



**Before The
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of ## Student v.
[School District]

DHA Case No. DPI-23-0018
DPI Case No. LEA-23-0016

DECISION

The PARTIES to this proceeding are:

##, Student and their parent, by

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[School District] , by

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PROCEDURAL HISTORY

On November 3, 2023, the Department of Public Instruction (the Department) received a request for an expedited due process hearing under Wis. Stat. Ch. 115 and the Individuals with Disabilities Education Improvement Act (IDEA) filed by ##### (Attorney) on behalf of the Student, D.C.(the Student) and his parent, against the ##### (the District). The Department forwarded the request to the Division of Hearings and Appeals (DHA) for assignment of an administrative law judge to act as the hearing officer in this matter.

Administrative Law Judge ##### (ALJ) was assigned to the matter and conducted a telephonic prehearing conference with the parties on November 17, 2023 at which time the issues for hearing were clarified. On November 30, 2023 the Student filed a motion to compel the production of District emails. The District was afforded an opportunity to respond to the motion in writing. The ALJ issued an Order denying the Student's motion on December 1, 2023. The due process hearing was held in-person at the ### [School District] central office administration building on December 6, 2023. The record in the matter includes a written transcript of the hearing proceedings, the Student's Exhibits 1-4, and the District's Exhibits 100-105. The decision is due by December 20, 2023.

ISSUES

The issues for hearing, as discussed by the parties and established during the prehearing conference are as follows:

- I. Whether the Student, who had not previously been identified eligible for special education services pursuant to the Individuals with Disabilities Education Act 2004 (IDEA), is entitled to the protections of special education laws under 20 U.S.C. § 1415(k)(5) and 34 CFR § 300.534(b) based upon the####'s [School District] alleged knowledge that the Student was a child with a disability prior to the disciplinary removal occurring in September 2023?
- II. Whether the ### [School District] improperly unilaterally changed the Student's educational placement by failing to conduct a manifestation determination review under 20 U.S.C. § 1415(k)(1)(E) and 34 CFR § 300.530 following the Student's disciplinary conduct occurring in September 2023?
- III. Whether the #### [School District] failed to timely refer the Student and/or conduct an evaluation for special education eligibility and services under 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111; Wis. Stat. §§ 115.777 and 115.78?

FINDINGS OF FACT

1. The Student is an 11-year-old resident of the ##### (the District). Aside from the receipt of Birth-to-3 services, the Student has not otherwise been found to be a student with a disability eligible for special education. (Tr. 65, 98)
2. Up until February 2023, the Student previously attended a private school, ##### [school], which is located ### [city]. In February 2023, the Student enrolled at the ### [school] due to interpersonal conflicts with peers at the private school. (Tr. 74, 77-78)
3. While attending ### [private school], the Student participated in an academic assistance program where he was pulled out of class for 1 on 1 assistance in math and reading. The Student's parent referred to the private school's academic assistance as "Title" services. The Student also received privately retained tutoring outside of school to address the Student's difficulties in math and reading. (Tr. 64, 92, 101)
4. The Student's parent chose to enroll the Student into the ### [school] in part, because the Student's grandmother worked as a parent coordinator at the school. The Student's grandmother (hereinafter "the parent coordinator") previously worked for the District as a paraprofessional and was hired as a parent coordinator at ### [school] in 2019. (Tr. 57-59, 78).

5. The application to enroll the Student in the District did not disclose that the Student had any disability or special education needs. (Ex. 101; Tr. 74)
6. Following his enrollment at #### [school], a special education teacher, ##### [teacher], who worked in the Student's classroom and assisted the Student on occasion suggested to the parent coordinator that the Student be evaluated for special education due to his academic/comprehension/processing and attention/focus difficulties observed by the special education teacher. The special education teacher did not initiate a referral to the school psychologist or any other staff at the District to have the Student evaluated for special education. (Tr. 67, 110-112, 114)
7. In March 2023, the parent coordinator at #### [school] spoke with the school psychologist, ##### [school psychologist's name], and inquired about having the Student evaluated for an IEP given concerns related to his classroom performance/focus. The parent coordinator further requested that ##### [school psychologist's name] contact the Student's parent regarding obtaining an IEP. (Tr. 48-49, 54)
8. As the school psychologist, ##### [school psychologist's name] is the primary contact person at #### [school] for special education referrals. (Tr. 15-16)
9. On the day of parent/teacher conferences in March 2023, ##### [school psychologist's name] called the Student's parent and left a voicemail message that the Student's parent could discuss the need for an IEP with the school psychologist during conferences. ##### [school psychologist's name] testified that she did not recall meeting with the Student's parent, did not document her phone call and voicemail in the Student's educational records, did not consider the parent coordinator's request a referral for a special education evaluation of the Student, and did not initiate a special education evaluation of the Student. In addition, there was no documentation of any follow up by the school psychologist or any other staff to initiate an evaluation of the Student. (Exs. 1, 105; Tr. 15-20, 23-25, 34, 44-45)
10. The parent coordinator introduced the Student's parent to the school psychologist during parent/teacher conferences in March 2023. The Student's parent met with the school psychologist only briefly because the school psychologist was busy. The parent requested an IEP for the Student and came away from the meeting with the belief that the school psychologist would be sending paperwork home with the Student to start the evaluation process. However, paperwork was never received; and neither the Student's parent nor the parent coordinator followed up with the school psychologist regarding the evaluation paperwork. (Tr. 54, 66-68, 94-96)
11. During parent/teacher conferences the Student's parent discussed the Student's learning issues with the Student's teacher and informed the Student's teacher that the Student had previously received academic assistance through the prior private school's "title" services, including being pulled out of class for extra help in math and reading. (Tr. 75-76, 81, 91)

12. According to the Student's report card, by the end of the 2022-2023 school year, the Student was achieving minimal progress in English/Language Arts/Reading, Mathematics, Social Studies, and Science. In addition, teacher comments reported that the Student experienced conflicts with other students on a daily basis, was easily distracted, disrupted class/others, and did not stay on task. The report card encouraged the Student to focus more and get a good night's rest to avoid sleeping in class. (Ex. 1, pp. 17-19; Tr. 80)
13. Following repeated altercations between the Student and peers, which made the Student fear for his safety, the Student's mother requested a meeting with the school principal. A meeting was conducted in May 2023 during which a safety plan was developed for the Student. The safety plan identified trusted adults in the Student's school to whom he could turn if he ever felt unsafe. The parent coordinator, the special education teacher, the Student's classroom teacher, and the school psychologist were all listed as trusted adults in the Student's safety plan. Special education services or an evaluation were not discussed during the May 2023 meeting. (Tr. 86-89, 116, 123)
14. On September 27, 2023, the Student was involved in an incident of alleged inappropriate touching by the Student of a female peer. As a result of the incident, a disciplinary referral was made to school administration. (Exs. 1, 100; Tr. 124-127)
15. The principal at ##### [school], ##### [school principal], conducted an investigation into the Student's alleged disciplinary conduct and determined that a three-day suspension should be imposed on the Student. However, the Student's suspension was subsequently increased to a five-day suspension. (Exs. 1, 100; Tr. 70-71, 125)
16. On October 5, 2023, a review meeting was conducted at the District's central office at which time it was determined that the Student would be transferred to a different school in the District due to the Student's conduct. The District's student services supervisor, ##### [student services supervisor] determined the Student would be placed at ##### [school]. (Ex. 104; Tr. 138-141)
17. No manifestation determination meeting was conducted. Instead, the District provided the Student's parent with three different schools in the District that the Student could attend instead of the ##### [school] Although the District eventually enrolled the Student at ##### [school], the Student's parent chose not to send the Student to any District school. As a result, the Student has not attended the District since September 27, 2023. (Tr. 71, 140-141, 149-154)
18. On October 9, 2023, the parent's Student submitted a written request that the Student be evaluated for special education. The written request documented that an evaluation of the Student had previously been requested. (Ex. 3; Tr. 68)

19. An evaluation for the Student's eligibility for special education is currently being conducted by the District. (Ex. 103; Tr. 34, 71)
20. An expedited Due Process Hearing Request was filed with the Department on the Student's behalf on November 3, 2023.

DISCUSSION

The Student in this matter alleges that the District failed to provide the Student with a free and appropriate public education (FAPE) by failing to timely evaluate the Student for special education and failing to conduct a manifestation determination following a disciplinary incident resulting in an alleged change in the Student's educational placement. The U.S. Supreme Court has ruled that the burden of proof in a due process hearing is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); see also, *Sch. Dist. Of Wisconsin Dells v. Z.S.*, 184 F.Supp.2d 860, 884 (W.D. Wis. 2001), *aff'd* 295 F.3d 671 (7th Cir. 2002). The burden of proof is a preponderance of the evidence. Wis. Stat. §111.80(5)(b).

- I. The Student was entitled to the IDEA protections because the Milwaukee Public Schools was deemed to have knowledge that the Student was a child with a disability prior to a disciplinary removal in September 2023.

Pursuant to 34 C.F.R. § 300.534, a child not found yet eligible for special education may be entitled to protections against removal from the student's educational placement if certain factors are established:

(a). General. A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in this part if the public agency had knowledge (as determined in accordance with paragraph (b) of this section) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(b) Basis of knowledge. A public agency must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred—

- (1) The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;
- (2) The parent of the child requested an evaluation of the child pursuant to §§ 300.300 through 300.311; or
- (3) The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child

directly to the director of special education of the agency or to other supervisory personnel of the agency.

(c) Exception. A public agency would not be deemed to have knowledge under paragraph (b) of this section if—

- (1) The parent of the child—
 - (i) Has not allowed an evaluation of the child pursuant to §§ 300.300 through 300.311; or
 - (ii) Has refused services under this part; or
- (2) The child has been evaluated in accordance with §§ 300.300 through 300.311 and determined to not be a child with a disability under this part.

(d) Conditions that apply if no basis of knowledge.

- (1) If a public agency does not have knowledge that a child is a child with a disability (in accordance with paragraphs (b) and (c) of this section) prior to taking disciplinary measures against the child, the child may be subjected to the disciplinary measures applied to children without disabilities who engage in comparable behaviors consistent with paragraph (d)(2) of this section.
- (2)
 - (i) If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under § 300.530, the evaluation must be conducted in an expedited manner.
 - (ii) Until the evaluation is completed, the child remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services.
 - (iii) If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency must provide special education and related services in accordance with this part, including the requirements of §§ 300.530 through 300.536 and section 612(a)(1)(A) of the Act.

In the present matter, the Student transferred to the District in February 2023 from a private school. Other than qualifying for Birth-to-3 services up until the age of four, the Student had not been evaluated for eligibility for special education services. Less than one month after transferring to the District, the parent coordinator at ##### [school], who was also the Student's grandmother, expressed concerns to the school psychologist related to the Student's difficulty

focusing in class, inquired about obtaining an IEP for the Student, and advised the school psychologist that the Student's parent would like to have the Student evaluated for an IEP. In March 2023, the school psychologist reached out to the Student's parent by telephone and left a voicemail message offering to meet with the parent at parent/teacher conferences to discuss an IEP. Conflicting testimony was presented at the hearing as to what interaction, if any, subsequently occurred between the school psychologist and the Student's parent. The school psychologist testified that she had no further contact with the Student's parent and that no request for an evaluation was made nor did anyone disclose to her that the Student had a disability. The school psychologist testified that the District uses a multi-tier process for evaluating student's need for educational support. No evidence was presented that the Student was ever evaluated for educational support, however.

The Student's parent credibly testified that she briefly met the school psychologist the night of parent/teacher conferences in March 2023 and believed that paperwork to initiate the evaluation would be sent home via the Student. It is undisputed that no evaluation for special education was initiated. The Student's parent acknowledged that she did not follow up with the school psychologist after the March parent/teacher conferences to inquire as to the status of a special education referral. However, the Student's parent testified that she discussed the Student's learning difficulties with the Student's teacher who also suggested the Student might benefit from special education services. Due to repeated altercations between peers and the Student that left him fearing for his safety, a meeting was held in May 2023 with the Student's parents and administrators to develop a "safety plan." The school principal testified that no concerns were raised by the parent during the May 2023 meeting related to the Student having a disability or to suggest that the parent requested an evaluation.

According to the Student's parent, the Student previously qualified for Birth-to-3 services and received academic assistance for math and reading at his prior private school, which were called "title" services. As well, the parent privately retained tutoring services for the Student. While the parent testified that she mentioned the Student's prior receipt of "title" services to the Student's teacher, she was unaware of whether any of the Student's prior records transferred to the District. Further, she admitted that she did not disclose in the Student's enrollment application to the District that the Student required special education services. It was apparent from the parent's testimony that she was not familiar with special education and whether "title" services at the private school were akin to special education. The Student's parent acknowledged at the hearing that the Student did not have any current medical diagnosis or documented disability but that she believed the Student had issues with attention and obviously struggled with math and reading. Therefore, she sought to have the District conduct an evaluation to determine whether the Student had a disability.

The evidence presented demonstrates that the Student struggled academically almost immediately upon enrolling at ##### [school]. A special education teacher who worked in the Student's classroom at the ##### [school] during the 2022-2023 school year and on occasion helped the Student with his classwork, testified that she believed he should be evaluated for special education due to his difficulty processing information. The special education teacher testified that

she expressed these concerns to the parent coordinator at the school, who she knew was the Student's grandmother, because they worked together at the school. However, the special education teacher herself did not initiate a special education referral with the school psychologist or any other administrative staff to have the Student evaluated.

The preponderance of the evidence does establish that District staff were aware of concerns with the Student's academic progress and interpersonal difficulties with peers. Further, it is clear that staff at ##### [school] familiar with the Student, including the parent coordinator, the Student's teacher, and a special education teacher, recognized that it may be appropriate to evaluate the Student for special education. The testimony at the hearing established that the parent coordinator expressed her concerns to the school psychologist regarding the Student and the desire to have him evaluated for an IEP and that the Student's parent requested an IEP evaluation when she met with the school psychologist in March 2023. The school psychologist acknowledged that she was the person at the school responsible for receiving special education referrals and passing them along so further evaluations could be conducted. Based upon the above, credible evidence exists that the school psychologist had a basis for knowledge that the Student may have a disability prior to his disciplinary incident in September 2023. Despite knowing that the Student's parent wanted to have the Student evaluated for an IEP, the school psychologist took no further steps to refer the Student for an evaluation. Therefore, based upon the preponderance of the evidence, the Student has met his burden to establish that the District is deemed to have knowledge that the Student was a child with a disability under 34 C.F.R. § 300.534(b)(2) or (3).

II. The ##### [District] improperly changed the Student's educational placement without first conducting a manifestation determination review.

Because I find that the District was deemed to have knowledge that the Student may have had a disability prior to the Student's September 2023 conduct violation, the Student should have been afforded the procedural protections afforded students eligible for special education under the IDEA. Thus, the District was required to conduct a manifestation determination before changing his educational placement.

A student may be suspended from school for five days for violating a code of student conduct. Wis. Stat. §120.13(1)(b)2 and 3. Prior to expelling or changing a special education student's educational placement due to a violation of school rules, school districts must comply with the following procedures:

(1) Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) 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 parents to determine –

(i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

(2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.

34 C.F.R. §300.530(e)(1)-(2); 20 U.S.C. §1415(k)(1)(E)(i).

It is undisputed that in the present matter the District removed the Student from ##### [school] following a disciplinary incident on September 27, 2023. The decision to transfer the student's enrollment from ##### [school] to ##### [school] was made by the District's student services supervisor, ##### [name]; and not by a team of individuals familiar with the Student's educational issues or needs. Although the Student's parent was presented with three different District schools that had openings for the Student, the Student's parent ultimately chose not to send the Student back to a District school.

While I find that the Student has met his burden to establish that the District should have conducted a manifestation determination following the Student's disciplinary incident based upon the District having been deemed to have knowledge that the Student may have a disability, there are insufficient facts in the record to determine whether the Student's conduct was caused by, or had a direct and substantial relationship to, the child's disability. Accordingly, if an IEP team determines that the Student is eligible for and in need of special education services, the IEP team should conduct a manifestation determination review under 34 C.F.R. § 300.530(e) and determine the appropriate educational placement for the Student.

III. The ##### [District] failed to timely identify the Student and/or conduct an evaluation for special education eligibility and services.

Pursuant to 20 U.S.C. § 1412(a), the IDEA requires that the District enact policies to assure that students with disabilities are identified and evaluated, including students attending private schools located within the District and those students suspected of having a disability. This is commonly referred to as a school's "child find" obligation:

All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

20 U.S.C. § 1412(a)(3)(A); see also, 34 C.F.R. § 300.111; *In re: Student with a Disability*, 122 LRP 46676 (WI SEA Dec. 2022). Under Wis. Stat. § 115.777(1)(b), licensed teachers employed by a school who reasonably believe that a child has a disability are required to refer the child for a

special education evaluation. Special education referrals “shall be in writing” and include “the reasons why the person believes that the child is a child with a disability.” Wis. Stat. § 115.777(2)(a). Further, within fifteen days of receiving a referral, the local educational agency must send a request for consent to evaluate to the student’s parent. Wis. Stat. § 115.777(3)(e). An evaluation must be completed within sixty days after the local educational agency receives parental consent for evaluation. Wis. Stat. § 115.78(3)(a).

In the present matter, a special education teacher working in the Student’s classroom at the ##### [school] testified that she believed the Student should be evaluated for special education due to his comprehension/processing and academic issues and expressed her concerns to the Student’s grandmother who worked at the school as the parent coordinator. The Student’s parent also testified that she spoke with the Student’s classroom teacher about the Student’s difficulties and his prior receipt of academic assistance at his private school. However, neither the Student’s teacher nor the special education teacher referred the Student for a special education evaluation. Following receipt of a request for an IEP conveyed to the school’s psychologist in March 2023 by both the parent and parent coordinator at the ##### [school] the school psychologist failed to send the Student’s parent a request for consent to enable the District to evaluate the Student. Based upon the Student’s report card at the end of the 2022-2023 school year, it was apparent he was only making minimal progress. Evidence produced at hearing further establishes that the Student struggled with interpersonal issues with peers. However, no actions were taken to have the Student evaluated. At a minimum, the evaluation process should have been initiated, if not completed, before the start of the 2023-2024 school year. A preponderance of the evidence establishes that the District failed to comply with its “child find” obligation to timely evaluate the Student for special education contrary to 20 U.S.C. § 1412(a)(3)(A), 34 C.F.R. § 300.111 and Wis. Stat. § 115.777. Accordingly, should the Student be determined to be eligible for and in need of special educational services, an award of compensatory services is appropriate from the start of the 2023-2024 school year until the effective date that special education services begin.

CONCLUSIONS OF LAW

1. The School District is deemed to have knowledge that the Student was a child with a disability pursuant to 34 C.F.R. § 300.534(b)(2) and (3) based upon both a school staff person expressing concern about the Student’s need for an IEP to the school psychologist and the parent having requested an IEP evaluation.
2. The School District failed to conduct a manifestation determination prior to changing the Student’s educational placement pursuant to 34 C.F.R. § 300.530.
3. The School District failed to comply with their “child find” duty by not timely evaluating the Student for special education pursuant to 20 U.S.C. § 1412(a)(3)(A), 34 C.F.R. § 300.111 and Wis. Stat. § 115.777.
4. The undersigned ALJ has authority to preside over this due process proceeding pursuant to Wis. Stat. § 115.80(2).

ORDER

IT IS HEREBY ORDERED:

1. That the School District shall without further delay complete an evaluation of the Student's eligibility for and need for special education services;
2. If the Student is determined to be eligible for and in need of special education, the School District shall conduct a manifestation determination under 34 C.F.R. § 300.530(e). If an IEP team determines that the Student's September 2023 conduct violation was a manifestation of his disability, the IEP team shall determine the appropriate educational placement for Student; and
3. Based upon the School District's child find violation, if the Student is found eligible for and in need of special education services, the IEP team shall determine an amount of compensatory services for the time period beginning from the start of the 2023-2024 school year until the effective date that special education services are scheduled to begin to address the denial of FAPE due to the delay in evaluating the Student.

Dated at Madison, Wisconsin on December 20, 2023.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By:  _____

Kristin P. Fredrick
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

Any party aggrieved by the attached decision of the administrative law judge may file a civil action in the circuit court for the county in which the child resides or in federal district court, pursuant to Wis. Stat. § 115.80(7), 20 USC § 1415, and 34 CFR § 300.512. The court action must be filed within 45 days after service of the decision by the Division of Hearings and Appeals.

It is the responsibility of the appealing party to send a copy of the appeal to the Director of Special Education, Special Education Team, Department of Public Instruction, 125 South Webster Street, Madison, WI 53703. The Department of Public Instruction will prepare and file the record with the court only upon receipt of a copy of the appeal. The record will be filed with the court within 40 days of the date that the Special Education Team at the Department of Public Instruction receives the appeal.