

⁵ In adhering to 5 California Code of Regulations § 3001(b), this Court determines only the standard of review. Nothing in this order should be construed as a definition of that regulation.

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Digest of Inquiry (July 5, 1989)

- Are states required to recognize dyslexia as a handicapping condition, under the category of "specific learning disabilities" (SLD) at Reg. 300.5?
- May a hearing officer rely on personal opinions regarding dyslexia throughout the administrative process, without sacrificing impartiality?
- If a state's classification system does not include "dyslexia" as a handicapping condition, is a child with dyslexia still entitled to receive FAPE from the local educational agency?
- Must states provide a continuum of alternative placement options for students with dyslexia?

Digest of Response (June 8, 1990)

Dyslexia May Be a Subcategory of SLD

Reg. 300.5(b)(9) specifies dyslexia as one possible subcategory of conditions included under "specific learning disabilities" (SLD). Thus, a child with dyslexia, who is determined to need special education or related services, is entitled to FAPE.

Personal Opinions About Dyslexia May Affect Impartiality

If any party to a due process hearing believes that personal opinions concerning dyslexia are affecting the hearing officer's impartiality, the party may raise such an objection during the proceedings. Under Reg. 300.511, a party may also appeal an administrative decision on the grounds that the hearing officer was not impartial.

Dyslexia Must Be Considered in Assessing SLD Child

All children with dyslexia, who are eligible for special education or related services under EHA, must receive FAPE, regardless of the state's classification system. If a child with dyslexia is deter-

mined to be eligible under the category of specific learning disabled (SLD), moreover, the child's dyslexia must be factored into the development of an IEP and the selection of placement options, in accordance with Regs. 300.340-300.349.

SEA Must Ensure Placement Alternatives for Dyslexic Children

Under Regs. 300.551(a) and 300.552(b), a state educational agency must ensure that local educational agencies maintain a continuum of alternative placements for children with specific learning disabilities, including those with dyslexia.

Text of Inquiry

The purpose of this letter is to seek an OSERS clarification regarding the following four (4) questions:

1. Does the federal reference in Reg. 300.5 concerning specific learning disabilities require states to recognize dyslexia as a handicapping condition, even though dyslexia is not named within a classification system?
2. Can impartial hearing officers, or administrative law judges charged with implementing the procedural safeguards of P.L. 94-142, rely upon their personal opinions regarding dyslexia, state those personal opinions during due process proceedings, rely upon those opinions in rendering judgments, and still be considered impartial?
3. If a state's classification system does not include the term "dyslexia," is an educational diagnosis of dyslexia to remain as viable for a local school district? In other words, must an educational diagnosis correlate with a classification system if it is to be considered by LEAs in developing IEPs and in making placement recommendations?
4. Does the reference to dyslexia within the federal regulations require each state to provide a continuum of alternative placement options to address that handicapping condition?

DISCUSSION

1.

In November of 1988, a law professor inquired of OSERS as to why "Attention Deficit Disorder" did not qualify as a separate handicapping condition under EHA-B (See attached Exhibit A). The February 1989 response explained that . . . "ADD was not expressly mentioned in the statutory definition of the term "handicapped children"; it still had not emerged as a separate disorder in the statute." It was also noted that because autism was not included in the statutory listing of handicapping conditions, the U.S. Department of Education did not have the legal authority to establish autism as a separate category. Footnoted to support this federal position was *Learning Disabilities: A Report to the U.S. Congress* (1987), pp. 198-200.

Based upon this 1989 response from the U.S. Department of Education, it would appear that the 50 states are required to recognize the regulatory listing of handicapping conditions found at 34 CFR Sec. 300.5. Reg 300.5(b)9 lists "dyslexia" as a handicapping condition, and specifically differentiates it from "perceptual handicaps." *Learning Disabilities: A Report to the U.S. Congress*, pp. 138-157 (See attached Exhibit B)

unequivocally uses the term dyslexia throughout its report, as well as making 14 references to dyslexia within the annotated bibliography. Therefore, based upon this most recent history, the supremacy of federal law over state law would seem to require that the individual states acknowledge dyslexia as a handicapping condition . . . even in this age of deregulation.

2.

Of the thousands of families for which our organization has provided legal and educational information since 1977, many have dealt with the needs of New Jersey students diagnosed as dyslexic by private consultants and/or agencies. In 1982, due process hearings were transferred from the N.J. Department of Education to the Office of Administrative Law. From 1982 to the present, administrative law judges were and are assigned to rule on special education disputes. Each of these judges comes from a unique personal, educational and professional background. Some are parents or grandparents of handicapped children. Some are intellectually interested in this complex area of law and approach it from purely legal backgrounds. One judge is a former social worker within New Jersey, and another a former school superintendent in New Jersey. In my experience, those judges who come from purely a legal background do not bring any predispositions, one way or the other, to disputes involving dyslexia. The problem arises, however, with those judges who bring their own past experiences, prejudices and opinions into the hearing in which they are required to be the impartial finder of fact. Two recent decisions exemplify the problem.

In *C.A. v. Bethlehem BOE*, EDS 233-87 (See attached Exhibit C) the judge, a former social worker, noted that:

The CST witnesses and C.A.'s P.I. teacher shied away from using the word "dyslexia" to describe C.A.'s educational disability. They testified that the "state" does not classify children as dyslexics and they each believed the term "P.I." as defined in regulations, adequately describe C.A.'s educational status. (p. 4)

The ALJ, Bernard Goldberg, then provided within his opinion a discussion about dyslexia that was provided by neither party, either through sworn testimony or evidence (p. 5). In other words, the appearance in the decision is one of bias in support of the handicapping condition known as dyslexia.

In *C.L. v. Mt. Arlington BOE*, another form of bias appeared, this time against the recognition of the condition of dyslexia. The judge, Ward Young, refused to consider the condition of dyslexia because it was not named as a New Jersey classification. Judge Young repeatedly stated both on and off the record that he did not believe the use of the word dyslexia to be important to the legal issues in dispute . . . though recognition of dyslexia was central to the parents' legal arguments. Judge Young was a former school superintendent in New Jersey. (See attached Exhibit D)

In either of these two examples, it appears that neither judge is impartial to the issue before him, namely dyslexia. One believes there is such a thing as dyslexia, the other believes that the naming of dyslexia is unimportant, *but neither is impartial to this issue*. Can such predisposition allow an impartial hearing, when the issue in dispute concerns dyslexia?

3.

Throughout my 12 years as founder and director of this organization, I have been in hundreds of school districts across New Jersey. When reference to the term "dyslexia" has been raised, the uniform response in the public schools has been, "New Jersey does not recognize dyslexia. It is a medical term, not an educational one. . . ." (This position is reaffirmed in Exhibit C.) New Jersey's refusal to recognize dyslexia is also well documented by the New Jersey Branch of the Orton Dyslexia Society, as well as ACLD. The argument set forth by New Jersey's LEAs appears to consistently confuse a categorical system with an educational diagnosis. But this appears true only regarding the condition of dyslexia. Cerebral palsy, autism, deafness, blindness are all recognized as handicapping conditions even though they are not categorical labels. In New Jersey, the condition of cerebral palsy is classified as Orthopedically Handicapped. The condition of autism is classified as Emotionally Disturbed. The condition of deafness is classified as Hearing Impaired. The condition of blindness is classified as Visually Impaired. The condition of dyslexia, however, is without a home. It is usually found to be synonymous in New Jersey with the classification of Perceptually Impaired, though private placements specializing in educating the dyslexic population are state approved for only Neurologically Impaired. Your assistance in clarifying a "handicapping condition" as opposed to a categorical designation would be most helpful, particularly because the federal language appears to require a distinction between "perceptual impairment" and dyslexia.

4.

New Jersey provides no continuum of placement options for dyslexic pupils. New Jersey has a continuum of placement options, however, for autistic students, even though there is no classification for autism in New Jersey. To provide placement options for one and not the other, when neither are designated as classification categories, appears to be discriminatory.

Historically in New Jersey, there have been neither private day nor residential placements designated for dyslexic pupils. It is also widely accepted that no public school program for dyslexics, on either a primary or secondary level, exists in any public school in New Jersey. Only two private day schools are approved by the N.J. Department of Education which specialize in the instruction of dyslexics. One is the Community School (Bergen County), and the other is the Newgrange School (Mercer County). Residential placements for dyslexics in New Jersey have been primarily at the Landmark School (Mass.), with some placements made over time at Eagle Hill (Conn.) and Pine Ridge (Vt.) No specific designation appears on any New Jersey approved private school documentation that these schools serve only dyslexics. The only indication is that they are approved for Neurologically Impaired students. (See attached Exhibit E).

Autistic pupils in New Jersey have historically had a range of placement options not contingent on a classification system (See attached Exhibit F). The word "autism" is used on these attachments to describe and differentiate the types of Emotionally Disturbed placements for New Jersey's handicapped children. The word "dyslexia" is not used in a single instance to differentiate any New Jersey approved N.I. place-

ment. (See attached Exhibit D). This practice would appear to discriminate against the requirement that New Jersey provide a continuum of placement options for all handicapped children (Reg. 300.551), including those with dyslexia.

Because of the growing numbers of due process hearings in New Jersey involving the issue and designation of the term "dyslexia" or "dyslexic," your prompt and complete response will be most appreciated.

Text of Response

I am writing in response to your recent letter on behalf of the Parent Information Center of New Jersey, Inc. We apologize for the delay in responding. In your letter, you ask four questions on the requirements of Part B of the Education of the Handicapped Act (EHA-B) that are applicable to children with dyslexia. These questions and the Department's responses are as follows:

1. Does the Federal reference in Reg. 300.5 concerning specific learning disabilities require States to recognize dyslexia as a handicapping condition, even though dyslexia is not named within a classification system?

The EHA-B definition of the handicapping condition "specific learning disability" (SLD) in 34 CFR § 300.5(b)(9) specifies that dyslexia is one possible subcategory of conditions for which children could be classified as SLD. A child who has been determined to have dyslexia and to be in need of special education and related services is covered by EHA-B and is entitled to a free appropriate public education (FAPE).

Any determination as to whether a child has an SLD must be made by a multidisciplinary evaluation team that includes the additional team members specified in 34 CFR § 300.540. The team must determine whether the child's impairment meets the criteria in 34 CFR § 300.5(b)(9) and 34 CFR § 300.541. See 34 CFR §§ 300.540-300.543 and 34 CFR §§ 300.530-300.534. The factors relevant to the team's determination include:

(1) whether a child's achievement is commensurate with his or her ability when provided with appropriate educational experiences; and (2) whether there is a severe discrepancy between the child's achievement and his/her intellectual ability in one or more of seven areas related to communication skills and mathematical ability. 34 CFR § 300.541(a)(1)-(4). In addition, the discrepancy must not result primarily from other handicapping conditions or economic, cultural, or environmental factors. 34 CFR § 300.541(b)(1)-(2).

2. Can impartial hearing officers, or administrative law judges charged with implementing the procedural safeguards of P.L. 94-142, rely upon their personal opinions regarding dyslexia, state those personal opinions during due process proceedings, rely upon those opinions in rendering judgments, and still be considered impartial?

EHA-B gives parents and public educational agencies the right to request an impartial due process hearing and establishes minimum criteria for the selection of impartial hearing officers to conduct such hearings. 34 CFR §§ 300.506-300.507. Specifically, under 34 CFR § 300.507, "a hearing may not be conducted: (1) by a person who is an employee of

a public agency which is involved in the education or care of the child; [or] (2) by any person having a personal or professional interest which would conflict with his or her objectivity at the hearing." 34 CFR § 300.507(a)(1)-(2). In New Jersey, the New Jersey State Department of Education (NJSDE) is responsible for conducting impartial due process hearings and for ensuring that EHA-B due process hearing officers are impartial. 34 CFR § 300.506(b) and § 300.131.

Generally, determinations of impartiality under the EHA-B must be made on a case-by-case basis. You may also wish to consult New Jersey laws on conflict of interest for additional guidance in making such determinations.

If a party to a due process hearing has reason to believe that their administrative law judge is not impartial by reason of his/her views about children with dyslexia, an objection to that effect may be made at the hearing. In addition, a party may appeal a hearing decision on the basis that the hearing officer was not impartial. 34 CFR § 300.511.

3. If a State's classification system does not include the term dyslexia, is an educational diagnosis of dyslexia to remain as viable for a local school district? In other words, must an educational diagnosis correlate with a classification system if it is to be considered by local educational agencies in developing IEPs and in making placement recommendations?

The definitions of handicapping conditions in EHA-B do not necessarily correspond with a State's classification system. However, all students who would be eligible for special education and related services under the Federal definition must receive FAPE, regardless of how they are classified under the State system. Should a child with dyslexia be determined to be SLD, the diagnosis of dyslexia would be one factor that must be considered in the development of the child's individualized education program (IEP) and in the selection of placement options. 34 CFR §§ 300.340-300.349; 34 CFR § 300.533(a).

4. Does the reference to dyslexia within the Federal regulations require each State to provide a continuum of alternative placement options to address that handicapping condition?

EHA-B requires public agencies to ensure that a continuum of alternative placements "is available to meet the needs of handicapped children for special education and related services." 34 CFR § 300.551(a). The Department has interpreted this requirement to mean that a continuum of alternative placements must be made available for each category of "handicapped children" defined under EHA-B, to the extent necessary to implement the IEP for each child with a handicap. See 34 CFR § 300.552(b). Thus, NJSDE is required to ensure that school districts with children with SLDs, including those with dyslexia, have a continuum of alternative placements available for them.

I hope this information has been helpful. If we may provide further assistance, please let me know.

Robert R. Davila
Assistant Secretary