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

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: [redacted]

Date of Birth: [redacted]

Date of Hearing: September 6, 2016

CLOSED HEARING

ODR Case # 17822-1516AS

Parties to the Hearing:	Representative:
Parent[s]	Pamela Berger, Esquire 434 Grace Street Pittsburgh, PA 15211
Burrell School District 1020 Puckety Church Road Lower Burrell, PA 15068	Patricia Andrews, Esquire Andrews & Price 1500 Ardmore Boulevard Suite 506 Pittsburgh, PA 15221
Date of Decision:	September 27, 2016
Hearing Officer:	Michael J. McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

[The student] ("student")[1] is a [mid-teenaged] student who has been identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEA")[2]. The student no longer resides in the Burrell School District ("District"). The student resided in the District from 2008 to 2013. Parent claims that the District failed to identify the student as eligible under IDEA when it evaluated the student in August 2009.

The parent filed her initial complaint in May 2016 and an amended complaint in July 2016. In her amended complaint, the parent claimed that the District withheld information required to be provided to her under IDEA, a withholding that prevented her from filing a special education due process complaint. The hearing officer requested from the parties offers of proof on the date that parent knew or should have known of the action that formed the basis of her complaint ("KOSHK date") to determine whether parent had complied with the 2-year statute of limitations filing requirement. (34 C.F.R. §§507(a)(2), 300.511(e); *see* G.L. v. Ligonier Valley School Authority, 801 F.3d 602 (3d Cir. 2015)).

Timely offers of proof were submitted by each party, and the hearing officer ruled that the May 2016 complaint, alleging that the August 2009

[1] To protect the student's confidentiality, the term "student" will be used instead of the student's name or gender-specific pronouns.
[2] It is this hearing officer's preference to cite to the implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818.

evaluation report failed to identify the student, was untimely as it was filed beyond two years of the action that formed the basis of the parent's complaint. The hearing officer noted, however, that allegations of withholding of information in the July 2016 amended complaint required an evidentiary record to see if the withholding exception applies to the 2-year statute of limitations filing requirement. (34 C.F.R. §300.511(f); *see* D.K. v. Abington School District, 696 F.3d 233 (3d Cir. 2012)).

For the reasons set forth below, I find the evidence on this record in terms of the withholding exception to be in equipoise. Therefore, parent has failed to carry her burden of persuasion on the withholding issue, and the complaint will be dismissed.

ISSUES

Did the District withhold information from the parent that prevented her from filing a timely complaint based on the results of the August 2009 evaluation?

FINDINGS OF FACT

1. The student moved into the District from another state in the 2008-2009 school year, the student's 2nd grade year. (Notes of Testimony ["NT"] at 31-32).
2. The student was evaluated [redacted]. (Parent's Exhibit ["P"]-1; NT at 38).

3. [Following the evaluation, t]he parent [redacted] indicated that possible "intervening factors" included a diagnosis of attention deficit hyperactivity disorder ("ADHD") and the student's attendance at seven previous schools. [Additionally,] the parent requested mediation. (P-2, Hearing Officer Exhibit ["HO"]-8).
4. Procedural safeguards [were sent to the parent] including a notice of parental rights in [redacted] and contact information for resources. (P-4; NT at 33-34).
5. The parent utilized the Office for Dispute Resolution ("ODR"), a statewide resource for initiating mediation services (among other dispute resolution services), to request mediation. ODR assigned a file number to the parent's request and arranged for a professional mediator to engage in mediation between the parties. (P-3, HO-8; NT at 38-39, 51-52).
6. In April 2009, the parties met for mediation, resulting in a mediation agreement. The mediation agreement indicated, among other things, that the parties agreed that student had "a confirmed diagnosis of ADHD" and that the District would complete "a comprehensive team evaluation for consideration of eligibility for special education by 9/30/09". On May 21, 2009, parent provided permission to the District to conduct the evaluation. (P-3).
7. In August 2009, the District issued its evaluation report ("ER") for eligibility for special education services. (P-5).

8. The August 2009 ER concluded that the student had a disability—the previously diagnosed ADHD— but did not require special education. Therefore, the District found that the student was not a student with a disability under IDEA. (P-5).
9. Parent testified that, at the meeting to consider the August 2009 ER, she was not provided with a notice of recommended educational placement ("NOREP") for declining to identify the student as a student with a disability under IDEA, including any notice of parental rights in special education matters and contact information for resources. Parent further testified that the District informed her at that meeting that she could not file a complaint on its determination. (NT at 46-48).
10. Parent testified that it was explained to her that eligibility for [redacted] and special education were somehow intertwined. (NT at 41-42).
11. The administrator at the meeting who, parent testified, shared this information with her did not attend the meeting related to August 2009 ER. (NT at 61, 65).
12. The August 2009 ER contains the following statement: "A copy of the Procedural Safeguards Notice is available upon request from your child's school. This document explains your rights, and includes state and local advocacy organizations that are available to help you understand your rights and how the special education process works." Parent testified she read that statement at the meeting and that, when

she asked about this statement, she was told that she had already received this information. (P-5 at page 14; NT at 53-54).

13. The administrator at the meeting who, parent testified, shared this information with her did not attend the meeting related to August 2009 ER. (NT at 61, 65).

14. In the school years at issue, the 2008-2009 and 2009-2010 school years, the District arranged with the local intermediate unit ("IU") to provide special education administrative services with a liaison at the District, either a building-level administrator or District school psychologist, an individual who also would serve as a decision-maker for the District in meetings with parents. (NT at 57-58, 60-61).

15. A District administrator testified that procedural safeguards are provided to parents whenever the District seeks permission to evaluate a student [redacted] and/or for special education and at the meeting held to discuss an evaluation. (NT at 62-63).

16. A District administrator testified that the IU destroyed District paperwork when the IU ceased to perform special education administrative functions for the District. It is unclear whether any NOREP or communication with the parent related to the August 2009 evaluation was part of any documentation maintained by the IU. (NT at 64, 69-70, 72).

17. The two witnesses who testified at the hearing, the parent and a District administrator, both testified credibly. There is no reason to

credit more or less heavily either witness's testimony, and so the testimony of both witnesses was given equal weight.

DISCUSSION AND CONCLUSIONS OF LAW

A parent must file a special education due process complaint "within two years of the date the parent…knew or should have known about the alleged action that forms the basis of the due process complaint". (34 C.F.R. §300.511(e); *see* G.L. v. Ligonier Valley School Authority, 801 F.3d 602 (3d Cir. 2015)). Where a school district withholds information that it is required to provide to a parent—including notice of actions it will take, or declines to take, regarding the identification, evaluation, placement, or provision of a free appropriate public education to a student and attendant procedural safeguards under IDEA—this filing requirement does not apply. (34 C.F.R. §300.511(f)(2); *see* D.K. v. Abington School District, 696 F.3d 233 (3d Cir. 2012)).

Additionally, generally and in special education due process hearings, the burden of proof has two aspects: the burden of production and the burden of persuasion. (Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005)). The burden of production is a procedural element in a hearing, determining the order and details of the presentation of evidence in a hearing (for example, the order of witnesses, who questions a witness first, the presentation of certain documents at certain times, etc.). The burden of

production may be assigned to one party over another, or it may even shift over the course of the hearing (e.g., the attorney for the parents questions witness X first followed by the attorney for the school district; with witness Y, however, the attorney for the school district questions the witness first followed by the attorney for the parents). Schaeffer, 546 U.S. 49, 56.

On the other hand, the burden of persuasion, as described by the Supreme Court, is the standard to determine "which party loses if the evidence is closely balanced". Schaeffer at 56. The burden of persuasion in special education due process proceedings rests, as it does in most hearings or trials, with the party who is seeking relief through the proceeding. In this case, that is the parent.

Therefore, the parent bears the burden of persuasion to show by a preponderance of the evidence that the District withheld information that prevented the parent from filing a complaint. As the Supreme Court further noted, when evidence is weighed in the balance, it normally tips decisively in one direction or the other-- "very few cases will be in evidentiary equipoise". Schaeffer at 58.

Here, though, this is the situation: On the question of whether or not the District withheld information that prevented the parent from filing a special education due process complaint related to the August 2009 evaluation, there is equally compelling evidence, almost exclusively in the form of testimony from the two witnesses in the matter, on both sides of the issue. In weighing the evidence on this record, this hearing officer often found

himself realizing that he was actually weighing evidentiary implications rather than evidentiary conclusions, or weighing legal arguments presented by the parties rather than evidence presented by the parties. Considered as a whole, the evidence is in true equipoise as to whether or not the District withheld information that prevented the parent from filing a special education due process complaint related to the August 2009 evaluation. Therefore, the parent, as the party who filed the complaint and is seeking relief through the hearing, has failed to meet her burden of persuasion.

Accordingly, the parent's complaint will be dismissed due to lack of timely filing and a failure to prove that the District withheld information that prevented her from filing a timely complaint.

CONCLUSION

The parent's complaint will be dismissed because parent has failed to carry her burden of persuasion that the withholding exception applies to the 2-year statute of limitations.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the evidence in this matter is in equipoise on whether or not the District withheld information that prevented the parent from filing a timely special education due process complaint related to the August 2009

evaluation. Therefore, parent has failed to carry her burden of persuasion that the withholding exception applies to the 2-year statute of limitations filing requirement. The complaint, therefore, is untimely and is dismissed with prejudice.

Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

September 27, 2016