

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

C. D. T.

PETITIONER

vs

Special Education Case No. 20-123

ELMORE COUNTY BOARD OF EDUCATION

RESPONDENT

ELMORE COUNTY BOARD OF EDUCATION

PETITIONER

vs

C. D. T.

Special Education Case No. 20-131

RESPONDENT

DUE PROCESS DECISION

I

Procedural History

A due process hearing was held as a result of the parent contesting a special education eligibility determination in which the Petitioner was found to be no longer eligible for special education services. (Hearing Exhibit Officer 2)(hereinafter referred to as HO ____). The parents' request was submitted to the State Board of Education on October 27, 2020. (HO1 and 2).

The Elmore County Board of Education filed a due process complaint requesting a hearing to show that its evaluation of Petitioner was appropriate. 34 CFR §300.502(b)(2)(i). (HO 11). That hearing request was in response to a letter from a lawyer retained by the parents after their due

process hearing request was filed. (HO 9). The Board submitted its request for hearing based on the demand by the parents' lawyer for an independent educational evaluation "in all areas of suspected disability". 34 CFR§ 300. 502 (a) –(b). The Board request for a due process hearing was submitted on December 1, 2020. (HO12).

The parents of the child appeared at the hearing. The mother testified. Mr. and Mrs. ■ were represented at the hearing by their attorney.

The Board of Education was represented by its lawyer. The school system's Special Education Director and its' psychometrist served as representatives of the system with special knowledge or training with respect to problems of children with disabilities. 20 USC§ 1415 (h)(1). Both individuals testified at the hearing. It was the parents' dissatisfaction with the psychometrist's evaluation of their ■ that was the primary focus of the hearing.

The presence of the Petitioner was waived. The parents requested that the hearing be closed. The witnesses were sequestered upon request by the parents' attorney.

II

Statement of Issues

The initial issue was whether the special education eligibility evaluation of Petitioner complied with federal regulations and the Alabama State Department of Education Administrative Code. 34 CFR§ 300.301 et sq; Ala Admin Code 290-8-9-.02. Second, if indeed there was compliance with those procedures did the eligibility team reach the appropriate conclusion in its

determination that the child was no longer eligible for special education services. 34 CFR§ 300.304-305; Ala Admin Code 290-8-9-.03.

Compliance with the regulatory technical or procedural aspects of an eligibility determination will not automatically mean that the evaluation of the child cannot withstand scrutiny as to whether the evaluation conclusions justified a rejection of eligibility for special education under the Individuals With Disabilities Education Act of 2004. 20 USC§ 1415(b)(6) (permitting due process complaint with respect to evaluation of child or other matters reflecting the failure to provide a free appropriate public education). See USC§ 1415(f)(3) E.(ii) (procedural violations). The evaluation conducted by the school system must be “appropriate”. 34 CFR§300.502(b)(i).

III

Findings of Fact

Petitioner is [REDACTED] years of age. [REDACTED] has been enrolled in the Elmore County School System since kindergarten. This year [REDACTED] is in the [REDACTED] grade. Education for the youngster – as with all the systems’ students – has been difficult due to the COVID-19 pandemic.

The child suffers from [REDACTED] difficulties. [REDACTED] conditions are medically and observationally documented. The child is [REDACTED]

[REDACTED]

[REDACTED]

Because the child had developmental delays [REDACTED] began receiving Early Intervention Services at the age of three and one-half years. 34 CFR§ 300.25 (infants and toddlers with a disability).

Initially, [REDACTED] was believed to be non-verbal but [REDACTED] mother said [REDACTED] began to speak after a period of

several months. It appeared from the evidence that the youngster has received speech – language services throughout [REDACTED] years. (Petitioner’s Exhibit 7) (hereinafter P. ____).

Upon entering [REDACTED] for the 2018-2019 school year the child began to receive special education services. 34 CFR§300.122. [REDACTED] was designated for those services under the disability category of [REDACTED]. Such children are entitled to special education services because they have [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

An individualized education plan (IEP) was developed for Petitioner to address [REDACTED] disability. Because Petitioner encountered academic and behavioral difficulties [REDACTED] first year in [REDACTED] parents requested that [REDACTED] be retained. [REDACTED] enrolled in a second year of [REDACTED] for the 2019 – 2020 school year. [REDACTED] had an IEP for that year as well.

Significantly, the same teacher instructed the youngster both [REDACTED] years. The teacher developed a relationship with the child that Mrs. [REDACTED] said was what her [REDACTED] needed to reduce [REDACTED] outbursts and tantrums. Both the mother and [REDACTED] were very pleased with the teacher.

The events made the basis of this dispute began with Petitioner’s triennial evaluation. The evaluation was initiated on October 1, 2020. (A special education re-evaluation of a child with a disability is required at least once every three years unless the parent and the school system agree that a re-evaluation is unnecessary). 34 CFR§ 300.303(b)(2).

The psychologist assigned to evaluate the child worked at the elementary school [REDACTED] attended. She testified that she did not know the [REDACTED] before she undertook her evaluation.

On January 19, 2020 the psychologist administered the Reynolds Intellectual Assessment Scales (RIAS) to the child. She stated she used her professional judgment in selecting that IQ test for Petitioner. She believed it to be appropriate because Petitioner was a young child and the test was shorter in the time it took to administer it. Thus, it was better for persons who exhibit attention difficulties. It also did not require the young [REDACTED] use of motor skills. See Ala Admin Code 290-8-9-.03 and 290-8-9-.03 (10) (e)3.(vii.) (professional judgment should be used to determine if the results of evaluations are an indicator of the child's level of functioning).

The psychologist remarked that the child's verbal score on the RIAS [REDACTED] was significantly higher than [REDACTED] non-verbal score [REDACTED]. She described that situation was unusual in that normally the higher score would be the non-verbal. However, she expressed that State Department of Education guidelines direct that the evaluator use the composite (full scale) intelligence quotient (IQ) score. In this case the composite score for Petitioner was [REDACTED]. And using the State Department of Education guidelines an [REDACTED] IQ would result in a predicted achievement score of [REDACTED]. Because an achievement test administered the next day disclosed scores on two subtests of [REDACTED] and [REDACTED], the child's testing did not reveal a severe discrepancy (16 points) between ability and achievement. The psychologist explained that without the severe discrepancy the Petitioner did not qualify for special education services under the specific learning disability category. 34 CFR§ 300.8(10) (defining specific learning disability).

The psychologist testified that the other disability category being examined in the re-evaluation of Petitioner was the category in which [REDACTED] was being served under – [REDACTED].

For that category she obtained two Behavior Assessment Systems for Children (BASC3). One was completed by Petitioner's [REDACTED] teacher and the other was completed by [REDACTED] grade teacher. (Respondent's Board Exhibit 10) (hereinafter referred to as Bd. ____). Neither scale revealed clinically significant behavior.

Similarly, Attention Deficit Disorders Rating Scales (ADDES) were distributed to and filled out by the two teachers. A third was completed by Petitioner's mother. Neither teachers' ADDES scales revealed clinically significant behavior. The mother's ADDES scale disagreed. It demonstrated clinically significant behavior in both [REDACTED]

Under the State Department of Education guidelines the behavior scales assembled for the eligibility report did not support a qualifying disability. (Bd. 9). For Emotional Disability there must be two behavior scales that demonstrate clinically significant behavior difficulties. Ala Admin Code 290-8-9 (4)(b)3. For Other Health Impairment as a result of attention deficit disorder or attention deficit hyperactivity disorder there must be two out of three ADDES scales that reveal that condition. Ala Admin Code 290-8-9(9)(d)3.

On October 22, 2020 an IEP/eligibility team met to review the data, assessments and documented criteria necessary for an eligibility determination. The mother attended as did her [REDACTED] grade general education teacher, [REDACTED] special education teacher and [REDACTED] speech therapist. The local education agency (LEA) official who was present was described as an IEP facilitator who conducted an observation of Petitioner being taught during small group instruction.

According to Mrs. [REDACTED], the psychometrist who was responsible for conducting the re-evaluation and assembling pertinent information did not initially appear even though the psychometrist's

office was in the same school as the location of the meeting. Mrs. ■ testified that the psychologist arrived at the meeting after it began. The psychologist appeared irritated that she was summoned. The psychologist acted in a perfunctory and defensive manner in describing the results of her evaluation. The psychologist did all the talking. While Mrs. ■ was present, the psychologist did not seek the opinion of other team members. Mrs. ■ stood up and called the meeting “Bull S**t”. She then left the meeting.

The psychologist denied Mrs. ■'s description of events. That testimony was not credible – particularly in view of the minutes of the meeting which continued after Mrs. ■'s departure. (Bd. 11).

As a consequence of the school system's evaluation, the eligibility committee (described as IEP team because it was a re-evaluation of a special education student) concluded that Petitioner did not meet the State Department of Education criteria for eligibility for special education services under the disability categories considered: ■ and ■

■ The team found that the youngster did not suffer from a disability that had an adverse affect on ■ educational performance so that ■ required specially designed instruction in order to access and participate in the general education curriculum. (Bd.9).

IV

Discussion of Issues

The State Department of Education requires that a school system must evaluate a child with a disability before determining that a child is no longer a child with a disability. Ala Admin Code 290-8-9-.02 (6)(g). That provision connotes compliance with **all** of the evaluation requirements

specified in the regulatory provisions relied on by the school system in this case Ala Admin Code 290-8-9-.02. (Bd.2). One such provision is set forth in .02 (1) (d)1. It requires review of **existing** evaluation data on the child, including evaluations and information provided by the parents of the child, current classroom-based local or state assessments, classroom –based observations, and observations by teachers and related service providers. That review is necessary to determine if the child continues to have a disability as well as the educational needs of the child. .02 (1)(d)2.

The testing criteria and assessments relied upon by the school system represent the **minimum** evaluation components with respect to an eligibility determination. Ala Admin Code 290-8-9-.03 and Ala Admin Code 290-8-9.03(9)(c). Although the evaluation assessments and other procedural components of the re-evaluation may have complied with technical aspects of State and federal regulations, what occurred in this case did not meet evaluation requirements/free appropriate education requirements recognized as the basis for a due process hearing complaint in 20 USC §1415(b)(6). Given the circumstances, it was not an “appropriate” evaluation.

34 CFR§300.502(b)(2)(i).

Initially, record of access to Petitioner’s student records on October 1, 2020, noted an “additional data” meeting attended by Mrs. ■, her ■ special education teacher, ■ general education teacher and the IEP facilitator. But there was no evidence of what was entailed by the cryptic note of “additional data”. Nor was there any indication that these persons reviewed the volume of material concerning this youngster’s difficulties with behavior and academics. (It did appear that at the meeting behavior scales and other assessments were distributed to the child’s teachers to complete). (Bd. 9; Bd. 10).

functional behavior assessment of the youngster was conducted by the school system. (Bd.6). A behavior plan was developed. (Bd. 6). The plan confirmed that the child's behaviors were negatively impacting ■ ability to succeed academically in the general education classroom.

In academics, Petitioner's ■ grade teacher wrote that despite being addressed by the Problem Solving Team (PST), the ■ had academic weaknesses with "reading, math, language, and behavior." (Access Records: Special Education Eligibility Documentation). ■ classroom behavior plan noted that Petitioner's behavior was impeding ■ learning. ■ behavior disrupted ■ learning process as well as that of the other students. (Bd.7). The Star Early Literacy Assessment revealed minimal academic progress during the first semester of the present school year. (Bd.4). (That period included weeks prior to and after the youngster's removal from the special education rolls).

(Mrs. ■ testified that her ■ grades dropped following cessation of special education services).

There were prior eligibility determinations and IEPs that were not reviewed by the IEP/eligibility team. These materials revealed that the Petitioner received speech language services throughout ■ school years. ■ ■ teacher described that one has to listen carefully to understand what the ■ says. She stated that fellow students and teachers had difficulty understanding what ■ is saying. (P.7). In response to the eligibility evaluation, Petitioner's ■ grade teacher reported that Petitioner's classmates had difficulty understanding ■. She remarked that the youngster's errors in sound production while understandable, often caused a negative impact on ■ performance in spelling and ■ ability to participate in oral reading. (Bd.9).

The ■ grade teacher wrote for the eligibility report that the child exhibited deficits in language including an inability to use age appropriate sentence length and structure. ■ was unable to

follow verbal instructions without repeated instruction or observing what [REDACTED] classmates were doing. [REDACTED] had difficulty understanding information presented to [REDACTED] in an oral manner. [REDACTED] did not express [REDACTED] effectively. Nor could [REDACTED] use verbal skills to solve problems. Sometimes [REDACTED] could not express in words [REDACTED] choices, preferences or feelings. (Bd. 9)

At the eligibility meeting Petitioner's speech therapist expressed concern that the child would not progress without [speech] services. (Bd.11).

Similarly, the re-evaluation conducted by the psychometrist while in the most part in technical/procedural regulatory compliance with the **minimum** requirements of such a re-evaluation, it nevertheless suffered from problems about which members of the IEP/eligibility team should have expressed concerns. The team members did not make full use of their professional judgment in determining if the results of the State Department of Education required evaluations were reliable sources of information or if other assessment data might be a more reliable indicator of the child's level of functioning. Ala Admin Code 290-8-9-.03. The psychometrist abandoned that concept entirely. She testified that there was no flexibility "as far as meeting criteria for special education services." (Tr. 172). "The results [scores] from the evaluation determine whether or not the student meets the criteria, not myself". **Id.**

The Petitioner was last assessed for hearing in early fall 2015. (Yet [REDACTED] experiences problems with [REDACTED] speech). [REDACTED] last vision assessment was in Spring of 2016.

The Petitioner's IQ test was apparently administered while on [REDACTED] substantial medical regimen. And behavior assessments at school while on medication would seem to cause a similar concern. (Mrs. [REDACTED] administers her [REDACTED] medicine before school as well as some after [REDACTED] comes home).

The observation of the [REDACTED] was conducted “during small group setting,” which the mother believed to be the child and one other student. The two children had an aide when Petitioner was in [REDACTED]. It was unclear if the assistance of the aide continued in the [REDACTED] grade. Accordingly, there was no information about whether the observation undertaken on October 8, 2020 took place when an aide was present. It was also unclear if the observation took place in the general education classroom where Petitioner spends most of [REDACTED] day, or in [REDACTED] resource classroom where [REDACTED] receives small group instruction for speech and/or social skills.

There also did not appear to be a BASC behavior scale completed by the parent. There must be two of such an assessment that reveal clinically significant behavior. Neither of the teachers’ scales demonstrated that level of behavior. Still, the criteria under the disability of [REDACTED] and [REDACTED] require three behavior scales obtained from three or more independent raters, one of whom may be the parent. Admin Code 290-8-9 (4)(a)3; 290-8-9(9)(d)3.

Both teachers who completed the BASC provided scores that rated the child “at risk” for clinically significant behavior. As such, the scales identified a significant problem with Petitioner’s behavior, albeit one that was not severe enough to require formal treatment. (Bd. 12).

However, the most compelling argument for another review of the eligibility determination is reflected in the report itself. The Petitioner’s [REDACTED] grade teacher expressed disagreement with its conclusion that the child was no longer eligible for services. (Bd.9). But even more significant are the minutes of the meeting which apparently continued after the parent’s departure. (Bd.11). Those minutes disclose that after the psychometrist reported figures on the scales and

assessments, she expressed that the youngster no longer met the requirements for [REDACTED]. When she added that [REDACTED] did not meet the requirements “for behavior” because there was no adverse effect, “[the team] all disagreed that it was not an accurate thing”. (Bd.11). The psychometrist then stated that she only followed the code and followed what the State puts in place. The response of the Petitioner’s general education teacher, [REDACTED] special education teacher and [REDACTED] speech [teacher] was that “we are failing this child” and [REDACTED] “will not progress without services”.
Id. And while the teachers did not disagree with the testing that had been done, they “do not agree with [REDACTED] not going to receive services”. (Bd. 11).

A review of the minutes does not reflect that the IEP/eligibility team reached a consensus on exiting Petitioner from special education. Indeed, if one includes the parent, a majority of the team did not believe that the child was no longer eligible for special education services.

V

Conclusions

The criticisms of the IEP/eligibility team for conducting what the Hearing Officer finds to be a re-evaluation that was insufficiently comprehensive to identify all of Petitioner’s special education and related needs does not warrant a finding that the school system’s duty to evaluate the child under IDEA standards was a substantive violation of §1415(b)(6). 34 CFR§ 300.122(evaluation). The re-evaluation of the child complied with many (if not most) of the procedural/technical components of the federal and State regulations. 34 CFR§ 300.304; Ala Admin Code 290-8-9-02. It did seem to reflect that a single measure or assessment (teacher behavior scales) were used as the sole criterion to deny eligibility. Ala Admin Code 290-8-9-02(1)(h). That is inappropriate. The behavior scales – the most subjective of all the State

Department of Education required assessments – took precedence over the significant amount of information (behavior plans, teacher observations etc.) that provided a more candid portrait of the child and ■ struggles.

Further, the focus of the evaluation on various assessment scores excluded parental (and teacher) information and observations. Based on the testimony of the psychometrist, she did not seem to recognize that the State Department of Education evaluation she initiated entailed only the **minimum** requirements for an eligibility determination. Ala Admin Code 290-8-9-.03.

Nevertheless, remedies such as compensatory services for the period the child ceased to receive special education services or even the Hearing Officer's reinstatement of the youngster as a child eligible for special education are not justified.

Instead, the Hearing Officer concludes that the IEP/eligibility team's failure to comply with Ala Admin Code 290-8-9-.02(d)1-2 and Ala Admin Code 290-8-9-.02 (6)(g) constitute a procedural violation of the IDEA. 34 CFR§ 300.303 and 305(a). In the event of such a procedural violation a child is not deemed to have been denied a free appropriate public education unless procedural inadequacies cause a deprivation of educational benefits, impede the child's right to a free appropriate education and/or significantly impede 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. 20 USC§ 1415(f)(3) E. (ii)(I) – (III).

In this dispute all three conditions representing a denial of a free appropriate public education to Petitioner were met. The child's previous special education designation was eliminated despite the objection of ■ parents (and ■ teachers).

VI

Specific Findings

1. The re-evaluation of the child conducted by the school system in October 2020 failed to consider **all information** relevant to the child, ■ disability and ■ eligibility for special education services. In view of the circumstances described above it was not an appropriate re-evaluation of the child. See 34 CFR§300.502(b)(2)(i).

Within 30 days from the decision herein an eligibility team consisting of the qualified professionals and the parent shall convene to determine whether Petitioner is a child with a disability as well as the educational/behavioral needs of the child. 34 CFR§ 300.306(a).

The eligibility team shall draw upon information from a variety of sources, including medical diagnosis (and effects of various prescription medicines on the child, including ■ behavior and ■ test taking or academic performance); aptitude and achievement tests; parent input; the child's behavior in a varied range of settings; the child's physical/neurological condition(s); social/cultural background; adaptive behavior; the services/related services ■ receives or once received, testing, IEPs and other information formerly applicable to the special education eligibility of the child. 34 CFR§ 300.306 (c)(1)(i). Importantly, the team shall consider teacher recommendations. **Id.**

2. The team should review the existing evaluation data compiled by the school system's psychometrist but also the data that existed prior to the October 2020 eligibility meeting.

3. Prior to the above designated determination an intellectual assessment of the child other than the Reynolds Intellectual Assessment Scale shall be administered. While the RIAS administered to the child was in compliance with the State Department of Education regulatory standards, it is

the determination of the Hearing Officer that the 17 point discrepancy that existed between the child's verbal intelligence index and that of ■■■ nonverbal intelligence on that assessment requires further investigation.

4. Prior to the above eligibility meeting Behavior (BASC) and Attention Deficit Disorder (ADDES) scales shall be disseminated to and completed by appropriate persons in accordance with Ala Admin Code 290-8-9 .03 (9)(d)-(e).

5. That a vision/hearing screening of Petitioner shall be completed.

6. That any observation for purposes of the evaluation shall be conducted while Petitioner is taught in a general education setting.

7. That the attorney for Petitioner may attend the eligibility meeting as a consultant. The attorney shall not be considered a member of the eligibility team. Should counsel for the Petitioner attend he shall be entitled to be paid by the school system at his regular hourly rate (and mileage if travel is involved). Counsel's time shall be capped at 5 hours for his participation (and travel) in(to) the eligibility meeting.

8. Upon completion of the above evaluations and/or eligibility determination the parent shall retain the right to an Independent Educational Evaluation (IEP) at public expense. 34 CFR§ 300.502; Ala Admin Code 290-8-9-.02(4).

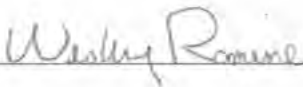
Upon such a request the school system may assert its right to demonstrate that the evaluation conducted as a result of the Hearing Officer decision was appropriate. **Id.** at 502(b)(2)(i) and .02(4)(d).

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 a notice of intent to file a civil action. Ala Admin Code 290-8-9-.8 (9) (c)16.

Done and Ordered 7th day of January 2021



/s/wesleyromine
Hearing Officer
3131 LeBron Road
Montgomery, AL 36106
(334)676-1368

Cc: Erika Tatum
James Sears
Shonta Jackson

APPENDIX OF WITNESSES

Name

1. [REDACTED] School System Psychometrist
2. [REDACTED] Parent
3. [REDACTED] School System Special Education Director

APPENDIX OF ADMITTED EXHIBITS

Hearing Officer Exhibits

HO- 1.	10/27/20	Hearing Officer appointment
HO- 2.	10-22-20	Due process hearing complaint
HO- 3.	10-30-20	Board motion to dismiss (insufficiency)
HO- 4.	11- 2-20	Order denying Board motion
HO- 5.	11- 6-20	Board answer to complaint
HO- 6.	11- 9-20	Email from parent re: resolution meeting
HO- 7.	11-10-20	Board letter confirming unsuccessful resolution
HO- 8.	11-10-20	Parent email re: independent testing
HO- 9.	11-11-20	Attorney notice of appearance for Petitioner
HO-10.	11-11-20	Email string re: outstanding issues/scheduling hearing
HO-11.	12-1 -20	Board due process hearing request
HO-12.	12-3-20	Email re: pre-hearing conference
HO-13	12-3-20	Email re: continuance of hearing
HO-14	12-3-20	Board agreement to proceed with its hearing request
HO-15	12-28-20	Hearing Officer extension of briefing schedule

HO-16 1-5-21 Petitioner's closing argument/brief
HO-17 1-5-21 Board closing argument/brief

PETITIONER'S ADMITTED EXHIBITS

P. 1 8-31-20 Email string with Petitioner's medical diagnosis
*P. 7 Eligibility/IEP excerpts of Petitioner

RESPONDENT (BOARD) ADMITTED EXHIBITS

Bd- 1. 10- 1-20 Notice of Re-evaluation
Bd- 2. Excerpts Ala Admin Code (evaluations)
Bd- 3. 10-19-20 Intellectual Assessment
Bd- 4. 9-4-20 - 12-10-20 Star Report
Bd- 5. 12- 4-18 Behavior Intervention Plan (Learning Tree)
Bd- 6. 5-7-20 School System FBA/BIP
Bd- 7. [REDACTED] Grade Classroom behavior plan
Bd- 8. 2019-2020 Office referrals
Bd-9. Re-evaluation Eligibility Report
Bd-10. BASC/ADDES Scales
Bd-11. 10-22-20 Eligibility Team Meeting Minutes

- Bd-12. [REDACTED] Grade teacher BASC (with explanation of components)
- Bd-13. Notice of Non-eligibility

OTHER

Reviewed but not Admitted as Exhibits were Petitioner's educational records

*Admitted over objection