

**BEFORE THE MISSISSIPPI DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION**

[REDACTED]

COMPLAINANT

v.

CASE NO. D09072018-05

Rankin County School District

RESPONDENT

DECISION AND ORDER

INTRODUCTION

1. This is a proceeding pursuant to the Mississippi "*State Policies¹ Regarding Children with Disabilities Under the Individuals with Disabilities Education Act Amendments of 2004*" (collectively referred to as the State Policies or the IDEA, herein), and involving a minor child (the Student or Child, herein), initiated by the mother (the Mother or Parent, herein)² of the student by the filing of a Complaint for Due Process received by the school district and the Mississippi Department of Education on September 07, 2018.

PARTIES

2. The Student is an [REDACTED] with a special education eligibility ruling of Language/Speech Impaired: Articulation. The eligibility date of the initial ruling was 11/8/17. The respondent is a Mississippi Public School District (District, herein) in which the student had

¹ Policies were adopted under the authority of "*The Individuals with Disabilities Act*" (IDEA), Public Law 101-476, reauthorized as "*The Individuals with Disabilities Education Improvement Act of 2004*" (IDEIA), Public Law 101-476 and 20 U.S.C. §1400 et. seq., *Title 34 of the Code of Federal Regulations*, Part 300, and the *Mississippi Standards and Procedures for the Education of Exceptional Children*, Mississippi Code §§37-23-133 through 150. The hearing officer and the Mississippi Department of Education have jurisdiction over these proceedings pursuant to the statute and code sections cited.

² Names of the parties, the witnesses, and the School District are stated on a cover sheet to this document filed with the original of this document to the Mississippi Department of Education and are not stated within this document in order to protect the privacy of the minor child involved.

attended prior to the 2018/19 school year. August 2018 the Student was enrolled in a nearby private school at the expense of the parents.

ISSUES AND RELIEF REQUESTED

3. The parents (the Parents or Complainant, herein) filed a REQUEST FOR DUE PROCESS HEARING UNDER PART B OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 2004 AMENDMENTS received by the Mississippi Department of Education September 7, 2018. During the course of the prehearing conference held November 6, 2018, the parties agreed that the issues in the Complaint appropriate for consideration requested were:

- A. Child Find – The District has failed to properly evaluate the Child and therefore, has not taken the appropriate steps in identifying the student who is suspected of having a disability under §300.8 and in need of special education services.
- B. The Child’s Educational Placement – The District has refused to change the Child’s educational placement and therefore, has failed to ensure the educational placement is appropriate and conforms to the Least Restrictive Environment (LRE) provisions of the *State Policies Regarding Children with Disabilities under the Individuals with Disabilities Education Act Amendments of 2004*.
- C. A Free Appropriate Public Education (FAPE) has not been provided due to failure to provide an IEP based on appropriate evaluations.
- D. The Complainant is seeking compensatory relief from the District in the form of payment for private school placement and related academic services for the Child.

Accordingly, these are the only issues that will be considered in this decision and order.

PROCEEDINGS

4. The due process hearing convened December 4, 11, & 20 in the District Administration Building. The Complainant called six witnesses that included herself and four educators from the private school the Child is currently attending, and an appearance by affidavit submitted by the Complainant's aunt. The District called seven witnesses that included the Special Education Director, an Instructional Interventionist, the District's 504/Dyslexia Coordinator, the District's Psychometrist, a [REDACTED] Grade Teacher, the Principal of the school attended by the Child, and a District Speech Language Pathologist. Witnesses identified on the District's witness list who did not attend the hearing were a District School Counselor, a District Assistant Principal, a District Afterschool Tutor, a District [REDACTED] Grade Teacher, the District's Assistant Special Education Director, and the Director/Principal of the private school.

APPLICABLE LAW

5. The IDEA requires each public-school district in Mississippi to have in effect policies and procedures to ensure that all children with disabilities residing in Mississippi in need of special education and related services are identified, located, and evaluated. §300.111(a)(1).³ The District provided evidence of such policies and procedures.

6. The State Procedures requires a school district, prior to the initiation of special education and related services, to conduct a full and individual initial evaluation, in accordance with §300.305 (Additional Requirements for Evaluations and Reevaluations) and §300.306 (Determination of Eligibility) of the Procedures. Those evaluation procedures must include assessments addressing "specific areas of educational need." §300.304(c)(2);

³ All sections (§) referenced are to the Mississippi "State Policies Regarding Children with Disabilities Under the Individuals with Disabilities Education Act Amendments of 2004 unless otherwise noted.

7. If, based on that evaluation, "...a determination is made that a child has a disability and needs special education and related services, an Individual Education Program (IEP) must be developed for the child in accordance with §§300.320 through 300.324 and §300.306(c)(2). The IEP is drafted by the school's IEP committee which is to include those persons specified in §300.321(a) and must contain those items specified in §300.320."

FACTS

8. The Child is an [REDACTED] who had attended [REDACTED] grades in the District. Due to academic concerns, a comprehensive evaluation was conducted October 20, 2017. In November 2017, the Student was determined eligible for special education services under the category of Language/Speech Impaired: Articulation and began receiving speech therapy 2 times weekly for 30 minutes per session. In addition to the IEP, a 504 Accommodations Plan⁴ was developed March 26, 2018 for the Child to address ADHD issues and suspected dyslexia problems.⁵ Prior to the special education ruling and the implementation of the 504 Plan, the Student was receiving Tier II intervention in the general education classroom. When the Child was forced to repeat the [REDACTED] grade, and because of the aforementioned complaints filed in the request, the Parents enrolled the Child in a nearby private school in August for the 2018-19 academic year.

9. The Child had failed a dyslexia screener when he was in kindergarten.⁶ The initial screener had recommended further testing, and the Mother felt the District had not followed-up on that recommendation. However, a second screener was administered to the Child when he

⁴ District Exhibit 15, p 1-3

⁵ Parent Exhibit 11, p. 11

⁶ Parental consent is not required for screeners or other tests given to all students used to assist in determining appropriate educational and instructional levels.

entered the █ grade and the Child passed.⁷ The District then determined no other evaluations were warranted regarding dyslexia. The Mother continued to notice symptoms of dyslexia and arranged for the Child to be assessed through the Mississippi Dyslexia Center. Based on that assessment, the Mother arranged for the Child to receive dyslexia tutoring twice a week for an hour per session at the parents' expense. The tutoring was first done through the District. When the Mother's request for a re-evaluation was denied, the Child then began to receive tutoring through the Mississippi Dyslexia Center.

DISCUSSION OF ISSUES

10. A hearing officer's role is not to second guess state and local policy decisions, but to determine whether school officials have complied with applicable law, and if not, decide a proper remedy. *Flour Bluff Independent School District v. Katherine M.* 91 F.3d 689.693 (5th Cir. 1996). The law does not require that a school district provide the best education possible. Rather, the law requires only that a district provide access to public education "sufficient to confer some educational benefit upon the handicapped child." *Houston Independent School District v. Bobby R.* 200 F. 3rd 341. ¶28, 31 IDELR 185 (5th Cir. 2000). That benefit must not be of a mere de minimis nature, but likely to result in progress, rather than "regression or trivial educational advancement." *Cyprus Fairbanks Independent School District v. Michael F.*, 118 F. 3rd 245, ¶4 (5th Cir. 1997).

11. The Parent(s), as challenger of the District's actions in this case, has the burden of proof as to all issues presented in this matter. *Schaffer v. Weast*, 546, US 49, 51 (5th Cir. 2005).

12. In deciding whether the requirements of the IDEA have been met, the first question to

⁷ Transcript Vol 2, p. 188

consider is whether the school District complied with the procedures of the IDEA. *Buster v. Corpus Christi Independent School District*, 51 F. 3d 490, 492 (5th Cir. 1995). Procedural violation, in and of themselves, do not amount to a denial of free appropriate public education (FAPE) unless the violations result in the loss of educational opportunity to the student or seriously infringe upon the Parent's opportunity to participate in the provision of FAPE to the Student. *Adams J. v. Keller Independent School District*, 328 F. 3d 804, 808 (5th Cir. 2003); *State Policies*, §300.513.

13. Second, the substantive issues are addressed by the answers to a two-prong test to determine eligibility for special education services. The first prong is to establish whether the student has a qualifying disability under *IDEA* and *State Policies* (IDEA §§300.304 – 300.312). If the first prong is met, the second prong focuses on whether "...the student having...a qualifying disability...and who by reason thereof, needs special education and related services." (IDEA §300.8).

ISSUE ONE: Child Find – The District has failed to properly evaluate the Child and therefore, has not taken the appropriate steps in identifying the student who is suspected of having a disability under §300.8 and in need of special education services.

14. The Parents' primary complaint was that the Child had been diagnosed with dyslexia through an Independent Educational Evaluation (IEE), and the Child's IEP⁸ should be amended to acknowledge dyslexia with therapy provided. Because the Child continued to make unsatisfactory grades in school, and the District had denied dyslexia as a qualifying category, the Parents felt an additional evaluation was warranted.⁹ The IEE was conducted February 15, 2018,

⁸ Parent Exhibit 6, pp. 1-11

⁹ The Parent testified as to her request for a second comprehensive evaluation, but no evidence was presented documenting the request.

with the Mother identifying ADHD, dyslexia, academic achievement, and mental ability assessment as reasons for the requested evaluation. In her testimony, the Mother was concerned the 504 Plan in place did not adequately address the dyslexia problems. She also voiced concerns that the District refused to provide tutoring in the area of dyslexia.

15. *State Policies Regarding Children with Disabilities under the Individuals with Disabilities Education Act Amendments of 2004* places the burden of identifying "...children who are suspected of having a disability under §300.8 and in need of special education, even though they are advancing from grade to grade..." clearly in the hands of the school district. The District provided testimony that demonstrated appropriate steps had been taken in identifying the Child who they suspected of having a disability. The District provided evidence and examples of interventions that had been implemented in the classroom prior to the Child's Language/Speech ruling, examples of modified instruction in the classroom, and communication with the Child's parents regarding poor academic performance.¹⁰ The Child was appropriately placed in Tier 2 and eventually moved into Tier 3 intervention. It was the recommendation of the Child's [REDACTED] grade teacher that he was assessed in Language/Speech and qualified for special education and related services in that disability category. The teacher testified that she recommended a comprehensive evaluation be conducted in October 2017, and in November the IEP was put in place.¹¹

16. The District provided appropriate documentation regarding the Child's placement in the Tier system, and minutes from the Teacher Support Team confirming regularly held meetings regarding the progress/regression made by the Child.

17. The Parent testified that the District refused to re-evaluate the Child "in the area of

¹⁰ District Exhibit 4, pp. 1-64

¹¹ Transcript Vol 2, pp. 85-115

dyslexia.” However, the District conducted a comprehensive evaluation in October 2017 in a timely manner with parental consent. While the District did not conduct a second evaluation when requested in early 2018, the Multidisciplinary Education Team, the Teacher Support Team, and the IEP Committee used the data from that evaluation submitted by the Independent Evaluator that had been conducted in February 2018. Those data were used to determine if the Child met the criteria for a ruling in dyslexia, and based on the guidelines specified in *IDEA* and *State Policies*, the District determined the Child did not qualify.¹²

18. According to the Independent Evaluator’s testimony, The International Dyslexia Association uses an eligibility base different from that used by the Mississippi Department of Education (MDE).¹³ An example of that difference is the discrepancy that exists between a child’s IQ score and some other standardized measure. The Independent Evaluator indicated the international organization uses 15-points as a threshold for qualifying a child as having dyslexia under the category of Specific Learning Disability, while MDE recommends a 22-23 point discrepancy as one of the possible indicators to qualify a child as dyslexic and receive therapy to address academic problems associated with the disability. Even using the lower discrepancy, the independent evaluator testified the Child had a “low average in one area which means he was high performing dyslexic...mild dyslexia...”¹⁴ Dyslexia can be a specific learning disability under MDE criteria. (*State Board Policy Chapter 74, Rule 19*). However, the data included in the results of the outside comprehensive evaluation did not meet MDE’s criteria for a specific learning disability.

18. Based on the evidence presented, the District correctly interpreted the qualification

¹² District Exhibit 16, pp. 1-2

¹³ Transcript Vol. 2, pp. 70-74

¹⁴ District Exhibit 2, p.13

guidelines found in *IDEA* and *State Policies* regarding the Child's dyslexia ruling. And, because the Child did not meet the criteria for a dyslexia ruling, dyslexia therapy could not be offered through the District.

ISSUE TWO: The Child's Educational Placement – The District has refused to change the Child's educational placement and therefore, has failed to ensure the educational placement is appropriate and conforms to the Least Restrictive Environment (LRE) provisions of the *State Policies Regarding Children with Disabilities under the Individuals with Disabilities Education Act Amendments of 2004*.

19. §300.114 of the *State Policies Regarding Children with Disabilities under the Individuals with Disabilities Education Act Amendments of 2004* addresses educational placement in the Least Restrictive Environment (LRE) in general and states “(1) Each public agency in Mississippi must have in effect policies and procedures to ensure the LRE requirements as stated below are being met. (2) Each public agency must ensure that – (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and (ii) Special classes, separate schooling or other removal of children with disabilities from the general educational environment occurs only if the nature or severity of the disability is such that education in general education classes with the use of supplementary aids and services cannot be achieved satisfactorily.”

20. The focus of the Parents' complaint centered on the District's refusal to qualify the Child with a Specific Learning Disability in the area of dyslexia. Therefore, his educational placement was inappropriate and violated the Least Restrictive Environment provisions of the *State Policies*. However, much of the testimony regarding this issue was more about the District

failure to provide a free appropriate public education (FAPE) than disagreeing with the Child's placement or LRE matters. FAPE will be addressed in ISSUE THREE below.

21. The Complainants argued that the Least Restrictive Environment for the Child was a private school that acknowledged his dyslexia and provided therapy to address the problem. The Parents insisted the smaller classroom size, along with the therapy the Child was receiving in the private school were the primary reasons for the significant grade improvement since changing schools. However, the IEP Committee deemed the instruction the Child received in the District was much more appropriate and provided the least restrictive learning environment for the Child. That decision was based on the quality of instruction, as well as the alternative curriculum offered through the private school. While the private school does not operate under the same state regulations as the District, the private school must meet academic and non-academic state standards when serving a child with an IEP (*Antkowiak v. Ambach* (1988), 838 F.2d quoting 20 U.S.C. Section 1401 (18) (B)).¹⁵ No evidence was presented as to where any state standards were included in the private school curriculum or instruction. The District provided evidence throughout the hearing that supported the claim that the Child was better served in the public school.

22. The grades received at the private school appeared to be notably inflated based on the Child's performance on standardized tests that had been previously administered.¹⁶ Testimony from the teachers in the private school suggested a lack of understanding regarding *IDEA* and appropriate accommodations provided through *Section 504*. Therefore, the Child's improved performance cannot be attributed to special assistance or accommodations being made in the

¹⁵ Dear Colleague Letter 66 IDELR 227, US Dept. of Education, Office of Special Education and Rehabilitative Services, 2015.

¹⁶ Parent Exhibit 14, p. 1;

classroom. Testimony from the private school faculty indicated a lack of awareness that the Child had an IEP prior to his enrollment in the private school, but did acknowledge the 504 Plan in place. However, the teachers were unable to answer pertinent questions concerning the accommodations to be provided by the Plan.

23. In determining the educational placement of a child with a disability, the District provided evidence that the placement decision was made by a group of people including the parents and others knowledgeable about the child, someone who could interpret evaluation data, and that the placement decision was made in conformity with the Least Restrictive Environment provisions in the *State Policies*. The *Policy* also requires the child's placement is determined at least annually, is based on the child's IEP, and takes into consideration any potential harmful effect on the child or on the quality of services offered. Appropriate educational placement must also take into account that a child with a disability is not removed from education in age-appropriate general education classrooms solely because of needed modifications in the general education curriculum. With the exception of speech therapy twice a week for 30-minute sessions, the Child was in the general education classroom more than 80% of the time as specified on the IEP. The District provided evidence throughout the hearing that satisfies all of the LRE requirements outlined in §§300.114 through 300.116.

ISSUE THREE: A Free Appropriate Public Education (FAPE) has not been provided due to failure to provide an IEP based on appropriate evaluations.

24. In determining if a child is receiving a free appropriate public education (FAPE), the Fifth Circuit Court of Appeals established standards to be considered. *Cypress-Fairbanks Independent School District v. Michael F.* (5th Cir. 1997). The Court held that FAPE is provided if: (1) the program is individualized on the basis of the student's assessment and performance;

(2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by key ‘stakeholders’; and (4) positive academic and non-academic benefits are demonstrated.

25. In considering the program being individualized based on assessment, the Complainant argued the IEP was not appropriate because the District refused to conduct a second comprehensive evaluation. The Parents insisted the Child had been diagnosed with dyslexia by an independent evaluator and a second comprehensive evaluation was justified. When the District refused a second comprehensive evaluation, the Parents had the Child assessed by an independent evaluator in March 2018.¹⁷ The District had conducted an evaluation only a few months before in October 2017, and developed the IEP according to the results of that evaluation.

26. Based on the testimony and evidence presented, the IEP was appropriate and reasonably calculated to enable the Child to make educational progress in the general education curriculum. *C.G. v. Waller Independent School District*, 70 IDELR (5th Cir. 2017). It is to be noted the general education curriculum in the private school was much different than the general education curriculum offered in the District. It is also to be noted that educational progress was measured in different means.¹⁸ This issue has been addressed in the response found in ISSUE TWO.

27. The District provided substantial evidence that supported a coordinated and collaborative effort on the part of the teachers, assistant teacher, and administrative personnel. Numerous examples were provided demonstrating the teachers’ observations of the Child struggling academically, providing support and intervention through small-group and one-on-one

¹⁷ Parent Exhibit 3, pp. 1-15

¹⁸ Parent Exhibit 8, p. 1-6; Parent Exhibit 14, p. 1

instruction, recommending the Child be assessed for possible special education services, and communicating those recommendations to the parents.¹⁹ The District also provided evidence of several committee meetings held regularly to discuss issues associate with the Child's progress.²⁰

28. Failing grades, in and of themselves, do not qualify a Child as having a disability under *IDEA* and cannot be used as a sole-criteria in determining academic and non-academic progress. Even though the Child was required to repeat the █ grade, performance on nationally normed, standardized test scores (i.e. STAR and iReady) indicated the Child was making reasonable academic and non-academic progress through the implementation of the IEP while enrolled in the District.²¹ Therefore, the District meets the criteria of providing FAPE as defined by *IDEA*, *State Policies*, and case law.

ISSUE FOUR: The Complainant is seeking compensatory relief from the District in the form of payment for private school placement and related academic services for the Child.

29. "An LEA (District) is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency (District) made FAPE available to the child and the parents elected to place the child in a private school or facility."²² The appropriateness of the Child's free, public education provided by the District has been addressed in ISSUE THREE.

30. Under previous administrations the District had placed students in this particular private school in an effort to provide FAPE. When the current Special Education Director was asked why this school had been used in the past, she was unable to answer. The Special Education Director testified she had visited the private school shortly after she was appointed

¹⁹ District Exhibit 4, pp. 1-64

²⁰ District Exhibit 5, pp. 1-6; District Exhibit 6, pp. 1-50

²¹ Parent Exhibit 4, pp. 1-4

²² State Policy §300.148 (a)

and prior to this complaint being filed, and had determined that no services could be offered there that couldn't be provided by the District. Part of the explanation as to why students in the District would not be referred to the private school were the lack of qualified teachers, poorly structured curriculum, and the lack of rigor in expectations and services provided to the students.²³

31. Testimony from those working in the private school supported the Special Education Director's opinion. Of the three (3) teachers who were called to testify on behalf of the private school, none were trained in any area of special education. One of the three teachers also provide related services as the school's dyslexia therapist who works with the Child at the private school. Testimony revealed the therapist to be a graduate student who holds no license, no certification, and is filling in for the therapist who is on extended leave for the year.²⁴

32. The US Supreme Court in *Burlington, MA v. Department of Education et al.*, 105 S. Ct. 1996, IDELR 556:389, held that parents may be awarded reimbursement of costs associated with a unilateral placement if it is found that (1) the school district's IEP is not appropriate; (2) the parent's placement is appropriate; and, (3) equitable factors may be taken into consideration. The District was diligent in identifying the child suspected of having a disability, in properly assessing the child in a timely manner, communicating with the parents and allowing parental participation, monitoring the child's progress through the Tier system, and developing an IEP based on appropriate assessments and qualifications specified in *State Policies* and *IDEA*. Based on the evidence presented, placement and services provided by the District are appropriate, and no compelling testimony was provided that supported the argument the Child would be better served in the private school.

²³ Transcript Vol 3, pp. 209-218

²⁴ Transcript Vol 1, pp. 69-71

CONCLUSION

33. While there were limited substantive problems noted regarding the District's responsibilities related to the claims brought forth by the hearing request, there were a few procedural issues. (1) No signatures on the IEPs submitted as evidence; (2) The District failed to hold an IEP meeting at the end of the Child's █ grade year prior to his withdrawal; (3) While there was no mention of adverse educational impact because of ADHD, the District should have taken a more aggressive approach in identifying possible problems; and, (4) The 504 Plan indicates the interventions implemented were successful, yet the Child failed the grade. Interventions not successful should have been identified with modifications made to the Plan. These violations did not result in the loss of educational opportunity to the student or seriously infringe upon the Parent's opportunity to participate in the provision of FAPE to the Student.

34. Based on the evidence presented throughout the hearing, the Parent(s) **failed** to sustain the burden of proof as to the issues of Child Find. Evidence strongly supports the District properly evaluated the Child and took appropriate steps in monitoring the Child's progress through the Tier interventions. The District accurately identified the disability (Language/Speech: Articulation) under §300.8 for which the Child qualified for special education and related services and provided appropriate support.

35. The Parent(s) **failed** to sustain the burden of proof in the claim the educational placement of the Child violated the Least Restrictive Environment (LRE) provisions of the *State Policies Regarding Children with Disabilities under the Individuals with Disabilities Education Act Amendments of 2004*.

36. The Parent(s) **failed** to sustain the burden of proof in the claim the Child had been

denied FAPE because the IEP was not based on appropriate evaluations. To the contrary, the evidence presented by the District indicated appropriate, timely evaluations that had been conducted, communication with the Parent(s) throughout the evaluation process, and numerous records and minutes from the Multidisciplinary Education Team, the Teacher Support Team, the 504 Committee, and the IEP Committee.²⁵

37. There being no violations regarding Child Find or LRE, and no denial of FAPE, reimbursement for compensatory services and/or compensatory education are not warranted. Accordingly, the Parent's request for relief are denied and the complaint is **dismissed**.

RIGHT TO APPEAL

38. Either party may make an appeal of this decision to the appropriate court within 30 days of receipt of the Written Decision and Order. If no appeal is made, the decision is final and binding on both parties.

So ordered, this the 9th day of January, 2019.



David P. Daves, Ph.D.
Hearing Officer

²⁵ District Exhibits 9, pp 1-13; District Exhibit 11, pp. 1-14; District Exhibit 13, pp. 13-25.