

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

**STUDENT, bnf
PARENTS,
Petitioner,**

§
§
§
§
§
§
§

v.

DOCKET NO. 030-SE-1009

**KELLER INDEPENDENT
SCHOOL DISTRICT,
Respondent.**

DECISION OF THE HEARING OFFICER

Introduction

Petitioner, Student (“Petitioner” or “Student”) brings this action against the Respondent Keller Independent School District (“Respondent,” “the school district,” or, “KISD”) under the Individuals with Disabilities Education Improvement Act, as amended, 20 U.S.C. § 1401 et. seq (IDEA) and its implementing state and federal regulations.

Party Representatives

Student has been represented throughout this litigation by student’s legal counsel, Elizabeth Russell, Attorney at Law. Beginning on October 26, 2009 Student was also represented by Ms. Russell’s co-counsel, Dorene Philpot, Attorney at Law with The Philpot Law Office. Respondent Keller Independent School District has been represented beginning on November 2, 2009 by its outside legal counsel, Nona Matthews with Walsh, Anderson, Brown, Gallegos & Brown and from the inception of this litigation by Ms. Matthews’ co-counsel Amanda Bigbee, General Counsel for KISD.

Resolution Session and Mediation

The parties submitted written waivers of the opportunity to convene a Resolution Session on October 23, 2009. The parties instead agreed to attempt mediation. The parties met in mediation on November 9, 2009 but were unable to reach an agreement to resolve the issues in this case through that process.

Procedural History

Petitioner filed petitioner’s initial request for hearing on October 9, 2009. An initial Scheduling Order was issued on October 12, 2009. The case was first set for hearing on December 1-2, 2009. Respondent filed a Notice of Insufficiency on October 23, 2009. An order ruling on the Notice was issued on October 27, 2009.

Initial Prehearing Conference and First Motion for Continuance

The initial prehearing telephone conference was conducted on November 6, 2009. The legal issues and items of requested relief were confirmed and clarified. Following the conference, the parties filed legal briefs and several preliminary motions. An issue also arose about Petitioner’s access to educational records. On November 13, 2009 Petitioner requested a continuance of the December hearing dates in order to resolve the discovery issue, to provide both parties with an adequate opportunity to prepare disclosure, to

give the hearing officer an opportunity to rule on all pending motions and jurisdictional issues, and, to resolve a scheduling conflict for an expert witness. Respondent did not oppose the request. The hearing was reset, by agreement, for February 9-12, 2010.

Second Continuance

The due process hearing was continued and reset a second time at Petitioner's request to allow Petitioner's counsel to attend to an emergency family matter. Respondent did not oppose the second request. The due process hearing was reset, by agreement, for April 6-9, 2010.

Preliminary Rulings

An Order on Respondent's Motion to Dismiss for Lack of Jurisdiction was issued on March 15, 2010, dismissing one of Petitioner's items of requested relief. An Order on Respondent's Motion to Dismiss on a statute of limitations issue was issued on March 17, 2010 limiting the scope of Petitioner's claims to those that arose within the one year limitations period applied in Texas.

The Due Process Hearing

The due process hearing was conducted on April 6-8, 2010. Petitioner continued to be represented by petitioner's legal counsel Elizabeth Russell and Dorene Philpot. Student's mother, *** and John Russell, Legal Assistant to Ms. Russell, also attended the hearing. Student's grandfather, *** attended the hearing on April 6-7, 2010 after testifying on April 6, 2010. Student's father, ***, attended the hearing on April 7-8, 2010.

Respondent continued to be represented by its legal counsel Nona Matthews and her co-counsel Amanda Bigbee. Heather Hughes, Special Education Director for KISD, also attended the hearing as the party representative. At the conclusion of the hearing the parties requested an opportunity to submit written closing arguments and legal briefs. The request was granted and the deadline for the Decision of the Hearing Officer extended accordingly to May 31, 2010.

Issues

The issues for decision in this case are:

1. Whether the school district failed to identify and assess Student in all areas of suspected disability beginning in May 2005 up through the present; specifically:
 - a. Whether the school district failed to identify all of Student's needs related to student's dyslexia and to assess and monitor student's on-going progress and needs as a student with a learning disability as required by state law and school district policy;
 - b. whether the school district failed to identify Student as a student with Other Health Impairment (OHI) based upon student's Attention Deficit Hyperactivity Disorder (ADHD);
 - c. whether the school district failed to assess Student's needs as a student with ADHD;

2. Whether the school district failed to develop appropriate Individual Educational Plans (IEPs) reasonably calculated to provide Student with a free, appropriate public education (FAPE) beginning with the 2005-2006 school year up through the present; specifically:
 - a. whether the school district failed to develop and implement individualized IEPs based on Student's educational needs, appropriate assessments and present levels of performance;
 - b. whether the IEPs lacked the requisite specific goals and objectives to address Student's educational needs – specifically in reading, reading fluency and to address learning disability deficits and address student's needs arising from student's ADHD;
 - c. whether the IEPs failed to provide appropriate and adequate services to address Student's educational needs – specifically in reading, reading fluency and to address learning disability deficits and address student's needs arising from student's ADHD;
 - d. whether the school district's alleged failure to provide Student an appropriate IEP to address student's dyslexia violated *Texas Education Code § 38.003(b)*, state guidelines for serving students with dyslexia ("the Dyslexia Handbook) and the school district's own policy, and, if so, whether that constitutes a failure to provide Student with an educational benefit, denial of FAPE and violation of the IDEA;
3. Whether the school district's overall educational program for Student failed to provide student with the requisite educational benefit under IDEA beginning in the 2005-2006 school year up through the present;
4. Whether the school district's alleged failure to provide Student with appropriate services (including specifically instruction and intervention to address student's needs as a student with dyslexia and related deficits) violated *Texas Education Code § 38.003 (b)(c)*, *Texas Administrative Code § 74.28*, the Dyslexia Handbook and, the school district's own policy and, if so, whether that constitutes a denial of FAPE and violation of the IDEA;
5. Whether the school district failed to provide Student with instruction by properly qualified personnel, specifically whether the school district violated *Texas Administrative Code § 74.28* and, if so, whether that constitutes a denial of FAPE and violation of the IDEA;
6. Whether the Admission, Review & Dismissal Committee ("ARD") meetings beginning in the 2005-2006 school year up through the present were properly constituted, specifically whether the ARD meetings failed to include a person with specific training in dyslexia and qualified to provide or supervise the provision of dyslexia instruction and, if so, whether that constitutes a denial of FAPE and violation of the IDEA; and,
7. Whether the school district failed to provide Student's parents with the requisite parent education under *Texas Administrative Code § 74.28* beginning in the 2005-2006 school year up through the present and, if so, whether that constitutes a denial of FAPE and violation of the IDEA;
8. Whether the hearing officer has jurisdiction over Petitioner's claims arising under the state's dyslexia rules and regulations and school district policy; and,

9. Whether the one year statute of limitations applied in Texas bars Petitioner's claims arising prior to October 9, 2008.

Requested Relief

Petitioner seeks the following items of requested relief:

1. An order that establishes that Student's current placement at *** School, a private school in ***, is the appropriate educational placement for the current school year based on student's individual needs and the failure of the school district to provide Student with an appropriate program under IDEA;
2. An order instructing the school district to convene an ARD meeting with all legally required members of the ARD (including the school district's dyslexia specialist and at least one faculty or staff member from *** School who has worked with Student) for the purpose of developing an appropriate IEP to be implemented at *** School for the remainder of the current school year;
3. Compensatory special education and related services specifically: (i) reimbursement for tuition and all costs associated with Student's current placement at *** School beginning in August 2009, (ii) reimbursement for the costs associated with private tutoring secured by Student's parents beginning in the 2005-2006 school year up through the 2008-2009 school year and, (iii) as prospective relief, tuition and all costs associated with Student's continued placement at *** School until student *** or *** School determines student no longer requires services and instruction there;
4. An order directing the school district to conduct one full day of district wide in-service training for all school district educators on the identification, evaluation and instruction of students with special needs – specifically students with dyslexia and ADHD;
5. Any other remedies or relief the Hearing Officer deems equitable and appropriate.

Limitations on the Scope of Petitioner's Claims and Requested Relief

Petitioner's claims and reimbursement requests arising prior to October 9, 2008 were barred by the application of the one year statute of limitations rule in Texas. *Order on Respondent's Partial Motion to Dismiss (Statute of Limitations (March 17, 2010))*. Petitioner's request for relief No. 4, supra, was dismissed as outside the hearing officer's jurisdiction and because Petitioner lacked standing to assert claims on behalf of students other than student's self. *Order on Respondent's Partial Motion to Dismiss For Lack of Jurisdiction (March 15, 2010)*. In sum, this Decision will rule on the issues and items of requested relief to the extent they arose during the 2008-2009 school year (beginning on October 9, 2008) up through the present.

Jurisdictional Issue

In its Partial Motion to Dismiss Respondent argued that Petitioner's claims based on state dyslexia rules are outside the hearing officer's jurisdiction. These arguments were resolved in Petitioner's favor as claims based on FAPE under the IDEA and not on state rules alone. *Order on Respondent's Partial Motion to Dismiss for Lack of Jurisdiction (March 15, 2010)*.

FINDINGS OF FACT

1. Student was first identified as eligible for special education services at age *** by the *** ISD. *** ISD conducted a Full Individual Evaluation (FIE) and concluded Student met eligibility requirements as a student with a specific learning disability (LD). *** ISD also identified Student as student with dyslexia. (Respondent's Exhibit 1, referred to hereafter as "R. Ex. ____").
2. Student enrolled in KISD during the *** school year in the *** semester of *** grade. KISD began serving Student in a resource class for language arts and reading and in the regular second grade classroom for all other subjects. (R. Ex. 2, 3) In *** an Admission, Review & Dismissal Committee (ARD) requested dyslexia screening for Student. (R. Ex. 2). The dyslexia screening was completed and Student was identified by KISD as a student with dyslexia in need of specific dyslexia instruction. (Petitioner's Exhibit 5, referred to hereafter as "P. Ex. ____") (R. Ex. 3). Student made progress under the dyslexia program and was dismissed from the program in ***. (P. Ex. 6, 12, 13) (R. 6, 7).
3. Student has an educational history of reading and writing difficulties associated with student's dyslexia. Over the years student received reading and language arts instruction from KISD in resource classes with additional support through content mastery and instructional modifications and accommodations. (R. Ex. 3, 4, 5, 6, 8, 9). However, Student received instruction in the Texas Essential Knowledge and Skills curriculum (TEKS) on grade level during *** school because student is intellectually capable of doing so – student has been consistently assessed as a student with average or above average intelligence. (P. Ex. 8, 16, 18, 22) (R. Ex. 13, 15, 17, 18).
4. Student also has an educational history of attention deficit issues. (R. Ex. 1, 3, 4, 7, 8, 9, 12). Student has been diagnosed with attention deficit disorder (ADD). (P. Ex. 16, 45). Student has taken medication for student's ADD and KISD has been aware of Student's ADD for a number of years. (P. Ex. 16, 17) (R. Ex. 9, 15) (Transcript Volume I, pp. 62-63, referred to hereafter as "Tr. Vol. ___, p. __"). However, KISD has never formally identified Student as a student with Other Health Impairment (OHI) based on student's ADD for purposes of special education services. (P. Ex. 55, p. 20) (Tr. Vol. I, p. 54).
5. Dyslexia is a specific learning disability neurological in origin. It is characterized by difficulties with accurate and/or fluent word recognition and by poor spelling and decoding abilities. Students with dyslexia may have difficulties in learning to read, write, or spell despite conventional instruction, adequate intelligence, and sociocultural opportunity. Secondary consequences of dyslexia may include problems in reading comprehension and reduced reading experience that can impede growth of vocabulary and background knowledge. (P. Ex. 57, p. 8)
6. In Texas students with dyslexia can be identified and served either through a general education dyslexia assessment and instructional program or through a special education evaluation (i.e. an FIE) and then, if eligible, as a student in need of special education under IDEA. A student may be referred and served under IDEA at any point of a school district's dyslexia assessment and instructional process. (P. Ex. 57, pp. 17, 24, Appendix C, Appendix F, Q & A, No. 19)(P. Ex. 58, p. 18)(R. Ex. 30, pp. 7, 18).

7. Not all students with dyslexia will be eligible for special education services under IDEA. Some will be adequately served through the school district's general education dyslexia program; others may be eligible for classroom accommodations under Section 504 of the Rehabilitation Act of 1973 (504) and/or for accommodations in taking the state-mandated curriculum mastery tests known as the Texas Assessment of Knowledge and Skills (TAKS). Texas has passed legislation to ensure students with dyslexia, not otherwise served under IDEA, are identified and provided with appropriate instruction. (P. Ex. 57, pp. 16-17, 18, 24, 29-32, 36) (P. Ex. 58).
8. KISD conducted a three year re-evaluation ("re-eval") at the end of Student's *** grade year and a report was issued on May 30, 2008. The re-eval included a classroom observation, information from classroom teachers, information from parents, and health information. The re-eval noted Student's diagnosis of ADD, that student takes medication, and that student "has trouble staying on task in class." (P. Ex.23).
9. An educational diagnostician administered formal assessments for intelligence (WISC IV) and for academic performance (WIAT II and Woodcock-Johnson III). The re-eval included assessment of Student's verbal comprehension, perceptual reasoning, working memory and processing speed. It also included assessment of word reading, reading comprehension, word decoding, numerical operations, math reasoning, reading fluency and written expression. (R. Ex. 25).
10. The re-eval noted Student's weaknesses in decoding, fluency and word attack skills and recommended Student's educational program include the following: check for understanding, Content Mastery, organizational assistance, positive reinforcement, and seating near the teacher. (R. Ex.25).
11. The IEP in place when Student began *** grade was developed at the annual ARD on December 11, 2007. The duration of services for the December 2007 IEP went from December 11, 2007 to December 11, 2008. (R. Ex. 14). The IEP contained a single annual goal: Student was to master the *** grade TEKS at a passing level (i.e., 70%). (R. Ex. 14). An agreed amendment to Student's IEP was made on September 30, 2008 at the beginning of *** grade. The use of a word bank for health and science classes was added as an accommodation and a copy of notes or study sheets and providing correctly completed examples were accommodations for math class. (R. Ex. 16).
12. An annual ARD convened in the middle of *** grade on December 4, 2008. The May 2008 FIE was reviewed as well as information from parents and teachers, grades, and TAKS scores. Parental concerns about low grades were discussed. Reading fluency and basic reading skills were noted as Student's areas of specific learning disability. Student's organizational needs were also discussed at the ARD including student's difficulties with late, missing or incomplete work. The ARD discussed various solutions including keeping a daily agenda that could be checked by parents or teachers. The science teacher agreed to send Student's mother power point presentations. The principal agreed to send her email address to Student's teachers in order to facilitate communication between home and school. (P. Ex. 27, 55) (R. Ex. 17).
13. The December 2008 ARD updated Student's IEP with the single annual goal that Student would master the grade level TEKS with accommodations at a minimum of 70% passing in English, Math, Social Studies, Sciences and Electives. (R. Ex. 17).

14. The “dyslexia bundle” is a State approved set of accommodations to support students with dyslexia in taking the TAKS. A student must be receiving the accommodations in student’s classroom as a threshold requirement. (R. Ex. 28, pp. 33-34). Student met that criteria and took the *** grade TAKS using the dyslexia bundle. Student achieved a score of *** which met the state standard for *** grade reading. Student also met the state standards for *** grade math, social studies, and science. (P. Ex. 27, p. 11) (P. Ex. 57, pp. 33, 34) (R. Ex. 29).
15. Student’s program for the 2008-2009 *** grade school year at the *** school included *** grade English, Math, Science, Social Studies, electives and Content Mastery support. Classroom accommodations included oral tests, note taking assistance, and the use of *** in math and science classes. (P. Ex. 27, p. 8, 55). Instruction was provided by certified teachers. (P. Ex. 63) (Tr. Vol. II, p. 273)(Tr. Vol. III, p. 171).
16. Student’s *** grade English teacher had specific training in dyslexia strategies and seven years experience as a remedial reading teacher. (Tr. Vol. III, 171-173). The English class began each class period with a daily drill on grammar, spelling and sentence structure. Student was able to successfully participate in the daily drills. (Tr. Vol. III, pp. 173-174). Along with student’s classmates Student read four novels, successfully completed comprehension checks on the contents of the novels and was able to conduct research and produce five-paragraph essays in student’s English class. (Tr. Vol. III, pp. 173-174, 186-188, 190-193).
17. Student was supported academically in *** grade through a combination of accessing the Content Mastery class on an almost daily basis and with outside private tutoring 2-3 times a week paid for by student’s parents. The Content Mastery teacher reconfigured and/or modified the format of tests and quizzes for Student. Student took all student’s tests and quizzes in the Content Mastery classroom. The teachers gave student extended time to complete tests, quizzes and assignments. Both student’s Content Mastery teacher and English teacher worked with Student, as needed, on organization skills to assist student in completing schoolwork. Student made good use of student’s homeroom period and used it to do homework, re-take tests, and for reading. There was frequent communication between Student’s mother and school staff about missing work and other academic issues. Student also regularly accessed tutorials before and after school with student’s teachers. (Tr. Vol. I, pp. 76-78, 95, 98, 102-103, 105)(Tr. Vol. II, pp. 274-275, 277) (Tr. Vol. III, pp. 181-183, 199) (P. Ex. 52, 55).
18. Student enjoyed *** in *** school and other outside activities. However, keeping up with student’s academic work was a challenge for Student. The private tutor was originally hired to work on reading remediation but completing regularly assigned schoolwork became such an issue that the private tutor ended up helping Student do student’s homework and abandoned remediation efforts. The family also decided that Student could no longer participate in *** due to the amount of time and effort it took to complete school work. (Tr. Vol. I, pp. 77-78, 86-87).
19. Student’s first semester grades in *** grade were as follows: English ***, *** with a final semester grade of ***; Math ***, *** with a final semester grade of ***; Science ***, *** with a final semester grade of ***; Health ***, *** with a final semester grade of ***; Art I ***, *** with a final semester grade of ***; History ***, *** with a final semester grade of ***; and, Athletics/PE ***, *** with a final semester grade of ***. (R. Ex. 17, pp. 5-6; R. Ex. 25, p. 3). Some of student’s low grades were attributed to absences and missing work. (R. Ex. 17, p. 16).

20. Student's second semester grades in *** grade were as follows: English, ***, *** with a final semester grade of ***; Math ***, *** and final semester grade of ***; Science ***, *** with a final semester grade of ***; Career Investigation ***, *** with a final semester grade of ***; Theater I ***, *** with a final semester grade of ***; History ***, *** with a final semester grade of ***; and, Athletics/PE ***, *** with a final semester grade of ***. (R. Ex. 25, p. 3). Student passed student's classes and was promoted to the *** grade. (R. 25) (Tr. Vol. III, p. 128).
21. Student's proposed program at the *** school for *** grade in the 2009-2010 school year included *** electives and continued Content Mastery support. Classroom accommodations in all classes included oral tests, and note taking assistance. The use of *** was also an accommodation in the science class and *** classes. The ARD also recommended TAKS with the dyslexia bundle accommodations. (P. Ex. 27, p. 12) (P. Ex. 37) (R. Ex. 31, p. 12).
22. An annual ARD was conducted for Student on December 4, 2008. Members of the ARD included the assistant principal, two of Student's regular education teachers, an educational diagnostician, Student's parents, a special education teacher (Student's content mastery teacher) and a representative from the school district's *** program. (P. Ex. 27, p. 17) (Tr. Vol. II, p. 217). Persons at the ARD knowledgeable about the needs of students with dyslexia included the content mastery special education teacher, the diagnostician, and the assistant principal. (Tr. Vol. I, pp. 185-186).
23. The school district maintains a parent education program for parents of students with dyslexia through distribution of a newsletter called "Dyslexia Digest." The newsletter includes reading and language activities, notices and announcements of parent training and meeting opportunities in the relevant geographic area, and, parent resources. (R. Ex. 27) (Tr. Vol. III, pp. 131-132).
24. Student has not been a behavior problem and is well-liked by student's teachers. (Tr. Vol. II, pp. 233, 241). Student has been described in the past by teachers and staff as "hard working" "a sweetie", and "polite and kind." (P. Ex. 25, pp. 2, 6, 11) (Tr. Vol. II, p. 23). At least two of student's *** school teachers described positive relationships with Student. In *** grade Student was described as a student with a happy demeanor, good social skills, good verbal communication skills, pleasant to be around, cooperative, compliant, and with organizational skills typical of student's peers. (P. Ex. 42) (Tr. Vol. II, pp. 239, 241, 275, 284-285) (Tr. Vol. III, pp. 199, 200-202).
25. A disciplinary incident in *** 2009 was viewed by school staff as an isolated occurrence. A manifestation determination ARD (MDR ARD) was conducted on May 19, 2010. The MDR ARD concluded the behavior at issue was not a manifestation of Student's learning disability or ADD. Student's parents disagreed with this determination and raised concerns about Student's educational program. (P. Ex. 37, 44) (R. 19, 22, pp.12-16) (Tr. Vol. II, p. 233, 241).
26. By the end of *** school Student's parents concluded that Student was not making sufficient academic progress. Student was making negative statements about student's-self and family members began to notice signs of depression, frustration, anxiety, and decreasing self esteem. Student perceived student's-self as the object of teasing and some name-calling by peers. As a

result of parental concerns about Student's academics and self esteem they decided to place student in a private, *** school. Student's mother considered *** schools but did not feel they were appropriate for Student. (P. Ex. 32, 33, 35, 39, 43)(R. Ex. 20, 22, p. 15)(Tr. Vol. I, pp. 52, 70-71, 105-107, 111, 227-228, 246)

27. Student was withdrawn from KISD on ***, 2009 and unilaterally placed by student's parents at *** School. *** School is a *** school for *** with dyslexia and related disorders grades ***. (R. Ex. 23, pp. 1-2). *** School uses a *** curriculum with an emphasis on the remediation of dyslexia. (P. Ex. 64, 65) (R. Ex. 33, p. 1). Tuition and room and board for the 2009-2010 school year was \$*** with an additional technology fee of \$*** and an annual bookstore account of \$***. (P. Ex. 40, 83) (R. Ex. 33, p. 2).

DISCUSSION

Failure to Identify and Assess

KISD evaluated and identified Student as a student with dyslexia and a specific learning disability year after year. Petitioner apparently contends that Student should have undergone some sort of specific dyslexia evaluation again in *** school. There was simply no need to do so. The school district was required to conduct a re-evaluation of Student at least every three years under IDEA. The evidence showed that it did so. *34 C.F.R. §§ 300.303, 300.305.*

The last FIE by KISD was conducted in May 2008 at the end of *** grade. The FIE was a comprehensive assessment of Student's intelligence and academic performance, including reading and writing skills. Current evaluation data was available and reviewed by the *** grade annual ARD.

The school district never formally identified Student as eligible for special education as a student with OHI based upon student's ADD diagnosis. However, the evidence also shows that the school district was aware of Student's diagnosis of ADD – teachers often noted Student's difficulty paying attention and settling down to focus on work. The FIE included teacher feedback that identified a number of attentional deficits.

The evidence shows that Student's attentional deficits were known and addressed by the school district. Student was provided with instructional accommodations in student's educational program that addressed needs arising from student's ADD. I conclude under these facts that no substantive educational harm occurred as a result of the failure to identify Student as a student with OHI. There is no denial of FAPE without a showing of a substantive educational harm. *See, 34 C.F.R. § 300.513 (a) (2).*

FAPE Claims

Petitioner contends that the school district failed to develop and implement an individualized IEP based on student's needs, appropriate assessments, and, present levels of performance. Petitioner claims the IEPs at issue failed to include specific goals and objectives to address student's needs as a student with a learning disability and with ADD. Petitioner asserts the IEPs at issue failed to provide student with appropriate services to meet student's educational needs. Petitioner argues petitioner was not provided with the requisite educational benefit under IDEA. Petitioner also contends the IEPs at issue did not comport with state standards for serving students with dyslexia and that the failure to do so constitutes a failure to provide FAPE. Petitioner further claims the school district failed to provide student with instruction by properly qualified personnel. Petitioner seeks reimbursement for the cost of tuition and related educational

Decision of the Hearing Officer

Dkt. No. 030-SE-1009

Page 9 of 18

expenses for student's unilateral private placement at *** School for the 2009-2010 school year and for continued placement there through *** as prospective relief.

Right to Reimbursement

In order to receive reimbursement for the unilateral private placement of a child with a disability the parent must prove that (i) the public school's IEP is not appropriate under IDEA; and (ii) the private placement was proper under IDEA. *Sch. Comm. of Burlington v. Dept. of Educ. of Mass*, 471 U.S. 359, 370 (1985); *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d 286, 293 (5th Cir. 2009).

Therefore, I must first determine whether the school district's program implemented in 2008-2009 and the proposed program for 2009-2010 were appropriate. If so, the inquiry ends there and Petitioner is not entitled to reimbursement for the unilateral private placement or continued prospective placement at *** School. If not, I must next consider whether the private school placement is "proper" under IDEA. *Id.*

The Four Factors Test

In Texas the Fifth Circuit has articulated a four factor test to determine whether a school district's program meets IDEA requirements. Those factors are:

- The program is individualized on the basis of the student's assessment and performance;
- The program is administered in the least restrictive environment;
- The services are provided in a coordinated, collaborative manner by the "key" stakeholders; and,
- Positive academic and non-academic benefits are demonstrated.

Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., 118 F. 3d 245, 253 (5th Cir. 1997).

These four factors need not be accorded any particular weight nor be applied in any particular way. Instead, they are merely indicators of an appropriate program and intended to guide the fact-intensive inquiry required in evaluating the school district's educational program for reimbursement purposes. *Richardson Ind. Sch. Dist. v. Michael Z.*, 580 F. 3d at 294.

First Factor: Individualized IEP

The credible evidence shows the program, although not perfect, met the minimum legal standards of the IDEA. *Rowley v. Bd. of Educ. of Hendrick Hudson Sch. Dist.*, 458 U.S. 176, 206-207 (1982). Student demonstrated mastery of the *** school curriculum on the basis of state-wide assessments. Student's placement in regular education classes and the IEP goal of passing those classes was individualized to the extent it reflected the assessment data and Student's ability to perform satisfactorily in the classroom. It is true that neither the *** grade IEP nor the proposed *** grade IEP included specific IEP goals and objectives addressing Student's weaknesses in basic reading skills, reading fluency, spelling, or composition.

However, while a program that included those specific IEP goals and objectives might be the "best" for Decision of the Hearing Officer

Student, the IDEA does not demand that it do so. A school district is legally obligated only to provide the student with a “basic floor of opportunity” and not to maximize a student’s potential. *Rowley, 458 U.S. at 198. See also, W.R. v. Union Beach Bd. of Educ., 110 LRP 23989, (D. C. N.J. 2010)(same IEP goals from previous year did not render subsequent IEP inappropriate where students needs were same).*

Second Factor: LRE

Student was educated to the maximum extent appropriate under IDEA: i.e. with student’s non-disabled peers. Student was fully mainstreamed and learned and socialized at school with student’s non-disabled peers. The educational program was provided at student’s home school in student’s own community. The record supports the conclusion the program was provided in the least restrictive environment. *34 C.F.R. § 300.114 (a) (2) (i) (ii).*

Third Factor: Collaboration

Services were provided in a collaborative manner by key stakeholders. Student’s regular classroom performance was supported by the Content Mastery teacher. The evidence shows the Content Mastery teacher reconfigured and modified the format of tests, assignments and/or quizzes and the evidence suggests this was entirely acceptable and approved by Student’s regular education teachers. The teachers worked with Student in organizing and completing student’s assignments. School staff communicated frequently with Student’s mother.

Fourth Factor: Benefit

The evidence established Student received some meaningful academic benefit from student’s program. Although Student continued to struggle with reading and writing tasks the evidence also showed student was able to pass student’s grade level content classes and mastered the grade level curriculum at the minimal state standards. It is certainly true that Student may be intellectually capable of making higher grades and student’s issues with task avoidance and organizational deficits continued to impact student’s academic performance. This is a close case in that regard. *Rowley, 458 U.S. at 203, 207 n. 8 (passing regular examinations and advancing from grade to grade indicative, though not dispositive, of requisite educational benefit required under IDEA); Houston Ind. Sch. Dist; v. Bobby R.R., 200 F. 3d 341, 349 (5th Cir. 2000) (student’s educational progress not measured by student’s relation to classmates – rejecting declining percentile scores as proof of lack of educational benefit).*

However, the law does not require the school district provide Student with the “best” education possible – although it is understandable that may be the goal for student’s family. The IDEA only requires the school district provided Student with a “basic floor of opportunity” – no less but no more. Because student was able to pass student’s classes and meet state expectations for mastery of grade level curriculum I conclude Student was provided with the minimal requisite educational benefit under the law. *Rowley, at 201, 203. But see, Kuszewski v. Chippewa Valley Schools, 131 F. Supp. 2d 926, 930 (D.C. Mich. 2001) (state statute requiring IEP to develop “maximum potential” of child added to Rowley standard).*

The proposed program at the ***** school was closely aligned with the program provided in ***. It included many of the same features. In that regard I conclude the proposed program was also reasonably calculated to provide Student with the requisite minimal educational benefit. *Rowley, supra.*

State Dyslexia Standards

Petitioner argues the school district failed to provide Student with FAPE because it failed to follow state dyslexia rules. *Texas Education Code* § 38.003 (1) defines dyslexia and related disorders, (2) mandates testing and instruction for students with dyslexia, and (3) gives the State Board of Education (SBOE) the authority to adopt rules and standards for administering testing and instruction. *Texas Administrative Code* § 74.28 outlines school district responsibilities in delivering services to students with dyslexia.

Beginning in 1986 the Texas Education Agency prepared an SBOE approved handbook to address the needs of children with dyslexia. The handbook has been revised numerous times – the most recent version is known as *The Dyslexia Handbook – Revised 2007: Procedures Concerning Dyslexia and related Disorders* (referred to hereafter as “*the Dyslexia Handbook*”). The purpose of the *Dyslexia Handbook* is to provide flexible guidelines for school districts and parents in the identification and instruction of students with dyslexia. See, *19 Tex. Admin. Code* § 74.28 (b); *Dyslexia Handbook*, p. v.

Significantly, *the Dyslexia Handbook* states that school districts are to follow the IDEA if a student with dyslexia is referred for special education. A student may be referred for an evaluation for special education at any time during an assessment for dyslexia, the identification process, or dyslexia instruction. *Dyslexia Handbook*, p. 10; Appendix A, p.17 (emphasis added).

State guidelines recognize that it is the ARD Committee that develops the student’s IEP. A student eligible for special education who also meets Texas criteria for dyslexia may not be denied access to the school district’s dyslexia programs unless the ARD committee determines such a program would deny the student a free, appropriate public education ... and [an] educational benefit.” *Dyslexia Handbook*, Appendix F, Q & A, pp. 38-39 (emphasis added). State law specifically recognizes the ARD Committee has the responsibility to determine the manner in which a special education student participates in the school district’s dyslexia reading instruction program, if at all. *Tex. Educ. Code* § 28.006 (h). See also, *Dyslexia Handbook*, Appendix F, Q & A, p. 29 (“If a student is suspected of having a disability within the scope of the Individuals with Disabilities Education Act (IDEA), all special education procedures must be followed.”).

It is for the ARD Committee to determine what “appropriate reading instruction” is for a particular student based on the student’s unique needs; that may include reading instruction through the school district’s dyslexia program or it may include placement in regular education with sufficient supports. An ARD may select a number of options depending upon the needs of the student. Access to the general curriculum and placement in regular education classes with non-disabled peers “to the maximum extent appropriate” meets IDEA goals and preferences. 20 U.S.C. § 1400 (c)(5)(A)(D); 20 U.S.C. § 1412 (A)(5); 34 C.F.R. § 300.114(a)(2)(i)(ii).

The state dyslexia rules may be of some relevance in determining whether a student has been properly served under IDEA. However, the issue of whether a student’s educational program provides a free, appropriate public education must be analyzed under the IDEA, its federal and state regulations, the case law, and policy interpretations of the federal and state agencies charged with its implementation. See, *Grant v. St. James Parish Sch. Bd.*, 2000 U.S. Dist. LEXIS 16544 (D.C. La. 2000) (school complied with IDEA and state dyslexia identification procedures).

In this case, the ARD committee concluded that Student was intellectually and academically capable of receiving grade level instruction in all student’s subjects (including English) in the regular education classroom with the support of Content Mastery and a set of accommodations. The evidence showed that

Decision of the Hearing Officer

Dkt. No. 030-SE-1009

Page 12 of 18

Student was able to understand the instructional content, engage in English class reading and writing activities at a satisfactory level, and demonstrated mastery of the regular *** grade curriculum by passing the TAKS using the state approved accommodations. Under these facts, I conclude that the school district's *** grade program and proposed *** grade program met minimum IDEA requirements. *Rowley, at 203-204.*

Qualified Personnel

Petitioner argues that the school district failed to provide instruction by personnel meeting the state standards for dyslexia instruction under *Texas Administrative Code § 74.28* and that the failure to do so constitutes a denial of FAPE. IDEA requires a school district ensure that all personnel providing special education and related services are adequately prepared and qualified. *34 C.F.R. § 300.207*. A teacher with a special education endorsement or certificate may be assigned to any level of basic special education instructional program serving students between 3-21 years of age. *19 Tex. Admin. Code § 89.1131 (b)*.

In Texas all special education and related service personnel must be certified, endorsed or licensed in the area or areas of assignment in accordance with the federal regulations and specified provisions of the Texas Education Code. *19 Tex. Admin. Code § 89.1131 (a)*; *See, 34 C.F.R. § 300.156; Tex. Educ. Code §§ 21.001, 21.003 and 29.304; Letter to Anonymous, 49 IDELR 44 (OSEP 2007) (qualifications of personnel providing compensatory services must be same as those providing services under an IEP)*.

Teachers who screen and treat students with dyslexia in a school district's general education dyslexia program must be trained in dyslexia and related disorders and in the set of state approved instructional methods. They must also participate in whatever professional development activities are required by the school district. *19 Tex. Admin. Code § 74.28 (c) (f)*. The evidence showed Student's teachers were duly certified and qualified under state and federal law. In particular, Student's English teacher had some training in dyslexia instructional strategies and experience teaching remedial reading. The Content Mastery teacher was a certified special education teacher.

Student was appropriately served in a regular *** grade English class supported, in part, by Content Mastery. The qualifications of those instructors must be reviewed according to the IDEA and Texas special education rules -- not state dyslexia rules. The evidence showed they met IDEA and state special education standards.

ARD Meetings

Petitioner contends that the ARD meetings at issue did not include a person with specific training in dyslexia or qualified to provide or supervise the provision of dyslexia instruction and that the failure to do so constitutes a denial of FAPE. *The Dyslexia Handbook* defines the set of "knowledgeable persons" who must participate in the ARD of a student with a learning disability arising from dyslexia or related disorder. The ARD must include two or more of the following: a superintendent, a principal, a counselor, a reading specialist, a dyslexia specialist, a speech/language pathologist, an educational diagnostician, a special education teacher and a teacher or "other professional educator." *Dyslexia Handbook, pp. 42-43*. Significantly, the guidelines do not specify which two.

This requirement must be reconciled with the required members of the ARD under IDEA. The statute requires the following persons attend an ARD: the parents of the child; at least one regular education teacher (in Student's ARD meetings there were two or more); at least one special education teacher; a representative of the school district who is qualified to provide or supervise the provision of specially designed instruction and knowledgeable about the general education curriculum and the availability of

Decision of the Hearing Officer

Dkt. No. 030-SE-1009

Page 13 of 18

school district resources; and, an individual who can interpret the instructional implications of evaluation results. *34 C.F.R. § 300.321 (a) (1)-(5); 19 Tex. Admin. Code § 89.1050 (c) (1) (A)-(D) (2) (3)*. In Texas, a campus administrator (principal or assistant principal) and an educational diagnostician meet the last two criteria. *19 Tex. Admin. Code §§ 239.83 (e) (g), 239.84, 241.15, 251.20*.

The record shows there were several persons with the requisite qualifications at each of the relevant ARD meetings. At the December 4, 2008 annual ARD there was an assistant principal, an educational diagnostician, a special education teacher, two regular education teachers, and another professional educator. All those members met the criteria of “knowledgeable persons” for purposes of designing an appropriate program for Student as a student with a learning disability under both IDEA and state dyslexia rules. Petitioner appears to argue that Student’s ARD meetings required the participation of the *** school dyslexia teacher or supervisor. This is not the requirement under IDEA or even the state dyslexia rule.

Parent Education

Each school district in Texas is required to provide a parent education program for parents of children with dyslexia and related disorders. *19 Tex. Admin. Code § 74.28*. Student participated in the school district’s dyslexia program for two years in *** school. Any complaint about the failure to provide Student’s parents with parent education under the dyslexia program is barred by the one year statute of limitations period in Texas. *19 Tex. Admin. Code § 89.1151 (c)*. Furthermore, the preponderance of the evidence does not support a finding that Student’s parents sought, requested or needed parent education or training as a related service under IDEA. *See, 34 C.F.R. § 300.34 (c) (8) (i) (ii)*.

Finally, the evidence showed the school district maintained a parent education program through the distribution of its “Dyslexia Digest” newsletter. The newsletter included announcements about parent training and meeting opportunities in the geographic area, resources for parents, and reading and language activities. It is reasonable to infer from the evidence that the newsletter was available to Student’s parents during the time student received specialized dyslexia reading instruction in *** school.

CONCLUSIONS OF LAW

1. Respondent properly identified and assessed Petitioner as a student with a learning disability based, in part, on identification as a student with dyslexia. *34 C.F.R. §§ 300.303, 300.305, 300.307-303.311; 19 Tex. Admin. Code § 89.1040 (9)*.
2. Although Respondent did not formally identify Petitioner as a student with Other Health Impairment based upon diagnosis of ADD Petitioner’s needs arising from attention and organizational deficits assessed as part of Respondent’s most recent FIE and those needs were addressed and met by the educational program. *34 C.F.R. §300.303; 19 Tex. Admin. Code § 89.1040 (c)(8)*. As a result, there was no substantive educational harm by the failure to formally identify Petitioner as a student with OHI and thus no denial of a free, appropriate public education under IDEA. *34 C.F.R. § 300.513 (a)(2)*.
3. Petitioner is not entitled to reimbursement or prospective relief for unilateral private placement at *** school for students with dyslexia. Respondent’s program met minimal standards for the provision of a free, appropriate public education under IDEA. *Rowley v Bd. of Educ. of Hendrick Hudson Sch. Dist., 458 U.S. 176 (1982); Sch. Comm. of Burlington v. Dept. of Educ. of Mass., 471 U.S. 359 (1985); Cypress-Fairbanks Ind. Sch. Dist. v. Michael F., 118 F. 3d 245, 253 (5th Cir. 1997)*.

4. State dyslexia rules for identifying and treating students with dyslexia may be of some relevance in determining a free, appropriate public education for students with dyslexia also identified as eligible for special education under IDEA. However, the Admission, Review & Dismissal Committee retains the responsibility under IDEA for determining appropriate reading instruction for such a student. While a student eligible under IDEA may not be denied access to a school district's dyslexia program the ARD Committee may, as in this case, decide the student can receive an educational benefit in regular education classes among other instructional options. Respondent provided Petitioner with a free, appropriate public education in the least restrictive environment. *34 C.F.R. § 300.114; 19 Tex. Admin. Code §§ 74.28, 89.63, 89.1050 (a).*
5. Teaching personnel who provided Petitioner with instructional program were qualified within the meaning of the IDEA. *34 C.F.R. §§ 300.156, 300.207; 19 Tex. Admin. Code § 89.1131 (a).*
6. ARD meetings were comprised of proper persons within the meaning of IDEA. The IDEA, not state dyslexia rules, establishes the necessary members of an ARD. *34 C.F.R. § 300.321; 19 Tex. Admin. Code §§ 89.1050(c), 242.15, 251.20, 239 (e)(g), 239.84.*
7. Petitioner's claim that Respondent failed to provide parent education as required under state dyslexia rules is dismissed as outside the one year statute of limitations period in Texas. Even if the claim survived the statute of limitations it is reasonable to infer from the evidence that a parent education program was available to Petitioner's parents during the period of time student received reading instruction through the Respondent's dyslexia program. *34 C.F.R. § 300.34 (c)(8), 300.511 (e); 19 Tex. Admin. Code § 89.51151 (c).*

ORDERS

Based upon the foregoing findings of fact and conclusions of law it is **ORDERED** that Petitioner's requests for relief are **DENIED**. All other relief not specifically stated is **DENIED**.

SIGNED the 25th day of May 2010

Ann Vevier Lockwood
Special Education Hearing Officer

NOTICE TO THE PARTIES

The Decision of the Hearing Officer in this cause is a final and appealable order. Any party aggrieved by the findings and decisions made by the hearing officer may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. *19 Tex. Admin. Code Sec. 89.1185 (p); Tex. Gov't Code, Sec. 2001.144(a) (b).*

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

STUDENT, bnf

PARENTS,

Petitioner,

§

§

§

v.

§

DOCKET NO. 030-SE-1009

§

KELLER INDEPENDENT

§

SCHOOL DISTRICT,

§

Respondent.

§

SYNOPSIS

Issue:

Whether school district failed to identify and assess *** grader with dyslexia and ADD in all areas of suspected disability.

Held:

FOR THE SCHOOL DISTRICT. School district identified student as eligible for special education as a student with a learning disability when student enrolled in *** school. School district responsible for conducting re-evaluations under IDEA and did so – the most recent FIE included intelligence and academic performance assessments. Academic assessment included evaluation of student’s reading and writing skills. Student continued to be identified as LD throughout *** school.

Although school district never formally identified student as eligible for special education as student with OHI, school district nevertheless was aware of student’s diagnosis of ADD. Evidence showed school district met student’s needs arising from attention deficits -- any procedural violation did not result in a substantive educational harm.

34 C.F.R. §§ 300.303, 300.305, 300.307-303.311; 300.513 (a) (2); 19 Tex. Admin. Code § 89.1040 (c) (8) (9).

Issue:

Whether student entitled to reimbursement and prospective relief, for cost of unilateral private placement at *** school for school district’s alleged failure to provide student with FAPE. Student alleged school district failed to develop individualized IEP for student with dyslexia based on student’s needs, appropriate assessments and present levels of performance, failed to include specific goals and objectives, and failed to provide appropriate services and educational benefit.

Held:

FOR THE SCHOOL DISTRICT. Program met minimum standards of providing educational benefit where student passed TAKS accommodated assessments in all areas and passed *** grade classes with grades of *** or better. Student received instruction in regular education classes with content mastery and classroom accommodations meeting IDEA preference for least restrictive environment. Teachers collaborated and school staff communicated frequently with parent.

34 C.F.R. §§ 300.101, 300.114(a) (2) (i)-(iii), 300.148; *Rowley v. Bd. of Educ. of Hendrick Hudson Sch. Dist.*, 458 U.S. 176 (1982); *Cypress-Fairbanks Sch. Dist. v Michael F.*, 118 F. 3d 245, 253 (5th Cir. 1997).

Issue:

Whether school district's program met state dyslexia standards and, if not, whether failure to do so resulted in denial of FAPE to *** school student with dyslexia and ADD.

Held:

FOR THE SCHOOL DISTRICT. State dyslexia rules for identifying and treating students with dyslexia may be of some relevance in determination of FAPE for students with dyslexia and eligible for special education under IDEA. ARD Committee retains responsibility for deciding appropriate reading instruction for student eligible for special education under IDEA. Student with dyslexia and eligible for special education under IDEA may not be denied access to school district's dyslexia program but ARD may decide student's needs best met in regular education classes among other options.

34 C.F.R. § 300.114 (a); 19 Tex. Admin. Code §§ 74.28, 89.63, (c), 89.1050 (a)

Issue:

Whether school district provided instruction to student with dyslexia by personnel who met state standards for dyslexia teacher training and, if not, whether failure resulted in denial of FAPE.

Held:

FOR THE SCHOOL DISTRICT. Student's placement and instruction in regular education classes with content mastery support provided by special education teacher meant qualifications of teaching personnel measured under IDEA and state's special education teaching standards. Evidence showed student's teachers properly qualified and certified.

34 C.F.R. §§ 300.156, 300.207; 19 Tex. Admin. Code § 89.1131 (a); Tex. Educ. Code § § 21.001, 21.003, 29.304

Synopsis

Dkt. No. 030-SE-1009

Issue:

Whether ARD meetings included “knowledgeable persons” under state dyslexia rules and whether failure to do so constitutes denial of FAPE.

Held: FOR THE SCHOOL DISTRICT. IDEA, not state dyslexia rules, establishes required ARD participants. Evidence showed ARD meetings included list of persons who must attend ARD under IDEA. ARD included campus assistant principal, educational diagnostician, special education teacher, parents, and at least two regular education teachers. Campus dyslexia teacher or supervisor not required ARD members under IDEA.

34 C.F.R. § 300.321; 19 Tex. Admin. Code §§ 89.1050 (c), 241.15, 251.20, 239.83 (e) (g), 239.84.

Issue:

Whether school district failed to provide parent education under state dyslexia rules and if not whether failure to do so constitutes denial of FAPE.

Held:

FOR THE SCHOOL DISTRICT. Complaint about failure to provide parent education when student served in *** school by school district’s general education dyslexia program barred by one year statute of limitations. Insufficient evidence to show need for parent training as related service under IDEA. Parent education program was available to parents through school district dyslexia newsletter.

34 C.F.R. §§ 300.34(c) (8), 300.511 (e); 19 Tex. Admin. Code § 89.1151 (c).