This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code § 16.63 regarding closed hearings.

IN THE PENNSYLVANIA OFFICE FOR DISPUTE RESOLUTION

FINAL DECISION AND ORDER[1]

Child's Name: M.S.
Date of Birth: [redacted]

Dates of Hearing:
March 31, 2011
June 1, 2011

CLOSED HEARING

ODR File Number 01931-1011 KE

Parties to the Hearing:	Representative:
Parents	Dean M. Beer, Esquire McAndrews Law Offices, P.C. 30 Cassatt Avenue Berwyn, PA 19312
Haverford Township School District 1801 Darby Road Havertown PA 19038	Frances Ratner, Esquire Law Offices of Beatty Lincke 200 Old Forge Road Suite 202 Kennett Square, PA 19348

Record Closed: June 22, 2011
Date of Decision: July 6, 2011

Hearing Officer: Brian Jason Ford, Esquire

[1] This Decision and Order is the second of two in a bifurcated due process hearing. This Decision is intended to be a final decision for purposes of 20 U.S.C. § 1415(i). The prior decision concerning the application of the IDEA's statute of limitations, was issued on March 19, 2011 under the same ODR file number.

Introduction and Procedural History

The Student is [redacted] and diagnosed with attention deficit hyperactivity disorder (ADHD). The Parents allege that the District failed to provide the Student a free appropriate public education (FAPE) from the start of the 2004-2005 school year through the present and that the Student's current individualized education plan (IEP) is inappropriate. The District denies these allegations and, in a counter-claim, avers that the Student no longer qualifies for special education. The District claims that the Student should receive accommodations pursuant to a Section 504 service agreement (504 Plan) instead of an IEP.

Both parties' claims arise under the Individuals With Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (IDEA); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504); and Title 22, Chapters 14 and 15 of the Pennsylvania Code, 22 Pa Code §§ 14, 15 (Chapter 14 and Chapter 15 respectively). Neither party raises claims [redacted].

At the outset of this hearing, the District filed a motion for partial dismissal. Therein, the District argued that claims arising more than two years before the date of the Parents' Complaint are time-barred by the IDEA's two-year statute of limitations. I bifurcated this hearing to address the statute of limitations first, and a hearing session was convened for that purpose. I ultimately resolved that dispute in favor of the District, issuing an order that the Parents may only pursue those claims arising on or after July 5, 2009 (two years before the date of their Complaint).[2] My decision and order regarding the statute of limitations is attached hereto as Appendix A.

Issues

The issues presented in this hearing are:

1. Did the District provide FAPE to the Student from January 5, 2009 through the present and, if not, is the Student entitled to compensatory education?
2. Is the Student's current program and placement is appropriate?[3]
3. Is the Student currently entitled to special education under the IDEA, or should the Student receive a Section 504 Plan instead?

Findings of Fact

Background

1. The Student presents with a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) and [redacted].[4]

[2] The Parents have preserved their right to appeal my decision regarding the statute of limitations. They have been explicit that their focus on the claims that I have permitted to go forward is not intended to be a waiver of the claims found to be time-barred.
[3] The District characterizes the first two issues as a single issue.
[4] [Footnote redacted.]

2. The Student has been identified by the District as both a child with a disability in need of special education [redacted] since the 2004-2005 school year. S-1, S-2, NT 797-798.

3. A District administrator who was knowledgeable about "[redacted]" children testified that, as a general matter, students who are [redacted] and have ADHD tend to exhibit a "unique learning style". *See* N.T. at 1031.

4. During the period of time in question and prior, none of the Student's IEPs call for the Student's teachers to be trained in the education of [redacted] children.

5. As discussed herein, the Student has difficulty with organization, homework completion and written expression. These areas of need are symptomatic of the Student's ADHD. Homework completion is, historically, a significant issue for the Student that has lowered the Student's grades. The Student's tendency to rush through work – especially tests and quizzes – also has had an adverse impact.

6. During the period of time in question, the Student's IEPs called for the Student to revise careless and low quality work. The wording of this accommodation changed over time. During testimony, there were vociferous arguments about the implementation of this accommodation and the Student's willingness to revisit completed work. The Parents claim that the District should have forced the Student to redo low quality work. The District claims that the Student often refused to do so, even understanding that the refusal would result in a low grade.

2007-2008 School Year (6th Grade)

7. As explained above, the 2007-2008 school year falls outside the statute of limitations in this case. However, an IEP drafted on February 13, 2008 (2008 IEP) was implemented through February of 2009, crossing into the period of time in question. NT 223, 815-16.

8. The 2008 IEP was based on a Reevaluation Report of February 1, 2008 (2008 RR). S-3; NT 809. The 2008 RR included no new testing, but instead relied upon a review of the Student's records.[5] *Id*. Based on the records review, the 2008 RR concluded that the Student continued to qualify for [redacted] and special education under the disability category Other Health Impairment (OHI) as a result of ADHD. *See id*. The 2008 RR also recommends the addition of "Behavioral goals… to [the Student's] IEP to assist [the Student] in learning behaviors that are negatively impacting [the Student's] performance." S-3, p. 2-3.

9. The 2008 IEP does not include a behavioral goal, but calls upon the Student to "present themed projects to enhance comprehension and verbal expression" and "improve problem solving skills." S-3, p. 5. The 2008 IEP is not clear as to what the

[5] The District contends that a review of records may satisfy IDEA tri-annual reevaluation criteria. NT 937-38. This argument stands on shaky ground, given federal and state regulations concerning reevaluations. *See* 20 U.S.C. § 1414(a)(2), (b); 34 C.F.R. § 300.303; 22 Pa Code § 14.124.

Student's baseline performance on those goals were at the time of drafting, nor is it clear how progress towards those goals could be objectively measured.

2008-2009 School Year (7th Grade)

10. The Student started 7th grade with the 2008 IEP, which was revised in February of 2009 (2009 IEP). S-8.

11. During 7th grade, the Student's teachers reported that the Student failed to complete homework projects, needed to make up incomplete homework and was upset by poor performance on some tests and quizzes. *See* S-10, S-11, NT 361, 412.

12. The 2009 IEP had a goal of completing 80% of homework. The Student finished the 2008-2009 school year with an overall homework completion rate of 72%. S-7, p. 9; NT 366. Not all missed assignments were equally weighted as a percentage of the final grade in any particular class, and homework completion rates were not the same in all classes. *See* P-6, P-7; NT 229, 283, 364, 366.

13. Teachers characterized the Student's poor homework performance and the resulting negative impact on the Student's grades as a failure to reach the Student's potential. *See* S-10, S-11, NT 361, 412. In particular, the Student's guidance teacher thought the Student was capable of earning As or A+s in all subjects and that lower grades indicated a failure to reach potential. *See* NT 412.

14. In core subjects, the Student's final grades in 7th grade were: C+ in Math; B in Social Studies; B+ in Science; and C in Language Arts. S-11

2009-2010 School Year (8th Grade)

15. On December 21, 2009, the District completed a Reevaluation Report (2009 RR). S-17. The 2009 RR was prompted by a parental request for additional testing. NT 827-28; S-12 at 1-2. More specifically, the Parents made their request on October 19, 2009; the District issued a permission to evaluate form on October 27, 2009 and then issued a second PTE form on November 2, 2009. The second form was issued to include a neuropsychological evaluation. The Parents signed the second form on November 3, 2009. S-14.

16. The 2009 RR concluded that the Student no longer required special education despite the ADHD diagnosis. Relying upon the 2009 RR, among other things, the District proposed exiting the Student from special education and providing a Section 504 plan. The Parents objected to this proposed action. S-17, p.23; N.T. 85-86, 139-40, 255.

17. The 2009 RR noted that the Student was sometimes tired, remarked that the Student historically has handwriting difficulties and noted a discrepancy between the Student's written expression skills and cognitive abilities. *See* S-17. At the same time, standardized, normative achievement testing in the 2009 RR showed that Student's performance was at or above grade level in reading, math and written expression. *Id*, NT 866. Remarkably, despite a diagnosis of ADHD, the Student's

ability to sustain attention - as measured by standard assessments - was in the average range. *Id*.

18. Testing for the 2009 RR was conducted and interpreted by a Certified School Psychologist employed by the District (District's CSP). The District's CSP testified that the 2009 RR indicates that the Student's only weakness is with organization skills – and that weakness can be addressed through regular education interventions under a Section 504 plan. NT 851, 866.

19. The District's CSP reviewed the 2009 RR with the Parents on December 21, 2009, the same day that the report was generated. NT 870-871. At that meeting, the District's CSP explained her position (ultimately the District's position) that the Student should be exited from special education and accommodated under a Section 504 plan. The Parent neither expressed agreement nor disagreement during the meeting. NT 871-872. The District then issued a Notice of Recommended Educational Placement (NOREP) on January 6, 2010 proposing to exit the Student from special education. S-19. The Parents ultimately rejected that NOREP. *Id*.

20. On January 28, 2010, the District's CSP met with the Student's mother to review a draft Section 504 plan. The Student's mother, upon realizing that the meeting was for the purpose of finalizing a Section 504 plan (not an IEP) refused to participate. S-22, NT 913-15, 974-975

21. Also in January 2010, the Parent requested an independent educational evaluation (IEE) at public expense. The District granted the request and an IEE was conducted in March of 2010 and completed on April 1, 2010 (2010 IEE). NT 949, 958; S-20 pp. 35, 48.

22. In light of both the rejected NOREP and the pending IEE, the District determined that it would take no action to exit the Student from special education at least until it had the results of the IEE. S-23; NT 522, 975-980.

23. Like the 2009 RR, the 2010 IEE notes difficulties with written expression and hypothesizes that the Student's poor writing skills will have a negative impact on [the Student's] educational performance. S-26.

24. More specifically, the 2010 IEE reports that the Student's hand-written work is "hard to decipher… poorly organized… nearly illegible and contains several grammatical and capitalization errors." S-26, p. 11.

25. The 2010 IEE also focuses on the Student's apparent inability to complete homework assignments and proposes interventions to address the Student's organizational and study skills, as well as written expression. *See* S-26.

26. The District received and reviewed the IEE in late April, 2010. In the District's opinion, all of the recommendations contained in the IEE can be implemented through regular education interventions. Despite this conclusion, and perhaps in an effort to avoid litigation, the District agreed that it would not exit the Student from

special education. That decision was communicated to the Student's mother via email on June 7, 2010. *See* S-26a, S-27; NT 991-995.

27. The Student's final grades for core subjects in 8th grade were: B in Math; B+ in Social Studies; B in Science; and B- in Language Arts. S-28. On the one hand, these grades may be inflated as a result of IEP accommodations calling for the Student to redo careless work. On the other hand, according to District personnel, the Student's academic performance was "well below what would be expected of a child of [the Student's] intellectual capacity. [The Student] has experienced difficulties with homework completion, carelessness, organization and distractibility." S-29, p. 9.

2010-2011 School Year (9th Grade)

28. An IEP meeting was held without the Parents on August 23, 2010. The Parents did not attend because the Student's mother had written down the wrong date for the meeting. N.T. 616-19.

29. The Student's IEP Team reconvened and the Student's IEP was revised on September 28, 2010. N.T. 625; S-31. The revisions were not to the Parents' satisfaction and a NOREP was not approved. S-43.

30. The Student's IEP team reconvened again and the IEP was again revised on October 18, 2010. N.T. 642-43; SD-35. The subsequent NOREP was not approved. S-43.

31. The fourth and final set of revisions to the Student's IEP during the 2010-2011 school year came on November 23, 2010. SD-40; N.T. 279, 664, 698. Again, a NOREP was not approved. S-43.

32. The Student attended the fourth IEP meeting. Unbeknownst to the Student's mother, the District invited the Student to the meeting.[6] The Student's mother perceived this as an effort to align the Student with the District and against her. The mother also believed that she and the District should be united in their presentation of any IEP to the Student, who might otherwise be reluctant to accept accommodations. The Mother requested that the District *not* invite the Student to subsequent IEP meetings. S-43 pp. 10-14; NT 1005-1006.

33. The Mother requested a fifth IEP meeting in November of 2010 and by December of 2010 the District proposed an ODR-facilitated IEP meeting. S-43 p. 13. A facilitated IEP meeting did not convene.

34. The Parents requested a due process hearing on January 11, 2011.

[6] Generally, the Student's mother is the parent who attends IEP meetings.

Discussion and Conclusions of Law

The Burden of Proof

Said as simply as possible, each party must prove entitlement to the relief they seek by preponderant evidence. *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 392 (3d Cir. 2006); *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005). Evidence resting in equipoise does not satisfy this burden. *Id*. As applied to this case, the Parents must prove that the Student was denied FAPE from January 5, 2009 through the present and that the Student's current placement is inappropriate. The District must prove that the Student should be exited from special education and receive services under a Section 504 plan.

Procedural and Substantive Violations

"In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies… impede the child's right to a free appropriate public education; significantly impede the parents' opportunity to participate in the decisionmaking process…; or … caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii). In other words, violations of the IDEA that do not result in substantive harm neither constitute a denial of FAPE nor warrant an award of compensatory education.

In the Third Circuit, IDEA-qualifying students receive FAPE through the implementation of IEPs that are reasonably calculated to confer a meaningful (more than trivial or *de minimis*) educational benefit. *See Shore Regional High School Bd. of Educ. v. P.S.*, 381 F.3d 194 (3d Cir. 2004); Ridgewood *Bd. of Educ. v. N.E.*, 172 F.3d 238 (3d Cir. 1999); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988). What is meaningful for one student might not be meaningful for another, and so the appropriateness of any IEP is a fact-specific inquiry. The term "meaningful" is student-specific but the term "educational" is broad. As the Parents accurately report in their closing brief:

> "It is abundantly well settled that "education" extends beyond discrete academic skill, and includes the social, emotional, and physical progress necessary to move the child toward meaningful independence and self-sufficiency consistent with the child's cognitive potential. *M.C. v. Central Regional Sch. Dist*., 81 F.3d 389, 393-394 (3d Cir. 1996); *Polk*, 853 F.2d at 181-182; *Kruelle v. New Castle County Sch. Dist*., 642 F.2d 687, 693 (3d Cir. 1981); *Armstrong v.Kline,* 629 F.2d 269 (3d Cir. 1980); *Bucks County Public Sch. v. Dept. of Educ.*, 529 A.2d 1201(Pa. Cmwlth. 1987); *Big Beaver Falls Area Sch. Dist. v. Jackson*, 615 A.2d 910 (Pa. Cmwlth. 1992). Thus, for an IEP to be appropriate, it must offer a child the opportunity to make progress which is "meaningful" in all relevant domains under the IDEA, including behavioral, social, and emotional. *M.C.,* 81 F.3d at 394; *Ridgewood*, 172 F.3d at 247."

Students are denied FAPE either when their IEPs fail to meet the above standard or when their IEPs meet the above standard but are not implemented in significant part.

When violations are substantive (either because they are substantive in nature or because they are procedural violations that yield substantive harm) compensatory education is a well-established remedy. *See e.g. P.P. v. West Chester Area School Dist*., 585 F.3d 727 (3d Cir. 2009); *M.C. v. Central Regional School Dist.,* 81 F.3d 389 (3d Cir. 1996).

The Parents demand compensatory education to remedy an alleged denial of FAPE. Under the foregoing standard, the Parents must prove that the Student did not receive FAPE during the period of time in question; *i.e.* that the Student was substantively harmed.

The Student Was Not Denied FAPE

After carefully reviewing all of the evidence and testimony, I find very little to support the Parents' contention that the Student was denied FAPE. What little evidence there is does not rise to a preponderance standard. The Parents have not substantiated their claim that the Student was denied a meaningful educational benefit over the period of time in question, and so compensatory education will not be awarded.

There is evidence to support the Parents' allegation that the Student did not work to [the Student's] potential. This fact alone cannot prove an alleged denial of FAPE. No court or hearing officer in this jurisdiction has ever held that school districts must bring students to their potential (or otherwise maximize the benefit of their education) to comply with the IDEA's obligations. Assuming, *arguendo*, that the Student is capable of earning "As" in all classes does not compel the District to bring the Student to that level of performance – and lower marks do not prove that the Student derived no meaningful benefit from [the Student's] education.

Importantly, the Student's laudable grades are not proof of FAPE either. *See West Chester Area School District v. Chad C.,* 194 F. Supp. 2d 417 (E.D. Pa.2002). Rather, the fact that the Student did not earn the superior grades that [the Student's] teachers thought [the Student] capable of does not prove that FAPE was denied. The standard is whether the Student derived a meaningful benefit from [the Student's] education, not whether the Student earned "As".

The Parents point to a number of instances in which the Student's teachers referred to the Student as "typical," and contend that the District failed to recognize the unique learning style of a [redacted] student with ADHD. This argument begs the question: how was the student harmed by the teachers' misconceptions? What should the teachers have been doing that they were not doing? With the exception of forcing the Student to resubmit poorly completed work or incomplete assignments (discussed below), the record is silent on this point.

There is also some evidence to suggest that the Student's IEPs were not implemented with fidelity in regard to the resubmission of low-quality work and missed assignments. There is, however, no preponderant evidence suggesting that the District substantially or consistently failed to implement this part of the Student's IEPs to the extent that FAPE was denied. As the Parents note in their closing brief, IEP implementation failures

must yield a denial substantive denial of FAPE for compensatory education to accrue. *See Melissa S. v. School Dist. of Pittsburgh,* 183 Fed. Appx. 184 (3d Cir.2006).

The Parents point to a few instances in which the Student refused to redo work and the teachers acquiesced to the Student's refusal. This scattering of isolated incidents, often in relation to assignments that constituted a very small part of the Student's overall grade in any given class, do not constitute an IEP implementation failure that gives rise to a denial of FAPE.[7]

Finally, the Parents suggest that the District has ignored other possible causes of the Student's symptoms, most notably possible depression. If the District had reason to believe that the Student was or is depressed, the District would be obligated to investigate that issue. In fact, the District's CSP was concerned about possible depression, which prompted the completion a behavior ratings scale which, in turn, satisfied the CSP that depression was a non-issue. NT 892-893.

In sum, the Parents contend that the District failed to recognize the Student's unique learning style and failed to implement components of the Student's IEPs and, consequently, the Student did not perform to [the Student's] potential. Preponderant evidence demonstrates that the Student's imperfect IEPs were imperfectly implemented, and that the Student did not reach [the Student's] potential in the period of time in question. There is no preponderant evidence suggesting that the Student was substantively harmed by the District's procedural failures or did not meaningfully benefit from [the Student's] education. Achievement of potential is not the standard by which FAPE is measured.

The Student Requires an IEP

Students are entitled to the substantive rights and procedural protections of the IDEA if 1) they are students with qualifying disabilities and 2) by reason thereof need special education and related services. *See* 34 C.F.R. § 300.8. In this case, the District questions whether the Student continues to have ADHD. The record, however, is devoid of any evidence that the Student does not have ADHD. Rather, the District points to the 2009 RR, the 2010 IEE and the testimony of teachers who see the Student in class to argue that the student is asymptomatic.

The Student is not asymptomatic. The District recognizes that the Student has deficits in organizational skills that manifest as rushed work and homework difficulties. These are symptoms of the Student's ADHD. Historically, the District has concluded (or conceded)

[7] This hearing officer has serious misgivings about the accommodation itself. Taking the evidence and testimony as a whole, it is clear that the accommodation was added at the Mother's insistence. It is not clear that the accommodation targets any of the Student's needs. It seems that the true function of the accommodation is to secure a minimum grade on all work. It is understandable that the Parents do not want the Student's transcript to suffer as a result of [the Student's] ADHD. But grades are not goals in and of themselves, and allowing the Student to re-take tests and quizzes and resubmit assignments for the purpose of getting a better grade is unlikely to curb the carelessness and disorganization that the Parents contend have not been properly addressed.

that specially designed instruction was required to remediate those issues – even after the 2009 RR.

This hearing officer is not convinced that the Student's organizational skills can be addressed solely through regular education interventions. Rather, the interventions must be individualized, targeted to the Student's actual needs (as opposed to a desired grade), and carefully monitored to assure progress is being made. An IEP is the best way to achieve this result.[8]

Further, there are open questions about the Student's possible depression and possible need for occupational therapy to address handwriting issues. The Student should not be exited from special education until those areas are sufficiently explored, as students who are thought to have a disability have certain rights under the IDEA and Chapter 14. *See, e.g.* 22 Pa. Code § 14.162 (conferring procedural protections to students who are thought to have a disability).

The Student's IEP Must Be Appropriate

The Parents contend that the Student's IEP is inappropriate because it flows from an inappropriate evaluation. They claim that the evaluation failed to examine the Student's possible depression and the Student's handwriting needs. The 2009 RR is not inappropriate on its face, however, and the 2010 IEE does examine the Student's handwriting. There is some contradictory testimony concerning the Student's handwriting. Those contradictions are resolved easily through the collection of baseline data and the input of an occupational therapist. Further, in an abundance of caution and in exercise of this hearing officer's equitable authority, the District shall be ordered to evaluate the Student's possible depression. This, and all of the foregoing, yields certain necessary components of the Student's IEP, which are expressed in the order below

ORDER

And now, this 6th day of July, 2011 it is hereby ORDERED that:

1. The Parent's claims for compensatory education are DISMISSED; and

2. The District's claim that the Student should be exited from special education is DISMISSED; and

3. The District shall seek the Parents' consent to evaluate the Student's possible depression and, if consent is given, the Student's IEP team shall consider the evaluation report and shall revise the Student's IEP as appropriate; and

4. An occupational therapist must evaluate the Student's hand-written work product generated in school, if any, to determine the need for occupational therapy to address the Student's handwriting skills; and

[8] The Parents failed to prove that the Student was denied FAPE and the District failed to prove that the Student no longer requires an IEP. These holdings are not mutually exclusive, and the parties do not contend that they are.

5. The occupational therapist shall report to the Student's IEP team regarding the analysis of the Student's hand-written work product. The Student's IEP team shall consider this input and shall revise the Student's IEP as appropriate; and

6. In the event that there is insufficient work product to determine the Student's need for occupational therapy, or upon the recommendation of the occupational therapist, the District shall propose an occupational therapy evaluation and, if consent is given, the Student's IEP team shall consider the evaluation report and shall revise the Student's IEP as appropriate; and

7. The Student's IEP shall include a measurable, objective goal to increase the Student's rate of homework completion. The goal must include a current baseline. If insufficient data exists to generate a baseline, the District must begin data collection immediately at the start of the 2011-2012 school year. The IEP must provide specially designed instruction that will enable the Student to make progress towards this goal. Progress towards this goal shall not be measured by the Student's attainment of any particular grade.

8. The Student's IEP shall include a measurable, objective goal to decrease the Student's tendency to rush through class work and tests. The goal must include a current baseline. If insufficient data exists to generate a baseline, the District must begin data collection immediately at the start of the 2011-2012 school year. The IEP must provide specially designed instruction that will enable the Student to make progress towards this goal. Progress towards this goal shall not be measured by the Student's attainment of any particular grade.

It is FURTHER ORDERED that any claims not specifically addressed by this decision and order are denied and dismissed.

/s/ Brian Jason Ford
HEARING OFFICER

APPENDIX A
Decision and Order Regarding the Statute of Limitations
Original Caption Omitted - Issued March 19, 2011

Introduction and Procedural History

On January 5, 2011, the Parents and the Student file a Due Process Hearing Complaint (Complaint) against the District raising claims pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq*. (IDEA) and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (Section 504).[9] The Parents seek, *inter alia,* compensatory education beginning in the 2004-2005 school year through the present.

On January 16, 2011, the District filed a Motion to Dismiss, seeking dismissal of claims arising prior to January 5, 2009. The District argued that the IDEA's statute of limitations (SOL) applies to all of the Parents' claims. Moreover, the District argued that the SOL bars claims arising more than two years before the Parents filed their Complaint, unless an exception applies. The District averred that exceptions do not apply in this matter.

On February 16, 2011, through correspondence, the Hearing Officer informed the parties that the District's argument was based, in part, on facts that could not be assumed before the due process hearing convened. On February 18, 2011, this due process hearing was bifurcated so that the parties could present evidence and testimony about how the IDEA's statute of limitations functions in this case, and whether any exceptions thereto apply in this case. On February 22, 2011, a hearing session convened for that limited purpose. The parties submitted briefs concerning the scope of this due process hearing on [March] 11, 2011.

Findings of Fact

1. The Parents first came to understand that the Student was having difficulty in school at the end of the of the 2003-2004 school year (2nd grade). N.T. at 28-31. Around that time, the Parents received a Psychological Evaluation dated April 6, 2004; [redacted]; and an Observation Report dated May 4, 2004. S-1. The Parents actually received these documents and agreed with their contents. N.T. at 30-32. At the time, the Student was identified as being in need of [redacted] instruction. N.T. at 29, S-1.
2. Although the Student's mother (Mother) described the meeting at the end of the 2003-2004 school year as an IEP Team Meeting, it appears that the documents at S-1 were drafted in connection to a [redacted] evaluation. Nevertheless, the documentation at S-1 describes the Student's needs in the areas of "Attention to Detail, Attention/On-task Behavior, Frustration Tolerance, Motivation, Organization and Self Control." S-1 at 3.

[9] Except for the caption, this Decision and Order contains no identifying information about the Student and Parents.

3. The Mother testified that during the meeting at the end of the 2003-2004 school year, the Parents "were made aware of everything." N.T. at 28
4. On March 14, 2005, the District issued a Permission to Evaluate form. S-49 pages 4 and 5. That form was signed by the Mother on March 15, 2005 and returned to the District on Mach 18, 2005. The form contains the following language: "Please read the enclosed **Procedural Safeguards Notice** which includes parent resources such as state or local advocacy organizations." *Id.* at 4, bold original. Later, the form allows the Parents to select an informal meeting, a prehearing conference, mediation or a due process hearing if they object to the proposed evaluation. *Id* at 5. Regarding the latter three options, the form includes the following language: "The enclosed **Procedural Safeguards Notice** provides information on the options..." *Id.*, bold original.
5. The District completed a special education Evaluation Report (ER) dated May 31, 2005. S-2. The ER contains a Parent Information Form completed by the Mother on March 16, 2005; a Qualitative Reading Inventory Summary Sheet dated December 9, 2004; a Speech and Language Progress Report dated May 31, 2005; testing data from standardized assessments administered in April of 2005 (including a Bender Gestalt II Test, a Wechsler Individual Achievement Test, second edition (WIAT-II), and a Test of Auditory Perceptual Skills); undated behavior ratings scales; and Attention Deficit Hyperactivity Disorder (ADHD) assessment. S-2.
6. A Psychiatric Evaluation was also completed on May 27, 2005. S-2 at 21-24. The psychiatrist who completed the Psychiatric Evaluation diagnosed the Student with ADHD, Inattentive Type.
7. The ER concludes that the Student is eligible for special education and related services under the disability category Other Health Impairment (OHI) due to the Student's diagnosis of ADHD and the Student's need for specially designed instruction. S-2.
8. The Mother did not recall receiving the ER in advance of an "IEP Team Meeting." N.T. at 33. However, the Mother did recall that the ER was discussed at an "IEP Team Meeting" which, based on evidence and testimony, was more likely a MDT Meeting to discuss the ER. *See e.g.* N.T. at 92-93. Regardless, the Mother testified that she did receive a copy of the ER; that she agreed with much of the ER's substantive contents; and that the ER was discussed at the meeting. N.T. at 33-36.
9. All team members, except for the Mother, indicated their agreement with the ER on a form included at S-2, page 20. Said form gives participants lines to check for "Yes," indicating agreement with the ER, or "No," indicating disagreement. The Mother wrote question marks on both the "Yes" and "No" lines. This writing does not clearly indicate agreement or disagreement. Despite this, and despite her general agreement with the substantive contents of the ER, the Mother testified that she did not agree with the ADHD diagnosis due to her understanding about how children with ADHD present, concerns about medicating the Student and concerns about labeling the Student. N.T. at 37-39.
10. Evidence establishes that the Mother expressed her doubts about the ADHD diagnosis to the District. The unusual way that the Mother completed the form at S-2, page 20 would have alerted the District that the Mother was, minimally, confused.

However, neither evidence nor testimony clearly establishes that the Mother affirmatively disagreed with the ER when it was offered or at any time thereafter.

11. The Mother testified that she discussed her options if she disagreed with the ER. N.T. at 38. The Mother recalls being told by the District's School Psychologist that if she disagreed with the District's evaluation, she could have the Student evaluated privately. N.T. at 38. The Mother testified that she made explicit inquiry as to whether public funding was available for a "private educational evaluator" and that she was "specifically told no..." N.T. at 38. *See also* N.T. at 70-71.
12. The Mother's testimony about statements made concerning her right to an IEE at public expense was directly contradicted by testimony from the District's School Psychologist, who did not recall ever telling the Mother that there was no right to an IEE at public expense. *See* N.T. at 94.
13. The School Psychologist testified that the Mother was offered a copy of the Procedural Safeguards in a 2005 MDT Meeting convened to review the ER, but that the Mother declined the offer. The School Psychologist's memory about this is quite explicit: "Well, she was offered the Procedural Safeguards. And she said no thank you. She said she had enough to paper her bathroom wall." N.T. at 94. However, the School Psychologist could not recall if a hard copy of the Procedural Safeguards were actually presented to the Mother at the meeting. The School Psychologist is not the person responsible for distributing the Procedural Safeguards, and she testified that the District's usual practice is to issue Procedural Safeguards when permission to evaluate forms are sent to parents. N.T. at 103-107.
14. The District's Director of Pupil Services and Special Education testified that it is the District's policy and practice to provide a physical copy of the Procedural Safeguards to the Parents at every IEP Team Meeting, but that parents typically decline. N.T. at 114-115. The Director did not personally attend any of the IEP Team Meetings in question.
15. The School Psychologist also contradicted the Mother's testimony about her concerns over the ADHD diagnosis. The School Psychologist testified that the Mother did not dispute the diagnosis. In fact, according to the School Psychologist, the Mother "wanted her child labeled because she was concerned because [the Student] was not achieving as to how she felt [the Student] should be. And she wanted [the Student] to have an IEP."
16. Despite the Mother's ambiguous notation on the form at S-2, page 20, an IEP Team Meeting convened on June 13, 2005 to draft an IEP for the upcoming 2005-2006 (4th grade) school year. S-46. The Mother testified that she expressed a number of concerns at the IEP Team Meeting about the Student's relationship with peers in school and the Student's ability to complete homework assignments, N.T. at 40-42. The Mother recalls being informed that those concerns would be addressed through the IEP. *Id.* Those concerns are actually reflected in the IEP itself at S-46, pages 25 and 26. Regarding homework in particular, the Mother testified that the language in the IEP at S-46 page 26 is a reflection of the IEP Team's discussion. N.T. at 41.
17. The IEP of June 2005 contains a signature page that includes the following sentence: "I have received a copy and understand the contents of the Procedural Safeguards Notice." That statement was signed by the Student's father on June 13, 2005.

18. A day after the IEP Team Meeting, June 14, 2005, the District issued a Procedural Safeguards Letter. S-46 at 32. A handwritten note to the Mother at the top of that letter says, "You are receiving this to acknowledge that [the Student] will continue speech with [the Student's] new IEP." The letter includes a Procedural Safeguards Notice. Unambiguously, the Notice says, "The parents may request an independent educational evaluation at the school district's/public agency expense if they disagree with an educational evaluation completed by the school district." S-46 at 35.[10]
19. On June 27, 2005, the District issued a Notice of Recommended Educational Placement (NOREP) through which the Parents could approve the implementation of the IEP. S-46 at 47. More specifically, the NOREP explains that the IEP Team concluded that the Student is in need of special education and recommends itinerant learning support and Speech/Language support, starting in September of 2005. *Id*. The NOREP is two pages long, and the form by which the Parents may consent to services is on the second page. Immediately above that form, the NOREP contains the following language: "You have certain rights and protections under law that [are] described in a document titled ***Procedural Safeguards Notice***. If you need more information or want a copy of the ***Procedural Safeguards Notice***, you may contact: [name and contact information for Supervisor of Special Education redacted]." *Id* at 48, bold and italics original. Immediately below that language, the Mother checked a box approving the NOREP, signed the form and dated it February 2, 2006 (about seven months after the form was issued). *Id.*
20. The Mother recalls receiving report cards during the 2005-2006 school year, and also recalls having telephone conversations with District personnel about the Student's progress. The Mother does not recall receiving IEP progress reports. N.T. at 42. Specifically, the Mother recalls that she "spoke frequently with the school and was basically assured that [the Student] was working on all of this and that the school was monitoring [the Student] and working with [the Student] and giving [the Student] the attention that [the Student] needed."[11] N.T. at 43.
21. At the end of the 2005-2006 school year, the IEP Team reconvened on June 14, 2006. S-47. The purpose of the meeting was to draft an IEP for the 2006-2007 (fifth grade) year. The Mother testified that she attended this meeting and that the IEP Team discussed the Student's organization, focus and homework issues and reached a consensus that the Student was still having problems in these areas. The Mother expressed her concerns at the meeting, and was assured that those deficits would be addressed through program modifications and specially designed instruction in the IEP. N.T. at 43-44. The IEP Team reviewed the Student's goals and the Parents did not request additional services for organizational or homework

[10] It should be noted that the Procedural Safeguard Letter and accompanying Notice starting at S-46 page 32 was admitted over the Parents' objection. The individual who purportedly authored the note at the top of S-46 page 32 is a current employee of the District. N.T. at 118. That individual did not testify. However, the document is probative to the extent that it includes the standardized language that was used in Procedural Safeguards Notices during the period of time in question. Any Procedural Safeguards Notice received by the Parent during the period of time in question would have contained this language or substantively identical language promulgated after amendments to the IDEA in 2004 and amendments to the implementing regulations in 2006.

[11] In context, "all of this" refers to the Student's IEP goals. Gender specific personal pronouns have been redacted.

issues. N.T. at 45. The IEP contains no related services. S-47 at 9. None were requested or offered. N.T. at 45-46.[12]

22. The IEP at S-47 contains a signature page. S-47 page 2. The signature page contains a section titled Procedural Safeguards Notice, which reads, "I have received a copy of the ***Procedural Safeguards Notice*** during this school year. The district has informed me whom I may contact if I need more information." *Id.*, bold and italics original. The Mother signed her name to that statement. *Id.*
23. The Mother testified that she received "daily progress reports" showing inconsistent progress during the 2006-2007 school year. N.T. at 46. The Student also exhibited an aversion to homework, and the Mother testified about her struggles to assist the Student at home. N.T. at 47. The Mother explained this situation to the District, but did not receive additional assistance. *Id.*
24. The IEP Team met again in June of 2007 to draft an IEP for the 2007-2008 (sixth grade) school year. S-47 at 31. Although some of the IEP Team members changed, the IEP of June 2007 contains a signature page that is nearly identical to the signature page in the IEP of June 2006. *Id.* The Procedural Safeguards Notice is identical and is signed by the Mother. *Id.*
25. On January 24, 2008, the Mother sent an email to a professional employee of the District raising concerns about the Student's Math test scores. S-47 page 47, N.T. at 58. The Mother asked if pre-testing could be an effective strategy. An unsigned, handwritten note on the email suggests that a response was sent back to the Mother saying that the Student's behaviors were interfering with [the Student's] scores in Math. Whether or not such a response was actually sent, the Mother was clearly worried about the Student's Math scores at this time.
26. The Student was reevaluated by the District in February of 2008. S-3. That report is dated February 1, 2008 but stamped received on February 26, 2008. The report indicates that the Mother was concerned at that time about the Student's grades in Math. Specifically, the Mother thought that the Student should be earning better grades in Math because the Student scored in the advanced range on the Math PSSA. At that time, the Student's quarterly grades in Math were 72 and 79. *Id.* The Mother asked if itinerant math support would help the Student. *Id.* The reevaluation report (RR) concludes that additional evaluations are not required and that the Student continued to be eligible for special education. Both of the Student's parents initialed the RR indicating their approval. *Id* at 5.
27. The Mother testified that she was unaware of her right to request additional evaluations at the time of the RR. N.T. at 52. However, the RR contains a form by which the team can indicate whether additional data is required. S-3 at 3. The form explains that if the team determines additional data is required, the District will issue a permission to reevaluate and administer additional evaluations. *Id*. The form clearly indicates that the team determined that additional data was not necessary, and the Parents agreed with that decision by approving the RR.
28. In terms of progress during the 2008-2009 school year, the Mother testified that she saw "more of the same" inconsistency that she observed in prior years. N.T. at 59. The Mother described the Student's grades as a "roller coaster ride." *Id*. Progress

[12] For purposes of resolving the scope of this due process hearing, the substantive appropriateness of the IEP at S-47 is not at issue.

notes of January 11, 2008 drafted by one of the Student's teachers were consistent with the Mother's concerns at that time.

29. The Mother testified that she attended an IEP Team Meeting in February of 2009. N.T. at 66. At that meeting, a District-employed member of the IEP Team asked the Mother if she had received a copy of the Procedural Safeguards Notice that year. The Mother responded that she had not, and the IEP Team member replied that the meeting would have to be postponed until the Notice was sent.[13] The Mother testified that she signed a form confirming her receipt of the Notice just so that the meeting could proceed.
30. The Mother testified that she received the Procedural Safeguards Notice *for the first time* on October 27, 2009 when she requested a reevaluation that was suggested by a private therapist working with the family. N.T. at 61-62. The Mother claims that she did not request a due process hearing or mediation at any time prior because she did not know what her rights were. *Id.*
31. On January 14, 2010, the Mother sent an email to the Student's [redacted] Language Arts teacher, saying that the first time she received the Procedural Safeguards Notice was in October of 2009. S-20 at 16. That email was ultimately forwarded to a number of District employees, including the District's Assistant Director of Pupil Services and Special Education, who responded by a letter dated January 15, 2010. S-20 at 32-33. The Director of Pupil Services and Special Education was copied on the response. The response indicates that the District conducted an investigation and discovered that the Parents signed for receipt of the Procedural Safeguards Notice on each of the Student's IEPs, dated June 13, 2005; June 9, 2006; June 8, 2007; February 12, 2008 and February 13, 2009. For the period of time under consideration (dates prior to January 5, 2009) evidence supports the conclusions of the District's investigation.
32. The Mother testified that she had no contact with advocates or attorneys until she received a reevaluation report in December of 2009, indicating that the Student may be exited from special education. N.T. at 74, 140. After that time, the Mother was in contact with a relatively large number of special education advocates and attorneys. N.T. at 134-138.
33. At various points in the hearing, the District attempted to highlight the fact that the Mother's allegations about not receiving Procedural Safeguards Notices came after her contact with various attorneys and advocates. I find that the Mother's contact with advocates and attorneys is irrelevant to her credibility. However, preponderant evidence supports the District's contention that the Procedural Safeguards Notice was made available to the Parents throughout the period of time in question.[14]

[13] Why the notice could not have been provided to the Parent at the meeting is unclear.

[14] The parties dispute who must bear the burden of proof to establish that the Parents did or did not receive the Procedural Safeguards Notice. In this case, the assignment of the burden of proof is not relevant, as the Hearing Officer would reach the same conclusion either way. The Parents did not establish that they did not receive the Notice *and* the District established that the Notice was offered. The evidence is not in equipoise, and so *Schaffer v. Weast*, 546 U.S. 49 (2005) and its progeny do not alter the outcome.

Applicable Statutory and Regulatory Provisions

The Parents requested a hearing under the IDEA and Section 504 of the Rehabilitation Act. Case law is clear, however, that IDEA's statute of limitations applies in cases that arise under both the IDEA and Section 504. *See P.P. v. West Chester Area School District*, 585 F.3d 727, 737 (3rd Cir. 2009). It is helpful, therefore, to recite the SOL here.

The SOL is contained in two clauses of the Act's procedural safeguards section. First, at 20 U.S.C. § 1415(b)(6)(b):

> "The procedures required by [the procedural safeguards] section [of the IDEA] shall include... [a]n opportunity for any party to present a complaint which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint... except that the exceptions to the timeline described in subsection (f)(3)(D) shall apply to the timeline described in this subparagraph."[15]

That first section is echoed in the federal regulations at 34 C.F.R. 300.507(a)(2):

> "The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint, or, if the State has an explicit time limitation for filing a due process complaint under this part, in the time allowed by that State law, except that the exceptions to the timeline described in § 300.511(f)apply to the timeline in this section."

Second, at 20 U.S.C. § 1415(f)(3)(C), the IDEA reads as follows:

> "A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint... ."[16]

The federal regulations at 34 C.F.R. § 300.511(e) are almost the same, if slightly more imperative:

> "A parent or agency must request an impartial hearing on their due process complaint within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint... ."

[15] *See also*, 34 C.F.R. § 300.507(a)(2). Language incorporating explicit state statutes of limitations is not applicable in Pennsylvania and is not quoted here.
[16] *See* n1, *supra*.

The IDEA includes two exceptions that, if proven by the party claiming exceptions, negate the foregoing limitations. Those exceptions are found at 20 U.S.C. § 1415(f)(3)(D)(i) and (ii):

> "The timeline described in subparagraph (C) [20 U.S.C. § 1415(f)(3)(C)] shall not apply to a parent if the parent was prevented from requesting the hearing due to—
>
> i. specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
>
> ii. the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent."[17]

Virtually identical language appears in the federal regulations at 34 C.F.R. § 300.511(f)(1) and (2):

> "The timeline described in paragraph (e) of this section does not apply to a parent if the parent was prevented from filing a due process complaint due to—
>
> 1. Specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or
> 2. The LEA's withholding of information from the parent that was required under this part to be provided to the parent.

Discussion

I. The Statute of Limitations

The parties' interpretation of the foregoing statutory and regulatory language is quite different. The Parents argue that 20 U.S.C. § 1415(f)(3)(C) creates a "procedural time period" or limitation which is tolled if the Parents are ignorant of the action that forms the basis of their Complaint. The Parents cite *Draper v. Atlanta Independent Sch. System*, 518 F.3d 1275 (11th Cir. 2008) and *J.L. v. Ambridge Area Sch. Dist.*, 2009 WL 1119608 (W.D. Pa. April 27, 2009) to support this contention. The Parents aver that they received information from the District, but that information was never explained and that they did not understand it. *Parents' Brief* at 5-6. Therefore, the Parents argue that the procedural time period should be tolled until the Parents better understood their rights in October of 2009.

The Parents view the procedural time period as something separate and distinct from the language at 20 U.S.C. § 1415(b)(6)(B). The Parents refer to (b)(6)(B) as the "substantive time period." Relying on the language of the statute itself, the Parents argue that the substantive time period is determined by a finding of when the *District* knew or should have known that it was violating the IDEA, and that the Parents may then present claims arising two years before that date. Said more simply, the Parents

[17] These exceptions apply to 20 U.S.C. § 1415(b)(6)(b).

argue that they may present claims arising two years before the District should have known it was violating the IDEA. In this case, the Parents argue that the District should have known it was not meeting the Student's needs in May of 2004.

The District disagrees with the foregoing analysis. The District acknowledges that there has been some disconnect between the way that some judges in the Eastern District and some Pennsylvania hearing officers have applied the SOL. The District characterizes the approach taken by some hearing officers as a "two-year look-forward." Under this approach, parents have two years from the date that they knew or should have known (KOSHK) of the action forming the basis of their complaint to file. Akin to the discovery rule, the District cites many special education due process decisions in which hearing officers have determined that parents have two years from the KOSHK date to request a hearing.[18] In sum, the District claims that the Parents were highly involved in the Student's education and had knowledge of all of the District's actions as they occurred. Therefore, the two-year limitations period began to run contemporaneously with each action, yielding a bar to claims arising before January 5, 2009.

Although the result is the same, the District actually disagrees with the two-year look-forward analysis as well, and argues the foregoing position in the alternative. The District's primary argument is that the IDEA cuts off claims arising two years before the date of the *complaint*, no matter what the parties knew or should have known. This analysis, characterized by the District as a "two-year look-back," is supported by case law. In *P.P. ex rel. Michael P. v. West Chester Area School Dist*., 557 F.Supp.2d 648 (E.D.Pa., 2008) the Eastern District held that "IDEA claims were correctly limited to those arising within the two years of their ... request for a due process hearing." *Id* at 659.[19] On appeal, the Third Circuit affirmed that the IDEA's statute of limitations applies to "claims made for education under § 504 of the Rehabilitation Act." *P.P. ex rel. Michael P. v. West Chester Area School Dist*., 585 F.3d 727, 737 (3rd Cir., 2009). The Third Circuit characterized the IDEA's timeline as a "two-year statute of limitations." *Id.* at 735 and 737.

In *School Dist. of Philadelphia v. Deborah A*., 2009 WL 778321, (E.D.Pa., 2009), parents appealed an administrative decision precluding "claims for compensatory education that arose [more than] two years before [the Plaintiffs] requested a due process hearing." *Id* at *4. The Court held that the statute of limitations was properly applied at the administrative level. *Id*. In reaching this decision, the Court relied upon an unreported decision in *Evan H., ex rel. Kosta H. v. Unionville-Chadds Ford School Dist*., 2008 WL 4791634 (E.D.Pa., 2008). In *Evan H.*, the Eastern District also affirmed an appeals panel determination that the IDEA's statute of limitations cuts off claims arising more than two years before a complaint is filed. *See id.*

[18] For more on the discovery rule, see *Vitallo v. Cabot Corp*., 339 F.3d 536, 538 (3rd Cir. 2005).
[19] The District Court had actually applied Pennsylvania's two-year statute of limitations to the Parent's Section 504 claims, and applied the IDEA's statute of limitations to the IDEA claims. Both are characterized as two-year statutes of limitations.

More recently, the Third Circuit determined that the 2004 amendments to the IDEA "broke new ground by providing for a two year statute of limitations where there previously had been none." *Steven I. v. Central Bucks School Dist*., 618 F.3d 411, 413 (3rd Cir., 2010). Moreover, the Third Circuit decided that the two year statute of limitations precluded claims arising more than two years before the filing of a due process complaint: "Steven I.'s parents did not initiate a due process hearing until May 1, 2007. Thus, the two-year statute of limitations in IDEA 2004 applies to Steven I.'s claims and bars any causes of action that accrued prior to May 1, 2005." *Id* at 417.

Although the decision in *Steven I.* is less than a year old, the Eastern District has already had an opportunity to consider it. Relying in part on *Steven I.*, the Eastern District very recently concluded that "[u]nder IDEA's amended statute of limitations, a court may consider alleged denials of a FAPE *occurring for a two-year period prior to parents' request for a due process hearing*." *L.G. v. Wissahickon School Dist.*, 2011 WL 13572, *7n5 (E.D.Pa., 2011), italics added.

It must be noted that all of the foregoing cases reference 20 U.S.C. § 1415(f)(3)(C) as the IDEA's statute of limitations. The cases do not explicitly mention 20 U.S.C. § 1415(b)(6)(B).[20] No court in Pennsylvania, federal or state, has explicitly attempted to reconcile these distinct provisions. Given the wording of the IDEA and its regulations, and the dearth of cases that examine both clauses, the Parents' argument could be a fair reading of the Act.[21] Nevertheless, in light of the foregoing cases, I must conclude that the IDEA truncates claims arising more than two years prior to the Parents' due process request. As such, claims arising prior to January 5, 2009 are time-barred unless an exception applies.

II. Exceptions to the Statute of Limitations

The IDEA's two-year statute of limitations is not imposed if either of the exceptions at 20 U.S.C. 1415(f)(3)(D) apply. The first exception applies if the Parents were prevented from requesting the hearing due to specific misrepresentations by the District that it had resolved the problem forming the basis of the complaint. *See* 20 U.S.C. 1415(f)(3)(D)(i). Assuming, *arguendo*, that the Parents explicitly disagreed with the 2005 ER, and that the District told the Parents that there is no right to request an IEE at public expense, the false statement does not give rise to the exception. Under those circumstances, the disagreement is the "problem" contemplated at 20 U.S.C. 1415(f)(3)(D)(i). Telling the Parents that they have no right to an IEE at public expense is not a misrepresentation

[20] In a footnote, the Eastern District explicitly considered an argument that the IDEA does not create a two-year statute of limitations, '"but rather establishes two distinct time periods: first, a parent has two years from the time that the parent is aware of the violation to initiate a due process hearing and, second, that the hearing officer must then consider and adjudicate all violations which occurred two years before any date that the District knew or should have known of the violation." *P.P. ex rel. Michael P. v. West Chester Area School Dist*., 557 F.Supp.2d 648, 660 n10 (E.D.Pa.,2008). Although the court does not explicitly reference 20 U.S.C. § 1415(b)(6)(B), it is reasonable to assume that the Court was considering this provision. The argument was rejected.

[21] The Parents will certainly be able to preserve any objection to argue for their interpretation on appeal, if they so choose.

that the problem is resolved. To the contrary, this misrepresentation would only highlight the existence of the problem. Consequently, under the facts of this case, 20 U.S.C. 1415(f)(3)(D)(i) does not apply even if the District provided false information to the Parents about their right to obtain a District-funded IEE.

The Parents also claim that the District made misrepresentations when various professional employees said that their concerns would be addressed through the Student's IEPs. Statements that reassured the Parents that their concerns were being addressed through the services provided via IEPs could be "misrepresentations by the District that it had resolved the problem forming the basis of the complaint" if those services were not provided. However, preponderant evidence indicates that the Parents were aware of what services were and were not being provided to the Student. The Parents were aware of content of the Student's IEP, communicated with District personnel, and were both aware of and concerned about the Student's inconsistent progress. The Mother's testimony concerning her understanding of the Student's progress demonstrates that the information provided by the District did not suggest that the "problem" (i.e. the Student's inconsistent performance) was resolved. Again, the information provided to the Parents by the District indicated that the problem persisted over the period of time in question. As such, 20 U.S.C. 1415(f)(3)(D)(i) is not triggered by the District's assertions that it would address the Student's problems through the Student's IEPs.

The second exception is triggered if if the Parents were prevented from requesting the hearing due to the District's withholding of information that it was required to provide to the Parents. *See* 20 U.S.C. 1415(f)(3)(D)(ii). District courts in the Third Circuit have thrice concluded that this exception refers to the withholding of the Procedural Safeguards Notice. *See Deborah A*., 2009 WL 778321, *5 (E.D.Pa., 2009); *Evan H.,* 2008 WL 4791634, *7 (E.D.Pa., 2008); and *D.G. v. Somerset Hill Sch. Dist.*, 559 F.Supp.2d 484, 492 (D.N.J., 2008). The Eastern District cases go a step further, concluding that the the exception applies *only* to withholding the Procedural Safeguards Notice. In this case, the Parents allege that the District withheld the Procedural Safeguards Notice, which would trigger the exception.

There is preponderant evidence that the Parents signed for receipt of the Procedural Safeguards Notice several times during the period in question. Testimony concerning the Parents' actual receipt of the Notice is contradictory. However, the documentary evidence is consistent with the testimony of the District's witnesses that, following the District's ordinary practices, the Notice was actually provided or offered when the Parents signed for it. More importantly, the language in the documents concerning the Parents' receipt of the notice is simple, direct and highlighted. Even if the Parents are not knowledgeable about special education, they signed documents referring to "the enclosed **Procedural Safeguards Notice**" and saying "I have received a copy of the ***Procedural Safeguards Notice***" FF-5, FF-23.

It is conceivable that the Parents did not fully appreciate their rights until October of 2009. But the Parents' understanding of their rights is irrelevant to the exception. The

inquiry is whether the District provided the Procedural Safeguards Notice. I cannot conclude that the Parents repeatedly signed for receipt of a document they never had. Consequently, I find that the exception at 20 U.S.C. 1415(f)(3)(D)(ii) does not apply.

ORDER

And now, this nineteenth day of March, 2011, it is hereby ORDERED that the Parents may pursue those claims raised in their Complaint accruing on or after January 5, 2009.

/s/ Brian Jason Ford
HEARING OFFICER