BEFORE THE MISSISSIPPI DEPARTMENT OF EDUCATION

SPECIAL EDUCATION CASE NO. D06262023-34

HEARING DECISION AND FINAL ORDER

I. PROCEDURAL HISTORY

This matter was filed by Complainant (Petitioner), [redacted] on behalf of [redacted], Student, against Ocean Springs School District (Respondent) effective June 26, 2023 and was assigned to this Hearing Officer by the Mississippi Department of Education. A Resolution Meeting was convened on July 7, 2023, and Mediation was subsequently convened on July 28, 2023. Pursuant to 34 C.F.R. § 300.532(c)(2); *Miss. Admin. Code* 7-3:74.19, State Board Policy Chapter 74, Rule 74.19, § 300.532(c)(2) the 20-school day timeline to conduct the due process hearing began on August 4, 2023, which was the first day of school in the district. The due process hearing convened on August 31, 2023. The 10-school day timeline to issue a written opinion began on September 1, 2023 and ends on this day, September 15, 2023.

II. EXHIBITS ADMITTED INTO EVIDENCE

At the hearing, exhibits were submitted by the parties in an Exhibit Binder and accepted by this Hearing Officer. These exhibits have been examined by this Hearing Officer subject to the issues heard at the due process hearing and in light of the testimony presented at said hearing. 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. SUMMARY OF THE TESTIMONY

This decision is based on all testimony presented at the hearing as well as exhibits admitted into evidence during the hearing. Both parties were permitted to offer testimony by way of witnesses sworn under oath. The testimony has been recorded and the transcript will be delivered to the Mississippi Department of Education. This Hearing Officer placed no weight on the fact that any particular testimony was offered by either party since the purpose was to provide all of the appropriate and admissible testimony. The witnesses were examined and the weight given to each was based upon the substantive nature contained therein for the purpose of making a decision in this matter.

Testimony:

A. [redacted] ("Student"). On May 3, 2023, Student went to the school bathroom. When Student finished using the bathroom, another student handed Student an object. Teacher walked into the bathroom and saw Student with the object. Student tried to hand the object back to the other student. Teacher walked Student to the office, and Student sent Student's father a text message. Student did not know who the other student was. The bathroom was dark and Student had long hair, which prevented Student from seeing well. Student was wearing earbuds. Student told the Assistant Principal that Student did not know what the object was. Student did not find out what the object was until the object was tested. Student took the object as an impulsive reaction. Student takes medication for ADHD every day and fidgets a lot. Student does not smoke and did not intend to smoke. Student has never smoked marijuana but has smoked

a nicotine device. Student has seen devices before but did not recognize that this object was a smoking device. Student did not put the device to Student's mouth.

B. [redacted]: Ocean Springs High School Science Teacher ("Teacher"). Teacher walked into the bathroom and observed Student with a vaping device at Student's mouth with Student's eyes closed. Student opened Student's eyes and saw Teacher; Student then tried to hand the vaping device off to another student. Teacher walked Student to the office and completed a referral form. Student told Teacher that the vaping device belonged to someone else but did not say who. Teacher did not send any other students to the office because Student was the only one possessing a vaping device.

V. ISSUE PRESENTED

The sole issue presented at the due process hearing is the Student's disciplinary change of placement pursuant to 34 C.F.R. § 300.530(g)(2); *Miss. Admin. Code* 7-3:74.19, State Board Policy Chapter 74, Rule 74.19, § 300.530(g)(2). The Request for Due Process Hearing asserts that Student was wrongly placed in an interim alternative educational setting. Via the Resolution Meeting and Mediation, all other issues presented in the request for the due process hearing were resolved and were therefore dismissed without prejudice by this Hearing Officer.

VI. DISCUSSION OF THE ISSUE

Student was in the ninth grade at Ocean Springs High School on the date of the incident. Student has an IEP with an eligibility category of Other Health Impairment-Attention Deficit Hyperactivity Disorder. On May 3, 2023, Student was caught by Teacher with a vaping device in the school bathroom. The Request for Due Process Hearing states that the incident occurred at 11:55 a.m. and that Student sent Student's father a text message at 11:56 a.m. stating that "someone passed [Student] a vape in the bathroom." The vaping device was tested by the Ocean Springs

High School's School Resource Officer and was found to contain THC. A Manifestation Determination Review (MDR) was conducted on May 10, 2023 and continued on May 16, 2023. The MDR committee determined that the conduct was a manifestation of Student's disability and that Student would spend 45 days in the district's alternative school, pursuant to the applicable regulation, which states:

> *Special Circumstances*. School personnel may remove a student to an interim alternative educational setting for not more than ***forty-five*** (45) school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child—
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> *****
>
> (2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of *the* LEA.

34 C.F.R. § 300.530(g)(2); *Miss. Admin. Code* 7-3:74.19, State Board Policy Chapter 74, Rule 74.19, § 300.530(g)(2) (emphasis in original). The Request for Due Process Hearing asserts that the Student did not meet the requirement of "knowingly possesses" and therefore that the MDR committee violated the *Individuals with Disabilities in Education Act of 2004* by placing Student in an interim alternative educational setting.

This Hearing Officer finds by a preponderance of the evidence that no violation has occurred. Student testified that Student accepted the vaping device from the other student. Teacher testified that Student had the vaping device up to the mouth when observed. The Request for Due Process Hearing states that Student sent Student's father a text message one minute after the incident stating that "someone passed [Student] a vape in the bathroom." Thus, Student knowingly possessed the vaping device. An example of not "knowingly possessing" would be where someone else's vaping device had fallen into the backpack of another student. In that instance, a student could possess something without knowing. That is not what occurred in the instant matter. Furthermore, the Request for Due Process Hearing asserts that due to Student's

disability, Student could not "knowingly possess" the object. The regulation specifically states that removal to an interim alternative educational setting is regardless of whether the behavior was a manifestation of the Student's disability.

This Hearing Officer observed the demeanor of the witnesses. This Hearing Officer was most persuaded by the demeanor of Teacher, who gave no indication of telling untruth. Accordingly, this Hearing Officer finds by a preponderance of the evidence that no violation has occurred.

VII. SPECIFIC RULINGS AND CONCLUSIONS

A. This Hearing Officer finds that, based upon the preponderance of the evidence, the School District did not violate the *Individuals with Disabilities in Education Act of 2004*, as the removal to the interim alternative educational setting was appropriate.

B. This Hearing Officer finds that, based upon the preponderance of the evidence, no relief is warranted.

VIII. FINAL ORDER AND NOTICE OF APPEAL RIGHTS

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

SO ORDERED this the 15th day of September, 2023.

Amanda Bradley
AMANDA BRADLEY
HEARING OFFICER

cc: Mr. Bobby Knight, II
Dr. Tricia Cox
Hon. KaShonda Day
Ms. Mona Spells Adou
Ms. Alisa Price