



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

In the Matter of [Student]

DECISION

v.

DHA Case No. DPI-20-0014
DPI Case No. LEA-20-0011

[School District]

The Parties to this proceeding are:

[Student], by

[Parent]

[School District], by

[District's Attorney]

PROCEDURAL HISTORY

On October 21, 2020, the Wisconsin 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 Act (IDEA) from ##### (the "Parent") on behalf of ##### (the "Student") against the ##### School District (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 attorneys on November 9, 2020. To accommodate the parties' request to pursue mediation, the hearing was scheduled for January 4, 2021, and the decision deadline was extended for cause to January 22, 2021. On December 14, 2020, per the parties' mutual request for additional time for mediation, the hearing was rescheduled to January 12, 2021, and the decision deadline was extended for

cause to February 4, 2021. The hearing scheduled for January 12, 2021 was later cancelled at the request of the parties due to a pending settlement agreement.

Following the parties' ultimately unsuccessful settlement/mediation and withdrawal of Parent's counsel, a prehearing telephone conference was scheduled for February 3, 2021. On February 2, 2021, the ALJ granted the Parent's request to reschedule the prehearing conference and extend the decision deadline to March 2, 2021. The prehearing telephone conference was rescheduled to February 9, 2021 and continued on February 18, 2021.

At the prehearing telephone conference on February 18, 2021, the hearing was rescheduled to March 22, 2021, deadlines for the filing of exhibits, witness lists, and post-hearing briefs were ordered, and, at the Parent's request, the decision deadline was extended for cause to April 26, 2021.

On March 15, 2021, the District timely filed its witness list and proposed exhibits. The Parent did not file a witness list or exhibits. The District objected to the Parent's failure to comply with the filing deadlines and moved for dismissal of the hearing request, which the ALJ denied.

The due process hearing was held by videoconference on March 22, 2021. On April 5, 2021, the District timely filed its post-hearing brief. The Parent did not file a post-hearing brief by the established deadline of April 5, 2021. On April 6, 2021, the ALJ ordered that the Parent could have until the end of the day, April 6, 2021, to file the post-hearing brief. The Parent filed a brief on April 7, 2021, which was untimely and, therefore, not considered in rendering this decision. The record closed on April 5, 2021.

ISSUE

On September 21, 2020, did the District improperly determine that the Student's conduct in school on September 16, 2020 was not a manifestation of his disability?

FINDINGS OF FACT

1. The Student (d.o.b. ##/##/####) is a resident of and attends school in the District.
2. The Student began receiving special education services in the District as a fourth grader after an IEP team evaluated him and determined that he met the eligibility criteria for an emotional behavioral disability (EBD) and needed special education and related services. (Ex. 2, p. 3)
3. The Parent revoked her consent for the Student to receive special education services in the fall of 2018, but in 2019 she again provided consent for the Student to be evaluated and receive special education services. (*Id.*; Tr. p. 24)

4. In February 2019, the IEP team evaluated the Student and determined that he continued to meet the criteria for an EBD disability and needed special education, noting that the Student “continues to demonstrate a need for specialized instruction to increase his social skills, self-regulation skills, and math problem solving and calculation deficits.” (Ex. 2, pp. 8-9)
5. On February 25, 2019, the IEP team developed an individualized education program (IEP) for the Student, as well as a Positive Behavioral Support Plan that modified an earlier Behavior Intervention Plan. The plan included “proactive-preventative” and “intervening” strategies for staff to use to redirect and calm the Student in situations where the Student exhibited signs of agitation and distractibility, left the classroom or the school building, used threatening language towards staff, or engaged in inappropriate behavior, including refusing to work, swearing, using disrespectful language, or being aggressive or noncompliant. (Ex. 3, pp. 3-7; Ex. 4)
6. On May 13, 2019, the IEP team met to review the Student’s IEP in response to an increase in aggressive behaviors in middle school that included a physical altercation with another Student that resulted in the Student’s suspension. Other inappropriate behaviors exhibited by the Student included disruptions, use of inappropriate language, disrespect, and insubordination. The IEP noted that the Student had received seven minor behavioral reports and two major behavioral reports that school year in middle school. (Ex. 5, p. 5)
7. On February 6, 2020, when the Student was a high school freshman, the IEP team conducted an annual review and revision of the Student’s IEP. In terms of the Student’s present level of performance, it was noted that he struggled with anxiety and depression, which at times manifested into defiance and disrespect. The IEP further stated that the Student needed assistance with organization and assignment completion and that he could become agitated by Students around him. With regard to the effects of the Student’s disability, the IEP stated that his “behavior affects his ability to follow adult directives/requests and appropriately self-regulate when in an upsetting or frustrating situation.” (Ex. 7, pp. 6-8)
8. The February 2020 IEP, which was in effect at the start of the 2020-2021 school year, included one goal related to increasing the Student’s math skills and two behavior-related goals that focused on increasing his compliance with directives/requests and increasing his ability to effectively manage his emotions. The IEP stated that the Student would receive specially-designed instruction in social skills/behavior development and math, as well as supplementary aids and services that included adult support in all core classes in both the regular education and special education classrooms. *Id.* at pp. 10-12 and 17.
9. In September 2020, the Student was ## years of age and enrolled in 10th grade at ##### High School.

10. On September 16, 2020, the Student physically assaulted another Student [Student B] in the high school's library media center (LMC) at approximately 7:59 a.m., prior to the start of classes which begin at 8:10 a.m. (Tr. pp. 86, 103, 148) The high school principal, assistant principal, and the school resource officer (a police officer from the ##### Police Department) interviewed the two Students and school staff shortly after the altercation occurred and prepared written investigation reports. (Ex. 8)
11. During the investigation, both Students stated that an argument had started between them at school a day earlier. According to the police officer's investigation report, on September 15, 2020, the Student became upset when [Student B] tried to look at and touch his necklace. The Student told investigators that [Student B] had tried to grab his necklace while they were in the school lobby, but he backed away. The Student said that he warned [Student B] not touch his necklace or they would "have problems." The Student further said that [Student B] had disrespected him and his dad and that was why he fought [Student B] on September 16, 2020. [Student B] told the investigators that the Student said he would "kick his ####" if [Student B] looked at the Student's necklace and not to touch him or the Student would hit [Student B]. *Id.* at p. 5.
12. Both Students also told the investigators that the argument continued via messages on social media. [Student B] said that the Student again brought up the necklace on social media during the evening of September 15, 2020. [Student B] said the Student called him a "tooth pick built ####" and said not to mess with him. [Student B] said that he told the Student to leave him alone and that they exchanged "come backs" on social media. [Student B] further said that he had received a message from the Student around 4:00 a.m. which [Student B] did not see until he woke up on September 16, 2020. Similarly, the Student showed the investigators Snapchat messages between the two Students including one in which he told [Student B], "you better watch yourself don't disrespect me, don't touch my chain, I'm gonna break your tooth pick built ####." In response, [Student B] sent the Student a message that said, "lol your Walmart Jesus chain, don't worry I wouldn't want that ##### you incest built ####." The Student said he got the message before school on September 16, 2020. The Student said that he decided that if he saw [Student B], he was going to fight [Student B]. The Student further stated to the investigators that he did not go looking for [Student B] when he got to school, but when he saw [Student B] (in the LMC) he walked up to him, pushed him off a chair, and "started drilling him." The Student admitted that [Student B] had not challenged him to a fight. *Id.*
13. When the Student had first arrived at school that morning, he had gone into a classroom to drop off some of his personal belongings and, while he was there, he told a special education aide that he was mad because [Student B] had disrespected him and his father, so he was going to "take care of" [Student B]. The aide told the Student to go talk with his case manager and not do anything he would regret. Another teacher who provided a face mask to the Student that morning learned the same information from the Student. Both staff members immediately informed the case manager, but the Student had already assaulted [Student B] by the time the case manager got to the LMC. (Ex. 16; Tr. pp. 156, 180-183)
14. A teacher in the LMC saw [Student B]'s high top chair hit the ground and the Student punch [Student B] multiple times. The teacher yelled "break it up," but the Student did

not stop, so the teacher physically intervened to stop the Student from continuing to hit [Student B]. The teacher then walked the Student to the principal's office. (Ex. 8 at pp. 1-2 and 6)

15. The school nurse examined [Student B] after the incident. (Exs. 9 and 10) After experiencing a worsening headache and dizziness, [Student B] was taken to the hospital later that day by his guardian and was medically diagnosed with a concussion. (Ex. 8, p. 6)
16. Shortly after the assault of [Student B] occurred, when the Student was in a conference room at the school, he sent a Snapchat message with a threatening tone to [Student B]. It was a photograph of the Student pointing his finger sideways with the text, "Don't dis my dad goofies," followed by a crying face emoji and a clown face emoji. [Student B] emailed a screen shot of the text to the Student's case manager. (Ex. 8, pp. 3 and 6; Tr. pp. 150-151)
17. The principal was surprised by the Student's physical assault of [Student B] because he had not exhibited that type of behavior in high school previously, and she described his prior inappropriate behaviors in high school as more impulsive, more defiant, using profanity, some property destruction, and elopement around the building. (Tr. pp. 149-150) Similarly, the Student's 10th grade case manager/special education teacher described the Student's EBD behaviors that he had observed prior to this incident as "very instantaneous, very aggressive, very vocal, a lot of swearing ... Roaming the halls. Not listening to any type of authority." (Tr. pp. 177-178)
18. The District provided a written Notice of Suspension to the Parent on September 16, 2020, which stated that the Student was suspended from school for three days for physically assaulting another Student and that the conduct constituted a violation of school regulations, materially and substantially disrupted the rights of others to an education, and endangered the individual or other individuals. The Notice further stated that the conduct met the definition of an expellable offense per the District's Student handbook and school board policy. (Ex. 11)
19. On September 21, 2020, the District held a manifestation determination review for the Student regarding the conduct that led to his suspension on September 16, 2020. The IEP team members who participated in the review included the Parent, Student, high school principal, case manager/special education teacher, assistant principal, school psychologist, English/general education teacher, and the District's director of pupil services as the local education agency (LEA) representative. (Ex. 12, p. 28)
20. The school resource police officer was listed as an IEP team participant under "other qualified personnel" on the written notice of the IEP team meeting/manifestation determination review that the District provided to the Parent. (Ex. 12, p. 5) The officer planned to attend the manifestation review but was called away on another police matter that morning and was unable to participate. (Tr. p. 101) The Parent would have preferred that the resource officer attend the manifestation review, so she did not later sign a form provided by the District stating that she agreed he would not attend. (Ex. 12, p. 6; Tr. pp. 99-100)

21. At the manifestation determination review, the IEP team participants considered and discussed information gathered during the investigation of the assault, including statements and texts made by the Student and [Student B]. The school psychologist presented to the team a historical review report of the Student's special education/IEP file and services, and the Student's behavior plan was reviewed. In addition, the Parent informed the team of the therapy services that the Student had been receiving in the home. (Ex. 12, pp. 1-3, 28; Tr. pp. 44-45)
22. During the review, the IEP team determined that the Student's behavior on September 16, 2020 was not the direct result of the District not implementing the Student's IEP. (Tr. pp. 124, 157, 187) The Student had been receiving one-to-one adult support during the school day, in accordance with his IEP. (Ex. 7, p. 17; Tr. pp. 70, 103) More than one adult was providing the support to the Student, rather than the same adult supporting the Student throughout the day, as had occurred in previous year(s). The IEP that was in effect did not require that the adult support be provided by only one person. (Ex. 7; Tr. pp. 188-189)
23. The IEP team did not reach consensus in determining if the Student's behavior was caused by or had a direct and substantial relationship to his disability. The Student's case manager/special education teacher, the high school principal, the assistant principal, and the director of pupil services determined the behavior was not caused by or directly or substantially related to the Student's disability. The Parent, Student, school psychologist, and the regular education teacher concluded that the Student's behavior was caused by or directly or substantially related to his disability. Because the IEP team did not reach consensus, the LEA representative, on behalf of the District, made the final determination that the Student's conduct on September 16, 2020 was not a manifestation of his disability. (Ex. 12, p. 29; Tr. pp. 159-160)
24. On October 21, 2020, the Parent filed a request for a due process hearing to challenge the District's determination that the Student's conduct on September 16, 2020 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 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).

Manifestation Determination

The IDEA and the related federal regulations set forth procedures that school personnel must follow regarding the disciplinary change of placement for Students with disabilities. 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 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). In situations where an IEP team cannot reach consensus regarding an educational decision, the LEA must make the determination. *See Fitzgerald v. Fairfax Cty. Sch. Bd.*, 556 F. Supp. 2d 543, 558 (E.D. Va. 2008).

In this case, it is undisputed that the Student physically assaulted another Student, thereby engaging in misconduct that violated the District's Student handbook and school board policy. The issue is whether the District acted in accordance with the law in determining that the Student's assaultive conduct on September 16, 2020 was a manifestation of his disability.

The evidence shows that the District timely convened an IEP team meeting to conduct the manifestation determination. The Parent, the Student, and relevant IEP team members attended and participated in the meeting. The Parent stated during the hearing (during her cross-examination of another witness, not while testifying under oath herself) that she would have preferred the resource officer to attend the manifestation review because he knew the Student well and that she would have preferred that the review be rescheduled. (Tr. pp. 101-102) The director of pupil services testified that she called the Parent to explain why the resource officer was unable to attend the review and that she did not recall the Parent asking the review to be rescheduled. (Tr. pp. 99-100, 103-104) However, the Parent denied speaking on the phone about

the resource officer not attending and said she did not receive emails about it from the District until October 1, 2020. (Tr. p. 99) The evidence on the record does not show that the District denied a request from the Parent to reschedule the manifestation review or held the review without sufficient, relevant members of the IEP team in attendance.

The manifestation determination review document and the testimony of IEP team members show that the IEP team properly reviewed relevant information in the Student's file, including a historical review report of the Student's special education/IEP file and services and the Student's behavior plan. In addition, the Parent provided informed about the Student's home therapy services. The IEP team also considered and discussed information gathered during the investigation of the assault, including the Students' statements and texts. (Ex. 12, pp. 28-29; Tr.44-45, 121-122, 156)

As set forth in the federal regulations, the manifestation determination rests on the answer to two questions. The second question will be addressed in this decision first, namely, if the Student's conduct was caused by the District failing to implement his IEP. All of the school district IEP team members who testified at the hearing stated that no one at the review raised a concern about the Student's IEP not being followed and causing the Student's behavior. (Tr. pp. 106, 124, 157, 187) However, the Parent testified that she did state at the meeting that the Student's IEP was not being followed and that the Student had not been receiving one-on-one support throughout the school day. (Tr. pp. 207-208, 217) The relevant language in the IEP stated that the Student would receive "adult support for all core classes, ELA, math, science, and social studies" in the special education and regular education classrooms. (Ex. 7, p. 17) The IEP did not require that the adult support be provided by only one person or that it be provided before the start of classes. The Student's case manager/special education teacher, who worked personally with the Student, and the director of pupil services both credibly testified that the Student had been receiving one-to-one adult support during the school day, as required by his IEP. (Tr. pp. 70, 188-189) The Parent failed to show by a preponderance of the evidence that the Student's misconduct on September 16, 2020 was caused by the District failing to implement his IEP.

The IEP team was unable to reach a consensus with regard to the other manifestation determination question, namely, was the Student's conduct caused by or had a direct and substantial relationship to the Student's disability. The Student, Parent, school psychologist, and the regular education teacher believed that the Student's conduct was caused by or was directly or substantially related to his disability. (Ex. 12, p. 29) The Parent testified that she felt the Student's conduct was related to his disability. She accurately pointed out that his IEP stated that he had difficulty letting go of situations and a history of aggression but did not say that the Student made only "spur of the moment" decisions. (Tr. pp. 205-208) The Parent also testified that [Student B]'s Snapchat messages were provoking to the Student with his history of poor self-regulation. (Tr. p. 210)

On the other hand, the Student's case manager/special education teacher, the high school principal, the assistant principal, and the director of pupil services believed that the Student's conduct on September 16, 2020 was not caused by or directly or substantially related to his

disability. (Ex. 12, p. 29) The Student's case manager/special education teacher testified that he did not believe the Student's assaultive behavior was a manifestation of his disability because of the "premeditation" of the incident which he felt differed from the Student's behavioral history of "very immediate," "in the moment" behaviors. (Tr. pp. 185-186) Similarly, when testifying about why he felt the Student's misconduct was not related to his disability, the assistant principal stated that the Student acknowledged that he had decided before he got to school that he was going to beat up [Student B] if he saw him, and he then came to school and followed through on his intention. (Tr. pp. 121-123) Likewise, the principal testified that the Student had not engaged in physically assaultive behavior previously in high school, and she felt the Student's planned assault did not "mirror his typically impulsive behaviors." (Tr. pp. 149-150, 157-158) The director of pupil services testified that the Student's typical deregulated behaviors would include swearing, acting disrespectful towards staff, and pacing the hallways, not doing the normal routine of going into a classroom, dropping his stuff off, and getting a mask. (Tr. pp. 84)

These four IEP team members believed that the Student had not acted in the impulsive, unregulated manner that was indicative of his EBD. Because the IEP team could not reach consensus, it was up to the director of pupil services, as the LEA representative, to make the determination. She determined that the Student's conduct was not caused by or directly or substantially related to his disability. Based upon negative answers to the two manifestation questions, the District therefore determined that the Student's conduct on September 16, 2020 was not a manifestation of his disability.

The lack of consensus among the IEP team members shows that, indeed, reasonable people could reach different conclusions about whether the Student's misconduct was caused by or directly or substantially related to his disability. The Parent raised valid concerns in her testimony about the Student's history of aggression, lack of self-regulation, and little or no reference in the Student's IEPs about him misbehaving only in an impulsive manner. However, the opinions of the school officials must be given due weight as the education experts, and I cannot substitute my own opinion for theirs. Moreover, while the Parent made some compelling points, her testimony was not more credible than that of the District's IEP team members. The Parent simply was unable to meet the burden of proving by a preponderance of the credible evidence that the District made an improper manifestation determination.

The District complied with the standards set forth in the IDEA and the federal regulations in properly determining that the Student's conduct on September 16, 2020 was not a manifestation of his disability.

CONCLUSION OF LAW

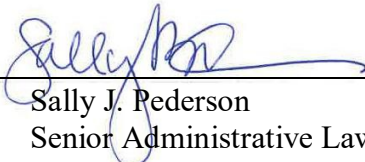
On September 21, 2020, the District properly and lawfully determined that the Student's conduct in school on September 16, 2020 was not a manifestation of his disability.

ORDER

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

Dated at Madison, Wisconsin on April 26, 2021.

STATE OF WISCONSIN
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By: 
Sally J. Pederson
Senior 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.