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

DERRICK FAHS, et al.,	:	1:15-cv-1108
	:	
Plaintiffs,	:	Hon. John E. Jones III
	:	
v.	:	
	:	
RED LION AREA SCHOOL DISTRICT,	:	
	:	
Defendant.	:	

MEMORANDUM & ORDER

May 18, 2016

Plaintiffs Sherry and Scott Fahs bring the above captioned action on behalf of themselves and their son, Derrick Fahs (collectively, "Plaintiffs"). The action arises under the Individuals with Disabilities Education Act ("IDEA") and related federal statutes. Plaintiffs Sherry and Scott Fahs also assert claims separately under Section 504 of the Rehabilitation Act, 29 U.S.C. § 791, *et seq*., and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq*., arising due to alleged retaliatory acts by Defendant, the Red Lion Area School District (the "District").

Presently pending before the Court is the District's Motion to Dismiss. (Doc. 19). In its Motion, the District argues that Plaintiffs have failed to exhaust relevant administrative remedies, and so their retaliation claims and their request

for enforcement of an Order issued by the Pennsylvania Office for Dispute Resolution are improperly before this Court pursuant to 12(b)(1). The District also argues that Plaintiffs fail to state claims for retaliation under Federal Rule of Civil Procedure 12(b)(6) and that these claims are barred by the applicable Statute of Limitations. For the reasons that follow, the District's Motion shall be denied.

I. FACTUAL & PROCEDURAL HISTORY

Plaintiff Derrick Fahs ("Derrick") is an eighteen year old student in the Red Lion Area School District. (Doc. 8, ¶ 45). Derrick contracted meningitis at the age of six months and became deaf and blind as a result of the illness. (*Id*., ¶ 51). When Derrick reached an age to attend school, the District determined that it would be unable to educate Derrick, and placed him at the Perkins School for the Blind in Massachusetts. (*Id*., ¶ 53). Derrick's parents, Plaintiffs Sherry and Scott Fahs, eventually challenged this determination in federal court. (*Id*., ¶ 54). They prevailed, and as a result Derrick began attending school in the District in 2006. (*Id*.). Initially, the District refused to place Derrick in general education classes with other students. (*Id*., ¶ 55). Derrick's parents again challenged the District's determination, this time in the Office for Dispute Resolution ("ODR"). (*Id*.). Again, they prevailed and the ODR ordered the District to educate Derrick with students who did not have disabilities for approximately half of the school day,

with the other half spent in the deafblind resource room operated by the Intermediate Unit. (*Id*.).

According to Plaintiffs' Complaint, Derrick's condition and his needs are complex. (*Id*., ¶ 56). Although Derrick is deaf and blind, he is not completely impaired in either sense. (*Id*., ¶ 57). He suffers from cortical vision impairment ("CVI"), meaning his vision is diminished because of the way signals from his optic nerves are interpreted in his brain. (*Id*.). CVI is not static, but rather may resolve itself over time. (*Id*., ¶ 58). Derrick's eyesight scores between a five and a six on a scale of ten, meaning he has a great deal of useable vision. (*Id*., ¶ 58). Similarly, Derrick has some hearing ability. (*Id*., ¶ 57). He received a cochlear implant when he was eighteen months old and can hear sounds at a speech level of 35 decibels and above. (*Id*., ¶ 59). Derrick has a threshold for hearing sounds at lower levels as well. (*Id*.). However, Derrick's parents allege that the District has failed to sufficiently develop Derrick's abilities beyond their current point. (*Id*., ¶ 59). Specifically, they allege that the District has failed to provide Derrick with the auditory training necessary to fully utilize his cochlear implant. Derrick's parents also allege that the District has failed to provide Derrick with visual signing, instead providing only tactile signing, which they argue creates dependency. (*Id*., ¶¶ 62, 65).

Beginning in April 2010, about four years after Derrick enrolled in the District, he began having incidents of distress in school. (*Id*., ¶ 69). Plaintiffs' Complaint alleges that these incidents were not reported to Derrick's parents until early 2011, when a paraprofessional (also referred to as an "intervenor," an aide to deafblind students who assists the students in communicating with those around them) described an incident of distress to Derrick's parents at Derrick's bus stop. (*Id*.). Derrick's behavior during these incidents included banging his head against the floor, becoming incontinent, screaming, crying and bolting. (*Id*., ¶ 69-72). In December 2011, these events began to occur not only in school, but also at Plaintiffs' residence. (*Id*., ¶ 73). Derrick's parents brought Derrick to Dr. Dennis Dlugos, a pediatric neurologist at Children's Hospital of Philadelphia ("CHOP"), who determined that these episodes were not caused by a diagnosable medical disorder. (*Id*., ¶ 77).

Meanwhile, a variety of District employees, educators, physicians, specialists and Derrick's parents continued to devise plans for Derrick's education. In April 2009, Hearing Officer McElligott ordered a comprehensive reevaluation of Derrick, after finding that the reevaluation that the District had conducted previously was not sufficient. (*Id*., ¶ 67). By 2011, the plan for Derrick was "to develop Individualized Education Plan ("IEP") goals that were referenced to and

aligned with the general education curriculum so that Derrick could participate in a more meaningful fashion in the general education classes rather than pursuing a parallel curriculum as an island in the mainstream with his intervenor." (*Id*., ¶ 75). Dr. Jerry Petroff, an expert consultant in deafblindness for the District, also opined that auditory training for Derrick should be revisited. Plaintiffs contend that the District never provided this training. (*Id*., ¶ 62). A final IEP was completed on December 14, 2011. (*Id*., ¶ 76). The IEP did not mention Derrick's episodes, but Special Education Director Laura Fitz and Dr. Lynn Murphy, the supervisor of the Intermediate Unit's deafblind program, indicated that they would confer regarding what the school team could do to help Derrick further expand his expressive communication skills and to determine and address the episodes of distress. (*Id*., ¶ 80).

On January 17, 2012, Derrick's parents requested that the District conduct an evaluation of Derrick to determine the cause of the episodes, as well as to address Derrick's dependence on prompts and his overall lack of independence and motivation. (*Id*., ¶ 82). On February 14, 2012, while the parties were engaged in an IEP meeting, Derrick was in the deafblind resource room with four adults. (*Id*., ¶ 84). While there, he had an especially serious episode in which he banged his head against the floor and lost consciousness, missing two days of school as a

result. (*Id.*). In a letter dated March 7, 2012, the District agreed to engage Dr. Petroff to perform the requested evaluation of Derrick's episodes. (*Id.*, ¶ 83). Derrick's parents expressed their concerns on a variety of issues related to Derrick's episodes, advancement, and education, including concerns that the dissonance between what Derrick's teachers would say to the class and what Derrick's intervenor would communicate to him through tactile sign was confusing Derrick and causing him to feel frustrated and unsafe. (*Id.*, ¶ 87, 88). The District issued Dr. Petroff a long list of questions to guide him in performing his evaluation, but he found "the District's data collection inadequate to determine the antecedents and consequences of the episodes" and ultimately concluded that he was unable to complete a functional behavioral assessment of Derrick. (*Id.*, ¶ 92, 93). Dr. Petroff recommended that the District revise its data collection system to obtain the necessary information to complete the assessment, and included Dr. Dlugos's neurological findings in his own report. (*Id.*, ¶ 95).

The District then attempted to obtain a second opinion about the potential medical causes of Derrick's episodes. (*Id.*, ¶ 96). On August 28, 2012, the District issued a request for permission to reevaluate Derrick. (*Id.*, ¶ 81). Specifically, the District was interested in conducting another neurologic examination and an audiological evaluation. (*Id.*). Derrick's parents refused this

request, given that Derrick was already being seen by a pediatric neurologist at CHOP. (*Id*., ¶ 97). Indeed, the expert retained by the District to conduct the second evaluation agreed that it was "99.9 percent likely that he would not find anything different from what CHOP had found, and that there was no need for him to offer a second opinion." (*Id*.). In lieu of an additional audiological evaluation, Derrick's parents provided the District and Dr. Petroff with a release so that he could speak directly with the staff at the Listening Center at Johns Hopkins, where Derrick had been regularly evaluated throughout his life. (*Id*., ¶¶ 98, 99). Derrick's parents also asked the District for additional information and reasons for the evaluations they requested, but the District never replied. (*Id*., ¶ 100).

Meanwhile, at some point in 2012 Derrick's episodes at school began to worsen. (*Id*., ¶ 104). He began to stop breathing, and his lips and face would turn blue. (*Id*.). He would continue to fall down and hit his head upon the ground. (*Id*.). His parents became extremely concerned and, with the support of Derrick's primary care physician, they elected to take him out of school. (*Id*., ¶¶ 6, 104).

In September 2012, the District initiated truancy proceedings against Scott Fahs,[1] and reported both of Derrick's parents to Children and Youth Services for

[1] While it is of no moment to our analysis below, we nonetheless note the lack of clarity concerning whether both Scott and Sherry Fahs were prosecuted for truancy or whether the citations charged Scott Fahs alone. For the sake of consistency, and because Document 25-4, the

child abuse and neglect due to Derrick's absences. (*Id*., ¶ 111, 112). The magisterial district judge found Mr. Fahs guilty of truancy on March 11, 2013. Mr. Fahs appealed this decision, and it was vacated by the Court of Common Pleas for York County. (*Id*., ¶ 113). Specifically, the Court of Common Pleas held that "the District knew very well the health and safety reasons [for] why Derrick was out of school" and that it was reasonable for Mr. Fahs to comply with the advice of Derrick's physician. (*Id*.).

In December 2012, as the truancy proceedings were ongoing, the District offered an updated IEP for Derrick. (*Id*., ¶ 7). However, the report stated that "the IEP team determined there is a need for additional data." (*Id*., ¶ 117). Thus, Plaintiffs contend that this IEP was never satisfactorily completed. (*Id*., ¶ 118). On January 24, 2013, Dr. Petroff issued a note containing suggestions for changing Derrick's education program. (*Id*., ¶ 12). Dr. Petroff concluded his suggestions by noting that "[t]hese elements of program design are merely suggestions and should be further refined and additional considerations should be explored with Derrick's full-time IEP team that includes his parents." (*Id*.). In February 2013, Derrick's IEP was revised, but again contained language indicating a need for additional data. (*Id*., ¶ 117). Also at some point in 2013, the District requested another

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Magisterial District Transcript Cover Page, lists Mr. Fahs as the only defendant in the proceedings, we shall reference him solely throughout.

functional behavior assessment, this time performed by a psychologist, Dr. Kevin Arnold. (*Id*., ¶ 103). Dr. Arnold suggested bringing Derrick back to the District in the hopes of triggering an episode of distress, which could then be observed for the purpose of data collection. (*Id*., ¶ 105). Derrick's parents were not comfortable with this plan and refused to allow Dr. Arnold to perform an assessment. (*Id*.). Later that year, the District suggested an evaluation by the neurobehavioral unit at the Kennedy Krieger Institute, to which Derrick's parents agreed. (*Id*., ¶ 108). However, the District could not bear the cost of the evaluation and Derrick's insurance would cover only a small fraction of the cost. (*Id*., ¶ 110). Thus, the idea of an evaluation by the neurobehavioral unit at the Kennedy Krieger Institute was abandoned. (*Id*.). Notably, no request for permission to reevaluate Derrick was ever issued to his parents during this time or subsequently. (*Id*., ¶ 9).

Plaintiffs allege that the District failed to offer an updated IEP for Derrick for the 2013-14 and 2014-15 school years. (*Id*., ¶ 7). The record is scant regarding communications between the parties from the end of 2013 to the present. (*See generally*, *id*.). On September 5, 2014, a due process hearing commenced in the Pennsylvania Office for Dispute Resolution. (Doc. 22, p. 5; Doc. 8, ¶ 1). On March 9, 2015, the Hearing Officer issued an Order concluding that "the District violated IDEA's requirements for timely and comprehensive evaluation of

Derrick." (Doc. 8, ¶ 8). The Order further required a comprehensive reevaluation of Derrick with "multiple specific components as well as five hours a day of instruction in the home until the reevaluation had been completed and an IEP developed that would enable Derrick to return to school." (*Id*.). However, the Order ultimately concluded that the District's failure to reevaluate as required by IDEA did not amount to a deprivation of a free, appropriate public education ("FAPE") for Derrick, and declined to order compensatory education, the primary form of relief his parents had requested. (*Id*., ¶ 10). Neither the District nor the Plaintiffs appealed this conclusion.[2]

On June 7, 2015, Plaintiffs asserted a Complaint (Doc. 1) alleging a variety of claims premised on the facts as summarized above. On August 3, 2015, Plaintiffs filed an Amended Complaint totaling sixty-five pages. (Doc. 8). The District responded with a Motion to Dismiss (Doc. 9), which was amended on September 4, 2015. (Doc. 19). The Amended Motion (Doc. 19) has been fully briefed (Docs. 20, 22 and 25) and is thus ripe for our review.

II. STANDARDS OF REVIEW

[2] "IDEA envisions a three-stage dispute-resolution process. The initial stage is a hearing, at which the parties are afforded enumerated procedural protections. Parties aggrieved by the findings and decision of the hearing process may appeal to the state's educational agency. Thereafter, IDEA permits an aggrieved party to file a civil action." *Jeremy H. v. Mount Lebanon Sch. Dist*., 95 F.3d 272, 275 (3d Cir. 1996). The District does not challenge Plaintiffs' decision not to appeal the resolution of the due process hearing to the Pennsylvania Department of Education as a failure to exhaust administrative remedies.

A. 12(b)(1)

When considering a motion to dismiss under Rule 12(b)(1), a court must distinguish between facial and factual challenges to its subject matter jurisdiction. *See Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). A facial attack challenges whether the plaintiff has properly pled jurisdiction. *Id.* "In reviewing a facial attack, the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." *Gould Elecs., Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000) (citing *Mortensen*, 549 F.2d at 891). A factual attack, in contrast, challenges jurisdiction based on facts apart from the pleadings. *Mortensen*, 549 F.2d at 891. "When a defendant attacks subject matter jurisdiction 'in fact,' ... the Court is free to weigh the evidence and satisfy itself whether it has power to hear the case. In such a situation, 'no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.'" *Carpet Group Int'l v. Oriental Rug Importers Ass'n*, 227 F.3d 62, 69 (3d Cir. 2000) (quoting *Mortensen*, 549 F.2d at 891). The instant case represents a facial attack. *Batchelor v. Rose Tree Media Sch. Dist.*, 759 F.3d 266, 271 (3d Cir. 2014); *see S.B. v. Trenton Bd. of Educ.*, Civil Action No. 13-0949, 2014 WL 5089716 at *3 (D.N.J.

October 9, 2014) (noting that where parties argue that the court "lacks subject matter jurisdiction because Plaintiffs failed to exhaust their administrative remedies . . . Defendants have launched a facial attack"). Thus, the Court must examine the allegations in the light most favorable to Plaintiffs.

B. 12(b)(6)

A motion to dismiss pursuant to Rule 12(b)(6) contends that the complaint has failed to assert a claim upon which relief can be granted. *See* FED. R. CIV. P. 12(b)(6). In considering such motion, courts "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips v. Cnty. Of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008) (quoting *Pinker v. Roche Holdings, Ltd.*, 292 F.3d 361, 374 n.7 (3d Cir. 2002)). To resolve the motion, a court generally should consider only the allegations in the complaint, as well as "any matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case." *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006) (citation and internal quotation marks omitted).

In general, a Rule 12(b)(6) motion tests the sufficiency of the complaint against the pleading requirements of Rule 8(a). Rule 8(a)(2) requires that a

complaint contain a short and plain statement of the claim showing that the pleader is entitled to relief, "in order to 'give the defendant fair notice of what the claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (alteration omitted)). While a complaint attacked by a Rule 12(b)(6) motion to dismiss need not contain detailed factual allegations, it must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). To survive a motion to dismiss, "a civil plaintiff must allege facts that 'raise a right to relief above the speculative level . . . .'" *Victaulic Co. v. Tieman*, 499 F.3d 227, 234 (3d Cir. 2007) (quoting *Twombly*, 550 U.S. at 555). Accordingly, to satisfy the plausibility standard, the complaint must indicate that the defendant's liability is more than "a sheer possibility." *Iqbal*, 556 U.S. at 678. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

Under the two-pronged approach articulated in *Twombly* and later formalized in *Iqbal*, a district court must first identify all factual allegations that constitute nothing more than "legal conclusions" or "naked assertion[s]."

Twombly, 550 U.S. at 564, 557. Such allegations are "not entitled to the assumption of truth" and must be disregarded for purposes of resolving a 12(b)(6) motion to dismiss. *Iqbal*, 556 U.S. at 679. Next, the district court must identify "the 'nub' of the . . . complaint – the well-pleaded, nonconclusory factual allegation[s]." *Id.* at 680. Taking these allegations as true, the district judge must then determine whether the complaint states a plausible claim for relief. *See id.*

However, "a complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits." *Phillips*, 515 F.3d at 231 (citing *Twombly*, 550 U.S. at 556-57). Rule 8 "'does not impose a probability requirement at the pleading stage,' but instead 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary element." *Id.* at 234 (quoting *Twombly*, 550 U.S. at 556).

III. DISCUSSION

As noted above, Plaintiffs bring myriad claims against the District, premised on the facts as stated in their sixty-five page Amended Complaint. (*See generally*, Doc. 8). Of these, two Counts are pertinent to the instant Motion to Dismiss. (Doc. 19). The first involves allegations of retaliation against Plaintiffs by the District, arising primarily from the truancy proceedings described above. The

District argues that Plaintiffs' retaliation claims spring from rights secured for Plaintiffs by the IDEA, and should therefore first be heard by the Office for Dispute Resolution, and not by this Court. (Doc. 20, pp. 5-8). In the alternative, the District argues that Plaintiffs have failed to satisfy the *prima facie* elements of a retaliation claim because they neglected to plead that the District's alleged "retaliatory action was sufficient to deter a person of ordinary firmness from exercising his or her rights." (Doc. 20, pp. 17-18). The District also alleges that the retaliation allegations are barred by the applicable statute of limitations, which in the Commonwealth of Pennsylvania spans two years.

The second claim pertinent to the District's Motion involves Plaintiffs' request for this Court to enforce the Hearing Officer's March 2015 Order. The District argues that Plaintiffs are not "aggrieved" under 20 U.S.C. § 1415(i)(2)(A) because the results of a pending investigation into the District's compliance have not yet been issued. (Doc. 20, pp. 14-16). As such, the District argues that Plaintiffs are not yet entitled to request injunctive relief.

We turn first to the arguments asserted in relation to Plaintiffs' retaliation claims, and begin first, as we must, with an analysis of the District's arguments regarding this Court's subject matter jurisdiction.[3]

[3] "It is familiar law that a federal court always has jurisdiction to determine its own jurisdiction." *U.S. v. Ruiz*., 536 U.S. 622, 628 (2002).

A. Subject Matter Jurisdiction over Plaintiffs' Retaliation Claim

Plaintiffs allege that the District retaliated against Sherry and Scott Fahs due to their engagement in protected behavior when they advocated for a FAPE on behalf of their son Derrick. (Doc. 8, ¶ 157). Plaintiffs' right to advocate for a FAPE on behalf of their son is protected by the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12131, *et seq*., and 28 C.F.R. § 35.130, and Section 504 of the Rehabilitation Act of 1973, *as amended*, 29 U.S.C. § 794 and 34 C.F.R. § 104.4. (*Id*., ¶ 156). By bringing unfounded truancy proceedings against Scott Fahs, Plaintiffs allege that the District's true intention was to retaliate against them for engaging in this behavior, in violation of the above listed laws. (*Id*., ¶ 157).

The District argues that Plaintiffs' retaliation claims are first subject to exhaustion under the IDEA. (Doc. 20, p. 5). The purpose of the IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs . . . ." 20 U.S.C.§ 1400(d)(1)(A). The Third Circuit has explained that

> Under the IDEA, a state is eligible for federal funding if it complies with several requirements . . . . [The state] must also implement specified procedural safeguards to ensure children with disabilities and their parents are provided with due process. These safeguards, known collectively as the IDEA's administrative process, provide parents with an avenue to file a complaint and to participate in an impartial due process hearing with respect

> to "any matter relating to the identification, evaluation, or educational placement of the[ir] child, or to the provision of a free appropriate public education to such child . . . ." *Id*. at § 1415(b)(6)(A).

Batchelor v. Rose Tree Media Sch. Dist., 759 F.3d 266, 271-72 (3d Cir. 2014). "A parent dissatisfied with the initial resolution of a complaint may take an administrative appeal." *Southard v. Wicomico Cnty. Bd. of Educ*., 79 F.Supp.3d 552, 557 (D.Md. 2015) (citing 20 U.S.C. § 1415(g)). It is this avenue which Plaintiffs took to address many of their grievances with the District regarding perceived shortcomings in Derrick's education, as described in the Factual Background, Section I, above. The District argues that Scott and Sherry Fahs should have also used the Office of Dispute Resolution's administrative process to address their retaliation claims.

Indeed, "[i]n the normal case, exhausting the IDEA's administrative process is required in order for the statute to "grant [ ] subject matter jurisdiction to the district court [ ]." *Batchelor*, 759 F.3d at 272 (quoting *Kominos v. Upper Saddle River Bd. of Educ*., 13 F.3d 775, 778 (3d Cir. 1994)). Courts have also held that "[e]xhaustion of the IDEA's administrative process is . . . required in non-IDEA actions where the plaintiff seeks relief that can be obtained under the IDEA." *Id*.[4]

[4] Congress provided an express rule of construction which clarifies this exhaustion requirement. It states:

> [n]othing in this chapter shall be construed to restrict or limit the rights, procedures and remedies available under the Constitution, the Americans with Disabilities Act of 1990

Thus, the relevant question before us is whether Plaintiffs may be remedied by the sort of relief available under the IDEA.

In order to determine this, the Third Circuit has counseled an injury-focused approach. *Id*. at 278. This approach was amply detailed in *Batchelor v. Rose Tree Media School District*, 759 F.3d 266 (3d Cir. 2014). There, the Third Circuit addressed an action brought by a disabled student's mother against the Rose Tree Media School District. Ms. Batchelor alleged retaliation against her for engaging in the same type of protected activity as the Plaintiffs here allege—advocating for the provision of a FAPE for her son. However, in *Batchelor*, the alleged injury inflicted took the form of the District bullying, intimidating, and harassing Ms. Batchelor during school meetings regarding her son's progress; refusing to timely reimburse her for her son's tutoring costs; replacing an effective tutor with one who presumably was less well-suited to her son's needs; and refusing to permit her son to participate in extra-curricular activities. *Id*. at 274. In short, the injuries alleged by Ms. Batchelor all related to stymieing her efforts to procure a FAPE for

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> [42 U.S.C. § 12101-12213], Title V of the Rehabilitation Act of 1973 [29 U.S.C. § 791-794f] or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the [IDEA administrative process] shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

20 U.S.C. § 1415(l). Courts have thus interpreted that "[e]xhaustion of the IDEA's administrative process is . . . required in non-IDEA actions where the plaintiff seeks relief that can be obtained under the IDEA." *Batchelor*, 759 F.3d at 272.

her son. More importantly in the instant analysis, the injuries could be remedied by improvements to his treatment and education by the District. *Id*. ("[W]e conclude that Appellants' retaliation claims asserted under Section 504 of the Rehabilitation Act and ADA "relate unmistakably" to the provision of a FAPE . . . and are thus subject to the IDEA's exhaustion requirement.").

We find the facts of the instant case distinguishable from those set forth in *Batchelor*. Though the initial behavior that allegedly triggered the retaliation was, in both cases, parents' advocacy for their child's rights to a FAPE as provided by the IDEA, the injuries that the Fahses allegedly endured versus those suffered by Ms. Batchelor are starkly different. All of the mistreatment Ms. Batchelor alleged took the form of retaliation against her in the context of her efforts to provide a FAPE for her son, or were inflicted upon her son specifically. They occurred, for the most part, physically within the school or in the context of letters sent to her about her son's FAPE. Plaintiffs here allege nothing of the sort. Rather, the retaliation they allege took the form of criminal proceedings against Mr. Fahs. These took place entirely outside of the school, and had nothing to do with how Derrick was treated by the District.

The injury-based approach requires us to examine whether the remedy for the specific retaliation alleged could in any way be provided for by the IDEA.[5] In the case of *Batchelor*, the Third Circuit held that the IDEA could indeed provide relief, because improvements to the education received by her son could alleviate Ms. Batchelors' concerns and alleged injuries. However, as is plainly clear by the facts of the Fahses' case, Plaintiffs' retaliation claims neither request relief available under IDEA, nor may they be remedied by any alteration to the educational placement of Derrick or to the provision of a FAPE for their son. Rather, the claims allege an entirely different type of harm from that which IDEA was designed to prevent: the stress and financial duress endured when one is subjected to a criminal proceeding, be it meritless or otherwise. To remedy *this* harm, Plaintiffs request compensatory damages and reimbursement of attorneys' fees and costs. (*See* Doc. 8, ¶¶ 161-62, 168).

Though neither party can direct the Court to a similar case within the Third Circuit,[6] we find an opinion issued by the District of Maryland to be instructive. In

[5] *See Batchelor*, 759 F.3d at 278 (explaining that where "both the genesis and the manifestations of the problem[s] are educational . . . the IDEA offers comprehensive educational solutions to directly address educational harms . . . .").

[6] The District points us to multiple cases in which parents alleged that various school districts retaliated against them in response to their efforts to procure a FAPE for their children. In a majority of these, courts held that the parents must first exhaust the procedural requirements of the IDEA. However, we find these cases inapposite because in them, parents only ever alleged retaliation in the form of a district providing an even worse educational environment for their children. Not a single one of these cases involved allegations of retaliation in the form of

Southard v. Wicomico Cnty. Bd. of Educ., 79 F.Supp.3d 563, (D.Md. 2015), a teacher who was also a parent of a disabled middle school student alleged that the district retaliated against her efforts to procure a FAPE for her son by *both* interfering with her son's educational evaluation at a new school, *and* by engaging in adverse employment actions against her personally. *Southard*, 79 F.Supp.3d at 557-58 (describing the "two varieties of retaliation" alleged in Ms. Southard's complaint) (emphasis added). The district court concluded that because the nature of Ms. Southard's adverse employment action claim was not educational, and "no change to her child's IEP could remedy, even in part, the professional injuries she allegedly suffered," exhaustion was not required. *Id*. at 559 (quoting *McCormick v. Waukegan Sch. Dist. No. 60*, 374 F.3d 564, 569 (7th Cir. 2004); *see also M.C. v. Perkiomen Valley Sch. Dist*., Civil Action No. 14-5707, 2015 WL 2231915 (E.D.Pa. May 11, 2015) (finding that "given the non-educational misconduct on

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truancy proceedings, or even other personal and private retaliation against the parents themselves. *See A.D. & R.D. v. Haddon Heights Bd. of Educ.*, Civil Action No. 14-1880 (JBS/KMW), 2015 WL 892643 (D.N.J. March 2, 2015) (involving no truancy proceedings against the parents and instead explaining that "Plaintiffs' retaliation claims . . . turn upon the educational placement of S.D."); *C.L. ex. Rel K.G. v. Mars Area Sch. Dist*., No. 2:14-cv-16666, 2015 WL 3968343 (W.D.Pa. May 18, 2012) (involving no truancy proceedings against the parents and alleging that the district lashed out against *C.L*. (and not his parents) by "imprisoning him in a closed room . . . for the sole purpose of retaliating against C.L. and his family for attempting to obtain an IEP."); *S.B. v. Trenton Bd. of Educ*., Civil Action No. 13-0949, 2014 WL 5089716, at *3-4 (involving no truancy proceedings, and finding that administrative remedies must be exhausted because "Plaintiffs' claims explicitly arise out of alleged violations of the IDEA requirements, including failure to locate and evaluate S.B. and the failure to provide an EIS.").

the bus and the district's alleged failure to separate M.C. and the co-student did not cause *educational* harm, the parents did not need to exhaust IDEA's due process hearing before invoking this Court's subject matter jurisdiction.") (emphasis added).

The same rationale applies here. Pursuant to their retaliation claims, Sherry and Scott Fahs allege that they (and not their son) suffered "humiliation and embarrassment" as well as "mental anguish, severe anxiety, disruption of their personal lives, and loss of enjoyment of the ordinary pleasures of every day." (Doc. 8, ¶¶ 159, 162). They also incurred debilitating litigation expenses in the course of undergoing "the arduous process of defending themselves." (*Id*., ¶ 160-61). Because (1) these injuries involve non-educational harm and were incurred well outside of the scope of their normal dealings with the District in relation to Derrick's education; (2) these injuries are distinct from their claims that their son was denied a FAPE; and (3) because these injuries cannot be remedied by the relief available under IDEA, the Court holds that Scott and Sherry Fahs need not exhaust the procedural remedies established by IDEA. Rather, the Court finds that it has subject matter jurisdiction over their claims.

B. The Merits of Plaintiffs' Retaliation Claims

Having established jurisdiction, we now address the District's arguments against the retaliation claims on their merits. Among other arguments, the District proposes that Plaintiffs' retaliation claims are barred by the applicable statute of limitations. (Doc. 20, pp. 19-20). We begin by considering the District's concerns in relation to the statute of limitations.

i. Statute of Limitations

Neither Section 504 nor the ADA contains their own statutes of limitations. Therefore we apply the "most closely analogous" statute of limitations. *Kingvision Pay-Per-View, Corp. v. 898 Belmont, Inc*., 366 F.3d 217, 220 (3d Cir. 2004) ("The rule is that courts look to the state statute 'most closely analogous' to the federal Act in need") (quoting *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995)). The District argues that because these claims "are born of and . . . rooted in the IDEA" (Doc. 20, p. 5), the two-year IDEA statute of limitations should apply. (Doc. 20, p. 19). However, we have already concluded that this argument is misplaced and the retaliation claim is in fact separate from Plaintiffs' IDEA claims. In the alternative, the District proposes that the Court should adopt Pennsylvania's two year personal injury statute. (*Id*.). As this proposal conforms to courts' prior treatment of claims arising under the ADA, we agree. *See Burkhart v. Widener Univ*., 70 Fed. Appx. 52, 53 (3d Cir. 2003) ("Because the ADA does not contain a

statute of limitations, we apply the most appropriate or analogous state statute of limitations. Here, Pennsylvania's state of limitations for both personal injury claims and claims under the PHRA is two years. We, therefore, will apply a two-year statute of limitations to the ADA claims.").[7] [8]

The statute of limitations for a retaliation claim begins "begins to run as soon as a right to institute and maintain suit arises." *Burkhart*, 70 Fed. Appx. at 53 (finding that a plaintiff who initiated claims of retaliation under the ADA nearly three years after his school allegedly failed to complete an institutional certification form was estopped due to the applicable statute of limitations). Here, the District first initiated truancy proceedings against Mr. Fahs "[a]fter Derrick left school in September 2012." (Doc. 8, ¶ 111). According to the District's brief, the proceedings began before the magisterial district judge in November 2012. (Doc. 20, p. 20). The proceedings concluded in March of 2013, when Mr. Fahs was found guilty. (Doc. 25-1, Ex. 1, p. 3). This finding was appealed to the Court of Common Pleas for York County, where it was eventually overturned when Judge Chronister vacated the conviction for truancy on September 25, 2013. (Doc. 8, ¶

[7] The Third Circuit also applied Pennsylvania's two-year statute of limitations to claims arising out of Title II of the ADA and Section 504 in *Disabled in Action of Pa. v. Se. Pa. Transp. Auth.*, 539 F.3d 199, 208 (3d Cir. 2008). However, it is notable that the parties to that case did not dispute that the claim in question indeed arose under the ADA. (*Id.*).

[8] The Plaintiffs also concur that a two year statute of limitations should govern Plaintiffs' retaliation claims, though their reasoning differs from that of the District. (Doc. 22, p. 19).

113). Plaintiffs argue that because the entire span of the truancy proceedings lasted nearly a year, only concluding when the charges were ultimately vacated, the prosecution represented a continuing violation from the time the citations were issued until September 25, 2013. (Doc. 22, p. 20). As such, their time to sue did not begin to run until after that final order by Judge Chronister was issued, making their claim timely. For the following reasons, we agree.

"Under the continuing violation doctrine, 'when a defendant's conduct is part of a continuing practice, an action is timely so long as the last act evidencing the continuing practice falls within the limitations period; in such an instance, the court will grant relief for the earlier related acts that would otherwise be time barred.'" *Zankel v. Temple Univ*., 245 Fed.Appx. 196, 198 (3d Cir. 2007) (quoting *Brenner v. Local 514, United Bhd. of Carpenters & Joiners of Am*., 927 F.2d 1283, 1295 (3d Cir. 1991) (declining to find that an employee's termination constituted a continuing violation of employer's earlier failures to accommodate)). The Third Circuit has held that, in order to determine whether a plaintiff may benefit from the doctrine,

> courts should consider at least three factors: (1) subject matter – whether the violations constitute the same type of discrimination, tending to connect them in a continuing violation; (2) frequency – whether the acts are recurring or more in the nature of isolated incidents; and (3) degree of permanence – whether the act had a degree of permanence which should trigger the plaintiff's awareness of and duty to assert his/her rights and

> whether the consequences of the act would continue even in the absence of a continuing intent to discriminate.

Cowell v. Palmer Twp., 263 F.3d 286, 292 (3d Cir. 2001). "The reach of this doctrine is understandably narrow." *Tearpock-Martini v. Borough of Shickshinny*, 756 F.3d 232, 236 (3d Cir. 2014).

Plaintiffs argue that after the District initiated the truancy citations, it acted in a continuing practice, first by prosecuting Mr. Fahs before the magisterial district judge, and then upon Mr. Fahs' appeal of his conviction, by acting in conjunction with the Commonwealth to present the case before the Court of Common Pleas. (Doc. 22, p. 20). Neither party points us to case law clarifying whether the prosecution and ensuing appeal following an initial citation may constitute a continuing act, or mere continuing ill effects under the continuing violation doctrine in this context. *See Cowell*, 263 F.3d at 293 (explaining that a continuing violation is occasioned by continual unlawful acts, not continual ill effects of an original violation). The absence of such case law is likely because under the ADA, the doctrine of continuing violations has been more often applied to cases of employment discrimination, *Tearpock*, 756 F.3d at 236, and not in the context of retaliatory criminal proceedings.

At the outset, we emphasize that, in accordance with the first prong of the analysis set forth in *Cowell* and articulated above, the truancy citations, hearing

before the magisterial district judge, and appeal resulting in the hearing before the Court of Common Pleas all dealt exclusively with the same subject matter, that is, Plaintiffs' decision to take Derrick out of school.

In regards to the second prong, frequency, we consider whether the acts were recurring or better described as isolated incidents. *See Cowell*, 263 F.3d at 292. We find the most important consideration here to be whether the continuing criminal proceeding constituted mere ill effects of the truancy citations, which, once initiated by the District, could not be halted; or whether the multiple stages of the proceeding represented ongoing and recurring affirmative acts by the District. The parties' briefings reveal a factual discrepancy on this issue, with Plaintiffs arguing that "the District could have ended the proceeding at any time before Judge Chronister's ruling by withdrawing the truancy citations, but chose not to do so." (Doc. 22, p. 21). In contrast, the District suggests, but does not openly state, that the magisterial district judge alone held the power to withdraw the citations. (Doc. 25, p. 17 n. 4). At this early stage of the proceedings, we must take all factual disputes in a light most favorable to Plaintiffs. However, even if we were not obliged to give Plaintiffs' assertion such credence, we are inclined to do so here. Plainly, the District's position is absurd. Had the District either withdrawn the citation, or (if truly unable to do so) abandoned its prosecution, the charges

against Mr. Fahs would have been nullified. As such, the District clearly had within its power the ability to halt the proceedings and obtain a favorable outcome for Plaintiffs.[9]

This analysis brings us to an important element of the District's argument. While we agree that a mere failure to withdraw the citation would not have risen to the level of an affirmative act, as required to establish a continuing violation, here such an argument is misplaced. It was not the failure to act affirmatively to withdraw the citations that kept the proceedings against Mr. Fahs in motion. Rather, the District remained actively involved in the continued prosecution by affirmatively choosing to continue to prosecute Mr. Fahs at the appellate level, as opposed to abandoning its position. In doing so, the District committed continuing violations that tolled the statute of limitations until the truancy conviction was withdrawn.

The District argues that the appeal taken by Mr. Fahs is what compelled the District to act, through the Commonwealth, to defend the magisterial district judge's ruling. Without such an appeal, the District suggests that it never would have had to act. Furthermore, the District argues that it never could have predicted

[9] Furthermore, it is notable that just one page further in its brief, the District states that "[t]he District's *refusal* to remove the truancy citations does not amount to an affirmative act of a continuing violation." (Doc. 25, p. 18) (emphasis added). Implicit in the District's statement that it "refused" to withdraw the citation is the understanding that the District indeed had the power to do so.

an appeal and, as such, Mr. Fahs's affirmative act forced the District's hand. (Doc. 25, p. 18). We disagree with this rationale. The act of taking an appeal in this context did not force the District to defend its position – rather, as we have stated several times now, the district could have done nothing, and in standing down, conceded the appellate process to Mr. Fahs. We emphasize that the proceeding before the Court of Common Pleas was de novo. Thus, the District was not defending, but instead was furthering an ongoing prosecution. Furthermore, given the myriad of medical evidence Plaintiffs had to justify their decision to take Derrick out of school, we find it unlikely that the District would have truly expected Plaintiffs to let the criminal conviction against Mr. Fahs stand without taking additional measures. The appeal was the result of Plaintiffs' legitimate exercise of their due process rights, and they should not be punished for pursuing that appeal by a tortured interpretation of the statute of limitations here.

Finally, the District argues that, pursuant to the analysis set forth above by the Third Circuit in *Cowell*, the act of filing truancy citations had a degree of permanence that should have "triggered Plaintiffs' awareness of and duty to assert their rights." We agree that the initial citations and conviction were possessed with an indicia of permanence. However, the very process that the District blames Plaintiffs for initiating–the appeal–indicates that Plaintiffs were preoccupied with

reversing the conviction and avoiding any lasting permanence it may have inflicted. Only after Plaintiffs had exhausted their appellate remedies would the conviction have become truly permanent. Surely, the third prong of analysis in applying the continuing violations doctrine, the requirement of permanence, was not meant to motivate parties to abandon any hopes of reversing a conviction, a process that could by itself take longer than the two year statute of limitations period, in order to pursue claims of retaliation before they expired. Such an argument as that put forth by the District defies both credulity and common sense, and we shall not give it credence here. Rather, we find that the District's acts in persisting with its criminal prosecution constituted continuing violations, and the statute of limitations was tolled until the Court of Common Pleas vacated Plaintiffs' conviction. As such, Plaintiffs' claim of retaliation was timely filed, and the District's argument for its dismissal on these grounds is denied.

ii. Whether Plaintiffs have stated a claim upon which relief may be granted

In order to establish a *prima facie* case of retaliation under the ADA, a plaintiff must show that (1) he or she was engaged in a protected activity; (2) he or she was subject to adverse action subsequent to or contemporaneously with such activity; and (3) there was a causal link between the protected activity and the adverse action. *Woodson v. Scott Paper Co.*, 109 F.3d 913, 920 (3d Cir. 1997)

(describing the requirements of a retaliation claim under the ADA, albeit in the context of adverse employment action). In order to establish a *prima facie* claim for retaliation under the Rehabilitation Act, Section 504, "plaintiffs must show (1) that they engaged in a protected activity; (2) that defendants' retaliatory action was sufficient to deter a person of ordinary firmness from exercising his or her rights; and (3) that there was a causal connection between the protected activity and the retaliatory action." *Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007) (citing *Robinson v. Potter*, 453 F.3d 990, 994 (8th Cir. 2006)).

The District proposes that Plaintiffs have pled insufficient factual matter to support their retaliation claims. In regards to Plaintiffs' claim made pursuant to the ADA, the District argues that Plaintiffs have not provided sufficiently specific details of their "advocacy" on behalf of Derrick. This is plainly not the case, as such an argument is utterly contradicted by the extensive factual background provided by Plaintiffs and retold in the factual history above. Plaintiffs' attempts to procure improvements to what they perceived as a deficient education provided by the District are amply detailed.[10] Given this vast history, we see no cause to deny Plaintiffs' retaliation claim under the ADA on these grounds.

[10] Among other examples, Plaintiffs relate their successful attempt in federal court to overturn the District's determination that it would be unable to educate Derrick at all, which had initially caused Derrick's placement at the Perkins School for the Blind. (Doc. 8, ¶¶ 53-54). Plaintiffs also explain their efforts to have Derrick placed in general education classes, where they felt he

The District also argues that Plaintiffs did not plead, with specificity, certain elements of their retaliation claim pursuant to § 504 of the Rehabilitation Act. Specifically, the District alleges that Plaintiffs did not state that the District's actions were sufficient to deter a person of ordinary firmness from exercising his or her rights, and that Plaintiffs in fact were deterred. Further, the District argues that Plaintiffs did not fully explain how the alleged retaliation caused them mental anguish. (Doc. 20, p. 18). In our view, it is unnecessary for Plaintiffs to explain exactly how an allegedly spurious criminal proceeding that initially resulted in a truancy conviction for Derrick's parents caused them mental anguish. Rather, taking their pleadings as true, it is impossible to see how such an ordeal could *not* cause Plaintiffs some degree of anguish. Thus, this argument is rejected. However, the District is accurate in its assertion that Plaintiffs did not in any way plead the legal conclusion that the District's alleged retaliatory acts would have deterred a person of ordinary firmness from exercising his or her rights. Plaintiffs instead ask us to infer that an ordinary person would be deterred, due to the conduct Plaintiffs allege. (Doc. 22, pp. 18-19).

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would benefit from time with his peers. (*Id*. ¶ 55). Plaintiffs also detail their request to have the Derrick reevaluated by the District in 2012, in order to determine the cause of his behavioral distress episodes, and to address Derrick's dependence on prompts and lack of motivation. (*Id*. ¶ 82). These examples represent just a sampling of Plaintiffs' attempts to advocate for a FAPE for their son.

At this early stage of the proceedings, we find it prudent to agree with Plaintiffs that, based on the factual record Plaintiffs have articulated, a person of ordinary firmness in Plaintiffs' position could have been deterred from pursuing his or her rights. The District asks us to dismiss their claim because Plaintiffs have not recited a mere legal conclusion—this misunderstands the standard articulated by *Twombly*. The more pertinent question is whether the factual record, presumed true, supports the legal conclusions necessary to make up a cause of action. Here the factual allegations are concrete, detailed and well pled. Plaintiffs allege that they were subject to criminal proceedings, large fines, and attendant anxiety and distress. The District also allegedly reported Plaintiffs to Children and Youth Services for child abuse and neglect. (Doc. 8, ¶¶ 111-113). Presuming, as we must, that these statements are true, they are sufficiently detailed and specific that Plaintiffs have successfully made out a case for retaliation at this early stage of the proceedings. To require Plaintiffs to spell out their cause of action with a mere recital of the elements of the claim in addition to these detailed factual specifications is unnecessary in order for their claim to survive. We make no judgment concerning Plaintiffs' ultimate ability to achieve success on the merits, but they may at least proceed to discovery on the allegations provided in their

Complaint. The District's Motion regarding Plaintiffs' retaliation claims is thus denied.

C. Subject Matter Jurisdiction over Plaintiffs' Request Enforcement of the Hearing Officer's Order

We turn now to the District's arguments concerning Plaintiffs' request for injunctive relief. Unlike the retaliation claims, here the District's arguments solely challenge the Court's subject matter jurisdiction over Plaintiffs' request for enforcement of the Hearing Officer's Order of March 9, 2015. As noted in the Factual History above, Section I, the Hearing Officer charged with reviewing Derrick's case concluded that "the District violated IDEA's requirements for timely and comprehensive evaluation of Derrick." (Doc. 8, ¶ 8). The Order required a comprehensive reevaluation of Derrick with "multiple specific components as well as five hours a day of instruction in the home until the reevaluation had been completed and an IEP developed that would enable Derrick to return to school." (*Id*.). Plaintiffs assert that the District has failed to comply with the Order with respect to both the reevaluation of Derrick and the mandated home education. (*Id*., ¶ 164). Plaintiffs seek enforcement of the Order pursuant to 20 U.S.C. § 1415(i)(2) of the IDEA and § 1983. (*Id*. ¶¶ 165, 168). The District challenges the Court's subject matter jurisdiction under both statutes. Because we concur with Plaintiffs' reasoning and find that subject matter jurisdiction is

established pursuant to 20 U.S.C. § 1415(i)(2), we see no need to address the District's argument regarding § 1983.

20 U.S.C. § 1415(i)(2) provides that "[a]ny party aggrieved by the findings and decision made pursuant [to an impartial due process hearing] . . . shall have the right to bring a civil action with respect to the complaint presented . . . , which action may be brought in a district court of the United States . . . ." *Id*. The Third Circuit has clarified that

> administrative exhaustion of a favorable decision is futile and barred by the express language of the statute in that only "aggrieved parties" may appeal. For those reasons, . . . a party seeking to enforce a favorable decision need not exhaust administrative remedies before filing suit in a court of law.

D.E. v. Central Dauphin Sch. Dist., 765 F.3d 260, 276 (3d Cir. 2014). Furthermore, "individuals seeking to enforce a favorable decision obtained at the administrative level are "aggrieved" for purposes of the IDEA and may properly pursue such claims in court." *Id*. at 278 (noting that where a party is successful before a hearing officer but the district in question refuses to carry out the decision, that party is as much aggrieved as they would have been had the administrative ruling been adverse).

The District argues that Plaintiffs may not appeal the Order to this Court because Plaintiffs were not "aggrieved by the findings," which were not "completely favorable for Plaintiffs." However, as the Plaintiffs seek enforcement

of only those portions of the Order that were in fact favorable, this argument is without merit.[11] *See Jeremy H. by Hunter v. Mount Lebanon Sch. Dist.*, 95 F.3d 272, 282 (3d Cir. 1996) (allowing plaintiffs to turn to the courts for enforcement of only certain portions of an Order); *Dudley v. Lower Merion Sch. Dist*., 768 F.Supp.2d 779, 781 (E.D.Pa. 2011) (same).

In the alternative, the District asserts that Plaintiffs have "elected" to pursue a complaint investigation process established with Pennsylvania's Bureau of Special Education ("BSE"), formerly set forth under 34 C.F.R. § 300.660-662, now § 300.151-153.[12] Because the result of that process was still pending, the District argued that Plaintiffs were not yet "aggrieved" for purposes of requesting injunctive relief. (Doc. 20, p. 15). However, the District's argument is no longer factually accurate or relevant. Less than two weeks after the parties finished

[11] As *D.E. v. Central Dauphin Sch. Dist*. allows for the enforcement of an entirely favorable decision under § 1415(i)(2), and *Jeremy H.* allows for enforcement of portions of an administrative decision that was not entirely favorable under § 1983, we see no reason to find that favorable portions of an order could not also be enforced under the same rationale as that applied by the Third Circuit in *D.E*.

[12] The District explains that "[a]n investigation is in process [sic] relative to the District's assurance form and compliance with the Order, and a Complaint Investigation Report (CIR) will be issued." (Doc. 20, p. 15). The Third Circuit has described this process as:

> the system established by the Commonwealth of Pennsylvania to implement a set of federal regulations that require state educational agencies establish procedures for receiving and resolving complaints relating to IDEA implementation. These regulations establish minimum procedures that state agencies must follow in resolving complaints, requiring, for instance, that agencies carry out an investigation and issue a written decision containing findings of fact, conclusions, and if necessary, corrective actions to achieve compliance. Complainants are also provided the right to appeal adverse decisions to the Secretary of the United States Department of Education.

Jeremy H., 95 F.3d at 282 (citing 34 C.F.R. § 300.660-300.662).

briefing the instant Motion, the complaint investigation process was, in fact, resolved. On October 13, 2015, the BSE provided Plaintiffs with a letter described as a response to their request for confirmation that the hearing order had been implemented. (Doc. 27-1). That document stated that "[b]ased on the copies of the NOREP/PWNs provided by the District, the Bureau has concluded that Hearing Order [sic] has been implemented as required by the Hearing Order #15359-14-15-AS." (*Id*.).

To the Court's knowledge, this scant, single-page response serves as the conclusion to the complaint investigation process and represents an exhaustion of Plaintiffs' procedural remedies.[13] Moreover, as the complaint was resolved in favor of the District, it has left Plaintiffs in the exact position that the District described would define them as "aggrieved." (Doc. 20, p. 15). The parties therefore appear to be in concurrence, and as Plaintiffs remain stalwart in their conviction that the District has not satisfactorily implemented the Order, we conclude that subject matter jurisdiction over Plaintiffs claim under 20 U.S.C. § 1415(i)(2) has been established. As noted above, because of this conclusion, we see no need to delve into the District's jurisdictional arguments pursuant to § 1983.

[13] According to Plaintiffs' brief, it appears that Plaintiffs may not take an appeal from this response. (Doc. 22, p. 11 ("Final CIRs [Complaint Investigation Reports] . . . are not appealable.")). In any case, the Third Circuit has held that plaintiffs need not launch an appeal order for a court to exercise subject matter jurisdiction over their claims. *See Jeremy H*, 95 F.3d at 283 ("[I]nvocation of the complaint procedures . . . will be elective, not mandatory.").

IV. CONCLUSION

For the reasons set forth above, we shall deny the District's Motion to Dismiss.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Defendants' Motion to Dismiss (Doc. 19) is **DENIED**.

s/ John E. Jones III
John E. Jones III
United States District Judge