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**PENNSYLVANIA**  
**SPECIAL EDUCATION HEARING OFFICER**

DECISION  
DUE PROCESS HEARING

Name of Child: BD  
ODR #7992/07-08 LS

Date of Birth: xx/xx/xx

Date of Hearing:  
November 26, 2007

CLOSED HEARING

Parties to the Hearing:  
Mr. and Mrs.

West Chester Area School District  
Special Education Director  
829 Paoli Pike  
West Chester, Pennsylvania 19380

Transcript Received:

Date of Decision:

Hearing Officer:

Representative:

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December 1, 2007

December 8, 2007

Linda M. Valentini, Psy.D.

## Background

Student is a xx year old male, a graduate of one of the District's high schools<sup>1</sup>, whose parents allege that the West Chester Area School District denied him FAPE from the 2000-2001 school year through the end of the 2004-2005 school year. At all relevant times Student was a regular education student, but in early June 2005 events triggered the District's potentially providing services under Section 504/Chapter 15 or the IDEA/Chapter 14. As the Parents' claims fall outside IDEIA's two-year statute of limitations period, this hearing was held solely to determine whether one of the exceptions to the statute of limitations exists.<sup>2</sup>

## Procedural History

On August 8, 2007 the Parents requested a due process hearing, seeking compensatory education for an alleged denial of FAPE from the 1994-1995 school year to the present. On September 13, 2007 the Parents submitted a Motion to place the burden of proof on the school district with regard to "establishing the lawful start of the limitations period", and on September 24, 2007, the District filed an Answer to the Parents' Motion. On October 6, 2007, the Hearing Officer issued a Ruling, holding that the Parents have the burden of proof with regard to the application of the statute of limitations.

On November 16, 2007, the Parents provided the hearing officer with notice that they were withdrawing claims from July 1, 2005 to the present, but that they would continue to pursue claims from the 1994-1995 school year through June 30, 2005. On November 19, 2007 the District filed a Motion to dismiss the claims from the 1994-1995 school year through June 30, 2005, as untimely<sup>3</sup>. On November 19, 2007 the Parents filed a Response to the District's Motion.

On November 20, 2007 this hearing officer issued a ruling denying the District's Motion to Dismiss, because in addition to Parents' arguments rejected by the hearing officer<sup>4</sup> the Parents' claims in support of denying the District's Motion also involved the possible existence of one of the two exceptions to IDEIA's statute of limitations (the local educational agency's withholding of information from the parent that was required to be

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<sup>1</sup> Student left the District at the beginning of junior year and went to a private school, returning to the District for the last six weeks of senior year.

<sup>2</sup> If the Parents prevailed on this issue, a full hearing on the merits of their complaint, without consideration of a statute of limitations, would be scheduled and held. If not, the District's Motion to Dismiss would be granted.

<sup>3</sup> The Parents later withdrew claims from 1994-1995 to the commencement of the 2000-2001 school year.

<sup>4</sup> The position that the matter should not be dismissed because IDEA 2004 is not retroactive; Child Find claims do not have a statutory limitations period; time periods are extended for a District's continuing violations of IDEA; tolling extends the statute of limitations; Section 504 of the Rehabilitation Act does not contain a statutory limitations period.

provided [under the IDEA] to the parent). The hearing was convened on the sole issue of whether or not the District at any time provided the Parents with formal notice of their procedural rights.

#### Issue

Did the West Chester Area School District fail to provide Mr. and Mrs. with a copy of the Procedural Safeguards Notice?

#### Findings of Fact

1. Student is a xx-year-old 2007 graduate of the West Chester Area School District.
2. Mrs., Student's mother, is a [profession redacted] providing adult education in [profession redacted], who holds a [degree redacted] from [institution redacted], a Baccalaureate Degree in [profession redacted] from [redacted] University, and a Master's Degree in [profession redacted] from the [redacted] University. (NT 35-36)
3. Mr., Student's father, holds a position managing [redacted] in the field of [redacted], and holds a Bachelor of Science Degree in [redacted] administration from [redacted]University. (NT 98-99)
4. On May 31, 2005 the father informed the high school's Assistant Principal that the Parents had engaged an Educational Consultant<sup>5</sup>, that Student was having a psychological evaluation done, and that the psychologist working with Student felt that Student had Attention Deficit Disorder (ADD)<sup>6</sup>. (NT 47; P-27)
5. By letter dated May 31, 2005 the Educational Consultant's office forwarded to the District consents signed by Student and his father for release of educational information<sup>7</sup>. (S-1)
6. The Assistant Principal's response was that the School Counselor should begin "gather[ing] teacher information for the CST [Child Study Team] process and try to put him through before the end of the [school] year...[or] he [could be] put first on the docket for next year" as the District would already have the teachers' information. (P-27)

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<sup>5</sup> The Parents had engaged this Educational Consultant previously with regard to their older son, who recommended the high school out of the country that the boy attended for his senior year. (NT 55)

<sup>6</sup> At times referenced as ADHD in the documents. ADD is a subtype of ADHD.

<sup>7</sup> The mother had testified that the District had been aware of the consents since mid-May. (NT 56)

7. During the May 31, 2005 telephone conversation with the father around Student's possibly having ADD, the Assistant Principal inquired if the father knew what a 504 (Plan) was and explained that the District could "look at Student for a 504 evaluation". The father said that he did not think that a 504 would benefit Student, but that a change in environment and a fresh start would be beneficial. (NT 101-102; P-27)
8. The Assistant Principal documented the conversation in an email to the School Counselor, dated May 31, 2005 that was sent at 5:15 pm. The email begins, "I just got off the phone with Mr. [redacted]". (P-27)
9. The father did not specifically recall the topic of a 504 evaluation or the term 504 coming up in the May 31, 2005 conversation. (NT 102, 107)
10. On June 1, 2005 the School Counselor informed the Assistant Principal that she had conversed with the mother who preferred that no further specialized assessments (such as the proposed Connor's observational scale) be done concerning Student, as he already had a professional assessment to determine ADHD. (P-30)
11. On June 3, 2005 the School Counselor issued a Permission for Assessment<sup>8</sup> letter to the Parents. (P-31)
12. The Parents' November 19, 2007 Family's Response to the District's Motion in Support of Dismissal of Parents' Claims indicates that on or about June 3, 2005 the Parents received a Notice of Protections Under Section 504 of the Rehabilitation Act (titled and referenced below as Notice of Parent and Student Rights Under 504). (NT 59-61; J-1: pages 10, 13; P-31)
13. When asked by Parents' attorney, "Do you recall receiving this document (at P-31, page 3, Notice of Parent and Student Rights Under 504) along with the 504 permission for assessment?" the mother stated, "I don't recall receiving anything other than the Permission to Evaluate" (Permission for Assessment). (NT 49)
14. When asked by District's attorney, "At page three of P-31 you were referred to safeguards. Are you stating that you did not receive the safeguards with the Permission to Assess? Is that your testimony?" the mother answered, "I'm saying that I don't remember seeing this document". (NT 59)
15. On June 9, 2005 the District issued a Permission to Evaluate<sup>9</sup> form to the Parents. At the top of the second page of the form it says, "Please read the enclosed PROCEDURAL SAFEGUARDS NOTICE that includes parent resources such as state or local advocacy organizations. If you have any questions, or if you need

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<sup>8</sup> Relating to a Section 504/Chapter 15 assessment.

<sup>9</sup> Relating to an IDEA/Chapter 14 evaluation.

the services of a translator or an interpreter, please contact me. [Ms. M], School Psychologist, [phone number redacted]” (emphasis in the original). (P-33<sup>10</sup>)

16. Under Directions for Parent, the Permission to Evaluate form provides the opportunity to check various boxes, one of which says, “I object to the proposed initial evaluation; I would like to schedule: [with boxes for three options] Pre-hearing conference, Mediation, Due Process Hearing”. The last line of the Permission to Evaluate form reads, “\* The enclosed PROCEDURAL SAFEGUARDS NOTICE provides information on the options listed” (star and emphasis in the original). (P-33)
17. The mother testified that she did not thoroughly read both pages of the Permission to Evaluate form since the Parents were not going to have the District evaluate Student. (NT 70)
18. Asked by her attorney, “Do you recall receiving a procedural safeguards notice with this permission to evaluate dated June 9<sup>th</sup>, 2005?” the mother replied “No”. (NT 50)
19. Shown a copy of a Procedural Safeguards Notice downloaded by her attorney’s office from PaTTAN’s website, and asked if she had ever seen a document like that one the mother answered “No”. (NT 50-51)
20. Asked by District’s attorney with regard to when she received the Permission to Evaluate form, “...do you know whether there were more than two pages in the envelope? Do you recall?” the mother testified, “No. I just recall getting documents to evaluate Student...” (NT 71)
21. Asked by Parents’ attorney if he recalled, “whether on June 3<sup>rd</sup>, 2005 or at any other time subsequent to that whether the District ever provided your family a procedural safeguards notice”, the father asked that the question be repeated. (NT 104)
22. Upon repeat of the questions the father answered, “No, I do not recall that they ever provided a procedural safeguards notice”. (NT 104)
23. Upon reviewing S-5 (Permission for Assessment and a Notice of Parent and Student Rights Under 504) the father testified that the Permission for Assessment (pages 1 and 2) came in the mail, but when asked if the Notice of Parent and Student Rights Under 504 (pages 3 through 5) was part of the package he said, “I do not recall that this was part of the package that came in the mail” and when asked “You don’t recall if it was or was not?” replied “I do not recall”. (NT 108)
24. Although the father recalled the Permission to Evaluate at S-6 coming in the mail (pages 1 and 2), with respect to the Procedural Safeguards Notice (pages 3 to 14)

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<sup>10</sup> P-33 is the document at S-6, but S-6 contains the Procedural Safeguards Notice. (NT 80-82)

he said “I have no recollection of three through fourteen coming in the mail with pages one and two”. Later the father, shown S-6 pages 3 through 14, said “I have never seen this document before”. (NT 109-110, S-6<sup>11</sup>)

25. As the original Procedural Safeguards Notice was bound into a 4 ¼ x 5 ½ booklet, the father was asked if he recalled a booklet’s being included and he responded, “No. I recall no booklet” and later to a question by Parents’ attorney if he recalled seeing the document at S-6 pages 3 through 14 in a booklet form he said, “I have not seen that document in a booklet form. I have not”. (NT 110, 125; 160-161)
26. The father testified, “I have never seen a procedural safeguards document in my life. Now, whether it was part of that package or not – you know I can tell you that I’ve never seen a procedural safeguards notice, but two years later coming in and swearing with my arm up in the air that it was not in an envelope or a book, I do not recall that form”. (NT 124)
27. Although the father stated that he read the “complete letter as it comes in the mail because of my personality being attentive to detail because of my job” in reference to pages one and two of S-6, he testified that he did not recall reading the statements prominently referencing the Procedural Safeguards Notice described above in Findings of Fact Numbers 15 and 16. (NT 110-111)
28. Specifically directed to the exhibit S-6, page 2, and asked if he recalled reading the bottom part of the Permission to Evaluate form where it notes, “\* The enclosed PROCEDURAL SAFEGUARDS NOTICE provides information on the options listed” (star and emphasis in the original), the father replied, “No. I do not recall reading that statement.” (NT 111-112; S-6)
29. The father testified that he did read the whole of pages 1 and 2 of S-6, “Based on my habits. I read everything that I open from front to back.” He acknowledged reading about the option of checking boxes asking for a pre-hearing conference, or mediation or a due process hearing, but as this was “the second or third time we had been contacted by the school by June 9<sup>th</sup> around doing some kind of ‘can we get with Student, can we look at Student, can we work with Student, can we do something with Student’, this was another case where I thought I had answered those questions. So I did not fill it out or send it back”. (NT 120)
30. On June 6, 2005 the Parents and Student signed Admission Application Forms published by The Association of Boarding Schools for distribution to various members of the high school staff. (S-7)
31. When the Parents re-enrolled Student in the District for the last six weeks of senior year they told the District that there had been an issue with the private

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<sup>11</sup> Although pages three through fourteen had been removed after the mother’s testimony since they were not used and there was an objection, given that these pages were used with the father the hearing officer later reinstated them into the record. (NT 121, 126)

school, providing in mother's words "a very vague answer", without explaining that they had withdrawn him from the private school so that he would avoid expulsion. The Parents considered the real reason private, and felt that the District did not need to know the reason they had withdrawn him from private school. (NT 75-76, 78-79, 113, 117, 119)<sup>12</sup>

32. Ms. M holds a Bachelor's Degree from [redacted] University and a Master's Degree from [redacted] University. She is finishing up her Doctorate in psychology at [redacted] and is a certified school psychologist. (NT 85-86)
33. Ms. M recalls sending out a Permission to Evaluate form to the Parents toward the end of the school year in 2005, and recalls that she did not evaluate Student. She does not recall the exact date she sent out the Permission to Evaluate form. (NT 86)
34. Ms. M, in response to the District attorney's question, "And did you issue procedural safeguards with the permission to evaluate form?" answered, "Yes, I did". (NT 86-87)
35. Ms. M. is sure that she issued the procedural safeguards because it is her standard practice that when she issues a permission to evaluate form she also issues the procedural safeguards, and that has been her practice since she began working in the field. She has never veered from that practice. (NT 87)
36. Ms. M. is "absolutely 100 percent sure" that she issued the procedural safeguards, "If a child or a parent received a permission to evaluate from me, I absolutely issued the procedural safeguards". (NT 87)
37. Ms. M. did not receive any notice that the permission to evaluate was sent by the Central Office. (NT 98)
38. Ms. H., School Counselor holds an undergraduate degree from [redacted] University and a Master's degree from [redacted] University. She is currently a fourth year Doctoral student in [redacted] University's educational psychology program and is a licensed professional counselor. (NT 129-130)
39. Ms. Hl testified that she mailed the Permission to Assess form to the Parents and also attached the Notice of Parent and Student Rights Under 504. (NT 132)
40. Ms. H is certain that she sent both the Permission to Assess and the Notice of Parent and Student Rights Under 504 to the Parents because "it's standard operating procedure, and it's just --- every time we send a permission to assess or evaluate we send the notification for safeguards". (NT 132)

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<sup>12</sup> **It should be noted that on Page 116 of the Transcript, lines 9 through 17, the statement attributed to The Witness was actually made by The Hearing Officer.**

41. Contemporaneously with events at the end of the school year in June 2005 (on or about June 3, 2005) Ms. H made notes on a Student Performance Report that read “Call 1<sup>st</sup>. Send permission letter for 504 Eval. √ Rights”. (NT 132-133; P-29)
42. Dr. M., Student Services Program Director, holds an undergraduate degree from [redacted] College, Master’s and Doctoral degrees from the [redacted] University, is a certified school psychologist through [redacted] University, has her supervisory certificate in pupil services from [redacted] University, and is currently enrolled in classes at [redacted] University towards her letter of eligibility. (NT 146)
43. Dr. M. provides training for the District’s school counselors and nurses about issuing procedural safeguards under 504, and to its school psychologists about issuing procedural safeguards under 504 and under Chapter 14. (NT 148)
44. Dr. M. put forth that there are certain documents that are “the psychologists’ bible” – the permission to evaluate, the procedural safeguards, the Evaluation Report, and the Notice of Recommended Educational Placement for non-exceptional children – are “their most vital documents”. (NT 148)
45. Dr. M. testified that the psychologists are directed that they must issue the procedural safeguards notice with the permission to evaluate as well as at other specific times. (NT 149)
46. Dr. M. noted that the Permission to Evaluate form itself provides a prompt to send the Procedural Safeguards Notice “in big bold letters” and that sending the Notices is standard operating procedure in the District. (NT 155-156)
47. The psychologists are trained in the same manner for Chapter 15/Section 504 evaluations. (NT 149)
48. Dr. M. directly supervised Ms. M., and in this role received input from staff in her building about her work. She described Ms. M. as “extremely meticulous with her record keeping”, “extremely fastidious about issuing procedural safeguards”, “extremely good about it” and said that “she very much wanted to be the one who would always issue them herself”. (NT 150)
49. Dr. M. referenced Ms. M.’s mention in testimony that every once in a while the Central Office was involved and said that she herself would call Ms. M. and say, “‘you need to issue this’ because she was very fastidious about doing those things herself”. (NT 150-151)
50. Dr. M. responded “Absolutely not” when asked if she ever had an issue with Ms. M. not adhering to procedures, and noted that when she left the District there was

general distress because she was so good with time lines and with paperwork.  
(NT 151)

### Legal Basis

#### Timelines

Since their July 1, 2005 effective date, the new provisions of the IDEIA require a parent or agency to request a due process hearing within two years of the date that the parent or agency knew or should have known about the alleged action that forms the basis of the complaint. *See* 20 U.S.C. § 1415(f)(3)(C).

IDEIA and the subsequent regulations permit two specific exceptions to the two-year limit:

- (D) EXCEPTIONS TO THE TIMELINE.-The timeline described in subparagraph (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 part to be provided to the parent.
- 20 U.S.C. § 1415(f)(3)(D)

Parents assert that the second exception to the two-year limit applies in this case.

#### Burden of Proof

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). As the Parents asked for this hearing, the Parents bear the burden of persuasion. However, application of the burden of persuasion does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio.

#### Credibility of Witnesses

Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.<sup>13</sup> Quite often, testimony – or documentary evidence – conflicts; this is to be expected as, had the parties been in full accord, there would have been no

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<sup>13</sup> Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). *See also*, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at \*28 (2003). This is a particularly important function, as in many cases the hearing officer level is the only forum in which the witnesses will be appearing in person.

### Discussion

Essentially, this decision revolves entirely around witness credibility. The Parents assert that the District did not provide them with the Procedural Safeguards Notice, thus depriving them of the opportunity to request a due process hearing. The District maintains that it provided the Parents with both the Notice of Parent and Student Rights Under 504 (when issuing the Permission for Assessment form on June 3, 2005) and the Procedural Safeguards Notice (when issuing the Permission to Evaluate form on June 9, 2005). It is necessary to carefully assess each witness' testimony.

Mrs.: The mother is a [profession redacted] who holds a Master's Degree. In their November 19, 2007 Family's Response to the District's Motion in Support of Dismissal of Parents' Claims, the Parents indicated that on or about June 3, 2005 they received a Notice of Protections Under Section 504 of the Rehabilitation Act (titled and referenced in this decision as Notice of Parent and Student Rights Under 504). (FF 12) However, when asked by Parents' attorney, "Do you recall receiving this document (Notice of Parent and Student Rights Under 504) along with the 504 permission for assessment?" the mother stated, "I don't recall receiving anything other than the Permission to Evaluate (Permission for Assessment)". (FF 13) The mother repeated this testimony when asked by District's attorney, "At page three of P-31 you were referred to safeguards. Are you stating that you did not receive the safeguards with the Permission to Assess? Is that your testimony?" answering, "I'm saying that I don't remember seeing this document". (FF 14) On June 9, 2005 the District issued a Permission to Evaluate form to the Parents. Procedural Safeguards are twice prominently referenced in capital letters on the second page of the Permission to Evaluate form. (FF 15) The mother testified that she did not thoroughly read both pages of the Permission to Evaluate form since the Parents were not going to have the District evaluate Student. (FF 17) The mother answered "No" when asked if she recalled receiving a procedural safeguards notice with the permission to evaluate (FF 18), and when asked by District's attorney "...do you know whether there were more than two pages in the envelope (with the Permission to Evaluate form)? Do you recall?" the mother testified, "No. I just recall getting documents to evaluate Student..." (FF 20)

The mother's credibility was seriously damaged by her lack of recollection of receiving a document (Notice of Parent and Student Rights Under 504) that the Parents previously

acknowledged in writing, through counsel, that they had received. Further, her testimony served only to establish that she did not recollect, rather than that she did not receive, a Procedural Safeguards Notice, leaving open the possibility that either she received the document and was misrepresenting the facts, or that she had received the document but had forgotten about it.

Mr.: The father holds a Bachelor's Degree and is a [profession redacted] at a [work location redacted]. The Assistant Principal and the father had a telephone conversation on May 31, 2005 that in part dealt with the possibility of Student's having ADD and the District's offering a 504 evaluation. The father said that he did not think that a 504 would benefit Student, but that a change in environment and a fresh start would be beneficial. (FF 7) Right after ending the conversation, the Assistant Principal described the conversation in an email sent at 5:15 pm. to the School Counselor, the email beginning, "I just got off the phone with Mr. [redacted]". (FF 8) The father testified that he did not specifically recall the topic of a 504 evaluation or the term 504 coming up in the conversation. (FF 9) As noted above, in their November 19, 2007 Family's Response to the District's Motion in Support of Dismissal of Parents' Claims the Parents indicated that on or about June 3, 2005 they received a Notice of Protections Under Section 504 of the Rehabilitation Act. (FF 12) Asked by Parents' attorney if he recalled, "whether on June 3<sup>rd</sup>, 2005 or at any other time subsequent to that whether the District ever provided your family a procedural safeguards notice", the father asked that the question be repeated. (FF 21) Upon repeat of the question the father answered, "No, I do not recall that they ever provided a procedural safeguards notice". (FF 22) The father was asked to review a document, and testified that although the Permission for Assessment came in the mail, regarding whether the Notice of Parent and Student Rights Under 504 was part of the package he said, "I do not recall that this was part of the package that came in the mail" and when asked "You don't recall if it was or was not?" replied "I do not recall". (FF 23) With regard to the Permission to Evaluate, which, as described above, prominently references Procedural Safeguards twice in capital letters on the second page, although the father stated that he read the "complete letter as it comes in the mail because of my personality being attentive to detail because of my job" he testified that he did not recall reading the statements referencing the Procedural Safeguards Notice. (FF 27) When asked specifically about the section of the Permission to Evaluate noting, "\* The enclosed PROCEDURAL SAFEGUARDS NOTICE provides information on the options listed" (star and emphasis in the original), the father replied, "No. I do not recall reading that statement." (FF 28) This lack of recall is significant as the father had testified that, "Based on my habits. I read everything that I open from front to back." On the Permission to Evaluate he acknowledged reading about the option of checking boxes asking for a pre-hearing conference, or mediation or a due process hearing, but as this was "the second or third time we had been contacted by the school by June 9<sup>th</sup> around doing some kind of 'can we get with Student, can we look at Student, can we work with Student, can we do something with Student', this was another case where I thought I had answered those questions. So I did not fill it out or send it back". (FF 29)

As was the case with the mother, the father's credibility was seriously damaged by his lack of recollection of receiving a document (Notice of Parent and Student Rights Under 504) that the Parents previously acknowledged through counsel that they had received. Further, given father's self-description of his habits of reading everything thoroughly it was quite remarkable that he did not recall reading the prominent references to the Procedural Safeguards contained on the Permission to Evaluate Form when he specifically remembered why he did not complete the form and return it to the District. It was notable that he asserted lack of recollection regarding receipt or non-receipt of certain documents rather than testifying with certainty that he had not received the documents. Finally, given his obvious intelligence and exactitude, it is striking that he did not recall discussing the 504 issue in his May 31<sup>st</sup> conversation, later documented immediately by the Assistant Principal. (FF 7, 8, and 9)

Although the District attempted to further diminish the Parents' credibility by citing the events around Student's return to the District at the end of 12<sup>th</sup> grade, this hearing officer did not give particular weight to the fact that the Parents provided a vague reason for wanting to re-enroll Student in the District six weeks short of graduation rather than offer a complete explanation of his difficulties in the private school. They were likely under some considerable stress, obviously did not want to jeopardize Student's re-enrollment and imminent graduation, and misrepresented only by omission in a situation where the District did not strictly have a need to know.

Ms. M: According to her former supervisor, Ms. M has the reputation of being fastidious about following procedures regarding paperwork. (FF 48 and 49) She testified with confidence and without hesitation that she sent a Procedural Safeguards Notice to the Parents, basing this certitude upon the fact that she always follows this routine procedure. (FF 34, 35 and 36) Her credibility was further enhanced by her recollection, without having been present for previous testimony (she testified by telephone from New York) that she had sent out the Permission to Evaluate and the Procedural Safeguards Notice towards the end of the school year (FF 33), "April or May", actually early June, and this mis-recollection only served to demonstrate that she had not reviewed records in preparation for her testimony and had not been coached in any way.

Ms. M. was an exceptionally credible witness.

Ms. H: Ms. H testified without a pause and with emphasis that on or about June 3<sup>rd</sup> she had sent the Parents the Notice of Parent and Student Rights Under 504 along with the Permission for Assessment, as she always followed this standard operating procedure. (FF 39, 40) The Parents acknowledged receiving this Notice in their Answer to the District's Motion to Dismiss. (FF 12) Further, contemporaneous notes she jotted down demonstrated the procedure that she followed in sending material to the Parents. (FF 41)

Ms. H was an exceptionally credible witness.

Dr. M: Dr. M testified at length and with certainty about the fact that she trains the District's counselors in procedures regarding sending Notices of Parent and Student Rights Under 504 along with the Permissions for Assessment, and that she trains its psychologists in procedures regarding sending Procedural Safeguards Notices along with Permissions to Evaluate. (FF 43, 45 and 47) She noted that these "vital" documents are "the psychologists' bible" (FF 44), and has no doubt that her staff followed the procedures in this case.

Dr. M was an exceptionally credible witness.

Conclusion: The hearing officer had ample opportunity to observe the witnesses' demeanor, listen to their manner of speaking, and hear what they had to say. In some instances witnesses' testimony was supported or refuted by documentary evidence. The hearing officer found the District's witnesses to be highly credible and the Parents to be significantly less so, for the reasons cited above. As this matter hinged entirely upon credibility determinations, the conclusion that the Parents did not meet their burden of proof is inescapable given their persistent lack of recollection, including lack of recollection about facts clearly documented.

In the unlikely event that a higher entity would choose to disturb the credibility determinations of the hearing officer, it is noted that at least one Pennsylvania Special Education Appeals Panel has ruled that "bad faith" on a District's part must be present to establish one or the other of the exceptions. In *In Re The Educational Assignment of S.I.*, Spec. Ed. Opinion No. 1850 (November 2007) the Panel wrote:

"Our interpretation of the exceptions component of the statute is that it requires flagrant or bad faith behavior on the part of the District to trigger exceptions to the two-year limitation. We can find no case law to support any other interpretation. For example, in *Marple-Newtown School District v. Raphael N.*<sup>14</sup> the court briefly concluded that there was no reason to disturb the Panel's ruling that a District's continual communication in English to a non-English speaking parent constituted behavior (specifically, withholding information) that prevented the parent from exercising the right to file for due process."

Clearly this District acted in nothing but good faith, and if by any means a higher entity could be persuaded that the District did not send the Parents their Notice of Parent and Student Rights Under 504 and/or their Procedural Safeguards Notices, there is no evidence that the District was acting with flagrant or bad faith.

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<sup>14</sup> *Marple Newtown School District v Raphael N*, 2007 U.S. Dist. Lexis 62494 (E.D. Pa 2007)

## Order

It is hereby ordered that:

The West Chester Area School District did not fail to provide Mr. and Mrs. with a copy of the Procedural Safeguards Notice.

The Parents did not meet their burden of proving that one of the exceptions to the IDEIA's statute of limitations exists.

The District's Motion to Dismiss is GRANTED.

December 8, 2007

Date

*Linda M. Valentini, Psy.D.*

Linda M. Valentini, Psy.D.  
Hearing Officer