



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

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[School District], by

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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

- 30 The Student ##### is a resident of the District and attended the eighth grade beginning in the 2023-2024 school year.
- 40 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 #####]Ft0_, 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)
- 60 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)
- 70 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 unfavored 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)

