



Before the
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of ##, Student v.

DECISION

[School District]

DHA Case No. DPI-24-0009

DPI Case No. LEA-24-0008

The Parties to this proceeding are:

#####, Student, by

Attorney Jeffrey Spitzer-Resnick
Systems Change Consulting, LLC
430 Sidney Street
Madison, WI 53703
spitznick@tds.net

[School District], by

Attorney Tess O'Brien-Heinzen
Renning Lewis & Lacy, S.C.
660 W. Washington Ave., Ste. 303
Madison, WI 53703
tobrien-heinzen@law-RLL.com

PROCEDURAL HISTORY

On March 21, 2024, the Wisconsin Department of Public Instruction (DPI) received a request for an expedited due process hearing under Wis. Stats. Chapter 115 and the federal Individuals with Disabilities Education Act (IDEA) on behalf of ##### (the "Student") against the ##### (the "District"). DPI referred the matter to the Wisconsin Division of Hearings and Appeals for hearing.

A prehearing telephone conference was held with the parties and their respective attorneys on April 2, 2024 and the issues for hearing that were expedited in nature were bifurcated from any non-expedited issues. A due process hearing was scheduled to commence on April 25, 2024 to address the expedited issues. A two-day hearing was held on April 25-26, 2024

at the ##### [School District]. A decision on the expedited issues is due May 10, 2024. The non-expedited issues are set for an adjourned prehearing conference on May 15, 2024.

EXPEDITED ISSUES

- I. Whether the School District incorrectly determined that the Student's misconduct was not a manifestation of his disability, and as a result, improperly expelled the Student from the School District?
- II. If the School District incorrectly determined that the Student's misconduct was not a manifestation of his disability, whether the School District has established that the Student should be placed in an Interim Alternative Educational Setting (IAES) under 34 CFR 300.532(b)?

FINDINGS OF FACT

1. The Student ##### is a resident of the District and attended the eighth grade beginning in the 2023-2024 school year.
2. The Student was removed from his home at the age of four months and placed in foster care due to allegations of abuse, including having sustained a subdural brain bleed, injury to the frontal lobe, and multiple rib fractures. The Student's injuries were consistent with shaken baby syndrome and repetitive abuse. Besides a traumatic brain injury, he is also diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), Anxiety Disorder, Oppositional Defiance Disorder (ODD), and episodic mood disorder. (Hearing testimony of Student's parent, Tr. 11-12; hearing testimony of ##### [Dr.], Tr. 142)
3. Due to the traumatic brain injury and history of abuse, the Student has struggled with behaviors related to impulse control, focus, anxiety, attachment, and not following directions/authority. The Student has high cortisol levels that often result in a fight or flight response making it difficult for him to respond appropriately to interactions with others. The Student was evaluated at the age of three for aggressive behaviors and anger, and a neuropsychological evaluation of the Student was completed at the age of six. (##### [Dr.] testimony, Tr. 142, 144-147; parent testimony)
4. The Student began receiving special education services in the District at the age of three or four years of age. An Individualized Education Plan (IEP) team determined that the Student met the eligibility criteria for a traumatic brain injury (TBI), which affected his educational performance in the following areas: attention, reasoning, judgment, problem solving, sensory, perceptual and motor skills, psychosocial behavior, and executive functions.. The IEP team further determined that the Student needed special education and related services to address his behavioral difficulties. (Parent testimony; Ex.13)
5. The Student's earlier IEPs identified targeted behaviors, including verbal/physical aggression towards peers and adults. The IEPs noted that problematic behaviors

frequently and consistently occur in a classroom when there was an unstructured lesson or environment. The Student's IEPs also stated that "he needs to feel safe and secure before he can learn" and noted that when the Student is anxious or agitated, his inappropriate behaviors and defiance escalate and that when anxiety is elevated it impedes the Student's ability to learn and triggers his defense mechanisms where he can go from regulated to disruptive "in a matter of seconds." (Ex. 13)

6. In sixth grade the Student was suspended for multiple behavioral issues, including: fighting, assaulting a student, putting a student in a headlock, tripping a student causing injury, and hitting a student in the face with a shoe. (Ex. 7)
7. A Functional Behavior Assessment (FBA) was conducted during the Student's sixth grade year. The FBA identified multiple target behaviors including: physically touching another person, any form of sexual behavior/overtone, use of profanity, off task behaviors and not following classroom expectations. The FBA further identified 24 behavior incidents that occurred during the 2021-2022 school year, including but not limited to: three instances of physical aggression, two instances of fighting, and ten instances of defiance/disrespect. (Ex. 5)
8. On January 6, 2022, the IEP team developed a Behavioral Intervention Plan (BIP), which was revised numerous times between January 2022 and April 2023. The most recent version of the BIP dated April 17, 2023 included a "Proactive Support Plan", a "Response Support Plan," and "Restorative Support Plan." The BIP identified stressors and triggers for the Student, including: change, history of not having a positive experience at school, lack of confidence, insecurity about peer relationships, tasks deemed difficult or boring, unstructured time/transitions, and anxiety. When the Student engaged in identified problematic behaviors, including using profanity, being off-task, or not following classroom expectations, the BIP set forth three steps for staff to follow. Step 1 was to provide redirection (and up to three redirections before having the Student take a break). Step 2 was to provide the Student with a choice to comply with the request or take a break. According to the BIP, the break would occur with either his case manager ##### [case manager], or another resiliency team member in Room 106, and include discussion, reteaching, and a return to class when the Student was ready. It could also be determined at this step if the Student needed to go to student services or the sensory room. Under Step 3, if the Student was still opposed to redirection, staff was to collaboratively problem solve solutions, text parents for redirections, involve members of his resiliency team for co-regulation and consequence discussion, and either the Student or resiliency team could involve student services. (Ex. 4, pp. 0030-31)
9. On February 7, 2023, the Student was suspended due to a behavioral incident where the Student hit another student in the groin. The IEP team determined that the Student's conduct was a manifestation of his disability. The Student received multiple other behavioral related suspensions, including a three-day suspension for slapping a student, a one-day suspension for hitting a student with his Ipad charger, and an additional five-day suspension for hitting a student in the head with a water bottle (Exs. 7 and 15)

10. The IEP team met several times during the 2022-2023 school year to review the Student's behaviors, which included at least four instances of physical aggression that resulted in suspensions, in addition to, being disruptive, using inappropriate language, being disrespectful, and insubordination.. (Ex. 5, p. 5)
11. The Student's most recent IEP dated June 1, 2023, which was in effect at the start of the 2023-2024 school year, included two behavior related goals to aid in learning and demonstrating strategies and tools so that the Student could remain in a regulated state, as follows: (1) Given a maximum of one redirection, the Student will remain on task with no task avoidance for 15 minutes in 4 out of 5 opportunities; (2) When faced with a situation causing anxiety or an un-preferred task, the Student will demonstrate appropriate word choices and by using his strategies and tools he will be able to appropriately regulate back to an expected emotional state and return to the given task in 4 out of 5 opportunities; and (3) The Student will participate in class appropriately and complete 70% of the assigned work in 4 out of 5 opportunities. (Ex. 3, pp. 0021-0023)
12. Under the section describing the Student's present level of performance, the June 1, 2023 IEP states that the Student "becomes very anxious at times. He can also go from a regulated state to disruptive in a matter of seconds. It is challenging talking with him 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 disfavored behaviors such as increased language and inappropriate actions." Similarly, under the section describing the effects of the Student's disability, the IEP states that "if [the Student's] anxiety is elevated it impedes his ability to learn and triggers his defense mechanisms. When [the Student's] anxiety has been triggered, he can go from regulated to disruptive in a matter of seconds..." (Ex. 3, pp. 0016 and 0018)
13. Due to his difficulties connecting with adults and persons of authority, the BIP provided that the Student could take breaks to meet with a trusted adult and/or members of a "resiliency team" consisting of individuals the Student trusted and with whom he had a good relationship. Members of his resiliency team included his prior case manager, ##### [case manager], ##### (a paraprofessional), principal #####, associate principal #####, and Student Services. In addition, the BIP provided that the Student could be given the option of going to the Student Services office if re-direction was not effective.(Ex. 4)
14. Due to the Student's known defense mechanisms involving a fight or flight response, it is critical that the adults working with the Student know him and understand his medical history. According to his prior case manager, the Student's typical fight response towards her was in the form of verbal aggression, including the use of profanity, but more commonly he demonstrated a flight response by shutting down and avoiding tasks. (##### [Dr.] testimony, Tr. 151; ##### [case manager] testimony, Tr. 369)

15. The Student does not like to be singled out and peer acceptance is important to him. (##### [case manager] testimony, Tr. 364, 368 and 399; ##### [long term special education substitute teacher] testimony, Tr. 617)
16. In the Spring of 2023, the Student and his family were made aware that ##### [case manager] was changing positions and would no longer be available to be his case manager. Following the June 1, 2023 IEP meeting, it was determined that the Student's new case manager would be #####, whom the Student knew and had a connection with through sports. However, ##### [new case manager] resigned in mid-August 2023. (Parent testimony, Tr. 20-21; ##### [case manager] testimony, Tr. 409-410)
17. One week prior to the start of the 2023-2024 school year, the District assigned ##### [long term special education substitute teacher] as the Student's replacement case manager. Ms. ##### [long term special education substitute teacher] worked for the District since March 2022 as a long term substitute teacher in the Intellectual Disability special education room. She had not previously worked with the Student. ##### [long term special education substitute teacher] had an associates degree but did not have a college degree related to education, did not hold a teacher license, and was not a licensed special education instructor. (##### [long term special education substitute teacher] testimony, Tr. 508, 549, 596)
18. The first contact the Student's family had with ##### [long term special education substitute teacher] was an email she sent on August 29, 2023, a few hours before a "Back to School Night" and just a week before the start of school. To prepare for working with the Student, ##### [long term special education substitute teacher] reviewed the Student's IEP, BIP and met with the Student's prior case manager for a cumulative total of approximately one hour of time. In addition, ##### [long term special education substitute teacher] met with the Student's father for approximately fifteen minutes on "Back to School Night". (Parent testimony, Tr. 301; ##### [long term special education substitute teacher] testimony, Tr. 552-553; ##### [case manager] testimony, Tr. 418; Ex. 17)
19. The first day of school of the 2023-2024 school year was Tuesday, September 5, 2023. On September 8, 2023, just four days into the school year, the Student was requiring repeated re-directions and reported to be noncompliant, acting inappropriately, and disruptive. By the sixth day of school, on September 12, 2023, the Student had two separate disciplinary referrals for being out of his seat, using profanity and leaving his classroom. The parents were not made aware of these incidents until after the Student was suspended on September 15, 2023. (Parent testimony, Tr. 303; Ex. 7)
20. On Friday, September 15, 2023, the Student was identified as one of thirteen students who participated and/or witnessed two students fighting. Based upon student interviews and a review of video, District administrators determined that the Student had started the fight between two other students by pushing one of the students into the other student. The Student was originally suspended for five days, which was the same discipline imposed against the fighting students, but the District Superintendent subsequently reduced the suspension to three days. (Parent testimony, Tr. 303-304, 306-307)
21. On September 27, 2023, the Student was in his first hour science class, which is taught by ##### [student's teacher], a teacher with whom the Student had conflicts with in 6th grade and resulted in a classroom change. At the outset of class on September 27, ##### [student's teacher]

instructed the class that they could pair up with another student to watch a video at a table if they did not have any grades of incomplete evidence. In response, the Student attempted to sit with two other students. The teacher instructed the Student to return to his seat because her instructions were that Students work only in pairs and the Student was seated on a stool taken from an adjacent lab table. The Student did not comply with the teacher's instruction and remained sitting on the stool in the same location. No apparent attempt was made to pair the Student up with another classmate. A short time later, the teacher confronted the Student a second time and instructed him to take his seat but he again did not comply. The teacher asked another teacher in the room to call the Student's case manager, ##### [long term special education substitute teacher], and she asked a third teacher, ##### [teacher], to escort the Student to Room 106, where ##### [long term special education substitute teacher] was located. ##### [teacher] suggested to the Student that they go down to Room 106 to work on the assignment. The Student walked out of his first class by himself. Neither ##### [teacher] nor any other teacher from the classroom attempted to follow him. According to ##### [student's teacher] and ##### [teacher], the Student was calm, did not say anything and was not being disruptive; however, they characterized his behavior as noncompliant with their directives. According to ##### [student's teacher], this all transpired within the first fifteen minutes of class. (Hearing testimony of ##### [student's teacher], Tr. 499-506; hearing testimony of ##### [teacher], Tr. 259, 261-262)

22. According to ##### [long term special education substitute teacher], on September 27, 2023 she received a phone call from the Student's first hour classroom informing her that the Student was being disruptive. ##### [long term special education substitute teacher] proceeded to the Student's first class but did not encounter the Student on the way. As she returned to her classroom she observed the Student in the hallway heading towards her class. Once inside her classroom, she asked the Student about what had happened and he informed her that he did not want to sit in his seat. According to ##### [long term special education substitute teacher], the Student's refusal to remain in his seat was a repeated problem since the beginning of the 2023-2024 school year. (##### [long term special education substitute teacher] hearing testimony, Tr. 565-568)
23. At 8:21 a.m. ##### [long term special education substitute teacher] called the Student's father and put him on speaker phone so that the three of them could discuss the matter. ##### [long term special education substitute teacher] believed that the Student's father would be able to help "re-set" the day for the Student. The Student's father perceived ##### [long term special education substitute teacher] as "yelling"; however, ##### [long term special education substitute teacher] stated that her voice may have been elevated merely because she was using the speaker phone. The Student's father was previously unaware of any issue with regard to the Student's refusal to sit in his seat since the start of the school year as it had not been communicated with the family. (Parent hearing testimony, Tr. 311-312; ##### [long term special education substitute teacher] testimony, Tr. 567-568)
24. When ##### [long term special education substitute teacher] stepped away from the phone to open her door for a maintenance worker, the Student hung up the phone with his father. While ##### [long term special education substitute teacher] called the Student's father back, the Student walked out of the room. ##### [long term special education substitute teacher] requested that the Student's father come to the school and then proceeded to follow the Student down the hall. The Student walked past the office and stopped at the door to the Student Services office; however, the door was locked. ##### [long term special education substitute teacher] informed the Student that he could not access student services. When the Student continued down the hall, one of the teachers on his resiliency team was visible in the hallway. ##### [long term special education substitute teacher] instructed the teacher to not

allow the Student into her classroom. Soon after, the warning bell for the next class period had rung at which time the Student walked towards his second class. The Student entered his second class and sat down at his assigned seat. ##### [long term special education substitute teacher] followed the Student into the classroom and instructed staff to keep the other students from entering the classroom. ##### [long term special education substitute teacher] sat across from the Student and requested that he exit the classroom and either go the office or return to Room 106 to meet up with his father. ##### [long term special education substitute teacher] did not provide any positive feedback to the Student for sitting quietly in his assigned seat at the assigned class time. When the Student got up from the desk, ##### [long term special education substitute teacher] also proceeded to the door where another teacher was already standing in the doorway. The Student was carrying his iPad and agenda/notebook. As he approached the doorway where ##### [long term special education substitute teacher] and the other teacher were standing, he threw his iPad at ##### [long term special education substitute teacher] and walked out of the classroom. The iPad struck ##### [long term special education substitute teacher] in the forehead.

(##### [long term special education substitute teacher] hearing testimony, Tr. 569-581, 622; hearing testimony of Amanda Lewis, Tr. 530-533; Ex. Exs. 9-10)

25. Just as he was arriving at the school, the Student's father received a call from the school's principal at 8:30 a.m. requesting that he come get the Student due to the incident that had just occurred with ##### [long term special education substitute teacher]. (Parent testimony, Tr. 313)
26. ##### [long term special education substitute teacher] was eventually diagnosed with a mild concussion as a result of being hit by the Student's Ipad. (Ex. 12)
27. On September 29, 2023, the District held a manifestation determination review (MDR) regarding the conduct that occurred on September 27, 2023. The IEP team members who participated in the review included the Parents, the director of pupil services, the Student's prior case manager, ##### [case manager], the associate principal, a regular education teacher, the school social worker, and another licensed special education teacher, #####,¹ whose classroom was adjacent to ##### [long term special education substitute teacher] and who allegedly had overheard and witnessed some of the Student's behaviors and interactions with ##### [long term special education substitute teacher]. Neither ##### [long term special education substitute teacher] nor the staff in the Student's first hour class participated in the MDR; rather, the team relied upon written statements submitted by ##### [long term special education substitute teacher] and ##### [student's teacher]. (Ex. 6)
28. At the MDR, the team participants considered and discussed information gathered during the investigation of the incident, including statements from ##### [student's teacher] and ##### [long term special education substitute teacher], neither of which attended the MDR meeting. The team reviewed the definition of TBI and discussed a prior MDR involving the Student's behavior. No individual from within or outside the school with a medical background that was familiar with the Student's disability participated in the MDR. And although a list of the Student's discipline history, which included numerous instances of prior physical aggression, were

¹ ##### [special education teacher] did not testify at the hearing in this matter and it is unclear whether the information she provided to the MDR team that was reported in the Manifestation Documentation was based upon what she was told versus what she personally observed. As no witnesses who testified at the hearing mentioned her being physically present during the incident that occurred on September 27, 2023, I do not afford much weight to the hearsay summary of her statements.

identified in the MDR report, they were not all discussed by the team during the meeting. (##### [case manager] hearing testimony, Tr. 479-483; parents' testimony; Ex. 6)

29. The members of the MDR from the District disagreed with the parents and concluded that the Student's behavior was neither caused by nor had a direct and substantial relationship to his disability; therefore, they found that the Student's conduct was not a manifestation of his disability. The members of the MDR who testified at the hearing stated the decision was largely based upon the fact that this incident was perceived differently from prior disciplinary issues because it involved physical aggression towards a staff person, not another student, and because the Student had been described as calm leading up to the incident. (##### [case manager] testimony, Tr. 423; parent testimony, Tr. 343)
30. The District staff in attendance at the MDR disagreed with the Student's parents' opinion that the Student's behavior was the result of District staff not implementing the Student's IEP and BIP. (Id)
31. As a result of the MDR determination that the Student's conduct was not a manifestation of the Student's disability, the Student was ultimately expelled from the School District by the School Board until the age of 21.
32. The Student has had no behavioral incidents since September 27, 2023 despite participating in sports and interacting with others in the community. (Parent testimony)
33. On March 21, 2024, the Parents filed a request for a due process hearing was filed with DPI to challenge the District's determination that the Student's conduct on September 27, 2023 was not a manifestation of his disability.

DISCUSSION

Burden of Proof

The U.S. Supreme Court has ruled that the burden of proof in an administrative hearing challenging an individualized education plan (IEP) is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). As the complainant in this matter, the burden of proof is on the Parent of the Student. The burden of proof is a preponderance of the evidence. Wis. Stat. §111.80(5)(b).

I. 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. *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

performance. Traumatic brain injury applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. Traumatic brain injury does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma.

34 C.F.R. § 300.8(c)(12).

The Seventh Circuit Court of Appeals has held that, in a special education due process hearing, an administrative law judge must give “due weight” to the opinions of school administrators and may not substitute her own opinion for theirs. *Sch. Dist. of Wis. Dells v. Z.S. ex rel. Littlegeorge*, 295 F.3d 671, 676 (7th Cir. 2002). CITE *Richland School Dist. v. Thomas P.*, 32 IDELR 233 (W.D. Wis. 2000).

In this case, it is undisputed that the Student qualifies for special education under the category of traumatic brain injury. It is also not contested that the Student incurred a traumatic brain injury as an infant and continues to have the same diagnosis. Further, the parties do not dispute the underlying fact that the Student injured a District staff person by throwing his iPad at her, thereby engaging in misconduct that violated the District’s student handbook and school board policy. The issue is whether the District properly determined that the Student’s conduct on September 27, 2023 was not a manifestation of his disability.

As set forth in the federal regulations, the manifestation determination rests on the answer to two questions: First, whether the Student’s conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability. Second, whether the Student’s conduct was caused by the District failing to implement his IEP. 34 CFR § 300.530(e)(1)-(2) I will address each question separately below.

A. Whether the Student’s conduct was caused by, or had a direct and substantial relationship, to his disability.

The process of determining whether the Student’s conduct in this matter was caused by or had a direct, substantial relationship to his disability requires not only consideration of the nature of the Student’s disability, but also requires the decision making team to review and consider the information available in the Student’s educational file, including prior conduct, along with information contained in the Student’s IEPs and the BIP. Based upon the relevant historical information contained in the Student’s IEPs and BIP, he struggles with behavioral issues in all settings due to his disability. When the Student started kindergarten at the District, the IEP determined he met the criteria for Traumatic Brain Injury (TBI), which affected his educational performance in the following areas: attention, reasoning, judgment, problem solving, sensory, perceptual and motor skills, psychosocial behavior, and executive functions. (Ex. 13) The Student was also diagnosed with Intermittent Explosive Disorder, Oppositional Defiant Disorder, Generalized Anxiety Disorder and ADHD. (Id; ##### [Dr.] testimony) Further, the Student’s IEP

identified targeted behaviors, including verbal/physical aggression towards peers and adults. (Id) The IEPs note that problematic behaviors frequently and consistently occur in a classroom when there is an unstructured lesson or environment. (Ex. 13) The Student's IEP also states that "he needs to feel safe and secure before he can learn." (Id) When the Student is anxious or agitated, his inappropriate behaviors and defiance escalate and that when anxiety is elevated it impedes the Student's ability to learn and triggers his defense mechanisms where he can go from regulated to disruptive "in a matter of seconds." (Id)

Based upon the testimony and evidence presented, it is well documented that the Student has a long history of struggling to connect and form trusting relationships with others, including teachers and staff. (##### [case manager] testimony; parent testimony) In fact, the Student's IEP documents that the Student "does well with established relationships"; thus, attempts were made to have the Student work with staff that know him and with whom he connects and/or has a trusting relationship. (Ex. 3) As an example, in sixth grade the Student was removed from ##### [student's teacher]' class because the teacher took the Student's disrespect personally. (##### [case manager] testimony) Unfortunately, in the spring of 2023, the parents and Student learned that he would no longer be working with the same case manager, ##### [case manager], due to her accepting a new role at the District. ##### [case manager] was an experienced licensed special education instructor, who was able to recognize when the Student was not being successful due to conflicts with certain teachers.

(##### [case manager] testimony) She volunteered to take over as the Student's case manager at the beginning of his sixth grade year and based upon her testimony at the hearing, it was clear that she cared about the student and understood him better than many other staff. (Id) ##### [case manager] testified credibly with regard to her understanding of the Student's complex disability, his related behavioral issues and the implementation of the Student's BIP. (Id) ##### [case manager] also testified that the Student's dysregulated behaviors most often manifested as swearing, task avoidance, and leaving a class. (Id) The Student would often leave a class and walk the hallways to self-regulate. ##### [case manager] understood that the Student displayed fight or flight defense mechanisms, but primarily observed the Student only use verbal aggression towards her as his fight response, while his more typical flight response was to shut down and/or leave the classroom. (Id.)

Attempts were made during the end of the Student's seventh grade year to identify a new case manager that was someone that the Student knew and trusted. (##### [case manager] testimony; parent testimony) By the end of the 2022-2023 school year, everyone believed that the person taking over as the Student's case manager for his eighth grade year would be ##### [new case manager], who the Student knew from his involvement in sports. (Id) However, ##### [new case manager] resigned in mid-August 2023 just before the start of the 2023-2024 school year leaving the District scrambling to find a last minute replacement to work as the Student's case manager.

[long term special education substitute teacher] was assigned to be the Student's case manager immediately before the start of the 2023-2024 school year. ##### [long term special education substitute teacher] had never been a member of the Student's IEP team, she had only worked in the District for just over a year as a substitute in an intellectual disabilities classroom, she had not previously worked directly with the Student, and she did not have an educational background in special education let alone licensure in special education.

(##### [long term special education substitute teacher] testimony) At the time she was assigned as the Student's case manager, she had only enrolled in an online program to work towards her bachelor's degree one month prior in July

2023. (Id) Further, although the District had also enrolled her in a DPI “induction” program in August 2023 that designed to train and retain special education teachers, she had not yet participated in the first session of the seven plus month program. (Id)

Prior to the start of the school year, ##### [long term special education substitute teacher] reviewed the Student’s IEP and BIP and met with ##### [case manager] during the professional development days for approximately 60 cumulative minutes to discuss the Student. In addition, she met with the Student’s father for 15 minutes during a back to school night prior to the first day of school. ##### [long term special education substitute teacher] did not meet 1:1 with the Student prior to the start of the school year. So, not only did the Student not have an opportunity to get to know the case manager, but there was also no time to develop a trusting relationship with her. To make matters worse, the Student was assigned to a first hour class with a teacher, ##### [student's teacher], that the District staff knew the Student previously had conflicts with and was removed from that teacher’s class in sixth grade. According to District staff, there was no other science teacher available to teach the Student 8th grade science. Thus, the Student started off the 2023-2024 school year without the benefit of a case manager sufficiently familiar with him and with a teacher for first hour that the District knew he did not have a trusting relationship.

Not surprisingly, the Student struggled in school almost from the very beginning of the 2023-2024 school year. On September 8, 2023, just four days into the school year, the Student was requiring repeated re-directions and reported to be noncompliant, acting inappropriately, and disruptive. (Ex. 7) By the sixth day of school, on September 12, 2023, the Student had two separate disciplinary referrals for being out of his seat, using profanity and leaving his classroom. (Id) On the ninth day of school, September 15, 2023, the Student was suspended for three days for being involved in a physical altercation with peers. (Id.) Up until that time, the Student’s case manager had not communicated to the Student’s parents that he was having any disciplinary/behavioral issues. (Testimony of parent, #####.) Prior to his return from the suspension, the District social worker suggested that the parents meet with the IEP team to discuss updating the Student’s BIP. (Ex. 17) Although the Student’s parent met with administrators for a re-entry meeting, no IEP meeting had been scheduled and the BIP had not been revised. The day the Student returned to school on September 21, 2023, he was again reported for not following directions, swearing and leaving the class during his first hour class. (Ex. 7) Just four school days later, on September 27, 2023, the Student was involved in another behavioral incident that began in his first hour class and quickly escalated to the Student throwing an Ipad at ##### [long term special education substitute teacher] had only worked with the Student as his case manager for 14 school days prior to the September 27, 2023 incident that led to his expulsion from school. Based upon the limited time she had known and worked with the Student, it is doubtful that the Student would have formed a trusting relationship with her. On the contrary, based upon the Student’s interactions with ##### [long term special education substitute teacher] on September 27, 2023, it is apparent that she was not someone with whom he had a strong connection. Even the Student’s prior case manager, with whom he had a close connection to, acknowledged that it took some time for him to trust her. (##### [case manager] testimony) Given the Student’s recognized difficulty forming trusting relationships with staff, the numerous and escalating disciplinary issues the Student was involved in during the first 14 days

of school, the uncontroverted testimony that the case manager had limited communication with the Student's parents, and her interactions with the Student on September 27, 2023, I do not find it credible that ##### [long term special education substitute teacher] understood the Student's disability and related needs, or that she was sufficiently familiar with his IEP/BIP, let alone that the Student would have considered her a trusted adult. Rather, based upon the evidence presented, ##### [long term special education substitute teacher] was ill prepared to be this particular Student's case manager, let alone equipped to adequately implement the Student's IEP and/or BIP, which was directly reflected in her handling of and response to the Student's behavior leading up to and culminating in the Student throwing his iPad at her on September 27, 2023.

According to ##### [long term special education substitute teacher] testimony, she did not observe any obvious signs that the Student was dysregulated. Again, ##### [long term special education substitute teacher] testimony reflects her lack of familiarity with the Student and a lack of training needed to meet the Student's needs. The evidence established that the Student was clearly trying to avoid compliance with the repeated directives given to him by staff beginning in his first hour class and that his behavior continued to deteriorate and escalate thereafter. The Student's first hour teacher testified at the hearing and reported that the Student did not follow the directions provided by her to the class when she told them that they could sit in a group of two with another student if they did not have any grades of insufficient evidence (IE). (##### [student's teacher] testimony) When the Student attempted to sit with an existing pair, the teacher instructed him to return to his seat. The Student refused to go to his seat as directed. When the student started working on his Ipad in the same spot, the teacher again directed him to sit in his seat. No testimony was provided as to whether an attempt was made to have the Student find another student to pair up with to complete the lesson. When an assistant in the class suggested that the Student accompany him to go see his case manager in Room 106, the Student walked out of his first hour class on his own. (##### [student's teacher] testimony)

Prior to arriving in Room 106, the Student apparently walked the school hallways. ##### [long term special education substitute teacher] testified that upon the Student's arrival in her room, she confronted the Student about his conduct during the first hour class. ##### [long term special education substitute teacher] then called the Student's father and informed him that the Student's failure to stay in his seat during class was a repeated issue this school year. (##### [long term special education substitute teacher] testimony; Parent testimony) When ##### [long term special education substitute teacher] stepped away from her desk, the Student hung up the phone with his father. When ##### [long term special education substitute teacher] attempted to call the father back, the Student left the room. At that point ##### [long term special education substitute teacher] requested that the Student's father come to school. (Id) In her testimony, she described the intent of the phone call as wanting to help the Student "re-set" the day. The Student continued to walk away from ##### [long term special education substitute teacher] and swore at her as she pursued him. Moreover, the Student disregarded ##### [long term special education substitute teacher]' repeated directives for him to return to her room or go to the office. All of the Student's behaviors up to this point demonstrate he had become dysregulated.

Notably, the Student appears to have been trying to follow the steps laid out in his BIP. After leaving his first hour class, he took a walking break and eventually went to Room 106. After leaving his case manager's classroom, he walked to the student services office; however, he was prevented from entering student services because the door was locked. When the bell rang, he then proceeded to his next class. (##### [long term special education substitute teacher] testimony; Ex. 9)

The manifestation determination review (MDR) documentation and the testimony of participants of the MDR review establish that the team reviewed some relevant information but either did not review all available relevant information related to the Student or just disregarded much of the available and relevant information. Specifically, per the testimony of ##### [case manager], the MDR team did not review all of the Student's prior disciplinary behaviors. (##### [case manager], Tr. 479-483) For example, in sixth grade the Student was suspended for fighting, assaulting a student, putting a student in a headlock, tripping a student causing injury, and hitting a student in the face with a shoe, none of which was discussed during the MDR. (Ex. 7) The Student exhibited similar behaviors in 7th grade, the school year immediately preceding the September 2023 incident: the Student was suspended five days for hitting another student in the groin, suspended three days for slapping a student, suspended one day for hitting a student with his Ipad charger, and suspended an additional five days for hitting a student in the head with a water bottle. (Id) Aside from the incident of hitting the student in the groin for which the IEP team determined was a manifestation of the Student's disability, the MDR team did not discuss the majority of the other prior incidents of physical aggression towards others that were similar to the September 27, 2023 incident. As was documented in the Student's IEPs going back to kindergarten, he has a history of physical aggression against peers and adults and his anxiety can trigger his defense mechanisms where he can go from regulated to disruptive in a matter of seconds. (Exs. 6 and 13)

Instead of acknowledging the similarities between the most recent incident and the well-documented historical information related to the Student's disability related behaviors, the MDR team appears to have made their determination mainly because they could not reconcile the facts described to them about the September 27, 2023 incident from the Student's typically observed behaviors. For example, District staff felt this conduct was different because it was the first time that the Student had struck a staff person. In addition, the Student's demeanor immediately before the incident was described as calm, rather than exhibiting obvious signs of escalating behaviors, nor did it involve seeking peer attention. Thus, the District staff on the MDR team concluded that the Student's September 27, 2023 behavior was not related to his TBI. (##### [case manager] testimony; hearing testimony of #####; parent testimony)

Although testimony was presented by District staff that they did not feel the Student's behavior was impulsive on September 27, 2023, there was no evidence that the Student's conduct was planned or premeditated or even that he intended to hit or hurt ##### [long term special education substitute teacher] when he threw his Ipad. In fact, the staff who observed the Student immediately before he threw his Ipad, testified that the throwing of the Ipad occurred suddenly, and without warning, as the Student was attempting to exit the classroom; thus, contradicting the conclusion that the Student's behavior was not impulsive. (##### [long term special education substitute teacher] testimony; ##### testimony) The MDR team members' focus on the perceived "difference" in the incident based upon who was injured, and their disregard for the Student's well documented and known fight or flight behavioral responses, appears to have played a part in their flawed conclusion that the Student's conduct on September 27, 2023 was not a manifestation of his disability.

By definition, a TBI disability results "in impairments in one or more areas, such as *cognition*; language; memory; attention; *reasoning*; abstract thinking; *judgment*; *problem-solving*; sensory, perceptual, and motor abilities; *psychosocial behavior*; physical functions;

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. (##### [Dr.] 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. (##### [Dr.] 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 ##### [long term special education substitute teacher] was not only 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 ##### [long term special education substitute teacher] was caused by 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 ##### [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. (##### 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).

e

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
DIVISION OF HEARINGS AND APPEALS
4822 Madison Yards Way, 5th Floor North
Madison, Wisconsin 53705-5400
Telephone: (608) 266-2447
FAX: (608) 264-9885
Email: Kristin.Fredrick@wisconsin.gov

By: _____


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.