

Case No. 19-51046

IN THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

**WILLIAM V., As Parent/Guardian/ Next Friend of W.V., A minor
individual with a disability; JENNY V., As Parent/Guardian/ Next
Friend of W.V., A minor individual with a disability,**
Plaintiffs – Appellants

v.

COPPERAS COVE INDEPENDENT SCHOOL DISTRICT,
Defendant – Appellee

Appeal from the United States District Court,
Western District of Texas, Waco Division, No. 6:17-cv- -

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v.

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Defendant – Appellee**

Fund (TASB LAF), which advocates the positions of local school districts in litigation with potential state-wide impact. The TASB LAF is governed by members from the Texas Association of School Boards, Inc. (TASB), the Texas Association of School Administrators (TASA), and the Texas Council of School Attorneys (CSA). TASB is a Texas non-profit corporation whose members are approximately 1,030 public school boards who are responsible for the governance of Texas public schools. TASA represents school superintendents and other administrators responsible for implementing the education policies adopted by their local boards of trustees, the Texas Education Agency, the State Board of Education, and for following state and federal law. CSA is composed of attorneys who represent more than 90 percent of school districts of Texas.

The Louisiana School Boards Association (LSBA) is a non-profit entity created in 1938 with the purpose of providing leadership, service, asce,aove549 2,,.8 (s)8.0,Tvint ncp

boards and school districts throughout Mississippi.

The National School Boards Association (NSBA)

Contrary to the district court's decision here, the mere existence of a particular disability does not and should not result in an automatic determination that the student is a "child with a disability" under IDEA. Such eligibility determinations are complex educational decisions that the IDEA gives to IEP/Multi-disciplinary teams through a collaborative process involving educators, evaluators, and the family. Students with dyslexia who are not found eligible under IDEA are almost always served under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, 34 C.F.R. Part 104 and the state guidelines for dyslexia. If this court affirms the district court's misapplication of the IDEA eligibility criteria, the ruling could require school districts in the Fifth Circuit to find many more students eligible under IDEA.

A. A "dyslexia" label is deceptively simple and not interchangeable with "Specific Learning Disability" under IDEA.

al., *A Critical Analysis of Dyslexia Legislation in Three States*, 66 LITERACY

RESEARCH: THEORY, M

concluded that the term “dyslexia” has become “so vague that it ‘has lost any real value for educators.’” Jo Worthy, et al., *A Critical Analysis of Dyslexia Legislation in Three States*, 66 LITERACY RESEARCH: THEORY, METHOD, AND PRACTICE 406, p. 407 (2017)(citing Elliott, J. & Grigorenko, E., *The Dyslexia Debate*, CAMBRIDGE UNIV. PRESS (2014)).

There are “many contradictions, inconsistencies, and questions, and few areas of consensus about dyslexia.” *Id.* at 408. See also GINGER STOKER, et al., DYSLEXIA AND RELATED DISORDERS REPORTING STUDY, p. 6 (2019), <https://tea.texas.gov/sites/default/files/DyslexiaIDReportStudyReport-508Compliant.pdf> (“Likely tied to the historical debate over its definition, there has been uncertainty as to how to diagnose and subsequently serve children who have symptoms consistent with dyslexia.”). There are “no universally employed measures or procedures for identifying dyslexia.” Worthy at 408.

Dyslexia is not a disease like measles, which a person can be clearly diagnosed as either having or not having. There is a gradient from good through average to very poor reading, and it is largely arbitrary where one draws the line and says that children below this line are candidates for the label “dyslexic.”

Id.

The American Psychiatric Association (APA) no longer lists “dyslexia” in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) as a separate category of disorder, because its Neurodevelopmental Work Group concluded that the many

definitions of dyslexia meant those terms would not be useful as disorder names or in the diagnostic criteria. Worthy at 407.

Students with learning disorders like dyslexia function in school very differently from one another. Some may need individualized services like those available under IDEA; some may not; and some may need them only for a period of time. It is possible for a student's educational needs to change over time, especially when a school has successfully intervened early to provide research-based support for that student to enable him to progress.

B. Several states have adopted special “dyslexia” laws outside of or in addition to IDEA requirements.

Despite differences of opinion among professionals about what constitutes “dyslexia,” and the wide array of educational needs of students with it, there is unity on the fact that many children in the United States struggle to learn to read and that

the IDEA special education framework and require or strongly encourage schools to address it through statewide guidelines or regulations. Most require or contemplate universal screening, staff training, specific research-based interventions, and state educational agency-produced guidelines for school districts. See Education Commission of the States, *Response to Information Request* (Sept. 7, 2018), https://www.ecs.org/wp-content/uploads/State_Inf_Request_State-Dyslexia_Policy.pdf.

In Mississippi, school districts must screen students for dyslexia and must make an initial eligibility determination under IDEA. If the student is ineligible for special education services, then the school district “may decide if a 504 Plan is warranted.” Mississippi Department of Education, *Dyslexia Frequently Asked Questions*, https://www.mdek12.org/sites/default/files/Offices/MDE/OAE/OEER/Dyslexia/dyslexiafaq_general2017.pdf.

In Louisiana, students who may have dyslexia are referred to a screening committee first, and then to a Section 504 evaluation team or a special education evaluation team as appropriate. Department of Education: Louisiana Believes, *A Guide to Dyslexia in Louisiana*, <https://www.louisianabelieves.com/docs/default-source/academics/a-guide-to-dyslexia-in-louisiana.pdf?sfvrsn=4>. Not all students identified as dyslexic are served under IDEA in any state in the Fifth Circuit.

intended to serve students with “dyslexia” who do not meet the more intricate and complex definition of a “Specific Learning Disability” under the IDEA.

When first enacting its state dyslexia law, Texas attempted to operationalize a definition of “dyslexia.” Texas’ statutory definition of “dyslexia” has remained the same for thirty-five years. Under Texas law, “dyslexia” simply “means a disorder of constitutional origin manifested by a *difficulty in learning to read, write, or spell*, despite conventional instruction, adequate intelligence, and sociocultural opportunity.” Tex. Educ. Code § 38.003(d)(1)(Emphasis supplied). Plainly and simply, Texas considers “dyslexic” any student for whom learning to read, write, and spell is difficult, after being provided core reading instruction and taking into consideration whether the student presents with average intelligence and has not been deprived of educational opportunities due to socioeconomic status. Texas’ definition was intentionally crafted to be more generous than the IDEA’s definition of SLD and to reach more students.

D. Students in Texas do not have to be eligible for special education to be considered dyslexic or to access dyslexia intervention services.

Texas school districts must screen or test all students for “dyslexia” starting in kindergarten. Tex. Educ. Code § 38.003(a). Procedures for screening and testing students for “dyslexia” must be in compliance with procedures adopted by the MC /P 8.1

automatically receive special education services? No, each local school district shall make an initial determination whether a student with dyslexia qualifies under the Individuals with Disabilities Education Act (IDEA) to receive services and funding under the provisions of the IDEA. If the student is ineligible for special education services, then the local district may decide if a 504 Plan is warranted.”)

The Dyslexia Handbook also provides educators with guidance on determining whether a student should be referred for a full and individual initial evaluation (FIE) under the IDEA. *Id.* Referral to special education is not automatic. The TEA resource cited by Decoding Dyslexia Texas in its amicus brief reinforces that “[n]ot all children

standards are more rigorous.

C.F.R. § 300.301(a). The completion of an FIE can, and often does, take up to 60 days² to complete due to the comprehensive nature of the evaluation, as described below. 34 C.F.R. § 300.301(c). In the case at bar, W.V.'s dyslexia evaluation outside of this IDEA-SLD process was completed within days of the parent's executing the consent forms. Consent was obtained on May 16, 2016. ROA 1918; ROA 2287-2288; ROA 2833: 14-2834:25. The "dyslexia" evaluation was completed and presented to an IEP team within fifteen days--by May 31, 2016. ROA 2380-2387.

Under the IDEA process, a detailed notice³ must be provided to parents before

emotional status, general intelligence, academic performance, communicative status, and motor abilities.” 34 C.F.R. § 300.304(c)(4). The evaluation must be sufficiently comprehensive to identify all of the child’s special education needs, whether or not commonly associated with the disability category in which the child has been classified. 34 C.F.R. § 300.304(c)(6). An IEP team and other qualified professionals must review existing evaluation data o

services guided by either an IEP under the IDEA (if they qualify as SLD) or a Section 504 Plan. *See Stoker* at 9. Data collected by the Texas Education Agency reflect that, during the 2017-18 school year, 169,036 (or 3.29%) of Texas' 5,143,315 students were

Dyslexia Handbook. The Dyslexia Handbook at 22. Providing general education SPDI is a far cry from attempting to “wriggle out” of serving a student with dyslexia. SPDI includes specified components for dyslexia instruction such as “phonological awareness, sound-symbol association, syllabication, orthography, morphology, syntax, reading comprehension, and reading fluency.” *Dyslexia Handbook* at 22. SPDI is evidence-based, multisensory, systematic, and intentional. *Id.* But, under state educational policy, it is *not*

was for W.V. in this case, he doe

classroom accommodations as “specially designed instruction.” They were basic classroom interventions: extra time to complete assignments; having an opportunity to repeat and explain instructions; sit near the teacher; receive reminders to stay on task; and have all material, except reading class passages, read to him. They do not rise to the level of special education services.

If all students with “dyslexia” necessarily must receive services under IDEA, all would require “specially designed instruction,” which must be provided by certified special education teachers, as opposed to general education teachers with special reading training. Currently, Texas has thousands of excellent, well-trained reading teachers and interventionists who provide effective reading support for students with reading difficulties.

In 2018, this court explicitly reaffirmed the validity of its *Michael F.* test in light of

Respectfully submitted,

/s/Holly B. Wardell

CERTIFICATE OF SERVICE

I hereby certify that on the 1st

Section IV: Problematizing Policies to Reframe Legislation and Practice

A Critical Analysis of Dyslexia Legislation in Three States

Literacy Research: Theory,
Method, and Practice
2017, Vol. 66, 406-421

^a The Author(s) 2017

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DOI: 10.1177/2381336917718501

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Sam DeJulio ¹, Angela Stefanski ², Amy Leitze ²,
and Jennifer Cooper ²

Abstract

After a multitude of studies across more than a century, researchers have failed to consistently identify characteristics or patterns that distinguish dyslexia from other decoding challenges. Many researchers and educators argue the construct is too vague and contradictory to be useful for educators. Nevertheless, attention to dyslexia in policy and practice has increased at a rapid rate; 37 states now have dyslexia laws, and national legislation was passed in 2016. Employing Bakhtin's concept of authoritative discourse (AD) as a theoretical lens, we examined the emergence and current state of dyslexia legislation and policy in Texas, Indiana, and Florida, three states that represent various histories of legislation and stages of policy implementation. Our analysis found similarities among the states' legislation, particularly regarding how the policies emerged and the AD embedded within them. The International Dyslexia Society's recommendations for a specific intervention approach that is "multisensory, systematic, and structured" appear in each state's laws. This approach is not well supported by research, but it is officially sanctioned through legislation in many states and has had a profound effect on policy and practice. By not engaging in the discourse or using the word "dyslexia," literacy researchers and educators place themselves outside of a closed discourse circle that influences policy and practice and deeply affects students. We encourage active participation in the conversation and in policy

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EXHIBIT

A

decisions that are currently taking place without the input of literacy educators and researchers.

Keywords

policy, dyslexia, legislation, authoritative discourse

Although the term dyslexia was coined in the late 19th century (Duane, 1985; Guardiola, 2001), dyslexia has more recently garnered widespread attention in policy and practice. Texas passed the nation's first dyslexia law in 1985, identifying dyslexia as a disability under Section 504 of the Rehabilitation Act (Council for Exceptional Children, n.d.). The law set up an identification and intervention process that is separate from the process for specific learning disabilities (SLDs). Since that time, 36 additional states have approved dyslexia laws, most of them passed since 2010, and additional bills continue to be proposed (Eide, 2017). Youman and Mather (2013) describe the laws as "characterized by variability and inconsistency" (p. 133). Atten-

Review of Research

In our examination of research across a range of fields, we found many contradictions,

research “inadequate, both in number of studies and in the quality of research methodology, to support that O-G interventions are scientifically valid” (p. 182). Similar results were found by What Works Clearinghouse (2010). Further, researchers from a variety of perspectives agree that all students need a comprehensive, meaning-based

dyslexia legislation and policies. We chose three states in which we are teachers and teacher educators. These states represent various histories of legislation and stages of policy implementation: (a) Texas, which passed the first law in 1985; (b) Indiana, which passed its first law in 2015; and (c) Florida, which proposed a bill in 2015 that was not passed.

Method

The researchers include current and former elementary classroom teachers and reading specialists, as well as teacher educators and researchers. We have seen increased attention to dyslexia in recent years, and we share an interest in learning about dyslexia policies and how they affect teachers and students.

Data sources varied by state and included dyslexia bills, laws, and accompanying documents that shaped or were shaped by dyslexia policy. Each state's research group engaged in a recursive process of analysis, starting with examining that state's documents using inductive analysis to generate open codes, meeting together to discuss and refine the codes, returning to the data to test them, and then combining the codes into categories that best represented the data (Patton, 2001). Next, each group posted their categories on a shared online document and met to discuss our initial analysis for each state and combine the codes we had generated into broader cross-state categories. At this phase, we examined additional relevant sources. For example, the website and newsletters from the IDA helped explain word choices used in development of state policies. The final phase of analysis consisted of rereading the state documents, comparing their content to the themes generated in team meetings, refining the themes, and returning to the data to test and refine them further. We continued this process until we came to consensus on three themes that represented the major ideas in the data: (a) There is a specific discourse of dyslexia that saturates dyslexia policy; (b) this discourse exists in a closed circle of organizations that largely excludes teachers and teacher educators; and (c) dyslexia legislation parallels the emergence of the learning disabilities construct. We begin the findings by describing dyslexia legislation in each state. Next, we present the cross-state themes.

Findings

Dyslexia Legislation

Texas: Where it all began. The major data source for the Texas analysis was the most recent update of the Texas Dyslexia Handbook (Texas Education Agency, 2014). The first Handbook was developed by the state in 1992 to provide guidelines to school districts for implementing dyslexia legislation. The Handbook has been updated and revised periodically to keep up with changing laws and guidelines (1998, 2001, 2007, 2010, and 2014). The 179-page document details the dyslexia definition and characteristics, assessment and identification procedures, and instructional guidelines. Appendices for the most recent (2014) revision include the laws, rules, and state statutes, and

blogs relevant to the history and controversy surrounding the bill. Florida's foray into dyslexia legislation began with Guiding, Reading, and Accelerating Student Performance (GRASP) Academy, the nation's first, and thus far only publicly funded school for dyslexia. Located in Jacksonville, Duval county, GRASP offers small classes, mentoring, and free transportation to students across the county identified as dyslexic. The school "specializes in teaching bright students with a dyslexic profile" (GRASP Academy, n.d.para. 1), and the curriculum "utilizes multi-sensory learning environments, ~~One~~ Gillingham based prescriptive intervention" (GRASP Academy/Homepage, n.d., para. 2). The school's founder is Duval County Superintendent Nicolai ~~iv~~ Vitti and his two sons are identified as dyslexic. Mr. Vitti was criticized for the disproportionate amount of resources spent on students in the school (Thompson, 2015) and for putting "his own

Another example of authoritative dyslexia discourse comes from reactions to APA's decision to drop dyslexia as a separate category of mental disorder from the DSM-5 (APA, n.d.). A group of attorneys and neuroscientists from the Yale Center for Dyslexia

where many teachers are not knowledgeable about this condition, students with dyslexia may be considered stupid or lazy” (Dyslexia at a Glance, n.d., para. 3). The IDA draws parents of children diagnosed with dyslexia into the circle through this language, which positions educators as part of the problem, as well as through Decoding Dyslexia organizations, which also dismiss educational perspectives. For example, in their “Steps to Lobby for Dyslexia Legislation,” Decoding Dyslexia Massachusetts (n.d.) advises parents to:

Respectfully request that biology and neuroscience guide the definition [of dyslexia] and not educational theories or previous misguided educational regulations. Teachers and educational administrators and policymakers should be guided by facts and science in matters of

of the Individuals with Disabilities Education Act IDEA (U.S. Department of Educa-

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