BEFORE THE
TENNESSEE DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION

IN THE MATTER OF:

MATTHEW B., a Minor Student,
By and Through his Parent and Representative,
B.B., and G.F.

Petitioners **Administrative Law Judge Collier**

v. **DOCKET NO. 07.03-210470J**

CLARKSVILLE-MONTGOMERY COUNTY SCHOOLS

Respondent

AMENDED[1] DUE PROCESS COMPLAINT

Pursuant to Public Law 94-142, the Individuals with Disabilities Education Act (IDEA), Tenn. Code Ann. §49-1-229, Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act, this is a request for due process for Matthew B., through the parent and guardian, B.B. and G.F., respectively.

I. PARTIES

1. Charles "Matthew" Brock is the minor child. For privacy reasons, he and his parent and representative are referred to by their first name or initials. Matthew resides with his father,

[1] Pursuant to Tennessee Uniform Rules of Procedure for Hearing Contested Cases 1360-04-01-.05(7), Petitioners have requested permission to file an Amended Due Process Complaint in this action. Respondent's counsel agreed in written correspondence to Petitioners being permitted to file an Amended Due Process Complaint should mediation not be successful in this matter.

B.B., and his legal representative under Power of Attorney for educational decision-making, G.F., in Montgomery County, Tennessee.

2. Clarksville-Montgomery County Schools is the local administrative agency (LEA) and governmental subdivision of the State of Tennessee, duly authorized to administer public schools. It is referred to below as "the District."

II. JURISDICTION

3. This is a due process proceeding under the Individuals with Disabilities Education Act (IDEA), before the Tennessee Department of Education ("TDOE"). It relates to "identification, evaluation or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. §1415(b)(6)(A).

4. For Petitioners' claims under Section 504 and Title II of the ADA that seek educational relief, they shall be heard by this tribunal for purposes of administrative exhaustion. 20 U.S.C. §1415(l); *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (U.S. 2017). Petitioners exercise their right to have an open hearing.

5. The District receives federal financial assistance within the meaning Section 504, 29 U.S.C. § 794, and is a public entity as defined in by Title II of the ADA, 42 U.S.C. § 12131(1). Accordingly, the District is responsible for upholding the rights of students under Section 504 and the ADA.

III. FACTS

A. Summary

6. This due process complaint involves a *decade-long* failure to identify Matthew's dyslexia and specific learning disability. As a result, Matthew has never been taught the basic function of literacy (reading), despite the District's knowledge and awareness of his limitations.

7. The District's failure is particularly egregious because it *knew of* Matthew's qualifications for SLD since at least first grade (2012). Only now, at almost 17, through a private provider, is Matthew just *beginning* to receive the appropriate services and beginning to learn to read—forming words and working on basics like vowel sounds.

8. The District's harm to Matthew's life through its denial of literacy and FAPE cannot be underestimated. Literacy is fundamental for American life. It is necessary to vote, to drive, to comprehend mail, and to sit as a juror. *It is enduring.* As the Supreme Court instructs:

> "Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause."

Plyler v. Doe, 457 U.S. 202, 222 (1982). The "child find" duties are of "paramount" importance to the IDEA so that services are actually provided based upon the individualized need. *Forest Grove Sch. Dist. v. T. A.*, 557 U.S. 230, 245 (2009).

B. Matthew's Parent and Representatives Learn the District's Misidentification and Timely File for Due Process in 2021

9. In January of 2020, Matthew's father, B.B., and his legal representative, G.F., learned of Tennessee's "Say Dyslexia" law. Matthew was 15 years old. With G.F. suspecting Matthew may have dyslexia, on January 22, 2020, they requested dyslexia screening from the District.

10. For over a decade, the District continually said it was appropriately serving Matthew, not for dyslexia, but for ADHD, under a category known as "Other Health Impaired."[2] His latest IEP, dated January 16, 2020, and ones preceding it, offered no dyslexia-specific services. In fact, Matthew had *never* been given an IEP providing a FAPE for his specific learning disability.

11. As requested, the District performed the evaluation. On February 26, 2020, the District shared the result that Matthew does, in fact, have dyslexia. While this marked the first time Matthew's parents knew, or had reason to suspect, that Matthew had dyslexia, and that he had not been identified correctly, the same could not be said for the District.

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[2] "Other health impairment" is defined as:

> having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—
> (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and
> (ii) Adversely affects a child's educational performance.

Id. § 300.8(c)(9).

C. The District's Decade-Long Denial of SLD Identification and Denial of FAPE

12. On February 3, 2021, Matthew timely filed for due process. He filed within two years of his parent and guardians' knowledge of the violations. 20 U.S.C. § 1415(f)(3)(C) ("A parent . . . shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint . . . .").[3]

13. To determine *how long* the District had misidentified Matthew and denied him a FAPE, his parents requested the complete educational file. On May 20, 2021, the District provided approximately 800 pages of Matthew's educational records to Petitioners as part of the due process.

14. Disturbingly, the records reflect more than a decade-long child find and FAPE failure for Matthew's specific learning disability. Beginning with kindergarten, 2009-2010, the District's own records show the District knew that Matthew's fluency and comprehension scores

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[3] The two-year limitation period only goes to *filing*. It is not a limitation on the length of *remedy*.

> In this reauthorization, we also include a 2-year statute of limitations on claims. However, it should be noted that this limitation is not designed to have any impact on the ability of a child to receive compensatory damages for the entire period in which he or she has been deprived of services. The statute of limitations goes only to the filing of the complaint, not the crafting of remedy. This is important because it is only fair that if a school district repeatedly failed to provide services to a child, they should be required to provide compensatory services to rectify this problem and help the child achieve despite the school's failings.
>
> Therefore, compensatory education must cover the entire period and must belatedly provide all education and related services previously denied and needed to make the child whole.

G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 624 (3d Cir. 2015) (citing the legislative history).

(known as "DIBELS") showed Matthew was "at risk" in almost all categories of reading, falling into the 0% and 1% in the categories of nonsense word fluency and letter naming fluency.

15. In addition to the DIBELS scores, Matthew's classroom teacher documented that Matthew was finishing kindergarten unable to recognize *any* letter sounds (consonant or vowels) and could only read *one* sight word. Matthew was retained for a second year of kindergarten.

16. Despite his kindergarten retention, and inability to read or know his sounds, the District did not evaluate Matthew for special education under the IDEA to provide him with an Individualized Education Program (IEP). Nor did it evaluate him for, or develop, a 504 Plan to assist him.

17. In *first grade*, 2011-2012, at the parents' request, the District conducted a psycho-educational evaluation. The District's report, dated January 23, 2012, shows Matthew's parent stating concerns about his reading: "He is starting to believe he can't do it correctly so he doesn't want to try." However, the parents relied upon the District as the professionals because the District performed a "psycho-educational" battery of tests upon Matthew.

18. The District's 2012 psycho-educational evaluation found that Matthew had a score in the 1% for reading composite. It also stated he had an oral reading fluency score of less than 0.1%.

19. Tragically, the District realized that Matthew met criteria for SLD but chose not to provide services for it. The District's own evaluation stated that Matthew "***does* meet the standards for identification as having a Learning Disability.**" But instead of providing the appropriate services for SLD, the District relied solely upon ADHD and "Other Health Impairment:"

> *While [Matthew] does demonstrate difficulty with academics, it appears that his working memory deficit in addition to his attention issues impacts his academic performance. Due*

> *to the recent diagnosis of ADD and the current and previous documented effects on [Matthew's] educational progress, the team may wish to consider identification as Other Health Impaired as the most appropriate category.*

20. The foreseeable result is that the District provided interventions for ADHD, but not for dyslexia, SLD, *and learning to read.* Consistently, in the IEP, the District found that Matthew was eligible only under the category of Other Health Impaired (OHI) due to ADHD. In sum, even though the District not only had clear signs of SLD but *knew* that Matthew met criteria for Specific Learning Disability (SLD), and had "documented difficulties with math and reading fluency," the District failed to identify and provide the appropriate services to address Matthew's reading deficits.

21. This failing would become the District's repeating pattern. Throughout first, second, and third grades, the District's IEP progress reports reflected Matthew's continued struggle with learning to read. The progress reports document his minimal progress towards meeting any of his IEP goals; for example, noting that Matthew had learned just *two* new sight words during the final quarter of his second grade year. And, for some of his IEP goals, the District did not attempt them and marked "N/A" year after year. Yet, foreseeably, without the appropriate interventions for SLD and dyslexia, Matthew would not learn to read.

22. By *fourth grade*, 2014- 2015, the District's own written educational records reveal a child struggling with self esteem. The District's own teachers described his feeling of ineptitude as a "learned helplessness." They wrote that he "has a very difficult time with decoding written material" and became "frustrated" and "dependent on adults to help him." Yet, incredibly, the District still did not provide dyslexia-specific interventions or revise the IEP to include SLD and the needed services.

23. From 2014 through 2018, the District's educational records are littered with comments about Matthew's inability to read. Heartbreakingly, teachers write that Matthew "cannot read," "he cannot decode," he "does not know sight words," and he "works best when someone reads to him."

24. By sixth grade, 2016-2017, the District's own testing records reveal that Matthew was being left behind his peers. In every category of reading, *Matthew was functioning at a kindergarten to early first grade level*. Yet the District continued to pass him along, despite the lack of interventions for SLD and his inability to read.

25. By middle school—grades sixth, seventh and eighth—the District's IEP goals for Matthew were stunningly below his cognitive abilities and his individual circumstances had he simply been given the appropriate interventions for SLD. The IEP placed Matthew's ability to read basic sight words at a "pre-primer to first grade level." The District retained Matthew's other (three) IEP goals year after year. It was obvious Matthew could not read, but the District continued to deny the appropriate interventions and pass him along. The District failed to evaluate Matthew for, or identify Matthew as, a child with a Specific Learning Disability.

26. By the end of Matthew's eighth grade year, 2018-2019, behavioral events began to set in. This is perhaps not surprising given the number of years the District failed to identify Matthew correctly, and his dismal progress over such an extended period. Additionally, Matthew was failing reading, math, and science.

D. Matthew's Parent and Guardian Request an Evaluation

27. As mentioned, in January of 2020, now ninth grade, the parent and guardian suspected the District could be in violation of a law called "Say Dyslexia" about which they had learned. At the *parent's* request, the District conducted an evaluation for SLD.

28. Eight years after the District already determined that Matthew met criteria for SLD (in first grade), and with *no* psychological evaluations in between, the District's school psychologist found Matthew to have a *severe* reading and writing deficit, a "mixed dyslexia presentation." The District's school psychologist estimated it will take "70 weeks" for Matthew to catch up, which she said "is not a reasonable expectation."

29. Given the Covid-19 pandemic, Matthew's IEP team met virtually on April 14, 2020 to review the District's psychological evaluation. At this meeting, the District acknowledged Matthew's dyslexia and agreed to change his primary eligibility under the IDEA to SLD in Reading Skills and Math Calculation. After a decade of failures, the District agreed to offer Matthew a "basic reading intervention class."

E. Private Instruction to Begin the Process of Remediating the District's Failure

30. Due to the pandemic, in 2020-2021, Matthew's tenth grade year, his attendance at school was a hybrid mixture of in-person instruction when possible and intermittent virtual instruction when schools were completely shut down due to the pandemic. During those periods of virtual instruction, Matthew received virtual instruction of 80 minutes three times per week, or 120 minutes twice per week in each of his academic classes. But given Matthew's inability to read, the requirements of virtual instruction were particularly difficult and ineffective. Critically, despite

his needs, the District failed to provide Matthew with dyslexia-specific reading intervention in the 2020-2021 school year.

31. In March of 2021, based upon the District's inaction, Matthew's parent and guardian removed him from the District and privately retained a Ed.D.-educator trained in the Orton Gillingham intervention system for dyslexia. The parents privately arranged for homeschooling and intensive work on a 1:1 basis to begin the process of teaching Matthew to read.

32. The degree of the District's failure is illustrated by Matthew's beginning baseline. He is like a first grader learning to read, barely moving in a decade. He is just now, as a junior in high school, learning his vowel sounds, what is a noun, and what is a verb. In math, he is learning his multiplication tables for the first time.

33. Matthew could not perform basic reading functions (for example, he could not read a menu when dining out with friends), he could not drive, and he was not even eligible for the district's vocational school.[4]

34. This action calls upon the District to answer serious questions involving its training, its *understanding* of dyslexia and SLD, and how it was possible to pass a cognitively capable child from grade to grade without him ever being able to read. Legally, this action is filed to obtain the appropriate identification, to extend IDEA eligibility, provide appropriate interventions for dyslexia and Specific Learning Disability, and obtain compensatory education, tutoring, rehabilitative

[4] This, despite the District's "transition plan" in Matthew's IEP stating that "Matthew will attend technical school after high school."

counseling, training for the District, and, when appropriate, the appropriate damages owing for the District's harm.[5]

IV. LEGAL CLAIMS

Count 1. Child Find and Denial of FAPE (IDEA and Section 504 and Tennessee Law)

35. Under the IDEA, all children with disabilities who are in need of special education and related services, or upon "reasonable suspicion," appear to be, must be identified, located and evaluated. 34 C.F.R. § 300.111(a).

36. Similarly, under Section 504, a public school must conduct an evaluation of any student who, because of handicap, needs or is *believed to need* special education or related services. 34 C.F.R. § 104.35(a).

37. Under the IDEA, a "specific learning disability" is "a disorder in one or more of the basic psychological processes involved in understanding or in using language." 20 U.S.C. § 1401(30)(B); 34 C.F.R. § 300.8(b)(10). Among other non-exhaustive disorders, a learning disability specifically *includes* "dyslexia." *Id.* To be eligible for special education under the IDEA, the child must have a specific learning disability and "by reason thereof, need special education and related services." 34 C.F.R. § 300.8(a)(1).

38. Additionally, under Section 504 and the ADA, a "disability" is one that "substantially limits a major life activity." 29 C.F.R. § 1630.2(g). Under Amendments to Section 504 and the ADA from 2008, "reading" is explicitly one of the major life activities and a "mental impairment" includes "specific learning disabilities." 29 C.F.R. § 1630.2(h)(2).

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[5] Damages for emotional distress and humiliation are not available at due process, but Petitioners give fair notice for purposes of exhaustion under the ADA and Section 504.

39. A school district must not overlook "clear signs of disability" or negligently fail to order testing. *Board of Educ. of Fayette County, Ky. v. L.M.*, 478 F.3d 307 (6th Cir. 2007).

40. The school district may not blame the parents or its own child find violation. "But a child's entitlement to special education should not depend upon the vigilance of the parents (who may not be sufficiently sophisticated to comprehend the problem) nor be abridged because the district's behavior did not rise to the level of slothfulness or bad faith. Rather, it is the responsibility of the child's teachers, therapists, and administrators -- and of the multi-disciplinary team that annually evaluates the student's progress -- to ascertain the child's educational needs, respond to deficiencies, and place him or her accordingly." *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996).

41. Matthew's dyslexia not only qualifies him under the IDEA, but the limitations it places upon his reading, concentrating, and thinking qualifies him under Section 504 and ADA for dyslexia-specific interventions too. He has been unable to read, write, or learn in comparison to his peers in spite of his abilities.[6]

42. Under the IDEA and Section 504, *beginning in kindergarten,* the District failed to fully consider and evaluate Matthew in all areas of suspected disability—particularly including specific learning disability and provide to him a FAPE. By first grade, the District had actual knowledge that Matthew met criteria for a specific learning disability, yet it failed to provide him

[6] "For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population." 29 C.F.R. § 1630.2(j)(4)(iii)

an appropriate IEP, dyslexia-specific interventions or SLD interventions, and FAPE. Defendant repeated these failings, year after year after year, up through the present.

43. Additionally, under the state law ("Say Dyslexia" law), the District failed to convene a school-based problem team to analyze data and implement evidence-based interventions for Matthew and his characteristics of dyslexia. Tenn. Code Ann. § 49-1-229.

44. In sum, the District failed to fully consider Matthew for all areas of suspected disability, denied him FAPE under both IDEA and Section 504, and denied Matthew a properly constructed IEP for a decade.[7]

Count 2. Discrimination and Denial of Accommodations (ADA and Section 504)

45. Under Section 504, "[n]o otherwise qualified individual with a disability … shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). The term "program or activity" includes "all of the operations" of a school system. 29 U.S.C. 794(b)(2)(B). Section 504, too, requires equal access and provision of reasonable accommodations. 29 U.S.C. § 794(a); 28 C.F.R. § 41.53.

46. Title II of the Americans with Disabilities Act, and its implementing regulation, mandate that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, such as a public school or school district, or be subjected to discrimination by any such

[7] Because that failure negatively affected Matthew's education, Matthew was necessarily denied a free appropriate public education. *Boose v. District of Columbia,* 786 F.3d 1054, 1056 (D.C. Cir. 2015).

entity. *See* 42 U.S.C. § 12132; 28 C.F.R. § 35.130(a). School districts are required to, among other things, afford students with disabilities an equal opportunity to participate in or benefit from any aid, benefit, or service provided to other students. 28 C.F.R. § 35.130(b)(1).

47. Not only was Matthew denied an IEP and FAPE for a decade, he was also "excluded from programs, denied benefits, or otherwise discriminated against on the basis of his disability." To wit, the District denied him the supports, services, and reasonable accommodations for the most basic educational function of learning to read.

48. These failings were knowing, deliberately indifferent, in bad faith and intentional.

PRAYER FOR RELIEF

49. Given the disturbing length of deprivation, Petitioners seek the "broad" authority of the Tribunal. The IDEA affords broad authority to fashion appropriate relief, including equitable factors to effectuate the IDEA. *Sch. Comm. Of Burlington v. Dep't of Educ.,* 471 U.S. 359 (1985); *Forest Grove Sch. Dist. v. T.A.,* 557 U.S. 230 (2009) (hearing officers have reimbursement authority); *see also Letter to Kohn*, 17 IDELR 522 (OSEP 1991) ("based upon the facts and circumstances of each individual case, an impartial hearing officer has the authority to grant any relief he/she deems necessary"); Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: The Latest Update*, 37 J. NAT'L ASS'N ADMIN. L. JUDICIARY 505 (2018).

50. Due to all of the violations set forth above, Matthew has suffered educationally, emotionally, and will suffer vocationally too. Accordingly, he seeks:

a. An IEP with dyslexia-specific interventions to assist Matthew;

b. Extended IEP eligibility;

c. Compensatory education for the substantial period of denial of identification and denial of FAPE which may be put in a monetary fund for parental access;

d. Reimbursement of the costs of private education and tutoring;

e. District and staff training on dyslexia specific interventions and child find;

f. Attorneys' fees and costs; and

g. Any further relief that may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and exact copy of the foregoing has been filed electronically with APD.Filings@tn.gov and copied via email to the following on this the 28th day of June, 2021.

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