

**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 [REDACTED] 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 [REDACTED]. [REDACTED]s 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

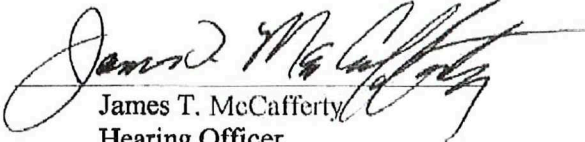
36. The foregoing considered, the District is ordered

- (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