

## **DECISION**

### **DUE PROCESS HEARING**

File No.: 14-001

### **PRELIMINARY MATTERS**

A prehearing conference by telephone conference call was convened for this matter on February 13, 2014. As a result of said conference, a Prehearing Conference Order was entered herein. Said Order is incorporated by reference herein.

Prior to the hearing, Respondent filed a Motion to Dismiss Petitioners' FERPA claims. The parties resolved this issue prior to hearing and Petitioners withdrew the claims that were in contest.

Also prior to the hearing, a Motion Hearing by telephone conference call was convened on April 11, 2014. Respondent's motion to sequester witnesses was granted. The ruling on Respondent's motion to exclude news media and to restrict recording devices was that news media members would be allowed to attend the hearing which had been designated open by the parents; that the court reporter would prepare the one and only official record of the testimony; that other electronic devices

are distracting and would need to be turned off during the hearing; and that each party would be allowed to make one unofficial audio recording of the hearing for their own purposes and subject to privacy considerations. Petitioners' motion in limine to restrict testimony concerning the licensing problems of petitioners' psychologist was denied because there was no jury and because the evidence had not yet been heard. Petitioners' motion for reasonable accommodations for counsel was granted and it was ruled that Respondent would provide a comfortable chair for counsel and that there would be frequent breaks during the hearing provided that the testimony proceeded efficiently. Said rulings are incorporated by reference herein.

Counsel for the Respondent filed an unopposed motion to extend the hearing officer's decision deadline. Said motion was granted. The deadline for the hearing officer's decision is June 9, 2014.

Prior to the hearing, the parties filed a joint prehearing memorandum pursuant to the direction of the hearing officer. Said memorandum contains numerous stipulations of fact, and it defines the issues presented for purposes of this due process hearing. Said memorandum also contains information concerning exhibits and witnesses. The parties' joint prehearing memorandum is incorporated by reference herein.

The due process hearing was held on four consecutive days from April 14 – 17, 2014. The administrative record is voluminous. Petitioners' exhibits 1-66 were admitted into evidence. Respondent's exhibits 1 – 230 were admitted into evidence. The documentary evidence totals approximately 1,700 pages. Twenty-one witnesses testified at the hearing. The hearing transcript exceeds 1,200 pages. All evidence submitted herein has been considered.

Subsequent to the hearing, the student's father emailed the hearing officer directly for advice complaining that Petitioners' Advocate had hired a separate attorney and had engaged in settlement discussions with counsel for Respondent without the consent or authorization of the parents. The hearing officer declined the parent's request for advice because the hearing officer is impartial and cannot advise either party. Because the email from the father was ex parte, the hearing officer forwarded a copy to counsel for Respondent. Because the father was represented by counsel, a copy of the email was also forwarded to counsel for Petitioners. The matter was not raised again, and no other action was taken with regard to the father's email.

Subsequent to the hearing, both parties filed written briefs and proposed findings of fact. All proposed findings, conclusions and supporting arguments submitted by the parties have been considered. To the extent that the proposed

findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and views stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

Personally identifiable information, including the names of parties and similar information, is provided on the cover sheet hereto which should be removed prior to distribution of this decision to the public. FERPA, 20 U.S.C. § 1232(g) and IDEA § 617(c).

### **ISSUES PRESENTED**

The issues presented at the due process hearing, as identified by the parties in the prehearing conference and confirmed in their joint prehearing memorandum, are as follows:

1. Whether the school district's evaluation of the student prior to the eligibility meeting on January 31, 2014 was appropriate?;

2. Whether the school district violated IDEA by determining that the student was not eligible for special education?;

3. Whether the school district denied the parents meaningful participation in the eligibility determination process?; and

4. Whether the school district violated its child find obligation?

It should be noted that in their post hearing brief, petitioner argued that respondent denied FAPE to the student. This issue is beyond the issues as stated at the prehearing conference and confirmed in the parties' prehearing memorandum. In addition, because the student is found to be not eligible for special education, he had no right to a free and appropriate public education under IDEA.

### **FINDINGS OF FACT**

Based upon the parties' stipulations of fact as contained in their joint prehearing memorandum, the hearing officer makes the following findings of fact:

1. Petitioners moved to the school district from Idaho on or about the 1st of January, 2013 and enrolled the student in the school district's elementary school. He was assigned to 6th grade and began classes on or about January 3, 2013. (Stip-1).

(References to stipulations of fact in the parties' joint prehearing memorandum are hereby referenced as "Stip-1," etc.).

2. The student was accepted by respondent into the advanced learning lab accelerated (gifted) class at the elementary school where he completed the 6th grade. (Stip 2)

3. During January of 6th grade, the student was tested by respondent for admission into its secondary advanced learning lab program, along with the other 6th grade students seeking admission. The student was accepted into respondent's secondary advanced learning lab accelerated program at one of respondent's middle schools for 7th grade. (Stip 3)

4. The secondary advanced learning lab testing performed by respondent's gifted services department does not include math placement testing; rather, it is handled by individual schools. The student participated in math placement testing and qualified for advanced math. (Stip 4)

5. The student began 7th grade at the middle school on or about August 20, 2013. (Stip 5)

6. The student's mother met with respondent's gifted and talented coordinator on November 18, 2013. (Stip 6)

7. A meeting was held at the student's middle school on November 20, 2013 regarding the student. In attendance were the parents, their advocate and school district personnel. (Stip 7)

8. Petitioner submitted a written request for special education evaluation under IDEA to the school district on November 20, 2013. (Stip 8)

9. Respondent's personnel accessed the cumulative file of the student on December 13, 2013 and January 10, 2014. (Stip 9)

10. An IEP eligibility determination meeting was held at the middle school on January 31, 2014. (Stip 10)

11. The student was found to be not eligible for special education services under IDEA. (Stip 11)

12. Petitioners disagreed with the eligibility determination. Petitioners filed a due process complaint on February 5, 2014 and provided copies to the school district on February 6, 2014. (Stip 12)

13. A settlement meeting was held by the parties on February 21, 2014. The parties did not reach settlement. (Stip 17)

14. Later on February 21, 2014, respondent through counsel submitted to petitioners' counsel a written offer of settlement. (Stip 18)

15. Petitioners rejected the district's written offer of settlement. (Stip 19)

Based upon the evidence in the record, the hearing officer makes the following findings of fact:

16. The student skipped 3rd grade in Idaho. The teachers and school officials in Idaho made some informal accommodations for the student at the request of his parents, but the student had no IEP or 504 plan while he was in Idaho and none of the accommodations were memorialized in any written document. (T of the student's mother) (References to exhibits shall hereafter be referred to as "P-1," etc. for the parents' exhibits; "R-1," etc. for the respondent's exhibits; references to testimony at the hearing is hereafter designated as "T".)

17. Respondent's K-12 enrollment exceeds 72,000 students. Of those students, over 7,900 have been identified as eligible under IDEA. The school district has approximately 200 students in its gifted program who also have an IEP or 504 plan. (T of respondent's special education director for secondary schools)

18. The student's 6th grade teacher at respondent's elementary school, who taught him in the gifted accelerated learning lab program, did not suspect that the student had a disability, and the student did not display any red flags that he might have a disability in her class. The student had some difficulties that were the result of his missing the training time at the beginning of the year and from his moving from a different state. (T of respondent's 6th grade gifted teacher)

19. The student's lowest grade at the end of 6th grade were a C+. (R-170; T of respondent's 6th grade gifted teacher)

20. On October 15, 2013, the student's mother e-mailed the guidance counselor at the student's school stating that "...school is going great for him. He has all A's in his subjects and seems happy at (the middle school). We are however having problems with him at home. We could use some help on how to handle this. Do you have any recommendations for a child psychologist? ..." (R-106)

21. On approximately October 17, 2013, the student began receiving therapy from a therapist at the company run by petitioners' expert psychologist. The therapy notes for these sessions indicate that the therapy addressed difficulties the student was having at home, especially concerning discipline and oppositional incidents. The therapy notes do not reflect any school-related concerns until his ninth session with the therapist on November 21, 2013. (R-174)

22. On November 5, 2013, the student's mother visited the middle school. She spoke with the student's guidance counselor about the availability of a §504 plan for the student. The guidance counselor then walked her over to the office of the assistant principal, who was the administrator for Section 504 plans. The assistant principal pulled out the student's grades and saw that the student had all A's and one A- for the first term which had recently ended. The assistant principal told the student's mother that the student did not qualify for a 504 plan or an IEP because of

his good grades. The student's mother also informed the vice principal that the student had recently been diagnosed with Asperger's and inquired about potential services. (T of respondent's guidance counselor; T of respondent's assistant principal; R-182)

23. The student's mother e-mailed the vice principal again the next day on November 6, 2013. He replied by e-mail within the hour informing the mother that she needed to write a letter to initiate the Section 504 eligibility process and that there were no guarantees, but they could bring it before a 504 committee. That same night, the student's mother responded by e-mail saying that, "We will write a letter for the 504 plan and get it to you. The real issue here is even though (the student) is at grade level, he is not learning to the best of HIS ability. Our main concern is finding a way for him to learn and keep him engaged and challenge him. We like his teachers but even the (gifted) math classes require no effort. The C he has right now is due to the illness and his not being able to ask his teachers for make-up work. If you look at last quarter, he had straight A's. Not one time did (the student) do work at home or study to achieve this." (R-107; T of respondent's vice principal)

24. Respondent never received a letter to initiate the 504 process. (T of respondent's vice principal)

25. On November 18, 2013, the student's mother sent an e-mail to a number of his core teachers. In the e-mail, she stated that the student loved the

middle school but that, "he is having some problem behaviors at home because he doesn't know what to do with himself, and his therapist thinks this may be due to boredom." (R-105)

26. A meeting was scheduled for November 20, 2013. The parents attended, along with their advocate. The parents requested additional ways to keep the student stimulated and his teacher suggested the Science Fair and Knowledge Bowl. The parents and teachers agreed upon a number of interim measures that would be taken to help the student, including ways to prevent the student from missing his "TEAL time" preferred activity even if his grades did not merit it. During the meeting respondent's staff gave the mother the name of a child psychologist in response to the mother's previous request for a recommendation of a psychologist. Petitioners' advocate was offended by the school district giving the parent the name of another psychologist after his wife had already begun working with the student. At the conclusion of the November 20, 2013 meeting, the student's parents submitted a signed request to have the student evaluated for special education eligibility under IDEA. (P-35; T of respondent's vice principal; T of respondent's special education coordinator; T of petitioners' advocate)

27. "TEAL time" is time built into the school day by respondent for students to seek additional help from teachers and make up assignments. When students' grades fall below a certain threshold, they must visit the class with the low

grade during TEAL time. If not, they may engage in a preferred activity instead. Respondent's band teacher occasionally forgot to excuse the student's missing assignments or absences, causing the computer system to reflect a problem. After the student's mother informed respondent's special education coordinator of this problem, the coordinator arranged a computer override so that the student would not miss his preferential activity even if a teacher forgot to excuse an absence or a missing assignment. (R-187; R-137; T of respondent's special education coordinator; T of respondent's band teacher)

28. The parents were provided with special education testing consent forms on approximately November 25, 2013 and respondent received them back on approximately December 6, 2013. (R-40; R-122; R-126)

29. After requesting that the school district evaluate the student for special education but before that evaluation was completed, the parents requested their expert psychologist to conduct testing on the student. Petitioners' advocate approved the district's testing noting that there would be no mixing of tests between the district and the testing that petitioners' psychologist intended to perform. (T of petitioners' psychologist; R-122; P-2)

30. Respondent's school psychologist conducted three classroom observations of the student on December 13, 19 and 20, 2013 as a part of the evaluation process. In band class, the student was observed to be consistently

engaged in practice. His social interactions were appropriate and did not hinder him from learning. In math class, the student was completely engaged. It was very participative (sic) and asked questions when he did not understand a concept. He displayed appropriate eye contact and had conversations with his peers. In English class, the student worked consistently well with group members in doing a reading of "A Christmas Carol." The student acted out some parts of the play in what appeared to be a British accent in an effort to be funny. (T of respondent's school psychologist; R-13, R-14, R-15)

31. The teacher rating scales on the BASC-2 and the GADS rating forms did not demonstrate areas of at risk or clinically significant concerning with the exception of the band teacher. The band teacher did not base his observations on first-hand observations, but rather included behaviors that the parent had told the band teacher. (T of respondent's school psychologist; R-5-12, R-17, R-18, R-23-25; T of respondent's clinical psychologist)

32. The school psychologist also sent a survey to the student's teachers. In response to the survey, the student's teachers noted no behavioral problems. One teacher said he is "always on task, an active engaged learner." (R-136)

33. In history class, the student regularly interacted with peers, including during warm-ups. In band class, the student got along with his peers and participated. (T of respondent's history teacher; T of respondent's band teacher)

34. Respondent's school psychologist asked respondent's clinical psychologist to administer the ADOS-2 to the student. The ADOS-2 is the gold standard of autism assessments. Respondent's clinical psychologist also recommended that the district include communication, or pragmatic testing, because they are an important criteria in diagnosing autism. Respondent's special education coordinator contacted the parents and they provided consent for the ADOS-2 and communication testing to be part of the district's evaluation of the student. (T of respondent's school psychologist; T of respondent's clinical psychologist; R-40, R-134, R-135; T of Respondent's Expert No. 2)

35. The school district used three of the BASC-2's five components in assessing the student. The BASC-2 manual provides that the five test components may be used in any combination. (T of respondent's clinical psychologist; R-1-12, R-189; T of respondent's expert No. 1)

36. The student's father filled out the BASC-2 forms that were sent home by the school district. When the school psychologist used the computer to score the BASC-2 parent rating scale, the computer software issued a caution with regard to the results because of inconsistent responses. The computer software that rates the scales has cautions built into it to determine when inconsistent responses are being provided by one of raters in order to ensure honest responses. Accordingly, the school psychologist had to be very careful in interpreting the results of the father's rating

scales on the BASC-2. (T of respondent's school psychologist; T of the student's father; R-2)

37. Respondent's school psychologist administered the Wechsler Intelligence Scale (WISC-IV) to the student. The assessment revealed a full-scale IQ of 124, which places the student at the 95% percentile. The student's IQ places him solidly in the above average category, but he is not extraordinary in terms of intelligence level. The school psychologist also had Respondent's staff administer the Woodcock-Johnson Tests of Achievement (WJ-III ACH). The assessment revealed that the student had basic reading skills in the high average range; reading comprehension skills in the high average range; math calculation skills in the high average range; math reasoning skills in the high average range; written expression skills in the average range; and academic fluency in the high average range. (T of respondent's school psychologist; R-45, R-47, R-26-32; T of Respondent's Expert No. 2)

38. Respondent's clinical psychologist administered the ADOS-2 assessment to the student. The results of the ADOS-2 assessment indicated that the student had a comparison score of 1 on the assessment. The comparison score rating scale on this assessment is as follows: 1 to 2 means minimal to no evidence of autism; 3 to 4 means low evidence of autism; 5 to 7 means moderate evidence of autism; and 8 to 10 means strong evidence of autism. The student did not meet the autism or autism spectrum

cutoffs, and he showed minimal to no symptoms of autism. (T of respondent's clinical psychologist; R-49; P -4; T of respondent's expert No. 1)

39. After administering the ADOS-2, respondent's clinical psychologist decided to conduct a mental status evaluation of the student and to administer the self-rater component of the BASC-2. The BASC-2 is a good measure of anxiety. The BASC-2 self-rater report did not show any scale scores in the clinically significant range which would suggest a high level of maladjustment. The only scores for the student that were in the at-risk range involved inattention and hyperactivity. The mental status evaluation revealed that the student did not meet criteria for areas of severe depression, anxiety or pervasive development disorder/Asperger's. The clinical psychologist also observed the student in band class for approximately sixty minutes on January 10, 2014; the student laughed and joked with his fellow students during class, and his focus, reciprocal communication and shared enjoyment appeared typical. (T of respondent's clinical psychologist; R-3, R-4; P-4; T of respondent's expert No. 2)

40. Respondent's speech pathologist conducted speech language, or pragmatic, testing of the student. The speech language pathologist administered the social language development test – adolescent to the student. The test was not normed for the student's age, and when respondent's special education director for secondary schools realized that the test was not age appropriate, he directed the

speech language pathologist to administer the appropriate aged test to the student. The speech pathologist then gave the correct test to the student for his age. The results of the age appropriate speech language assessment were that the student was in the average range for his age. (T of respondent's speech language pathologist; R-19, R-20, R-154, R-172)

41. The mistake by the speech language therapist in giving the wrong assessment was not that much of a concern in this case because the scores on the second test were actually lower than the scores on the first test. (T of respondent's expert No. 2)

42. Respondent's staff prepared a team evaluation summary report that summarized all of its observations and assessments and other data used in its evaluation of the student. (R-47)

43. Respondent's evaluation of the student was comprehensive, thorough and appropriate. Respondent used technically sound instruments to assess the child. The assessments were conducted by trained and knowledgeable personnel in accordance with their instructions. The student was assessed in all areas related to suspected disability. The assessment included classroom observations of the student and it employed a variety of assessment tools and strategies to gather relevant data. (T of respondent's expert No. 1; T of respondent's expert No. 2; record evidence as a whole)

44. After the Christmas break, the student's parents withdrew him from his core classes. The parents' advocate wrote a letter to respondent on January 3, 2014 notifying the school district that the student was withdrawing from his core classes and that the evaluation of the student by petitioners' psychologist was complete and that a report would be forthcoming to the district. At this point, the student's mother felt that school district staff had been harassing her. The advocate's letter notified the district that all contacts with petitioners should be directed to the attention of the father and not the mother. The letter also stated that the advocate's official involvement as an educational advocate for the parents would be terminating at the end of that day. (R-140; P-7)

45. The district withdrew the student from his core classes, as requested. The withdrawal form indicates that at the time of withdrawal in the second term from October 28, 2013 to January 13, 2014, the student had the following grades: Math 2, A-; CTE Intro, A-; English accelerated, A; Utah History, A-; Int. Science, A-. The student had a poor grade in band, but that was because he had not yet completed two scale tests. (R-184; T of respondent's math teacher; T of Respondent's history teacher; T of respondent's band teacher)

46. The school district provided the petitioners with results of their evaluations that had been completed approximately one week before the eligibility meeting. Respondent did not provide the psychoeducational evaluation reports by

the school psychologist or the clinical psychologist because they had not yet been completed. (R-185; T of respondent's special education coordinator; T of respondent's school psychologist; T of respondent's clinical psychologist)

47. In approximately December 2013, respondent's special education director learned that the cumulative file for the student was missing. She assumed that it would be quickly found. (T of respondent's special education director)

48. On approximately January 17, 2014, respondent's special education director and the special education director for secondary schools invited petitioners' advocate and another advocate from the same firm to have lunch with them. They met at a Texas Roadhouse restaurant. The lunch lasted approximately one hour. During the lunch, the school officials described their programs and philosophy and the petitioners' advocates described the philosophy and functioning of their organization. The tone at the lunch was cordial. During the lunch, petitioners' advocate notified respondent that they had "an Achilles' heel." The special education director for secondary schools asked what the Achilles' heel was, and petitioners' advocate replied that it was the way that respondent treated twice exceptional children, that is those who are both gifted and have a disability. The special education director for secondary schools asked for clarification, but none was provided. During that lunch, respondent's special education director learned that the student's cumulative file was still missing. Respondent faxed the Idaho schools for the missing

documents. The initial response from the Idaho school district was incomplete, so the special education director for secondary schools made additional telephone calls to obtain additional documents. The special education director for secondary schools then e-mailed petitioners' advocate on January 23, 2014 to tell him once he had obtained the grades from the Idaho schools. The special education director for secondary schools also provided the information to the advocate for the parents at the eligibility determination meeting. (T of respondent's special education director; T of special education director for secondary schools; T of petitioners' advocate; R-228; R-153; P-54)

49. Petitioners' advocate traveled to Spokane, Washington on the way to Idaho to independently try to obtain additional information concerning the student's elementary school documentation, but as he arrived, he received notice from the Idaho Schools that they would not meet with him without a subpoena or court order. (T of petitioners' advocate; P-65)

50. In mid-January 2014, the student began receiving tutoring from petitioners' tutor who works for the firm owned by petitioners' psychologist. (T of Petitioners' tutor)

51. On January 15, 2014, respondent's clinical psychologist e-mailed the other members of the eligibility team on respondent's staff and suggested a pre-meeting to review test results and to ensure that paperwork had been finished.

She made clear in the e-mail that the pre-meeting was not to be a predetermination of the result. In the e-mail, she mentioned a recent Idaho hearing officer decision and suggested that the team consider teacher reports and class observations involving both core and elective classes and including group work and public speaking to determine any difficulties with social interaction and rigid thinking. (R-148; T of respondent's clinical psychologist.)

52. The members of respondent's staff who were on the eligibility team held a pre-meeting. The team members did not make an eligibility determination at said meeting. (T of respondent's school psychologist.)

53. The eligibility team members employed by respondent had an open mind at the eligibility meeting concerning whether the student was eligible for special education. (T of respondent's history teacher; T of respondent's speech language pathologist; T of respondent's school psychologist; T of respondent's clinical psychologist)

54. The eligibility committee meeting was convened on January 31, 2014. Respondent's special education director for secondary schools explained the eligibility criteria under IDEA and asked the parents' advocate whether the parents wanted to share any information. They decided to defer until the end of the meeting. The school district's evaluators presented their test results and discussed them during the meeting. Respondent's staff gave petitioners and their advocate the opportunity to

ask questions and share information with the rest of the team on a number of occasions during the two and a half to three hour eligibility meeting. Petitioners' advocate also withdrew a question that petitioners' tutor tried to ask during the eligibility meeting. On some occasions when the father tried to speak, the petitioners' advocate hushed or shushed him, preventing him from sharing what he wanted to say. After the school district had presented all of its evaluation results, respondent's special education director for secondary schools offered to adjourn the meeting so that the parents and their advocate could review any new material and suggested that the meeting be reconvened at a later date to make the eligibility determination. Petitioners' advocate declined this opportunity and stated that the team should make its eligibility determination at the meeting. The team found the student to be not eligible for special education under the disability categories of autism, emotional disturbance and other health impairment. (R-47; P-61; T of respondent's special education director for secondary schools; T of respondent's history teacher; T of respondent's school psychologist; T of respondent's clinical psychologist; T of petitioners' tutor)

55. On several occasions during the eligibility meeting, petitioners' advocate objected on the basis that he had not received copies of certain test results prior to the meeting. Among the results he claimed not to have received were the BASC-2 self-report of personality administered to the student and the parent rating scales.

After the team concluded that the student was not eligible for special education pursuant to the evaluation findings, petitioners' advocate provided respondent members of the IEP team with a 184 page position statement. Included in the 184 page position statement by petitioners' advocate were references to a number of the test results that he claimed at the meeting he had not yet received. (T of respondent's special education director for secondary schools; R-174; P-40)

56. The spiral bound 184 page report by petitioners' advocate that was presented to the school district after the eligibility determination included the results of the evaluation of the student by petitioners' psychologist as well as legal position papers prepared by the advocate. (R-174)

57. The student was evaluated by petitioners' psychologist on October 17, 2013, December 5, 2013 and December 10, 2013. Petitioners' psychologist is the wife of petitioners' advocate. The report of the evaluation is dated December 16, 2013. Among the tests administered by petitioners' psychologist were the following: Connors 3 – Parent; Vanderbilt ADHD Parent Rating Scale; Child Analyst and Psychiatry Rating Scale; Beck Anxiety Inventory for Youth; Beck Depression Inventory for Youth; PASS Rating Scale; Cognitive Assessment System; Kaufman Test of Educational Achievement – 2nd Edition; Milton Preadolescent Clinical Inventory; House Tree Person; Kinetic Drawing System for Family and School; self-portrait; children's sentence completion; and Childhood Autism Rating Scale – 2nd

Edition. Although she felt that it was important for school officials to consider the information, petitioners' psychologist omitted from the copy of the report sent to the school district all information concerning the parents and the student's medical history and other private information because the parents had requested her to do so. Petitioners' psychologist supplied student's teachers with rating forms, but she did not wait to receive the information back from the teachers before preparing her report. The diagnoses issued by petitioners' psychologist were Asperger's disorder, generalized anxiety disorder, dysthymic disorder with early onset, and disruptive behavior disorder not otherwise specified. Among the recommendations of the psychologist were "(the student) would benefit from an IEP through his school..." Petitioners' advocate advised the parents not to share the psychologist's evaluation report with the school district before the eligibility meeting because he had a bad feeling about how things were going with the school district.(P-2; T of petitioners' psychologist; R-174; T of petitioners' advocate)

58. Some of the instruments used by petitioners' psychologist in her evaluation of the student were not standardized and some were not meant to be diagnostic instruments at all. The projective tests used by petitioners' psychologist were not well researched and do not provide reliable diagnostic information. Petitioners' psychologist's use of Sohn Grayson Asperger's Rating Scale was inappropriate because it is not valid or reliable. Her use of the Child Autism Rating

Scale was inappropriately applied. The projective tests that petitioners' psychologist used in the evaluation of the student, specifically the House Tree Person kinetic drawing system and the self-portrait and children sentence completion tests, are not valid and provide no valid basis for making assumptions relative to the student's well-being. Petitioners' psychologist's interpretation of the preadolescent clinical inventory was inappropriate because it was not personalized for the individual child. The report of petitioners' psychologist contains a leap of logic in concluding that his problems at home were the result of holding in problems at school. The conclusion that the student suffers from Asperger's syndrome is not supported by the evaluative data in the report by petitioners' psychologist. The report by petitioners' psychologist did not take into account any information from the student's teachers concerning how he was functioning at school. (T of respondent's expert No. 2; T of respondent's expert No. 1; P-2)

59. After being evaluated by petitioners' psychologist, the student was brought by his parents to a psychiatrist, who prescribed antidepressant medication for the student. (P-8; T of petitioners' psychologist)

60. The student began receiving therapy from a therapist employed by the company operated by petitioners' psychologist on October 17, 2013. The therapist worked with the student on issues that occurred at home not at school. The initial progress notes of the therapist indicate that he worked on issues occurring in the

home, including social skills, oppositional behaviors and fixation on health concerns. Subsequent progress notes indicate that the therapist worked with the parents and the student on discipline and development of a plan to manage oppositional behaviors occurring in the home. None of the first eight visits by the student to the therapist focused on any issue relating to things happening at the school. The first mention of any school-related stressors for the student in the therapist's progress notes is on November 21, 2013, subsequent to the request by petitioners' advocate for an IDEA evaluation of the student. (T of petitioners' therapist; R-174)

61. After the student was withdrawn from school, petitioners' therapist stated in his progress notes that the student continued to have issues of defiance at home. Removing the student from school was causing the student some problems. (T of petitioners' therapist; P-12)

62. The student has always had difficulties with change. He has always reacted to changes in his situation with tantrums and behavioral issues. His meltdowns and behavioral issues occurred at home and not at the school. The student had difficulty adjusting and transitioning to a new state. The move to a new state exaggerated existing problems for the student. (T of student's father; T of student's mother; T of student's 6th grade teacher; T of petitioners' therapist)

63. Respondent posts information on the district website to attempt to locate children with disabilities. In cooperation with local utilities, local customers'

water bills include child find information twice per year. The school district periodically mails newsletters to parents concerning child find issues. Most schools, including the middle school attended by the student, utilized student study teams or similar intervention teams to proactively identify and intervene with students who might have disabilities or need help. (T of respondent's special education director; R-51-58)

64. In his 7th grade classes at respondent's middle school, the student did not display any red flags that he might have a disability. Respondent had no reason to suspect that he might have a disability because of his academic work or behavior in his 7th grade classes. (T of respondent's history teacher; T of respondent's math teacher; T of respondent's school psychologist; R-47)

65. Respondent's staff are very much "guided away from initiating...(special education) testing...." (T of respondent's gifted coordinator)

66. The student had all A's when he was withdrawn from school after the holiday break. The second term continued until mid-January 2014. At the end of the second term, which including a number of weeks of nonattendance after being withdrawn, the student had the following grades: English D+; Intermediate Math 2 C-; Utah History A-; Integrated Science A-; Introduction to Spanish A; Exploring Technology A; Intermediate Band D+ and Introduction to Career and Technical

Education B+. The student received all A's in the first term of the school year and missed significant time during the second term. (R-45)

67. Respondent correctly determined that the student does not meet the criteria for any of the disability categories specified by IDEA. (Record evidence as a whole)

68. The student's condition does not adversely affect his educational performance. (Record evidence as a whole)

69. The student's conditions and impairments do not require him to need special education and related services. (Record evidence as a whole)

70. Respondent afforded the student's parents and their representatives a meaningful opportunity to participate in the eligibility determination process. (Record evidence as a whole)

71. There was no reason for respondent to suspect that the student had a disability that required evaluation for special education. (Record evidence as a whole)

72. Respondent's staff has not been adequately trained concerning their responsibilities under respondent's child find obligation. (Record evidence as a whole)

## CONCLUSIONS OF LAW

Based upon the arguments of the parties, all of the evidence in the record, as well as legal research by the hearing officer, the hearing officer makes the following conclusions of law:

1. In conducting an evaluation, a school district must use a variety of assessment tools and strategies to gather relevant functional, developmental and academic information about the child. It must use technically sound instruments to assess the child. The assessments must be conducted by trained and knowledgeable personnel and administered in accordance with any instructions provided by the producer. The child must be assessed in all areas related to the suspected disability on an initial evaluation. The evaluation must be comprehensive. When conducting an evaluation, a school district must review appropriate existing evaluation data including classroom based assessments and observations by a teacher or related service provider, and on that basis determine whether any additional data are needed to determine whether the student is eligible, as well as to identify the child's special education and related services needs. IDEA § 614; 34 C.F.R. §§ 300.301, 300.304 – 300.305; Utah State Office of Education, Special Education Rules, Rule II-D, F and H.

2. Under IDEA, a child with a disability is defined as "a child:

- (i) with a mental impairment, hearing impairments, including deafness, speech or language impairments, visual impairments (including blindness), social emotional disturbances (referred to in this title as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments or specific learning disabilities; and
- (ii) who by reason thereof needs special education and related services."

IDEA § 602(3); 34 C.F.R. § 300.8; Utah State Office of Education, Special Education Regulations, Regulation II-I and J.

3. In addition, to be eligible under IDEA, the student must meet the definition of one of the enumerated disabilities, which includes a requirement that the disability adversely affects a child's educational performance. 34 C.F.R. § 300.8(a)(9); Utah State Office of Education, Special Education Rules, Rule II-I and J.

4. A professional evaluator, including a physician or a psychologist, may not simply prescribe special education, rather the eligibility team must consider all relevant factors. Marshall Joint School District No. 2 v. CD by Brian and Traci D., 616 F.3d 632, 54 IDELR 307 (7th Cir. August 2, 2010); District of Columbia Public Schools, 111 L.R.P. 76506 (SEA DC September 23, 2011).

5. A school district must provide parents with a meaningful opportunity to participate in the process, and they may not predetermine the results of an IDEA team decision. Deal v. Hamilton County Board of Education, 392 F.3d 840, 42 IDELR 109 (6th Cir. 2004); See, Utah State Office of Education, Special Education Rules, Rule III-G. Preplanning meetings by the staff of a school district or the

preparation of a draft document is not unlawful predetermination unless the team members have a closed mind with regard to receiving input and information from the parent. J.D. v. Kanawha County Board of Education, 48 IDELR 159 (S.D. WV 2007).

6. A school district is not required to ensure that skills learned by a student in school are generalized across other environments. Thompson R2-J School District v. Luke P. by Jeff and Julie P., 540 F.3d 1143, 50 IDELR 212 (10th Cir. 2008).

7. Under IDEA, school districts have a child find obligation, which means that they must ensure that children with disabilities or children who are reasonably suspected of having disabilities are identified, located and evaluated and that a practical method is developed and implemented to determine whether children with disabilities are currently receiving special education and related services. IDEA § 612(a)(3); 34 C.F.R. § 300.111; Utah State Office of Education, Special Education Regulations, Rule II-A; Wiesenberg v. Board of Educ. Salt Lake City School Dist., 181 F. Supp. 2d 1307, 36 IDELR 34 (D. Utah 2002); Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. March 19, 2012).

8. In the context of the provision of a free and appropriate public education, procedural violations are not actionable unless they adversely impact the student's education or significantly impede upon the parents' opportunity to participate in the process. IDEA § 615(f)(3)(E)(ii); Sytsema by Sytsema v. Academy

School District No. 20, 538 F.3d 1306, 50 IDELR 213 (10th Cir. 2008). However, nothing in the rule concerning procedural violations should be construed to preclude a hearing officer from ordering a school district to comply with the procedural requirements of IDEA. IDEA § 615(f)(3)(E)(iii).

9. In the instant case, the school district's evaluation of the student was comprehensive, thorough and appropriate, and it complied with all legal requirements.

10. In the instant case, the school district properly and correctly concluded that the student is not eligible for special education and related services.

11. In the instant case, the school district provided the student's parents and their representatives with a meaningful opportunity to participate in the eligibility determination process.

12. In the instant case, the school district did not have a reasonable suspicion that the student had a disability and therefore did not violate their child find obligation with regard to the student.

13. In the instant case, Respondent violated its child find obligation by not properly training its staff concerning how to handle statements by a parent that their child has a diagnosis of a disability and by failing to train their staff concerning the circumstances under which an evaluation for special education referral should be made.

## DISCUSSION

### 1. Merits

Issue No. 1: Was the evaluation of the student conducted by the school district on January 31, 2014 appropriate?

In conducting an evaluation, a school district must use a variety of assessment tools and strategies to gather relevant functional, developmental and academic information about the child. It must use technically sound instruments to assess the child. The assessment must be conducted by trained and knowledgeable personnel and administered in accordance with any instructions provided by the producer. The child must be assessed in all areas related to the suspected disability on an initial evaluation. The evaluation must be comprehensive. When conducting the evaluation, a school district must review appropriate existing evaluation data including classroom based assessments and observations by a teacher or related service providers, and on that basis determine whether any additional data are needed to determine whether the student is eligible, as well as to identify the child's special education and related services needs. IDEA § 614; 34 C.F.R. §§ 300.301, 300-304-300.305; Utah State Office of Education Special Education Rules Rule II D, F and H.

Although the evaluation issue was not specifically addressed in the petitioners' post hearing brief, it is discussed herein because it was raised in the parties' joint prehearing memorandum and because some testimony at the due process hearing seemed to indicate that Petitioners were attacking the appropriateness of Respondent's evaluation of the student.

Petitioners have not demonstrated that the evaluation conducted by the school district was inappropriate. The evaluation included multiple classroom observations of the student by the school psychologist and one by the clinical psychologist. Additional information was collected from the teachers through surveys, as well as participation in teacher rating forms on the BASC-2, the GADS and the Vineland-2 forms. In addition, respondent administered the WISC-4 to the student and determined his IQ. Respondent also administered Woodcock-Johnson Tests of Achievement (WJ-III ACH) to establish his levels of academic achievement.

Respondent gave the student the BASC-2, a social-emotional behavior assessment. The GADS is an autism screening assessment that was administered to the student by respondent. The Vineland-2 is an adaptive functioning assessment. Respondent's speech language pathologist administered a communication assessment of the student. Respondent's clinical psychologist administered the ADOS-2 to the student. The ADOS is the gold standard in autism assessment.

The assessments and tests administered by respondent in the evaluation process of the student were conducted by trained and knowledgeable personnel. The tests and assessments were technically sound and administered in accordance with all instructions. The evaluation of the student by respondent was comprehensive. The student was assessed in all areas related to suspected disability. The assessment included observations of the student and it employed a variety of assessment tools and strategies to gather relevant data.

There were some issues that occurred during the assessment process, but the record evidence reveals that respondent corrected the deficiencies. The speech language pathologist initially administered an assessment that was age inappropriate for the student. The speech language pathologist subsequently corrected the problem by administering the correct age assessment to the student. In addition, the school psychologist initially sent home a rating scale for children older than the student. The school psychologist corrected his error by sending home the correct age rating scales. Neither of the two errors by respondent's staff concerning age appropriate assessments compromised the validity of their evaluations. Respondent also presented the unrebutted testimony of two expert witnesses in this case. Both expert witnesses testified credibly and persuasively that respondent's evaluation of the student was comprehensive and appropriate.

Petitioner raises certain additional challenges to the evaluation process by respondent. Petitioner contends that Respondent's special education director for secondary schools directed the speech language pathologist concerning the conduct of his evaluation. Although the record includes an e-mail that the secondary schools director sent to the speech language pathologist, a fair reading of the evidence is that the director was attempting to have the speech language pathologist state clearly what he had found. The e-mail includes no interference in the evaluation process or suggestions to the speech language pathologist that he change the substance of the report of his evaluation. Petitioners' argument in this regard is rejected.

Petitioner also contends that Respondent should have administered all five components of the BASC-2, to the student. The manual for the BASC-2, however, provides that the test components may be used individually or in any combination. In addition, one of the experts called by respondent testified credibly and persuasively that in practice no one administers all five components of the BASC-2.

In addition, petitioners argue that respondent's evaluator should have conducted a formal interview with one of the parents. The district did however send home a parent information survey and rating scales, and the parents had previously provided multiple e-mails to the school district regarding their concerns about the student's problems at home. The school district had a lot of information from the

parents. Moreover, the parents and their representatives were offered a number of opportunities to present information to the eligibility committee before it made a determination, but they declined on advice of their advocate. Respondent's failure to formally interview the parents does not render its evaluation inappropriate.

Petitioners also contend that the failure to consider the contents of the missing cumulative file from Idaho renders the evaluation inappropriate. However, the record evidence reveals that respondent was able to obtain the student's grades from Idaho. Although it is somewhat troubling that a child's cumulative file could be lost, there is no indication that the cumulative file would have contained anything that might have affected the evaluation process. In particular, it should be noted that the student was never evaluated or considered for special education eligibility while in Idaho. Petitioners have not suggested that any contents of the missing Idaho information could have changed the result of the evaluation. The missing file does not render the evaluation process inappropriate.

Finally, it should be noted that the parents' advocate was involved with and approved of the testing that the school district used for the student's evaluation. At no point prior to the eligibility determination meeting did the advocate raise any questions or concerns with regard to the comprehensiveness or appropriateness of the tests that were to be administered by respondent.

Concerning the issue of evaluation, the testimony of petitioners' witnesses is less credible and persuasive than the testimony of respondent's staff and respondent's expert witnesses. See discussion of credibility in section on eligibility herein.

Based upon the evidence in the record, it must be concluded that respondent's evaluation of the student was comprehensive, thorough and appropriate. Respondent's evaluation of the student complied with all legal requirements.

Issue No. 2: Did respondent violate IDEA by finding the student to be not eligible for special education?

In order to be eligible under IDEA, a student must have one of the enumerated impairments, he must by reason thereof need special education and related services; and he must meet the requirement, included in the definition of the enumerated disabilities, that the disability adversely affect his educational performance. IDEA § 602(3); 34 C.F.R. § 300.8; Utah State Office of Education Special Education Rules Rule II-I and J.

In the instant case, respondent convened an eligibility team meeting on January 31, 2014. At the two and a half to three hour eligibility meeting, respondent's staff presented their results of the assessments that they had conducted and offered the parents an opportunity to provide information. Upon the advice of their

advocate, the parents did not provide their information until after an eligibility determination was made. The eligibility team considered whether the student might be eligible under the categories of other health impairment, emotional disturbance, and autism. The team concluded that the student did not meet the requirements of any of the three disability categories considered.

Petitioners contest the conclusion that the student is not eligible. In its post hearing brief, petitioners argue that the student should be eligible under the categories of other health impairment or specific learning disability. The post hearing brief is the first mention by petitioners of the possibility that the student might be eligible under a specific learning disability. That point had not been previously raised at the eligibility meeting and is not supported by any evidence submitted by the petitioner herein. Accordingly, the contention that the student has a specific learning disability is rejected. Even assuming arguendo that the student did have a specific learning disability, however, as later discussion will show, the student would still not be eligible because he did not meet the second and third prongs of the eligibility requirement.

The Utah State Special Education Rules define other health impairment as "having limited strength, vitality, or alertness including a heightened alertness to environmental stimuli, that results in limited alertness with respect to educational environment, that is due to chronic or acute health problems such as asthma,

attention deficit disorder...diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, Tourette's syndrome, HIV/AIDS, or an acquired brain injury... that adversely affects the student's educational performance. Utah State Office Special Education Rules Rule II-J(9)(a). Said regulations require, as a part of the evaluation process, that the student's prior medical history must be on record regarding specific symptoms. In this case, Petitioners did not provide the student's medical history or a diagnosis of anxiety disorder prior to the eligibility determination. Even after the eligibility determination, the report of petitioners' psychologist omitted the medical history of the student and his parents.

In the instant case, respondent's school psychologist observed the student in the classroom on multiple occasions. He determined that the student did not have limited alertness with respect to the educational environment. Petitioners never provided the student's medical history to respondent.

In addition, the student's grades indicate that he was performing well without special education. The student received many A's in 6th grade in his gifted classes. In 7th grade when he was withdrawn, he had all A's with the exception of a band grade that was caused by his neglecting to turn in or make up certain assignments that he had missed. After he had been withdrawn from school and missed a lot of school, he

still had four A's, a C- and two D+'s as of January 31, 2014 at the eligibility meeting even though he had missed weeks of school after having been withdrawn.

It is concluded that respondent correctly determined that the student is not eligible for special education. The record evidence supports this conclusion.

In its post hearing brief, petitioner cites the District Court case which was subsequently affirmed by the First Circuit in Mr. and Mrs. I v. Maine School Administrative District No. 55, 480 F.3d 1, 47 IDELR 121 (1st Cir. 2007) for the proposition that a student with strong academics may still be eligible for special education. The facts of this case are substantially different than those of the Mr. and Mrs. I case. In that case, the State of Maine had an extremely broad definition of educational performance which is not applicable here. Moreover, in the Mr. and Mrs. I case, the student's disability had a strong negative effect on her academic performance. In the instant case, the student's behavior problems occurred at home. As the mother testified, even in Idaho, the student often had tantrums after changes in his situation. The student had severe meltdowns at home and he was obviously having trouble with the transition from Idaho to Utah.

The emails by the student's mother make it clear that the student's behavior issues occurred at home and not at school. In addition, the progress notes of the student's therapist make it clear that the student was being treated for problems he

was causing at home. Petitioners' therapist conceded this point in his testimony. It was only after Petitioners hired their advocate and requested a special education evaluation that the parents and student raised school issues with the therapist. The record evidence makes it clear that the student's outbursts occurred at home and not at school. Thus, even assuming arguendo that the student had one of the enumerated disabilities, these outbursts at home did not adversely affect his education or cause him to need specialized instruction.

Indeed, given that the student's problems were focused in the home, they are beyond the purview of the school district. As the 10th Circuit Court of Appeals noted in Thompson R2-J School District v. Luke P. by Jeff and Julie P., 540 F.3d 1143, 50 IDELR 212 (10th Cir. 2008), even where an IEP is provided, a FAPE does not require that a student be able to generalize skills across settings outside of school. Although Thompson was a FAPE case involving residential placement issues, the principle applies here - it is abundantly clear that the student's problems at home in this case did not adversely impact his education or cause him to need special education. Respondent correctly determined that the student was not eligible for special education and related services. At the eligibility determination meeting, the staff of respondent encouraged petitioners to provide information at several points during the process. Upon the advice of their advocate, however, they decided not to do so until after the committee made an eligibility determination. Indeed, the report

of the evaluation was ready a month and a half before the meeting, but petitioners' advocate advised the parents not to share the report with the school district. Because the report of the petitioners' expert psychologist was not available to the eligibility team at the time of the determination, it is not appropriate to consider them here. Petitioners are contesting the eligibility determination made by respondent on January 31, 2014, and at that time of the decision, the eligibility team did not have available to it the information supplied by petitioners at the due process hearing.

Even assuming *arguendo* that the petitioners' psychologist's report is properly before the hearing officer, however, it is still clear that the student is not eligible for special education. Preliminarily, it should be pointed out that the evaluation by petitioners' psychologist is not an independent educational evaluation under IDEA because a parent is entitled to an independent educational evaluation only after the school district conducts an evaluation with which the parent disagrees. 34 C.F.R. § 300.502; Utah State Office of Education Special Education Rules Rule IV-C(3)(a) and (d). As respondent correctly points out in its post hearing brief, the evaluation conducted by petitioners' psychologist was prepared before the eligibility meeting and the evaluation that was presented by respondent at the evaluation meeting. Accordingly, the evaluation by petitioners' psychologist is not an independent educational evaluation for purposes of IDEA and not one for which petitioner can seek reimbursement.

Even assuming, arguendo, that the report by petitioners' psychologist should be considered herein, it is abundantly clear that the report does not constitute a basis for concluding that respondent's eligibility determination was incorrect or inappropriate. After the eligibility determination, Petitioners presented a report by their psychologist that concluded that the student has Asperger's syndrome, generalized anxiety disorder, dysthymic disorder and disruptive behavior disorder not otherwise specified. It was the persuasive and credible testimony of respondent's two expert witnesses, however, that petitioners' psychologist used assessment instruments that were not standardized and not meant to be diagnostic, that some of the measures were not supported by research showing them to be reliable and valid, and that her interpretation of data was in some cases surprising. Both of respondent's experts testified credibly and persuasively that the diagnoses made by petitioners' expert were incorrect.

It is also significant that petitioners' psychologist did not take into account any information from the student's teachers about how the student was functioning at the school. Although the psychologist had asked teachers to fill out certain rating forms, she did not receive the information in time to incorporate it into her report and so she did not include any of the information. Also, the petitioners' psychologist observed the student only in her own offices. All of the information relied upon by petitioners' psychologist concerning the student's functioning at school came from the student's

parents. The evaluation of the student by petitioners' psychologist does not constitute a basis for concluding that respondent's eligibility determination with regard to the student was incorrect or inappropriate.

Moreover, under IDEA, a professional evaluator may not simply prescribe special education, rather the eligibility team must consider all relevant factors. Marshall Joint School District No. 2 v. CD by Brian and Traci D., 616 F.3d 632, 54 IDELR 307 (7th Cir. August 2, 2010); District of Columbia Public Schools 111 L.R.P. 76506 (SEA D.C. 2011).

Also, the testimony of petitioners' witnesses is less credible and persuasive than the testimony of respondent's staff and respondent's experts who testified at the hearing and respondent's expert witnesses. This conclusion is based upon the demeanor of the witnesses, as well as the following factors: It is clear from the evidence in the record that petitioners' psychologist, petitioners' advocate, petitioners' tutor, as well as the parents themselves, were imposing a potential maximizing standard in their argument that the student should be eligible for special education.

Even where a student is eligible for an IEP, IDEA does not require that the school district maximize the potential of a student or provide him with the best possible education. Bd. of Educ., etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); Thompson R2-J School District v. Luke P. by Jeff and Julie P.,

540 F.3d 1143, 50 IDELR 212 (10th Cir. 2008); In re Student with a Disability, 111 L.R.P. 40554 (SEA WV 2011). It is understandable that the parents want the best possible education for their child, but a school district is not required to provide the best education even where a child is eligible.

In the instant case, Petitioners' psychologist testified that she was not an expert in the development of an IEP for a student and that she was not qualified to say if the student needed one. She just recommended that some sort of change be made in his school environment. In her report, petitioners' psychologist stated that the student would "benefit" from an IEP. Similarly, the student's tutor testified that the student would "benefit" from smaller student/teacher ratio, but he admitted on cross-examination that most students would benefit from a smaller student/teacher ratio. In addition, petitioners' advocate testified that the student could make progress in a public school, but it was just a matter of level. Also, the emails by the student's mother made it clear that her concern was that the student was not learning to the "best of his ability." It is clear from the testimony and exhibits offered by petitioners that petitioners wanted to maximize the student's potential rather than provide him with the basic floor of opportunity offered by IDEA.

In addition, the testimony of the petitioners' advocate was impaired by a number of additional factors. The advocate had extremely poor memory and was

very evasive when questioned by the attorney for the school district. In contrast, when the advocate was questioned by the attorney for petitioners, his answers were direct and his memory was excellent. Moreover, the advocate's testimony included certain inconsistencies. For example, he testified on direct that he had not read the respondent's speech language evaluation or the BASC-2 results and the parents' scales before the eligibility meeting. On cross-examination, however, he admitted that he handed out a bound report at the eligibility meeting after the team had made its determination, which showed that he in fact had read the speech language evaluation, the BASC-2 and the parent scales. In addition, on direct examination, petitioners' advocate testified that it was cruel for the school district to evaluate the student after he had been evaluated by petitioners' psychologist, yet he suggested that relief that would be appropriate for the student should include further evaluations of the student. For all of the reasons set forth above, the testimony of the witnesses called on behalf of the petitioners is less credible and persuasive than the testimony provided by respondent's staff and respondent's expert witnesses.

However, as has been implied above, even assuming *arguendo* that the report of petitioners' psychologist constituted evidence that the student met the requirements for one of the enumerated disabilities, it is clear that the student cannot meet the requirements of the second and third prongs of IDEA eligibility. His behavior outbursts occurred at home and not at school. These outbursts or

meltdowns did not adversely affect his education. Moreover, he was doing really well in school without special education; it is clear that even if he had a disability, he did not by reason thereof require special education.

It is concluded that petitioners have not established that respondent's eligibility determination concerning the student was erroneous or invalid.

Issue No. 3: Did respondent the student's parents meaningful participation in the process?

Under IDEA, the parents are provided the right to meaningful participation in the process. See Deal v. Hamilton County Board of Education, 392 F.3d 840, 42 IDELR 109 (6th Cir. 2004); See, Utah State Office of Education Special Education Rules Rule III-G.

In the instant case, it is abundantly clear that respondent provided petitioners with an opportunity to participate in the eligibility determination process. The student's father and the petitioners' advocate attended the eligibility determination meeting. The eligibility determination meeting lasted between two and a half and three hours, and petitioners were provided several opportunities to ask questions or provide information that they wanted the team to consider. Respondent's staff also

offered to recess the meeting after Respondent had presented its data and evaluation in order to provide Petitioners and their representatives time to consider the information and to reconvene at a later date. Petitioners declined the offer. At the insistence of petitioners' advocate, petitioners also declined to provide their report or any other information until after the eligibility team first made a determination. In addition, the student's father attempted to speak a number of times at the eligibility determination team meeting, but he was hushed by petitioners' advocate. Similarly, the advocate "withdrew" a question that petitioners' tutor attempted to ask at the meeting. Thus, to the extent that petitioners did not participate in the eligibility determination team meeting, it was by their own choosing and the direction of their advocate and not as a result of denial of opportunity by the respondent.

Petitioners, in their brief, contend that respondent denied them meaningful participation in the eligibility process by predetermining the result. As evidence, they cite to an e-mail from respondent's clinical psychologist to other team members mentioning a recent IDEA hearing officer decision in Idaho concerning a child with autism. The clinical psychologist explained in her testimony that she was not attempting to predetermine the result of the eligibility meeting but rather ensuring that certain information be included in the report so that it would be comprehensive. A pre-meeting such as the one conducted by respondent's staff at the suggestion of its clinical psychologist is not unlawful under IDEA, so long as the participants at the

eligibility meeting have an open mind. J.D. v. Kanawha County Board of Education, 48 IDELR 159 (S.D. WV 2007). In the instant case, it was the credible and persuasive testimony of the respondent's staff that attended the eligibility meeting that they came to the meeting with an open mind. The testimony of respondent's staff and respondent's experts who testified at the due process hearing was more credible and persuasive than the testimony of witnesses who testified on behalf of petitioner. See the credibility discussion in previous section on eligibility herein.

It is concluded that respondent did not predetermine the result of the eligibility determination meeting and that respondent did not deny petitioners' meaningful participation in the eligibility meeting process by conducting the pre-staffing meeting.

Petitioners also claim that respondent denied meaningful participation by failing to provide certain records to petitioners before the eligibility meeting. It appears that the results of many of the tests that were completed prior to the meeting were provided to petitioners prior to the meeting. Even if documents were not provided to them, however, petitioners cite no legal authority for the proposition that respondent must provide test results to petitioners in advance of an eligibility meeting (and the hearing officer's own research revealed no such authority). This argument is rejected.

In addition, petitioners contend that respondent denied them meaningful participation in the eligibility process by agreeing to certain “TEAL time” accommodations for the student during the evaluation process and then not providing all such accommodations. It is difficult to understand this argument. Petitioners cite no authority, and the hearing officer can find no authority, that a school district is required to agree to, or comply with, accommodations during the evaluation process. Given that respondent was not required to provide these accommodations, its failure to provide them certainly does not violate the law. More importantly, there is no logical connection between the failure of respondent to provide some accommodations and the parents' participation in the eligibility process. The evidence in the record reflects that some of the student's teachers did not consistently apply certain accommodations, but even if respondent were legally required to provide these accommodations, it is difficult to understand how these accommodations impacted the eligibility process, or Petitioners participation therein, in any way. Petitioners' argument in this regard is rejected. Petitioner has not established that respondent denied meaningful participation to the parents.

Issue No. 4: Did respondent violate its child find obligation?

Under the Individuals With Disabilities Education Act, school districts have a child find obligation which means that they must ensure that children with disabilities

or children who are reasonably suspected of having disabilities are identified, located and evaluated and that a practical method is developed and implemented to determine whether children with disabilities are currently receiving special education and related services. IDEA § 612(a)(3); 34 C.F.R. § 300.111; Utah State Office of Education Special Education Regulations Regulation II-A; Wiesenberg v. Board of Educ. Salt Lake City School Dist., 181 F. Supp. 2d 1307, 36 IDELR 34 (D. Utah 2002) Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. March 19, 2012). The child find duty is triggered upon reasonable suspicion of disability. Wiesenberg, supra. Petitioner alleges that respondent violated its child find obligation with regard to the student.

Respondent has in place policies to ensure that potential special education students and their parents are aware of the availability of special education services. The school district has persuaded the utility company to include child find information in water bills sent to its customers twice per year. The school district provides newsletters addressing child find issues periodically to interested persons. District schools, including the middle school attended by the student, have student study teams or similar intervention teams to proactively identify and intervene with students that need help.

In its post hearing brief, respondent contends that there could be no child find obligation if the student is not eligible for special education. The hearing officer disagrees with this argument. The primary authority cited for this proposition is an unpublished decision by the 5th Circuit. Respondent's brief cited two unpublished decisions; unpublished decisions have no precedential value and should not be cited as authority. Neither decision was considered herein. The other authority cited by respondent for the argument was a hearing officer decision from Georgia, which the hearing officer does not find to be persuasive.

That having been said, it is clear that the student is not eligible for special education. See previous section. Given that the student is not eligible for special education, petitioners were not harmed by any child violation with regard to the student.

Much of petitioners' post hearing brief on this issue is concerned with an alleged overreliance on response to intervention, but as has been discussed, the petitioner had no eligibility under IDEA and, therefore, that argument is rejected.

To the extent that petitioners allege that respondent committed child find violations that directly affected the education of the student, the testimony of petitioners' witnesses is less credible and persuasive than the testimony of

respondent's staff and respondent's expert witnesses. See the credibility analysis in previous section on eligibility herein.

However, two additional procedural child find allegations by petitioners require further discussion. First, when the student's mother requested a §504 plan and revealed that the student had a diagnosis of Asperger's syndrome, the response of respondent's assistant principal was that the student would not qualify for an IEP and probably would not qualify for a §504 plan because of his good grades. A single person employed by a school district should not be making an IDEA eligibility determination. As has been discussed thoroughly above, an eligibility determination is a team decision. When asked directly by the parent for a §504 plan, at a minimum the assistant principal should have discussed with the parent her options, including the option of requesting a special education evaluation. It is fairly clear that the assistant principal has not been thoroughly trained with regard to the school district's child find obligations.

The other incident that needs to be discussed involves the testimony of respondent's gifted and talented program coordinator. When questioned about referring children for special education evaluation, she testified that Respondent's staff were "very much guided away from initiating that testing." Clearly, Respondent should not be encouraging its staff to avoid special education evaluations if an

evaluation is appropriate. Once again, it appears that respondent's staff has not been properly trained in respondent's child find obligations.

The two incidents outlined above constitute procedural violations of respondent's child find duty even if they had no impact upon this student or his parents. Respondent violated the procedural requirements of its child find obligation. In the context of denial of FAPE, a procedural violation is only actionable if it results in education harm to the student or a substantial infringement upon the parents' right to participate. Bd. of Educ., etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 533 IDELR 656 (1982); Sytsema by Sytsema v. Academy School District No. 20, 538 F.3d 1306, 50 IDELR 213 (10th Cir. 2008); IDEA § 615(f)(3)(E)(ii). Although this issue involves a question of identification rather than a free and appropriate public education, IDEA § 615(b)(6)(A), the same principle should apply here. In other words, because there was no harm to the student or petitioners, no individual relief should be provided to petitioners as a result of these violations.

IDEA also provides, however, that the restriction on procedural violations shall not be construed to preclude a hearing officer from ordering a school district to comply with the procedural requirements of the law. IDEA § 615(f)(3)(E)(iii). Relief requiring future compliance by the school district with these procedural requirements is appropriate. This matter shall be discussed further in the section on relief.

The petitioners have not established that respondent committed a child find violation that directly affected the student or his parents. Petitioners have established that respondent has committed two procedural child find violations as described above.

## 2. Relief

Because petitioners have proved no violation that affects the student, it would be inappropriate and unjust to award any relief to the student or to his parents.

However, petitioners have established that respondent committed two procedural violations involving its child find obligations. Because the hearing officer has authority to address such violations to ensure procedural compliance with IDEA, respondent will be ordered to provide training to its staff concerning its child find obligations.

## **ORDER**

Based upon the foregoing, it is HEREBY ORDERED as follows:

1. Respondent is hereby ordered to provide a training or trainings for its staff within 60 days of the date of this decision concerning respondent's child find obligations under IDEA. Particular emphasis should be devoted to what steps to take

if a parent provides information or red flags that might reasonably raise a suspicion of disability in a child; what steps to take if a parent requests an IEP or 504 plan; the circumstances under which a student should be referred for special education evaluation; and the IDEA eligibility determination process.

2. All other relief requested by the instant due process complaint is hereby denied.

ENTERED: June 9, 2014

James Gerl

James Gerl, Certified Hearing Official  
Hearing Officer

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he has served the foregoing DECISION  
by emailing a true and correct copy thereof to the following:

Edward Flint, Esquire  
specialedflint@gmail.com

and

Joan Andrews, Esquire  
jandrews@fabianlaw.com

On this 9th day of June, 2014.

James Gerl  
James Gerl, Certified Hearing Official  
Hearing Officer

SCOTTI & GERL  
216 S. Jefferson Street  
Lewisburg, WV 24901