

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

J. S.)	
Petitioner,)	Special Education No. 19-20
v.)	
)	
Jefferson County)	
Board of Education)	
Respondent.)	

DUE PROCESS DECISION

I. Procedural History

This matter is before the undersigned pursuant to a due process request filed on February 14, 2019 by the Honorable Shane T. Sears on behalf of [REDACTED] parent and legal guardian of *J. S.* (“Petitioner”), a student in the Jefferson County School District. Thereafter, pursuant to a letter dated the same February 14, 2019 issued by the State Superintendent of Education, the undersigned was asked to serve as the Impartial Hearing Officer in this proceeding. The undersigned issued correspondence dated February 14, 2019 setting a status conference for March 1, 2019.

The Respondent District waived the Resolution Meeting on February 21, 2019. Next, due to scheduling conflicts, the status conference was rescheduled and conducted on March 5, 2019. By agreement a due process hearing schedule was due to be put in place as outlined in the Pre-hearing Order dated March 8, 2019.

On April 30, 2019, Counsel for the Respondent timely filed *Pre-hearing Disclosures of Respondent/Petitioner, Jefferson County Board of Education* (included Case 19-20 & Case 19-52) and Counsel for the Petitioner timely filed *Petitioner’s Witnesses, Exhibits, and Subpoena Requests for Due Process Hearing* (included Case 19-20 & Case 19-52).

On May 4, 2019, the Honorable James D. Sears filed *Notice of Appearance* as additional

counsel for the Petitioner for Case 19-20. Additionally, on May 4, 2019, Counsel for the Petitioner filed *Motion to Continue*. This *Motion* was filed in response to the timing of certain documents disclosed by the District around 3:00 p.m. on the Friday, May 3rd with the hearing set to begin on May 7th. These disclosures followed the timely disclosure earlier by the District.

A phone conference was conducted on May 6, 2019. During the conference, the parties confirmed some details about how these documents ‘came to light’ and the question of such admissibility in light of the administrative code. The parties discussed the merits of postponing the hearing and the possible change in location of the hearing. At the end of the discussion, the Petitioner’s attorneys agreed to move forward as scheduled. It was also agreed that the hearing would remain scheduled to occur at the central office. [See record for correspondence dated May 6, 2019]

The Hearing comprised two (2) days of testimony, with testimony provided on May 7 & 8, 2019. Ten (10) exhibits were submitted. Testimony from nine (9) people was obtained within the 2 days of hearing comprising 651 pages of hearing transcript. All exhibits were kept in the possession of the undersigned as the hearing proceeded and were reviewed again at the conclusion of the hearing. This hearing was conducted concurrently with a hearing related to a due process complaint filed by the Respondent in defense of their evaluation process following the Petitioner’s request for an Independent Educational Evaluation. The undersigned issued a decision on that due process complaint on May 22, 2019.

Following the Hearing, counsel for the Respondent timely filed a post hearing letter/brief on June 17, 2019 in conformity with an agreement as to length and type. Petitioner’s counsel advised that they had determined not to file a post-hearing letter-brief.

During the course of each of the 2 days of the hearing, each party presented evidence and offered the testimony of witnesses in support of their respective positions, and were allowed to cross examine witnesses as provided for under the applicable rules. The Hearing was conducted as a closed hearing, with both parties represented by their counsel. The Petitioner was represented by the Honorable Shane T. Sears and the Honorable James D. Sears with [REDACTED] mother, present during the entire process. The Respondent was represented by the Honorable Carl B. Johnson with [REDACTED] serving as the

corporative representative for the District with [REDACTED] attending.

II. Exhibits and Witnesses

By agreement placed on the record, the parties stipulated that the Exhibit 1 would comprise a bates stamped collection of 195 pages marked JCBE Doc (page) 1-195 which comprised the child's educational records offered by the Respondent. As such, when Exhibit 1 is referenced below, the bates-stamped page number is listed as [Doc _] within this administrative record. The Transcript is hereinafter referred to as [Tr_].

Finally, there were other exhibits offered and are referenced below as R Ex 2 through 3, and P Ex 1 through 7.

Petitioner's Exhibits

As stated, the parties stipulated to utilize the Respondents' bates stamped collection of the child's educational records as well as the following:

P Ex 1: 4/16 IEE email Sears to Johnson

P Ex 2: Pouncey follow-up email

P Ex 3: Email exchange M/[REDACTED]

P Ex 4: Email exchange M, [REDACTED]

P Ex 5: Email 2/8/19exchange M and [REDACTED]

P Ex 6: Subpart to P4Email exchange M, [REDACTED]

P Ex 7: Fall 20018 Email exchange M and [REDACTED]

Respondent's Exhibits

R Ex 1: Notebook, child's school records, Bates-stamped 1 through 195

R Ex 2: School Medication records

R Ex 3: Email exchange [REDACTED]

Witnesses (in order of initial appearance)

- [REDACTED], mother of Petitioner
- [REDACTED], LPN, [REDACTED] Middle School
- [REDACTED], [REDACTED] Middle School
- [REDACTED], [REDACTED] Middle School
- [REDACTED] Special Education Teacher, [REDACTED] Middle School
- [REDACTED] Social Studies Teacher, [REDACTED] Middle School
- [REDACTED] Middle School
- [REDACTED] Middle School
- [REDACTED] Jefferson County BOE

The exhibits submitted have been kept and maintained by the undersigned during the course of this hearing. On May 7 & 8, the testimony taken was transcribed by [REDACTED] [REDACTED] Certified Court Reporter and Commissioner, ACCR# 646, who duly took down all testimony and dialogue. Subsequently the undersigned was able to review the transcript in the consideration of, and in the drafting of, the decision set out below. Finally, the various post hearing briefs submitted by the parties at the completion of the hearing were also taken into account by the undersigned.

III. Summary of Facts

J S resides with [REDACTED] mother, sister, brother, and grandmother in Birmingham, Alabama [TR pg 18] and was a [REDACTED] grade student within the Jefferson County Board of Education school

According to the parent, it was “hit or miss” with the medicine but now [REDACTED] is taking [REDACTED] apparently consistently based on the record. [TR pg 27]

On February 1, 2019, J S was suspended for fighting and a Class III hearing was scheduled. [Doc 85]

The *Complaint for Due Process* was filed on February 14, 2019. [See record]

The *Referral for Evaluation* was received on February 14, 2019 and was accepted for evaluation on March 20, 2019. The evaluation referral did not reflect any instructional concerns checked. Behavioral concerns checked included “excessively high/low activity level”, “difficulty following directions”, “easily frustrated”, and other “concerns are per parent”. J S has had a diagnosis of [REDACTED] (since age 6 years, diagnosed by [REDACTED] pediatrician) and [REDACTED] (the last 3-4 years, diagnosed by [REDACTED] psychiatrist with [REDACTED] [REDACTED] currently sees a physician at [REDACTED]) and takes prescribed medications at home and school. J S wears prescribed glasses. [REDACTED] grades have “stayed about the same each year” and are “above average”. Further, J is enrolled in all Honors classes and band. [Docs 4-7]

Following the ‘fight’ and in connection with the Class III hearing, J S was suspended for ‘disciplinary reason’ related to a physical altercation with a peer. [REDACTED] Middle School is a Title 1 school. [Docs 4-7]

As part of the records for the hearing a *Confidential Psychological Report* was submitted that is dated April 10, 2019. [Doc 162] The Eligibility Team met on April 16, 2019 and found that J S was not eligible for services. [Doc 161]

IV. Issues Presented

Issues:

The Petitioner outlined these issues and concerns regarding a free, appropriate public education:

- Failure to properly evaluate Petitioner in all areas of suspected disability
- Failure to identify Petitioner as a student with a disability

Issue 1: Did the Respondent District fail to properly evaluate the Petitioner in all areas of

suspected disability?

Issue 2: Did the Respondent District determination that the Petitioner was not a student with a disability deny the Petitioner a FAPE?

V. Discussion

Introduction:

The Individuals with Disabilities Education Act (the “IDEA” or “Act”) established certain basic entitlements, including a free, appropriate public education (“FAPE”), for children between the ages of three and twenty-one years old with specified disabilities. *20 U.S.C. §§ 1400, 1412(a)(1)(A) (2004)*. Now called the IDEIA (Individuals with Disabilities Improvement Act), the act defines “free appropriate public education” (FAPE) as “special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate pre-school, elementary or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title” 20 U.S.C. § 1401 (18). In order to be eligible for Federal financial services under IDEIA, a state must therefore assure that “all children with disabilities who are between the ages of three and twenty-one receive a Free Appropriate Public Education (FAPE).”

The point of service whereby a FAPE is provided to children eligible for services, is at the local level, the school district or local educational agency, where a child resides. With this matter of course, Jefferson County Schools is this Local Educational Agency. The State of Alabama implements this law via the directives found in the Rules of the Alabama State Board of Education, State Department of Education, Special Education Services, codified in *The Alabama Administrative Code* § 290-8-9-.00 et seq. Additionally, the Federal Regulations that provide guidance for the implementation of IDEIA are found in the Code of Federal Regulation, 34 CFR 300.101, et seq. What follows is a discussion of the general issues raised and identified by the parties during this Due Process Hearing in light of the applicable law and the facts relevant to the matter, as presented during the hearing.

Applicable Laws and Issues:

Issue 1: Did the Respondent District fail to properly evaluate the Petitioner in all areas of suspected disability?

The *Alabama Administrative Code* specifically outlines Minimum Evaluative Components for thirteen disability definitions. The minimum evaluation components for Other Health Impaired – ADD or ADHD are found in Section 290-8-9.03(9)(e) and are written here in italics with particulars for this matter following:

1. *Vision and hearing screening.*

Vision and hearing screenings were passed on 03/21/2019. It was noted the student wears contact lenses. [Doc 156]

2. *A statement of how the health impairment adversely affects the educational performance of the child and documentation or performance measures such as individual and/or group intelligence scores, individual and/or group education achievement and/or diagnostic test(s) scores, classroom observations, criterion-referenced tests, curriculum-based assessments, review of child's existing records, (i.e. attendance, health, discipline).*

The OHI/OI Impact Statement was completed on 03/22/2019. “No adverse educational impact” was noted on that document. [Doc 46]

3. *Administration of three of the same norm-referenced behavior rating scale, ADD or ADHD scale by three or more independent raters who have had knowledge of the child for at least six weeks. One of the raters may be the parent or the child. If self-report is used, it must be a version of the same behavior rating scale, ADD or ADHD scale.*

Three teachers completed the Behavior Rating Inventory of Executive Functioning, Second Edition (Brief 2) on 03/21/2019. [Doc 34-41]

The parent completed the Behavior Rating Inventory of Executive Function, Second Edition on 4/10/2019. [Doc 169-175]

4. *For initial evaluations for special education services only, documentation of interventions/accommodations must include a written description of all interventions/accommodations that have been tried in the regular class(es)...but were deemed unsuccessful....*

Documentation of Repeated Data-Based Assessment was signed April 5, 2019; behavior being measured: behavior conflict resolution – no office referrals [Doc 56, 158]

The minimum evaluative components for Specific Learning Disability are found in Section 290-8-9.03(10)(d) and include in part written here in italics with particulars for this matter following:

1. *Vision/hearing*

Vision and hearing screenings were passed on 03/21/2019. It was noted the student wears contact lenses. [Doc 156]

2. *Documentation of a specific learning disability: documentations that the child does not achieve adequately for the child's age or meet State approved grade-level standards in one or more of the {following} areas...; an age-appropriate norm-referenced individually administered intelligence test (full scale score); an age-appropriate, individually administered, standardized, norm-referenced achievement test to determine a student's obtained achievement score(s) using one of the {following} two methods....;*

The Wechsler Intelligence Scale for Children – Fifth Edition was administered on 04/10/2019. [Doc 162-166]

The Woodcock Johnson IV Tests of Achievement were administered on 04/08/2019. [Doc 156]

3. *Documentation that the existence of specific learning disability is not the result of a visual, hearing, or motor disability; intellectual disability; emotional disability; cultural factors; environmental or economic disadvantage or limited English proficiency must include but is not limited to adaptive behavior scale, behavior rating, environmental cultural economic concerns checklist.*

The Adaptive Behavior Evaluation Scale Third Edition (ABES-3 Home Version) was completed by the mother on 04/10/2019. The School Edition was completed on 03/21/2019.

[Doc 156] The Environmental, Cultural, Language, and Economic Concerns Checklist was dated 3/20/2019. The only area checked is “The student receives other services such as, Title 1, Migrant, 504, EL, etc.” [Doc 25] An additional notation on the eligibility report states: [REDACTED]

[REDACTED] Middle School is a Title 1 school”. [Doc 158]

- 4. Data that demonstrate that the child was provided appropriate instruction in regular education settings, delivered by qualified personnel; and data-based documentation or repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction which was provided to child’s parents.*

“The student has received small group instruction/interventions for behavior and has received standards-based instruction by a highly qualified teacher”. [Doc 158]

- 5. Observation*

J was observed in Geography class. [Doc 158]

- 6. Work samples in the area of difficulty....*

Grades from all classes and work samples from Honors Math were reviewed. [Doc 159]

The minimum evaluative components for Emotional Disability are found in Section 290-8-9.03(4)(c) and include in part written here in italics with particulars for this matter following:

- 1. Vision/hearing screening.*

Vision and hearing screenings were passed on 03/21/2019. It was noted the student wears contact lenses. [Doc 156]

- 2. Individual intellectual evaluation.*

The Wechsler Intelligence Scale for Children – Fifth Edition was administered on 04/10/2019. [Doc 162-166]

- 3. Administration of three of the same norm-referenced behavior rating scale by three or more independent raters who have had knowledge of the child for at least six weeks.*

One of the raters may be the parent or the child. If a self-report is used, it must be a version of the same behavior rating scale.

The mother completed the Behavior Evaluation Scale Fourth Edition (BES-4 Home Version) on 4/10/2019. [Doc 157, 167] The School Edition was completed on 3/21/2019 by [REDACTED] teacher. [Doc 157]

Three teachers—[REDACTED]—completed the Behavior Rating Inventory of Executive Functioning, Second Edition (Brief 2) on 03/21/2019. [Doc 34-41]

The parent completed the Behavior Rating Inventory of Executive Function, Second Edition on 4/10/2019. [Doc 169-175]

- 4. Individual educational achievement evaluation and a statement of how the impairment adversely affects the child's academic performance and/or the child's social/emotional functioning.*

The Woodcock Johnson IV Tests of Achievement were administered on 04/08/2019. [Doc 156]

In the eligibility decision, it is stated: "J is enrolled in Honors/Advanced courses and does not demonstrate a need for specially designed instruction". [Doc 161]

- 5. Documentation that the emotional disability is exhibited over a long period of time (typically six months) to a marked degree that adversely affects educational performance...*

On the SLD ONLY SECTION, "emotional disability" was ruled out as a primary cause of the impairment. [Doc 160]

- 6. Observation by a qualified professional in two or more educational settings (One structured setting and one unstructured setting).*

Both the structured and unstructured observation were conducted on March 21, 2019. [Docs 157-158]

Issue 2: Did the Respondent District determination that the Petitioner was not a student with a disability deny the Petitioner a FAPE?

The *Alabama Administrative Code* Section 290-8-9.03(3)(c)4. defines Emotional Disability:

- (a) Definition. Emotional disability means 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:
1. An inability to learn that cannot be explained by intellectual, sensory, or health factors;
 2. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
 3. Inappropriate types of behavior or feelings under normal circumstances;
 4. A general pervasive mood of unhappiness or depression; or
 5. A tendency to develop physical symptoms or fears associated with personal or school problems. Emotional disability includes schizophrenia. The term does not include children who are socially maladjusted, unless it is determined that they have an emotional disability as defined herein.

Six teachers completed the 'Student Evaluation Form for Class III Hearing' on February 4, 2019. Their responses are as follows:

General Attitude & Behavior in Class:

"Student talks during class to the point [redacted] needed to be moved to an isolated seat. [redacted] does not show much effort during class" – [redacted]

"[redacted] is usually okay in class if [redacted] has not taken his medication [redacted] will be very talkative" – [redacted]

"J is a great student. [redacted] does not have any behavior issues in my class" – [redacted]

"J has always shown good behavior and a good attitude in class. [redacted] has never displayed any behavior issues" – [redacted]

"J can be a little talkative, but is usually good at calming down when redirected" – [redacted]

"Good student but can have a nasty attitude sometimes. [redacted] has always corrected [redacted] attitude when directing it at me" – [redacted]

Completion of Classwork/Homework:

"Student completes classwork and homework about 60% of the time" – [redacted]

"[redacted] usually does/tries [redacted] work" – [redacted]

“J completes assignments and usually does well on [redacted] work” – [redacted]

“J completes all assignments” – [redacted]

“J is not missing any work and has even been working ahead” – [redacted]

“Has difficulty completing assignments due to playing on [redacted] phone A LOT!” – [redacted]

Student Participation and Cooperation:

“At the beginning of the year [redacted] would participate willingly. Since the winter break, [redacted] is reluctant to participate during class” – [redacted]

“When instructed by me to stop fighting [redacted] did after [redacted] got one more lick so [redacted] is cooperative” – [redacted]

“J participates well and cooperates well with others” – [redacted]

“Student participates and cooperates on the regular. [redacted] works well with other and does not have any issues with group activities” – [redacted]

“J is usually cooperative. When [redacted] has more trouble, it is usually in advisory” – [redacted]

“Usually good but gets an attitude with other students sometimes” – [redacted]

[Docs 91-96]

Results from the standardized behavior rating scales and an interpretation of the scores were reported in the ‘Notice and Eligibility Decision Regarding Special Education Services’. On the Behavior Evaluation Scale Fourth Edition (BES-4 School Version) the total quotient rating was [redacted]. The interpretation was “scores of [redacted] are considered significant”. On the Behavior Evaluation Scale Fourth Edition (BES-4 Home Version) completed by the mother, the total quotient was [redacted]. The interpretation was “scores of 70 and below are considered significant”. [Doc 157]

Three teachers completed the ‘Behavior Rating Inventory of Executive Functioning (Brief-2 Teacher) with composite scores of [redacted]. The interpretation was “scores of 130 and above are considered significant”. The mother completed the home version with a composite score of [redacted]. [Doc 157]

During the taking of testimony, Honorable Jim Sears questioned Ms. [REDACTED] about J S' overall behavior in class. Ms. [REDACTED] replied: "Every day, I mean, [REDACTED] is in class. [REDACTED] comes to class. [REDACTED] not usually tardy. [REDACTED] gets out the material that [REDACTED] needs. [REDACTED] has [REDACTED] materials that [REDACTED] needs for class, and [REDACTED] starts working. And [REDACTED] usually tries to do [REDACTED] work or [REDACTED] seems to be trying to do [REDACTED] work". [TR pg 183] Mr. Jim Sears further questions:

Q: And is that—when you say "[REDACTED] usually does", does that mean that sometimes [REDACTED] doesn't?

A: Sometimes [REDACTED] doesn't, yeah.

Q: Okay. And is there a reason [REDACTED] doesn't?

A: I don't know the reason, but I would attribute it to being a [REDACTED]

[TR pg 183-184]

Mr. Johnson questioned Ms. [REDACTED] [REDACTED] teacher, about J's "...level of engagement or [REDACTED] interaction with other students or you, as [REDACTED] teacher". Ms. [REDACTED] responded "typically, I mean it's -it's kind of hard to comment on because there's nothing that particularly stands out...J is usually diligent about [REDACTED] work. But like most [REDACTED] [REDACTED] you know, had a bad day or two. [REDACTED] talks frequently with [REDACTED] friends and generally gets along well with [REDACTED] friends. They'll agree about sports and stuff, that kind of thing...one time [REDACTED] got upset with me because I think I had gotten onto [REDACTED] about work or talking too much or something, and, you know, [REDACTED] kind of was frustrated with me and just kind of lashed out at me. But that's not really unusual because [REDACTED] graders, when they're having a bad day, lash out". [TR pg 394-395]

Ms. [REDACTED] has been the administrator/assistant principal at

[REDACTED] Middle School for two years. [TR pg 476] Mr. Johnson questioned Ms.

[REDACTED] about any kind of regular interaction with J:

A: Not a regular interaction, no, sir.

Q: Okay. Have you had occasional interaction with [REDACTED]? Direct or anything?

A: Well, if I could explain. I have to stand out in the hallway between classes...so I would occasionally see J walking to and from class, and then we had an incident in February.

Q: Okay. But apart from that sort of informal casual observation, you've had no real dealings with J?

A: No. I've never had to have any conversations or closed-door conversations or anything of the sort.

While there is no evidence the eligibility team reviewed the information gathered for the Class III hearing, and there was testimony to support this, several of the same teachers had completed the student evaluation form and completed the standardized behavior checklists as part of the evaluation process. Taken together, the anecdotal records on the student evaluation form, standardized checklist scores, and testimony given by teachers support the decision of the eligibility team that the student does not meet “AAC criteria for the suspected area(s) of disability” for having one of the defined characteristics over a long period of time to a marked degree for an emotional disability at this time.

The *Alabama Administrative Code* Section 290-8-9-.03(9) defines Other Health Impairment:

- (a) Definition. Other Health Impairment means having limited strength, vitality or alertness, including a 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 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 (emphasis added).**

For the Class III hearing following a fight and suspension of J S, the parent provided the assistant principal a letter dated February 4, 2019 from [REDACTED] describing that “J S has been under the care of [REDACTED] since June 2017 for the treatment of both [REDACTED], [REDACTED] as well as [REDACTED]. After Dr. [REDACTED] changed offices last year J was transitioned to... [REDACTED]” The letter further stated “because of the above diagnoses, J may exhibit inattention, impulsivity and frustration as well as have difficulty with authority. As of [REDACTED] last visit, J’s symptoms were reported as being well-managed with [REDACTED] current medication regime.” [Doc 99]

On the 'Notice and Eligibility Decision Regarding Special Education Services', under Area of Assessment: Medical, it is stated: "per parent in referral information: has a diagnosis of [REDACTED] (diagnosed by pediatrician at age [REDACTED] years); and [REDACTED] (diagnosed by [REDACTED] Psychiatrist with [REDACTED], the last [REDACTED] years). J currently is seen by [REDACTED] [REDACTED] is prescribed [REDACTED] (taken at home); [REDACTED] at lunchtime; [REDACTED] once daily in the AM". [Doc 159] During the taking of testimony, regarding the letter from [REDACTED], Ms. [REDACTED] testified: "We did not have that letter at the eligibility. We took the parent report of the medical history with regard to the diagnosis and the medication". [TR pg 634]

Grades were summarized in the eligibility decision: "2018-2019 1st semester averages: Life Science [REDACTED]; Citizenship Honors/Adv- [REDACTED]; [REDACTED] PE [REDACTED]; English [REDACTED]; Math Honors/Adv [REDACTED]; Intermediate Band [REDACTED] 3rd grading period: Life Science [REDACTED]; Geography Honors/Adv [REDACTED]; [REDACTED] PE [REDACTED]; English [REDACTED]; Math Honors/Adv [REDACTED]; Intermediate Band [REDACTED]". [Doc 159]

Counsel for both parties questioned Ms. [REDACTED] about J's performance in Math Honors/Adv class. Ms. [REDACTED] testified J has maintained a solid C through this nine weeks and stated she had made some changes in her classroom by checking to make sure students have done assignments before giving the answers and changed student seating to separate some [REDACTED] [TR pg 200, 201] In the [REDACTED] grade, J spent half a year in [REDACTED] grade math and then was moved to [REDACTED] grade honors math. [TR pg 192] Ms. [REDACTED] noted that J may have missed some of the foundations that are built on in [REDACTED] grade honors class and this could also account for some of [REDACTED] difficulties in math. [TR pg 193] Overall, Ms. [REDACTED] noted "[REDACTED] a good student, yeah" and agreed "[REDACTED] deserved to be in AP math". [TR pg 183]

Ms. [REDACTED] grade honors/pre-AP Social Studies teacher testified J "has done well in my class". [TR pg 394]

Taken together, the anecdotal records, standardized test scores, grades and testimony given by teachers support the decision of the eligibility team that the student does not meet "AAC criteria for the suspected area(s) of disability" for having a medical condition that adversely affects educational performance to be eligible for other health impairment at this time.

While there was the outlier with the testimony of the band teacher Ms. [REDACTED] with respect to her statements that were critical of the Petitioner's behavior, the rest of the teachers did not provide information that would have indicated the child's behavior was really a problem. Further, during her testimony Ms. [REDACTED] acknowledged that early in 2019 she actually tried to contact parents of approximately 30 % of her students to discuss their respective behaviors. She then also indicated that the Petitioner's mother was perhaps the only one who had responded. Further, she testified that the child's behavior was actually better than average in her class and she is not sure she ever made that clear to the child's parent. [TR pgs 245-287]

To the undersigned the mom's concern over the reports on her [REDACTED] from Ms. [REDACTED] reflect well upon the parent as opposed to raising further concerns about the child's behavior. Put another way, this additional information reflects that the child's behavior was not necessarily out of the ordinary for Ms. [REDACTED] class, and actually reflects positively on the parent's attention to her child's progress at school. The parent also testified that the child had participated in three separate team sports for the middle school during this past year, and would not likely be able to do band any further. In sum, the undersigned noted both the alleged poor behavior in [REDACTED] class and noted that the Petitioner's counsel suggestion that if the [REDACTED] teacher had been one to complete a behavior scale the results might have differed. However, with the total picture put forward by all testimony, this argument does not change the fact that the child did not have behavior, in general, that amounted to a level that adversely affected the child's ability to learn and do this work in the class room.

The *Alabama Administrative Code* Section 290-8-9-.03(10) defines Specific Learning Disability:

- (a) definition. Specific learning disability means 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, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, 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.

For the “SLD ONLY SECTION” of the “Notice and Eligibility Decision Regarding Special Education Services”, “Option 3: Severe Discrepancy (SD) Documentation” was completed. A severe discrepancy “must be 16 points or greater for all ages” between the predicted achievement and achievement test. The team used the Broad Achievement Score of 87 (total test score) and did not find a severe discrepancy between ability and achievement. [Doc 156, 160] (A quick calculation of the subtest scores from the Woodcock Johnson IV Tests of Achievement showed there was not a 16 point discrepancy in any area.)

On the “Referral for Evaluation” form dated 02/14/2019 under “Instructional Concerns”, the box for “none” was checked. [Doc 4] During the taking of testimony, Ms. [REDACTED] explained: “...There were really no instructional concerns. [REDACTED] was characterized as a bright young [REDACTED] in honors classes, doing well. There was dialogue about [REDACTED] classwork. But, ultimately, the decision was that there were no real academic concerns”. [TR pg 580]

Neither the eligibility report nor psychological report reference a “disorder” in a “basic psychological process”. [Doc 156, 162-166]

The test scores, psychological report, and testimony support the decision of the eligibility team that the student does not meet “AAC criteria for the suspected area(s) of disability” for having a learning disability at this time.

VI. Conclusion

The issues properly before the undersigned hearing officer in this due process hearing are due to be reviewed in the manner provided for under *20 U.S.C. §1415 (f)(3)(E)*. Further, Congress directs that any decision of the undersigned is limited in this Final Order to a decision:

- (i) [Made] on substantive grounds based on a determination of whether the child received a free appropriate public education.
- (ii) Procedural issues. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate education only if the procedural inadequacies-
 - (I) impeded the child’s right to a free appropriate public education; or,
 - (II) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parent’s child; or,
 - (III) caused a deprivation of educational benefits. *20 U.S.C. §1415(f)(3)(E)(I)&(ii)*

The undersigned reviews the issues in light of the fact that the burden of proof in a due process hearing rests upon the Petitioner. Therefore, in order to prevail the Petitioner must demonstrate by a preponderance of the evidence that the Petitioner was in fact denied a FAPE by virtue of the actions, or lack thereof, by the Respondent School District. See *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 52 (2005)

Finally, in completing a review in this matter the undersigned is mindful that it is not the job of the hearing officer to substitute his judgment for those of the educational professionals involved in the decisions made for the child. The standard as to such review does arise through the decision in *Board of Education Hendrick-Hudson v. Rowley*, 458 U.S. 176, 206 (1982). With this in mind the undersigned has reviewed the facts as set forth in the testimony and evidence, providing the due weight to the information provided by the Petitioners and Respondent alike. The discussion above purports to examine what the undersigned found was not only relevant to an understanding of the facts in this hearing, but the facts that were germane to an understanding of how the law would apply to the questions posed by the Petitioner's complaint and allegations.

"Eligibility for special education has three components: (1) the child must have a disability under the criteria of the Alabama Administrative Code, (2) the disability must adversely affect the child's educational performance, and (3) the disability must require the need for specially designed instruction". *Alabama Administrative Code* §§290-8-9.02, 290-8-9.03.

In the present matter, J S clearly has been diagnosed with [REDACTED] and [REDACTED] however, there appears to be no adverse effect on [REDACTED] academic performance. The low [REDACTED] grades were explained as due to other causes and the [REDACTED] teacher clearly did not state a need for special education. This is supported by case law. In *Durbrow v. Cobb County School District* 887 F.3d 1182 (11th Cir. 2018), the U. S. Court of Appeals, Eleventh Circuit explained a student needed to show that his ADHD had an adverse effect on his academic performance and that [REDACTED] needed special education as a result. Also, the panel observed the student's teachers did not believe [REDACTED] needed special education. [72 IDELR 1]

In the present matter, the behavior rating scales were in the average range and this was supported by teacher comments on the student evaluation form for the Class 3 hearing. In *L. C. v.*

Tuscaloosa County Board of Education 7:15-CV-750-RDP (N.D. Ala. 2016), the U. S. District Court found that a child's medical condition must have an adverse impact on educational performance and noted average scores on behavior rating scales were bolstered by the teacher's observations and the student in this matter was not eligible for special education. [67 IDELR 213]

Based on the record, testimony, case law, and the three components required for special education services, J S is not eligible for IDEA services at this time.

VII. Specific Findings

1. The Respondent District evaluated the Petitioner in all areas of suspected disability.
2. The Respondent District properly concluded J S was not a student with a disability at this time.
3. The Petitioner was **not** denied a FAPE due to failure in the evaluation process or failure to be identified as one with a disability.
4. If the parent wishes, the parent and District should consider referral to the 504 Team to determine if the Petitioner meets the criteria for a 504 plan if they have not so already.

VIII. Notice of Appeal Rights

Any party dissatisfied with the decision may bring an appeal pursuant to 20.U.S.C. § 1415(e)(2) and/or Alabama Administrative Code 290-8-9.08(9) (c) (15) and must file 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.

DONE and ORDERED.

Entered this the 1st day of July, 2019

[REDACTED]

Steve P. Morton, Jr.
Due Process Hearing Officer

A copy of this Order has been forwarded to the Honorable Shane T. Sears, the Honorable Carl Johnson, and the Honorable Drew Rudloff via email and US mail first class.

cc: - [REDACTED]