IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MALINDA and RITCH B., individually
and as parents of their minor child, L.B.,

Plaintiffs,

v.

BIRCHWOOD SCHOOL DISTRICT,

Defendant.

OPINION AND ORDER

10-cv-233-slc

On November 7, 2008, defendant Birchwood School District (BSD) permanently expelled L.B., the minor child of plaintiffs Malinda and Ritch B., for possessing a knife and threatening another student during class. Because L.B. had been diagnosed with attention deficit disorder, BSD was required to follow certain procedures set forth in the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1487, and federal regulations. Specifically, before it could expel L.B., BSD had to determine whether his misconduct was a manifestation of his disability. 34 C.F.R. § 300.530(e).

At an individualized education plan (IEP) meeting in October 2008, BSD determined that the knife incident was not a manifestation of L.B.'s educational disability and that L.B. did not meet the eligibility criteria for any other disability. Malinda and Rich B. appealed the district's manifestation determination. Following a due process hearing on February 16-17, 2010, Administrative Law Judge Sally Pederson found that BSD properly expelled L.B. and had provided him with a free appropriate public education (FAPE) immediately following his expulsion with respect to educational services. Although the hearing examiner determined that BSD had failed to provide L.B. with physical education, vocational education and behavior modification services designed to prevent a recurrence of the behavior for which he was expelled,

she did not award compensatory education. In this lawsuit, plaintiffs seek reversal of the ALJ's decision pursuant to 20 U.S.C. § 1415(i)(2)(A) and have filed a motion for summary judgment. Dkt. 16.

In response, BSD contends that the ALJ erred in finding plaintiffs' hearing request timely and admitting evidence of L.B.'s mental health conditions that was not before the IEP team, but that the ALJ nevertheless reached a correct decision with respect to the manifestation determination and FAPE. This court has jurisdiction pursuant to 20 U.S.C. § 1415(i)(3)(A) and 28 U.S.C. § 1331.

For the reasons that follow, I conclude that the ALJ applied the correct legal standard when analyzing defendant's statute of limitations and when admitting additional evidence of L.B.'s mental health conditions. I also conclude that substantial evidence supports the ALJ's findings that L.B.'s mental illnesses did not qualify him as a child with a disability and that BSD provided him with FAPE following his expulsion, except with respect to his physical, vocational and behavioral education. Therefore, I am denying plaintiff's motion for summary judgment and affirming the decision of the ALJ in all parts but one; before I can rule on the residual issue of compensatory services I am providing the parties an opportunity to provide additional proposed findings of fact and argument on that issue alone.

From the parties' proposed findings of fact and the administrative record, I find the following facts:

UNDISPUTED FACTS

I. The Parties

L.B., who was 14 years old at the time of the administrative hearing, is the adopted child of plaintiffs Malinda and Ritch B. L.B.'s biological mother was 17 years old at the time of his

birth, and because she used alcohol, L.B. faced possible fetal alcohol syndrome. Malinda and Ritch B. became foster parents for L.B. when he was 22 months old and later adopted him at age 6. L.B. attended elementary and middle school within the Birchwood School District (BSD), a duly incorporated school district under Wisconsin law. From the middle of 1st grade until the middle of 5th grade, BSD provided L.B. with special education services for speech articulation. During the 3rd through 5th grades, L.B. received grades ranging from 2 (signifying "some improvement") to 5 (signifying "exceptional"). In the middle of L.B.'s 5th grade year (2006-07), BSD determined that he was no longer eligible for special education. Decision, Div. Hrgs. & App. Case No. LEA-09-026 ("ALJ Dec."), at 2.

II. L.B.'s Academic and Behavioral Issues

During elementary school, L.B. began viewing pornography on the internet at home. By the time L.B. was about to enter middle school in the 6th grade (2007-2008 school year), he began exhibiting other behavioral problems at home. In the summer of 2007, Malinda and Ritch found L.B. in his closet with a string tightened around his neck after he had gotten in trouble for accessing porn. Four months later, Malinda observed L.B. undoing the strings from his guitar after he had been in trouble and she was pretty sure that he was going to attempt suicide again. Hrg. Tr. at 59-60. During the school year, L.B. viewed pornography on the internet on a daily basis, broke into his uncle's home next door to view pornography, refused to brush his teeth or take a shower without prodding, took personal items out of his parents' drawers and exhibited poor hygiene and bathroom habits that resulted in feces on his clothing and around the bathroom.. ALJ Dec. at 3. Ritch B. had to lock up the family computer because of L.B.'s almost daily inappropriate use. Hrg. Tr. at 186.

In January 2008, Dr. Christianah Ogunlesi of the Marshfield Clinic conducted a psychiatric evaluation of L.B. and diagnosed him with major depressive disorder, dysthymic disorder, impulsive control disorder, disruptive behavior and attention deficit disorder (ADHD). L.B. saw Dr. Ogunlesi four times between January and April 2008. L.B.'s global assessment of functioning (GAF) score was 35 on a scale of 1-100, which meant that he was moderately to severely impaired. ALJ Dec. at 2. Because neuropsychological testing showed that L.B. was of average intelligence, Dr. Ogunlesi believed that L.B.'s behavior was interfering with his learning. Hrg. Tr. at 535.

At school, L.B. did not exhibit behavioral problems on a routine basis. He received three lunchtime detentions for misbehavior in the 4th, 5th and 6th grades, that is, one per year. However, these were not recorded as disciplinary incidents by the school district. In February 2008, L.B. was suspended from school for four days for bringing some of his prescription pills to school and giving them to another student. L.B. once was sent to the principal's office for misbehaving in the classroom. ALJ Dec. at 2-3.

L.B.'s educational performance waned during the 1st quarter of 6th grade when he received 2 Fs, 4 Bs, 2 Cs and 1 D. Hrg. Exh. 3 at 17. Thereafter, L.B. received 3 As, 3 Bs and 3 Cs in the 2nd quarter; 3 Bs, 4 Cs and 1 D in the 3rd quarter; and 2 As, 1 B, 3 Cs and 2 Ds in the 4th quarter. Hrg. Exh. 3 at 17. So although L.B.'s grades were substantially lower than they had been the previous year, by the end of the 2007-2008 school year, L.B.'s grades had improved enough so that he was on track to progress to 7th grade. ALJ Dec. at 2.

According to Jan Treland, the guidance counselor for grades K-8 at BSD, the middle school only intervenes to address a student's performance when the student receives 2 or more Fs in core subjects for more than 2 quarters. Hrg. Tr. at 207-11. Because L.B. received all

passing grades in the 2nd quarter of 6th grade, the school did not initiate any action. *Id.* at 212. However, on August 22, 2008, just before the start of 7th grade, Malinda and Rich requested a special education evaluation of L.B. based on their concerns about his ADHD and poor grades. ALJ Dec. at 2. BSD received the request on August 28 and formed an IEP team consisting of the school principal (Jeffrey Stanley), a special education teacher (Trish Melchiori), a regular education teacher (Sonja Rogers) and the school psychologist (Charles Dykstra). Hrg. Exh. 2.

In September 2008, BSD notified Malinda B. that Dykstra and Melchiori would be evaluating L.B.'s ability, achievement and behavior. *Id.* Dykstra and Melchiori administered the Woodcock-Johnson Test of Cognitive Abilities III, the Woodcock-Johnson Psycho-Educational Battery III and the Behavior Assessment System for Children II (BASC-II). The evaluation included information obtained from Malinda and Rich, classroom observations of L.B. by his teachers and a review of L.B.'s previous evaluations and student records, including state and district-wide testing. For the BASC-II, reports were completed by L.B., his parents and two of his teachers. ALJ Dec. at 3; Hrg. Exh. 3 at 9-10. Test results showed that L.B. had average intellectual ability and cognitive functioning. Hrg. Exh. 3 at 9-11. Although L.B.'s parents rated his behavior as pervasively disruptive, the L.B. and his teachers reported less severe behavioral difficulties, with most problems occurring in the area of sustaining attention. *Id.* at 12.

Because L.B.'s inappropriate use of the family computer continued during the summer of 2008, Malinda and Rich made the decision to enroll L.B. at the Siren Day Treatment facility for children with severe emotional needs. They told the school district about the switch the summer before school began in 2008. Because L.B. did not exhibit regular behavioral problems

at school, BSD staff members were surprised to learn that his parents were placing him at Siren. ALJ Dec. at 3; Hrg Tr. at 30-31, 45-46, 60.

Before beginning at Siren, B.D. started the school year in the public middle school. L.B. knew that he soon would be attending the Siren Day Treatment program instead of attending middle school in the district. Although L.B. told middle school staff that he did not want to go to Siren, his parents were not aware of this. ALJ Dec. at 3; Hrg. Tr. 45-46. On October 17, 2008, district staff learned from two students that on October 16 and 17, 2008, L.B. had brought a knife to school and showed it to other students. L.B. admitted these acts to Jeffrey Stanley, the school principal and upon request, surrendered his knife to Stanley. L.B. further advised Stanley that he had held the knife to his own wrist during a class, and that he had asked a girl if she loved him, told her that he loved her, told her that he would stab her if she left him and held the knife to the girl's wrist and her ribs. ALJ Dec. at 3. After the knife incident, L.B. was suspended and hospitalized.

III. October 2008 BSD Findings

A. Special Education Evaluation and Manifestation Determination

On October 24, 2008, the district held an IEP team meeting that was divided into two parts: (1) L.B.'s special education evaluation and eligibility determination; and (2) a manifestation determination regarding the knife incident. The IEP team members included Stanley, Melchiori, Rogers, Dykstra, Deb Ramacher (a parent liaison), Kristi Hoff (assistant director of special education) and Malinda B., who appeared by telephone because Ritch B. was in the hospital. ALJ Dec. at 4; Hrg. Exh. 3. Although Malinda was given an opportunity to

provide input at the evaluation and manifestation determination, she did not know what input she could provide. Hrg. Tr. at 140-41.

During the special education evaluation, the IEP team determined that L.B. met the eligibility criteria for "other health impairment" (OHI) and was in need of special education and related services. In reaching this decision, the IEP team noted L.B.'s distractibility, inattentiveness, poor grades, failure to turn in homework and ADHD diagnosis. The team did not review any of L.B.'s medical records or consider his mental health as a factor to be considered as an other health impaired category. Malinda and Ritch B. did not provide written information or documentation from Dr. Ogunlesi or Siren Day Treatment to the IEP team. ALJ Dec. at 4; Hrg. Exh. 3 at 2-4. At the time, Dykstra, the school psychologist, knew that L.B. had been on antidepressants since January or February of 2008 but he did not look further into L.B.'s treatment for depression. He was not familiar with Dr. Ogunlesi and did not know that L.B. was still in counseling. Dykstra was under the impression that L.B. had discontinued treatment and that his parents were considering placing him in a day treatment program. Hrg. Tr. at 574-76; *see also* Hrg. Exh. 3 at 2 (showing parents reported treatment for depression to IEP team).

The IEP team found that L.B. did not meet the eligibility criteria for emotional behavioral disability (EBD) or specific learning disability (SLD). In determining whether L.B. met the EBD eligibility criteria, the IEP team used the guidelines set forth by DPI. ALJ Dec. at 4; Hrg. Exh. 3 at 4, 6. Team members believed that L.B.'s conduct had to be severe, chronic and frequent across multiple settings (school and home) in order for L.B. to meet the EBD criteria. Hrg. Tr. at 231 (Stanley testimony), 626-33 (Dykstra testimony) and 640-41 (Hoff testimony).

Although team members agreed that L.B. had been exhibiting significant defiant behavior at home and that his behavior at school (distributing his medication and the knife incident) had been severe, they noted that L.B. had had only two behavioral incidents at school in the preceding 10 months. ALJ Dec. at 4; Hrg. Tr. at 244-46 (Stanley testimony), 510 (Melchiori testimony), 578-80 (Dykstra testimony); Hrg. Exh. 3 at 4. Therefore, the team determined that although L.B.'s behavior was chronic and frequent at home, it was not chronic and frequent at school and, therefore, did not qualify him as a child with an EBD. *Id.*; Hrg. Tr. at 499 (Melchiori testimony), 601-02, 627-28 (Dykstra testimony). To be chronic or frequent, Dykstra would have expected severe behaviors on a weekly or biweekly basis. Hrg. Tr. at 600.

Immediately following the evaluation portion of the IEP meeting, the team conducted its manifestation determination and concluded that L.B.'s acts at school that had led to his expulsion were not a manifestation of his ADHD. The IEP team reviewed relevant information in L.B.'s file, teacher observations, L.B.'s evaluation and information provided by his parents. ALJ Dec. at 4. The team discussed and agreed that the knife incident was not an impulsive act because for two days, L.B. had been hiding the knife in his sweatshirt and showing it to other kids. Hrg. Exh. 4. Dykstra believed that the incident was planned because L.B. made an intentional effort to keep the incident hidden by hiding his knife under his desk and by attempting to make the victim of his threats keep the incident secret. Hrg. Tr. at 581-82.

B. L.B.'s 2008 Individualized Education Plan

On October 28, 2008, the IEP team met to develop an IEP to be implemented at Siren. The IEP provided for physical education and vocational education services, but did not include any behavior intervention services or modifications designed to prevent L.B. from engaging in

the same behavior. The IEP required L.B.'s teacher to work on his transition needs and plans for when he graduates high school. The IEP's only two goals were that L.B. should: (1) respond more quickly to teacher directives and (2) turn in homework 100% of the time (no time-frame was included to determine if the goal had been met). ALJ Dec. at 4-5; Hrg. Exh. 5. The IEP was to commence the following Monday, November 3, 2008. Hrg. Exh. 5.

The IEP included a finding that L.B.'s behavior impeded his learning, specifically that his failure to turn in homework assignments impeded his success and that he was not paying attention in the classroom or following teachers' directions. In response, the IEP recommended that he check in and out of school at the beginning and end of the school day, a reward system for homework completed, e-mailing homework assignments to his parent(s) and charting of grades. *Id.*

C. The Decision To Expel L.B.

On November 3, 2008, the BSD school board conducted an expulsion hearing, during which it found the interests of the district demanded L.B.'s expulsion. L.B. was expelled through his 21st birthday. The expulsion order was signed and dated on November 7, 2008 and official notice of the expulsion was delivered to L.B.'s parents on November 11, 2008. They appealed and on April 16, 2009, the Department of Public Instruction (DPI) affirmed the expulsion. ALJ Dec. at 5.

IV. Post-Expulsion Mental Health Treatment

A. The Siren Program

Between October 30, 2008 and October 2, 2009, L.B. attended the Siren Day Treatment program from 8:00 a.m. to 3:00 p.m., five days a week. L.B. left home at 6:30 a.m. each morning and returned at 4:00 p.m. each afternoon. Hrg. Tr. at 107, 113, 383. His day consisted of 5 hours of group therapy, 1 hour of educational programming, 1 hour of lunch and 1 hour of closing group. ALJ Dec. at 5. The initial focus of L.B.'s treatment at Siren was safety and stability. Later, Siren staff worked with L.B. to help him improve his mood, get a better handle on his depression and eventually work on his relationship with his parents. During his year at Siren, L.B. never threatened anyone. Hrg. Tr. at 406.

BSD staff had monthly meetings with Siren staff and provided educational materials. However, it did not provide L.B. physical education or vocational education services. ALJ Dec. at 5. Although L.B.'s IEP called for 6 hours of educational services per week (2 hours a day, 3 days a week), L.B. could not have absorbed more than one hour a day at Siren because that was all that the educational programming time the program allotted. Hrg. Tr. at 505. Jessica Hubbel, L.B.'s case manager at Siren, agrees that additional education from a BSD teacher would be helpful to L.B., to answer questions about assignments and to hold L.B. accountable for his work. Hrg. Tr. at 433-34. However, to provide more educational services, BSD would have to provide the services after 4:00 p.m. or on weekends. ALJ Dec. at 11. No one ever suggested that L.B. should do evening or weekend educational work. Hrg. Tr. at 446-47 (Hubbel testimony); 505, 519 (Melchiori testimony). Although Melchiori believes that any child would benefit from additional education, trying to have L.B. focus late in the day would be difficult given his ADHD and the fact that his medication would be wearing off at that time of day. Hrg. Tr. at 518-19.

The educational materials that BSD provided for L.B. consisted of self-study Wisconsin PASS packets (a program designed for students to be able to work independently on curriculum that aligns with state standards). According to Melchiori, the PASS packets were the best choice for L.B.'s situation. From discussions with Siren staff, Melchiori believed that L.B. was progressing well, especially in writing. Although the PASS program curriculum differs from what L.B. would have received in school, it provides an information and knowledge base in the subject area. L.B. never received a report card for his work on the PASS packets in the 7th grade. Hrg. Tr. at 503-04, 519. However, the reports concerning L.B.'s academic effort from Siren were satisfactory: on a five point scale, L.B. earned 3's and 4's. Hrg. Tr. at 456-57, 658.

B. L.B.'s Mental Health Diagnoses

Soon after L.B.'s admission to Siren, Sarah Busch, a licensed professional counselor and certified art therapist at Siren, diagnosed L.B. with depressive disorder, reactive attachment disorder and ADHD. ALJ Dec. at 5; Hrg. Tr. at 387-90. Dr. Ogunlesi also continued to treat L.B. while he attended Siren. On December 30, 2008, Dr. Ogunlesi diagnosed L.B. with conduct disorder, which is the repetitive and persistent pattern of behavior of violating the rules of society. ALJ Dec. at 5; Hrg. Tr. at 536-37. She based the diagnosis on the fact that L.B. had lied repeatedly to his parents about viewing pornography, destroyed property at home and threatened himself and another person with a knife. Hrg. Tr. at 536-47. Dr. Ogunlesi explained that unlike Siren, she did not have enough information about L.B.'s early childhood years to be able to diagnose him with—or conversely, to rule out—reactive attachment disorder. According to Dr. Ogunlesi, reactive attachment disorder and conduct disorder are not mutually exclusive diagnoses. Hrg. Tr. at 555-57.

In a letter dated February 12, 2009, Busch informed BSD of her diagnoses of L.B. and explained the connection between L.B.'s misbehavior and his disability. Hrg. Exh. 16. In a letter to BSD dated September 23, 2009, Dr. Ogunlesi wrote that L.B. had conduct disorder, attention deficit hyperactivity disorder and depressive disorder which interfere with his academic functioning and require that L.B. be reevaluated. Hrg. Exh. 7. On October 14, 2009, Dr. Ogunlesi sent a follow-up letter to the school district, explaining that L.B.'s misbehavior was a manifestation of his mental health diagnoses. Hrg. Exh. 6.

V. L.B.'s 2009 IEP

In early September 2009, BSD was advised of L.B.'s pending discharge from Siren, which meant that BSD would resume more directly responsibility for L.B.'s education. Hrg. Tr. at 445. Upon L.B.'s discharge on October 2, Siren made educational recommendations to BSD, such as placing L.B. in a supervised setting with an opportunity for peer social interaction, as opposed to having L.B. work on PASS packets by himself, as he had done at Siren. Hrg. Tr. at 442.

On October 5, 2009, BSD held an IEP meeting to review and revise L.B.'s IEP and placement with BSD. ALJ Dec. at 5. The IEP team found that L.B.'s behavior impeded his learning and incorporated certain components from L.B.'s regimen at Siren, such as a motivational reward system. However, the October 2009 IEP retained the same two goals as the October 2008 IEP and added no others. Hrg. Tr. at 86-88, 258-59; Hrg. Exh. 9. The IEP also included the following safety plan: (1) Before L.B. left home, his parents were to check him thoroughly for objects that may be used to cause harm to himself or others; (2) L.B. was to bring only the items he needed for that day; and (3) When L.B. entered the building, he was to be thoroughly checked, using a hands-off search method.

L.B.'s curriculum under the October 2009 IEP was about half that of the general curriculum undertaken by a typical BSD 8th grader. Hrg. Tr. at 261, 313. The IEP provided that L.B. would receive two hours of instruction three days per week at a neutral site with an aide and would work on PASS packets in history, math and writing. Hrg. Exh. 9. Jennifer Garret, the aide, was to meet regularly with the special education teacher regarding L.B.'s program. ALJ Dec. at 5; Hrg. Tr. at 278-79, 590-91, 660. Garret had worked as a library aide but had no formal training or certification in special education, mental health or physical education. Hrg. Tr. at 458, 464-65. Although L.B. did not have a cognitive disability that would have prevented him from completing the general curriculum, the IEP team decided that L.B. should work only on history, math and writing in order to prevent him from being overwhelmed. Hrg. Tr. at 260-62.

The IEP also stated that L.B. would receive specially designed physical education and vocational education. The IEP did not include counseling or other behavior modification services designed to address and prevent recurrence of the behavior that had resulted in L.P.'s expulsion. L.B.'s physical education services consisted of L.B. watching and exercising to exercise video tapes with his aide at the village hall. As of February 2010, BSD had not yet provided L.B. with vocational education services to help him transition to work after he graduated. ALJ Dec. at 6; Hrg. Tr. at 465; Hrg. Exh. 9.

VI. Appeals

A. Request For Reconsideration

On October 19, 2009, BSD notified Ritch and Malinda B. that it had received the additional medical information from Busch and Ogunlesi and it proposed reconvening the IEP team to reevaluate L.B. to determine whether he had an EBD (emotional behavioral disability). However, the school district indicated that the new medical information would not be used to initiate a new manifestation determination, because the IEP team had considered all available information when it made its initial determination in October 2008. Hrg. Exh. 8. In a letter dated October 20, 2009, Malinda requested that BSD reopen the manifestation determination given the new evidence. ALJ Dec. at 6; Hrg. Exh. 6. BSD denied this request on November 2, 2009. Hrg. Exh. 6.

B. Administrative Hearing Request

On October 30, 2009, plaintiffs' attorney faxed a request for a due process hearing to BSD pursuant to Wis. Stat. Chapter 115 and the IDEA, asserting that BSD "illegally expelled [L.B.] from school on November 4, 2008" because "the behavior for which he was expelled was clearly a manifestation of his disability." AR, Def.'s SJ Brf., Exh. 4. The complaint did not allege specifically that L.B.'s behavior was a manifestation of his OHI ("other health impairment") disability or that the IEP team incorrectly had determined that L.B. did not meet the EBD criteria. *Id.* DPI received a copy of the request on November 5, 2009 and referred the matter to the Division of Hearings and Appeals. *Id.*

VII. December 2009 Reevaluation and IEP

On December 21, 2009, after the start of the administrative review process on plaintiffs' request for a hearing, L.B.'s IEP team met to reevaluate L.B. and to revise his IEP. ALJ Dec. at 6; Hrg. Exh. 9; and Hrg. Tr. 291-93. Stanley, Melchiori, Dykstra, Hoff, Elizabeth Meyers (6th through 8th grade special education teacher) and Mary Kampa (Director of Special Education) participated in the IEP meeting. Hrg. Exh. 10. Neither Dr. Ogunlesi nor anyone from Siren was asked to participate. Although L.B. had received mental health day-treatment for over a year, Meyers did not feel that it was important to involve mental health professionals when reevaluating L.B.'s EBD determination because she had received reports from his family, from Siren and from Garret that L.B. had been behaving well. Hrg. Tr. at 294-97. Meyers believed that the treatment L.B. had received had put L.B. in a position from which he could succeed. *Id.* at 299-301.

Dykstra performed additional testing for the reevaluation, including another BASC and the Brown Attention Deficit Disorder Rating Scales. Hrg. Tr. at 586-87. Dykstra did not believe that L.B. qualified as a child with an EBD because the parent report and the report from the educational professional at Siren indicated that L.B.'s behavior was normal. Hrg. Tr. at 589-90. In conjunction with the reevaluation, L.B.'s parents reported that L.B. had matured and had become a "more normal teenager." Hrg. Exh. 10 at 24. They reported that he was more compliant, had taught himself guitar and could hold back-and-forth conversations. *Id*. L.B.'s parents expressed concern about his academic achievement and performance. At that time, L.B. was starting to show a pattern of forgetting or not completing his homework for his tutor (he had a 77% completion rate). Siren reported that L.B. did well with his behavior plan as long as

he received incentives. L.B.'s tutor at the neutral educational site reported that his behavior was wonderful. *Id.* at 24-25.

The IEP team considered Ogunlesi's diagnoses and the medications that she prescribed for L.B. Hrg. Tr. at 615-16; Hrg. Exh. 10 at 19-20. The team also reviewed L.P.'s medical records from Siren and his other providers at the Marshfield Clinic. Hrg. Tr. at 615-16; Hrg. Exh. 10 at 14. At the time, Dykstra noted in his report that there was disagreement in the diagnoses from Siren (reactive attachment disorder) and the Marshfield Clinic (conduct disorder), and that the diagnoses listed in the Marshfield Clinic records were inconsistent from one appointment to another and seemed based entirely on anecdotal reports from L.B.'s parents rather than input from the Siren program or standardized assessments. Hrg. Exh. 10 at 14.

The result was that the only substantive revision to the IEP was the addition of two additional hours per week of educational services for L.B. with his aide at a neutral site. ALJ Dec. at 6. That change was made in response to Malinda's request that L.B. receive additional time with the aide because there had been no change in L.B.'s academic ability since the October 2009 IEP. Hrg. Tr. at 96 and 266-67; Hrg. Exh. 10 at 31. Although BSD agreed to increase L.B.'s instructional time in December 2009, L.B. still received no direct instruction from a teacher. *Id.*

Following the IEP meeting, L.B.'s behavior at home deteriorated. L.P. attempted to run away, leaving a note apologizing for being so much trouble and stating that he would try to live on his own. At the time of the due process hearing, L.B. was undergoing a 30-day assessment at Northwest Passages, Siren's residential treatment program. Hrg. Tr. at 97-100 and 385-86.

While being educated pursuant to his post-expulsion IEPs, L.B. made educational

progress in the general curriculum contained in the Wisconsin PASS packets. ALJ Dec. at 6. At the time of the administrative hearing, L.B. had completed Language Arts A and B (for which he received As), had completed 4 of 5 Earth Science units, and was on track to finish the 8th grade PASS packets. L.P. still needed to finish 2 units of math, 1 unit of U.S. history, Wisconsin history and reading. Hrg. Tr. at 282-86 (Meyers testimony). According to Meyers, L.B. was academically in a position whence he could have transferred into the regular education classes for his age and grade. Hrg. Tr. at 284-85.

VIII. Administrative Hearing

A. Summary Judgment Decision on Statute of Limitations

Prior to the administrative hearing, BSD filed a motion for partial summary judgment on the ground that the hearing request was untimely under the 1-year statute of limitations period set forth in Wis. Stat. § 115.80(1)(a)(1) because the manifestation determination had occurred on October 24, 2008, more than a year before the request was filed with DPI. AR, Def.'s Br. In Supp. of Motion for Partial Summ. Judg., Exh. 4. In an order dated January 4, 2010, the ALJ found the request timely because it was the order of expulsion (issued November 7, 2008) and not the manifestation determination that triggered the start of the statute of limitations clock. *See* AR, Div. of Hrgs. and App., Ruling and Ord. on Motion for Partial Summ. Judg., Jan. 4, 2010. The ALJ explained that § 115.80(1)(a) provides that a change in the student's evaluation, individualized education program, educational placement or the provision of FAPE (a free appropriate public education) are the grounds giving rise to a hearing request. She further stated that "[w]hether or not the manifestation determination was correct may be

relevant to the appropriateness of the expulsion and it would be a misuse of the one year statute of limitations to interpret it to effectively bar evidence at the hearing regarding the manifestation determination, which the Board may have relied upon in ordering the expulsion." *Id.*

B. Mental Health Evidence

The administrative hearing was held on February 16-17, 2010. Plaintiffs argued that L.B.'s behavior during the knife incident was caused by or had a direct and substantial relationship to his various mental illness diagnoses. In response, BSD contended that the ALJ could not consider information about L.B.'s mental illnesses because the IEP team did not have access to that information in making the manifestation determination.

Over BSD's objections, the ALJ relied on this court's decision in *Richland School Dist. v. Thomas P.*, Case No. 00-C-0139-X, 32 IDELR 233 (W.D. Wis. May 24, 2000) (ALJ review of manifestation determination is *de novo* and not limited to evidence before IEP team), and allowed plaintiffs to present testimony from Dr. Ogunlesi and Busch regarding L.B.'s mental health diagnoses that were made after the manifestation determination. BSD had argued that because the IDEA was reauthorized in 2004, *Richland* no longer was valid. However, the ALJ found that the standard of review for a hearing officer in an appeal of a manifestation determination under the reauthorized IDEA was no more restrictive than it had been at the time of the *Richland* decision; indeed it was arguably less restrictive. Therefore, the ALJ determined that the reasoning of *Richland* still was valid, so she allowed the challenged testimony from Busch and Dr. Ogunlesi.

Busch and Dr. Ogunlesi both opined that the knife incident was a manifestation of L.B.'s mental health diagnoses. Busch testified that planning to get out of an uncomfortable situation is "very typical of reactive attachment disorder, and that's exactly what L.B. did." Hrg. Tr. at 402. According to Busch, L.B. "was looking for a way to get out of his home" at the time of the knife incident, and "he thought that if he did something bad enough to get sent to day treatment, that he needed to do something else to get sent somewhere where he could leave his home." *Id.* According to Busch, when L.B. left Siren, he no longer was suicidal or threatening to hurt himself or others, and his behavior at home had improved. *Id.* at 403-04. However, she testified that it is very typical for someone with reactive attachment disorder to have peaks and valleys throughout his life. *Id.* at 405.

Dr. Ogunlesi testified that the knife incident was a manifestation of all of L.B.'s conditions— ADHD, depression and conduct disorder—with conduct disorder being the most impairing. Hrg. Tr. at 538-39, 542. She stated that she had not diagnosed L.B. with conduct disorder in January 2008 because at that time, he had not threatened harm to a person, a necessary component to the diagnosis. *Id.* at 545. Dr. Ogunlesi testified that she would have made the diagnosis of conduct disorder at the time of the knife incident in October 2008 had she evaluated L.B. at the time.

According to Dr. Ogunlesi, L.B.'s conduct disorder interfered with his learning. When asked the basis for her opinion, Dr. Ogunlesi testified that L.B.'s parents told her in January 2008 that L.B. was failing all of his classes. Dr. Ogunlesi also spoke with L.B.'s teacher at the time (Rogers), who reported that other than getting off task at times, L.B. was doing well. Given the conflicting information, Dr. Ogunlesi had Rogers and L.B.'s parents complete ADHD rating

scales in January 2008. No one noted symptoms of conduct disorder or defiant disorder at that time. *Id.* at 548-54. It is Dr. Ogunlesi's opinion that L.B.'s conduct disorder affects his learning in that it causes him to not turn in his homework assignments, leading to poor grades. *Id.* at 555.

The ALJ heard testimony from many other witnesses, including L.B., Malinda B., Ritch B. and members of the IEP team. After hearing Dr. Ogunlesi's testimony, Dykstra testified that L.B.'s conduct disorder was not an educational disability because L.B. had failed only two classes in the 1st quarter of 6th grade; otherwise his grades did not change significantly over the years. Hrg. Tr. at 585-86.

IX. The ALJ's Decision

On March 18, 2010, the ALJ issued a decision finding that the school district had not expelled L.B. improperly because the behavior that resulted in his expulsion was not a manifestation of his disability. The ALJ further found that BSD had not denied L.B. his FAPE by failing to provided sufficient post-expulsion educational services; however, ALJ determined that the school district had denied L.B. FAPE to the extent that it had not provided physical education and behavior modification services adequate to meet his post-expulsion needs. The ALJ ordered the district to convene an IEP meeting to arrange for such services.

A. The EBD Decision and Manifestation Determination

The ALJ explained that the relevant question under the IDEA was whether L.B.'s conduct was a manifestation of his "disability." According to the ALJ, even though they had not

discussed L.B.'s eligibility in the hearing request, it had become apparent during the hearing that Malinda and Ritch were arguing that L.B. has an emotional behavioral disability (EBD) in addition to ADHD. The ALJ pointed out that complainants may not raise issues at the due process hearing that were not raised in the complaint unless the other party agrees, 20 U.S.C. § 1415(f)(3)(B). However, she found that even though BSD did not agree specifically to add the EBD issue, it did not object to allowing information regarding the IEP team's EBD determination into evidence and, in fact, had presented such evidence. The ALJ concluded that:

> While I need not address the issue . . . in light of the substantial amount of evidence and argument presented by both parties regarding EBD, I will note in this decision that the Parent was unable to show by a preponderance of the evidence that the IEP team incorrectly determined that the Student does not have an EBD.

ALJ Dec. at 9.

The ALJ explained that a child with a mental health diagnosis is not automatically a "child with a disability," a term defined in the federal regulations as one of several listed impairments, including "emotional disturbance." She noted that the federal regulations define emotional disturbance as a condition exhibiting one or more listed characteristics "over a long period of time and to a marked degree that adversely affects a child's education performance." 34 C.F.R. § 300.8(c)(4)(i). Although Malinda and Ritch B. argued that BSD improperly had used the more restrictive state DPI guidelines for EBD eligibility, the ALJ determined that L.B.'s behavior and emotional problems did not meet the even more permissive federal criteria. The ALJ found that although some of L.B.'s misbehavior at home occurred over a long time, it did not adversely affect his educational performance. The ALJ also found that L.B. did not have a lengthy disciplinary record and did not regularly engage in misbehavior at school that adversely

affected his educational performance. The ALJ concluded that the IEP team had correctly considered whether L.B.'s behavior was a manifestation of his OHI-ADHD disability and was not required to seek out additional medical or psychiatric information.

B. Adequacy of Post-Expulsion IEP

The ALJ determined that plaintiffs did not meet their burden of showing that BSD denied L.B. a free, appropriate education after his expulsion. The ALJ noted that BSD suspended L.B. after the knife incident until October 30, 2008, when he entered the Siren program. The ALJ found no evidence that BSD had failed to provide L.B. with educational services following his suspension, totaling 10 school days. While L.B. attended Siren, BSD provided materials for the one hour of daily educational time that Siren scheduled into L.B.'s program and BSD staff met monthly with Siren staff.

The ALJ noted that in order for L.B. to receive more than five hours of educational services per week, BSD would have had to have provided instruction after 4:00 p.m. or on the weekend. The ALJ found no credible evidence that BSD, Siren or L.B.'s parents had asked for, or had believed that L.B. needed additional hours of educational instruction at Siren in order to receive FAPE. The ALJ cited the testimony of Melchiori, who stated that because of L.B.'s ADHD, she would have been concerned that L.B. would not have been able to focus on additional instruction after a full day at Siren. ALJ Dec. at 11.

With respect to the post-Siren IEPs, the ALJ determined that it sufficed for BSD to increase L.B.'s educational services from five hours per week to six hours (in October 2009), then

to eight hours (in December 2009). The ALJ noted that L.B. had progressed in the curriculum using the PASS packets since October 2009. *Id.*

The ALJ found that L.B. received little or no physical education or vocational educational services, even though his post-expulsion IEPs included such services. She also found that none of L.B.'s post-expulsion IEPs provided for behavioral modification services designed to prevent recurrence of the behavior that had resulted in L.B.'s expulsion. Because there was insufficient information in the record from which she could determine what physical education and behavioral modification services B.D. needed, the ALJ declined to order compensatory services, but ordered BSD to do its own follow-up on these issues. Noting that BSD had planned to implement the vocational educational services provided for in the IEP, the ALJ concluded that it was premature to determine whether those services met L.B.'s needs. *Id.* at 11-12.

OPINION

I. Burden of Proof and Standard of Review

Although this case is before the court on a motion for summary judgment, the standard for reviewing a hearing officer's decision in an IDEA case differs from a typical summary judgment analysis. *See Schroll v. Bd. of Ed. Champaign Cmty. Unit Sch. Dist. # 4*, 2007 WL 2681207, at *3 (C.D. Ill. 2007); *Andrew B. v. Bd. of Ed. of Cmty. High Sch. Dist. 99*, 2006 WL 3147719, at *3 (N.D. Ill. 2006). A summary judgment motion in an IDEA case "is simply the procedural vehicle for asking the judge to decide the case on the basis of the administrative record." *Andrew B.*, 2006 WL 3147719, at *3, quoting *Heather S. v. State of Wis.*, 125 F.3d 1045, 1052 (7th Cir.1997). Despite being captioned a motion for summary judgment, the court

is to base its decision on a preponderance of the evidence. *Patricia P. v. Bd. of Ed. of Oak Park*, 203 F.3d 462, 466 (7th Cir.2000); *Hoffman v. East Troy Cmty. Sch. Dist.*, 38 F. Supp. 2d 750, 760 (E.D. Wis. 1999); *see also Bd. of Ed. of Twp. High Sch. Dist. No. 211 v. Ross*, 486 F.3d 267, 270 (7th Cir. 2007). As the party challenging the outcome of the administrative hearing, L.B. bears the burden of persuasion in this case. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57-58 (2005); *Marshall Joint Sch. Dist. No. 2 v. C.D. ex rel. Brian D.*, 616 F.3d 632, 636 (7th Cir. 2010).

In reviewing administrative agency decisions under the IDEA, a court must 1) receive the records of the administrative proceedings; 2) at its discretion, admit additional evidence at the request of a party; and 3) base its decision on the preponderance of the evidence, granting relief that it determines to be appropriate. 20 U.S.C. § 1415(i)(2)(C); *Ross*, 486 F.3d at 270. Although the court must independently determine whether the IDEA's requirements have been satisfied, it must give "due weight" to the results of the administrative decisions and not substitute its "own notions of sound educational policy for those of the school authorities which they review." *Bd. of Ed. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982)); *see also Ross*, 486 F.3d at 270 (citing *Rowley* standard); *Alex R. v. Forrestville Valley Community Unit Sch. Dist. No. 221*, 375 F.3d 603, 611-12 (7th Cir. 2004) (same).

The Court of Appeals for the Seventh Circuit instructs that when a district court reviews an administrative decision under the IDEA, it should give no deference to the ALJ's legal conclusions but must give the ALJ's factual findings due weight. *Marshall*, 616 F.3d at 636. The meaning of "due weight" varies from cases to case, depending on the degree to which the court relies on evidence that was not before the hearing officer. *Alex R.*, 375 F.3d at 612. For example, when a reviewing court does not take new evidence and relies solely on the

administrative record, it owes considerable deference to the hearing officer and may set aside the administrative order only if it is "strongly convinced that the order is erroneous." *Id.* (quoting *School District of Wisconsin Dells v. Z.S.*, 295 F.3d 671, 675 (7th Cir. 2002). This standard is analogous to review for clear error or substantial evidence. *Id.*

II. Overview of Relevant IDEA Provisions

The IDEA requires that the school district provide children with disabilities with a free appropriate public education (FAPE) in the least restrictive environment. 20 U.S.C. § 1412(a)(1) and (5). FAPE comprises both special education and related services. 20 U.S.C. § 1401(9). "Special education" is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education." 20 U.S.C. § 1401(29). "Related services" are defined as developmental, corrective and other supportive services (including physical and occupational therapy, recreation and orientation and mobility services) required to assist a child with a disability to benefit from special education. 20 U.S.C. § 1401(26).

The IDEA and Wisconsin special education laws impose extensive procedures that a school district must follow when evaluating whether a student is a "child with a disability" who is eligible for special education and related services. 20 U.S.C. §§ 1414(b), 1415; Wis. Stat. § 115.782. Evaluations are conducted by an IEP team, which usually consists of the child's parents and qualified professionals, including a regular education teacher, a special education teacher, a representative of the local education agency, an individual who can interpret the

instructional implications of the evaluation results, and other individuals with knowledge or special expertise regarding the child. 20 U.S.C. §§ 1414(b)(4), (c) and (d)(1)(B). To meet the definition of "child with a disability," a student must meet the criteria for one of the 13 listed categories and "by reason thereof, need[] special education and related services." § 1401(3)(A)(ii). "Other health impairment" (OHI) and "emotional disturbance" (referred to as EBD in the record and by the parties) are two of the listed categories. § 1401(3)(A)(i). Although the IDEA does not define any of the qualifying disabilities in § 1401(3)(A)(i), the Department of Education has issued a defining regulation. 34 C.F.R. § 300.8(c).

Before expelling a child with a disability for violating school rules, a local education agency must determine whether "the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability." 34 C.F.R. § 300.530(e)(1)(i). In doing so, the regulations require the child's IEP team to 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." *Id.* If the behavior was not a manifestation of the child's disability, then the school district may discipline the child "in the same manner and for the same duration as the procedures would be applied to children without disabilities." 34 C.F.R. § 300.530(c).

III. Timeliness of Hearing Request

Before turning to the substance of the ALJ's decision, I must address BSD's assertion that, contrary to the ALJ's decision, plaintiffs' request for a hearing was untimely. The IDEA requires states to establish procedures to ensure that children and parents have procedural safeguards, such as a mechanism to present a complaint "with respect to any matter relating to

the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6); *see also Edwards v. School Dist. of Baraboo*, 570 F. Supp. 2d 1077, 1082 (W.D. Wis. 2008); *VanDenBerg v. Appleton Area School Dist.*, 252 F. Supp. 2d 786, 788 (E.D. Wis. 2003) (citing WI DPI, *About Due Process Hearings*, accessed at http://www.dpi.state.wi.us/een/dueproc.html).

Wis. Stat. § 115.80(1)(a) provides that

> a written request for a hearing [may be filed] 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 . . ..[1]

In Interim Guidance issued after the 2004 amendments to the IDEA, DPI states that "[a] parent or LEA must request a due process hearing within one year of the date the parent or LEA knew or should have known about the alleged action that forms the basis of the hearing request." *IDEA 2004 Significant Changes Regarding Due Process Effective July 1, 2005*, Interim Guidance, accessed at http://www.dpi.state.wi.us/een/dueproc.html on March 2, 2011.

Plaintiffs filed their request for a hearing with DPI on November 5, 2009, challenging the school district's October 24, 2008 manifestation determination as erroneous and arguing that L.B. had not been provided FAPE after he was expelled. At the administrative level and in this court, BSD has argued that because plaintiffs are challenging the manifestation determination and not the expulsion, the hearing request should have been filed by October 24, 2009. Plaintiffs contend, and the ALJ agreed, that the date of the expulsion decision (November

[1] Although the IDEA states that a hearing request must be made within 2 years of the alleged action, it defers to state law. 20 U.S.C. § 1415(f)(3)(C).

7, 2008) is the start of the limitations period because that is the date on which BSD actually decided to change L.B.'s educational placement. According to plaintiffs, although the manifestation determination was a necessary step in the decision to change L.B.'s placement, it did not have any independent effect and, therefore, did not trigger the start of the statute of limitations period.

The plain language of the statute indicates that the event triggering the statute of limitations period is a proposed change in an evaluation, IEP, placement or receipt of FAPE. *See VanDenBerg*, 252 F. Supp. 2d at 791 ("[T]he Wisconsin legislature has enacted a rather lengthy and specific provision governing requests for due process hearings."). After L.B. brandished a knife at school, BSD met on October 24, 2008 and initiated changes in L.B.'s evaluation and IEP. BSD did not change L.B.'s placement until November 7 and only notified plaintiffs of that change on November 11. Therefore, under the statute, any challenges to L.B.'s placement had to be made by November 11, 2009.

When plaintiffs requested a hearing on November 5, 2009, they claimed that the expulsion (or change in placement) was illegal because the IEP had reached an erroneous manifestation determination. However, BSD argues that plaintiffs never appealed the expulsion itself but rather focused on the manifestation determination, which it contends is a separate and distinct act. In support, BSD cites provisions in the IDEA and federal regulations that distinguish between placement decisions and manifestation determinations. *See, e.g.,* 20 U.S.C. § 1415(k)(3)(A) ("The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, . . . may request a hearing."); 34 C.F.R. § 300.532(a) ("parent of a child with a disability who disagrees with any

decision regarding placement under §§ 300.530 and 300.531, or the manifestation determination under § 300.530(e), . . . may appeal the decision by requesting a hearing.").

However, § 300.532(a) goes on to state that a hearing is requested by filing a complaint pursuant to §§ 300.507 and 300.508(a) and (b). Section 300.507(a) provides that the complaint may be filed on "any of the matters described in § 300.503(a)(1) and (2)," which include proposals or refusals to "initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child." Therefore, the federal regulations also contemplate that hearing requests are prompted by these specific affirmative acts.

As plaintiffs point out, the manifestation determination is a required step in the expulsion process of a child with a disability but it is not the act that results in a change in educational placement. *See* 34 C.F.R. § 300.530(e)(1)(i) (within 10 days of any decision to change placement, local education agency must determine whether "conduct in question was caused by, or had a direct and substantial relationship to, the child's disability."). Although the term "educational placement" is not statutorily defined, the Court of Appeals for the Seventh Circuit has noted that "[u]nder IDEA case law developed by other circuits, the meaning of 'educational placement' falls somewhere between the physical school attended by a child and the abstract goals of a child's IEP." *Board of Educ. of Community High School Dist. No. 218, Cook County*, 103 F.3d 545, 548 (7th Cir. 1996). In expulsion cases, "courts have construed 'educational placement' much more narrowly by looking to the specific institution." *Id.*; *see also John M. v. Board of Educ. of Evanston Tp. High School Dist. 202*, 502 F.3d 708, 714 (7th Cir. 2007) (recognizing placement as general educational program rather than mere variations in program itself). Under either a narrow or broad reading of the term placement, it is difficult to see how

a manifestation determination constitutes a change in placement. A manifestation determination may *lead* to a change in placement, perhaps inexorably in some situations, but the determination itself is merely a preliminary step in the process of determining the child's ultimate placement. Therefore, I conclude that the ALJ did not err in finding that the hearing request was timely filed with respect to the manifestation determination.

IV. Manifestation Determination

As the ALJ recognized at the hearing, and what is apparent from plaintiffs' supporting brief on summary judgment, plaintiffs are not claiming that the IEP team erred in determining that the knife incident was not a manifestation of L.B.'s ADHD. Rather, the crux of plaintiffs' argument is that L.B. should not have been expelled because the knife incident was a manifestation of his mental health diagnoses, which they contend also make him eligible as a child with an OHI and an EBD. Specifically, plaintiffs assert that in addition to ADHD, the IEP team should have considered that L.B. suffers from reactive attachment disorder, major depressive disorder, dysthymic disorder (chronic depression), impulse-control disorder, disruptive behavior and conduct disorder. Plaintiffs contend that the unrebutted expert testimony and opinions of Dr. Ogunlesi and Busch demonstrate that the knife incident was a manifestation of L.B.'s mental illnesses. Plaintiffs point out that Busch had written to the school district to explain that there was a connection between L.B.'s misbehavior and his reactive attachment disorder and she later testified that planning to get out of an uncomfortable situation was typical of that disability. Plaintiffs also cite Ogunlesi's testimony that the knife incident was a

manifestation of all of L.B.'s diagnoses and that L.B.'s global functioning score of 35 meant that he was moderately to severely impaired.

BSD has not challenged L.B.'s mental health diagnoses *per se* but argues that: (1) the ALJ should not have considered them because they were not before the IEP team at the time of the manifestation determination; and (2) in the alternative, there is no evidence that L.B.'s experience with those conditions meet the specific eligibility criteria for EBD or OHI, particularly with respect to interfering with his educational performance. I address each argument in turn.

A. Admission of Mental Health Evidence

In her decision, the ALJ chose to address whether L.B. met the EBD criteria even though it was not properly raised in the complaint, reasoning that it was appropriate issue to consider given the amount of evidence both parties presented and the lack of objection from BSD. Although BSD has not challenged the ALJ's addition of the EBD issue, it argued before the ALJ and in this court that an ALJ cannot consider evidence that was not before the IEP team during a manifestation determination. As noted above, the ALJ rejected this argument based on this court's decision in *Richland*.

As plaintiffs point out, the facts in *Richland* are similar to this case. In *Richland*, the student, Thomas P., had been receiving special education for a learning disability for a number of years. *Richland*, Case No. 00-C-139-X, May 24, 2000 Op. & Ord., at 1. During his senior year in high school, Thomas was involved in a vandalism incident for which the school district expelled him after determining that his behavior was not a manifestation of his learning

disability. *Id.* Thomas's mother appealed and had Thomas evaluated after the expulsion by a clinical psychologist who diagnosed him with attention deficit disorder and a mood disorder, and opined that these conditions led to his involvement in the vandalism incident. *Id.* at 1-2. The ALJ who presided over the due process hearing not only considered this new evidence but found it persuasive enough to set aside the expulsion. *Id.* at 2. On appeal in this court, the school district contended that the ALJ exceeded the proper scope of his review by considering the new diagnoses. *Id.*

After considering the administrative review provision of the IDEA, 20 U.S.C. §1415(k)(6)(B)(i) (2000 version), and the legislative history, I determined that the ALJ was not precluded from considering the new evidence even though it had come to light after the district's manifestation determination. *Id.* The school district attempted to rely on § 1415(k)(4)(C), which stated that "if a disciplinary action involving a change of placement for more than 10 days is contemplated for a child with a disability . . .", the IEP Team must determine that the child's behavior was "not a manifestation of such child's disability" before the school may take the proposed disciplinary action. *Id.* at 16-17. According to the school district, the phrase "such child's disability" meant only the disability identified by the school district which had made the student eligible for special education in the first place. *Id.* I found that nothing in the plain language of the statute limited the term disability in this manner and concluded that the ALJ was free to consider new evidence that Thomas suffered from an additional disability at the time of the vandalism incident. *Id.*

BSD maintains that *Richland* is no longer good law after the 2004 reauthorization of the IDEA because none of the statutory language on which this court based its decision exists today.

In support, BSD cites the provisions in § 1415(k) governing the manifestation determination. At the time of the *Richland* decision, the IDEA provided that in carrying out the manifestation determination review, the IEP Team must consider "all relevant information." § 1415(k)(4)(C) (2000 version).[2] After the reauthorization of the IDEA, that provision was changed to require the IEP team to consider "all relevant information *in the student's file*." § 1415(k)(1)(E)(i) (emphasis added). However, contrary to BSD's assertions, the court in *Richland* did not "interpret[] this language to allow a reviewing ALJ to consider information not considered by the IEP team in making its manifestation determination." Dkt. 21 at 11. As noted above, the court in *Richland* interpreted the administrative review provision and found that regardless what evidence the IEP team reviewed or had before it, the ALJ may consider other evidence related to the child's disability.

As the ALJ pointed out in her decision, the standard of review for a hearing officer in an appeal of a manifestation determination under the reauthorized IDEA is no more restrictive than it was at the time of the *Richland* decision and, arguably, is less restrictive. In 2000, the IDEA's administrative standard of review for manifestation determinations provided that "the hearing officer shall determine whether the public agency has demonstrated that the child's behavior was not a manifestation of such child's disability." 20 U.S.C. § 1415(k)(6)(B)(i) (2000 version). The reauthorized IDEA states that a hearing officer "shall hear, and make a determination regarding, an appeal [of a placement decision or manifestation determination]" and that "the

[2] In its brief, BSD incorrectly cited § 1415(k)(5)(A), which prior to 2005, related to disciplinary procedures available if the behavior in question was found not to be a manifestation of the child's disability. *See* dkt. 21at 11. The language BSD quotes in its brief actually appears in the former verison of § 1415(k)(4)(C).

hearing officer may order a change in placement of a child with a disability" in making such determination. 20 U.S.C. § 1415(k)(3)(B)(i)-(ii).

In a related argument, BSD asserts that the circumstances in this case are analogous to a situation in which a non-special education student facing discipline raises disability as a defense. The IDEA and federal regulations provide that a local educational agency will be deemed to have knowledge that a child is a child with a disability only where the behavior that precipitated the disciplinary action occurred after the child's parent expressed concerns in writing to school officials or requested an evaluation or after school personnel expressed concerns about the child's behavior. § 1415(k)(5)(A); 34 C.F.R. § 300.530(e). BSD asserts that it did not and had no reason to know that L.B. had other disabilities at the time of the knife incident because neither Ogunlesi nor Busch had even made their diagnoses at that time.

The school district in *Richland* unsuccessfully raised this same argument in seeking to avoid the admission of new evidence of the chid's disability. *See Richland*, Case No. 00-C-139-X, May 24, 2000 Op. & Ord., at 17. The argument fails in this case for similar reasons. Although BSD argues that § 1415(k)(5)(A) is applicable in this case because L.B. alleges that his misconduct was related to a disability for which he was not yet receiving services, that statute applies only to "[a] child who has not been determined to be eligible for special education and related services under this subchapter . . ." *Id.* At the time of the knife incident, L.B. *was* determined to be eligible for such education and related services, albeit for a different disability than the one he asserts led to his misconduct. Therefore, under the statute's plain language, the manifestation determination review applies to students alleging both a disability for which services are already being provided and a "new" disability for which they are not. *See id*.

In sum, I agree with the ALJ that *Richland* remains good law, making it permissible for her to consider "new" evidence related to L.B.'s disability on administrative review.

B. EBD Eligibility

The federal regulations define "emotional disturbance" as a condition exhibiting at least one of five listed characteristics "over a long period of time and to a marked degree that adversely affects a child's educational performance." 34 C.F.R. § 300.8(c)(4)(i). Children who are only "socially maladjusted" and fail to exhibit at least one of the five provided characteristics do not qualify. § 300.8(c)(4)(ii). The listed characteristics relevant to this case include an inability to build or maintain satisfactory interpersonal relationships with peers and teachers, inappropriate types of behavior or feelings under normal circumstances and a general pervasive mood of unhappiness or depression. In order to be considered a child suffering from an emotional disturbance, the child's "behavioral problems must be unusually serious as compared to the majority of his peers and must present a significant impediment to learning." *Hoffman*, 38 F. Supp. 2d at 767.

In addition, many states have adopted more circumscribed criteria for identifying children with disabilities under the IDEA. *Mr. I. ex rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1, 11-13 (1st Cir. 2007). Under Wisconsin law, "emotional behavioral disability" is a listed impairment, Wis. Stat. 115.76(5)(a), which is defined as "social, emotional or behavioral functioning that so departs from generally accepted, age appropriate ethnic or cultural norms that it adversely affects a child's academic progress, social relationships, personal adjustment, classroom adjustment, self-care or vocational skills," Wis. Admin. Code § PI 11.36(7). In

addition, a child with an EBD must demonstrate "severe, chronic and frequent behavior that is not the result of situational anxiety, stress or conflict"; the behavior described in the definition section must occur "in school and in at least one other setting"; and the child must display one of several listed conditions, including an inability to develop or maintain satisfactory interpersonal relationships; inappropriate affective or behavior response to a normal situation; pervasive unhappiness, depression or anxiety; or other inappropriate behaviors that are so different from similarly situated children. *Id.*

Although plaintiffs criticize BSD for using the more restrictive criteria for EBD found in the state guidelines, the ALJ found that even under the less restrictive federal criteria, L.B. did not exhibit any of the EBD characteristics over a long period of time and that none of these characteristics adversely affected his educational performance. In her written decision, the ALJ noted that although some of L.B.'s misbehavior at home occurred over a long period of time, it had not adversely affected his educational performance. The ALJ also found that L.B. did not have a lengthy disciplinary record and did not regularly engage in misbehavior at school that adversely affected his educational performance.

Plaintiffs assert that the evidence supports a contrary decision. They argue that L.B.'s passing of pills, threats with the knife and obsession with pornography are evidence of "inappropriate types of behavior or feelings under normal circumstances" and "inability to build or maintain satisfactory interpersonal relationships with peers and teachers." 34 C.F.R. § 300.8(c)(4)(i). They also argue that L.B.'s diagnosis of depression shows that he has "a general pervasive mood of unhappiness or depression." *Id.* Plaintiffs point out that although L.B. only had two severe behavioral incidents at school, he had been exhibiting behavioral problems at

home since early elementary school. With respect to educational performance, plaintiffs note that L.B.'s grades nosedived in the first quarter of sixth grade when he received 2 Fs.

The federal regulations do not provide guidance as to what constitutes a "long period of time" or a "marked degree" for purposes of analyzing the criteria for emotional disturbance. However, there is substantial evidence that at the time of the knife incident, L.B. had exhibited inappropriate behavior—viewing pornography, poor hygiene and defiant behavior—at home for a long period of time. At that time, L.B. also had been suffering with depression for about 10 months. On the other hand, there is little evidence, apart from supposition, that L.B. had an inability to build or maintain relationships. Plaintiffs draw this inference from the fact that L.B. passed pills once and threatened a student with a knife. Although these are serious incidents, they do nothing to establish that L.B. had a long history of failing to build or maintain relationships with peers or teachers. In fact, L.B. had very few disciplinary incidents at school; school personnel viewed L.B. as inattentive, not disruptive. For example, reports completed by L.B.'s teachers for L.B.'s evaluations in 2008 evaluations by Dr. Ogunlesi and BSD showed that L.B. had problems sustaining attention but was not disruptive and did not have severe behavioral difficulties.

With respect to L.B.'s depression and his inappropriate behavior at home, I agree with the ALJ that there is insufficient evidence of a link between those conditions and L.B.'s poor academic performance. Although the terms "adversely affect" and "educational performance" are not defined in the IDEA or the federal regulations, the Court of Appeals for Second Circuit has held that a child who is performing at average levels and progressing from grade to grade was not suffering an adverse effect to his educational performance. *See Mr. N.C. v. Bedford Cent.*

School Dist., 2008 WL 4874535 (2nd Cir. Nov. 12, 2008) (even if student displayed characteristics of emotionally disturbed child, educational performance not adversely affected where student did not fail any classes and his grade point average dropped only nine points); *A.J. v. Board of Educ.*, 679 F. Supp. 2d 299, 309-11 (E.D. N.Y. 2010) (summarizing cases and noting same). *Cf.*, *Hansen ex rel. J.H. v. Republic R-III School Dist.*, 632 F.3d 1024, 1027 (8th Cir. 2011) (child who consistently struggled to pass classes, failed standardized tests and suffered academically because of his bipolar disorder met criteria for EBD). The district court in *A.J.* also found that to the extent that it may be inferred that the child's problems had prevented him from being able "to reach his maximum academic potential, this idea, albeit in a different context, has been rejected by the Supreme Court," which has held that the IDEA does not require states to "maximize the potential of handicapped children 'commensurate with the opportunity provided to other children.'" *A.J.*, 679 F. Supp. 2d at 310-11 (quoting *Rowley*, 458 U.S. at 186).

Neither Busch nor Dr. Ogunlesi discussed L.B.'s depression or any effect that it might have had on L.B.'s educational performance. They did not opine that L.B.'s misbehavior at home over the years adversely affected his educational performance. Although L.B. failed two classes in the first quarter of sixth grade, that was an aberration: by the next quarter he was passing all of his courses by a fair margin. As BSD points out, L.B. never was a straight A student and he earned a wide range of grades in the third through fifth grades. The evidence points to L.B.'s ADHD, specifically his inability to remain attentive, as the drag on his academic performance.

Dr. Ogunlesi did testify that she believed that L.B.'s conduct disorder interfered with his learning. However, when asked the basis for her opinion, she responded that L.B.'s parents told her in January 2008 that L.B. was failing all of his classes and then she discussed how she tested and treated L.B. for ADHD. In fact, when Dr. Ogunlesi first began seeing L.B. in January 2008 (after his poor first quarter grades), she focused on his ADHD because at that time, no one noted symptoms of conduct disorder or defiant disorder.

Later in her testimony, Dr. Ogunlesi explained that L.B.'s conduct disorder caused him not to turn in homework assignments, leading to poor grades. However, Dr. Ogunlesi testified that the earliest point at which she would have diagnosed L.B. with conduct disorder was the knife incident in October 2008 because threatening harm to a person is a necessary component to the diagnosis. According to testimony from L.B.'s teachers and the IEP team reports, L.B.'s failure to turn in assignments had been contributing to his poor grades all along, well before he ever met the diagnosis of conduct disorder. Further, L.B.'s grades actually improved and did not plunge again, even after he was caught passing pills and brandishing a knife. Given the lack of a clear causal connection between L.B.'s poor grades and either his misconduct at home or the late-occurring diagnosis of conduct disorder, I conclude that plaintiffs have not established that the ALJ erred when she determined that L.B. did not qualify as a child with an EBD.

C. OHI Eligibility

Plaintiffs briefly assert on summary judgment that BSD failed to consider how L.B.'s mental health diagnoses and behaviors related to his other health impairments (OHI),[3] and instead incorrectly focused solely on L.B.'s ADHD. Dkt. 17 at 15. However, plaintiffs failed to raise this point this at the administrative level, and neither the ALJ nor the expert witnesses addressed it. *See* ALJ Dec. at 9 (noting that although issue not raised in hearing request, it became apparent at hearing that parents believe IEP team's *EBD* determination was incorrect); AR, Student's Post-hearing Br. at 16-17 (arguing IEP team should have characterized L.B.'s disability as *EBD*). Plaintiffs also fail to explain how (or to adduce any evidence demonstrating that) any of L.B.'s mental health diagnoses limit his strength, vitality or alertness. As a result, plaintiffs have waived this argument.

For completeness's sake, I note that even if plaintiffs timely had presented this issue, the dispositive question is the same as for EBD: is there sufficient evidence that L.B.'s mental health conditions adversely affect his educational performance? Because the answer to that question is "No," I cannot find that L.B. qualifies as a child with an OHI on the basis of any of his mental health diagnoses.

V. Adequacy of Post-Expulsion Services

Plaintiffs assert that the inadequacy of L.B.'s post-expulsion IEPs amounts to a denial of FAPE and necessitates an award of compensatory education. The Supreme Court has held that

[3]OHI "means having limited strength, vitality, or alertness" that "results in limited alertness with respect to the educational environment" that is due to chronic or acute health problems (such as attention deficit disorder) and adversely affects a child's educational performance. 34 C.F.R. § 300.8(c)(9).

a state satisfies the FAPE requirement if it provides personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Rowley*, 458 U.S. at 203. In *Rowley*, Court reasoned that the IDEA had been adopted to provide a "basic floor of opportunity," 458 U.S. at 201, and noted that "the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside," *id.* at 192. "[T]he requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children." *Id.* at 198 (internal quotation and citation omitted).

Therefore, the educational benefit does not have to be meaningful or significant. *A.S. v. Madison Metropolitan School District*, 477 F. Supp. 2d 969, 979 (W.D. Wis. 2007) (rejecting higher standard of "meaningful educational benefit"); *see also Hjortness ex rel. Hjortness v. Neenah Joint School District*, 507 F.3d 1060, 1065 (7th Cir. 2007) (standard set in *Rowley* still applicable); *Z.S.*, 295 F.3d at 677 (same). A school district is required to provide only an appropriate education, not the best possible education or the placement that the parents prefer. *Heather S.*, 125 F.3d at 1057 (internal citations omitted). Recognizing the difficulty in determining whether a school system has met its burden under the Act, the Court in *Rowley* noted that the school's grading and advancement system "constitutes an important factor in determining [whether a child is receiving an] educational benefit." 458 U.S. at 203.

A. Delay in Services

Plaintiffs point out that no services were provided to L.B. between his initial suspension sometime on Friday, October 17, 2008 and his entry into Siren on Thursday, October 30, 2008, nine school days later. As the ALJ seemed to acknowledge (*see* dkt. 1, Exh. 1 at 11), 34 C.F.R. § 300.530(b) allows school personnel to suspend a child who violates a code of student conduct for up to 10 consecutive school days without providing educational services. The ALJ also pointed out that although is no evidence showing exactly when L.B. began receiving educational services at Siren, L.B.'s IEP was developed on October 28 and the parties seem to presume that those services began upon his entry into the program on October 30. Therefore, any gap in required services—if there even was a gap—would have been minimal, a matter of a few days, and it would not rise to the level of an IDEA violation. *See Sarah Z. v. Menlo Park City School Dist.*, 2007 WL 1574569, *7 (N.D. Cal. May 30, 2007) (missing 14 days of behavioral services was not material failure to implement IEP). I also note that any error on the ALJ's part relating to this issue would be harmless. *See id.* at 7-9.

B. Educational Instruction

Plaintiffs assert that the services that BSD provided to L.B. at Siren were inadequate because BSD provided only 1 hour of daily self study (5 hours per week), even though the IEP called for educational instruction 2 hours a day, 3 days a week (or 6 hours a week). Plaintiffs point out that the self-study PASS packets did not match BSD's general curriculum and that BSD did not give L.B. a report card while he was at Siren. Although BSD increased L.B.'s educational time in December 2009 to 8 hours per week, plaintiffs note that L.B. did not receive direct instruction from a teacher. As evidence that the educational instruction was deficient,

plaintiffs cite the fact that L.B.'s academic abilities did not increase between the October 2008 and December 2009 IEPs. According to plaintiffs, BSD's willingness to increase his instructional time in December 2009 was tacit acknowledgment that the first IEP was inadequate.

Plaintiff's first challenge relates to BSD's implementation of the October 2008 IEP at Siren, namely that he received only 5 hours of instruction a week instead of the planned 6. As BSD points out, the Court of Appeals for the Ninth Circuit addressed challenges to the implementation of an IEP and determined that "when a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP." *Van Duyn ex rel. Van Duyn v. Baker School Dist.*, 502 F.3d 811, 815 (9th Cir. 2007). The court defined material failure as "more than a minor discrepancy between the services provided to a disabled child and those required by the IEP." *Id.* In deciding the issue, the court looked to *Rowley*, in which the Court addressed a challenge to an IEP's content and held that procedural flaws in an IEP's formation do not automatically violate the IDEA. *Id.* at 821 (citing *Rowley*, 458 U.S. at 207). The court in *Van Duyn* reasoned that "minor failures in implementing an IEP, just like minor failures in following the IDEA's procedural requirements, should not automatically be treated as violations of the statute." *Id.* It also noted that the court of appeals for the Fifth and Eighth circuits had taken similar positions. *Id.* at 818, 821 (citing *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) (*de minimis* failures to implement IEP do not violate IDEA but "substantial" or "significant" failures do); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003) (IDEA violated when school fails to implement "essential" IEP element, or element "necessary for the child to receive an educational benefit.")). Two other circuits have since applied the standard

set forth in *Van Duyn*. *A.P. v. Woodstock Bd. of Educ.*, 370 Fed. Appx. 202, *2 (2nd Cir. Mar. 23, 2010); *Couture v. Board of Educ. of Albuquerque Public Sch.*, 535 F.3d 1243, 1252 (10th Cir. 2008).

A 17% shortfall in instructional time sounds serious in isolation, but in context, the one-hour-per-week shortfall does not appear to qualify as a significant implementation failure. *See Van Duyn*, 502 F.3d at 823 (five hours of missed math instruction per week was material implementation failure); *Bobby R.*, 200 F.2d at 344, 348 (failure to provide one hour a week of speech therapy and two months of special speech program were *de minimis*). Although the witnesses agreed that generally a student would benefit from additional instruction, all parties involved also seemed to agree that there was no time in L.B.'s daily schedule at Siren to accommodate more instruction time.[4] As the ALJ pointed out in her decision, no one complained that L.B. was in need of further instruction while he was attending Siren. Although plaintiffs are correct that the IDEA does not condition FAPE on a parent's request for services, plaintiffs' silence in this instance suggests that they deemed provision of 5 out of 6 hours of instructional services per week as a minor deviation from the IEP. (Recall also that plaintiffs had made the decision to place L.B. in Siren *before* he had been expelled, implying acquiescence in Siren's agenda limiting instructional services to an hour a day). Further, as discussed below, L.B. received educational benefit under his IEP, and once his schedule opened up (after finishing at Siren), BSD revised L.B.'s IEP and added more instructional hours.

[4] Recall that L.B. was spending about two hours each weekday commuting to and from Siren, six hours a day in therapy, with an hour for lunch. That left an hour a day at Siren for L.B. to do school work. His options to pick up that sixth hour were to do it at the end of the day, when his medications were wearing off, or on the weekend.

The next question is whether the educational services that BSD provided met L.B.'s needs. Plaintiffs criticize BSD for providing L.B. with nothing but self-study packets that did not match the general curriculum. They point to testimony from Siren staff that L.B. would have benefitted from direct instruction from a teacher both during and after his stay at Siren and from opportunities for social interaction with his peers after leaving Siren.

However, as the Court made clear in *Rowley*, the IDEA does not require the best possible education or even a meaningful education. Although L.B. likely would have benefitted from direct instruction and increased social interaction—who wouldn't?—this does not mean that he did not receive FAPE. The PASS packets did not mirror BSD's regular curriculum, but they allowed L.B. an opportunity to gain knowledge in core areas and, according to the educational professionals who testified at the hearing, the packets seemed the best fit for L.B.'s situation. L.B. was able to complete PASS packets and receive satisfactory effort ratings (3's and 4's out of 5). At the time of the administrative hearing, L.B. had completed Language Arts A and B (for which he received As), four of five Earth Science units and was on track to finish the 8th grade PASS packets. L.B. had yet to finish 2 units of math, 1 unit of U.S. history, Wisconsin history and reading. Hrg. Tr. at 282-86. Therefore, I find that substantial evidence supports the ALJ's decision that the educational instruction components of L.B.'s post-expulsion IEPs were reasonably calculated to enable him to receive an appropriate educational benefit. *See Rowley*, 458 U.S. at 207.

C. Physical, Vocational and Behavioral Education Services

Plaintiffs argue that since L.B.'s expulsion, BSD has failed to provide him physical education and vocational (transitional) services. They also note that BSD did not attempt to address the behavior that led to L.B.'s expulsion in an effort to prevent its recurrence, as required by 34 C.F.R. § 300.530(d)(1). Although the ALJ agreed that L.B. was not provided adequate physical education or behavioral services, she did not award compensatory services in these areas because there was insufficient evidence in the record about what compensation would be appropriate. With respect to the vocational services, the ALJ found that the issue was not yet ripe because BSD had planned to provide—and still had time to provide—the vocational services listed in the IEP. She then ordered BSD to revise B.D.'s IED

> To include adequate physical education and behavior modification services to meet [B.P.'s] needs and that [BSD] provide those services in accordance with the revised IEP and also provide the vocational services included in the Student's current IEP.

Dkt. 1, Exh. 1 at 12.

The ALJ's findings that BSD failed to provide FAPE with respect to physical, vocational and behavioral education services are supported by substantial evidence in the record. BSD admitted that it had not yet provided any behavioral or vocational services and that the only physical education it provided to L.B. was in the form of workout tapes at the Village Hall after his release from Siren. Given BSD had plans and still had time to implement L.B.'s IEP with respect to vocational services, the ALJ did not err in determining that the issue was not yet ripe for review.

Plaintiffs' claim for relief includes only an undifferentiated request that BSD provide compensatory education to L.B. for BSD's "various violations" of L.B.'s right to FAPE.

Complaint, dkt. 1 at V(21)(C). Their brief in support of summary judgment is equally general, *see* dkt. 17 at 33. BSD, on the other hand, reports that it has complied with the ALJ's order, there has been no complaint about how it proceeded and it has substantially met its responsibilities with regard to L.B.'s behavioral intervention needs. *See* dkt. 21 at 26-27. Only in reply do plaintiffs address this issue, implying that the IEP committee has *not* addressed these issues, and challenging the ALJ's decision not to award compensatory education. *See* dkt. 23 at 14-15.

Although the IDEA does not authorize compensatory education as a remedy *per se*, "it authorizes the court to 'grant such relief as the court determines is appropriate.'" *Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Todd A.*, 79 F.3d 654, 656 (7th Cir. 1996) (quoting 20 U.S.C. § 1415(e)(2) (now at 20 U.S.C. § 1415(i)(2)(C)(iii))); *see also John M. v. Board of Educ. of Evanston Tp. High School Dist. 202*, 2009 WL 691276, *5 (N.D. Ill. Mar. 16, 2009) (noting same). The Seventh Circuit has recognized that this provision empowers district courts to order compensatory education when appropriate to cure violations of the IDEA. *Id.*

Before I can determine whether this court should consider an award of compensatory education on the points left open by the ALJ, I need to know:

(1) What physical or behavioral education services did L.B. require to receive FAPE?

(2) What compensatory services, if any, should L.B. receive?[5]

[5] Although the court wishes to hear from the parties on this issue, it is not saying that an award of compensatory services is appropriate. Both the ALJ and BSD allude to the fact that because plaintiffs did not present sufficient evidence on this issue, they waived it. This may turn out to be the case. However, this court needs more information before I can rule on this matter.

(3) Has BSD complied with the ALJ's order to provide physical, behavioral and vocational services?

(4) Did BSD reconvene B.D.'s IEP committee as ordered?

(5) Did the committee modify B.D.'s IEP to include physical education and behavior modification services?

(6) If so, what are the modifications?

(7) Is BSD providing those services?

(8) Has BSD provided vocational services to B.D. yet? If not, what is the plan? When will it be implemented?

(9) Does the provision of such services obviate the need for compensatory education to remedy the lack of FAPE that L.B. received in these areas?

I will give each side until May 9, 2011 to file and serve proposed findings of facts and argument on these questions (including relevant interstitial detail), with a response to the other side's submissions due by May 16, 2011. Proposed findings of fact should be supported by admissible evidence pursuant to the court's procedure governing summary judgment. I do not want and will not consider any additional briefs or legal arguments on any other issue raised in this lawsuit.

ORDER

IT IS ORDERED that:

1. The motion for summary judgment filed by plaintiffs Melinda and Ritch B., dkt. 16, is DENIED in part and STAYED in part.

2. The parties shall provide proposed facts and argument on the remaining open issue in the manner and at the times directed above.

Entered this 28th day of April, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge