



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

In the Matter of [Student]

v.

Milwaukee Public Schools

DHA Case No. DPI-18-0009

DPI Case No. LEA-18-0018

DECISION

The PARTIES to this proceeding are:

[Student], by

[Parent]

Milwaukee Public Schools, by

Attorney Calvin Fermin
Office of The City Attorney
200 E. Wells Street, Room 800
Milwaukee, WI 53202-3551

PROCEDURAL HISTORY

On LEA-18-0018, the Department of Public Instruction (DPI) received a request for a due process hearing under Wis. Stats. Chapter 115 and the federal Individuals with Disabilities Education Improvement Act (IDEA) from [Parent] (the Parents) on behalf of their child, [Student] (the Student), against the Milwaukee Public Schools (the District). DPI referred the matter to this Division for hearing.

A prehearing telephone conference was held on June 4, 2018. The issues for hearing were further clarified during a telephonic status conference on June 25, 2018. The due process hearing was held on July 10, 2018. Post hearing briefs were to be filed by August 3 with reply briefs due by August 10, 2018. The record closed on August 10, 2018 and the decision is due by August 24, 2018. The District filed its post hearing brief on August 3, 2018. The Student did not file any post hearing brief nor respond to the District's brief.

ISSUES

The issues for hearing, as discussed by the parties and established during the prehearing telephone conference on Monday, June 4, 2018, and clarified on June 25 are as follows:

- (a) Whether the District failed to properly conduct a manifestation determination;
- (b) Whether the District committed procedural violations that amount to a denial of FAPE; and

- (c) Whether the District failed to implement the Student's IEP.

FINDINGS OF FACT

1. The Student is 13 years old and a student of the Milwaukee Public Schools (the District).
2. During the 2015-2016 school year, the Student attended [District School] in the District. (Transcript, p. 187).
3. In November 2015, an individualized education plan (IEP) was prepared to address the Student's need for specialized instruction in reading, writing and math. The IEP contained four goals to address the Student's deficits in math, reading, writing and social/behavior skills. (Ex. 206)
4. The Student transferred to the [District School 1] for the 2016-2017 school year based upon the Parent's concerns he was not seeing improvement in the Student's academics or behaviors. (Tr., pp. 160, 187)
5. The Student's IEP Team met on November 15, 2016 to conduct an annual review of the Student's IEP. The IEP prepared at that time included a Functional Behavior Assessment (FBA) and Behavioral Intervention Plan (BIP). The IEP contained four goals to address deficits in math, writing, reading and staying on task. The FBA and BIP addressed behavioral concerns related to the Student's negative interactions with peers and adults, including swearing, being disrespectful and verbal/physical confrontations that escalate quickly. (Ex. 208)
6. In response to the Parent's concerns that District staff were not communicating with him and not intervening to prevent escalation of the Student's behaviors, on January 5, 2017 the IEP team met again to conduct a review/revise meeting with regard to the Student's progress and to add daily monitoring and a check-in/check-out procedure for the Student. (Exs. 107 and 209)
7. Due to fifteen new behavioral incidents involving the Student between January and March 2017, on March 15, 2017 the IEP team met and additional revisions were made to the Student's IEP, including modifying the BIP to add incentives and adding a Crisis Plan. (Exs. 205 and 210; Tr. P. 70)
8. On March 16, 2017, the Student was involved in a confrontation with peers and his teacher. As the Student left the classroom, he shut the door. The teacher's hand got caught in the door and was injured. As a result of the incident, a disciplinary referral was made to school administration. (Ex. 204; Tr. p. 10)
9. On March 16, 2017 an assistant principal at [District School 1] determined that a three day suspension should be imposed on the Student. The assistant principal spoke to the Student's Parent that same date and the Parent requested that additional investigation

be completed before issuing the suspension. Written notice of the 3 day suspension was sent on March 20, 2017. (Tr., pp. 11-13)

10. The Student's suspension was subsequently upgraded by the District Central Office to a Level 4 incident that includes acts that endanger safety/well-being of others based upon the injury incurred by the teacher and the suspension was increased to a five day suspension. (Ex. 205; Tr. pp. 13, 187)
11. On March 21, 2017 the District sent written notice to the Parent advising of the District's intent to conduct an investigative review meeting on March 28, 2017 with regard to the March 16 incident. (Ex. 203)
12. On March 28, 2017 an investigative review meeting was conducted at the District Central Office to determine whether the facts warranted an expulsion hearing. Following the meeting, a manifestation determination meeting was conducted that found that the Student would not be expelled because his behavior was a manifestation of his disability. (Ex. 211; Tr. pp. 56-57, 60-61, 187)
13. During the March 28, 2017 meeting the Parent asked whether the Student could be transferred to a new school. By agreement of the parties, the Student's placement was changed to [District School 2]. (Ex. 211; Tr., pp. 61, 187-188)
14. The Parent filed a Due Process Hearing Request on March 16, 2018.

DISCUSSION

The IDEA requires that all children with disabilities are offered a free, appropriate public education (FAPE) that meets their individual needs. 20 USC § 1400 (d); 34 CFR § 300.1. The U.S. Supreme Court has set forth a two-prong test to determine if a child has received FAPE: (1) whether there has been compliance with the IDEA's procedural requirements; and (2) whether the IEP is reasonably calculated to provide educational benefits. *Board of Educ. v. Rowley*, 458 U.S. 176, 206-207 (1982). The federal regulations implementing the IDEA mandate that, in a due process proceeding involving a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (1) impeded the child's right to a FAPE; or (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the child; or (3) caused a deprivation of educational benefit. 34 CFR § 300.513 (a)(2). The FAPE determination aside, a hearing officer may order an LEA to comply with the procedural safeguard provisions of the IDEA. 34 CFR § 300.513 (a)(3).

In the present case, the Parent alleged that the District failed to properly conduct a manifestation determination; that the school district committed procedural violations under the IDEA that amount to a denial of FAPE; and that the school district failed to implement the Student's IEP.

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 Parent. The Parent must “cite credible evidence that the choice[s] the school district made cannot be justified.” *Sch. Dist. Of Wisconsin Dells v. Z.S.*, 184 F.Supp.2d 860, 884 (W.D. Wis. 2001), *aff’d* 295 F.3d 671 (7th Cir. 2002). The burden of proof is a preponderance of the evidence. Wis. Stat. §111.80(5)(b).

Failure to Implement IEP Provisions

The Parent alleges that the District failed to provide the Student FAPE during the 2015-2016 school year by failing to implement the Student’s IEP. The IDEA has not been interpreted by the courts to require perfect implementation of IEP provisions. *See Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811 (9th Cir. 2007); *Melissa S. v. Sch. Dist. of Pittsburg*, 183 F. App’x 184, 187 (3rd Cir. 2006). Rather, courts have held that the IDEA is violated if there is evidence that a school district failed to implement substantial provisions of an IEP or “an essential element of the IEP that was necessary for the child to receive an educational benefit.” *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 n. 3 (8th Cir. 2003); *see also Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 348-349 (5th Cir. 2000).

The Parent testified at the hearing that there was a pattern of District staff not contacting him with regard to issues arising at school, whether it was related to homework completion or behavioral issues, until the Student was disciplined. (Tr. 167) In addition, the Parent did not believe that the teachers intervened soon enough to prevent the Student’s behavioral incidents from escalating. (Id.) The Parent also felt that teachers did not follow the BIP and specifically, that the March 16, 2017 behavioral incident would not have occurred had the Student’s teacher followed the BIP and crisis management plan. To the extent that the Parent alleges any failure by the District prior to March 16, 2017, it is beyond the one year statute of limitations period. Wis. Stat. §115.80(1) (a Parent “may file a written request for a hearing within one year after the refusal or proposal of the local educational agency to initiate or change his or her child’s evaluation, individualized education program, educational placement, or the provision of a free appropriate public education...”; *see also*, 34 CFR §300.503(a)(1) and (2) and 34 CFR §300.507(a)(1).

The evidence presented demonstrates that the Student struggled academically and behaviorally for many years in the District. During the 2016-2017 school year, the District took numerous steps to address ongoing issues by reconvening the Student’s IEP team and making revisions to the IEP, including the BIP and inclusion of a crisis management plan. The District held three IEP meetings: an annual review in November 2016; a review/revise in January 2017 to add check-in/check-out and monitoring procedures to improve communication with the Parent; and following continued behavioral referrals, on March 15, 2017 the IEP team revised the BIP to incorporate incentives and add a crisis management plan. The Student’s behavioral goal remained to improve his ability to stay on task. The District special education supervisor testified that she spoke with the Student’s teacher following the March 16, 2017 incident that led to his suspension and she determined that the teacher had followed the BIP and crisis plan by speaking to the Student in a calm voice, giving the Student a task to do and then ultimately having him leave the room due to his escalating behaviors. Nothing in the record establishes that the teacher failed to implement the Student’s IEP on March 16, 2017 and that such a failure was the cause of the Student’s

behavioral incident. Although the District's attempts to address the Student's behaviors over time may not have always resulted in improvement or progress, I do not find that the Parent has met his burden of proving that the District failed to implement this IEP provisions or that the failure to implement IEP provisions caused a deprivation of educational benefit to the Student.

Procedural Violations

A student may be suspended for five days for violating a code of student conduct and advised of the reason for the suspension. Wis. Stat. §120.13(1)(b)2 and 3. As stated above, procedural violations result in a denial of FAPE only if the procedural inadequacies: (1) impeded the child's right to a FAPE; or (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the child; or (3) caused a deprivation of educational benefit. 34 CFR § 300.513 (a)(2). The Parent has not met his burden to establish a procedural violation that resulted in a denial of FAPE under the law.

The Student in this matter was suspended on March 20, 2017. Parent vaguely alleged that the District failed to provide FAPE to the Student by not following the correct due process/notice procedures. At the hearing the Parent testified that he never received the written notice of a five day suspension, only the three day suspension. However, it is undisputed that the Parent spoke with the assistant principal about the suspension and was then put on actual notice that the District had increased the Student's conduct violation to a "level 4" five day suspension, which resulted in a central office investigatory review meeting and manifestation determination hearing. The Parent was made aware of and participated in the March 28 meetings. Ultimately, it was decided that the Student would not be expelled, however, and by the Parent's own request and the IEP team's agreement, the Student transferred to another school. The Parent presented no evidence that the Student suffered any deprivation of educational benefit as a result of any alleged procedural violation. Nor do I find that the District's actions resulted in a denial of FAPE to the Student.

Failure to Properly Conduct a Manifestation Determination

Finally, the Parent alleges that the District failed to properly conduct a manifestation determination of the Student. Prior to expelling or changing a special education student's educational placement due to a violation of school rules, the District must comply with the following procedures:

- (1) Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine –
 - (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
 - (ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

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

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

In the present matter, the Student was involved in a behavioral incident on March 16, 2017. Notice of suspension was sent to the Parent on March 20, 2017. The District notified the Parent that it would be conducting an investigatory review of the March 16 incident and conducting a manifestation determination hearing on March 28, 2017, less than ten school days after the incident. Immediately following the March 28, 2017 central office investigative review meeting which found evidence existed warranting a possible expulsion due to the injury to staff as a result of the March 16 incident, the Student's parent and relevant IEP team members met to conduct a manifestation determination hearing. The IEP team determined that the Student's behavior was a manifestation of his disability and checked the box that the Student's behavior was caused by or had a direct and substantial relationship to the student's disability. (Ex. 211, p. 16)

The Parent does not take the position that the Student's behavior was NOT a manifestation of his disability or that the Student should be expelled. Rather, the Parent alleges that it was the District's failure to implement the Student's IEP that led to the Student's behavioral incident as opposed to just the Student's disability. In addition, the Parent alleges that he only agreed to the manifestation "by default" because the Student was getting bullied, getting into fights and teachers were failing to intervene before it happened. (Tr. 176) The Parent therefore believes that the manifestation determination should be removed from the Student's record. As discussed above, I do not find that the Parent has presented sufficient evidence to meet its burden establishing that the District failed to implement the Student's IEP, let alone that the failure to implement the IEP was the cause of the Student's March 16, 2017 behavioral incident. Based upon the preponderance of the evidence, the IEP team correctly found that the Student's behavior was caused by or had a direct and substantial relationship to the student's disability. The Student subsequently transferred to another school based upon the Parent seeking the transfer and by agreement of the IEP team. However, the transfer was not a change in placement due to disciplinary action by the District. Therefore, I find that the District properly conducted the manifestation determination.

CONCLUSIONS OF LAW

1. The School District properly conducted a manifestation determination.
2. The School District did not commit procedural violations that amount to a denial of FAPE.
3. The School District did not deny the Student a free, appropriate public education during the 2016-2017 school year by failing to implement the Student's IEP.

ORDER

It is hereby ordered that the due process hearing request in this matter is dismissed.

Dated at Madison, Wisconsin on August 24, 2018.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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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 30 days of the date the Division of Hearings and Appeals receives the appeal.