

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

G.L.W.  
PETITIONER

**Special Education Case No. 19-99**

**VS.**

**MACON COUNTY BOARD OF EDUCATION**

**RESPONDENT**

**DUE PROCESS DECISION**

**I.**

**Procedural History**

A due process hearing was held as a result of a request by the attorney for the Petitioner. The hearing request was received by the State Department of Education on August 27, 2019.

(Hearing Officer Exhibit 2)( hereinafter referred to as HO\_.) The undersigned was appointed as the impartial due process Hearing Officer on September 5, 2019.( HO 1.)

The hearing request was made pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (IDEA). 20 USC §1400, et seq. The due process complaint alleged that the school system had improperly terminated special education services for the Petitioner without a basis or consideration of appropriate testing.

The lawyer for the parent/child alleged that after an evaluation of the Petitioner by two independent education evaluators that resulted from the demand for a due process hearing, the school system refused to consider a diagnosis by the evaluators that the child suffered from an audio processing disorder that qualified him for special education services as a specific

learning disabled student. 34 CFR 300.8 (10) (defining that disability).

The attorney for the school system denied the allegations. ( HO 3) The attorney maintained that the evaluation of the youngster that resulted in ■ removal from eligibility for special education services as well as the evaluation conducted as a result of the request for due process hearing complied with the Alabama State Department of Education evaluation requirements. Ala Admin Code 290-8-9.02 and 290-8-9.03.

The parent was represented at the due process hearing by her attorney. The Board of Education was represented by two of its' lawyers. The school system's Special Education Director and it's psychometrist served as representatives of the system with special knowledge or training with respect to the problems of children with disabilities. 20 USC §1415(h) (1). The parent requested that the hearing be closed. The presence of the Petitioner was waived. The witnesses were sequestered per the agreement of the parties.

## II

### Statement of Issues

The initial issue was that the school system failed to follow or perform the services set forth in Petitioner's IEP (Individualized Education Plan). When a triennial evaluation conducted in January, 2019 resulted in the Petitioner being found ineligible for special education services, the denial of eligibility became a corollary issue. 34 CFR 300.303.(b)(2) ( reevaluation of a child must occur at least once every 3 years unless parent and/or school agree reevaluation is unnecessary).

After engaging in further evaluation of the child – including the authorization of independent educational evaluations- a second eligibility determination rejected the notion that the child required specially designed instruction. That decision was asserted by the parent to have improperly denied [REDACTED] special education services and a free appropriate public education.

### III

#### Findings of Facts

The Petitioner is [REDACTED] years of age. [REDACTED] mother is [REDACTED]. The child will enter the [REDACTED] grade when school begins for 2020 – 2021 school year.

The events made the basis of this dispute began with the Petitioner’s triennial evaluation which was initiated on January 8, 2019. From the period that the child had been enrolled in the Macon County Board of Education School System as a pre-kindergarten student [REDACTED] had an Individualized Education Plan (IEP) to address what was described as a [REDACTED] [REDACTED] IEP goals and services provided [REDACTED] with speech services for a [REDACTED] (Petitioner Ex 5) (hereinafter designated a P \_\_). The IEP revealed that the [REDACTED] would [REDACTED] when [REDACTED] became overly excited or when under pressure. The latter situation harmed [REDACTED] ability to read aloud in the classroom. [REDACTED] mother wanted the child to become more fluent when reading. Although Petitioner was designated for special education as a speech – language impaired individual, [REDACTED] IEPs disclosed that throughout the period of [REDACTED] eligibility for special education [REDACTED] fluency disorder did not adversely affect [REDACTED] academic performance or [REDACTED] classroom participation. (P 5)

When an evaluation of the youngster was conducted in January, 2019, during Petitioner’s [REDACTED] grade school year, [REDACTED] testing disclosed that [REDACTED] no longer qualified for speech language services.

That was the disability category by which means ■ had an IEP. 34 CFR 300.8 (11) (defining speech language impairment).

The special education eligibility committee reviewed the results of an OWLS (oral/written language skills). That assessment revealed Petitioner was at grade level in both listening comprehension and expressive language. A ■ severity instrument measured ■ condition in that regard as “mild severity”. A fluency checklist filled out by ■ teachers disclosed that ■ “condition” did not affect ■ academic performance or ■ classroom participation. The speech pathology teacher who taught ■ in a three person resource room once a week (later two times a month) during ■ IEP services testified that over time ■ no longer ■. ■ was her peer helper. As such, ■ was capable of understanding directions. ■ followed her instructions. ■ was capable of explaining things to ■ classmates. The sole exercise was directed to assisting Petitioner with ■ fluency. The teacher reinforced breathing patterns and techniques to assist the Petitioner when ■ read aloud. In that regard she said ■ made substantial progress. She related her opinions to the eligibility committee at its January 2019 meeting. (P 6)

As a consequence of these tests/teacher input, Petitioner no longer qualified under the IDEA for speech language services. (Respondent [Board] Exhibit 1) (hereinafter referred to as Bd \_\_\_\_). (Ala Admin Code 290-8-.03(11) (b) (setting criteria for eligibility for a speech language impairment).

Petitioner’s termination from special education services led ■ mother ■ to seek additional testing/evaluations of ■. Ms. ■ testified at the due process hearing that Petitioner had difficulty understanding instructions from adults. ■ sometimes expressed that ■ could not

understand what ■ friends or associates said to ■. ■ had difficulty remembering what was told to ■ or the content of passages ■ had read. According to Ms. ■, ■ is falling further behind in ■ studies as a result of ■ difficulties. For that reason she sought out an attorney to assist her.

These events lead to the filing of the request for a due process hearing on August 27, 2019. (HO

2) The request was filed as Petitioner entered the ■ grade.

Upon the filing of the due process hearing request the school system agreed to conduct additional evaluations. When the parent requested an evaluation of her child by independent evaluators, the school system agreed to pay for the independent evaluations.

Although it was unclear if the school system's agreement to pay for an IEE (Independent Education Evaluation) occurred before or after the initial independent evaluation began, the evidence revealed that a clinical neuro-psychological evaluation by a clinical psychologist at ■ was initiated in June, 2019. It was completed the next month. (P 2).

After completion of her evaluation, the clinical psychologist concluded that Petitioner had a learning disorder in reading and mathematics. Her findings were based, in part on, the youngster's difficulty understanding her directions, ■ tendency to ask her to repeat questions and ■ insistence that ■ could not understand what ■ had read or remember its contents. (These were all circumstances about which Ms. ■ had complained to school officials).

Significantly, however, upon administration of an Intellectual Quotient (IQ) test to Petitioner ■ composite score was ■. The IQ test administered by the school system in January 2019 revealed an IQ of ■ (Bd. 2). Despite that correlation the clinical psychologist rejected the composite score of ■ because of what she characterized as significant discrepancy in the scores

reflected by the subtests which comprised the composite IQ score. As a consequence, the clinical psychologist reported that Petitioner's IQ would more likely be in the range of [REDACTED]. She remarked that only a non-verbal IQ test would reveal Petitioner's true IQ score. A non-verbal assessment was necessary because she suspected [REDACTED] had an auditory processing disorder. The clinical psychologist recommended that an appropriate person evaluate the Petitioner for that condition.

On September 6, 2019 a clinical audiologist undertook an evaluation of Petitioner (P.3). The school system agreed to pay for her evaluation.

Just as the clinical psychologist had found, Petitioner revealed very poor memory of content (whether spoken or read), very poor memory for sequence, difficulty listening in the presence of background noise, a tendency to be distracted and difficulty with phonics and speech delineation. The audiologist concluded that Petitioner suffered from a central auditory processing disorder. That disorder resulted in academic weakness. The audiologist explained that Petitioner's disorder was not a hearing impairment. Instead, it was a problem with what the youngster's brain did with what [REDACTED] ears heard. She expressed that [REDACTED] disorder "could be" characterized as a Specific Learning Disability, 34 CFR.300.8 (10) (defining specific learning disability)..

On August 16, 2019, a referral meeting was held in order to conduct a renewed eligibility consideration for the child. Ala Admin Code 290-8-9.04. Ms. [REDACTED] attended. When the report of the clinical psychologist was mentioned, the psychometrist for the school system refused to provide a copy to Ms. [REDACTED]. Ms. [REDACTED] insisted on a copy of it but it was not provided at that time. While perhaps not the best practice given the need for a collaborative process between parents and school system personnel in these matters, the parent was not entitled to a copy of the report

at that time. 42 USC §1415(b) (1) and (3) ; §1415(d) (2); and §1414(d)(4) (“upon **completion** of the administrative assessments and other evaluations “ a copy of the evaluation report and documentation of eligibility shall be given to the parent”). Mrs. ■ was provided a copy of the clinical psychological evaluation on September 10, 2019.

On October 15, 2019 an eligibility meeting was conducted. Once again the consensus of the team members was that Petitioner was not eligible for special education services. The team members believed the youngster only needed accommodations to be successful. ■ did not need specially designed instruction. 34 CFR 300.39 (b)(3); Ala Admin Code 290-3-9.00(21)(a)1 and 3. It was determined that ■ was capable of accessing the general curriculum and meeting grade standards that allowed ■ to advance from grade to grade. Ms. ■ expressed her disagreement with the teams’ decision. (Bd 3)

#### **IV**

#### **Discussions of Issues**

Although Ms. ■ and her attorney expressed that the eligibility team had refused or failed to consider the opinions/diagnosis of the independent evaluators, the evidence did not support that assertion. For example, at the January, 2019, eligibility meeting, committee members concluded that the child did not have a disability that adversely affected ■ educational performance. But based on the independent evaluation reports the team revised its view and at the October, 2019 eligibility meeting determined that the audio processing disorder was a disability that adversely affected Petitioner’s educational performance.(Compare P6 with Bd3). However, the consensus of the team members was that the child did not need specially designed instruction.

Specially designed instruction is defined as: “adapting, as appropriate, to the needs of an eligible child...the content, methodology or delivery of instruction to address the unique needs of the child that result from the child’s disability in order to ensure access of the child to the general curriculum, so that that the child can meet the educational standards within the jurisdiction of the [school system] that apply to all children.” One court has characterized such instruction as a student receiving services or technology that other students do not receive or need. Jefferson County Board of Education v Rajeeni M. 2:19 -CV-1136 (N.D.Ala 2019).

A comparison of what services the child received prior to being declared ineligible for special education and what the audiologist who evaluated [REDACTED] recommended is instructive in that regard.

During the period that Petitioner was served by an IEP via small group instruction the service was directed to enhancing [REDACTED] speech fluency – particularly when reading aloud. [REDACTED] IEP’s were stated to address the youngster’s communication needs. In that vein [REDACTED] teacher used worksheets, (often stating the nature of the lesson) , games and technology devices to introduce and reinforce language/content concepts. [REDACTED] was assigned short stories to read. [REDACTED] was allowed more time to express [REDACTED] verbally. [REDACTED] was encouraged to speak slower when talking to peers. [REDACTED] was instructed to repeat words and syllables at appropriate times. [REDACTED] teacher reinforced breathing patterns and other techniques to assist the youngster when reading aloud. That exercise sought to enhance [REDACTED] IEP goal of speaking with appropriate expression and tone when speaking aloud or in a group setting.

[REDACTED] special education teacher testified that she followed the IEPs. Petitioner’s [REDACTED] diminished until she believed it was no longer a problem. The teacher remarked that Petitioner engaged with [REDACTED] fellow students as her peer helper. In that regard [REDACTED] spoke so that [REDACTED] was



understood. Similarly, the teacher reported that Petitioner's use of repetition of syllables and words when reading no longer occurred when ■ engaged in conversation or read aloud. (P 5).

Conversely, the audiologist recommended sound amplification, preferential seating, audio training by means of a reading coach or special education teacher to assist the youngster with ■ academics. All of these services appeared to be more than the services provided by the child's prior IEPs – and all were services that the school system insisted it was prepared to provide by means of a Section 504 plan.

The parent's insistence on an IEP to address the diagnosis of audio processing disorder must also fail based on the test established by the Eleventh Circuit Court of Appeals in Dubrow v Cobb City School System, 887 F.3d 1182 (11<sup>th</sup> Cir 2019).

In that case the appeals court held that in order for a student to be entitled to free appropriate public education the student must show that his or her disability adversely affects academic performance and by reason thereof, needs special education. The court found that the student, who suffered from ADHD, did not demonstrate a need for a special education (specially designed instruction) because the student's overall academic performance ranged from mediocre to extraordinary.

In Dubrow, the court – while not stating that the factors it examined to be exhaustive – concluded that a student is unlikely to need special education if: the student meets academic standards; teachers do not recommend special education for the student; the student does not exhibit unusual or alarming conduct warranting special education; and the student demonstrates the capacity to comprehend course material.

In this dispute all four factors supported the decision of school system personnel that the youngster did not need specially designed instruction. The Petitioner met academic standards despite grades ranging from Cs and Bs to some Fs. And while ■■■ mother attributed the failing marks in reading and math to ■■■ difficulty understanding instructions, the child made acceptable grades in subjects like science and social studies, courses that involve similar teaching techniques and reliance by the student on reading and arithmetic skills. Nor did the student demonstrate unusual or alarming conduct. ■■■ was described as quiet and polite although the parent was called on a few occasions when ■■■ engaged in "behavioral incidents" which Ms. ■■■ characterized as a "diversionary" means of coping with ■■■ frustration with ■■■ lack of progress. (P 8). Petitioner demonstrated the capacity to comprehend course material despite the fact that the history that ■■■ mother and ■■■ provided to the independent evaluators was to the contrary. Indeed, in that regard ■■■ achievement scores in both the January eligibility report and the October eligibility report were consistent with ■■■ IQ, including the IQ test administered to the youngster by the independent clinical psychologist.

Further, on both evaluations the school system's actions were in accordance with State Department of Education mandated criteria for determining special education eligibility. Ala Admin Code, 290-8-9-03. Those evaluations, including those by a clinical psychologist and an audiologist, examined whether Petitioner required specially designed instruction under the disability category of specific learning disability. (The January, 2019 evaluation appeared to be directed toward whether Petitioner continued to qualify under the disability of speech language impairment).

On both evaluations the school system administered the appropriate assessments. For speech language impairment, assessments for both fluency and language disorder were administered.

Ala Admin Code 290-8-9-.03 (11)(c) 3.and 4. The scores obtained from the assessments did not qualify Petitioner under that disability category. (Bd.2) Ala Admin Code 290 -03 (11)(c) 3.(i) and 4.(ii). With respect to a specific learning disability the school system conducted the required evaluations. Ala Admin Code 290-8-9 .03 (10) (c) 2.and (d) 3. Included in those assessments were an IQ test and achievement test(s). The 16 points below the child's predicted achievement score (i.e. "severe discrepancy" between predicted achievement and actual achievement) necessary for eligibility under specific learning disability was not met. (The pattern of strengths and weaknesses was also considered but did not qualify Petitioner for eligibility as a learning disabled student). (Bd. 6).

The same circumstance occurred with the October, 2019 evaluation. Appropriate assessments/measures were administered. Again, the scores resulted in the child not qualifying as a learning disabled student. (Bd 3 and Bd. 7)

The difference between the earlier January, 2019 eligibility assessment and the October, 2019 determination was that school system personnel considered the psychological evaluation and the evaluation by the audiologist that determined that the Petitioner suffered from an auditory processing disorder. From those evaluations the eligibility team concluded that the youngster had a disability that adversely affected ■ educational performance.

The eligibility committee, however, rejected the idea the Petitioner required specially designed instruction. (Even if as the audiologist suggested that an audio device for the Petitioner was necessary to drown out distracting ambient noise, that situation would provide no more than a "related service" so that child would remain ineligible for an IEP. 34 CFR 300.8 (a)(2) (i) (if a

child only needs a related service and not special education, the child is not a child with a disability).

Lastly, the attorney for the Petitioner complained that the IQ test results for the youngster obtained by the school system should be rejected and a non-verbal IQ test administered . The attorney further insisted that the 90 IQ that the clinical psychologist determined by analysis of the Petitioner's sub-test/category scores should have been used for eligibility. Thus, the psychologist's opinion that the child qualified as specific learning disabled should prevail because the achievement tests she administered revealed at least a 16 point difference in predicted achievement (based on 90 IQ) and the achievement score she actually obtained upon her evaluation of ██████ in July, 2019. (P 2)

Initially, a person conducting an individual intellectual evaluation may not independently determine eligibility for special education services. Ala Admin Code 290-8-9-.02 (3) (c). Second, since the seminal decision in Board of Education v Rowley, 458 US 176,207-08(1982) it has been recognized that preferable educational matters are left to the States and local educational agencies providing public education. That concept is codified in the Alabama Administrative Code which states that professional judgment should be used to determine if the results of evaluations are reliable sources of information or if other assessment data may prove to be a more accurate indicator of the child's level of functioning. Ala Admin Code 290-8-9-.03 and 290-8-9-.03 (10)(e) 3.(viii) (specific learning disability). And the fact that provisions regarding the parent's right to an independent educational evaluation require only that the school system "consider" the results of the independent evaluation supports the conclusion that a school system's decision regarding eligibility takes precedence where the evaluators' opinions differ from that of school system personnel. Ala Admin Code 290-8-9-.02 (4)(d.)

## V

### Conclusions

The IEP (eligibility) team conducted both its reevaluation of the child in January, 2019 and its initial evaluation by means of an appropriate eligibility meeting. Ala Admin Code 290-8-9 .02 (f). No single measure or assessment was used as the sole criterion for determining whether the child was eligible for special education services. Ala Admin Code 290-8-9 .02 (h). The evaluations were sufficiently comprehensive to identify whether the child needed special education. Ala Admin Code 290-8-9 .02 (i). The child was assessed in all areas related to ■ designated disability, ■ suspected disability (audio processing disorder) and ■ educational needs. AlaAdmin Code 290-8-9-.02 (i) (d) 2. (i) and (g).

In view of these facts, that outside evaluators may disagree with the determination of a consensus the eligibility team that student does not require specially designed instruction is not a ground to support the notion that the student should remain eligible for special education services

## VI

### Specific Findings

1. The re-evaluation of the child conducted by the school system in January 2019 was appropriate. The eligibility team decision to exit the Petitioner from special education did not deny the child a free appropriate public education.
2. The evaluation of the child conducted by the school system in October 2019 was appropriate. The eligibility team considered the reports of the independent public education evaluators. The eligibility team decision concluding that Petitioner did not

require specially designed instruction and thereby did not qualify for special education services under the IDEA is upheld.

3. The school system complied with the Petitioner's IEP(s) which were limited to providing services to enhance Petitioner's speech fluency. The school system did not fail to communicate with the parent because the child's IEP(s) required the system to report on the status of ■ IEP goals when report cards were issued which was every 9 weeks. 20 USC §1414 (d) (A )(i) III) 34 CFR 300.(a) (3) (ii)

## VII

### Appeal Rights

Any party dissatisfied with the decision may bring an appeal pursuant to 20 USC §1415( i) (2).

The party dissatisfied with the decision must file a notice of intent to file a civil action with all other parties within (30) days of the filing of the notice of intent to file a civil action. Ala Admin Code 290-8-9-.8(9) (c) 16.

Done and Ordered this 31<sup>st</sup> day of July, 2020.

/s/wesleyromine

Wesley Romine  
Hearing Officer  
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cc: Barbara Agricola, Esq.  
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Shonta Jackson

## APPENDIX OF CHRONOLOGICAL HISTORY OF PRE-HEARING EVENTS

- 8-27-2019 Due Process Hearing filed.
- 9-5-2019 Hearing Officer assignment.
- 9-17-2019 Hearing date set for October 22, 2019 as parties await results of IEE/proposed eligibility meeting.
- 10-11-2019 Parties' counsel request continuance/extension of 45-day deadline for decision/eligibility meeting set for October 15, 2019.
- 10-25-2019 Hearing date set for December 19-20, 2019/child found ineligible 34 CFR 300.39 (b) (3).(did not need specially designed instruction).
- 12-16-2019 Parties' counsel mutually request continuance due to intervening events – professional (trial conflict) and personal (family surgical consultation).  
  
Parties confirm child has 504 plan.  
  
Hearing date set for January 28-29, 2020.
- 1-27-2020 Parties' counsel mutually request continuance/will confer if 504 services adequate to settle care  
  
Hearing date set for April 7-8, 2020, due to spring break, parties' attorneys' trial schedule and special education director's unavailability for proposed dates in February – March 2020.  
  
Board counsel insists child receiving services similar to those received when child eligible for special education.
- 3-27-2020 Hearing Officer/parties' counsel agree to proceed/case set for May18-19, 2020.
- 5-18-2020 Parties' counsel jointly request continuance; the 2 independent education evaluators unavailable to testify to their reports.
- 7-14-2020 Case proceeds to hearing via both virtual testimony and live Testimony

## **APPENDIX OF ADMITTED EXHIBITS**

### Hearing Officer Exhibits:

HO-1	9-15-2019	Hearing Officer appointment
HO-2	8-27-2019	Due process hearing complaint
HO-3	9-6-2019	Board answer to complaint
HO-4	9-11-2019	Initial hearing setting/report on resolution meeting
HO-5	10-11-2019	Request for continuance
HO-6	9-17-2019	Due Process Hearing Order & Directives
HO-7	10-10-2019	Email confirming receipt of IEE/request for continuance
HO-8	10-25-2019	Amended Order re-setting hearing date
HO-9	10-25-2019	HO letter confirming continuance/deadline extension request
HO-10	12-12-2019	HO email to counsel re: Jefferson Co. Bd v CJM decision
HO-11	12-16-2019	Parties' joint request for continuance
HO-12	12-17-2019	HO letter resetting hearing
HO-13	1-27-2020	Parties' joint request for continuance
HO-14	1-27-2020	HO grant of continuance/setting of scheduling conference
HO-15	2-4-2020	Email resetting hearing
HO-16	2-4-22020	Parties agreement to new hearing date
HO-17	2-4-2020	2 <sup>nd</sup> Amended Due Process Order
HO-18	3-26-2020	State Dept. of Education (SDE) memorandum prohibiting due process Proceedings (face to face meetings)
HO-19	3-26-2020	HO email confirming SDE directive
HO-20	3-30-2020	HO email re-setting hearing date
HO-21	5-14-2020	Email string re: resuming in-person proceedings



HO-22 5-18-2020 Email string re: unavailability of independent evaluators for testimony

HO-23 5-20-2020 Email proposal to proceed from record/educational records

HO-24 5-21-2020 Parties joint request for continuance due to unavailability of expert witnesses

HO-25 5-27-2020 HO email proposing dates to re-set proceedings for hearing

HO-26 5-28-2020 Order re-setting hearing

HO-27 7-23-2020 Board of Education legal authority

HO-28 7-24-2020 Petitioner's legal authority

### **Petitioner's Admitted Exhibits**

- P.2 Summer 2019 Independent Education Evaluation by Dr. [REDACTED]
- P.3 9-6-2019 Report of Central Auditory Processing Disorder  
by Dr. [REDACTED]
- P.5 Composite IEP's 2-7-2013 to 1-30-19
- P.6 Eligibility Decision (Revaluation)
- P.6A 2-4-2016 Eligibility Decision (Revaluation)
- P.7 5-20-2015 Parent complaint re: student progress/lack of  
teacher communication
- P. 8 1-8-2019 Parent request for Learning Disability Evaluation/  
§504 Evaluation
- P.9 8-16-2019 Parent notes re: referral for evaluation meeting
- P.13 10-15-2019 Eligibility Decision (Initial [resumed] Eligibility)

### **Respondent (Board) Admitted Exhibits**

- Bd. 1 Ala Admin Code
- Bd.2 1-30-2019 Eligibility Decision
- Bd.3 -10-15-2019 Eligibility Decision
- Bd.4 3-5-2018 Notice of April 2018 IEP meeting
- Bd.5 1-8-2019  
To  
12-20-2019 Special Education Direct Timeline of Events/Actions
- Bd.6 10-8-19 Pattern of Strengths/Weaknesses Worksheet
- Bd.7 1-22-2019 Pattern of Strengths/Weaknesses Worksheet

**APPENDIX OF WITNESSES**

<b><u>NAME</u></b>	<b><u>POSITION</u></b>
1. [REDACTED]	Clinical psychologist/Independent Evaluator
2. [REDACTED]	Clinical Audiologist/Central Auditory Processing Independent Evaluator
3. [REDACTED]	Parent
4. [REDACTED]	Special Education Case Manager/ Speech Language Pathologist
5. [REDACTED]	School System Psychometrist
6. [REDACTED]	School System Special Education Director