

COVER SHEET

BEFORE THE MISSISSIPPI DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION



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██████████ in the interest of a minor child, ██████████ COMPLAINANT

v. CASE NO. D01172019-17

Leake County School District RESPONDENT

The Parties to and Subject of this proceeding are:

1. ██████████ the Complainant, identified as the Mother or the child's Parent, herein.
2. The Leake County School District, the Respondent, identified as the District or the School District, herein.
3. The subject of the proceeding is ██████████ minor child of ██████████ referred to as the Child or the Student, herein.

The witnesses are as follows:

Witness #1. ██████████, mother of ██████████ identified as Witness #1, or the Mother, or the Parent, herein.

Witness #2. Telecia Kennard, Speech Pathologist, identified as Witness #2, or District Speech Pathologist, herein.

Witness #3. Markela Horton, Special Education Inclusion Teacher, identified as Witness #3, or Inclusion Teacher, herein.

Witness #4. Greg Beard, Leake County Special Education Director, identified as Witness #4, or the Special Education Director, herein.

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

██████████ in the interest
of the minor child, ██████████

COMPLAINANT

v.

CASE NO. D01172019-17

Leake 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 Amendment of 2004*" (collectively referred to as the State Policies or the IDEA, herein), and involves 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 January 17, 2019.

PARTIES

2. The Student is a 6-year-old male in the School District with a Language/Speech

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.

Fluency eligibility ruling.³ During the 2018-2019 academic year, additional evaluations determined the Child also met the criteria for Other Health Impairment – Attention Deficit Hyperactivity Disorder.⁴ The respondent is a Mississippi Public School District (District, herein) in which the Student was enrolled in the 1st grade.

ISSUES AND RELIEF REQUESTED

3. The Mother initially filed a REQUEST FOR DUE PROCESS HEARING UNDER PART B OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT OF 2004 AMENDMENTS received by the Mississippi Department of Education January 17, 2019. During the course of the final prehearing conference held February 6, 2019, the parties agreed that the issue(s) in the Complaint appropriate for consideration requested in the due process hearing were:

A Free Appropriate Public Education (FAPE) has not been provided due to a pattern of indifference to the procedural requirements of IDEA, and inadequate Language/Speech instruction.

Accordingly, this is the only issue that will be addressed in this opinion and order.

PROCEEDINGS

4. The due process hearing convened March 5, 2019 in the District Board Room. The Complainant called one witness, the Mother who had filed the complaint. The District identified twenty (20) witnesses, but at the request of the hearing officer only the Speech Pathologist, the School Psychometrist, the Special Education Inclusion teacher, and the Special Education Director were asked to testify.

³ District Exhibit 1

⁴ District Exhibit 2

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).⁵ 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);

7. If, based on that evaluation, “...a determination is made that a child has a disability and needs special education and related services, an Individualized 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.” The District provided sufficient evidence that these State Procedures had been properly implemented.

FACTS

8. The Student was enrolled in the 1st grade during the 2018-19 school year and had attended kindergarten in the District the year prior. While in kindergarten, the Child was evaluated and determined to be eligible for Language/Speech services.⁶ The eligibility ruling

⁵ 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.

⁶ District Exhibit 1

changed during the 2018-19 academic year to include Other Health Impairment – ADHD with the current IEP reflecting speech services 1 x weekly for 30 minutes, and behavioral goals to address inattention, hyperactivity/impulsivity issues.⁷

9. According to her testimony, the Mother specified the Child had been placed on a Do-Not-Paddle list, but he had been paddled twice during the current school year. In addition to the corporal punishment issues, the Mother testified that the District was negligent in dealing with a fight between her son and an older student that occurred on a bus the week the students got out for Christmas break.⁸ The Mother's complaint also included an alleged accusation that the District was not providing appropriate instruction in the general education class because of a long-term substitute who had taken the place of the 1st grade teacher who was out due to illness.

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 placement." *Cyprus Fairbanks Independent School District v. Michael F.*, 118 F. 3rd 245, ¶4 (5th Cir. 1997).

⁷ District Exhibit 2

⁸ Transcript pp. 47-49

11. The Parent(s), as challenger of the District's actions, 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 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 violations, 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: A Free Appropriate Public Education (FAPE) has not been provided due to a pattern of indifference to the procedural requirements of IDEA, and inadequate Language/Speech instruction.

14. The Parent's primary complaint was that the District had violated procedural requirements of IDEA because corporal punishment had been administered without parental consent, a spelling test and a vocabulary test had been administered without appropriate accommodations, and that the Child was not receiving reading fluency instruction as specified in the IEP. Also, the Parent claimed the District was negligent when it took no action when the

Child was involved in a fight on the bus that resulted in the Child being taken to the emergency room.

15. Subpart B – State Eligibility §300.101 states “FAPE must be available to all children with disabilities residing in Mississippi between the ages of three (3) and (20)...” In determining whether a student receives a FAPE, the Courts apply four factors that serve as indicators used in calculating programs/plans intended to provide meaningful educational benefits related to students identified with disabilities. These are: (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. *Cypress-Fairbanks Independent School District v. Michael F.*, 26 IDELR 303, 118 F.3d 245 (United States Court of Appeals, Fifth Circuit, 1997).

16. Of the four indicators mentioned above, the initial IEP as well as the revised IEP, satisfies all but one of these points. Due to an extended illness, the first-grade class in question was being taught by a long-term substitute who was not a certified teacher. No evidence was presented that would support a coordinated and collaborative effort between the substitute general education teacher, the special education teacher, and the Parent. Because of these personnel issues, the District failed to notify the parent of progress reports and disciplinary action taken on two occasions. However, procedural violations such as failure to notify parents of progress reports, report cards, discipline referrals, etc. do not constitute a loss of educational opportunity. *Adams J. v. Keller Independent School District*, 328 F3.d 804, 39 IDELR 1 (United States Court of Appeal, 5th Circuit, 2003). Likewise, district personnel’s failure to adhere to local policies regarding corporal punishment did not create or cause a loss of educational opportunity.

Although the Child was punished for exhibiting severe behavior problems typically associated with ADHD, he continued to make progress affording him an educational benefit. Therefore, FAPE has been provided.

17. The complaint alleged the District demonstrated patterns of indifference to procedural requirements of IDEA because the Child was given a spelling test and a vocabulary test without proper accommodations and that the Child was not receiving special education instruction in reading fluency. The Child was eventually provided the accommodations and allowed to re-take the tests and the grades were changed.⁹ Also, the District provided sufficient evidence the Child received special education instruction in the area of reading fluency for 30 minutes weekly as specified in the IEP.¹⁰

18. The Parent testified the Child had been in an altercation on a bus and the District had taken no action. Reportedly, an older student “assaulted”¹¹ the Child on December 14, 2018 on the way home from school. Without a request from the Parent, or permission from the District, the Child was allowed to board a different bus than the one he usually rides. The fight resulted in injuries that required the Parent to take the Child to the emergency room.¹² The Parent’s complaint was the District had made no effort to contact her regarding the Child’s injury, the District had not taken any action against the older child, nor had the District taken any action against the bus driver for allowing the Child to board the wrong bus. However, testimony and evidence presented supported the District’s claim that the Assistant Principal had called the Parent the evening of December 14 checking on the Child. The District also provided evidence

⁹ The tests in question were given in September, but accommodations and re-testing was not done until October.

¹⁰ Transcript pp 94; 101-102; 116

¹¹ Transcript p 45

¹² Transcript pp 46-50

that the Assistant Superintendent called the Parent during the Christmas holidays to discuss the incident.¹³ Regardless, the incident nor the handling of the incident, constitutes a denial of FAPE.

19. 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..." clearly in the hands of the school district. The District provided evidence that demonstrated appropriate steps had been taken in identifying the Child who they suspected of having a disability. The District recognized a Language/Speech problem when the Child was in kindergarten, conducted the appropriate assessments, followed appropriate protocol regarding prior written notice and parental participation, developed an IEP that was appropriate, and provided proper accommodations based on the IEP. The IEP was revised the following year when the Parent requested a re-evaluation to determine if the Child met the criteria for Attention Deficit Hyperactivity Disorder (ADHD). The District psychiatrist conducted the appropriate evaluations and the IEP Committee concluded ADHD as the primary eligibility category and Language/Speech-fluency as the secondary eligibility category.¹⁴

20. Based on the evidence presented, the District was in compliance with the procedural requirements of IDEA in providing the Child a free appropriate public education (FAPE). No evidence or testimony was provided that supported the claim of indifference on behalf of the District toward the procedural requirements specified in the Law. The District properly evaluated the Child and took appropriate steps in monitoring the Child progress.

¹³ Transcript pp 50-55

¹⁴ District Exhibit 2; Transcript pp 99-101


CONCLUSION

21. The Parent **failed** to sustain the burden of proof in her claim that the child had been denied FAPE due to actions and/or inactions of the District. There being no violations or denial of a free appropriate public education, the Parent's complaint is **dismissed**.

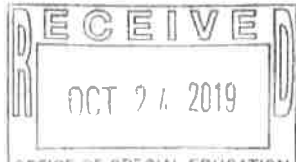
RIGHT TO APPEAL

22. 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 21th day of March, 2019.



David P. Daves, Ph.D.
Hearing Officer



BEFORE THE MISSISSIPPI DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION

██████████ in the interest
of the minor child, ██████████

COMPLAINANT

v.

CASE NO. D08122019-05

Harrison County School District

RESPONDENT

DECISION AND ORDER

ISSUES AND RELIEF REQUESTED

The mother initially filed a *REQUEST FOR DUE PROCESS HEARING UNDER PART B OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT AMENDMENTS OF 2004* received by the Mississippi Department of Education August 12, 2019. During the course of the final pre-hearing conference held September 4, 2019, the parties agreed that the issues in the Complaint appropriate for consideration requested in the due process hearing were:

1. A Free Appropriate Public Education (FAPE) has not been provided due to failure to implement an IEP that addresses placement and accommodations required.
2. The Child’s Educational Placement – the District 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*.
3. Child Find – the District has failed to take appropriate steps in identifying the Child who is suspected of having a disability under §300.8 and in need of special education services in the area of behavioral intervention.
4. Procedural Safeguards – the District has failed to meet the Procedural Safeguards requirement of IDEA related to Prior Written Notice, Parental Consent, and Access to Student’s educational records.

PROCEEDINGS

The due process hearing convened October 16, 2019 in the District Board Room. Prior to the start of the hearing, a settlement agreement was reached between both parties. Elements of the agreement include:

1. The student, ██████████ will continue to receive homebound services with the following additions: (a) she will receive 16 hours of compensatory services for reading and math; and, (b) she will receive one hour of additional reading intervention per week for 12 weeks.

2. The District will pay for an assessment of [REDACTED] at Huntington.
3. The IEP Committee will reconvene within 30 days of receiving the Huntington assessment to reconsider the issues of placement and least restrictive environment.
4. The parties agree to deal with each other in good faith in an attempt to honor the terms of this settlement. They agree to cooperate and communicate with respect to all matters, including scheduling and available times.

CONCLUSION

The mother testified that the abovementioned resolution satisfied her concerns regarding the provisions of Free Appropriate Public Education, disputes related to the Child's Educational Placement, concerns associated with Child Find issues, and matters involving Procedural Safeguards. There being no unresolved matters associated with Case No. D08122019-05, I recognize the parent's withdrawal of this complaint and consider the case settled.

So ordered, this the 17th day of October, 2019.



David P. Daves, Ph.D.
Hearing Officer

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

**[REDACTED] IN THE INTEREST
OF HER MINOR CHILD,
[REDACTED]**

COMPLAINANT

V.

CASE NO. D12052018-13

NOXUBEE COUNTY SCHOOL DISTRICT

RESPONDENT

DECISION AND ORDER

Complainant: [REDACTED]
[REDACTED]
Macon, Mississippi 39341

Subject Child: [REDACTED] (Child, herein)

Respondent: Noxubee County School District
Post Office Box 540
37 Gandy-Tindal Road
Macon, Mississippi 39341

**THIS COVER PAGE IS FOR IDENTIFICATION OF THE PARTIES TO THE ORDER,
ONLY. IT IS TO BE FILED WITH THE ADMINISTRATIVE RECORD IN THIS
MATTER MAINTAINED BY THE MISSISSIPPI DEPARTMENT OF EDUCATION.
FOR PROTECTION OF THE PRIVACY OF THE PARTIES, IT IS NOT TO BE
DISSEMINATED BUT IS TO REMAIN ATTACHED TO THE ORIGINAL ORDER IN
THE FILES OF THE ADMINSTRATIVE RECORD.**

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

**PARENT, IN THE INTEREST OF
HER MINOR CHILD**

COMPLAINANT

V.

CASE NO. D12052018-13

SCHOOL DISTRICT

RESPONDENT

DECISION AND ORDER

1. This is a proceeding pursuant to the Mississippi State Policies Regarding Children with Disabilities Under The Individuals with Disabilities Education Act Amendments of 2004,¹ [Mississippi] State Board [of Education] Policy 7219 (Policies, herein).

PARTIES

2. The Parties are the Complainant Parent (Parent or Complainant, herein) and the Respondent School District (School District or District, herein).²

JURISDICTION

3. The hearing officer and the Mississippi Department of Education have jurisdiction over this proceeding (including the parties to and the subject matter of thereof) pursuant to the Mississippi State Policies Regarding Children with Disabilities Under The Individuals with Disabilities Education Act Amendments of 2004, which Policies were adopted under the authority of The Individuals with Disabilities Education Act (IDEA), Public Law 101476, reauthorized as

¹The Individuals with Disabilities Education Act (IDEA), Public Law 101476, reauthorized as The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), Public Law 108-446 and 20 U.S.C. Sections 1400 et seq.

²The Complainant Parent, the Child, and the Respondent School District are identified by name on the cover sheet to the original of this order filed with the Mississippi Department of Education in the file with that department corresponding to the above case number and on an identification page appended to this document.

The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), Public Law 108-446 and 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300.

THE COMPLAINT

4. Parent initiated this proceeding on behalf of her minor child, a three year old student³ at the County Head Start Center [HSC], by filing on December 5, 2018, a form state complaint alleging that the Child was being denied a free appropriate public education (FAPE) for the reason that, from August 10, 2018, through the date of the filing, the Child had not received speech therapy services as provided by her Individualized Education Program (IEP). She proposed by way of resolution of the matter that the specified services be provided to the Child and that "all missed sessions [be] made up."

5. A hearing was held in the matter on April 12, 2019,⁴ with the Parent proceeding pro se, the Respondent District represented by counsel, and the undersigned as hearing officer.

FACTS

6. The first witness the Parent called was the District's Speech Pathologist [SP, herein]. The SP testified that she was the District's only speech pathologist for the school year 2018-2019 and that she had a caseload of approximately 80 students. Of those eighty, four were at the Head Start Center, one of the four being the Child. She agreed that the Child's IEP called for 50 minutes of speech therapy per week.

7. The SP said that she ordinarily tried to have her speech therapy sessions at the Head Start Center where the Child is a student on Wednesdays, but, due to meetings that sometimes conflicted

³Born August 10, 2015.

⁴Orders extending the time for completion of this matter were entered pursuant to the Policies.

with that schedule, she could not always hold the sessions on Wednesdays and, accordingly, did not consider Wednesday to be the “regular day” for her sessions.

8. Among other things, she said, “[W]e make a schedule, like a monthly schedule. And then it depends on whether like there are some eligibility meetings that are happening that it's not my control. . . . So when there's a meeting, I will not be able to come. And then I'll try to make up on other days. That's why Wednesday is not the regular day.” She also testified that she did not “provide a schedule [for speech services] to the” HSC. Rather, she said, “we just go to the school [the HSC] and serve.” She also testified that if a child who receives speech therapy is absent when she makes her visit to the Head Start Center, it is her usual practice to hold “make-up sessions the next time the child is present. The next trip when I go there.”

9. According to her testimony, the SP would sign in when she went to the HSC in one of two sign in logs maintained by the HSC. Sometimes she would sign on one and sometimes on another.

10. Exhibit 1, offered into evidence by the Parent, included a page (the first page of the exhibit) containing a recapitulation of the SP’s notes concerning her service and attempted service to the Child. The SP testified that the page was prepared from information taken from Spedtrack, software used by the District to document IEPs and related meetings, and agreed that it was an accurate compilation of therapy sessions provided to the Child.

11. The SP’s testimony and the recapitulation based on the Spedtrack software indicated the following concerning the SP’s services to the Child.

August 2018

12. The Child's first speech therapy session was to have been on Wednesday, August 15, 2018. That session was not held, however, due to the Child's absence. The SP testified that she [the SP] did not go to the Head Start Center for a session on August 22 because she was out of town. The SP also held no sessions on August 29, due to a conflicting IEP meeting.

September 2018

13. The SP testified that she went to the Head Start Center on September 10th (a Monday) to hold a makeup session for the Child but the Child was absent. The SP did not go to the HSC on the 12th (a Wednesday) due to a conflicting IEP meeting or on 19th because of conflicting student testing. When she attempted make-up sessions on the 24th (a Monday), and the 26th (a Wednesday), the SP testified, the Child was absent.

October 2018

14. The SP agreed that she signed into the HSC on October 3 at 10:23 and signed out at 10:27. She also testified she attended a meeting at the HSC that day. When asked if she had a therapy session with the Child after she signed out, she said that she could not remember whether she had a session with the Child that day or not. The recapitulation of services (page one of Exhibit One) prepared from information taken from Spedtrack, however, reflected that speech therapy services were provided to the Child on October 3. No services were provided during the week of October 10 due to the District's scheduled Fall Break. The SP testified that she held therapy sessions with the Child on Wednesday, October 17, and on Wednesday, October 24. No session was held on Wednesday, October 31, but one was held on Friday of that week (Nov. 2).

November 2018

15. The SP further testified that she held speech therapy sessions with the Child on Friday, November 2, and on Wednesday, November 7. She said she called the HSC to see if the Child was available for a makeup session on November 13, but the Child was absent. The child was also absent on November 14, 26, and 29.

16. When asked by the Complainant why she was not shown as signing in on October 17 and 24 and on November 2 and 11, the SP testified that there were two sign up sheets and that she signed in but on a different sheet from the one about which Complainant questioned her.

17. The second witness called by the Complainant was the HSC Director. The HSC Director began her testimony by stating that, although she was supervisor at the HSC, the Disability Director (her superior), was the spokesperson for the HSC. The HSC Director confirmed that there were two sign in books, one intended for parents and one for visitors. She testified that sometimes persons signed in the wrong book. She also testified that the District provided her with no specific information as to days speech therapy services would be provided or as to when make-up days would be held. Generally, this witness's knowledge of the services provided by the SP was limited and not helpful in resolving the question as to what services were or were not provided.

18. The Complainant's final witness was the Disability Director, the supervisor of the Center Director. Among other things, she testified that service provider logs had been provided to her by the Center Director. She agreed that, according to the logs provided to her, no speech therapy services were provided to the child from August to December except for November. She also testified that there were at least three separate sign in logs and that it was possible that when

records were submitted to her by Ms. Williams some sign in sheets might not have been sent.

19. The Complainant asked, "If the sign in sheets are not signed as well as the Service Provider Logs, can you conclude that the services were not given?" The Disability Director replied, "I don't believe you can conclude that. Because you can sign in the front and maybe forget in the classroom or vice versa. You forget to sign in front. I don't think you can conclude that services weren't rendered because the lack of signing in one place versus another."

20. Because the Disability Director was testifying from documents provided to her by the HSC Director and not from firsthand knowledge, and because she stated that the those documents were not conclusive as to whether services were provided, her testimony is not helpful regarding the number of speech therapy sessions provided to the child.

21. The Respondent called no witnesses.

LAW

22. The Parent, as challenger of the District's actions, has the burden of proof as to issues presented in this matter. *See, Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 808 (5th Cir. 2003). A hearing officer's role is not to second guess state and local policy decisions but to determine whether state and local school officials have complied with applicable law, and if not, what the proper remedy should be. *Flour Bluff Independent School. Dist. v. Katherine M.*, 91 F.3d 689, 693 (5th Cir. 1996).

23. The purpose of the IDEA "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living ... [and] that the rights of children with disabilities and parents of such children

are protected." 20 U.S.C.A. § 1400(d)(1)(A)-(B). States receiving federal funds must make a Free Appropriate Public Education (FAPE) available to all children with disabilities living within the state. *Forest Grove Sch. Dist, v. T.A.*, 129 S. Ct. 2484, 2487 (2009). Each child between the ages of three and twenty with a disability must be evaluated by the local or state educational authority in order to develop a written "individualized education program" ("IEP") for the child, including special education and related services, 20 U.S.C.A. § 1414(d); Policies § 300.101. Related services include speech-language pathology and audiology services. Policies § 300.34.

24. The IDEA as implemented by Mississippi's State Policies does not require that a school district provide the best education possible. Rather, the law requires only that a district must provide access to public education that is "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).

25. The U. S. Supreme Court has established a two part test for determining whether FAPE has been provided or denied. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? *Board of Education v. Rowley*, 458 U.S. 176, 206-207 (U.S. 1982).

26. There being no procedural violations alleged by the Complainant or established at the hearing, it is appropriate to begin with the second question: was the IEP "reasonably calculated to enable the child to receive educational benefits?" Four factors are used to make that determination:

- (1) whether the program is individualized on the basis of the student's assessment and performance;

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

Adam J. v. Keller Independent School District, 328 F.3d 804, 810 (5th Cir. 2003).

27. Since the Complainant has not disputed the District’s actions regarding the first two factors, only factors three and four will be considered here.

28. First, were the services provided in a coordinated and collaborative manner by the key “stakeholders?” The Child’s IEP indicates that the IEP Committee, citing the Child’s comprehensive assessments as the basis for its decision, determined that the Child would “receive speech therapy 50 minutes once a week.” From the week of August 15, 2018, the first week the child was to have received speech services at the HSC, through the date of filing of the Complaint, there were approximately 13 weeks [not counting the fall break and Thanksgiving weeks] in which the Child should have received the speech therapy services provided by the IEP. In that time, according to the testimony of the SP, the Child received only five speech therapy sessions. Four of the eight missed sessions (August 22 and 29; September 12 and 19) were missed due to conflicts the SP had in her schedule.

29. The SP testified that the Child had poor attendance, a statement not contradicted by any other evidence. “[T]he general rule is that if the school district makes IEP services available to the student at the normally scheduled time, the school district is not obligated to make other arrangements to provide services if the disabled student is absent from school at that time for reasons other than his or her participation in school-sponsored activities. See, *Letter to Balkman*,

23 LRP 3417 (OSEP April 10, 1995). On the other hand, if the therapy is missed due to the absence of the therapist, “the school district would be required to make other arrangements to provide the services at that time or reschedule the required IEP services in order to meet its responsibility of providing FAPE to that student in accordance with his or her IEP.” *Id.* Had the District established a regular time for speech therapy sessions and make-up sessions and communicated the same to the Parent, it might well have fulfilled its duty to offer FAPE in the circumstances according to the opinion expressed in *Letter to Balkman*.

30. The SP’s testimony, however, was unclear as to whether a “normally scheduled time” was set for the Child’s services. When asked if there was a regular or specific day and time when [the Child] is to receive services, she answered: “Before I scheduled it Wednesday.” She added, “[W]e make a schedule, like a monthly schedule. And then it depends on whether like there are some eligibility meetings that are happening that it’s not my control. . . . So when there’s a meeting, I will not be able to come. And then I’ll try to make up on other days. That’s why Wednesday is not the regular day.” She also testified that she did not “provide a schedule [for speech services] to the Head Start.” Rather, she said, “we just go to the school and serve,” and said, “we will call the family usually if there’s some changes.” She also testified, however, that she “wasn’t able to call” the Parent in this matter.

31. According to the SP, she provides “make-up” sessions when a regular session is missed either due to a child’s absence or her own. These make-up sessions are not provided according to a particular schedule, she said, but “the next time the child is present. The next time I go there.” The lack of a set schedule for the weekly speech therapy sessions or for the make-up sessions held

according to the SP's practice would understandably make it difficult for a parent to insure a child received services in the event of absences.

32. Given the fact that the parent was not provided with a schedule for services and make-up sessions were not provided according to any set schedule, and in view of the failure of the District to contact the parent concerning absences or make-up sessions, I find that the speech pathology services were not provided in a coordinated and collaborative manner.

33. The remaining question is whether positive academic and non-academic benefits are demonstrated. The evidence establishes that only five of thirteen weekly therapy sessions were held during the relevant time period. Although the Parent established that well over half of the Child's speech sessions were not held, the District did not offer any evidence of academic or non-academic benefits to the Student notwithstanding the missed sessions. In view of the foregoing, I cannot find that academic and/or non-academic benefits were demonstrated.

34. Although *Jefferson Parish (La) Public School System*, 71 IDELR 132 (August 28, 2017), the Office for Civil Rights (OCR), Southern Division, Dallas (Louisiana), involved a civil rights complaint under § 504 of the Americans with Disabilities Act rather than a complaint pursuant to the IDEA, it is instructive as to whether FAPE was provided in the instant case. In *Jefferson Parish*, the OCR had before it a complaint that FAPE had been denied to a kindergartener who had missed some 18 of 39 scheduled speech therapy sessions. The OCR found that where the child missed almost half of the speech therapy sessions provided for by his IEP, there was "sufficient evidence to support a conclusion of noncompliance . . . with regard to the provision of a FAPE to the Student." See also *Lowndes County (GA) School District*, Office

for Civil Rights, Southern Division, Atlanta (Georgia) (December 19, 2016), 9 GASLD 78, 117 LRP 16924.

35. Considering the facts of this case in the light of the *Adam J.* factors and the OCR ruling in *Jefferson Parish*, supra, the hearing officer finds that the District has not complied with its obligation to provide FAPE due to its failure to provide the speech therapy services to the Child as provided in the Child's IEP.

RELIEF GRANTED

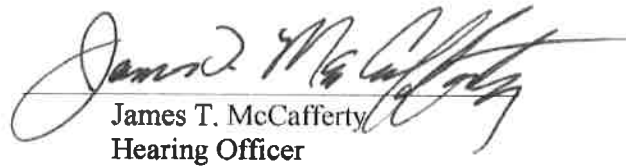
36. The foregoing considered, the District is ordered

- (1) to provide from here forward any and all speech therapy services as may be prescribed by the Child's IEP;
- (2) to provide the Parent within 30 days of this date a schedule for make-up sessions as normally conducted by the SP in the case of missed sessions for the eight therapy sessions missed by the Child from August 15, 2018, through the filing of the Complaint, with those sessions to be offered on days and during hours the child ordinarily would be in attendance at the HSC;⁵ and
- (3) in the event of any deviation from the above schedule necessitated by changes in the schedules of District or HSC employees or for other good cause, to contact the parent to arrange alternative times for regular or make-up speech therapy sessions, with such sessions, unless agreed to

⁵In order to avoid future problems with the provision of services, it is suggested, but not ordered, that the District provide the Parent on a regular basis with a schedule for the Child's speech therapy sessions and for opportunities for make-up sessions.

otherwise by the Parent and the District, to be held on days and during hours
the child ordinarily would be in attendance at the HSC.

So ordered, this the 17th day of May 2019


James T. McCafferty
Hearing Officer

**BEFORE THE MISSISSIPPI DEPARTMENT OF EDUCATION
SPECIAL EDUCATION CASE NO. D05162019-27**

HEARING DECISION AND FINAL ORDER

I. PROCEDURAL HISTORY

This matter was filed by Complainant (Petitioner), [REDACTED] on behalf of [REDACTED], Student, against Aberdeen Separate School District (Respondent) on May 16, 2019 and was assigned to this Hearing Officer by the Mississippi Department of Education. Mediation was convened in lieu of a resolution meeting on June 12, 2019. An Order to Extend Timeline for Good Cause was entered on July 30, 2019. The due process hearing convened on August 28, 2019. Petitioner proceeded *pro se*, and Respondent was represented by Hon. Nathaniel Armistad.

II. EXHIBITS ADMITTED INTO EVIDENCE

Exhibits were submitted by the parties and accepted by this Hearing Officer. These exhibits have been examined by this Hearing Officer subject to the issues presented in the due process complaint. The documents and materials have been in the constant possession of this Hearing Officer until the rendering of this decision. Hereafter, they will be delivered to the Mississippi Department of Education. The documents were examined and the weight given to each was based upon the contents of the document which was submitted and not on which party introduced said document. This Hearing Officer has examined the exhibits based upon the substantive nature contained therein for the purpose of making a decision in this matter.

III. BURDEN OF PROOF

The burden of proof in this matter is upon Petitioner as the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005).

IV. ISSUE PRESENTED

The sole issue presented in Petitioner's Complaint¹ was: "I am filing Due Process for Complaint No. 02072019-55 Findings for Allegation No. 2: Compliant"².

V. DISCUSSION OF THE ISSUE

The sole issue presented in Petitioner's Complaint was: "I am filing Due Process for Complaint No. 02072019-55 Findings for Allegation No. 2: Compliant". The following facts were asserted in Petitioner's Complaint: "[Student] did not verbally admit being bullied. [Student] stated that [Student] was not being bullied at the present time because [Student] was in alternative school." The following proposed resolution was requested in Petitioner's Complaint: "The school district be held accountable for not addressing the bullying issue according to school policy."

Student was in the ninth grade during the 2018-2019 school year and 15 years of age. Student was involved in the purchase of drugs with at least one other student in a car in the parking lot of the school where Student attended. Student testified at the hearing that another student pulled out a gun during the exchange. Student took the purchased drugs home that evening. Student then brought the drugs back to school the next day and distributed said drugs to at least one other student. Student testified at the hearing that Student lied to the school principal when initially questioned but later admitted distributing the drugs.

¹ Petitioner's Complaint was insufficient as a matter of law because Petitioner did not indicate on the complaint how the problems complained of resulted from a proposed or refused initiation or change as required. See 34 C.F.R. § 300.508(b)(5); *Miss. Admin. Code* 7-3:74.19, State Board Policy Chapter 74, Rule 74.19, § 300.508(b)(5). However, Petitioner's Complaint was deemed sufficient because Respondent did not notify both this Hearing Officer and Petitioner in writing within 15 days of receipt of the due process complaint that said complaint was insufficient. See 34 C.F.R. § 300.508(d)(1); *Miss. Admin. Code* 7-3:74.19, State Board Policy Chapter 74, Rule 74.19, § 300.508(d)(1).

² Petitioner filed a Formal State Complaint with the Mississippi Department of Education Office of Special Education on February 7, 2019. Issue No. 2, as ascertained by the Mississippi Department of Education Office of Special Education, was whether "[t]he [Aberdeen Separate School District] failed to address allegations of bullying that was impacting [Student's] FAPE." The Mississippi Department of Education Office of Special Education issued its findings in a written decision on April 5, 2019, finding the Aberdeen Separate School District compliant with Issue No. 2.

The request for due process hearing alleges that Student was bullied into buying the drugs in the school parking lot because another student pulled out a gun during the exchange. The Aberdeen Separate School District's Bullying Policy defines bullying as:

any pattern of gestures or written, electronic, or verbal communications, or any physical act or any threatening communication, or any act reasonably perceived as being motivated by any actual or perceived differentiating characteristic that:

- (a) Places a student or school employee in actual and reasonable fear of harm to his or her person or damage to his or her property, or
- (b) Creates or is certain to create a hostile environment by substantially interfering with or impairing a student's education, including but not limited to educational performance, opportunities, or benefits.

Whether the Aberdeen Separate School District complied with its bullying policy is outside the scope of this Hearing Officer's jurisdiction, as this Hearing Officer only has authority to determine whether the Aberdeen Separate School District complied with the *Individuals with Disabilities in Education Act of 2004*, its implementing regulations, and the implementing state code. However, even if bullying did occur, it does not rise to the denial of a Free, Appropriate Public Education guaranteed to Student by the *Individuals with Disabilities in Education Act of 2004*. The *Individuals with Disabilities in Education Act of 2004* "requires an educational program reasonably calculated to enable a child to make progress in light of a child's circumstances". *Andrew F., etc. v. Douglas County School Dist. RE-1*, 137 S.Ct. 988, 1000 (2017). Furthermore,

. . . [T]he IDEA requires that children with disabilities receive education in the regular classroom "whenever possible." . . . (citing §1412(a)(5)). When this preference is met, "the system itself monitors the educational progress of the child." . . . "Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material." Progress through this system is what our society generally means by an "education." And access to an "education" is what the IDEA promises. *Ibid.* Accordingly, for a child fully integrated in the regular classroom, an IEP typically should, as *Rowley* put it, be "reasonably

calculated to enable the child to achieve passing marks and advance from grade to grade.”

Id. at 999, citing and quoting *Board of Educ., etc. v. Rowley*, 458 U.S. 176 (1982). None of the testimony at the hearing demonstrated that Student’s ability to progress from grade to grade was impacted. The exhibits show that Student did progress from grade to grade during the applicable statute of limitations. Therefore, this Hearing Officer finds that Student was not denied a Free, Appropriate Public Education pursuant to the *Individuals with Disabilities in Education Act of 2004*.


VI. SPECIFIC RULINGS AND CONCLUSIONS

- A. This Hearing Officer finds that, based upon the preponderance of the evidence, Respondent did not deny Student a Free, Appropriate Public Education mandated by the *Individuals with Disabilities Education Act of 2004*.
- B. This Hearing Officer finds that, based upon the preponderance of the evidence, no form of relief is warranted.

VII. FINAL ORDER AND NOTICE OF APPEAL RIGHTS

This Decision constitutes a Final Order in this matter. Any party dissatisfied with the decision may bring an appeal pursuant to 20 U.S.C. §1415(i)(2).

SO ORDERED this the 13th day of September, 2019.


AMANDA DICKERSON BRADLEY
HEARING OFFICER

cc: Ms. [REDACTED]
[REDACTED]
[REDACTED]
Hon. Nathaniel Armistad