

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

PARENT,¹ ON BEHALF OF HER CHILD

COMPLAINANT

v.

Case No. D01092023-15

JONES COUNTY SCHOOL DISTRICT

RESPONDENT

FINAL DECISION AND ORDER

1. This matter having come before me, the undersigned hearing officer, upon the Complaint of the Parent for a Due Process Hearing, and a hearing having been held on the same on February 27, 2023, I, having considered said Complaint and the Response of the District thereto, as well as the testimony of the witnesses, other evidence submitted, and the arguments of the parties, and having considered the same, find and order as follows:

PARTIES

2. The parties to this proceeding are the Parent and the Respondent Jones County School District (the District, herein).

JURISDICTION

3. The hearing officer and the Mississippi Department of Education have jurisdiction over this proceeding and the parties hereto pursuant to the Mississippi “State Policies Regarding Children with Disabilities Under ‘The Individuals with Disabilities Education Act Amendments of 2004, 7 Miss. Admin. Code Pt. 34, Ch. 74, Rule 74.19 (State Policies, herein),” which State Policies were adopted under the authority of Mississippi’s Exceptional Children Law, §§ 37-23-1 through -159, and “The Individuals with Disabilities Education Act (“IDEA”),” Public Law

101476, reauthorized as "The Individuals with Disabilities Education Improvement Act of 2004 ("IDEA")," Public Law 108-446 and the policies and regulations promulgated pursuant thereto. 20 U.S.C. §§ 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300.

PROCEEDINGS

4. The Parent initiated this proceeding on or about January 9, 2023, with the filing of a Complaint² for Due Process (dated January 6, 2023) pursuant to §300.508 of the State Policies. The District filed a Response as required by law, including with that document a Motion to Dismiss challenging the sufficiency of the Complaint by alleging it "fail[ed]to comply with the requirements under Mississippi law and the Individuals with Disabilities Act" for Complaints for Due Process. More specifically, the District argued (1) "that the Complainant . . . failed to sufficiently articulate a description of the nature of the problem relating to any proposed initiation or change, including facts relating to the problem, and a proposed resolution of the problem to the extent known and available to the party at the time," and that (2) "the Complainant . . . failed to identify any matter relating to a proposal or a refusal to initiate or change the identification, evaluation, or educational placement of the student or the provision of a free appropriate public education" as required by §300.508 (a) (1) of the State Policies. By order dated January 23, 2023, I found the Complaint sufficient on its face under the requirements of §300.508 (b) of the State Policies. The District subsequently filed a motion for Summary Judgment which was denied by my order of February 22, 2023. A hearing was held in the matter on February 27, 2023,³ with the Parent proceeding pro se, the Respondent District represented by counsel, and the undersigned as hearing officer.

5. The issues presented by the parent⁴ were
 1. Complainant contested the findings of the manifestation determination regarding her child;
 2. Complainant wanted the disciplinary measures meted out because of the behavior that prompted the manifestation hearing to be expunged from her child's record;
 3. Complainant's child (who is the subject of the complaint) was being bullied at school;
 4. the school did not discipline Complainant's child in accordance with the child's IEP; and
 5. Complainant's child needs a new Functional Behavior Assessment and Behavior Plan and/or IEP based upon the same.

THE HEARING

6. As the complaining party, the Parent had the burden of proof. See *Adam J. v. Keller Independent School District*, 51 F. 3d 804 (5th Cir. 2003). The Parent called seven witnesses: (1) the Student's Special Education Inclusion Teacher (Witness CW-1) (T. 17-38); (2) the Student's [REDACTED] School Counselor (Witness CW-2) (T. 39-48); the Student's Mental Health Therapist (Witness CW-3) (T. 50-64); the Student's class mate and self-described best friend (Witness CW-4) (T. 65-70); the Student's older sister (Witness CW-5) (T. 71-73); the Student's brother (Witness CW-6) (T. 74-77); and the Student (Witness CW-7) (T. 78-84).

7. The District called five witnesses: the Student's English teacher (Witness DW-1) (T. 84-90); the student's General Education Teacher (Witness DW-2) (T. 91-94); the District Behavior Specialist (Witness DW-3) (T. 95-106); the [REDACTED] School Principal (Witness DW-4) (T. 106-139); and the District Special Education Director (Witness DW-5) (T. 140-153).

8. The testimony and exhibits offered established that the child (hereinafter referred to as the Student) in question in this matter is a [REDACTED] grader with a special education eligibility ruling of emotional disability who at all times relevant hereto was a student in the District. [REDACTED] also has a diagnosis through Mississippi Behavioral Health Services [MBHS] of "ADHD, bipolar, and psychosis." T. 51. According to [REDACTED] Mental Health Therapist (Witness CW-3) the student has had "verbal hallucinations, hearing things that's not there." T. 52. The same therapist testified that the Student "has poor impulse control, that [REDACTED] doesn't think about the consequences of [REDACTED] actions," and that "[REDACTED] doesn't always make good decisions." According to the testimony, prior to November [REDACTED] 2022, the Student "was very quiet, and [REDACTED] worked hard" (T. 86) and exhibited no violence or aggression at school. T. 107. On at least one occasion [REDACTED] expressed "suicidal ideation" to [REDACTED] school counselor (Witness CW-2). T. 43.

9. On November [REDACTED] 2022, a girl at the Student's school called the Student an offensive name. Later that day, according to the testimony of the Student's friend, Witness CW-4, the Student and Witness CW-4 made plans to "beat up" on the next day (November [REDACTED]) the girl who used the offensive term toward the Student. T. 69.

10. The [REDACTED] School Principal (Witness DW-4) testified that when he arrived at the school on November [REDACTED] 2022, he learned "there had been a situation on the campus involving a [REDACTED] school student." T. 108. He witnessed the school nurse "checking [a [REDACTED] student] out,

because [REDACTED] lip was busted, and it was bleeding.” T. 132. An unnamed “supervising principal” on campus earlier had “been getting statements from the kids that were involved in the situation” T. 108; T. 109. The Principal (Witness DW-4) showed video of the incident taken from campus cameras to the campus “resource officer,” a law enforcement officer. She advised the Principal that the video depicted an assault. The Principal asked the officer to call the youth court judge, which she did. She described the video to the judge and read to him statements taken from students, whereupon he issued a “pickup order” for the Student. T. 109. The Student was picked up by law enforcement authorities and held at the youth detention center until released to [REDACTED] mother later that day.

11. A manifestation determination meeting pursuant to § 300.530 was held by the School on November 14. The meeting included the Student’s [REDACTED] School Principal (Witness DW-4), the Student’s general education teacher (Witness DW-1), the Parent, the District Behavior Specialist (Witness D-3), and the Student’s Special Education Inclusion Teacher (CW-1). The committee determined that the incident of November [REDACTED] was not a manifestation of the Student’s disability. After that determination, the committee decided that the Student, as a consequence of [REDACTED] behavior, should be sent to the District alternative school for 45 days.

DISCUSSION OF THE ISSUES

THE MANIFESTATION DETERMINATION

12. The Parent challenges the District’s determination that the incident in which the Student punched another student in the face was not a manifestation of the Student’s disability. Before a child with a disability can be given a disciplinary change in placement exceeding ten

consecutive school days due to a violation of a student code of conduct a school district must convene within ten days of the decision to change placement a committee for the purpose of determining whether the violation was a manifestation of the child's disability. The committee must include the parent and relevant members of the child's IEP committee (as determined by the parent and the school district). The manifestation determination committee must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parent(s). State Policies, § 300.530 (e) (1).

13. From that review the committee must determine (1) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability or (2) if the conduct in question was the direct result of the District's failure to implement the IEP. State Policies, § 300.530 (3)(c). If the conduct violation is determined not to be a manifestation of the child's disability, the School may apply the relevant disciplinary procedure to the child in question "in the same manner and for the same duration as the procedures would be applied to children without disabilities," except that

(1) A child with a disability who is removed from the child's current placement . . . must (i) Continue to receive educational services, as provided in §300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and (ii) Receive, as appropriate, a functional behavioral assessment (FBA), and behavioral intervention services, and modifications, that are designed to address the behavior violation to prevent said behavior from recurring.

State Policies, § 300.530 (3) (d) – (e).

14. The committee convened on November 14, 2023, to determine whether the Student's behavior was a manifestation of ■■■ disability. The committee included the Student's English Teacher, Witness DW-1; the District Representative (the Principal), Witness DW-4; the

District Behavior Specialist, Witness DW-3); the Student's Special Education Inclusion Teacher, Witness CW-1); and the Parent. The Student's therapist, Witness CW-3, also was included. The committee unanimously concluded that the Student's punching of [REDACTED] fellow student on November [REDACTED] 2023, was not a manifestation of [REDACTED] disability.

15. The Parent's first witness (CW-1), the Student's Special Education Inclusion teacher, and the District's third witness (DW-3), the District Behavior Specialist, who both participated in the manifestation determination, testified that impulsive and reactive behaviors were characteristic of the Student's emotional disability. CW-1, T 26; DW-3, T 101. The punching of the child on November [REDACTED], however, was a planned, deliberate act. It was that premeditative aspect of the incident that caused those witnesses and the committee to conclude that the Student's striking of another student was not a manifestation of [REDACTED] disability. I found the testimonies of Witnesses CW-1 and DW-3 especially convincing since the former is frequently with the Student during the course of [REDACTED] school day and the latter's field is behavior.

16. Witnesses CW-5 (the sister of the Student) and CW-6 (the brother of the Student) both testified that they did not see the Student hit the child. Significantly, they did not deny that the Student hit the girl. The Student did deny striking the child. I do not find [REDACTED] testimony helpful on that issue, however, since [REDACTED] followed up that statement by saying [REDACTED] did not remember what [REDACTED] did. Moreover, [REDACTED] testimony at the hearing conflicted with the written statement [REDACTED] gave the day of the incident (November [REDACTED]) in which [REDACTED] wrote that [REDACTED] "punched her in the mouth." Exhibit 12, page 1. Witness CW-4 (the Student's best friend), agreed with her questioner on redirect that while [REDACTED] and the Student made plans to "beat up" the girl they were not going to execute those plans. Other statements from other students, including the Student,

however, make clear that the Student did in fact punch the girl in the lip. See Exhibit 12. I found it very significant that the Student's therapist (CW-3), a witness for the Parent, testified at the hearing that, although the Student's "diagnosis played a part in [redacted] inability to make a good decision," she did not believe it excused the Student's behavior on November [redacted].

17. The committee, having reviewed all relevant evidence in the child's file, including the child's IEP, teacher observations, and information provided by the Parent, unanimously determined that [the Student's] conduct [on November [redacted]] was not a manifestation of [redacted] disability and that disciplinary procedures applicable to children without disabilities would be applied. Exhibit 4, page 2 ; T. 88, T. 105, T. 121.

18. In the light of the foregoing, I find the Parent has failed to meet her burden of proof as to this issue and I affirm the District's conclusion that the incident of November [redacted] in which the Student struck another student was not a manifestation of [redacted] disability.

EXPUNGEMENT OF DISCIPLINARY RECORD

19. The Complainant also asks that the disciplinary measures meted out as a result of the Student's behavior be expunged from her child's record. It having been determined at the manifestation meeting that the Student's striking of another child was not a manifestation of [redacted] disability, the District then appropriately applied the same disciplinary procedures to the Student as it would to students without a disability. State Policies, § 300.530 (3) (c).

20. The Principal (Witness DW-4) testified (T 121-124) that the decision to place the Student at the alternative school was based on the Discipline Ladder Steps/Consequences from the District's Student Handbook. See Exhibit 6. The Student's punching of another child, he

testified, was categorized as an assault, for which there is a set of possible consequence options ranging from home suspension, for five to nine days, or a combination of in school suspension or out of school suspension equal to five to nine days, to a nine day suspension with a recommended expulsion for the remainder of the calendar year. Sixth on the list was a six day suspension, a 45 day placement at the alternative school, with an expulsion recommendation optional. The Student was suspended for three days and placed at the alternative school for 45 days, which was neither the least punitive nor the most punitive of the options available under District policy. Accordingly, the district complied with its policy in imposing the consequence it selected, he testified. T 124.

21. A hearing officer's task is not to second guess local school district decisions but to determine whether the district complied with applicable procedures. See *Flour Bluff Independent School District v. Katherine M.*, 91 F. 3d 689, 683 (5th Cir. 1996). In this case, in choosing a consequence for the Student's behavior of November █ the District applied its established disciplinary policies from its student handbook to the Student. Accordingly, I find the Parent failed to meet her burden of proof on this issue and I find for the District as to this issue.

BULLYING

22. A hearing officer's authority generally is limited to determining whether the District complied with the provisions of the Individuals with Disabilities in Education Act of 2004 and the state policies promulgated pursuant thereto. The issue of bullying⁵ normally falls outside that purview.⁶ Bullying of a student with a disability that results in the student not receiving a meaningful educational benefit, however, "constitutes a denial of a free appropriate public

education (FAPE) under the IDEA that must be remedied.” Dear Colleague Letter, OSERS, 61 IDELR 264, 113 LRP 33753 (August 20, 2013).

23. In this case the Student and witness CW-4 testified that the girl the Student struck on November █, 2022, called the Student offensive names. T 82; T 69. Witnesses CW-1 and CW-3 both testified that they were aware that the Student was kicked on one occasion. T 19. 4-5. The student also was slapped by a fellow student on another occasion. T 126.

24. Assuming but not finding that those incidents taken individually or collectively constituted bullying, the question becomes whether such bullying constituted a denial of FAPE. The evidence adduced at the hearing, however, did not establish that the incidents described above prevented the Student from receiving a meaningful educational benefit or otherwise affected █ academic progress. Accordingly, I find the Parent failed to meet her burden of proof as to the allegation of bullying and I find for the District on this issue.

**THE SCHOOL DID NOT DISCIPLINE
THE STUDENT IN ACCORDANCE WITH THE CHILD'S IEP**

25. There was no evidence adduced at the hearing supporting the proposition that the Student’s IEP required that █ be disciplined in a special way. Accordingly, I find the parent did not meet her burden of proof on this issue and I find for the District regarding the same.

DOES THE STUDENT REQUIRE A NEW FUNCTIONAL
BEHAVIOR ASSESSMENT AND BEHAVIOR INTERVENTION PLAN

26. Finally, the Parent has asked that the District be required to create a new Functional Behavior Assessment (FBA) and Behavior Intervention Plan (BIP) for the Student. In this case, two witnesses (the Student's Special Education Inclusion Teacher, CW-1, and the District Special Education Director, DW-5) testified that it was their understanding that the student at one time had a FBA and a BIP. T. 28; T 141. The IEP committee met before November ■ and discussed, among other things, the issues of an FBA and a BIP. According to the General Education Teacher (DW-2) it was determined that a BIP was not needed at that time. Handwritten notes on the "Prior Written Notice" document for a November 2, 2022, IEP Committee meeting confirm that the IEP Committee did discuss the issue of a BFA and BIP at that meeting and decided that "[i]n the event that one is needed in the future, appropriate paperwork and documentation will support it." Exhibit 7, page 13.

27. As previously noted, the State Policies provide that in cases in which the misconduct of a child with a disability resulting in a change of placement of more than ten days is determined *not* to be a manifestation of the child's disability, disciplinary procedures applicable to children without disabilities may apply to that child. State Policies, § 300.530 (c). There are two qualifications to that provision. First, the child must continue to receive the required educational services, and, second, the child must "[r]eceive, as appropriate, a functional behavioral assessment (FBA), and behavioral intervention services, and modifications, that are designed to address the behavior violation to prevent said behavior from recurring." § 300.530 (d).

28. In this case, given the evidence that the Student had not demonstrated aggressive behaviors prior to November ■, it is understandable that the District would not have determined an FBA and a BIP to be necessary at the November ■ meeting. The Student's history of "outbursts" and ■ "emerging behaviors," Ex. 5, pp. 4-5, however, in combination with the District's determination that the seriousness of ■ November ■ conduct required a 45 day placement at the alternative school, convince me that it is appropriate, if not required by § 300.530 of the State Policies, that the Student receive an FBA and that a BIP based upon the same should be implemented. Accordingly, I find for the Parent on this issue.

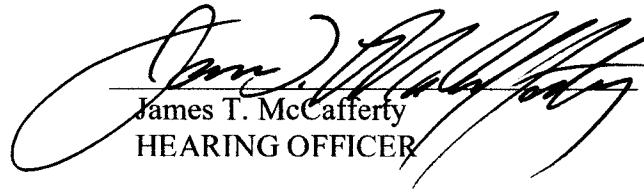
CONCLUSION

29. The foregoing considered, I find that the District should and hereby is ordered to conduct a Functional Behavior Assessment of the Student and to implement a Behavior Intervention Plan based upon the same, as provided by the Mississippi "State Policies Regarding Children with Disabilities Under 'The Individuals with Disabilities Education Act Amendments of 2004, 7 Miss. Admin. Code Pt. 34, Ch. 74, Rule 74.19, including but not limited to § 300.530 (d), not later than June 30, 2023, unless the District and the Parent agree in writing to a different date, in which case such agreed date shall serve as the deadline. All other requests for relief set out in the Parent's Complaint are denied and dismissed.

30. A party aggrieved by this Decision and Order may appeal as provided by State Policies 500.516 and 20 U.S.C. 81415(i)(2).

31. The original of this Decision and Order is to be filed with the Administrative Record in this matter maintained by the Mississippi Department of Education.

32. SO ORDERED, this the 4th day of April 2023


James T. McCafferty
HEARING OFFICER

¹The Parent's name, the name of the Child on whose behalf the Parent filed the Complaint for Due Process, the names of witnesses keyed to their respective designations in this document, and the names of schools and/or other entities appearing in this document are set forth on the two pages of cover sheets to this document that are to be a part of the original of this document maintained with the administrative record for this case by the Mississippi Department of Education but are not to be reproduced or disseminated outside or apart from that administrative record.

²The complaint was filed on a Mississippi Department of Education (MDE) form. Hand written statements were also submitted. The form complaint did not state that the handwritten statements were intended to be part of the complaint and the complaint did not indicate the proceeding was a challenge to a manifestation hearing. Accordingly, both the MDE and the hearing officer placed the matter on an ordinary rather than an expedited timeline of §300.530. In retrospect the latter may have been appropriate.

³An order granting a 30 extension of time was entered March 17, 2023, pursuant to the motion of the District.

⁴As clarified from the complaint with in conversation with the Parent at a prehearing conference held February 6, 2023, and confirmed by my letter of February 7, 2023.

⁵Mississippi law defines "bullying or harassing behavior" 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 takes place on school property, at any school-sponsored function, or on a school bus, and 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 educational performance, opportunities or benefits. For purposes of this section, "hostile environment" means that the victim subjectively views the conduct as bullying or harassing behavior and the conduct is objectively severe or pervasive enough that a reasonable person would agree that it is bullying or harassing behavior.

Miss. Code Ann. § 37-11-67.

⁶State Policies specifically authorize a hearing officer only to (1) determine the sufficiency of a complaint upon the timely request of the receiving party [§ 300.508(d)]; (2) permit a party to amend a complaint at any time not later than five (5) days before a due process hearing begins [§300.508 (d) (3) (ii)]; (3) begin the due process time line at the request of the parent if the District fails to hold a resolution session in a timely manner [§300.510 (b)(5)]; (4) order a District to comply with procedural requirements under §§300.500 through 300.536 [§ 300.513 (a)(3)]; (5) grant, at the

request of either party, specific extensions of time beyond the periods set out in §300.515 (a) [§300.515 (c)]; (6) require an independent educational evaluation as part of a hearing on a due process complaint at public expense [§300.502]; (7) bar any party that fails to comply with the prehearing disclosure timeline (without the consent of the other party) from introducing relevant evaluations or recommendations at the hearing [§ 300.512 (b) (2)]; (8) determine whether a District provided FAPE to a subject student [§300.513]; (9) require reimbursement of the parents for the cost of appropriate private school enrollment if he finds that the District did not make FAPE available to the child in a timely manner prior to that enrollment [§300.148 (c)]; and (10) hear parental appeals of decisions regarding student placement pursuant to §§300.530 and 300.531 and of manifestation determinations under §300.530(e) [§300.532 (b)].