. No. 14-6354, Luo IV, and Luo V against all defendants.

A motion for reconsideration is only granted when the party seeking reconsideration has demonstrated: (1) an intervening change in the controlling law; (2) availability of new evidence unavailable when the court made its decision; or (3) a need to correct a clear error of law or fact to prevent manifest injustice. See Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999). There has been no change in the controlling law and no new evidence has been presented. The court inadvertently did not rule on the pending motions to dismiss for claims 1, 2, 3, 4, 5, 8, 11, 13, and 16 brought under 42 U.S.C. § 1983 in Luo IV.[1] Mr. Luo has not shown any clear error of law or fact, except to the extent, as he points out, that the court failed to rule on these Section 1983 claims against the School District and Geoffrey Ball, the Supervisor of Special Education at the School

[1] While the court ruled on the IDEA component of claims 7, 10, 12 and 14 in the court's memorandum in support of its October 30, 2023 order, the court did not rule on the Section 1983 aspect of these claims. Therefore, they will be addressed at the same time as the other Section 1983 claims that Mr. Luo identifies.

District.

In order to maintain a Section 1983 claim, "a plaintiff must show that the defendant deprived him of a right or privilege secured by the Constitution or laws of the United States while acting under color of state law." Williams v. Borough of West Chester, 891 F.2d 458, 464 (3d Cir. 1989). A Section 1983 claim may only survive a motion to dismiss under Rule 12(b)(6) if plaintiff first "identif[ies] the exact contours of the underlying right said to have been violated." Morrow v. Balaski, 719 F.3d 160, 165-66 (3d Cir. 2013) (citing Nicini v. Morra, 212 F.3d 798, 806 (3d Cir. 2000) (en banc)). A claim will be dismissed when a plaintiff has not identified a sufficiently specific constitutional right.

In claim 1, Mr. Luo alleges that the School District and Mr. Ball violated his substantive due process right by terminating B.L.'s bus aide. Mr. Luo does not identify a constitutionally protected right to his son being provided with a bus aide. Rather, whether this service is necessary is a October 30, 2023 order, the court did not rule on the Section 1983 aspect of these claims. Therefore, they will be addressed at the same time as the other Section 1983 claims that Mr. Luo identifies. question of B.L.'s right to a free appropriate public education ("FAPE"), the contours of which are defined and protected under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, et seq. ("IDEA"), rather than under the Constitution. See A.W. v. Jersey City Pub. Schs., 486 F.3d 791, 803 (3d Cir. 2007). Therefore, claim 1 fails.

Claim 2 states that Mr. Luo's procedural due process right was violated by the School District

because the hearing officer maintained a hearing on the necessity of a bus aide despite the fact the service had been temporarily restored. The procedural rights of a parent and their child in determining whether a child is provided with a FAPE are governed by the IDEA. Mr. Luo does not state an independent constitutional right regarding due process in this matter, and therefore, this claim will be dismissed.

In claims 3 and 4, Mr. Luo asserts that his liberty and property rights were violated by the School District and Mr. Ball's decision to terminate B.L.'s bus aide. Whether B.L. has a bus aide is ultimately an educational judgment and should be disputed using IDEA safeguards. A parent may not challenge an educational judgment regarding the provision of a free appropriate public education through Section 1983. See A.W., 486 F.3d at 803.

Claim 5 is a Section 1983 claim against the School District and Mr. Ball for their failure to notify Mr. Luo when B.L. was hit while on the bus on October 21, 2015. He alleges that this action violated Mr. Luo's right to "direct the upbringing and education of the child." The Constitution protects the right of a parent to raise their own children. Gruenke v. Seip, 225 F.3d 290, 303 (3d Cir. 2000). However, courts have concluded that failing to protect a student from student-on-student bullying[2] does not constitute a violation of the Due Process clause. In Lansberry v. Altoona Area School District, the court determined that even where a school,

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[2] Mr. Luo has not alleged that B.L. was hit by a state actor, which would change the analysis of this claim.

contrary to policy, failed to notify parents of persistent bullying, plaintiff did not have a cognizable claim through Section 1983. 356 F. Supp. 3d 486, 490, 500-01 (W.D. Pa. 2018). Therefore, this claim fails.

In claims 7 and 8, Mr. Luo alleges violations of Section 1983 based on the adjudication of the necessity of B.L.'s bus aide. First, Mr. Luo filed a due process complaint because B.L.'s bus aide had been terminated. After filing, but before the hearing, the School District temporarily reinstated the bus aide. From Mr. Luo's perspective, this made the issue of providing a bus aide moot. In claim 7, he alleges that the

School District violated his right to due process because he was not provided with adequate notice that the need for a bus aide would still be adjudicated at a due process hearing. In claim 8, he alleges that continuing to have this hearing denied him an adequate opportunity to respond to the School District's argument regarding the lack of necessity of the bus aide. Neither claim adequately alleges the violation of a constitutional right. Therefore, these two claims fail under Section 1983. To the extent this is cognizable under IDEA, the claim fails for the reasons discussed in the court's memorandum in support of its October 30, 2023 order.

In claims 10 and 11, Mr. Luo alleges that his liberty right was violated by the School District and Mr. Ball because an evaluator appeared by phone during one of B.L.'s IEP meetings, and because he was never given the opportunity to determine whether the evaluator could appear by phone. This

allegation does not state a constitutional claim. Thus, this claim does not succeed under Section 1983.

Mr. Luo avers in claim 12 that the School District and Mr. Ball falsely claimed that Mr. Luo had agreed to change the date of the IEP meeting, which violated his liberty right. Again, he has not stated a constitutional claim regarding the timing of an IEP meeting. Moreover, the claim does not succeed as an IDEA claim for the reasons previously discussed in the memorandum in support of the court's October 30, 2023 order.

In claim 13, Mr. Luo alleges that the School District and Mr. Ball violated his liberty right because Mr. Luo was denied the ability to edit B.L.'s IEP when his submissions were added to the "Parents' Comments" section, rather than adopted in the substance of the IEP. Mr. Luo has not identified a constitutional right to edit the IEP. Therefore, this claim fails. The IDEA does not require that parent input be integrated into the IEP as Mr. Luo suggests.

Claim 14 alleges that Mr. Luo's due process right was violated by the School District and Mr. Ball because the IEP was implemented prior to the expiration of his ninety-day period within which he could appeal the hearing officer's decision. Mr. Luo does not identify a constitutional right to deny compliance with an administrative decision prior to the time an appeal has lapsed. The IDEA governs his rights in this context. As discussed in the court's October 30, 2023 order, Mr. Luo does not state a successful IDEA claim, as no procedure ties the implementation of an IEP to the appeals timeline.

Therefore, this claim fails.

Claim 16 avers that the School District and Mr. Ball violated Mr. Luo's liberty right in revising B.L.'s IEP over his objection. Mr. Luo does not state a constitutional right to the control the substance of his son's IEP. Therefore, this claim is not cognizable.

The remaining issues that Mr. Luo raises in his motion are without merit, and do not meet the standard for reconsideration. For these reasons, the motion for reconsideration will be denied.