

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

Jefferson County)	
Board of Education)	
Petitioner,)	Special Education No. 19-52
v.)	
)	
J. S.)	
Respondent.)	

DUE PROCESS DECISION

I. Procedural History

This matter is before the undersigned pursuant to a due process request filed on April 18, 2019 by the Honorable Carl Johnson and the Honorable Andrew Rudloff on behalf of the Jefferson County School District. Thereafter, pursuant to a letter dated the same April 18, 2019 issued by the State Superintendent of Education, the undersigned was asked to serve as the Impartial Hearing Officer in this proceeding.

A planned conference was conducted on April 22, 2019 with counsel for the Petitioner and counsel for the Respondent, the Honorable Shane T. Sears participating.

As a school district filed the complaint, there was no required resolution meeting. The hearing officer's responsibility was to set and conduct a due process hearing and pursuant to the Pre-Hearing Conference conducted on April 22, 2019 a hearing schedule was put in place as outlined in the Pre-hearing Order issued by the undersigned on same April 22, 2019.

The due process hearing was conducted concomitantly with Case # 19-20. For the purpose of addressing the sole issue for Case # 19-20, only the pertinent exhibits are listed and copied for this decision.

II. Exhibits and Witnesses

By agreement placed on the record, the parties stipulated that the Respondent's 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. Further, the parties confirmed on the record that pages 178-195 were documents identified after the deadline for disclosure, but the undersigned determined that there was a plausible explanation as to these documents being pro-offered late and as such, were deemed to be part of Exhibit 1. Petitioner's objection to such a finding was noted. To that end, when Exhibit 1 is referenced below, the bates-stamped page number is listed as [Doc _] within this administrative record.

The exhibits submitted have been kept and maintained by the undersigned during the course of this hearing.

III. Summary of Facts

The child's mother filed a due process complaint on February 14, 2019, Case 19-20. Thereafter as the due process went forward, the District undertook evaluations, explaining that the due process complaint was taken, in part, as a request for an evaluation of the child and in response they undertook an evaluation process. Next, following the completion of the evaluation process, an eligibility meeting occurred on April 16, 2019. At that time the eligibility team found that the child was ineligible for special education services. In response, the child's mother and her counsel, who both attended the eligibility meeting, advised the District that she would be seeking an independent educational evaluation. The District then filed this due process complaint in defense of their evaluation, stating that they were not in agreement with the request that the district pay for an independent educational evaluation.

The hearing was then held on May 7th and 8th with the following information gleaned

from the concomitant hearing process via testimony and evidence submitted.

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

The Wechsler Intelligence Scale for Children Fifth Edition (WISC-V) was administered on 4/10/2019. [Doc 156, 162-165]

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

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 Behavior Evaluation Scale Fourth Edition (BES-4 Home Version) was completed by the parent on 04/10/2019. The School Edition was completed on 03/21/2019. [Doc 157]

The Behavior Rating Inventory of Executive Function Second Edition (BRIEF-2 Parent) was completed by the mother on 04/10/2019. The School Edition was completed by three separate teachers on 03/21/2019. [Doc 157]

Structured and unstructured observations were completed on 03/21/2019. [Doc 157-159]

Documentation of Appropriate Instruction – Prong 1 was noted on 3/22/2019. [Doc 158]

Documentation of Appropriate Instruction - Prong II was noted on 3/22/2019. [Doc 158]

Environmental, Cultural, Language, and Economic Concerns Checklist was dated 3/20/2019. [Doc 158]

OHI/OI Impact Statement was completed on 03/22/2019. [Doc 158]

Attendance reports, grades, and state assessments were reviewed on 04/11/2019. [Doc

158] Discipline Records were noted on 03/21/2019. [Doc 159]. Work samples from 01/30/2019 were recorded.

Parent information regarding medical diagnosis and medication was noted on 03/20/2019. [Doc 159]

PST Information was noted from 02/25/2019. [Doc 159]

IV. Issues Presented

Issues:

Following the completion of a “full and individual initial evaluation of the Respondent’s suspected areas of disability and educational needs in accordance with IDEA...” the Respondent was found “...not a child with a disability...and not eligible to receive special education and related services”. The Respondent’s counsel “disagrees with the results of the testing” and requested an independent education evaluation, presumably “that the IEE sought at public expense”. The Board/District (Petitioner) denies any demand by the Respondent for an IEE at public expense “because the Board’s evaluation was appropriate in all respects”. Therefore, the issue is as follows:

Was the Board’s evaluation appropriate and if not, is the Board required to fund an IEE at public expense?

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 issue 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 law:

The *Alabama Administrative Code* specifically outlines minimum evaluative components for all disability definitions. The minimum evaluative components for Other Health Impaired – ADD or ADHD are found in Section 290-8-9.03(9)(e):

1. Vision and hearing screening.
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).
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.
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....

The minimum evaluative components for Specific Learning Disability are found in Section 290-8-9.03(10)(d) and include in part:

1. Vision/hearing
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....;
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.
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.
5. Observation
6. Work samples in the area of difficulty....

The minimum evaluative components for emotional disability are found in Section 290-8-9.03(4)(c) and include in part:

1. Vision/hearing screen.
2. Individual intellectual evaluation.

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

At the time the District/Board undertook the evaluation process, the child had not been one previously identified as a child with a disability. Several weeks prior to the District/Board commencing with an evaluation of the child, the District/Board had been put on notice that the child had a diagnosis of [REDACTED]. In fact, the child had been administered medication via the school nurse for several years. However, the formal notice which was a letter dated [REDACTED] 2019 from [REDACTED] CRNP, PMHNP-BC with [REDACTED] was provided by the parent in connection with a discipline hearing conducted on February 8th 2019. [Doc 186] Following that discipline proceeding the child was suspended, though [REDACTED] was allowed to catch up [REDACTED] work.

The District/Board's evaluation process included review by several teachers who were familiar with the child, though as pointed out by the Parent's attorney, one was not sought from the [REDACTED] teacher who had in fact been in touch with the parent about the child's behavior. Notably, however, the [REDACTED] also testified that [REDACTED] had contacted over 1/3rd of [REDACTED] student's parents due to behavior so this child was clearly not the only one who had, according to the [REDACTED] teacher, had behavior that merited contacting parents. Further, the day of the child's

behavior incident the parent was at school with plans to observe her child in the [REDACTED] class.

Regardless, during the evaluation process, data was collected as to the child's behavior from a variety of sources, including the parent.

Additionally, the evaluation process undertaken by the District/Board included review of the testing mentioned above, input by the parent and consideration of the various participants at the eligibility meeting. Testimony during the hearing confirmed that the parent was a very involved parent, was in touch with teachers and on top of her child's studies and grades and noting the language of the letter from [REDACTED] managed her child's medication for [REDACTED] well. This was also confirmed by testimony from the School Nurse, [REDACTED]. Testimony and the record also indicate that the child is very active, [REDACTED] for two years and had just this year participated in Middle School sports as a [REDACTED] including the sports of [REDACTED]. Finally, testimony from the teachers was that the child had not been what they considered a discipline problem, while at times [REDACTED] was talkative, [REDACTED] appeared able to self-correct when reminded to do so.

The child's [REDACTED] teacher was present at the eligibility meeting as the representative general education teacher, which was significant since [REDACTED] seems to be the course work that gave the child the most difficulty. A Psychological Report was also completed during the course of the evaluation process and at the Eligibility meeting [REDACTED] the District's Director of Exceptional Education, was present and available to review this test and others as the person available to interpret the instructional implications of the evaluation results. [REDACTED] testified during the hearing that [REDACTED] had participated and reviewed the material and that the team took the

parent at her word as to the child's diagnosis of [REDACTED] and [REDACTED] even though they did not have medical records on the child.

VI. Conclusion

The issue properly before the undersigned hearing officer in this due process hearing is 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 issue in light of the fact that the burden of proof in a due process hearing routinely rests upon the Petitioner, in this case, the Jefferson County Board of Education. Therefore, in order to properly defend their evaluation, in essence prevail in the context of this hearing on this issue, the Petitioning Board of Education must demonstrate by a preponderance of the evidence that the District's evaluation was properly undertaken and completed. 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.

The undersigned has reviewed the evaluation and eligibility documents containing the evaluative components required for a minimum appropriate evaluation. The evaluation process undertaken and completed by the District meets such standards and served as a proper evaluation process as called for under the law. It is, however, significant to note that the undersigned's role in this administrative decision is to focus on the propriety of the process, not rule as to the correctness of the conclusion coming out of the process. In conclusion, the undersigned finds that the Petitioning District is not required to provide an independent education evaluation (IEE) at public expense to the Respondent, J. S., as the District's evaluation met the standards and the District has demonstrated that their process was correctly undertaken and completed.

VII. Specific Findings

The Petitioner, Jefferson County BOE, conducted an appropriate evaluation and is not required to fund an independent educational evaluation at public expense.

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, ORDERED and entered this the 22nd day of May, 2019

[REDACTED]

Steve P. Morton, Jr.
Due Process Hearing Officer

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

cc: [REDACTED]