



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

In the Matter of ###, Student

DECISION

v.

DHA Case No. DPI-24-0016
DPI Case No. LEA-24-0015

[School District]

The PARTIES to this proceeding are:

####, Student, by

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[School District], by

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PROCEDURAL HISTORY

On April 17, 2024, Attorney Ally Seneczko, on behalf of ##### (Parents) and ##### (Student), filed an expedited due process hearing request with the Department of Public Instruction (DPI) under the Individuals with Disabilities Education Act (IDEA) and Wis. Stats. Chapter 115 against the ##### (District). DPI referred the matter to the Wisconsin Division of Hearings and Appeals, and Senior Administrative Law Judge (ALJ) Sally Pederson was duly appointed to conduct an expedited hearing.

On April 25, 2024, a prehearing telephone conference was held with the parties, and the expedited hearing was scheduled for May 9, 2024. The hearing commenced as scheduled but was unable to be completed in one day and, consequently, was continued on May 14, 2024. The District did not hold school on May 17 and 27, 2024. Therefore, the decision in this expedited matter is due on May 30, 2024.

ISSUE

Did the District incorrectly determine that the Student's conduct on March 13, 2024 was not a manifestation of his disability and, consequently, improperly expel the Student from school?

FINDINGS OF FACT

1. The Student is a 15-year-old (d.o.b. 12/01/2008) child with disabilities who resides in the District.
2. Due to his disabilities, the Student has struggled with impulse control, emotional and behavior regulation, and social functioning since he was a young child. (Parents' Exhibits 4 and 5)¹
3. When the Student was seven years old in November 2016, the Dean Clinic conducted a neuropsychological evaluation, and the Student was diagnosed with attention deficit hyperactivity disorder (ADHD)-combined subtype and adjustment disorder with depressed features. (P. Ex. 4, p. 41)
4. In December 2016, when the Student was in second grade, the District evaluated him for services under Section 504 of the Rehabilitation Act of 1973. The referral form noted that the Student "struggles with regulating his behavior, body, and emotions a large part of the day," and his "impulsive behaviors affect his work input and output, often having to miss chunks of time due to being a disruption to the classroom environment or needing breaks to reset his body." The District found him eligible for services and developed a Section 504 Plan for him. *Id.*
5. In October 2018, when the Student was in fourth grade, the District's previous Director of Pupil Services referred the Student for a special education evaluation under the IDEA in response to the Student's "increase of behavioral incidences" that "resulted in him being sent home, out of school suspension, and police contact." (P. Ex. 5, p. 57)

¹ Hereinafter, references to the Parents' exhibits will be abbreviated as P. Ex., and references to the District's exhibits will be abbreviated as D. Ex.

6. The Student incurred the following disciplinary referrals from kindergarten through December 2018 (halfway through his fourth-grade school year):
 - Kindergarten (2014-2015) – three disciplinary referrals, all for “being physical” with other students.
 - First grade (2015-2016) – seven disciplinary referrals, three for being physical with other students, four for non-compliance/disruptive behaviors.
 - Second grade (2016-2017) – 13 disciplinary referrals, eight for being physical with others, one threat (putting nuts in the lunchbox of a student with a nut allergy), two for non-compliance/disruptive behaviors, one for profanity, one for vandalism.
 - Third grade (2017-2018) – seven disciplinary referrals, five for being physical with other students, two for non-compliance/disruptive behaviors.
 - Fourth grade (as of December 2018) – 16 disciplinary referrals, four for being physical with other students, nine for non-compliance/disruptive behaviors, one for running off school grounds, and one for bringing a weapon (a pocket-knife) to school, which the Student would not relinquish to an adult until the District called the police.
Id. at pp. 68, 71.

7. In November 2018, the District convened an individualized education program (IEP) team to evaluate the Student. The evaluation and assessment reports indicated that the Student was functioning above grade level academically, particularly in math and reading. However, his behaviors were impeding the learning of himself and others, and despite the “many behavior accommodations and supports being provided, [the Student] continued to struggle with self-regulation.” While the Student was already receiving private therapy at Stateline Mental Health Services, the special education teacher’s assessment summary stated that the Student “needs to be coached by a trained professional on how to handle his emotions and his body to function successfully in the educational setting.” *Id.* at pp. 68, 71, 75.

8. On December 12, 2018, the IEP team determined the Student met the eligibility criteria for emotional behavioral disability (EBD) and that he needed special education services. *Id.* at pp. 81-84.

9. On that same date, the IEP team developed an initial IEP that contained three annual goals, all addressing the Student’s struggle to comply with teacher directives and his lack of impulse control, coping skills, and self-regulation. The IEP included 15 minutes per day of special education/specially designed instruction that focused on social skills. The Student was attending school in the District for a limited amount of time in the afternoons and was engaging in outpatient therapy at the Cross Roads program in Janesville during

the mornings. The IEP also included transportation as a related service and numerous supplementary aids and services. (P. Ex. 5, pp. 93-99)

10. The IEP team also conducted a functional behavioral assessment (FBA) of the Student and developed a behavior intervention plan (BIP) that was included in his December 2018 IEP. The BIP indicated that the Student's difficult behaviors included making loud verbalizations and distracting noises in class, refusing adult correction in class, disrupting class by moving around and making grand gestures, and becoming "instrumentally aggressive." *Id.* at pp. 105-109.
11. In January, February, and March 2019, the IEP team reviewed and revised the Student's IEP to increase his hours in school, based upon his behavior improving and his transition from Cross Roads to a nearly full-time school day in the District in March. In addition to the existing 15 minutes of specialized social skills instruction in the Student's IEP, the IEP team increased the amount of special education services to include 20 minutes of academic instruction in the January IEP, which was then increased to 80 minutes of academic instruction in the February IEP, and reduced to 65 minutes of academic instruction in the March 2019 IEP. (S. Ex. 6, p. 124; S. Ex. 7, pp. 168, 148; St. Ex. 8, pp. 156, 167, 171)
12. In November 2019, when the Student was in fifth grade, the IEP team conducted an annual review of his IEP and revised it to include two annual goals. Both goals addressed the Student's need "to increase his ability to use coping strategies to regulate his body in order to remain an active learner in the classroom." The IEP called for 20 minutes of specially designed instruction in the form of two 10-minute breaks during the afternoon, as well as various supplementary aids and services aimed at encouraging positive behaviors and work completion. (S. Ex. 9, pp. 181-184)
13. In February 2020, the IEP met again to review and revise the IEP based on increased behavioral concerns, noting that the Student's behaviors had become more sexual in nature during fifth grade. The IEP team revised the Student's BIP to include information about his sexually inappropriate behavior and add consequences for that and other disruptive behavior, including removing him from the classroom if he could not be redirected or continued misbehaving after having a break outside of class. (S. Ex. 10)
14. In October 2020, when the Student was in sixth grade, the IEP team revised his IEP to reduce his educational placement to three and a half hours per day at school. The IEP team determined that, due to the Student's needs in the area of self-regulation, he would attend classes at school in the morning, and class work would be provided for him to complete at home, as his self-regulation difficulties were heightened in the afternoon. (P. Ex. 11, p. 224)

15. In January 2021, the IEP team met again and revised the Student's sixth grade IEP to allow him to attend classes until 2:00 p.m. While not a full school day, this increased his hours in school to five and a half hours per day, which the IEP team determined was appropriate based upon his "heightened difficulties with self-regulation in the afternoon." The IEP team also increased the amount of specially designed instruction to 50 minutes per week to address "self-monitoring for work completion and self-regulation." (P. Ex. 12, pp. 242-243)
16. In May 2021, the IEP team met to review/revise the IEP that would be in effect for the Student's seventh grade school year. The IEP noted that the Student had "matured a lot" and did a "great job academically and socially when he [was] regulated." The IEP continued to require 50 minutes of specially designed instruction, and it contained the same two annual goals in effect since the November 2019 IEP. (P. Ex. 13, pp. 251-261)
17. In August 2021, at the beginning of seventh grade, the IEP team met for the purpose of determining the length of the Student's school day. In describing the effects of the Student's disability, the IEP stated that, "When [the Student] becomes dysregulated and disruptive due to peer triggers, impulsivity, or inappropriate actions, his behavior impedes his learning and the learning of others." The IEP team determined that the Student would initially attend school for only three hours per day, based upon his "struggles with self-regulation and gaining positive peer attention" and that he would have a one-on-one paraprofessional educator with him in the classroom to assist him with building peer relationships, managing impulsivity, and regulating his behavior. (P. Ex. 14, pp. 272, 274, 282)
18. The IEP team convened twice in September 2021 to further revise the Student's IEP to gradually increase his schedule to a full school day by the end of September. The amount of specially designed instruction in his IEP was increased to include: 90 minutes per week of instruction on self-regulation; 150 minutes per week of "instruction, practice, and guidance in gaining positive peer attention, managing impulsivity and building self-regulation"; and 540 minutes per week of homework completion monitoring and reinforcement of class material." In addition, the IEP team revised his behavior goal to include more specific objectives and accurately reflect his specialized instruction on regulating classroom behavior and coping strategies. (P. Exs. 15 and 16, pp. 314, 322)
19. In December 2021, the IEP team conducted a three-year educational reevaluation of the Student and determined that he continued to need special education services as a child with EBD. The reevaluation report noted that, while the Student's emotional and behavioral skills had appeared to improve in the last three years, he continued to need support and instruction in self-regulation skills and strategies. (P. Ex. 17, pp. 343, 351-352, 362)

20. On March 1, 2022, during the annual IEP review/revision meeting, the IEP team revised the Student's IEP to include one annual goal, which related to behavioral regulation, and reduced the amount of time that a one-on-one paraprofessional would be with the Student in school. However, on April 27, 2022, the IEP team reconvened in response to an increase in behavioral incidents by the Student that resulted in out-of-school and in-school suspensions, and the IEP team increased the paraprofessional's one-on-one time with the Student to 150 minutes per day. (P. Exs. 18 and 19, p. 413)
21. At the beginning of the 2022-2023 school year, when the Student was in eighth grade, his IEP continued with the same annual goal, and he continued to receive 150 minutes daily of one-on-one paraprofessional support, per his IEP, as well as 110 minutes per week of specially designed instruction on self-regulation skills and managing impulsivity. (P. Ex. 20, pp. 428-430)
22. In January 2023, at the annual IEP review/revise meeting, the IEP team reduced the amount of specially designed instruction on self-regulation skills to 75 minutes weekly. In addition, the 150 minutes per day of paraprofessional support was removed from the Student's IEP and replaced with "adult support" for 10 minutes per day in science and social studies classes, along with a study hall in the special education setting. The one annual goal remained in place. (P. Ex. 21, pp. 458-459, 463)
23. In August 2023, at the start of ninth grade – the Student's first year in high school, the IEP team met and revised the Student's IEP, removing adult/paraprofessional support for the Student in the classroom. The IEP called for 100 minutes per week of specially designed instruction, described as "services and reinforcement in modeling and practice of self-regulation skills and sustaining effort," and it continued to include a study hall in the special education setting and an annual goal related to self-regulation. (D. Ex. 18; P. Ex. 22, pp. 480-481, 485-489)
24. In October 2023, the Parent requested an IEP team meeting to discuss recent behaviors of the Student at school. The first incident occurred in Spanish class when the Student played a video on his Chromebook of a male seemingly having an orgasm, and the second incident involved the Student grabbing another male student's buttocks in gym class. In response, the other male student tried to punch the Student but did not make contact. The IEP team discussed that the Student did not perceive these actions through an adult lens and seemed to think they were funny. The IEP team revised the Student's IEP, adding 50 minutes per week of related services that consisted of instruction by the school social worker and school psychologist on how actions are perceived by others and replacement behaviors when the Student feels impulsive. Shortly thereafter, the school psychologist intern was removed from the Student's IEP, and the school social worker solely took over the related services instruction. (D. Ex. 19; P. Ex. 23, p. 495, 502-503, 509; ##### [school psychologist intern] testimony, Day 1, pp. 98-99)

25. On December 7, 2023, the Student was involved in a physical behavioral incident with another student (hereinafter Student X) in his homeroom class. ##### [District's Behavior Support Specialist], the District's Behavior Support Specialist, investigated the incident. ##### [District's Behavior Support Specialist] interviewed Student X and three students who witnessed the incident, and he spoke briefly to the Student by telephone. The Student had been making fun of Student X's haircut and shoes, which upset Student X, who told ##### [District's Behavior Support Specialist] that the Student had been making fun of him for about a month and a half, causing Student X to not want to come to school. The written discipline report states that Student X stood up from his seat and asked the Student to stop. In response, the Student called Student X a "hobo" and a "pussy" and then "tackled [Student X] to the ground." Student X then slapped the Student. The District suspended the Student from school for three days for this incident, which it categorized in his discipline record as physical contact, not fighting. (D. Ex. 10, p. 23; ##### [District's Behavior Support Specialist] testimony)

26. On January 5, 2024, the IEP team met for the annual review/revision of the Student's IEP. The IEP team determined that the Student had not met the annual goal of increasing his ability to regulate his classroom behavior by independently and successfully utilizing a coping strategy in 70% of observed instances of dysregulation. The revised IEP included two new annual goals:

- Given specialized instruction in perspective taking, [the Student] will be able to identify three potential perspectives a person could take in a given scenario in 50% of given instances by the end of the IEP.
- Given specialized instruction in identifying unwanted emotions, [the Student] will be able to state an area of his body that he feels a change in that is an indication of the need to take a break or accept a cue in 2 out of 4 opportunities by the end date of the IEP.

(D. Ex. 20; P. Ex. 24, pp. 534-535)

27. The Student's IEP continued to require 100 minutes weekly of specially designed instruction and reduced the amount of related services to 20 minutes of instruction twice per week with the school social worker on "self-regulation skills including identifying personal emotions and perspective taking." *Id.* at pp. 537-539.

28. On January 5, 2024, the IEP team also reviewed and revised the Student's BIP. The BIP indicates that the Student's challenging behaviors include: making loud verbalizations and/or other loud distracting noises; blurting out inappropriate, rude comments typically while teachers are presenting information/directions to the class; and making sexualized gestures and sexual/borderline sexual verbal comments aloud or directly to others. This

list of challenging behaviors is virtually unchanged from his December 2021 BIP. (D. Ex. 21; P. Ex. 17, p. 374)

29. On January 8, 2024, the Student received a two-day in-school suspension for using profanity. The incident occurred in the weight room when a group of male and female students entered into “a friendly competition” about lifting the same weight amount. The Student successfully lifted the weight after a female student had failed to do so. Three student witnesses told ##### [District’s Behavior Support Specialist] that the Student then called the female student a bitch and a cunt. One of the student witnesses said that the Student also told the female, “that’s why your mom left you.” The female student got upset by the Student’s remarks, pushed him, and left the weight room. (D. Ex. 10)
30. As of January 8, 2024, the Student had been suspended for nine and a half days during the 2023-2024 school year. Accordingly, on January 18, 2024, the District convened an IEP meeting to conduct a manifestation determination review (MDR) regarding the Student’s behavior. All IEP team members agreed that “[the Student] does not have the coping skills to filter his impulsive behavior and therefor *[sic]* his behavior was caused by his Emotional/Behavioral Disability.” (D. Ex. 22, pp. 203- 204)
31. At the January 18, 2024 meeting, the IEP team also reviewed and revised the Student’s recent IEP. The IEP lists several supplementary aids and services/supports that would be helpful “to have in place during athletic extracurricular activities,” and it states that the Student’s case manager will give copies of the Student’s IEP and BIP to supervisors of his extracurricular activities. The IEP team considered adding paraprofessional support for the Student in the classroom, as he had received in previous years, but ultimately determined that it would not be helpful. (D. Ex. 22, pp. 189-190, 193, 206)
32. In addition, the IEP team reviewed the and revised the Student’s BIP at the January 18 meeting. The IEP team did not revise the description of the Student’s challenging behaviors. However, the list of known triggers for the Student was revised and expanded to include:
 - Unstructured times/environments when he perceives he will not get in trouble
 - If he perceives that an adult is not paying attention or aware of his behavior
 - When adults correct/redirect his behavior, and he perceives that his behavior does not warrant a redirection
 - When he believes the adult is not currently watching his actions, he will act out to get peer attention or get them to laugh
 - When he hears or thinks of something he deems funny, makes him uncomfortable, or causes him to feel rejection
 - When he is uninterested in a topic
 - A desire to obtain peer attention or get them to laugh

- A peer makes a comment or action that he deems funny or challenging
- Not wanting to be in a class or a certain situation
- Unstructured times such as lunch or recess, dismissal from school, or after-school activities such as sporting events
- When he perceives that a teacher is not prepared or had made a mistake while teaching
- Adults informing him that they will be writing a referral for him
- Competitive situations (usually non-academic in nature)
- When others take an authoritative approach with him
- Due to past trauma, unknown things may trigger him
(D. Ex. 24)

33. In response to the Student's increase in behavioral incidents, the District's Pupil Services Director ##### and the Parent agreed that the Student should be reevaluated, noting that their FBA was out-of-date. The Notice of Reevaluation states: "Despite [the Student's] current supports he continues to struggle behaviorally. [They] have 18 referrals in five months. [They] have currently at 9.5 days of suspension. Behaviors consist of disruptive [*sic*], disrespect, profanity, and physical contact." (##### [District's Pupil Services Director] testimony, Day 2, pp. 49-50; P. Ex. 26, p. 557)

34. The FBA was conducted by the District's school psychologist intern #####, who began working in the District in August 2023 under a provisional substitute license issued by DPI. She was not licensed as a school psychologist during the 2023-2024 school year. Her anticipated graduation with an educational specialist master's degree is in May 2024. (##### [school psychologist intern] testimony, Day 1, pp. 97-98, 165)

35. During the 2023-2024 school year, ##### [school psychologist intern] met with the Student three times prior to being removed from his IEP team after it was determined that the school social worker would solely provide related services to the Student. She also met with the Student virtually on two occasions for 15 minutes when conducting the FBA. At the time of the hearing, the District indicated that ##### [school psychologist intern] had finished her work on the FBA, but the IEP team had not met to complete the reevaluation. (##### [school psychologist intern] testimony, Day 1, pp. 98-100; ##### [District's Pupil Services Director] testimony, Day 2, pp. 50, 54)

36. The FBA drafted by ##### [school psychologist intern] focuses on the following behaviors: sexualized comments/behavior (e.g., profane language and actions); disruptive behavior (e.g., loud verbalizations); and communication (e.g., inappropriate comments to staff and classmates). These are the same behaviors that his 2021 and 2024 BIP focused on. Although the Notice of Reevaluation cites physical contact as a problem behavior, the FBA does not include that behavior as impeding the Student's positive school functioning. (D. Ex. 26; P. Ex. 26)

37. When conducting the FBA, ##### [school psychologist intern] had the Parents and an unspecified number of teachers complete the Behavior Rating Inventory of Executive Function, Second Edition (BRIEF-2). The Parents' ratings of the Student in all three areas of executive function –behavior regulation, emotion regulation, and cognitive regulation – were at clinically elevated levels; the teachers' scores of the Student ranked him clinically elevated in the area of behavior regulation and at potentially clinically elevated in emotion regulation.(D. Ex. 25, p. 233; D. Ex. 27)
38. ##### [school psychologist intern] also administered the Behavior Assessment System for Children, Third Edition (BASC-3) as part of the FBA. Two teachers and the Student completed the BASC-3 rating scale. Both teachers scored the Student as being in the clinically significant range for aggression. In addition, Teacher 1's scores placed the Student in the clinically significant range for several other areas, including: hyperactivity, conduct problems, externalizing problems, anxiety, atypicality, withdrawal, and behavioral symptoms index. Teacher 2 also scored the Student in the clinically significant range in the areas of depression, attention problems, school problems, atypicality, and behavior symptoms index. In addition, both teachers scored the Student as being in the at-risk range in several areas. The Student's scores placed him in the clinically significant range in the areas of attitude to teachers, locus of control, social stress, interpersonal relations, and personal adjustment. (D. Ex. 25, pp. 234-236; D. Ex. 28)
39. On March 13, 2024, the Student was involved in a behavioral incident during track practice that resulted in his expulsion. The incident came to light when track coach ##### notified ##### [District's Behavior Support Specialist] that the Student had reportedly wrestled with another male student (hereinafter Student B) on the ground near the flagpole on the way to track practice and later rubbed blood from his hand onto a different student's shirt. ##### [track coach] did not personally witness the event. ##### [District's Behavior Support Specialist] investigated the incident, first by viewing video footage from a school camera that was directed towards the flagpole.(##### [District's Behavior Support Specialist] testimony, Day 1, p. 358)
40. The video footage of the incident shows the Student walking out of the school building with several other students. The Student and one or two other male students, including Student B, have their heads turned towards one another, looking at each other as they are walking in a manner indicative of conversing. However, the video footage has no audio, so talking cannot be heard. For several steps while crossing the driveway onto the sidewalk, Student B is looking back towards the Student while walking. When they have crossed the driveway to the sidewalk and are standing near each other, the Student and Student B continue to look at each other, with another male student standing close by watching them. Student B then kneels down on the grass to tie his shoes. Except for one or two seconds, Student B continues to look up at the Student while tying his shoes. When Student B switches from one knee to the other, he is looking at the Student. The Student then lunges at him on the grass, and Student B gets to his feet right before the

Student tackles him to the ground. They quickly get up from the ground, and as they are getting to their feet, the Student extends his right arm, and it appears that his right hand hits Student B's forehead. Student B then jumps on the Student's back, tackles the Student to the ground, and they wrestle around on the ground. Just before they stand up, the Student slaps Student B's butt. They then walk away. (D. Ex. 6)

41. After watching the video footage, ##### [District's Behavior Support Specialist] identified five students who appeared to have witnessed the incident, and those students were interviewed on March 14, 2024. The information provided by the student witnesses, as set forth in ##### [track coach] written report, is as follows:

- The athletic director interviewed Witness 1 who said the Student and Student B were mad at each other, he heard a lot of swearing, and Student B was upset.
- ##### [District's Behavior Support Specialist] and the athletic director interviewed Witness 2. Witness 2 said someone had told her that the Student had made a comment about making Witness 2's younger sister, who is in sixth grade, "give him head." Witness 2 said that Student B had confronted the Student about the inappropriate sexual comment, which caused the Student to become upset.
- The junior-senior high school principal ##### was present with ##### [District's Behavior Support Specialist] and the athletic director when Witnesses 3 and 4 were interviewed. Witness 3 stated that the Student was getting upset by comments that Student B was saying to him. Witness 3 said that the Student and Student B were both "saying words" to each other when the Student tackled Student B to the ground, and they began to "roll around" on the ground. Witness 3 further stated that "they were both mad" and that the altercation stemmed from the comment the Student had made about Witness 2's younger sister.
- Witness 4 stated, "I think our friends 'jaw' at each other because no one takes offense to it." He further said, "[The Student] knew saying gross things about a 6th grade girl would get a reaction out of [Student B], her and all of us." Witness 4 went on to say that the Student slapped Student B's head, and Student B then jumped on the Student's back. Witness 4 also said that the Student rubbed blood on another student at the track.
- ##### [District's Behavior Support Specialist] spoke to Witness 5 who said the Student rubbed his bloody hand on Witness 5's shirt while he was walking to the track and also later at the track.
(D. Ex. 14)

42. ##### [District's Behavior Support Specialist] also spoke to Student B about the incident but did not include the information from Student B in his written report with the other student witnesses' statements. Student

B told ##### [District's Behavior Support Specialist] that he had been making comments to the Student about the Student's sexual remark regarding the sixth grader and that his comments had made the Student upset. (##### [District's Behavior Support Specialist] testimony, Day 1, pp. 368-371, 384)

43. Student B is the best friend of the Student's older brother. Student B's mother has known the Student about 10 years and coached him in basketball for five months in 2023-2024. With regard to the incident on March 13, Student B told his mother that he and the Student were talking back and forth, and Student B told the Student he was going to "tell on [him]" leading up to the Student tackling him. (Shallenberger testimony, Day 2, p. 90)
44. ##### [District's Behavior Support Specialist] did not interview the Student because the Student did not attend school on March 14, 2024, the day after the incident. Principal ##### attempted to contact the Student and his family about the incident by calling their home twice on the morning of March 14 and leaving messages, but she did not receive a return call. After the principal and District staff viewed the video footage of the incident and interviewed the student witnesses, Principal ##### completed paperwork on March 14 or 15, 2024 to recommend the Student for expulsion. (##### [District's Behavior Support Specialist] testimony, Day 1, pp. 360-361; ##### [junior-senior high school principal] testimony, Day 1, pp. 266-269; P. Ex. 41, p. 749; P. Ex. 47, p. 819)
45. On April 2, 2024, the District held a MDR meeting to determine whether the Student's behavior on March 13, 2024 was a manifestation of his disability. The IEP team meeting was attended by the Parents, the Student, the Student's case manager/special education teacher #####, the director of pupil services, the high school principal, the school social worker #####, the school psychologist intern, ##### who is a friend of the Parents and an experienced special education teacher licensed in Wisconsin, the Student's aunt, the attorney for the District, and attorney for the Student and Parents.(D. Ex. 9)
46. The MDR meeting participants discussed and considered the Student's disability and how his behavior typically presents. District staff members opined that the Student typically engages in class clown behavior, suffers from social anxiety, engages in behaviors to elicit reactions from other students in an effort make a connection with them, and has shown an increase in sexualized behaviors. Based on her review of the Student's disciplinary records and IEPs and her work on his FBA, it was the intern school psychologist's opinion that the Student's aggressive behaviors were in the past and that his disability does not present in an aggressive manner. (##### [school psychologist intern] testimony, Day 1, pp. 148-149, 159-162; ##### [District's Pupil Services Director] testimony, Day 2, pp. 62-63)
47. The MDR report included a summary of the Student's disciplinary records, showing that the Student had incurred 169 behavioral "offenses" from the 2015-2016 school year through March 2024. The list of the offenses by year is as follows:

- 2023-2024: 2 profanity, 4 disruptive, 3 physical contact, 5 disrespect, 1 tech violation
- 2022-2023: 7 disruptive, 3 profanity, 2 physical contact, 1 noncompliance, 4 disrespect, 1 fighting, 1 tech violation
- 2021-2022: 2 profanity, 5 disruptive, 1 fighting, 2 tech violations, 2 plagiarism, 1 physical contact
- 2020-2021: 1 noncompliance, 4 tech violations, 7 profanity, 6 disruptive
- 2019-2020: 7 noncompliance, 1 tech violation, 1 profanity, 8 disruptive, 2 physical contact, 1 tardy
- 2018-2019: 2 profanity, 4 fighting, 7 disruptive, 8 noncompliance, 1 tech violation
- 2017-2018: 2 think sheets, 2 noncompliance, 1 major profanity, 1 weapon, 3 acts of danger
- 2016-2017: 4 fighting, 1 noncompliance, 3 disruptive, 10 think sheets, 1 tech violation, 1 vandalism, 1 physical contact, 2 profanity
- 2015-2016: 4 noncompliance, 6 disruptive, 4 fighting
(D. Ex. 9, p. 19)

48. District staff on the MDR team acknowledged that the Student had 15 fighting offenses over his school career but emphasized that 12 of those 15 offenses were over five years ago. It is true that, according to his disciplinary records, the Student's fighting offenses had decreased to one time per year for the last three school years, compared to four instances per year of fighting during the 2018-2019, 2016-2017, and 2015-2016 school years. However, to consider only fighting offenses as aggressive physical behavior is misleading and inaccurate because, under the District's disciplinary record system of categorizing offenses, aggressive physical behavior is sometimes categorized as physical contact, rather than as fighting. (D. Ex. 9, p. 19; ##### [school psychologist intern] testimony, Day 1, pp. 122-123, 126, 130-131)

49. Examples of the District categorizing aggressive physical behavior by the Student in the last five years as physical contact offenses include:

- tackling a student in class down to the ground in December 2023;
- hiding behind a classroom door and kneeling a student in the genitals when he walked into class in April 2023;
- shutting the lid of his Chromebook on a staff member's finger and squeezing it down harder when she asked him to let go in January 2023;
- hitting a student with a dog leash in June 2022; slapping a student on the head during a basketball game in December 2021;
- punching a student in the stomach because he was frustrated that the student was being loud in lunch line in January 2020; and,
- putting his hands around a student's neck to "pressure point" the student in September 2019.

Moreover, behavior by the Student that was categorized as disrespect, non-compliance, or acts of danger in the District's disciplinary record system have also sometimes involved aggressive physical behavior. Recent examples of aggressive physical behavior by the Student that was categorized as disrespect include:

- shoving another student into a cabinet in shop class in February 2023; and,
- grabbing a student's head and thrusting his hips towards the student's back in November 2022.
(P. Ex. 40)

50. The MDR participants watched the video of the incident by the flagpole during the April 2 meeting. However, ##### [District's Behavior Support Specialist] written report containing the student witness statements was not provided to the participants at the MDR meeting. Instead, the principal discussed the student witnesses' interviews and "noted that the individuals involved in the incident had different recollections." (D. Ex. 9, p. 14; D. Ex. 14; ##### [District's Pupil Services Director] testimony, Day 2, p. 111; ##### [junior-senior high school principal] testimony, Day 1, pp. 281-282; ##### [school psychologist intern] testimony, Day 2, pp. 24-25; ##### [school social worker] testimony, Day 1, p. 334)
51. The Student was allowed to explain the March 13 incident from his perspective at the MDR meeting, although his description of the incident was not included in the District's MDR report. (D. Ex. 9, p. 14) He also explained the incident at the subsequent expulsion hearing, which was recorded. The Student acknowledged that he had made a sexual comment about a girl a couple days prior to the incident, and before track practice on March 13, boys in the gym were bringing up his comment. The boys, including Student B, said they were going to tell the girl what the Student had said about her. The Student did not want them to tell the girl. The Student said the boys told him if he got down on his knees and begged they would not tell the girl what he had said about her. The Student said he got down on his knees. Nevertheless, the boys kept "yapping" or "jaw jacking", including Student B. The Student became triggered by Student B's comments and tackled Student B in response. (D. Ex. 7b; ##### [District's Pupil Services Director] testimony, Day 2, pp. 110-111; ##### [school psychologist intern] testimony, Day 2, pp. 120-122; ##### [school social worker] testimony, Day 1, pp. 333, 336-337)
52. Video footage captured on a school camera inside the gym prior to track practice on March 13, 2024 shows the Student and other students milling around, appearing to talk, and at one point, the Student gets down on his knees by some boys. (D. Ex. 1) The IEP team did not watch or consider the gym video footage during the MDR meeting. (##### [District's Pupil Services Director] testimony, Day 2, p. 60)
53. The District staff members at the MDR meeting concluded the Student's behavior was not impulsive because they felt that, since he had made the sexual comment days earlier, he had "time to process prior to acting" and tackling Student B. They believed the Student did not appear dysregulated in the video and that he had "time to think and plan

his actions” and “repeatedly hit the other student when he was down.” Consequently, they concluded that the Student’s behavior was not caused by or substantially related to his EBD disability. (D. Ex. 9, p. 19)

54. The members of the MDR did not reach consensus. The Parents and ##### [school psychologist intern] believed the Student’s behavior was caused by or had a direct and substantial relationship to his disability, as did his private therapist who had submitted a letter to the District stating her opinion. ##### [director of pupil services] was “wavering” and “in the middle for a lot” of the discussion but ultimately agreed with District staff that the Student’s behavior was not caused by or substantially related to his disability. (D. Ex. 9; P. Ex. 1; ##### [director of pupil services] testimony, Day 1, p. 226)
55. The Parents and ##### [school psychologist intern] also believed that the Student’s behavior was a result of the District not implementing the IEP, specifically by not providing 100 minutes weekly of instruction from the special education teacher and by not having staff more closely supervise the Student during track practice to watch for dysregulation and provide him with a break. When the Parents raised the issue of the 100 minutes of specially designed instruction not being provided by a licensed special educator, the District took a break to gather information in response. The District acknowledged that the 100 minutes of instruction had been provided by a paraprofessional and that specially designed instruction must be provided by a licensed educator, not by a paraprofessional. Nevertheless, District staff felt that “the spirit and intent of the IEP” had been followed and that “if there was a lack of proper implementation on the part of the school, it did not have a direct or causal relationship” to the Student’s behavior on March 13. The director of pupil services described the issue as a “clerical error” in the IEP, stating that the IEP had been poorly drafted, because the 100 minutes of services was not meant to be instruction in self-regulation, but rather was support with work completion which should have been listed as a supplementary service to be provided by a paraprofessional, rather than specially designed instruction. District staff also disagreed that the IEP was not implemented regarding staff supervising the Student, noting that coaching staff was nearby when the March 13 incident occurred, and that the IEP did not require a one-on-one aide to be with the Student. (D. Ex. 9, p. 20; ##### [District’s Pupil Services Director] testimony, Day 2, p. 67-71; ##### [director of pupil services] testimony, Day 1, p. 216; ##### [school psychologist intern] testimony, Day 2, pp. 151-152)
56. Because the team could not reach consensus, the director of pupil services, as the local education agency representative, was ultimately responsible for making the MDR decision. Like other District staff on the team, she believed the Student’s behavior was different than the incident in December 2023 when he tackled a student to the ground in class, viewing the Student to have acted defensively in that situation. Moreover, she opined that the Student did not act impulsively because he paused and waited to tackle Student B when he was kneeling to tie his shoes. In addition, she was influenced by the recent FBA that the school psychologist intern had conducted, stating that “aggression

never came up” and that the FBA was focused on his social connection impulsivity, class clown, and sexualized behaviors. The director of pupil services decided that the Student’s behavior on March 13, 2024 was not a manifestation of his disability. (#### [District’s Pupil Services Director] testimony, Day 2, pp. 62-66; D. Ex. 9, p. 20)

57. As a result of the determination that the Student’s conduct was not a manifestation of his disability, on April 10, 2024, the school board expelled the Student from the District until the age of 21. (D. Ex. 13)
58. On April 17, 2024, the Parents, by their attorney and on behalf of the Student, filed a request for an expedited due process hearing to challenge the MDR determination that led to the Student’s expulsion.

DISCUSSION

Jurisdiction

The undersigned ALJ has authority to preside over this due process proceeding pursuant to Wis. Stat. § 115.80(2).

Burden of Proof

The U.S. Supreme Court has ruled that the burden of proof in an administrative hearing challenging an IEP is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). As the complainants in this matter, the burden of proof is on the Parents of the Student. The burden of proof is a preponderance of the evidence. Wis. Stat. §115.80(5)(b).

Manifestation Determination

The IDEA and the related federal regulations set forth the standard that local education agencies must follow in order change the placement of a child with a disability for disciplinary reasons. In accordance with 34 CFR § 300.530, a local education agency must conduct a manifestation determination prior to expelling a child with a disability for violating school rules. If a local education agency determines that the child’s behavior was not a manifestation of the child’s disability, it may discipline the child in the same manner as a child without a disability. 34 CFR § 300.535.

With regard to a manifestation determination, the federal regulations state:

- (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 CFR § 300.530(e)(1)-(2). *See also* 20 U.S.C. § 1415 (k)(1)(E)(i).

The IDEA states that a hearing officer “shall hear and make a determination regarding an appeal [of a manifestation determination]” and “may order a change in placement of a child with a disability” in making such determination. 20 USC § 1415(k)(3)(B)(i)-(ii). In addition, under 34 CFR § 300.532, the hearing officer may “[r]eturn the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of § 300.530 or that the child's behavior was a manifestation of the child's disability.”

The Seventh Circuit Court of Appeals has held that hearing officers in special education hearings under the IDEA are specialists who are “not required to accept supinely whatever school officials testify to ... but they are to give that testimony due weight.” *Sch. Dist. of Wis. Dells v. Z.S. ex rel. Littlegeorge*, 295 F.3d 671, 676 (7th Cir. 2002).

Was the Student's behavior caused by or had a direct and substantial relationship to his disability?

There is no dispute between the parties that the Student has an emotional behavioral disability (EBD), which has resulted in him struggling with self-regulation since he was a young child in grade school. His difficulties with impulse control and social functioning manifest in both verbal and physical behaviors. His diagnoses include ADHD and adjustment disorder-depression. While his current private therapist also treats the Student for suspected autism and post-traumatic stress disorder, he has not been diagnosed by a physician or neuropsychologist with those conditions, and the record does not contain sufficient evidence showing that he has disabilities in those areas.

In this case, the testimony of District staff, as well as the Student's educational records and the MDR documentation, establish that the MDR team did not consider all relevant information, or the team misunderstood or mischaracterized some of the relevant information about the Student's disability-related behavior in the past and on March 13, 2024.

First, the MDR team did not consider all of the relevant information in the Student's disciplinary records regarding his history of aggressive physical behavior. The MDR report acknowledged that he had 15 prior fighting offenses in school but stressed that 12 of those had occurred more than five years ago, furthering the District's conclusion that the Student's disability no longer presented as physical aggression. (D. Ex. 9, p. 19) However, a thorough review of the Student's disciplinary records shows that in the last five years, he has engaged in at least eight other offenses that included physically aggressive behavior that were not categorized as fighting. (P. Ex. 40)

There was also other evidence on the record which showed that aggression by the Student remains a concern at school; however, that evidence was seemingly ignored or mischaracterized by District staff on the MDR team. Two of the Student's teachers rated him in the clinically significant range for aggression on the BASC-3 questionnaire that assessed the Student's behavior as part of his recent FBA dated February 20, 2024. (D. Ex. 25, pp. 234-236) Despite the school psychologist intern having a minimal amount of personal experience working with or even observing the Student, she strongly asserted that the Student's disability does not present as aggression and that his aggressive behaviors were in the past. She testified that aggression was never brought up in teacher or parent interviews or at recent IEP meetings, and she emphasized that her opinion was based upon all the data she reviewed and compiled for the FBA. (#### [school psychologist intern] testimony, Day 1, pp. 157-162) The Parents and the teacher that #### [school psychologist intern] interviewed may not have mentioned aggression as a concern, but the two teachers who completed the BASC-3 certainly did. This information was not mentioned in the MDR report or by the director of pupil services. Instead, #### [District's Pupil Services Director] testified that she found the recent FBA information very "compelling" and stressed that "physical aggression never came up." (#### [District's Pupil Services Director] testimony, Day 2, pp. 63-64)

The FBA focused on sexualized comments/behavior, disruptive behavior, and communication, and the Student did, in fact, exhibit those behaviors which impeded his education. However, the Notice of Reevaluation also cited physical contact as a problem behavior, and as recently as December 2023, the Student acted in a physically aggressive manner by tackling another student to the ground in a classroom after making fun of the student. It is unclear why physical contact was not included as a problem behavior in the FBA, and more importantly for purposes of this hearing, it is concerning that the District did not consider or give weight to the teachers' BASC-3 scores on aggression at the MDR. (D. Ex. 26; P. Ex. 26) Those teachers' clinically significant scores contradict the testimony that the Student's aggression is no longer a concern or a challenging behavior related to his disability.

The MDR team also did not consider all information relevant to the March 13, 2024 incident itself and the Student's behavior on that date. Critically, the MDR team did not receive #### [District's Behavior Support Specialist's] written report with the student witnesses' statements, and #### [District's Behavior Support Specialist] did not attend the MDR meeting. In addition, the MDR team was not informed about what Student B told #### [District's Behavior Support Specialist] about the incident. The high school principal attended the MDR meeting, and she told the team about the student witnesses' statements. However, she was not present for all of

the student interviews, and it is not clear from the record if the witness statements were described accurately and in detail to the MDR team. Rather, the principal told the team that “the individuals involved in the incident had different recollections.” (D. Ex. 9, p. 14; ##### [District’s Pupil Services Director] testimony, Day 2, p. 111; ##### [junior-senior high school principal] testimony, Day 1, pp. 281-282; ##### [school psychologist intern] testimony, Day 2, pp. 24-25; ##### [school social worker] testimony, Day 1, p. 334) Further, ##### [District’s Pupil Services Director] testified that it was the consensus of school staff *who conducted the investigation* that the Student’s statement about the incident did not match the other witnesses’ statements. (##### [District’s Pupil Services Director] testimony, Day 2, p. 111) However, the investigating staff did not even have a statement from the Student during their investigation because they were unable to interview him.

In fact, the statements about the incident from the five student witnesses, Student B, and the Student are all substantially consistent. (D. Ex. 14; ##### [District’s Behavior Support Specialist] testimony, Day 1, pp. 368-371, 384; D. Ex. 7b; ##### [District’s Pupil Services Director] testimony, Day 2, pp. 110-111; ##### [school psychologist intern] testimony, Day 2, pp. 120-122; ##### [school social worker] testimony, Day 1, pp. 333, 336-337) Student B and other student witnesses said that both the Student and Student B were exchanging words and that the Student got upset. This is also consistent with the Student’s version of the events leading up to him tackling Student B. Moreover, the gym video footage of the Student kneeling down in gym lends credibility to the Student, as it corroborates his statement that the boys told him they would not tell the girl what he had said about her if he got down on his knees and begged. Notably, the MDR team did not view the video footage from the gym, so they did not consider this relevant information.

In addition, the MDR team apparently misunderstood or misconstrued some of the relevant information about the March 13 incident. The description of the altercation by District staff has inconsistencies with the video footage and witnesses’ statements. District staff testified that they did not feel the Student acted impulsively when he tackled Student B because: 1) they believed the incident was “initiated several days prior” when the Student made the sexual comment about the girl; 2) there was a pause after “the conversation between the boys” and the tackling; and 3) the Student waited to attack until he was in a more powerful position when Student B was kneeling down and looking away or turned with his back to him. (##### [District’s Pupil Services Director] testimony, Day 2, pp. 60-61, 73-74; ##### [junior-senior high school principal] testimony, Day 1, p. 326)

The proposition that the Student did not act impulsively on March 13 because he made the sexual comment about the girl a few days earlier is unpersuasive, illogical, and unsupported by the evidence. The fact that he made the sexual comment days earlier does not equate to him planning to get into an altercation about it with another male student days later. Student B and other student witnesses told ##### [District’s Behavior Support Specialist] that Student B and the Student were talking about the sexual comment and that it made the Student upset. Further, the video does not, in fact, show a lengthy pause between the Student and Student B interacting and the tackle occurring. They are looking at each other on the sidewalk and continue to look at each other when Student B begins tying his shoe. The third student standing near them is watching them and appears to be listening to them. The student witnesses stated that the two boys were talking to each other and getting mad, and the video does not support that they were looking at each other in silence during this time, with the Student calculating when to attack Student B. Student B was kneeling down, but

he was looking at the Student and scrambled to his feet as the Student lunged at him. Student B was sideways or turned around when the Student hit him on the face and butt, but the video shows those actions happened in the midst of the altercation during moments of dysregulation, not planned aggression.

In August 2021, the Student's IEP team noted that he can become dysregulated by "peer triggers" and both this incident and the December 2023 classroom incident show that this remains true. (P. Ex. 14) The District's assertions that the differences in the December 2023 and March 2024 altercations show that the Student was not dysregulated or acting impulsively in March are unconvincing and unsupported based on a review of all the relevant information. ##### [District's Behavior Support Specialist] report regarding the December 2023 offense indicates that the incident began when the Student was teasing the other student and, in fact, he had been teasing the other student for over a month. When the other student stood up and asked him to stop, the Student tackled him to the floor. District staff, none of whom witnessed the incident, described the other student as "posturing" or "hovering" over the Student, but there is nothing in ##### [District's Behavior Support Specialist] disciplinary write-up that indicates the Student felt afraid or threatened by the other student standing up and asking him to stop. (D. Ex. 10; ##### [District's Pupil Services Director] testimony, Day 2, p. 65) In fact, the Student called the other student two vulgar names before tackling him to the ground. Even if the Student was reacting defensively when he tackled the student in December, that does not mean that his conduct in March was not the result of him becoming dysregulated and acting impulsively and aggressively towards Student B as a result of him becoming triggered and dysregulated by Student B's comments.

The student witnesses' statements, the Student's records and history of physical aggression in school, Student's B statement to ##### [District's Behavior Support Specialist], the Student's statement, and the video footage from both the gym and the flagpole area support the conclusion that the Student, whose disability causes him to become dysregulated and act out inappropriately, was triggered by Student B threatening to tell the girl about what the Student had said, causing him to act impulsively and aggressively towards Student B. A thorough review of all the relevant information from the Student's records and about the incident shows by a preponderance of the credible evidence that the Student's behavior was caused by or had a direct and substantial relationship to his EBD disability. Therefore, I find that the District incorrectly determined that the Student's conduct on March 13, 2024 was not caused by or did not have a direct and substantial relationship to his disability under 34 CFR § 300.530(e)(1)(i).

Was the behavior a direct result of the District not implementing the Student's IEP?

The Student's IEP in effect on March 13, 2024 required that he receive 100 minutes weekly of "specially designed services and reinforcement in modeling and practice of prioritizing and sustaining effort." (D. Ex. 22) These services were listed as special education/specially designed instruction in the IEP. The District acknowledged that specially designed instruction must be provided by a licensed educator and admitted that the

paraprofessional, not the special education teacher, had been providing the 100 minutes of instruction to the Student. (##### [District's Pupil Services Director] testimony, Day 2, p. 67-71)

It is possible that it was the IEP team's intent that these services were meant to be work completion assistance that should have been listed as supplementary aids and services, rather than specially designed instruction, in the IEP. However, that would be quite a huge "clerical error" and the law does not require that a District simply provide services consistent with the "spirit and intent" of an IEP, as argued by the District. The District did not provide the Student with 100 minutes per week of specially designed instruction by a licensed educator. However, the Parents and Student did not meet their burden of showing that the Student's conduct on March 13, 2024 was a direct result of the District's failure to have a licensed educator provide those 100 minutes of services weekly. There is simply insufficient evidence on the record to prove that causal relationship.

Likewise, the evidence does not show that Student's behavior was the direct result of the District failing to implement provisions of the IEP related to school staff watching for signs of dysregulation by the Student and then communicating with the Student to offer him a break. There were staff visible on the video footage of the gym and outside the school. The evidence on the record does not establish that staff were not watching the Student closely enough for signs of him becoming dysregulated, resulting in his conduct.

The Parents and Student did not meet their burden of showing by a preponderance of the evidence that the Student's behavior was a direct result of the District failing to implement his IEP. Nevertheless, I determined that the Student's behavior on March 13, 2024 was caused by or had a direct and substantial relationship to his disability; therefore, the Student's conduct was a manifestation of his disability, and accordingly, he was improperly expelled from school.

All of the arguments presented by the parties were carefully considered by the undersigned ALJ. The courts have recognized that an administrative decision-maker "is not required to make findings that respond to every issue [a party] raised in its request." *Peace Lutheran Church & Acad. v. Vill. of Sussex*, 2001 WI App 139, ¶ 33, 246 Wis. 2d 502, 631 N.W.2d 229. Thus, any arguments and evidence on the record that were not specifically mentioned were determined to not merit comment in the decision.

CONCLUSION OF LAW

The District incorrectly determined that the Student's conduct on March 13, 2024 was not a manifestation of his disability under 34 CFR § 300.530(e), and consequently, the District improperly expelled the Student from school.

ORDER

IT IS HEREBY ORDERED THAT:

1. The manifestation determination dated April 2, 2024, which concluded that the Student's conduct was not a manifestation of his disability, is hereby reversed; and,
2. The Student shall be allowed to return to his former educational placement at the Clinton Community School District.

Dated at Madison, Wisconsin on May 30, 2024.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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Madison, Wisconsin 53705-5400
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By: _____


Sally Pederson
Senior 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.