

child's disability, it may discipline the child in the same manner as a child without a disability. *See* 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 that “the hearing officer 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,” or “[o]rder a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.”

A “child with a disability” is defined under the federal regulations to mean a child evaluated in accordance with [the relevant provisions of the federal regulations] as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred in this part as “emotional disturbance”), and orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. 34 CFR § 300.8(a)(1). A traumatic brain injury is further defined as follows:

Traumatic brain injury means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational

information processing; and speech.” 34 C.F.R. § 300.8(c)(12) (italicized emphasis added). As described by the Student’s doctor, impulse control is one of the biggest pieces that lead to behaviors for individuals with a TBI. (U@ testimony) The Student’s doctor also testified that the Student’s impulse control issues can occur without provocation and turn on like a switch. (Id.). This fact is documented in the Student’s IEP, which confirms that the Student can go “from a regulated state to disruptive in a matter of seconds.” (Exs. 3, 6 and 13) The Student’s IEP also states that “it is challenging to talk to the Student when he is in an escalated emotional state of mind. When he is anxious, frustrated, angry, or embarrassed is when we [sic] an increase in unfavored behaviors such as increased language and inappropriate actions.” (Ex. 3) According to the doctor, the Student’s behaviors can be mitigated if individuals working with him know what triggers him; thus, it is important for people working with him to not only know him, but follow his IEP and BIP. (U@ testimony)

Moreover, the fact that most of the Student’s prior behavioral incidents involved physical aggression with peers rather than staff illustrates two important and relevant distinguishing points: (1) that interactions between the Student and individuals who are untrained and/or unfamiliar with the Student’s disability, i.e. peers, are likely to result in the triggering and escalation of the Student’s inappropriate behaviors and impulsive fight/flight responses; and (2) that when staff working with the Student are knowledgeable of his disability, including his triggers and his BIP, the Student’s inappropriate behaviors are mitigated and less likely to culminate in physical aggression or a fight response. Accordingly, the Student’s action of throwing his Ipad at ORQWHUPVSHFLDOHGXFOWLRQXEVWLWXWHWHDKJHU@ consistent with his numerous prior behaviors in school (including nearly a dozen incidents of physical aggression, including throwing items at individuals and causing injury) as documented in his disciplinary history, but it is consistent with the Student’s fight or flight response to stressful situations based upon his disability. Further, the Student’s conduct is consistent with what one should expect from the Student when he is dealing with someone he is not connected with and who is not trained and knowledgeable about his disability and/or the proper implementation of his BIP. Unfortunately, it appears that the MDR team primarily relied upon and improperly afforded more weight to the observations of the Student’s behavior on September 27, 2023 from individuals who were clearly not familiar with the Student or his disability as opposed to the existing and available information about the Student’s known behavioral issues attributable to his TBI that were well-documented throughout his IEPs and educational records.

As described above, the September 27, 2023 incident was similar to nearly a dozen other instances of physical aggression by the Student in the last two years, including throwing items at and hitting individuals. The testimony presented at the hearing also supports the conclusion that the Student’s conduct was an impulsive fight/flight response attributed to the Student’s TBI disability and the result of having been triggered by [long term special education substitute teacher] interactions with him. Based upon the preponderance of credible evidence presented at the hearing, the Student’s action of throwing an iPad at ORQWHUPVSHFLDOHGXFOWLRQXEVWLWXWHWHDKJHU@ and directly and substantially related to the Student’s TBI disability, which includes impairments in cognition, reasoning, judgment, problem solving, and psychosocial behaviors, associated with having been a victim of a brain injury and traumatic abuse as an infant. Therefore, I find that the School District incorrectly determined that the Student’s conduct was not a manifestation of his disability under 34 CFR § 300.530(e)(1)(i).

B. Failure to follow IEP and BIP.

Based on the record, I also find that Ms. ##### [long term special education substitute teacher] failure to properly implement the Student's IEP and BIP led the Student to throw his iPad at her. Indicative of her lack of familiarity with the Student, his disability and his IEP/BIP, ##### [long term special education substitute teacher] did not recognize that the Student was triggered or dysregulated despite knowing that he had just walked out of his first hour class, along with having observed him hang up on his father, leave her classroom, repeatedly swear at her, and refuse to comply with her directives. Any suggestion that the Student was not dysregulated leading up to the iPad throwing incident is simply not credible based upon the other evidence in the record.

Moreover, ##### [long term special education substitute teacher] did not take appropriate proactive steps to prevent further escalation of the Student's behaviors. She did not afford the Student adequate time and opportunity to take a break so he could self-regulate. Instead, she insisted that the Student comply with her repeated directives as she pursued him through the school in an attempt to get him to comply. She did not attempt to enlist the help of another staff person from the Student's resiliency team or with whom she knew the Student had a trusted relationship. On the contrary, ##### [long term special education substitute teacher] instructed one of the members of his resiliency team members to not allow the Student into her classroom. Not only was the Student not provided with a break or allowed to meet with a trusted adult or member of his resiliency team, but the Student was denied access to student services due to the door being locked. When the Student attempted to enter the locked student services office, ##### [long term special education substitute teacher] told him that he could not access student services and never bothered to offer to assist the Student in accessing student services as provided for in his BIP. Instead, she repeated the directive that he could either go to the office or to her classroom to meet with his dad. (##### [long term special education substitute teacher] testimony; Ex. 6)

Even after the Student attempted to avoid her by entering his next class at the assigned class time and sitting in his assigned seat, ##### [long term special education substitute teacher] continued to pursue him. Perhaps making it even worse, ##### [long term special education substitute teacher] singled him out and drew attention to him by refusing to allow other students to enter the classroom. Someone familiar with the Student and his IEP would have known that singling him out in front of others, particularly his peers, would cause him to become even more dysregulated. ##### [long term special education substitute teacher] then sat between him and the door repeatedly telling him that his "choice" was either to return to her classroom or go to the office to meet with his dad. ##### [long term special education substitute teacher] failed to recognize that the Student was dysregulated and to recognize how her own actions were triggering the Student further and escalating the situation. When the Student's prior case manager was asked how she would have handled a similar situation, she stated that she would not have attempted to continue to talk to him when she saw he was dysregulated. (##### [case manager] testimony) Other witnesses familiar with the Student similarly testified that the Student should have been left alone when it was obvious that he was becoming dysregulated. (T. Schultz testimony; ##### [Dr.] testimony)

It is apparent that ##### [long term special education substitute teacher] failure to follow the BIP ultimately led to the Student's escalation from flight to fight. He was literally cornered in a classroom while both ##### [long term special education substitute teacher] and another teacher, who was also not familiar with the Student, both admittedly stood in near

and partially blocking the only doorway to exit the room. Given the Student's well documented disability, behavioral history, and known fight or flight response to stressful situations, it is not surprising that the Student would resort to a fight response throwing his Ipad at ##### [long term special education substitute teacher] as he attempted to leave the room. The District's MDR team failed to recognize or acknowledge that the Student's conduct was a direct result of a failure to follow the Student's IEP and BIP pursuant to 34 CFR § 300.530(e)(1)(ii).

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The Student has met the burden of proving by a preponderance of the credible evidence that the District incorrectly determined that the Student's conduct was not a manifestation of his disability under 34 CFR § 300.530(e)(1) and (2).

II. Interim Alternative Educational Setting

In response to the Student's Due Process Hearing Request filed with the Wisconsin DPI, the District filed a counterclaim requesting that the Student be placed in an appropriate interim alternative educational setting (IAES) under 34 CFR § 300.532(b) if this ALJ determines that the Student's conduct was a manifestation of the Student's disability. Pursuant to 34 CFR § 300.532(b), a child with a disability may be placed in an IAES for up to 45 school days if it is determined that "maintaining the current placement of the child is substantially likely to result in injury to the child or to others."

In support of the counterclaim, the District elicited testimony from numerous witnesses who felt that the Student might harm others if he was allowed to return to school. As recognized by the Student's doctor, there can be no guarantee that the Student would not have similar behavioral issues in the future given the nature of his disability. This is particularly true if staff are not familiar with the Student and/or not implementing the Student's IEP and BIP as was the case here. However, no evidence was presented demonstrating that the Student had any behavioral incidents since September 27, 2023 despite participating in sports and interacting with people in the community the entire time. Imposing an IAES would undermine important and basic tenets under the IDEA that requires schools to develop and follow a student's IEP and provide FAPE to students with disabilities in the least restrictive environment.

The District has failed to present sufficient evidence or a legal basis for imposing an IAES under the circumstances in the present matter.

CONCLUSIONS OF LAW

1. On September 29, 2023, the District incorrectly determined that the Student's conduct on September 27, 2023 was not a manifestation of his disability, which resulted in the improper expulsion of the Student from the District contrary to 34 CFR § 300.530(e)(1) and (2).
2. The District has not met its burden to establish that the Student should be placed in an Interim Alternative Educational Setting under 34 CFR § 300.532(b).

ORDER


IT IS HEREBY ORDERED THAT:

1. The manifestation determination dated September 29, 2023, which concluded that the Student's conduct was not a manifestation of his disability, is hereby reversed;
2. The Student shall be allowed to return to his former educational placement at the ##### [School District];

Dated at Madison, Wisconsin on May 10, 2024.

STATE OF WISCONSIN
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Kristin P. Fredrick
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

APPEAL TO COURT: Within 45 days after the decision of the administrative law judge has been issued, either party may appeal the decision to the circuit court for the county in which the child resides under §115.80(7), Wis. Stats., or to federal district court pursuant to U.S.C. §1415 and 34 C.F.R. §300.512.

A copy of the appeal should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The Division will prepare and file the record with the court only upon receipt of a copy of the appeal. It is the responsibility of the appealing party to send a copy of the appeal to the Division of Hearings and Appeals. The record will be filed with the court within 40 days of the date the Division of Hearings and Appeals receives the appeal.