

**BEFORE THE THREE-MEMBER DUE PROCESS HEARING PANEL
EMPOWERED BY THE MISSOURI STATE BOARD OF EDUCATION
PURSUANT TO RSMo. § 162.961**

WENTZVILLE R-IV SCHOOL DISTRICT,)	
)	
)	
Petitioner,)	
)	Filed June 29, 2012
v.)	
)	Pamela S. Wright, Chairperson
XXXXX, by and through her parents, YYYYYYYYYYYYYYYYYY,)	
)	
Respondent.)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

The Hearing Panel, after conducting the due process hearing on January 22, 2013, issues the following Findings of Fact, Conclusions of Law, Decision and Order:

FINDINGS OF FACT

The Parties

1. XXXXXXXX (“Student”) was born on XXXXXXXX XX, 2002. Student is the daughter of YYYYYYYYYYYYYY (“Parents or “Father/Mother”). Student and Parents (hereinafter collectively referred to as “Respondent”) at all times relevant to this case resided within the boundaries of the Wentzville R-IV School District (“the District”). Ex. B¹

2. The District is a Missouri Public School District which is organized pursuant to Missouri statutes. The District is located in St. Charles County, Missouri and educates approximately 13,391 students, including 6,822 elementary school students. 2012-2013 Missouri School Directory.

3. The Respondent appeared *pro se* in this matter at the time of the hearing.²

4. Ernest G. Trakas and Betsey A. Helfrich of Mickes Goldman O’Toole, LLC, 555 Maryville University Drive, Suite 240, St. Louis, MO 63141, represented the District.

¹ All references to the District’s Exhibits will be to “Ex. ___-[#]”. References to the hearing transcript is cited as “Tr. [pg.#].”

² The Respondent was represented by counsel at various times during the relevant period described herein. Attorney, Chantel Alberhasky, withdrew as Respondent’s counsel in November 2012. Since that time the Parents have acted *pro se*.

5. The Hearing Panel for this due process proceeding was:

Pamela S. Wright	Hearing Chairperson
Christine D. Montgomery	Panel Member (selected by the District)
Rand Hodgson	Panel Member (selected by the Respondent)

Time Line Information and Procedural Background

6. The District requested a due process hearing by complaint (“Complaint”) filed with the Missouri Department of Elementary and Secondary Education (“DESE”) dated June 29, 2012. In the Complaint, the District alleges that Student does not meet eligibility criteria under the Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq. (“IDEA”), and is not in need of special education. The District seeks a declaration that the IDEA evaluations it conducted on Student were appropriate and that the determinations the District made in March and May 2012 regarding Student’s eligibility to receive special education and/or related services under the IDEA were legally correct and that Student does not qualify as a student with a disability as defined by the IDEA.

7. On July 12, 2012, the Respondent filed an insufficiency challenge, and request for dismissal (“Motion to Dismiss”) in response to the District’s Complaint.

8. On July 24, 2012, the District filed its Response to the Respondent’s Motion to Dismiss. On the same date, the Respondent submitted a Reply indicating a continued request for dismissal and alleging that the Complaint had been filed to harass and retaliate against the Parents for earlier child complaints and a pending OCR investigation.

9. On July 26, 2012, the Chairperson issued an Order denying the Respondent’s Motion to Dismiss and denying the District’s request for more detailed response by the Respondent to the District’s Complaint.

10. On July 30, 2012, Chantel Alberhasky filed her Entry of Appearance on behalf of the Respondent. On the same date, the Respondent through counsel filed a Motion for Continuance of the Pre-Hearing Conference that had been scheduled for July 31, 2012.

11. On August 7, 2012, unaware that an Order had been entered on July 26, 2012, the District filed its Supplemental Response to the Respondent’s Motion to Dismiss.

12. On August 8, 2012, the Chairperson held a Pre-Hearing Conference with counsel for the parties. The parties agreed on (a) hearing dates of November 7-9, 2012 and (b) an extension of the statutory timeline to November 16, 2012. Respondent’s counsel also requested a briefing schedule to be set for a Motion to Reconsider (of the previously denied Respondent’s Motion to Dismiss).

13. On August 9, 2012, the parties filed their Joint Motion to Extend Statutory Timelines.

14. On August 14, 2012, the Chairperson entered a Scheduling Order detailing the discussion at the August 8, 2012 Pre-Hearing Conference, including the extension of the timeline to November 16, 2012. The Order also provided that each party would have 8.0 hours to present evidence, and direct and cross-examination testimony at the hearing. The Order also set out the Issues for the Hearing Panel that the parties had discussed during the Pre-Hearing Conference.

15. On September 4, 2012, the Respondent filed its Motion to Reconsider the Respondent's Motion to Dismiss without Prejudice the District's Complaint or, in the Alternative, Motion to Transfer Venue to the Missouri Administrative Hearing Commission and Suggestions in Support thereof ("Motion to Reconsider.").

16. On September 18, 2012, the District filed its Memorandum in Opposition to the Respondent's Motion to Reconsider.

17. On September 25, 2012, the Respondent filed a Reply to the District's Memorandum in Opposition to Respondent's Motion to Reconsider.

18. On September 28, 2012, the District filed its Motion for Leave to Amend Due Process Complaint and Suggestions in Support ("Motion to Amend Complaint.") based on information received after the District filed the original Complaint. The District's proposed Amended Complaint seeks an order from the Hearing Panel confirming that the District's evaluation of Student was appropriate; that the Multidisciplinary Team decisions that Student did not meet the eligibility criteria as a student with a disability in need of special education and related services under the IDEA was correct; that the District acted in compliance with the IDEA; and establishing that the District is not and will not be responsible for the cost of Student's private education.

19. On October 1, 2012, the Respondent filed a Response to the District's Motion to Amend Complaint.

20. On October 8, 2012, the Chairperson issued an Order: (1) granting the District's Motion to Amend Complaint; (2) Denying the Respondent's Motion to Reconsider and (3) Denying the Respondent's Motion to Transfer Venue to the Administrative Hearing Commission.

21. On October 15, 2012, the District filed its Motion to Extend Date for Hearing to allow the parties the opportunity to engage in the discovery process as permitted in accordance with the Missouri Administrative Procedures Act, including, but not limited to, taking depositions of the Respondent.

22. On October 15, 2012, the Respondent sent correspondence to the Chairperson requesting a closed hearing.

23. On October 18, 2012, the Respondent's filed their Memorandum in Opposition to the District's Motion to Extend Date for Hearing.

24. On October 18, 2012, the Chairperson issued an order denying the District's Motion to Extend Date for Hearing.

25. On October 18, 2012, the Respondent filed a Waiver of Right to Seek Reimbursement for Unilateral Placement.

26. On October 19, 2012, the District served Notices of Deposition and Subpoena Duces Tecum on Parents. The Return of Service was dated October 23, 2012.

27. On October 22, 2012, the Respondent filed a Motion to Quash Subpoena Duces Tecum served on Parents ("Motion to Quash") alleging that the list of documents required to be produced by the subpoena was vague, overbroad, unduly burdensome and oppressive. Further the Respondent alleged the documents were already in the District's possession.

28. On October 24, 2012, the District filed its Suggestions in Opposition to the Respondent's Motion to Quash stating the documents requested were not intended to include any documents protected by work product and/or attorney client privileges. Further, the District stated the Respondent did not have to produce exact copies of the documents or correspondence created by the District and sent to the Respondent.

29. On October 25, 2012, the Chairperson issued an order granting in part and denying in part Respondent's Motion to Quash. The Respondent was ordered to produce the documents requested in categories 2 through 7 of Exhibit A of the subpoena duces tecum.

30. On October 26, 2012, the District took the deposition of Student's mother.

31. On October 30, 2012, the District disclosed and provided copies of its anticipated hearing exhibits to the Respondent's counsel and all three (3) hearing panel members via Federal Express.

32. The Respondent failed to comply with 34 C.F.R. § 300.512 (b) and did not disclose or exchange any documents intended for use as exhibits at the hearing.

33. On November 1, 2012, the District's counsel took the deposition of Student's father.

34. On November 2, 2012, Chantel Alberhasky filed a Motion to Withdraw as counsel for the Respondent.

35. On November 5, 2012, the Chairperson notified the parties that she would issue an order granting Ms. Alberhasky leave to withdraw as counsel for Respondent with the understanding that the Respondent was in agreement with said withdrawal and recognized that the hearing would go forward on November 7, 2012, and that there would be no continuances for the Respondent to retain new counsel.

36. On November 6, 2012, panel member Rand Hodgson contacted the Chairperson and stated he had a family emergency and could not attend the hearing.

37. The Chairperson, due to panel member Hodgson's unavailability, decided to reschedule the hearing and corresponded with the parties regarding possible new hearing dates.

38. On November 14, 2012, the Chairperson corresponded with the parties indicating that the expiration of the timeline for the decision was soon approaching and that one of the parties would need to request an extension of the timeline.

39. On November 14, 2012, in response to the Chairperson's November 14, 2012 communication, the District's counsel requested an extension of the timeline for the decision in the matter to February 28, 2013.

40. On November 14, 2012, the Chairperson issued an Order Extending the Timeline to February 28, 2013.

41. On November 19, 2012, the Chairperson issued the First Amended Scheduling Order setting the case for hearing on January 22, 2013, with a backup hearing date of January 25, 2013.

42. On January 22, 2013, at 9:00 a.m., the District, by counsel, and the Chairperson and the other hearing panel members appeared at One Campus Drive, Wentzville, MO 63385, the scheduled date and place for the hearing. Respondent did not appear at the appointed time and location.

43. At 9:15 a.m., after Respondent failed to appear for the hearing of this case, the Chairperson commenced the hearing and instructed the District's counsel to proceed with the presentation of the District's evidence. Tr. p. 5.

44. The District offered Petitioner's Exhibits B; C; F; G; H; J; K; and L into evidence. Tr. P. 109. They were admitted without objection.

45. The District offered the testimony of District employee, AAAAAAAA.

46. All proffered District evidence and testimony was admitted without objection, and un-rebutted by the Respondent.

47. The District completed the presentation of its evidence and rested its case at approximately 12:15 p.m., January 22, 2013. At the close of the District's case, the Chairperson ordered the transcript to be completed by February 1, 2013 and the parties to file their post-hearing briefs by February 15, 2013. The Chairperson granted the District's request for the timeline to be extended from February 28, 2013 to March 12, 2013 for filing of the Decision.

48. On January 22, 2013, the Chairperson issued an Order memorializing the dates referenced in Finding of Fact (“FF”)#47. Copies were sent to the parties as well as the other Hearing Panel members.

49. On February 5, 2013, the Chairperson received a call and fax from the Mother alleging that she had received information of an ex parte contact between Hearing Panel member Chris Montgomery and Ernest Trakas. The Mother requested that Ms. Montgomery be removed as a member of the Hearing Panel.³ After hearing from both parties as well as Ms. Montgomery, the Chairperson on February 7, 2013 entered an Order Denying Respondents’ Request for the Removal of Chris Montgomery as a Hearing Panel Member.

50. The Hearing Panel issues its unanimous decision within the March 12, 2013 timeline.

The Issue Heard by the Hearing Panel

51. Were the evaluations of Respondent undertaken by the District between January and March 2012 and April to May 2012 appropriate and, if so, were the determinations that the Respondent did not meet eligibility criteria under the IDEA to receive special education and/or related services correct? Stated more simply, did the District correctly find that the Student does not qualify as student with a disability under IDEA?

BACKGROUND FACTS

52. Student was enrolled in the District as a third grade student during the 2011-2012 school year. Ex. B, p. 21. During this school year, Student achieved the following grades: first quarter, all A’s with all areas at “meets” or “exceeds; second quarter, A’s with one B+ in Language Arts; and third quarter, all A’s. Ex. G, p. 76.

53. The following medical diagnoses appear on Student’s health records on file with the District: allergy to Ceftin; allergy to nickel; seasonal allergies; asthma; anxiety; ADHD; dysuria; sensory processing disorder; sleep disturbance and Asperger’s, which was just diagnosed in October 2011. Ex. J, p. 87.

54. The Parents have advised the District that she takes the following medications: Albuterol; melatonin; Pepcid; and Singular. Ex. J, p. 87.

55. Student is served under a 504 plan initiated in April 2011 and was updated in December 2011. Her 504 plan contains the following services: small group; testing; close proximity to the teacher; modification of assignments as needed to accommodate the ADHD; occupational therapy services; and weekly check-in with the school counselor. Student also has an asthma health plan in place with the school nurse. Ex. K, p. 115.

³ Earlier in this case, the Respondent filed a child complaint against Chris Montgomery with DESE. The complaint alleged a conflict of interest, which was found to be without merit by DESE.

First Evaluation of Student

56. In December 2011, the Respondent made a request for an IDEA evaluation of Student. Ex. B, p. 11; Tr. p. 11.

January 4, 2012 Review of existing data (“RED”) meeting

57. In response to Respondent’s request for evaluation, the District convened a multidisciplinary team to conduct a review of existing data (“RED”). The multidisciplinary team met regarding Student on January 4, 2012. Ex. B, p. 10; Tr. p. 11. A RED meeting is when a team of knowledgeable individuals review information about a student, determine what information they have, and whether there are areas where further assessment is needed in order to determine the student’s eligibility under the IDEA. Ex. B, p. 10; Tr. p. 10.

58. Ms. AAAAAAAAAA facilitated the January 4, 2012 RED meeting. Ex. B, p. 12; Tr. p. 12. Her background is as follows:

(a) AAAAAAAAAA is currently employed by the Wentzville School District as a school psychological examiner and the process coordinator for the evaluation department. Tr. p. 6. AAAAAAAAAA received her undergraduate degree in special education from the University of Missouri – Columbia and received her Master’s degree in education from Lindenwood University. Tr. pp. 6-7.

(b) AAAAAAAAAA has been employed by the District and involved in evaluating students for IDEA eligibility for sixteen years. Tr. p. 8; 47. She first started with the District as a special education teacher and then moved to the psychological examiner role after about four and a half years. Tr. p. 8. AAAAAAAAAA has been involved in approximately 100 IEPs. Tr. p. 9

(c) In her role as psychological examiner, AAAAAAAAAA evaluates District students to determine if they are eligible to receive special education and/or related services under the IDEA. Tr. P. 7. In her role as process coordinator of the evaluation department, AAAAAAAAAA coordinates the other psychological examiners in the District and oversees the evaluations conducted in the District. Tr. p. 7.

(d) In her role as psychological examiner and process coordinator, AAAAAAAAAA is familiar with Student. Tr. p. 9.

59. The Parents were present at the January 4, 2012 RED meeting. Ex. B, p. 13; Tr. p. 15. The Parents freely and meaningfully participated in the RED meeting and their views were heard and considered by the team. Tr. p. 16.

60. At the January 4, 2012 RED meeting, the team decided that further evaluation of Student was needed in the areas of language and social/emotional/behavioral. Ex. B; Tr. p. 12.

61. In the area of language, the team decided to administer the Comprehensive Assessment of Spoken Language (CASL) to Student and to conduct pragmatic language observations. Ex. B; Tr. p. 13.

62. The Parents provided additional information regarding their concerns in the area of language. Ex. B, p. 7; Tr. p. 13.

63. As noted, the multidisciplinary team also determined that further assessment was needed in the area of Social/Emotional/Behavioral. Ex. B, p. 9; Tr. p. 14.

64. To assess Student in the area of Social/Emotional/Behavioral, the team decided to administer the Behavioral Disorder Identification Scale (BDIS), conduct interviews of recess and lunch aides to assess peer interaction, conduct observations, gather a social history, and conduct an autism evaluation including parent interviews, rating scales, and observation. Ex: B, p. 9; Tr. p. 14.

65. At the conclusion of the January 4, 2012, RED meeting, the team reached consensus on what additional information and data was necessary to assess Student's eligibility under the IDEA. Ex. B, p. 13; Tr. 15. Everyone on the multidisciplinary team agreed on the assessments and other means which were going to be administered and utilized to evaluate Student's eligibility for special education. Tr. p. 88.

66. On January 4, 2012, AAAAAAAA presented the Parents with a written Notice of Action and obtained consent to start the evaluation. Ex. C; Tr. p.16.

67. The January 4, 2012, Notice of Action contained a Procedural Safeguards notification informing the Parents of their rights under the IDEA. Ex. C; Tr. p. 18. The Parents had been previously provided with a copy of the IDEA Procedural Safeguards upon their request for referral for a special education evaluation in December 2011. Ex. C; Tr. p. 18.

68. Attached to the Notice of Action was an evaluation plan which outlined the areas to be assessed and identified the assessment instruments that would be administered as agreed upon at the January 4th RED meeting. Ex. C, p. 30; Tr. p. 19.

69. Following the January 4, 2012, RED meeting, the Parents gave their consent for the evaluation of Student to proceed. Ex. C; Tr. p. 14.

70. Following the completion of the evaluation, AAAAAAAA prepared a draft evaluation report. Ex. E; Tr. p. 21. The evaluation report detailed and summarized all of the evaluation data gathered during the evaluation process. Tr. pp. 21-22. The report summarized the information gathered from the assessments administered pursuant to the evaluation plan. Ex. C; Tr. p. 22.

March 2, 2012 Evaluation

71. The multidisciplinary team met on March 2, 2012 to review the results of the evaluation as contained in the draft evaluation report. Ex. E; Tr. p. 22. AAAAAAAAAA was present at the meeting. Tr. p. 22.

72. Following the March 2nd meeting to review the evaluation data, the Respondent requested that the draft evaluation report be amended to include additional information. Tr. p. 23. Accordingly, the evaluation report was amended to include the opinions of two outside professionals from whom Respondent had requested input. Ex. J; Tr. p. 23. The District did not have this information until the March 2, 2012 meeting. Tr. pp. 24-25. Nonetheless, the District agreed to amend the report to include the information presented by the Respondent and the multidisciplinary team considered this information when making its eligibility determination. Ex. J; Tr. p. 25.

73. A copy of the amended evaluation report was provided to the Respondent by AAAAAAAAAA. Ex. J, p. 113; Tr. pp. 25-26.

Results of the Language Evaluation

74. The evaluation report detailed the results of the language evaluation conducted on Student and included the results of the Comprehensive Assessment of Spoken Language (CASL) and each of its subparts were detailed in the report. Ex. J, p. 91; Tr. p. 28.

75. The CASL included several subtests designed to evaluate a student's ability to comprehend the meaning of antonyms, syntax construction, paragraph construction, nonliteral language and pragmatic judgment. Ex. J, p. 91. The results are summarized as follows:

(a) The antonym subtest is used to determine whether the student tested has the ability to retrieve and express words that are opposite in meaning. *Id.*; Tr. 29. Student scored 108 on the antonym subtest. This score places Student in the average range with respect to age-like peers. Ex. J, p. 91; Tr. 29.

(b) Student scored a 97 on the syntax construction subtest which is in the average range. Ex. J, p. 91; Tr. p. 29.

(c) Student scored a 109 on the paragraph comprehension subtest which is also in the average range. Ex. J, p. 91; Tr. p. 30.

(d) Student scored in the above average range on the nonliteral language subtest with a score of 119. Ex. J, p. 91; Tr. p. 30.

(e) Student scored in the average range on the pragmatic judgment subtest with a score of 108. Ex. J, p. 91; Tr. 130.

(f) Student received a total score of 102 on the CASL, which is in the average range. Overall, the CASL showed that Student's language skills were all average or above average as compared to her peers. Tr. p. 30.

76. The Social Language Development Test – Elementary (SLDT-E), was also administered to Student to assess her social language skills, including nonverbal communication. Ex. J, p. 91; Tr. p. 30. The SLDT-E includes categories or subtests to assess a student's ability to make inferences, engage in interpersonal negotiation, make multiple interpretations and support peers. Ex. J, p. 91. The results are summarized as follows:

(a) The first subpart in the making inferences subtest evaluates the ability to express thoughts. Student scored an 86 on this subpart, placing her in the average range. Ex. J, p. 91; Tr. p. 31. On the other subpart, stating visual cues, Student scored a 77, which was below average. For a total score in the area of making inferences, Student scored an 81, which was below average. Ex. J, p. 91; Tr. P. 31.

(b) On the next category or subtest of the SLDT-E, interpersonal negotiation, there are three subparts - stating problems, stating solutions and justifying solutions. Ex. J, p. 91; Tr. P. 31. On the stating problems subpart, Student scored a 98, which is in the average range. Ex. J, p. 91; Tr. P. 31. On the stating solutions subpart, Student scored a 99, which is in the average range. Ex. J, p. 91; Tr. P. 31. On the final subpart, justifying solutions, Student scored a 108, which is also in the average range. Ex. J, p. 91; Tr. P. 31.

(c) On the interpersonal negotiation category, Student received a total score of 102, which put her in the average range. Ex. J, p. 91; Tr. P. 31.

(d) On the multiple interpretations category of the SLDT-E, Student scored an 88, which is in the average range. In the final category of the SLDT-E, supporting peers, Student scored a 101, which is in the average range. Ex. J, p. 91; Tr. p. 32.

(e) Student's total score on the SLDT-E was 97, which falls in the average range. Ex. J, p. 91; Tr. p. 32.

77. The Test of Pragmatic Language (TOPL-2) was also administered to Student. Ex. J, p. 93; Tr. p. 32. This test evaluates the appropriateness and effectiveness of a student's pragmatic or social language skills. Ex. J, p. 93; Tr. p. 32. The TOPL-2 provides data and information within six core subcomponents of pragmatic language, including physical setting, audience, topic, purpose, visual gestural cues, and abstraction. Ex. J, p. 93; Tr. p. 32. On the TOPL-2, Student received a 102, which places her in the average range. Ex. J, p. 93; Tr. p. 33.

78. As part of Student's assessment in the area of language, Student was also observed in the school setting. Observations in the area of language "assist the speech and language pathologist to understand if what the information she gains on a formal

test is backed up by how the child actually performs in a classroom setting, or in a social setting.” Tr. p. 33.

79. An observation of Student was conducted on February 13, 2012. Ex. J, p. 94; Tr. p. 33.

80. During the February 13, 2012 observation, the observer noted, “the teacher then explained they would be working with a partner to complete a measuring worksheet and asked the class to find a peer in the room to work with and make eye contact with that peer. [Student] immediately stood up and looked directly at the peer across the room, different from the peer she was observed to interact with previously, and smiled. When directed by the teacher to join the peer, [Student] joined the peer at the desk on the other side of the room.” Ex. J, p. 95; Tr. 34. AAAAAAAAAA testified that this observation was significant because it shows that Student immediately complied with the teacher’s directive and was interacting with her peers appropriately. Ex. J, p. 95; Tr. P. 34.

81. The evaluation report included a summary of the language evaluation conducted on Student. Ex. J, p. 96. The summary noted that in the area of syntax, Student spoke in grammatically correct, complete sentences, using a variety of sentence types, primarily simple and compound. Ex. J, p. 96. AAAAAAAAAA testified that this was significant as it showed that Student was using syntax properly and at an age-appropriate level. Tr. p. 35.

82. With regard to semantics, the evaluation summary reported that Student “appeared to understand and use appropriate vocabulary concepts.” Ex. J, p. 96; Tr. p. 35. AAAAAAAAAA testified that this was significant because it showed that Student is using age appropriate vocabulary. Ex. J, p. 96; Tr. p. 35.

83. With regard to pragmatics, the evaluation summary reported that “[Student] was friendly and talkative with the examiner in a one-on-one testing situation, as well as elsewhere in the educational environment. When [Student] had an opportunity to interact with the examiner, [Student] initiated and responded to greetings and farewells. She frequently initiated topics of conversation with the examiner. Her topics of conversation were typically related to events or situations presented within stimulus items or testing questions that reminded her of personal situations.” Ex. J, p. 96; Tr. p. 35.

84. AAAAAAAAAA testified that the summary of pragmatics reflects Student’s ability to be friendly with the examiner when she saw her and use appropriate pragmatic skills. Tr. p. 36.

Results of the Social/Emotional/Behavioral Evaluation

85. The evaluation report also summarized the results of the testing conducted in the area of Social/Emotional/Behavioral (“S/E/B”). Ex. J, p. 97; Tr. p. 36.

86. One of the instruments used to assess Student in the S/E/B area was the Behavior Disorder Identification Scale, Second Edition (BDIS-2). Ex. J, p. 97; Tr. p. 36. This assessment tool uses a behavior rating scale for multiple items where different raters evaluate particular behaviors and the frequency the behavior is observed. Tr. p. 37. AAAAAAAA's testified very credibly regarding the BDIS evaluation:

(a) Five of the raters on this BDIS were Student's teachers, including her classroom teacher, music teacher, PE teacher, art teacher and computer teacher. The sixth rater was Student's mother. Ex. J, p. 97; Tr. p. 37.

(b) The areas rated on the BDIS were: learning problems, interpersonal problems, inappropriate behavior, unhappiness, depression, and physical symptoms/fears. Ex. J, p. 97; Tr. p. 37.

(c) The scores on the BDIS reflect that (1) all the teachers scored Student in the average to above average range, (2) these scores were very consistent with each other, and (3) demonstrate that among various settings, Student is displaying the same behaviors. Ex. J, p. 97; Tr. pp. 37-38. Student's mother's scores were all zeros, which is more than two standard deviations from the norm and indicate serious concerns. E. J, p. 97.

(d) AAAAAAAA stated that this large discrepancy between the teacher's scores and Student's mother's scores could be attributable to a variety of reasons, including different expectations in the school environment versus the home environment, as well as the fact that the Parent did not have a classroom of other third grade students to compare to when she rated her child. Tr. P. 38. AAAAAAAA also acknowledged that it is possible that a parent who reports zeros may be motivated by a desire to skew the results. Tr. p. 39.

87. To further assess Student in the S/E/B area, observations of Student were also undertaken. Observations across multiple settings are important when considering the existence of an emotional disturbance, and the attendant eligibility for special education based on that finding. Tr. pp. 39-40. AAAAAAAA testified very credibly regarding the results of the observations detailed in Ex. J. p. 100-106:

(a) On January 10, 2012, a S/E/B observation was conducted of Student in her music and PE classes. Ex. J, p. 100; Tr. p. 40.

(b) In the report of the January 10, 2012 observation, the observer noted, "[Student] sang along with music, talked with students near her between songs, as did most of the other students. She giggled quietly while several of the boys in the class pretended to dance while they were seated." Ex. J, p. 100; Tr. p. 40. AAAAAAAA testified that this observation was significant because it showed that Student was "very much like her peers" and was "acting like a third grader." Tr. pp. 40-41.

(c) The report of the music/PE observation also noted that, "[a]fter approximately 11 minutes, the teacher distributed slips of paper on which the

students were to vote for their favorite song that had been played in class. The voting results of the entire school would determine the song to be performed in an upcoming school event. [Student] passed down the slips of paper after taking one and waited for her turn to use a pen. She filled out her slip, turned in her vote, and returned the pen to the teacher's desk as had been directed." Ex. J, p. 100; Tr. p. 41. AAAAAAAA felt that this observation demonstrated that Student was behaving appropriately as directed. Tr. p. 41.

(d) In all the observations conducted on Student, the observers felt Student met expectations and demonstrated no need for specialized instruction. Ex. J, p. 100-106; Tr. p. 42.

Results of the Autism Evaluations

88. Student was also administered the Gilliam Asperger's Disorder Scale (GADS), which is a screening instrument for the identification of behavioral characteristics of Asperger's Disorder and to assess unique behavioral problems, and the Sohn Grayson Rating Scale for Asperger's Syndrome and High Functioning PDD. Ex. J, p. 107.

89. The Sohn Grayson and the GADS are rating scales listing characteristics or behaviors that different raters evaluate and score, and which indicate how frequently a child displays those characteristics which are related to autism. Tr. p. 42.

90. The Sohn Grayson and GADS were administered to Student in response to her Parents' belief that Student was eligible under the IDEA for autism. Student's Parents had obtained a medical diagnosis of Asperger's disorder for Student. Tr. pp. 42-43.

91. On the GADS, Student's teacher rated Student in the low or not probable category of probability of Asperger's disorder. Ex. J, p. 107; Tr. p. 43. Accordingly, the teacher's ratings did not indicate a probability that Student had behaviors that were consistent with Asperger's disorder. Tr. p. 43.

92. On the Sohn Grayson, Student's Art teacher, Computer teacher, and PE teacher completed the rating scales and each teacher scored Student in the very low to low probability ratings of Asperger's disorder based on their observations of Student in their classrooms through the year. Ex. J, p. 107; Tr. pp. 43-44.

93. Student was also observed on February 14, 2012, and February 15, 2012 to determine whether Student met the eligibility criteria under the autism category contained in the Missouri State Plan Implementing Part B of the Individuals with Disabilities Education Act (Revised 2012) ("State Plan"). Ex. J, p. 107; Tr. p. 45; Tr. pp. 44-45. Student's teachers and Student's mother were also interviewed as part of her evaluation in this area. Tr. p. 45.

94. The February 14 and 15, 2012 observations of Student did not show any concerns or significance with respect to autism. Ex. J, pp. 108-109; Tr. p. 45. None of

the observers indicated that there was any reason to suspect that Student had autism. Ex. J, p. 109; Tr. p. 46.

95. In summary, the autism evaluation concluded that, “[f]or the characteristics of autism for speech, language, cognitive and nonverbal communications, [Student] displayed good conversational skills with good eye contact, turn taking and topic maintenance. In the school setting [Student] seemed to take into consideration the facial expressions and body language of others, and used great facial expressions to enhance her communication. There was no evidence of a lack of understanding of nonliteral language. In the area that relates to the characteristics of autism for the capacities to relate to the characteristics of autism for the capacities to relate to people, objects, and events, [Student] has developed friendships and has appropriate interactions with peers and adults. She seeks to share her enjoyment of interest and achievements with others, she engages in play activities with peers, she’s not schedule driven, and adapts easily to changes in routines, such as assemblies and fire drills. She does not fixate on ideas or activities.” Ex. J, p. 111; Tr. pp. 46-47.

96. AAAAAAAA testified that she has been involved in a thousand evaluations and participated in the development of hundreds of IEPs, including work developing and evaluating students with Asperger’s or autism. Tr. p. 47. AAAAAAAA also testified that Student’s evaluation was not consistent with a child who has Autism or Asperger’s disease. *Id.*

Conclusions from the First Evaluation

97. On March 2, 2012, the multi-disciplinary evaluation team determined that Student did not meet eligibility criteria of emotional disturbance or autism and did not qualify to receive special education and/or related services under the IDEA. Ex. J, p. 111; Tr. p. 48.

98. The Parents were present at the March 2, 2012, meeting and were given written confirmation of the decision on Student’s eligibility via a Notice of Action along with a final copy of the evaluation report. Ex. F; Tr. p. 48. The Notice of Action confirmed that Student was not eligible under the IDEA and stated the reasons for that decision. Ex. F; Tr. p. 49.

99. Following the March 2, 2012 decision that Student did not meet eligibility criteria to receive special education, Respondent wrote a letter to District superintendent, Dr. Terry Adams, requesting an independent educational evaluation (IEE). Tr. p. 52.

100. A parent can request an IEE if they disagree with a school district’s evaluation. Tr. p. 52.

101. Respondent’s request for an IEE sought evaluation in areas that had not been identified in the January 4, 2012, RED or evaluated consistent with the attendant evaluation plan. Tr. p. 53; Ex. B, p. 2-12; Ex. C, p. 30.

102. Respondent's request for an IEE also sought independent evaluation in the areas of social/emotional and language which were evaluated by the District as part of the January 4, 2012, RED and evaluation plan. Tr. P. 53.

103. In response to Respondent's request for an IEE, the District granted the request and agreed to pay for an IEE in the areas that had been previously evaluated (language and social/emotional/behavioral).⁴ Tr. p. 53. The District decided to hold another review of existing data meeting for the new areas identified in Respondent's request for an IEE that had not been previously evaluated. *Id.*

Second Evaluation of Student

April 16, 2012 RED Meeting

104. A second review of existing data meeting was held on April 16, 2012 ("RED – 2"), approximately six weeks after the multidisciplinary team met to review the results of the January-March 2012 evaluation, to review data in the areas that had not been assessed in the January-March 2012 evaluation. Tr. pp. 55-56.

105. AAAAAA credibly testified that it was not typical to conduct a second RED meeting within six weeks of a full evaluation on a student. Tr. p.56.

106. Respondent was present and contributed to the information considered at the RED-2. Ex. G, p. 78; Tr. p. 64-65.

107. At the RED-2, the team agreed to assess Student in the areas of Health/Motor, Language, Intellectual/Cognitive, Adaptive Behavior, S/E/B, and Academic Achievement. Ex. G. pp. 66-77; P, p. 82.

108. To assess Student's Health/Motor needs the District conducted a sensory and occupational therapy evaluation. Ex. J, p. 69; Tr. p. 55. At the time of the RED-2 meeting, Student was receiving 60 minutes a week of occupational therapy ("OT") services through a Section 504 plan. Tr. p. 57. The team agreed to look at the area of sensory and O.T. as part of the April-May 2012 evaluation. Tr. p. 57. These assessments are typically performed by an occupational therapist. Tr. p. 57.

109. In the area of Language, Student would be administered the Clinical Evaluation of Language Fundamentals, Fourth Edition ("CELF-4"). Ex. G, p. 71; Tr. p. 58. Although the team had previously assessed Student in this area as part of the January-March 2012 evaluation, this time the team agreed to look specifically in the areas of pragmatic language and language as a whole to address Respondent's concerns. Tr. p. 58.

⁴ AAAAAA did not recall if the Parents followed through on the request for an IEE. Tr. p. 54. She later testified that the District received a records request causing the District to conclude an outside evaluation was taking place. Tr. J. p. 108. The Parents, however, did not provide the results of any tests other than an additional language test – the same test as previously administered by the District and with very consistent results. Tr. J. p. 108-109.

110. To assess Student in the area of language, the CELF-4 was administered. The CELF-4 is a different language assessment tool than was used to evaluate Student during the January-March 2012 evaluation. Tr. p. 59. Accordingly, there was no issue with regard to the validity of the results of the CELF-4. Tr. p. 59.

111. In the area of intellectual/cognitive, the Weschler Intelligence Scale for Children, 4th Edition (“WISC-IV”) was administered to assess Student’s abilities and potential. Tr. p. 60.

112. AAAAAAAAAA administered the WISC-IV, and testified that she has administered the WISC-IV “hundreds” of times in her career. Tr. p. 60.

113. To assess Student in the area of Adaptive Behavior the Adaptive Behavior Evaluation (ABES) was utilized. Ex. G, p. 72; Tr. p. 61. Adaptive behaviors are the skills that students are expected to be able to perform independently at certain ages. Tr. p. 61.

114. The team also decided to do further assessment in the area of S/E/B. Ex. G, p. 72; Tr. p. 61. Specifically, the team decided to conduct a functional behavioral analysis (“FBA”) of Student’s frequency of visits to the school nurse. Ex. G, p. 72; Tr. p. 62.

115. Student was also evaluated in the area of academic achievement, specifically in the areas of reading, written expression, and math. Ex. G, p. 76; Tr. p. 63.

116. Accordingly, despite the fact that the team had just completed an evaluation of Student in March 2012, the team decided to evaluate Student again in the areas of academic achievement, cognitive/intellectual, language, and social/emotional. Tr. p. 64.

117. Following the April RED-2 meeting, Respondent was provided a written Notice of Action proposing another evaluation. Ex. H. This notice indicated the areas that Student was going to be assessed and the reasons for the assessment as well as the instruments or tools to be utilized. Ex. H, p. 82.

118. Respondent consented to this evaluation. Ex. H, p. 81.

119. After assessments, observations, and interviews were completed in accordance with the RED-2 and evaluation plan, the multidisciplinary team met on May 16, 2012 to review the results of the evaluation. Tr. p. 70; Ex. K.

Results of WISC-IV

120. In the area of Intellectual/Cognitive the team reviewed the results of the WISC-IV, the IQ test that was given to Student. Ex. K, p. 116; Tr. p. 70. AAAAAAAAAA personally administered the WISC-IV to Student. Tr. p. 70. The test results were as follows:

(a) Student's full scale IQ as calculated by the WISC-IV was a 98, which is in the average range. Ex. K, p. 116; Tr. p. 71. The test is broken down into four sub-areas. The first area is verbal comprehension and it assesses the child's ability to verbally comprehend and verbally express answers. Ex. K, p. 116; Tr. p. 71. Student had an index score in this area of 95 which falls in the average range. Ex. K, p. 116; Tr. p. 71.

(b) The next sub-area in the WISC-IV is perceptual reasoning, which assesses hands-on activities, such as visual motor, visual special abilities, and abstract reasoning. On this sub-area, Student had a score of 106, which is in the average range. Ex. K, p. 116; Tr. p. 71.

(c) The third area in the WISC-IV is working memory index, which looks at short-term memory, the ability to maintain some information in short-term memory and recite it, or to manipulate that information and recite it; Student scored a 94, which is in the average range. Ex. K, p. 116; Tr. pp. 71-72.

(d) The fourth index of the WISC-IV is processing speed, which is assessed using timed tests to measure how quickly Student can process information; Student scored a 97, which is in the average range. Ex. K, p. 116; Tr. p. 72.

(e) Overall, on the WISC-IV, Student's abilities were in the average range and her profile was very consistent across the subtests. Ex. K, p. 116; Tr. p. 72.

Adaptive Behavior Evaluation Results

121. The team also reviewed the results of the Adaptive Behavior Evaluation Scale-R2 ("ABES") administered to Student in the area of adaptive behavior. Ex. K, p. 117; Tr. p. 72. The team heard the following results:

(a) The ABES is a behavior rating scale that looks at how independent a child is with respect to certain areas as compared to same-aged peers. Tr. p. 73. It is an inventory or list of activities or behaviors on which various raters indicate whether or not they have seen Student exhibit that behavior and whether she is able to complete that task. Tr. p. 73. In general, it is expected that a child's adaptive behavior scales will be consistent with their IQ. Tr. p. 73.

(b) On the ABES, Student's mother completed one scale and another scale was completed by Student's classroom teacher, Mrs. Anderson. Tr. pp. 73-74.

(c) On the scales reported by Student's teacher, overall Student's adaptive scales quotient was a 97, which falls in the average range and is consistent with her IQ of 98. Ex. K, p. 117; Tr. p. 74.

(d) On the scales reported by Student's mother, Student's adaptive skills quotient was a 65, which is significantly below average and significantly below Student's measured IQ. Tr. p. 74. AAAAAAAA testified that in thousands of evaluations,

she has never seen the extremely wide discrepancy between IQ and a parental adaptive skills rating as occurred here. Tr. p. 75.

(e) This disparity in results between Student's teacher and mother could be the result of the parent not having other third grade students to compare to, and/or the result of having different expectations in the home versus the classroom. Tr. pp. 74-75. It is also possible that a parent's report could be motivated by a desire to skew the results to obtain a certain result. Tr. p. 75.

Other Test Results

122. In evaluating academic achievement the team considered the results of the Weschler Individual Achievement Test ("WIAT-III"), which looked at Student's skill in reading, math and written expression as compared to grade level peers. The results of the WIAT-III demonstrated that all of Student's scores, in every subtest, were in the average range. Ex. K, p. 120; Tr. pp. 76-77. This demonstrated that Student is able to meet the academic expectations in the third grade classroom. Tr. p. 77.

123. The results on the WIAT-III were consistent with the results of the intellectual/cognitive evaluation of the WISC-IV administered to Student. Tr. p. 77.

124. An occupational therapy evaluation was also conducted on Student on May 9, 2012. Ex. K, p. 123; Tr. p. 78. The summary of this evaluation indicates that Student exhibits sensory processing skills in handwriting legibility within normal limits and functioning level for third grade. Ex. K, p. 124; Tr. p. 7.

125. At the May 16, 2012, meeting the team also reviewed and considered the results of the Clinical Evaluation of Language Fundamentals - Fourth Edition ("CELF-4") administered to Student on April 24, 2012, to assess language. In all areas of the CELF-4: concepts and following directions, recalling sentences, formulated sentences, and word classes, Student scored in the average range culminating in a core language score of 108, which falls in the average range. Ex. K, p. 125; Tr. p. 78.

126. Student's score on the CELF-4 was consistent with the results garnered from the WISC-IV, and WIAT-III. Student's scores on each of these tests were in the average range. Tr. p. 79.

127. The results of Student's S/E/B evaluation were also reviewed and considered by the team. Ex. K, p. 127; Tr. p. 79. In this portion of the evaluation, an FBA was conducted to determine the function of Student's frequent visits to the nurse. Tr. p. 80.

128. Over the course of four weeks between April 16th to May 16th 2012, data was taken and kept on how often Student visited the nurse and the circumstances surrounding Student's visits. Tr. p. 80. Student's visits were charted looking at how many requests Student made each week and how many times Student actually visited the nurse and from what class Student was leaving to go to the nurse. Ex. K, p. 128; Tr. p. 80.

129. To thoroughly consider the reasons behind Student's visits to the nurse, and to address Respondent's concerns regarding the number of Student's visits to the nurse, the team also looked at Student's history of nurse visits during kindergarten, first grade, and second grade, including the number of visits, the reason for going, and Student's stated reason for going. Charts were developed to analyze this data for each grade. Ex. K, pp. 128-131; Tr. p. 81.

130. As a result of this FBA, the team concluded that overall Student seemed to be going to the nurse for attention. Ex. K, p. 131; Tr. p. 81. Student was receiving individualized attention from the nurse and she liked that relationship and was therefore requesting nurse visits frequently. Tr. p. 101. However, despite Student's frequent nurse visits, Student missed less than .003% of the instructional day. Tr. p. 82.

131. The May 16, 2012 evaluation report also included data and information obtained in the March 2012 IDEA evaluation, which was placed in the report to serve as a reference in the current evaluation. Ex. K, p. 131; Tr. pp. 82-83

Conclusions from the Second Evaluation

132. At the May 16, 2012, eligibility determination meeting, Respondent invited an outside professional from Behavior Solutions, who had conducted an observation of Student, to attend the meeting. At the meeting, the individual from Behavior Solutions orally shared their observations with the team. They had no written report. Tr. pp. 104-105. The individual from Behavior Solutions did not report anything significant regarding his/her observation of Student. Tr. p. 105. Individuals from Missouri Protection and Advocacy Services also attended the meeting at the invitation and request of the Respondent but they did not have a lot of input. Tr. pp. 107- 108.

133. Ultimately, on May 16, 2012, after analyzing and discussing all the evaluation results, the eligibility determination team concluded that Student did not meet the eligibility criteria to qualify as a student with a disability eligible to receive special education and/or related services under the IDEA. Ex. K, p. 157; Tr. p. 83. The team specifically found that Student did not meet the criteria for either Specific Learning Disability or Language Impairment Disability. Ex. K, p. 157. Specifically, a significant discrepancy between ability scores, achievement scores and language scores was not present as defined by Missouri state criteria. Ex. K, p. 157. The team also declined to change the eligibility determination [regarding Autism and Emotional Disturbance] decision from the March 2, 2012 evaluation based on the updated evaluation in the social/emotional area. Ex. K, p. 157.

134. Respondent was present at the May 16, 2012, meeting when the eligibility determination was made. Tr. p. 83. The team considered all the information and documentation Respondent had presented and/or offered. Tr. p. 84. The Respondent had the full opportunity to express their opinions and views during the eligibility staffing. Tr. p. 84.

135. Respondent was mailed a Notice of Action confirming the determination that Student did not meet the eligibility criteria as a student with a disability eligible to

receive special education and/or related services under the IDEA with a final copy of the evaluation report. Ex. L; Tr. pp. 84, 86.

CONCLUSIONS OF LAW

The Hearing Panel makes the following Conclusions of Law:

The Parties

1. The District is a Missouri Public School District which is organized pursuant to Missouri statutes.

2. The Student and her Parents (Respondent) are now and have been during all times material to this proceeding, residents of the District, as defined by Section 167.020 RSMo.

3. Article IX § 2(a) of the Missouri Constitution states in pertinent part that “[t]he supervision of instruction in the public schools shall be vested in a state board of education. . . .” The State Board of Education for the State of Missouri is the “State Educational Agency” (“SEA”) for the State of Missouri, as that term is defined in the IDEA, 20 U.S.C. § 1401(28).

Due Process Complaints and The IDEA’s Burden of Proof

4. The District filed its due process complaint on June 29, 2012 and an Amended Due Process complaint on October 8, 2012. FF#18 &20. The District seeks an order from the Hearing Panel confirming that the District’s evaluations of Student were appropriate; that the Multidisciplinary Team’s decisions that Student did not meet the eligibility criteria as a student with a disability in need of special education and related services under the IDEA was correct; that the District acted in compliance with the IDEA; and establishing that the District is not and will not be responsible for the cost of Student’s private education.⁵

5. The burden of proof in an administrative hearing arising under the IDEA is properly placed upon the party seeking relief. *Schaffer ex rel. Schaffer v. Weist*, 546 U.S. 49, 126 S.Ct. 528, 537 (2005). The standard of proof in this administrative proceeding, as in most civil cases, is proof by a preponderance of the evidence. *Tate v. Department of Social Services*, 18 S.W.3d 3, 8. (Mo. App. E.D. 2000). The burden of proof is on the District.

Appropriateness of the Evaluations

6. The IDEA imposes an affirmative obligation on school authorities to identify and evaluate children with disabilities. See 34 C.F.R. Section 300.320(a)(1)-(2). Specifically, the Act mandates that a “State educational agency, other State agency, or local educational agency shall conduct a full and individual initial evaluation. . . before

⁵ This issue was resolved on October 8, 2012 when the Respondent filed a Waiver of Right to Seek Reimbursement for Unilateral Placement. FF#25.

the initial provision of special education and related services to a child with a disability. . . 20 U.S.C. Section 1414 (a)(1)(A).

7. IDEA's implementing regulations require that "[i]n evaluating each child with a disability . . . the evaluation must be sufficiently comprehensive to identify all of the child's special education and related needs, whether or not commonly linked to the disability category in which the child has been classified." 34 C. F. R. 300.304(c)(6).

8. IDEA also mandates that in conducting the evaluation, the local educational agency shall -

(A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining -

(i) whether the child is a child with a disability . . .

20 U. S. C. Section 1414(b)(2).

9. The IDEA and the Missouri State Plan contain provisions describing in detail how an evaluation of a student should be carried out. See 34 C.F.R. § 300.301-300.306 (2006); State Plan at p. 33-35.

10. To assess the adequacy of the District's evaluations, we must determine whether those evaluations meet the criteria set forth by the IDEA and the State Plan. More specifically, the IDEA requires that: (1) the evaluation be conducted by qualified persons; (2) the testing and assessment materials and procedures must be selected and administered so as not to be racially, culturally, or sexually discriminatory, and should be provided and administered in the student's primary language or other mode of communication; (3) any standardized tests used must have been validated for the specific purpose for which they were used; (4) testing must be administered by trained and knowledgeable personnel in accordance with any instructions provided by the producers of the tests; (5) evaluation materials must be tailored to assess specific areas of educational need, rather than merely provide a single general intelligence quotient; (6) tests must be selected and administered so as to ensure that the results accurately reflect the aptitude or achievement level of a child with impaired sensory, manual, or speaking skills; (7) no single procedure may be used as the sole criterion for determining whether a child is disabled, or for determining an appropriate educational program for the child; (8) the child must be assessed in all areas related to the suspected disability; (9) the evaluation must be sufficiently comprehensive to identify all of the child's special education and related service needs; (10) the evaluator must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors; and (11) the evaluator must use assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child. See 34 C.F.R. § 300.304 (2006); See *also* State Plan. pp. 33-35 (2012).

11. Various courts that have analyzed the sufficiency of district evaluations have focused on the criteria set out in Conclusion of Law (“CL”)#10. *See e.g., Council Rock School District v. Bolick*, Civil Action 09-5604 (E.D. Pa. 2010) (all areas relating to the suspected disability, including *inter alia*, social and emotional behavior, general cognitive skills, academic performance, communication skills were tested with results indicating that the student did not qualify as child with a disability); *Los Angeles Unified School District California State Educational Agency*, 55 IDELR 209 (SEA 2010)(the District’s evaluation included a variety of assessment tools and strategies as well as using technically sound instruments as mandated by the IDEA implementing regulation at 34 CFR 300.304(b)); *Blake v. Council Rock School District*, 2008 WL 4489793 (E. D. Pa. 2008)(the District used a variety of assessment tools and did not rely on a sole instrument as the basis for any its conclusions; the District evaluated the Student in all areas of suspected disability; used technically sound instruments administered in accordance with the instructions provided by the producer); *DeMerchant v. Springfield School District*, 2007 WL 2572357(D. Vt. 2007) (the court found that the testing was comprehensive and conducted by qualified professionals); *K.S. v. Abington School District*, 2007 U.S. Dist. LEXIS 73047, 2007 WL 2851268 (E.D. Pa. 2007)(the Court found that the evaluation report addressed the Student’s deficiency between ability and achievement in math skills, identified that he had a specific learning disability and used a variety of reliable testing to reach these conclusions, all of which provided sufficient information to develop an adequate IEP).

12. An evaluation is not in of itself deficient solely because it does not review all areas of concern expressed by parents or because a district failed to utilize the parents’ choice of instruments for assessment. *In P.P. v. West Chester Area Sch. Dist*, 585 F. 3d 727, 737 (3rd Cir. 2009) the Court found that the School District’s evaluation was appropriate even though it did not contain all the assessments requested by the parents. Similarly, in *Concord Public Schools*, 53 IDELR 342 (SEA MA 2010), the Hearing Officer noted that the purpose of an evaluation is to assess whether a student has an educational disability and stated, “[i]t is not relevant that the educational assessment might have included additional testing (even testing that might have been requested by parents or might have enhanced the evaluation) or could have been written more thoroughly or more accurately, so long as [the District’s] evaluation met the applicable standards of comprehensive and appropriate.”

13. As discussed in more detail later in this Decision, we conclude that the evaluations as reflected in Student’s Evaluation Reports dated March 2, 2012 and May 16, 2012 met the IDEA requirements as set out in CL#6-12 above in that the District conducted comprehensive and appropriate evaluations.

Determination of Eligibility under IDEA

14. In interpreting evaluation data for the purpose of determining if a child is a child with a disability under 34 CFR 300.8 and the educational needs of the child, each public agency must:

- (i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher

recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and

- (ii) Ensure that information obtained from all of these sources is documented and carefully considered.

34 CFR 300.306 (c)(1).

- 15. Pursuant to the Missouri State Plan:

Upon completing the administration of tests and other evaluation materials, a group of qualified professionals and the parent of the child must determine whether the child is a child with a disability and the educational needs of the child. The public agency must provide a copy of the evaluation report which documents the determination of eligibility at no cost to the parent.

State Plan p. 35; see also 34 C.F.R. 300.306.

- 16. Under IDEA, the term “child with a disability” means a child with a variety of impairments who by reason of such impairment needs special education and related services. 20 U. S. C. Section 1401; 34 CFR 300.8(a)(1). See also State Plan, p.2.

- 17. In determining eligibility under IDEA, the student must: (1) have one of the 13 disabilities delineated under the Act; (2) the disability must have had an adverse effect on the student’s educational performance; and (3) as a result of the adverse impact on the student’s education, the student needs special education and related services. *Mowery v. Board of Education of the School District of Springfield R-12*, Case #08-3042-CV-S-REL (W.D. Mo., 2011); *In Re Benjamin A.*, 946 N.Y.S.2d 65, (N.Y. Fam. Ct. 2011). “It is not whether something, when considered in the abstract, can adversely affect a student’s educational performance, but whether in reality it does.” *Marshall Joint School District No. 2 v. C.D. ex rel. Brian D.*, 616 F.3d 632, 637 (7th Cir. 2010).

- 18. A medical or psychological diagnosis pursuant to the DSM-IV is not synonymous with eligibility under IDEA. See *Letter to Coe*, 32 IDELR 204 (OSEP 1999) (responding to inquiry regarding IDEA eligibility for student medically diagnosed as PDD and unequivocally stating that eligibility under DSM-IV does not guarantee eligibility under IDEA). A physician’s diagnosis and input is significant and helps an evaluating team to make an informed decision but a doctor cannot prescribe special education. *Marshall Joint School District No. 2 v. C.D. ex rel. Brian D.*, 616 F.3d 632, 640 (7th Cir. 2010).

19. Emotional disturbance has the same definition under IDEA and the State Plan. 34 CFR Section 300.8(c)(4)(i) State plan, p. 22. This disability “involves a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance:

(A) an inability to learn that cannot be explained by intellectual, sensory, or health factors;

(B) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) inappropriate types of behavior or feelings under normal circumstances;

(D) a general pervasive mood of unhappiness or depression, and

(E) a tendency to develop physical symptoms or fears associated with personal or social problems.

34 CFR Section 300.8(c)(4)(i) State plan, p. 22.

20. IDEA and the State plan share similar definitions of autism: “a developmental disability significantly affecting verbal or nonverbal communication and social interaction, generally evident before age three (3) that adversely affects a child’s educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. 34 CFR Section 300.8(c)(1)(i) State plan, p. 20.

21. IDEA and the State Plan also contain the identical definition of specific learning disability: “a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations.” 34 CFR Section 300.8(c)(10)(i) State plan, p. 25.

22. For reasons detailed later in this Decision, we conclude that Student did not meet the eligibility criteria for emotional disturbance, autism or specific learning disability. The District, by more than a preponderance of the evidence, demonstrated that its March 2, 2012 and May 16, 2012 evaluations correctly found the Student ineligible for special education pursuant to IDEA.

DECISION

Appropriateness of the Evaluations

The District filed a due process complaint seeking to show the March 2, 2012 and May 16, 2012 evaluations were appropriate under the parameters of IDEA and the State

Plan. The Parents offered no evidence demonstrating that the evaluations were insufficient.⁶ Thus, we are forced to analyze the evaluations from evidence presented only by the District.

The District provided an abundance of evidence to show that its evaluation methodology was adequate. The evaluations were conducted by AAAAAA, a psychological examiner as well as the Process Coordinator employed by the District for more than sixteen (16) years. FF#58. She has performed over a 1000 evaluations. FF#96. AAAAAA was a very credible witness.

The Parents and the District agreed at the RED meeting on January 4, 2012 to evaluate Student in the areas of language and social/emotional/behavioral. FF#60. The District utilized several tools to assess the Student 's language skills: (1) CASL assessment which showed Student's oral language skills to be in the average range; FF#75 (2) SLDT-E tested her social language skills, which were also found to be in the average range; FF#76; (3) the effectiveness of Student's pragmatic or social language was tested via TOPL-2, with test results again in the average range; FF#77 and (4) observations in the school setting, which indicated that Student used age appropriate vocabulary and other language skills. FF#80-84.

The District used a variety of assessments in the social/emotional/behavioral (S/E/B) area. Five teachers and the mother completed behavior rating scales as part of the BDIS-2, which is designed to identify children with behavior and emotional problems. FF#86. Except for the Mother's scores, the ratings by the teachers reflected Student to be in the average to above average range. FF#86. The observations across

⁶ We also received no information from the Parents indicating that they ever followed through on their request for an IEE. FF#103, footnote 4.

multiple settings in the school also showed Student to meet expectations: she generally followed classroom and school rules as well as actively participating in the activities during the observation periods. FF#87. The observers saw her smile and laugh in appropriate situations. Ex. E, p. 55. The examiner interviewed the cafeteria and playground supervisors, who indicated the behavior by Student to be that typical of a third-grader. Ex. E, p. 55.

The District also administered two screening assessments for autism in the school setting: GADS and the Sohn Grayson. FF#88. Student's potential for autism was also assessed through observations in the school setting as well as interviews with teachers and Mother. FF#93-94. As summarized in FF#95, the District found minimal evidence of autism in the school setting.

As previously noted, the evaluation team concluded on March 2, 2012 that Student did not meet eligibility criteria for emotional disturbance or autism and did not qualify for special education and/or related services under IDEA. FF#97. The District agreed, however, to hold another RED meeting on April 16, 2012 when the team decided to assess Student in the areas of Health/Motor, Language, Intellectual/cognitive, Adaptive Behavior, S/E/B and academic achievement. FF#107.

This second evaluation was even more extensive and thorough than the first evaluation. The District administered these tests: (1) Student's full scale IQ as calculated by the WISC-IV was 98, which is in the average range; FF#120; (2) ABES, a behavior rating scale to assess a student's independence in certain areas compared to peers, completed by Student's classroom teacher and the Mother, with the teacher's scales

consistent with the Student's IQ⁷; FF#121; (3) WIAT-III, which looked at Student's reading, math and written expression skills compared to peers, with results in the average range and consistent with the WISC-IV results;FF#122-123 (4) an occupational therapy evaluation indicating sensory processing skills in handwriting legibility within normal limits and functioning level for third grade; FF#124 (5) CELF-4, a language assessment tool, with results in the average range and consistent with the WISC-IV and WIAT-III; FF#125-126; and (6) S/E/B evaluation consisted of a FBA regarding Student's visits to the school nurse, which the team concluded were to get attention and resulted in minimal loss of classroom time. FF#127-130.

The evaluation team met on May 16, 2012. The team looked at the above test results as well as her current grades; received input from the Respondent and a representative from Behavior Solutions; and reviewed the previous evaluation. FF#132. The team concluded that Student did not meet the criteria for either Specific Learning Disability or Language Impairment Disability as defined by the State Plan. FF#133. The team also declined to change the eligibility determination regarding autism and emotional disturbance from the March 2, 2012 evaluation.

The various courts and administrative panels that have addressed the appropriateness of district evaluations focus on whether the evaluation satisfied the requirements set out in Section 300.304 (summarized in CL #10). In *P. P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 739 (3rd Cir. 2009) the Court found the District evaluation to be appropriate even though it did not contain all the assessments requested by parents – areas that were not identified as suspected disabilities. In a case

⁷ AAAAAAAA very credibly testified that there was a very wide discrepancy between the Mother's rating scales and the Student's IQ –making the accuracy of the Mother's scales very questionable. FF#121(d) and (e).

involving another Pennsylvania school district, *Blake B v. Council Rock Sch. Dist.*, 2008 WL448979 (E. D. Pa. October 3, 2008), noted the thoroughness of the re-evaluation, including using a variety of assessment tools such as conversations with parents, teacher reports, review of student's educational records and all previous evaluations. *Id.* at*3. In finding the re-evaluation in compliance with IDEA, the Court emphasized the District did not rely on a sole instrument as the basis for any of its conclusions; the District evaluated the student in all areas of suspected disability and appropriately used technically sound instruments administered by those experts credentialed and trained in the administration of the specific instruments. *Id.* at *6-8; 10-11.

In *Concord Public Schools*, 53 IDELR 342 (SEA MA 2010), the Hearing Officer noted the oft-cited purposes of an evaluation is to assess whether a student has educational disabilities and if so found, to enable the development of an appropriate IEP. The Hearing Officer then stated:

I consider whether Concord's educational evaluation was appropriate and comprehensive for these purposes and within this context. It is not relevant that the educational assessment might have included additional testing (even testing that might have been requested by parents or might have enhanced the evaluation) or could have been written more thoroughly or more accurately, so long as Concord's evaluation met the applicable standards of comprehensive and appropriate. (emphasis added)

Id.

The Panel concludes more than a preponderance of the evidence demonstrates that the District's 2012 evaluations of the Student were comprehensive and appropriate. The District unquestionably met its burden of proof to show that the District's evaluation methodology was more than adequate. The evidence clearly shows that the assessment tools utilized in the Student's evaluation were technically sound and all

testing was conducted by trained and knowledgeable personnel according to appropriate instructions. *See* 34 C.F.R. § 300.304. The tests used were selected and administered so as to accurately reflect the Student's aptitude, abilities, and skills. *See* 34 C.F.R. § 300.304. In short, the evidence showed that the District's comprehensive evaluations more than satisfied the IDEA's evaluation requirements. No single procedure was utilized to determine the Student's current level of functioning and the evaluations fully complied with IDEA standards. Further, the tests administered represent a valid and reliable assessment of the Student's academic achievement skills and were reflective of her ability levels. The assessments also complied with the evaluation plans agreed upon at the two RED meetings. *DeMerchant v. Springfield School District*, 2007 WL 2572357 at 6 (D. Vt. 2007).

Determination of Eligibility under IDEA

The Due Process Complaint filed by the District seeks a ruling that the evaluations were appropriate under IDEA and the State Plan as well as a finding that the determinations of ineligibility were correct. To be classified as a child with a disability under IDEA, a student must not only have a specific disability as set forth in the Act, but the disability must also adversely affect the student's educational performance to the extent that the student requires special services and programs. CL#16 and 17.

Even if we assume that Student had one or more of the disabilities enumerated in IDEA and the State Plan, the District showed by more than a preponderance of evidence that Student's disabilities did not affect her educational performance. The cases dealing with IDEA eligibility are split as to whether educational performance is limited to academic performance or extends to non-academic factors such as a child's development of social skills and appropriate behaviors. *See Mr. I. ex rel. L. I. v. Me.*

Sch. Admin. Dist. No. 55, 480 F.3d 1, 11-12 (1st Cir. 2007) (educational performance is more than just academics); *A. J. ex rel. C. L. v. Bd. of Educ.*, 679 F. Supp. 2d 299, 309 (E.D. N.Y. 2010)(academic performance is the guiding factor). *See also*, Garda, *Untangling Eligibility Requirements under the Individuals with Disabilities Education Act*, 69 MO. L. REV 441, 473 (Spring 2004) for a very thorough discussion of eligibility issues under IDEA.

Assuming a very broad interpretation of educational performance, the District successfully demonstrated that none of Student's impairments adversely affected her educational performance. While the term "adversely affects" is not defined by the IDEA regulations or the State Plan, we have given the term its ordinary meaning and have not inferred a qualifier such as "severe" or "significant." The District produced evidence of: normal school attendance by Student; she achieved average or above average grades; she was functioning at an academic level consistent with her ability; Student behaved appropriately with District personnel; and Student interacted appropriately with her peers. In sum, after drawing upon information from a variety of sources, including aptitude and achievement tests, parent input and teacher observations as well as information about Student's physical condition, social background and adaptive behavior, the District correctly concluded that Student does not qualify as a child with a disability under the IDEA.

CONCLUSION

We conclude that the District carried its burden of proof on the issues of the appropriateness of the District's evaluations and eligibility determinations regarding Student.

ORDER

Judgment is entered in favor of the Petitioner Wentzville R-IV School District and against the Respondents.

APPEAL PROCEDURE

PLEASE TAKE NOTICE that these Findings of Fact, Conclusions of Law, Decision and Order constitute the final decision of the Department of Elementary and Secondary Education in this matter and you have a right to request review of this decision. Specifically, you may request review as follows:

1. Proceedings for review may be instituted by filing a petition in the circuit court of the county of proper venue within forty-five days after the mailing or delivery of the notice of the agency's final decision...
2. The venue of such cases shall, at the option of the plaintiff, be in the circuit court of Cole County or in the county of the plaintiff or of one of plaintiff's place of business...

PLEASE TAKE NOTICE that you also have a right to file a civil action in Federal or State Court pursuant to the IDEA. See 34 C.F.R. §300.512.

Dated this 10th day of March, 2013.

/s/ _____
Pamela S. Wright, Chairperson

Rand Hodgson, Panel Member
(Dissents)

/s/ _____
Christine Montgomery, Panel Member

Dissenting opinion

By: Rand Hodgson

This is a particular unique case between Wentzville school district and the parents. If I understand correctly the school district has filled a due process case against the parents in order to prove that they are not responsible for any private school reimbursements.

What is unique about this case is the school district, filed not after IEE (Individual Education Evaluation) I do not disagree with findings of facts within the hearing it self rather the school district has a right to file a due process outside of C.F.R. 300 parameters.

At the hearing, the parents did not attend or have representation. The evidence was very limited. The purpose of this hearing was to show the Evaluations were appropriate to avoid future reimbursement costs.

My understanding of I.D.E.A. and code of federal regulations is that this was created for the parents to have rights of their minor children, who they eligible as a person with a disability. The parents can, if they choose to file a due process, when they have a significant difference with the school district. On the other hand, the school has mandated to identify and provide services for such children.

In this particular case evidence was brought forth by the district that the parents requested multiple evaluations for the purpose of eligibility under I.D.E.A. The evidence shows clearly that the parents were not in agreement with the districts evaluations and conclusions. Further, the district agreed to provide these I.E.E.'s to the parents.

For some reason or another these did not take place. At some point the parents pulled the child from the school district. My concern is a point of law, I disagree with the position that the district has the right not to defend their position but aggressively pursue it. Again this comes from my understanding that the district has a rights to file a Due process, under only two circumstances.

The first is "child find". If the district suspects that a child has a disability and has not been identified or made eligible. In that Event, if the parent will not consent to an initial evaluation than the district must proceed against the family to secure permission for evaluation.

Second, if the district chooses to deny a request for an Individual Education Evaluation then they may file a due process request to justify the comprehensive and importance of the district evaluations.

If we believed the any district, had the right to file due process at any time a parent pull out their child from school, then we could have thousands and thousands of additional cases for when parents home school or private school their children. Parents have the right to file due process and seek reimbursement as long they are within the statute of limitations. This right resides with the parents alone. Recently, the Supreme Court found a cases for reimbursement when eligibility had not previously been found by the school district.

Again, if the school districts has the right to supersede the parent right, this would invoke unbelievable cost for the parents, who may never file due process. I believe congress has set up I.D.E.A. to fund states and school districts and has mandated these states to provide these services with children with disabilities. The funds go to the state department of Education and the school districts within those states. The parents have rights for the child and to file appropriate due process. Beside the fore mentions two areas for the district to file due process, the district does not have the right to file or preempt the parents of filing. We have somehow gotten confused that the districts has rights, I believe the districts has obligations not rights.

I have spent a great deal of time wrestling with this issue and I have come to this conclusion. I cannot agree with my panel members that the district has proven their case that these parents are not entitled to seek reimbursement at the later day. It is very clear this attempt is exactly that. So, I would find for the respondent.

Rand Hodgson

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of March, 2013, a true and correct copy of the foregoing was sent by electronic mail and by U.S. Mail, first-class postage prepaid, to the following:

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_____/s/_____
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