

**BEFORE THE DEPARTMENT OF EDUCATION
OF THE STATE OF ALABAMA**

A.S.,)	
)	
PETITIONER,)	
)	
v.)	SPECIAL EDUCATION NO. 18-121
)	
JEFFERSON COUNTY)	
BOARD OF EDUCATION,)	
)	
RESPONDENT.)	

FINAL ORDER

I. PROCEDURAL HISTORY

This matter was filed by Petitioner on October 19, 2018 and was assigned to this Hearing Officer by the Alabama State Department of Education on the same day. A resolution meeting was convened on November 2, 2018. The parties elected to submit briefs and supporting documents in lieu of convening to take testimony. Both parties submitted reply briefs after studying the submissions of the party opposite.

II. EXHIBITS ADMITTED INTO EVIDENCE

Exhibits were submitted by Respondent and accepted by this Hearing Officer. These exhibits have been examined by this Hearing Officer subject to the issues presented in the due process complaint. The documents and materials have been in the constant possession of this Hearing Officer until the rendering of this decision. Hereafter, they will be delivered to the Alabama State Department of Education. The documents were examined and the weight given to each was based upon the contents of the document which was submitted and not on which party introduced said document. This Hearing Officer has examined the exhibits based upon the substantive nature contained therein for the purpose of making a decision in this matter.

A. RESPONDENT'S EXHIBITS

1. Respondent's Exhibit 1: Jefferson County Board of Education 2017-2018 Calendar
2. Respondent's Exhibit 2: Affidavit of [REDACTED]
3. Respondent's Exhibit 3: Affidavit of [REDACTED]
4. Respondent's Exhibit 4: Affidavit of [REDACTED]
5. Respondent's Exhibit 5: Affidavit of [REDACTED]
6. Respondent's Exhibit 6: Mastering the Maze (Eligibility Decision)
7. Respondent's Exhibit 7: Student's Records
8. Respondent's Exhibit 8: Student's Section 504 Plan

III. BURDEN OF PROOF

The burden of proof in this matter is upon Petitioner as the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005); Ala. Admin. Code § 290-8-9.08(9)(c).

IV. STATEMENT OF FACTS

This section is a summary of some of the pertinent facts presented to this Hearing Officer. These facts are not necessarily the only facts considered by this Hearing Officer in making this decision. This decision is based upon the briefs and all exhibits admitted into evidence.

2017-2018 School Year:

Student enrolled in the Jefferson County School District as a [REDACTED] grader at [REDACTED] [REDACTED] School after the school year began on September 29, 2017. Student had previously been enrolled in other school districts in Alabama and had homeschooled in conjunction with a private school. Student's Mother submitted personal information on the enrollment form, stating that Student had been diagnosed with [REDACTED]. Mother did not submit Student's medical record. The private school where Student had received

homeschooling support provided a summative document indicating that Student's present work was current and that previous work was "all satisfactory."

Student began attending classes at [REDACTED] School on [REDACTED] 2017. Student's [REDACTED] grade teacher identified deficiencies and began Response to Intervention Tier I interventions on October 9, 2017. Student failed a [REDACTED] screener and participated in [REDACTED] assessments. The [REDACTED] [REDACTED] School Response to Intervention Team then met on November 9, 2017 to develop a Tier II Intervention Plan. Additional assessments were administered, and Mother was notified on November 16, 2017 that Tier III interventions would begin soon. Also on November 16, 2017, Mother wrote a letter to the [REDACTED] School administration and staff requesting that the school determine if Student would be eligible to receive special education services. Tier III reading interventions began after the Thanksgiving break on November 27, 2017. A referral meeting convened to determine whether Student would be referred for a special education evaluation on December 18, 2017. The referral team decided that Student would be referred for an evaluation for the suspected areas of Other Health Impairment and Specific Learning Disability. On January 8, 2018, Student began receiving Tier III interventions in math and behavior while the evaluation was ongoing. As part of that evaluation, intervention data, medical information, and testing was considered. Student's behavioral testing did not reveal any area of clinical significance, and Student's intelligence and achievement testing did not reveal a severe discrepancy in any area. On January 25, 2018, the evaluation team met and decided that Student did not qualify for special education services.

On February 12, 2018, a Section 504 eligibility team met, concluded that Student did meet Section 504 eligibility criteria, and developed a Section 504 Plan for Student. In April 2018, a medical doctor diagnosed Student with [REDACTED] and recommended unfettered access to

██████████ The Section 504 Team met to consider the medical diagnosis and recommendations. The Section 504 Team amended Student's Section 504 plan to provide homebound services that began on May 3, 2018 and extended through the school year.

2018-2019 School Year:

Student returned to ██████████ School at the beginning of the school year. On September 20, 2018, Mother contacted the Principal and requested that homebound services be continued. A parent-teacher conference was convened on October 3, 2018, and Student's issues with ██████████ were discussed and remedied. Math interventions were also reviewed and discussed. On October 10, 2018, the Section 504 team amended Student's Section 504 Plan to provide for homebound services through the end of the semester. The principal conferred with a special education specialist in the district's central office, and the two determined that a new special education evaluation might be appropriate. The Principal informed Mother on October 11, 2018 that the school was gathering information needed for the special education referral process and that a special education referral meeting would be held.

The due process complaint in the instant matter was filed by Petitioner on October 19, 2018. A second special education referral meeting was convened on October 30, 2018, and the special education referral was accepted. Student continued to receive homebound services pursuant to the Section 504 Plan until early December 2018, when Student returned to school. On December 17, 2018, the special education eligibility team met and again determined that Student did not meet special education eligibility criteria. Student attended school for three days in January 2019. Mother then requested homebound services again, which continued through the end of the school year. Student was on the honor roll in Spring 2019.

V. ISSUE PRESENTED

The sole issue presented in Petitioner's Complaint was whether Respondent failed to provide Petitioner a free, appropriate public education.

VI. DISCUSSION OF THE ISSUE

The sole issue presented in Petitioner's Complaint was whether Respondent failed to provide Petitioner a free, appropriate public education. School Districts have a duty to provide students with disabilities a Free, Appropriate Public Education. Ala. Admin. Code 290-8-9-.05(1)(a).

Whether the Board violated its obligation to provide Student a Free, Appropriate Public Education:

In the complaint for due process, Petitioner alleges the following violations, *verbatim*: (1) Failing to appropriately evaluate Petitioner in a timely manner; (2) Failing to find Petitioner eligible for special education services; (3) Failing to develop and implement an IEP that (a) complies with state and federal laws, and all regulations and policies promulgated thereto; (b) addresses the individual needs and characteristics of Petitioner; and (c) is based upon current professional practices as determined by peer reviewed research; (4) Failing to consider the parent an equal participant in the development and implementation of Petitioner's educational program.

First, Petitioner alleges that Respondent failed to appropriately evaluate Petitioner in a timely manner. Petitioner did not put forth evidence to address either the appropriateness or timeliness of the evaluation that was conducted within the statute of limitations in the brief or the reply brief. Based upon the preponderance of the evidence, this Hearing Officer finds no violation.

Second, Petitioner alleges that Respondent failed to find Petitioner eligible for special education services. Respondent refused to initiate the provision of a Free, Appropriate Public

Education when the eligibility team decided¹ that Petitioner was not eligible to receive special education services on January 25, 2018. Student was evaluated in the suspected areas of disability of Other Health Impairment and Specific Learning Disability. The Alabama State Department of Education defines Other Health Impairment as:

[H]aving limited strength, vitality or alertness, including heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette Syndrome. If a medical diagnosis is presented, the medical diagnosis alone is not enough to justify being identified in the area of other health impairment. The impairment must adversely affect the educational performance of the child.

Ala. Admin. Code 290-8-9-.03(9)(a). The Alabama State Department of Education defines Specific Learning Disability as:

[A] disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, speak, read, write, spell, or to do mathematical

¹ Respondent's assertion in its "Answer to Due Process Complaint" that this Hearing Officer lacks jurisdiction to hear Petitioner's challenge of the January 25, 2018 eligibility decision is without merit. "An impartial due process hearing is available when a parent or the public agency disagrees with any matter relating to a proposal or refusal to initiate or change the identification, evaluation, educational placement of a child or the provision of FAPE to a child." Ala. Admin. Code 290-8-9-.08(9)(c). This Hearing Officer must "[e]nsure that the issues raised in the hearing request pertain to the proposal or refusal to initiate or change the identification, evaluation, educational placement, and/or the provision of FAPE." Ala. Admin. Code 290-8-9-.08(9)(c)(12)(i)(I). A proposal or refusal is defined as a "special education decision" by the Alabama State Department of Education on its form mandated via 20 U.S.C. §1415(b)(8). See <https://www.alsde.edu/sec/ses/Forms/Due%20Process%20Hearing%20Request%20Form-fillable.pdf>

calculations, including conditions such as perceptual disabilities, brain injury, minimal brain disfunction, dyslexia, and developmental aphasia. Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of intellectual disability, of emotional disability, or of environmental, cultural, or economic disadvantage.”

Ala. Admin. Code 290-8-9-.03(10)(a). In order to be entitled to a Free, Appropriate Public Education pursuant to the Individuals with Disabilities in Education Act of 2004, Petitioner must be a “child with a disability” within the meaning of the statute. The Act defines “child with a disability” as having a qualifying disability and being in need of special education by reason thereof. 20 U.S.C. § 1401(3)(A). The Eleventh Circuit Court of Appeals recently held:

The IDEA confers the right to a FAPE only upon “children with disabilities.” One of the essential purposes of the IDEA is “to ensure that all *children with disabilities* have available to them a free appropriate public education,” 20 U.S.C. § 1400 (d)(1)(A) (emphasis added), meaning “special education and related services,” *id.* at § 1401(9). Conversely, if a student is not a “child with a disability,” then the student is not entitled to a FAPE under the IDEA.

Durbrow v. Cobb Cty. Sch. Dist., 887 F.3d 1182, 1189 (11th Cir. 2018). The January 25, 2018 eligibility team considered intervention data, medical information², and testing, and that eligibility team decided that Student did not meet the eligibility requirements for either Other Health Impairment or Specific Learning Disability because Student’s behavioral testing did not reveal any area of clinical significance, Student’s intelligence and achievement testing did not reveal a

² The Northern District Court of Alabama recently held that a “medical diagnosis of ADHD alone does not, in-and-of itself, bring a student within the ambit of the IDEA”. See *K.W. v. Tuscaloosa Cnty. Sch. Sys.*, Case 7:17-cv-01243-LSC.

severe discrepancy in any area, and Student did not need specialized instruction. Judge Kallon, writing for the United States District Court, Northern Division of Alabama, recently opined,

“After all, because ‘a federal district court does not have the expertise or experience in the field of education presumably possessed by professional educators,’ courts ‘grant deference to the evaluations of [the student’s] teachers and the school officials’ when signs of disability are not readily clear. *Clay T.*, 952 F. Supp. at 823.

D.J.D. v. Madison City Bd. of Educ., Case No. 5:17-cv-00096-AKK (N.D. Ala. 2018), at *10. Applying Judge Kallon’s rationale, deference should be given to the professional educators’ input. Additionally, as Petitioner is not a “child with a disability” within the meaning of the Individuals with Disabilities in Education Act of 2004, Respondent owed Petitioner no child find duty. *Durbrow*, 887 F.3d at 1196. Any complaint regarding the December 17, 2018 special education eligibility subsequent to the filing of this request for a due process hearing is outside the scope of this Hearing Officer’s jurisdiction, as the request for a due process hearing applies to the two previous years from the date of the filing. Ala. Admin. Code 290-8-9-.08(9)(c). Accordingly, no child find duty was owed to Petitioner from the January 25, 2018 eligibility decision to the date of the filing of the instant complaint, as Petitioner chose not to challenge the December 17, 2018 eligibility team decision. *Id.* Based upon the preponderance of the evidence, this Hearing Officer finds no violation.

Third, Petitioner alleges that Respondent failed to develop and implement an IEP that (a) complies with state and federal laws, and all regulations and policies promulgated thereto; (b) addresses the individual needs and characteristics of Petitioner; and (c) is based upon current professional practices as determined by peer reviewed research. As Petitioner is not a “child with

a disability” within the meaning of the Individuals with Disabilities in Education Act of 2004, Petitioner is not entitled to an Individualized Education Plan. *Durbrow*, 887 F.3d at 1189. Based upon the preponderance of the evidence, this Hearing Officer finds no violation.

Fourth, Petitioner alleges that Respondent failed to consider the parent an equal participant in the development and implementation of Petitioner’s educational program. Petitioner did not put forth evidence to support any claim that Respondent did not convene with Mother and consider her input. Based upon the preponderance of the evidence, this Hearing Officer finds no violation.

Accordingly, this Hearing Officer finds by a preponderance of the evidence that the Jefferson County Board of Education did not fail to provide Student a Free, Appropriate Public Education.

The appropriate amount and type of compensatory education or other relief, if any:

This Hearing Officer finds that the Jefferson County Board of Education did not fail to provide Student a Free, Appropriate Public Education mandated by the Individuals with Disabilities Education Act of 2004. Accordingly, this Hearing Officer finds by a preponderance of the evidence that no award of compensatory education or other relief is warranted.

VII. SPECIFIC RULINGS AND CONCLUSIONS

- A. This Hearing Officer finds that, based upon the preponderance of the evidence, Respondent did not fail to provide Student a Free, Appropriate Public Education mandated by the Individuals with Disabilities Education Act of 2004.
- B. This Hearing Officer finds that, based upon the preponderance of the evidence, no award of compensatory education or any other relief is warranted.

VIII. FINAL ORDER AND NOTICE OF APPEAL RIGHTS

This Decision constitutes a Final Order in this matter. Any party dissatisfied with the decision may bring an appeal pursuant to 20 U.S.C. 81415(i)(2). The party dissatisfied with this

decision must file a notice of intent to file a civil action with all other parties within thirty (30) calendar days of the receipt of this decision. Thereafter, a civil action must be initiated within thirty (30) days of the filing of the notice of intent to file a civil action. Ala. Admin. Code 290-8-9-.08(9)(c)(16).

SO ORDERED this the 15th day of August, 2019.



AMANDA DICKERSON BRADLEY 0
HEARING OFFICER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this document has been sent via certified mail and electronic mail to:

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SO CERTIFIED, this the 15th day of August, 2019.



AMANDA DICKERSON BRADLEY
HEARING OFFICER