This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania

Special Education Hearing Officer

DISMISSAL

Student's Name: E.T.

Date of Birth: [redacted]

ODR No. 16384-1516AS

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent[s]	*Pro se*
Red Lion Area School District 696 Delta Road Red Lion, PA 17356-9185	Zachary E. Nahass, Esq. CGA Law Firm 135 North George Street York, PA 17401

Dates of Hearing: 09/10/2015

Record Closed: 09/14/2015

Date of Decision: 09/25/2015

Hearing Officer: Brian Jason Ford

Introduction and Procedural History

This matter arises under the Individuals with Disabilities Education Act (IDEA)[1] and Section 504 of the Rehabilitation Act of 1973 (Section 504).[2] [redacted] (individually and collectively, Parents) requested this hearing on behalf of Student against the Red Lion Area School District (District).

This memorandum accompanies the final order in this case. That order dismisses this matter over what I presume to be the Parents' objection. Therefore, it is drafted in the form of a final decision and order, in accordance with the customary practice of the Office for Dispute Resolution (ODR). However, as explained below, I make no findings of fact.

The Parents filed the complaint initiating this matter on June 2, 2015 (Complaint). The Complaint was drafted by an attorney. However, except for drafting and filing the complaint, the Parents were *pro se* throughout.

The Complaint alleges that the Student is a student with disabilities as defined by the IDEA, and that symptoms of those disabilities began to manifest sometime during the 2012-13 school year. According to the Complaint, the Student exhibited severe symptoms of the disabilities during [sports] practice in late August of 2014 and required medical attention. That medical attention ultimately resulted in a formal diagnosis of the Student's disabling condition. The Student began to take medication for the disabling condition shortly thereafter.

The 2014-15 school year was the Student's senior (12th grade) year. According to the Complaint, the Student also sustained [sports] injuries unrelated to the disabling condition, and required surgery twice during the 2014-15 school year. These surgeries, and adjustment to the new medication, resulted in the Student missing a significant amount of school during the 2014-15 school year and a decline in the Student's grades. The Parents aver that the decline in grades reflects penalties for late assignments, that assignments were missed only as a result of the Student's disabilities, and that the Student's grades are not indicative of the Student's actual knowledge. Regardless, the Student failed two classes and, as a result, did earn enough credits to graduate.

The Parents claim that the District had an obligation under the IDEA to identify the Student as thought-to-be exceptional, evaluate the Student for IDEA eligibility and, if the Student qualified, offer an Individualized Education Program (IEP). Regardless of IDEA eligibility, the Parents further claim that the Student was protected under Section 504 and should have received accommodations. The Parents argue in the Complaint that either under an IEP or Section 504 accommodations, the Student should not have been penalized for late or incomplete work and would have enough credits to graduate.

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[1] 20 U.S.C. § 1400 *et seq.*
[2] 34 C.F.R. Part 104.4.

The Complaint is somewhat ambiguous as to whether the Parents were demanding current accommodations or special education services from the District. There is no demand for compensatory education. The only demands clearly presented are that I "determine that [Student] was eligible under the IDEA or Section 504, determine that [Student] was improperly penalized as the result of [Student's] disabling conditions, and determine that [Student] passed either of the courses that [District] has determined that [Student] failed." *Complaint* at 7.

While the hearing was pending, the Parents informed me during conference calls that the Student was offered admission to an out-of-state, competitive, four-year university, and that the Parents had taken the Student to the university for the start of school. During these conversations, the Parents confirmed that they were no longer seeking special education services or accommodations from the District. Rather, the Parents confirmed that they were only seeking a finding that the District filed to identify Student and offer special education services or accommodations to the Student.[3]

Throughout these proceedings, I explained to the parties that I have authority to make the requested finding and issue declarative relief. However, I also explained to the Parents that they bear the burden of proof. As just one example, in late June and early July of 2015, I became concerned that the Parents had failed to make disclosures and potentially were choosing to not attend the hearing. In an email of July 2, 2015, I wrote the following:

> The Parents have the burden of proof in this case. If the hearing convenes and they do not attend, I will have no choice but to dismiss this case. Similarly, the Parents' purported failure to make disclosures will significantly impede their ability to present their case, should the hearing convene as scheduled.[4]

The hearing was originally scheduled for July 6, 2015. It was continued to September 10, 2015.[5] Both parties explicitly confirmed their availability for September 10 via email,

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[3] When this information was relayed during a conference call, I was under the impression that the Student had received a diploma from the District. Both parties agreed that the Student took classes online during the summer of 2015, and that the District counts credits earned in those classes towards graduation. Further, receipt of a diploma is usually a condition for admission to competitive colleges and universities. During the hearing session on September 10, 2015, the District stated its position that the Student had not received a diploma and was currently enrolled in online classes to earn credit towards a diploma. NT at 8-9. The District took no position regarding the Student's admission to or attendance at the university.

[4] H-2 at 1.

[5] The hearing was first continued to August 19, 2015 as a procedural matter. I knew that the District's attorney was not available on that date when the hearing was scheduled, but I explained to the parties that they could think of August 19 as a placeholder while we all worked together to find a mutually-agreeable date. The parties explicitly moved to extend the decision due date to enable this.

and I sent notice of the new hearing date to the parties via email on August 18, 2015.[6] ODR sent an additional (but more official-looking) Due Process Hearing Notice on August 31, 2015, listing this hearing for the same date and time.[7] The District changed the location of the hearing from one District building to another, and notified the Parents and me of that change by email on September 9, 2015 at 9:44 a.m.[8]

I arrived for the hearing shortly after 9:00 a.m. on September 10, 2015, having been delayed by traffic. Witnesses for the District, the District's counsel, and the court reporter were all present, but the Parents were absent. I called the Parents' cell phone number – the same number that I used previously for conference calls – at 9:30 to ascertain their whereabouts. The phone rang and went to voicemail. I left a detailed message with my cell phone number, instructing the Parents to call me back. I explained that I would try twice more to call, and then would proceed without the Parents. I repeated the call at 9:35 with the same result. I repeated the call at 9:45 with the same result. The hearing convened *ex parte* at 9:47 a.m.[9]

During the hearing, the District averred that it did not receive disclosures from the Parents.[10] Given the Parent's failure to disclose, and their absence during the hearing, I took no evidence from them. The District did not present evidence either, but reiterated its position that the Student is not and never was eligible under either the IDEA or Section 504.

Discussion and Conclusions of Law

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief.[11] The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the

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[6] All correspondence to and from me in this matter was via email. The Parents replied to various emails throughout. No email to the Parents ever returned an error indicating a problem with transmission or receipt.

[7] H-1.

[8] Last minute location changes happen with some frequency in special education proceedings in Pennsylvania. In other cases, I have shown up at wrong locations and always have been redirected. In this case, the court reporter was not told about the location change and went first to the location listed on the ODR Notice. The District redirected the court reporter to the correct location.

[9] NT at 3.

[10] The Parents' failure to disclose evidence has been an ongoing issue, and I take the District at its word under the circumstances. Disclosure rules were explained to the Parents during conference calls, and the consequences of failing to disclose evidence was stated in the email quoted above. The IDEA's disclosure rules appear at 20 U.S.C. § 1415(f)(2)(A). Pennsylvania has a stricter disclosure rule at 22 Pa. Code § 14.162(k).

[11] *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006)

evidence rests in equipoise.[12] In this particular case, the Parents are party seeking relief and must bear the burden of persuasion.

The Parents cannot meet their burden as a matter of law. The Parents have not presented evidence to support their claims. As such, the Parents are not entitled to the relief that they seek, and this matter is dismissed.

Although dismissal is the only outcome that I can reach as a matter of law, I believe that it is important to note that this hearing was continued to accommodate the Parents' participation. One purpose of the continuance was to extend disclosure deadlines. I granted the continuance in deference to the Parents' *pro se* status. Further, the Parents had 23 days notice of the hearing, and were fully aware of the consequences of their non-participation. A corresponding order follows.

ORDER

Now, September 25, 2015, it is hereby **ORDERED** that the Parents' claims are **DENIED** and that this matter is **DISMISSED.**

/s/ Brian Jason Ford
HEARING OFFICER

[12] *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing S*hore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004).