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

DECISION

Child's Name: E. S.

Date of Birth: [redacted]

ODR No. 17621-15-16-AS

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent[s]	Pro Se
Marple Newtown School District 40 Media Line Road Newtown Square, PA 19073	Karl A. Romberger, Jr., Esquire Sweet, Stevens, Katz & Williams LLC 331 East Butler Avenue New Britain, PA 18901
Date of Hearing:	July 6, 2016
Record Closed:	July 12, 2016
Date of Decision:	July 21, 2016
Hearing Officer:	William F. Culleton, Esquire, CHO

INTRODUCTION AND PROCEDURAL HISTORY

The child named in this matter (Student)[1] is a late-teen-aged child and attends a private school. Student was an eligible enrollee of the school district named in this matter (District) from first grade (2004-2005 school year) until eighth grade (2011-2012 school year). Parents unilaterally withdrew Student from the District after eighth grade, starting Student in a parochial school in September 2012 for the beginning of ninth grade (2012-2013 school year). (NT 16-17.) Student never returned to the District after September 2012; sometime after withdrawal from the District, Parents enrolled Student in Student's present private school. (NT 16-17.) Student is classified under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA) as a child with the disability that IDEA labels as Specific Learning Disability.

Student's parents (Parents) requested due process on April 13, 2016, asserting a number of claims based upon the IDEA, asserting that the District failed to provide Student with appropriate services when Student was enrolled in the District in and before 2012. The District asserts that the IDEA statute of limitations bars Parents from proceeding, because Parents waited more than the two years allowed by the IDEA to ask for a hearing about events that happened in or before September 2012. 20 U.S.C. §1415(f)(3)(C).

Parents concede that the IDEA statute of limitations had expired on all of their claims when they filed this request for due process, but they argue that an exception to the statute of limitations applies, nullifying the limitations period. They assert that the District failed to provide them with

[1] Student, Parents and the respondent District are named in the title page of this decision and/or the order accompanying this decision; personal references to the parties are omitted here in order to guard Student's confidentiality. Student's Mother, who appeared for Parents and participated in all or most of the interactions with the District that are discussed in this decision, is referred to in the singular as "Parent".

their Procedural Safeguards Notice, thus "withholding" information required by the IDEA, Part B, to be provided to Parents. 20 U.S.C. §1415(f)(3)(D)(ii). The District denies this.

I convened a hearing solely to receive evidence as to the application of the "withholding" exception in this matter. This is the only assertion of Parents as to why the IDEA statute of limitations does not apply to bar all of their claims.

The hearing was completed in one session. I have determined the credibility of all witnesses and I have considered and weighed all of the evidence of record. I conclude that the "withholding" exception to the IDEA statute of limitations does not apply. Consequently I dismiss this matter in its entirety.

ISSUES

1. Did the District withhold the Procedural Safeguards Notice from Parents?

2. If so, did the District's withholding of the Procedural Safeguards Notice cause Parents to not request due process within two years of the actions forming the basis of their complaint?

FINDINGS OF FACT

1. In 2012, it was the custom, practice and policy of the District to make the Procedural Safeguards Notice physically available and offer to provide it at every IEP meeting. It was also the practice of the District director of pupil services and other District special education personnel to send it to parents with other correspondence, for example, when sending of a Notice of Recommended Educational Placement/Prior Written Notice (NOREP). (NT 59-60, 66-67, 71.)

2. When the director of pupil services and members of his staff corresponded with a parent regarding special education for the parent's child, they sometimes noted in the correspondence that the Procedural Safeguards Notice was enclosed, and whenever this appeared in correspondence, it was their practice to enclose a copy of the Procedural Safeguards Notice with the correspondence. (NT 61-62, 66-67; S 37 p. 1; 39, 43.)

3. Parents received the Procedural Safeguards Notice, or the Procedural Safeguards Notice was physically offered to Parents, during IEP meetings on September 13, 2010 and February 28, 2011. Parents received the Procedural Safeguards Notice by mail after the

February 22, 2012 IEP meeting. (NT 59-62, 66-67, 76, 78-79, 87-88; S 30 p. 4, 32 p. 4, 35, 37 p. 1, 39.)

4. Parents received form invitations to IEP meetings, containing reference to and describing the availability of the Procedural Safeguards Notice, dated September 7, 2010; February 23, 2011; and February 15, 2012. (S 29, 31, 34.)

5. Parents received NOREP forms containing specific reference to a parent's right to file for due process, dated February 28, 2011 and February 24, 2012. (S 33, 36.)

6. On March 19, 2012, Parent filled out a request for mediation form that specifically referenced due process. On March 21, 2012, the Office for Dispute Resolution (ODR) sent a form to Parents regarding their rights in view of their request for mediation; the form specifically referenced due process. On April 23, 2012, ODR sent a form acknowledging the conducting of an unsuccessful mediation; the form referenced due process. (S 41.)

7. On May 3, 2012, the Parents received the Procedural Safeguards Notice from the District in the mail. (NT 61-62, 66-67; S 43.)

8. Parents were aware of their right to request due process on June 7, 2012. (NT 76; S 45.)

9. The District provides a Special Education Manual on line, which can be accessed by parents. At pages 80-82, this manual references the Procedural Safeguards Notice, with a link to a PATTAN web site copy of the Procedural Safeguards Notice. The Manual does not state the two year statute of limitations, but at page 82, in the context of an "informal meeting" as one method to resolve disagreements, it references "timelines" that "run" for filing a due process request. Again at page 83, the manual, in context of a discussion of due process, notes that there are "many legal requirements and timelines associated with this action." (P 3 pp. 80-83.)

CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the

finder of fact.[2] In Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence[3] that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

In the present matter, the District asserts an affirmative defense, relying solely upon the IDEA statute of limitations. Its motion based upon this statute of limitations is classified as an "affirmative" defense, because it asserts a new issue based upon additional facts that are not merely asserted by way of denial of the facts or legal authorities in the complaint. See J.L. v. Ambridge Area School District, 2008 U.S. Dist. LEXIS 54904 at 27 to 30 (W.D. Pa. 2008)(unpublished); see also, Sechler v. Ensign-Bickford Co., 322 Pa. Super. 162, 166 (1983); Pa.R.C.P. 1030. Thus, the District initially had the burden of persuasion to prove that the IDEA statute of limitations defense applies in this matter. That it does apply is apparent on the face of the complaint, and indeed Parents concede that they allowed the statute of limitations to expire before bringing their claims. Thus, the District has satisfied its burden of persuasion as to the applicability of the IDEA statute of limitations to bar Parents' claims.

Nevertheless, Parents argue that an exception applies, and as they are thus asserting additional facts, the burden shifts to them prove that the exception applies. See J.L, 2008 U.S. Dist. LEXIS above at 29-30 (unpublished). Their assertion of new facts requires Parents to prove first that the District withheld the Procedural Safeguards Notice from them; and second, that the

[2] The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

[3] A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

District's withholding of the Procedural Safeguards Notice caused them to delay requesting due process for more than two years after the dates of the actions forming the basis of their complaints. 20 U.S.C. §1415(f)(3)(D)(ii).

CREDIBILITY

It is the responsibility of the hearing officer to determine the credibility of witnesses. 22 PA. Code §14.162 (requiring findings of fact); A.S. v. Office for Dispute Resolution, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact). I carefully listened to all of the testimony, keeping this responsibility in mind, and I found all witnesses to be credible and reliable.

WITHHOLDING EXCEPTION TO THE IDEA STATUTE OF LIMITATIONS

The IDEA at 20 U.S.C. 1415(f)(3)(C) is subject to only two explicit exceptions, set forth at 20 U.S.C. §1415(f)(3)(D):

> 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) (ii) the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.

The second, "withholding" exception applies only when the agency is charged with "withholding" of information "that was required under this subchapter to be provided … ." 20 U.S.C. 1415(f)(3)(D)(ii). The question remains as to what kinds of information are "required … to be provided" so that their "withholding" triggers the exception.

In D.K. v. Abington Sch. Dist., 696 F.3d 233, 246 (3d Cir. 2012), the Third Circuit held that parents "can satisfy this exception only by showing that the school failed to provide them with a written notice, explanation or form specifically required by the IDEA statute and regulations." I construe this to mean that parents must prove a failure to provide any "notice, explanation or form" that is "specifically required" to be disclosed pursuant to Part B[4] of the IDEA. The Procedural Safeguards Notice, which Parents specifically identify as the withheld information, satisfies this definition. 20 U.S.C. §1415(d).

In this matter, Parents have failed to show by a preponderance of the evidence that they did not receive the Procedural Safeguards Notice. In fact, Parent admitted that Parents did receive this standardized form document, which advises of the Parents' right to file for due process.

Parents argued at the hearing that they never knew about the IDEA statute of limitations. The evidence tends to support this argument circumstantially, because Parent in 2012 indicated in writing that she wanted to "reserve my rights to request a due process hearing at a later date." (S 45.) Parents also sought to corroborate this assertion through witnesses who indicated that Parents did not ever mention the statute of limitations, a fact that again tends to corroborate Parents' assertion circumstantially.

[4] The IDEA is contained within Title 20 of the United States Code, entitled "Education". 20 U.S.C.A. (Table of Contents)(West 2010). This title is divided into 78 chapters of which Chapter 33, "Education of Individuals with Disabilities", contains the IDEA. Ibid. Section 1415 of the Chapter, "Procedural Safeguards Notice", which contains the limitation provision and its exceptions, is located in Subchapter II of Chapter 33 ("Assistance for Education of All Children With Disabilities"). Ibid. This subchapter contains all of Part B of the IDEA. See, El Paso Independent School District v. Richard R., 567 F. Supp. 2d 918, 944-45 n. 35 (exception refers to entire Part B) (W.D. Tex. 2008), vac. in part on other grounds, 591 F. 3d 417 (5th Cir. 2009).

Yet neither of these pieces of evidence tends to confirm a lack of parental knowledge directly. Parent could have sought to reserve her rights on the May 2012 NOREP signature page, (S 45), in full knowledge of the two year time limitation. While deserving of limited weight, it is not particularly telling that Parents never discussed the two-year limitation period with others; it is not the kind of thing one would expect to be brought up in ordinary conversation, even in conversation about a child's rights. Thus, at best, the evidence is paper-thin in support of Parents' assertion.

Yet, even accepting that Parents never learned about the statute of limitations in the ensuing four years after Student left the District, their subjective knowledge is not the primary issue. The first question to be answered is whether or not the District "withheld" information about the statute of limitations. There is no evidence that it did so. Rather, it provided the Procedural Safeguards Notice to Parents more than once, and provided repeated written notices of Parents' right to due process and the availability of the Procedural Safeguards Notice.

Moreover, there is no evidence that the District, in 2012, did anything to cause Parents to delay requesting due process for the next four years. Parents argue that the District's Special Education Manual, accessible on line, does not mention the statute of limitations directly, and that it presently refers the reader seeking the Procedural Safeguards Notice to a bad web address. Yet, the Parents do not deny receiving the Procedural Safeguards Notice in 2012, so any confusion caused by the District web site is beside the point. Moreover, Parents' evidence was about how the District's Manual operates now; it does not establish any confusing tendency in 2012, when such confusion might arguably have caused a delay in filing for due process.

Parents provided no evidence that the Procedural Safeguards Notice in 2012 did not reference the two-year time limit, and I am not prepared to presume such a thing. On the contrary,

consistent with general law, there is a presumption that this document explicitly stated the two-year deadline for filing for due process at the time at which Parents received it, because that was required by law at the time, 34 C.F.R. §300.504(c)(5)(i); Advanced Disposal Servs. East v. NLRB, 820 F.3d 592, 604 (3d Cir. 2016).

CONCLUSION

On this record, therefore, I conclude that Parents have not proven by a preponderance of the evidence that the District either withheld information that the law required the District to provide to Parents, or caused Parents to wait for four years to complain about matters that occurred in or before 2012. Consequently, they have failed to establish that the "withholding" exception to the two-year IDEA statute of limitations applies to their claims, and their due process request will be dismissed.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the requests for relief are hereby DENIED and DISMISSED. It is FURTHER ORDERED that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

William F. Culleton, Jr. Esq.

WILLIAM F. CULLETON, JR., ESQ., CHO
HEARING OFFICER

DATED: July 21, 2016