

**BEFORE A SPECIAL EDUCATION HEARING OFFICER
STATE OF TEXAS**

**STUDENT,
bnf ***,
Petitioner,**

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§
§

v.

DOCKET NO. 200-SE-0315

**HARDIN-JEFFERSON INDEPENDENT
SCHOOL DISTRICT,
Respondent.**

DECISION OF THE HEARING OFFICER

recorded
and transcribed by a certified court reporter. Both parties timely filed their respective written closing arguments on or before July 17, 2015. The decision of the hearing officer was extended to August 14, 2015 at school district request.

Petitioner confirmed the following issues for decision in this case:

1. Whether the school district should have identified Student as a student with a disability (for example as a duty within the meaning of the Individuals with Disabilities Education Act (IDEA) beginning in 2009 up through the present;
2. Whether, as a result of the failure to identify, the school district failed to provide Student with a free, appropriate public education (FAPE) and failed to devise appropriate Individual Educ

3.

Student struggled with *** at the beginning of the year. (Tr. Vol. II, p. 837). The *** teacher worked with Student in a small group giving additional instruction in learning ***. (Tr. Vol. II, p. II, pp. 820-821, 870-872). The *** teacher discussed concerns about *** difficulties identifying the *** with *** in an October *** conference. (Tr. Vol. I, p. 136)(Tr. Vol. II, pp. 562, 822-823, 825).

3. Dyslexia ***. (Tr. Vol. I. pp. 50-51, 416)(P. Ex. 3-78). ***. (Tr. Vol. I. p. 416). *** with the *** teacher and requested Student be evaluated for dyslexia. (Tr. Vol. I, pp. 51, 323, 416, 419). Dyslexia is a language-based deficit. (Tr. Vol. II., p. 736). The primary characteristics of dyslexia include: difficulty reading words in isolation, difficulty accurately decoding unfamiliar words, difficulty with oral reading (slow, inaccurate, or labored also referred to as a fluency deficit), written spelling, phonological processing, and listening comprehension. (Tr. Vol. I, pp. 74-75)(Tr. Vol. II, p. 736)(P. Ex. 3-78, 3-79)(R. Ex. 14). Consequences may include difficulties in reading comprehension and/or written expression. (Tr. Vol. I., pp. 54-55)(P. Ex. 3-78). A student exhibiting two or more primary characteristics of dyslexia is a factor in

consent for a 504 evaluation on ***. (Tr. Vol. I, p. 137)(R. Ex. 5). The problem noted on the initial referral packet visual issues and reading difficulties (Tr. Vol. I, p. 412)(R. Ex. 3-2)(R. Ex. 4). Student *** ation began. (P. 2-2)(P. Ex. 4-1).

9. Beginning in earlyp59()10(r)13(e)14(f)23(e)14(N)-79(I)33vyp59()10en

24. The *** evaluation identified Student as a student with symptoms of dyslexia and a moderate oral and language impairment. (Tr. Vol. I, pp. 69-70, 315-316, 320). (P. Ex. 7-23, 7-25). *** shared information from the dyslexia tutor and the *** evaluation report with the school district. (Tr. Vol. I, pp 130-131, 166-167)(Tr. Vol. II, pp. 615, 859)(P. Ex. 13-19, 13-20)(P. Ex. 11-5, 11-7). *** provided the *** evaluation to the Assistant Principal on *** with a letter from the dyslexia tutor. (Tr. Vol. I, pp. 432, 435).
25. The letter from the tutor _____, the results of her two informal assessments, and recommendations for an intense, systematic, multisensory curriculum with gradual introduction of a few *** at a time. The tutor also recommended Student ***. *** asked to be notified if the school planned to set up an evaluation. (Tr. Vol. I, p. 167)(R. Ex. 11). The Assistant Principal forwarded the *** evaluation information and _____ to the *** teacher because she was knowledgeable about Student and served on Stude _____ (Tr. Vol. I, pp. 167-168, 169, 433)(P. Ex. 11-6, 11-7). (R. Ex. 11-2, 11-3) (R. Ex. 12-3, 12-4).
26. In response to the *** _____ the school district evaluated Student for dyslexia. (Tr. Vol. I, pp. 440, 441)(R. Ex. 11-2)(R. Ex. 13). _____ stated her view that _____ distric _____ also _____. (R. Ex. 4, p. 3)(Tr. Vol. I, p. 51).
27. The school district completed its dyslexia evaluation on _____. (Tr. Vol. I, pp. 64-65, 67)(P. Ex. 5) (R. Ex. 14). _____ referenced the *** evaluation that included administration of the GORT V and the CTOP. (Tr. Vol. I, pp. 69-70, 141, 440)(Tr. Vol. II, p. 748). _____ administered the KTEA II. (Tr. Vol. I, pp. 141, 265, 441)(Tr. Vol. II, pp. 742, 793)(R. Ex. 13). The KTEA II can be used to screen a student for dyslexia. (Tr. Vol. II, p. 741). Because Student had not yet received any *** instruction at the time the Student was scored two ways on the KTEA II: _____. (Tr. Vol. II, p. 743). Student fell in the average range under both scoring approaches for word reading, word decoding, written spelling, and phonological processing. (Tr. Vol. I, pp. 438-439)(Tr. Vol. II, pp. 585, 747)(R. Ex. 14-1, 14-2).
28. The *** _____. (R. Ex. 14). Student scored below average in reading comprehension on the KTEA-II and had poor fluency under the GORT-5 administered by _____. These results showed a deficit in two or more of the primary characteristics of dyslexia. (R. Ex. 14-1). Student also scored below average in listening comprehension on the KTEA II -- _____ (Tr. Vol. I, pp. 141, 440)(Tr. Vol. II, pp. 551, 556)(R. Ex. 14). Not all parts of the KTEA II were administered _____ it did not include a fluency assessment and some decoding information. (Tr. Vol. II, pp. 877-879). The KTEA II also has a written expression subtest that was not administered _____ dyslexia evaluation. (Tr. Vol. I, pp. 93-94).
29. The *** teacher, the Assistant Principal, _____ *** in a 504 meeting on *** prior to the beginning of *** grade. (Tr. Vol. I, p. 443)(R. Ex. 16). The 504 Committee reviewed the *** criteria for dyslexia. (Tr. Vol. I, p. 440)(R. Ex. 11)(R. Ex. 14-

Student is restless, upset, and frustrated when doing homework or studying at home with

60. On ***

Misrepresentation Exception

exception. The United States Department of Education left it to hearing officers to decide on a case by case basis the factors that establish whether a parent knew or should have known about the action that is the basis of the hearing request. *71 Fed. Reg. 46540, 46706 (Aug. 14, 2006)*. Case law provides some guidance in making that determination.

educational program was objectively inappropriate but instead that the school district subjectively determined Student was not receiving a free, appropriate public education and intentionally and knowingly misrepresented that fact to ***. *D.K. v. Abington Sch. Dist., 2012 U.S. App. LEXIS 21060 (3d Cir. 2012)* (student could not show misrepresentations caused failure to request a hearing or file a complaint on time teachers did not intentionally or knowingly mislead parents about extent of academic and behavioral issues or efficacy of solutions and programs attempted). See, also, *Evan H. v. Unionville-Chadds Ford Sch. Dist., 2008 U.S. Dist. LEXIS 91442, pp. 4-5 (D.C. Pa. 2008)*.

Furthermore not any misrepresentation triggers the exception. Instead the misrepresentation must be such that it prevents the parent from requesting a due process hearing regarding claims that would otherwise be time-barred. *C.H. v. Northwest Ind. Sch. Dist., 815 F. Supp 2d 977, 984 (E.D. Tex. 2011)*; *G.I. v. Lewisville Ind. Sch. Dist., 2013 U.S. Dist. LEXIS 120156 (E.D. Tex.*

*** raised concerns about educational progress and that doing so prevented her from filing a due process Complaint.
educational concern raised by a parent. See, *Evan H. v. Unid*

Conclusion on Statute of Limitations Issues

the level of flagrant, intentional misrepresentation required by the first exception to the statute of limitations rule. In order to apply this exception Petitioner had to establish that the school district knew that it was not providing Student with an appropriate education and intentionally misled *** into believing otherwise. I find insufficient support for such a conclusion in the record. *D.K. v. Abington Sch. Dist., supra; See, Evan H. v. Unionville Chadds Ford Sch. Dist., 2008 U.S. Dist. LEXIS 91441 at p. 5 (D.C. Pa. 2008)*. In addition, the evidence supports the *** had at least constructive knowledge of her procedural rights, including the right to file a due process Complaint. *El Paso Ind. Sch. Dist. v. Richard R., supra*.

Eligibility as a Student with a Disability - General Rule

A free, appropriate public education must be available to any individual child with a disability who needs special education and related services. *34 C.F.R. § 300.101 (c) (1)*. The determination that a child is eligible for special education and related services must be made on an individual basis by the group responsible for making eligibility determinations. *34 C.F.R. § 300.101 (c) (2)*. In Texas that group is the Admission, Review & Dismissal Committee (ARD). *19 Tex. Admin. Code §§ 1040 (b); 89.1050 (a) (5)*. the meaning of the IDEA to be eligible for special education services in Texas. *19 Tex. Admin. Code § 89.1040 (a)*.

Child With a Disability

of the enumerated disability classifications. *34 C.F.R. § 300.8 (a)*. A child with a disability may qualify for special education services under more than one classification. *E.M. v. Pajaro Valley Unified Sch. Dist., 758 F. 3d 1162(9th Cir. 2014), cert. denied, 2015 U.S. Lexis 204 (2015)*.

Educational Need

Even if a student can meet the criteria of one or more of the disability classifications a student must also demonstrate a need for special education and related services for eligibility purposes. *34 C.F.R. § 300.8 (a)(1)*. The determination of whether a individual basis. *Bd. of Hendrick Hudson Int. Sch. Dist., v. Rowley, 458 U.S. 176, 207 (1982)*.

Educational need is not strictly limited to academics but also includes behavioral progress and the acquisition of appropriate social skills as well as academic achievement. *Venus Ind. Sch. Dist. v. Daniel S., 2002 U.S. Dist. LEXIS 6247 (N. D. Tex. 2002)*. While the achievement of passing marks and the advancement from grade to grade is important in determining educational need it is but one factor in the analysis. *Bd. of Hendrick Hudson Int. Sch. Dist. v. Rowley, 458 U.S. 176, 207, n. 28 (1982)*. *Venus Ind. Sch. Dist. v. Daniel S., supra*. The decision of whether a student who is advancing from grade to grade is in need of special education must be determined on an individual basis. *Rowley, supra*.

Child Find

The school district has a duty under the IDEA to identify, locate, and evaluate students with disabilities who are in *34 C.F.R. § 300.111 (a) (1) (i)*. The Child Find duty includes children suspected of having a disability and in need of special education even though they are advancing from grade to grade. *34 C.F.R. § 300.111 (c) (1)*. Under Texas law special education referral is required as part of the school overall regular education referral or screening system for students experiencing difficulty in the regular classroom. *19 Tex. Admin. Code § 89.1011*.

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educational gains. However, the evidence also showed that despite their best efforts Student continued to struggle with reading -- and there is no real dispute that Student needed, and continues to needs, accommodations and interventions in order to learn. The preponderance of the evidence demonstrates the school district should have suspected Student might have an educational need for special education. *34 C.F.R. § 300.111*.

I conclude the school district failed in its continuing Child Find Duty bev(t)18(e(o)10(n)i0(.))TJETBT1 0 0 01.71.65 676

its website and ensure that contact information on Child Find brochures give callers specific information on which school staff members to contact for any inquiries about special education services or requests for help with their child and not simply a menu of school staff phone numbers.

The evidence also showed the school district has not provided *** teachers or administrative staff with updated Child Find training in at least 3-4 years. The Campus 504 Coordinator and dyslexia teachers also misunderstood State recommendations ***. A child

features and components identified in this Decision, no later than 60 calendar days from the date the school
*** as legal guardian;

***, as legal guardian, shall meet with the Special Education Director no later than 10
calendar days from

**BEFORE A SPECIAL EDUCATION HEARING OFFICER
STATE OF TEXAS**

**STUDENT,
bnf ***,
Petitioner,**

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HELD:

FOR THE STUDENT

level standards as well as RTI but evidence showed that although student made progress student also continued to struggle with spelling and reading and exhibited characteristics of dyslexia -approved grade

ISSUE:

HELD:

FOR THE SCHOOL DISTRICT

DEA related to identification, evaluation, educational placement or provision of a FAPE. Claims arising under any law other than the IDEA dismissed for want of jurisdiction. **34 C.F.R. §§ 300.503, 300.507, 300.511.**