



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 12-060

Application of the [REDACTED]  
[REDACTED] for review of a  
determination of a hearing officer relating to the provision of  
educational services to a student with a disability

### Appearances:

Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, Garrett L. Silveira, Esq., of counsel

Gerard J. Pisanelli, Esq., attorney for respondent

## DECISION

### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which overturned a manifestation determination review (MDR) team's December 19, 2011 finding that the conduct of respondent's (the parent's) son was not a manifestation of his disability and ordered it to reconvene an MDR. The appeal must be sustained.

### II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a school district representative (Educ. Law. § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the

identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law. § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2],[c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision, and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.514[c]; 8 NYCRR 200.5[k][2]).

### **III. Facts and Procedural History**

On April 27, 2011, the CSE met and developed the student's IEP for the 2011-12 school year (Dist. Ex. 8). The CSE determined the student was eligible for special education and related services and recommended that the student be placed in an integrated co-teaching class (ICT)<sup>1</sup> for English and social studies (id. at pp. 1, 7; see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]). During the 2011-12 school year, the student has been attending twelfth grade in the district's high school (Tr. pp. 14, 30).

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<sup>1</sup> State regulations define ICT services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). Effective July 1, 2008, the "maximum number of students with disabilities receiving integrated co-teaching services in a class . . . shall not exceed 12 students" (8 NYCRR 200.6[g][1]). In addition, State regulations require that an ICT class shall "minimally include a special education teacher and a general education teacher" as staffing (8 NYCRR 200.6[g][2]). In April 2008, the Office of Vocational and Educational Services for Individuals with Disabilities (VESID) issued a guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities" (see <http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>).

On or about December 13, 2011, the student was involved in a physical altercation with another student (Dist. Exs. 3; 4 at p. 2; 6). The student was immediately suspended for five days and the district sent the parent a "Notice of Superintendent's Disciplinary Hearing for Students with Disabilities" (Dist. Exs. 4; 6). Attached to the notice was a "Statement of Charges" that summarized the December 13, 2011 incident involving the student (Dist. Ex. 4 at p. 2).

Also on December 13, 2011, the district sent the parent a "Meeting Notice for Manifestation Determination" (Dist. Ex. 12). The notice advised the parent that the manifestation team would meet due to the student's disciplinary matter and suspension (*id.* at p. 1). The notice also advised the parent that he had the "right to invite other individuals" who he determined to have knowledge or special expertise about the student (*id.*).

On December 19, 2011, the district convened an MDR (Dist. Exs. 9; 10). Immediately following the MDR, the district sent a letter dated December 19, 2011 to the parent notifying him of the manifestation team's conclusion that the student's recent behavior which resulted in his suspension from school was not caused by his disability, or by a failure by the district to implement his IEP, and that the matter should be sent to a superintendent's disciplinary hearing (Dist. Exs. 2 at p. 1; 9).<sup>2</sup>

#### **A. Due Process Complaint Notice**

The parent filed a due process complaint notice dated January 6, 2012 in which he challenged the December 19, 2011 determination of the MDR and the decision of the superintendent's disciplinary hearing (Dist. Ex. 1 at p. 1).<sup>3</sup> The parent asserted that: (1) he was not prepared for the "Formal Hearings that took place on December 19, 2011;" (2) he did not have legal representation at the hearings; and (3) there was a "nexus"<sup>4</sup> between the student's disability and his behavior on December 13, 2011 (*id.*).

#### **B. Impartial Hearing Officer Decision**

A two-day impartial hearing was conducted on an expedited basis on February 1, 2012 and February 6, 2012 (Tr. pp. 1, 262; see 8 NYCRR 201.11[a][3]). In a decision dated February 17, 2012, the IHO determined that the manifestation team failed to review all of the assessments relating to the student and it did not fully consider the parent's concerns regarding the student's

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<sup>2</sup> The hearing record does not contain information as to the eventual outcome of the superintendent's disciplinary hearing.

<sup>3</sup> The hearing record does not indicate how long the student was scheduled to be suspended; however, testimony reflects that it was a "long-term" suspension (Tr. p. 186).

<sup>4</sup> Although the parent and IHO interchangeably referred to "nexus" when describing the manifestation team's determination regarding the relationship between the student's conduct and his disability, I note that the language in IDEA 1997 and the 1999 implementing federal regulations governing MDRs was revised when the IDEA and new regulations became effective in 2004 and 2006 (compare 34 CFR 300.523 [64 Fed. Reg. 12454] with 34 CFR 300.530[e][1] [71 Fed. Reg. 46798]; compare Appeal of a Student with a Disability, 35 Ed Dep't Rep 17, Decision No. 13,448 [1995] [explaining that when district staff should reasonably suspect that a student has a disability, the hearing process under N.Y. Educ. Law § 3214 calls for referral of the student to the CSE for evaluation if a "nexus" is found between conduct underlying disciplinary charges and suspected disability or handicapping condition] with Appeal of a Student with a Disability, 50 Ed Dep't Rep \_\_\_\_, Decision No. 16,106 [2010] [referring to the updated direct and substantial relationship language]).

attention deficit disorder (ADD) (IHO Decision at p. 11). The IHO found that the manifestation team did not fully consider that the student had stopped taking medication that he had previously been taking, and it did not adequately consider the behaviors that the student had been exhibiting in school and the possible "nexus" between those behaviors and the alleged December 13, 2011 misconduct (IHO Decision at p. 11). According to the IHO, the manifestation team did not review the results of the "Conners Teacher Assessment,"<sup>5</sup> despite the district staff's knowledge that the assessment had been performed, and that no one at the MDR raised concerns about the student's aggressive behaviors based on that assessment (*id.* at p. 10; *see id.* at pp. 4-6). The IHO also determined that she could not reach a conclusion regarding whether the student's behavior was a manifestation of his disability because the manifestation team did not consider all of the relevant information (*id.* at p. 12). Therefore, she remanded the matter to the manifestation team to consider the results of the Conner's-3, the student's and the parent's concerns regarding his ADD, the student's taking and stopping of medication, the student's disciplinary history, the teachers' concerns relating to the student's behavior, and any other information the district, student or parent may otherwise put forth (*id.* at p. 12).

#### **IV. Appeal for State-Level Review**

The district appeals asserting that the IHO improperly raised and determined the issue of whether the district's manifestation team reviewed all of the assessments relating to the student, and, therefore improperly reached the conclusion that the failure to do so warranted a remand to the manifestation team. The district asserts that the only issue raised in the parent's due process complaint notice was whether there was a "nexus" between the student's disability and his conduct at school on December 13, 2011. The district further contends that the IHO erred in failing to determine that the manifestation team had properly found that there was no direct and substantial relationship between the conduct giving rise to the discipline and the student's disability. The district alleges that the determination made by the manifestation team is supported by the hearing record and that the manifestation team properly reviewed all relevant information in the student's file. Lastly, the district asserts that the manifestation team considered the student's disciplinary history and the parent's concern regarding the Conner's-3. The district requests a determination that the manifestation team properly determined that the student's conduct was not a manifestation of his disability.

In his answer, the parent denies that the IHO improperly introduced and determined the issue of whether the district's manifestation team reviewed all of the assessments. The parent also denies that the only issue in the parent's due process complaint notice was that the manifestation team erred in determining that a "nexus" did not exist between the student's disability and his behavior at school on December 13, 2011. The parent requests that the IHO's decision be upheld.

#### **V. Applicable Standards – MDR**

The procedure under the IDEA (20 U.S.C. §§ 1400-1482) relevant to this case involves the process by which school officials may seek a disciplinary change in placement of a student with a disability who violates a code of student conduct (*see* 20 U.S.C. § 1415[k]; 34 CFR

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<sup>5</sup> The January 2010 assessment referred to by the IHO was the Conner's, 3rd Edition and was filled out by both the parent and the teacher (Dist. Ex. 14). Hereinafter, the assessment will be referred to in this decision as the Conner's-3.

300.530-300.537; Educ. Law § 3214[3][g]; 8 NYCRR Part 201).<sup>6</sup> State regulations provide that a disciplinary change in placement means a

suspension or removal from a student's current educational placement that is either:

- (1) for more than 10 consecutive school days; or
  - (2) for a period of 10 consecutive days or less if the student is subjected to a series of suspensions or removals that constitute a pattern because they cumulate to more than 10 school days in a school year
- (8 NYCRR 201.2[e]; see 20 U.S.C. § 1415[k][1][B]; 34 CFR 300.530[b][2], [c]).<sup>7</sup>

If a district is considering a disciplinary change in placement for a student with a disability, the district must conduct an MDR meeting "within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct" (20 U.S.C. § 1415[k][1][E]; 34 CFR 300.530[e]; 8 NYCRR 201.4[a][3]). An MDR meeting must also be conducted within 10 school days after a superintendent or IHO decides to place a student in an interim alternative educational setting (IAES) (see 8 NYCRR 201.4[a][1]-[2], 201.7[e], 201.8[a]; see also 20 U.S.C. § 1415[k][1][G], [3][B][ii][II]; 34 CFR 300.530[g], 300.532[b][2][ii]; Educ. Law § 3214[3][g][3][iv], [vii]). The participants at the MDR meeting must include a district representative, the parents, and the "relevant members" of the CSE as determined by the parent and the district (20 U.S.C. § 1415[k][1][E][i]; 34 CFR 300.530[e][1]; Educ. Law § 3214[3][g][2][ii]; 8 NYCRR 201.4[b]). State regulations additionally require that the parent must receive written notification prior to any manifestation team meeting "to ensure that the parent has an opportunity to attend" (8 NYCRR 201.4[b]). Further, State regulations require that such written notice inform the parent of the purpose of the meeting, the names of the people expected to attend, and the parent's right to have relevant members of the CSE participate at the parent's request (id.).

Within 10 school days of any decision to change the placement of a student with a disability because of a violation of a code of student conduct, the manifestation team must review all relevant information in the student's file including the student's IEP, any teacher observations, and any relevant information provided by the parents to determine if:

- (1) the conduct in question was caused by or had a direct and substantial relationship to the student's disability; or
  - (2) the conduct in question was the direct result of the school district's failure to implement the IEP
- (8 NYCRR 201.4[c]; see 20 U.S.C. § 1415[k][1][E]; 34 CFR 300.530[e][1]; Educ. Law § 3214[3][g][3][vii]).

While courts have not interpreted 8 NYCRR 201.4(c) to be exhaustive, requiring review of every piece of information contained in a student's educational file, a manifestation team must "review

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<sup>6</sup> The procedures also apply to a student presumed to have a disability for discipline purposes (20 U.S.C. § 1415[k][5]; 8 NYCRR 201.2[n], 201.5; see 34 CFR 300.534).

<sup>7</sup> If a district proposes to suspend a student with a disability for more than five school days for alleged misconduct, a superintendent's hearing is conducted in which it is first determined whether the student engaged in the alleged misconduct and, upon such a finding, it is then determined whether a disciplinary change in placement will be considered as a possible penalty (Educ. Law § 3214[3][c]; 8 NYCRR 201.9[c][1]).

the information pertinent to that decision" (Fitzgerald v. Fairfax County Sch. Bd., 556 F. Supp. 2d 543, 559 [E.D.Va. 2008]).

If the result of the MDR is a determination that the student's behavior was not a manifestation of his or her disability, "the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities" (20 U.S.C. § 1415[k][1][C]; 34 CFR 300.530[c]; see Educ. Law § 3214[3][g][vi]). However, if the result of the MDR is a determination that the student's behavior was a manifestation of his or her disability, the CSE is required to conduct a functional behavioral assessment (FBA) and implement a behavioral intervention plan (BIP); or if the student already has a BIP, review the BIP and modify it as necessary to address the behavior (20 U.S.C. § 1415[k][1][F][i]-[ii]; 34 CFR 300.530[f][1][i]-[ii]; 8 NYCRR 201.3). Except under "special circumstances" as defined in the IDEA and regulations, the district must also return the student to the placement from which he or she was removed or suspended (20 U.S.C. § 1415[k][1][F][iii]; Educ. Law § 3214[3][g][3][viii]; 34 CFR 300.530[f][2]; 8 NYCRR 201.4[d][2][ii]).<sup>8</sup> If the manifestation team determines that the student's conduct was the direct result of the school district's failure to implement the student's IEP, the district must take immediate steps to correct the deficiencies in the implementation of the student's IEP (20 U.S.C. § 1415[k][3][E][i][II]; 34 CFR 300.530[e][1][ii], [3]; 8 NYCRR 201.4[e]).

If the parent of a student with a disability disagrees with: (1) a school district's decision regarding the student's placement, including but not limited to the decision by the district to place the student in an IAES; or (2) a determination of the manifestation team, the parent may request an expedited impartial hearing (20 U.S.C. § 1415[k][3][A]; 34 CFR 300.532[c]; 8 NYCRR 201.11[3]-[4]; see Coleman v. Newburgh Enlarged City Sch. Dist., 503 F.3d 198, 201-02 [2d Cir. 2007]).

## **VI. Discussion**

### **A. Scope of the Impartial Hearing**

The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at \*4-\*5 [E.D.N.Y. Jan. 6, 2012]; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at \*12-\*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at \*12 [Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at \*13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at \*6-\*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*8 [S.D.N.Y. Aug. 27, 2010]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue

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<sup>8</sup> A district and parents may agree to a change in the student's placement and, under certain circumstances, a district may continue to maintain the student in an IAES for up to 45 days (20 U.S.C. § 1415[k][1][F][iii], [G]; 34 CFR 300.530[f][2], [g]; 8 NYCRR 201.7[e], 201.8[d], 201.9[c][3]).

which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on the issues raised sua sponte (see Dep't of Educ., Hawai'i v. C.B., 2012 WL 220517, at \*7-\*8 [D.Hawai'i, Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

In this case, the district asserts that the IHO improperly introduced and determined the issue of whether the district's manifestation team reviewed all of the assessments because this issue that was not identified in the parent's due process complaint notice. Upon review, I find that the parent's due process complaint notice asserts that the MDR team reached the incorrect conclusion, but it cannot be reasonably read to include claims that the MDR failed to follow the requisite procedures or lacked adequate information regarding the student in order to render a determination (see Dist. Ex. 1). The hearing record demonstrates that the issue before the IHO was whether the conduct in question that precipitated the need for the MDR was caused by or had a direct and substantial relationship to the student's disability (Dist. Ex. 1 at p. 1).<sup>9</sup> Furthermore, the district's counsel explicitly stated at the beginning of the impartial hearing that based on what was raised in the due process complaint notice, the only issue it believed was before the IHO was "whether the district's manifestation team properly determined that the conduct which gave rise to the discipline of [the student] was not a manifestation of [his] disability" (Tr. pp. 16-17). The hearing record shows that the district did not agree to an expansion of the issues in this case, nor did the parent attempt to amend his due process complaint notice.

Based on the foregoing, I find that the IHO's determination that the manifestation team failed to review all of the assessments relating to the student, including the Conner's-3, and her order that the district reconvene a new MDR for the purposes of considering the Conner's-3 and other relevant information, went beyond the scope of the issues before her at the impartial hearing. However, as further described below, even if the issue of inadequate or lack of consideration of the evaluative information such as the Conner's-3 had been raised, this evidence does not support the conclusion that the conduct in question was caused by or had a direct and substantial relationship to the student's disability, and, consequently there is no need to remand the matter for a new MDR.

## **B. MDR**

The hearing record shows that the student is eligible for special education as a student with a learning disability (Tr. p. 30; Dist. Ex. 8; see Parent Exs. A; E). In attendance at the December 19, 2011 MDR were the district's director of pupil personnel who also acted as the manifestation team chairperson (chairperson), a district psychologist, the building administrator, a special education teacher, one of the student's regular education teachers, the parent, the student's guidance counselor, the student, and the special education department chairperson (Tr.

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<sup>9</sup> While the parent also alleged in his due process complaint notice that he was not prepared for the meetings and was not represented by counsel at them, the parent did not assert that his due process rights were violated (Dist. Ex. 1 at p. 1). Moreover, the IHO did not make a determination regarding these issues and the parent does not appeal any part of the IHO's decision; therefore, these issues are not before me on appeal.

p. 159; Dist. Ex. 10). According to the hearing record, the manifestation team reviewed the student's April 2011 IEP, disciplinary reports, 2009 psychoeducational evaluation, FBA and BIP, and a classroom observation, as well as obtained teacher and parent input (Tr. pp. 46-47; Dist. Exs. 2; 9). The chairperson testified that all MDR meetings follow a standard procedure (Tr. pp. 41-42). He testified that after the principal describes the incident that precipitates the MDR, the student's issues relative to his need for an IEP are discussed, and in the case of this student, the school psychologist reviewed the student's latest assessments, diagnostic measurements, teacher reports and classroom observations (Tr. pp. 46, 61). The chairperson further testified that after the school psychologist presented the information regarding the student, he asked the psychologist if there was anything in the evaluations or any other assessments in the file that would indicate concerns about the student regarding "violence, aggression or anything along those lines," to which the psychologist stated there was not (Tr. pp. 50-53, 57-58, 61). The chairperson then testified that the principal provided a copy of the student's disciplinary reports, which demonstrated to the manifestation team that in the prior two years the student had only received two disciplinary reports, both related to inappropriate comments, cutting class, or being uncooperative (Tr. p. 56). With regard to the student's IEP, the chairperson testified that the manifestation team considered the student's program and related services, strengths, academic achievement, social development, goals, vocational transition, and writing (Tr. pp. 58-59). The chairperson testified that he then asked the entire manifestation team to offer any information regarding the student's social/emotional needs (Tr. pp. 63-64). He stated that the team members believed that the student was doing well and had "a disability that's been managed over years with support from special ed[ucation] services," and the incident that led to the student's suspension was "out of sync" with what they knew about the student (Tr. p. 64).

Based upon the documentation and discussion concerning the student, the manifestation team determined that the student's actions were not caused by or had a direct and substantial relationship to the student's disability (see e.g., Tr. pp. 52, 55, 64, 65, 67, 71, 73-74, 115, 133). The student's disciplinary report reviewed at the MDR showed that from January 2006 through January 2011, the student was disciplined 11 times, all for nonviolent or nonaggressive behaviors (Dist. Ex. 11). Furthermore, the manifestation team members determined that the student's disciplinary reports and evaluations demonstrated a student who at times was uncooperative, made inappropriate comments, or cut class, but did not demonstrate any aggressive or assaultive behaviors (see e.g., Tr. pp. 55, 64, 115). The chairperson testified that the parent told the manifestation team that the student was on medication and that it was discontinued, which may have contributed to the student's actions (Tr. p. 66). The chairperson then asked the manifestation team if this information changed their determination that the conduct in question was not caused by or had a direct and substantial relationship to the student's disability and the team indicated that it still believed there was no relationship (Tr. pp. 66-67).

With regard to IHO's concerns related to the Conner's-3, I agree with her statement that it is not "conclusive evidence alone" (IHO Decision at p. 12), and therefore precludes overturning the MDR decision under the circumstances of this case. The results of the Conners-3 showed that overall, neither the parent nor the student's teachers believed the student demonstrated violent or aggressive behavior (Dist. Ex. 14). With regard to the student's teachers' evaluations of the student, he received T-scores that were very elevated and thus were areas of more concern than are typically reported (id. at p. 28). The student received very elevated scores for inattention, executive functioning, learning problems, and aggression (id.). While the T-scores reflected that aggression was a concern, the common characteristics for aggression as measured in the Conners-3 includes, among other things, bullying, being argumentative, and verbally

aggressive (id. at p. 32). Further, the T-scores related to the DSM-IV-TR<sup>10</sup> regarding attention deficit hyperactivity disorder (ADHD)<sup>11</sup> indicated that the student's teachers were most concerned about the student's inattentiveness (T-Score 77) and not his impulsivity (T-Score 54) (id. at p. 34). Furthermore, the itemization ratings show that the student's teachers responded "Not true at all/Never" to the following questions concerning aggression: threatened to hurt others, intentionally damages or destroys things that belong to others, physically hurts people, is angry and resentful, is cold hearted and cruel, argues with adults, annoys other people on purpose, loses temper, gets into trouble with the police, and intentionally starts fights with others (id. at p. 44). The student's teachers responded "Just a little true/occasionally" to the following: bullied, threatened or scared others; gets into trouble with teachers and the principal; actively refuses to do what adults tell him to do; is selfish and self-centered with others; and tries to get even with people (id.). The student's teachers answered "Pretty much true/often" to the following: acts in sneaky or manipulative ways, does not seem sorry for misbehaving, and lies to avoid having to do something or to get things (id.).

The Conner's-3 Teachers Assessment also showed that with regard to questions concerning oppositional defiant disorder criterion, the student's teachers responded "Not at all/never" to the following: loses temper, argues with adults, annoys people on purpose, is irritable and easily annoyed by others, and is angry and resentful (Dist. Ex. 14 at p. 46). The student's teachers also answered "Just a little true/occasionally" to the following: actively refuses to do what adults tell him to do, blames others for his mistakes or misbehavior, and tries to get even with people (id.).

The responses to the Conner's-3 Parent Assessment further demonstrated that the student's profile did not indicate that he presented with violent tendencies (Dist. Ex. 14 at p. 14). The parent answered "Not true at all/never" to all but two questions: argues with adults (just a little true/occasionally) and swears or uses bad language (pretty much true/often) (id. at p. 17). The parent's responses indicated that at the time of the Conner's-3, he had more concerns with the student's inattention, learning problems, and executive functioning than he did with aggression (id. at pp. 16-17).

In summary, while the student received a T-score indicating a concern for aggression, the aggressive behaviors indicated are of a nonviolent type, primarily those actions which are geared toward arguing with teachers, insubordinate behavior, disrupting class, noncooperation with adults, and manipulation of others to get his way (see Dist Exs. 5; 6; 11; 14 at pp. 14, 16, 17, 44-46). The student's profile indicated that his parent and teachers were not concerned with violent aggressive behavior; rather, they were more concerned with the student's inattention, executive functioning, and learning problems. With particular attention to the results of the Conners-3, I find little if any support for the conclusion that the student's conduct on December 13, 2011 was caused by or had a direct and substantial relationship to the student's disability (8 NYCRR 201.4[c]). Moreover, the psychologist who scored the January 2010 Conner's-3 was part of the manifestation team and participated in the decision that the student's actions were not caused by or had a direct and substantial relationship to the student's disability (Tr. pp. 156-159; Dist. Exs. 10; 14 at p. 1).

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<sup>10</sup> "DMS-IV\_TR" stands for the Diagnostic and Statistical Manual of Mental Disorders - Fourth Edition (Text Revision).

<sup>11</sup> The Conner's-3 assessment instrument in evidence uses criterion related to ADHD (Dist. Ex. 14). I note that the student in this case received a diagnosis of ADD (Dist. Ex. 1 at p. 3).

Additionally, the IHO found that the manifestation team did not "fully" consider the parent's concerns regarding the student's ADD and did not "fully" consider the fact that the student had previously been taking medication and had also stopped taking his medication prior to the December 13, 2011 incident (IHO Decision at p. 11).

As discussed above, the parent informed the manifestation team that the student had been on medication and had stopped taking it – something the members of the team were unaware of until the MDR was conducted (Tr. pp. 66-67). The MDR team considered that information and the members did not change their determination based on the information (Tr. p. 67). The hearing record also reflects that the parent participated in the MDR process and provided input regarding the student (Tr. pp. 66-67). The manifestation team's "checklist" reflected information supplied by the parent, which supports the conclusion that the information regarding the student's medication was considered during the MDR (Dist. Ex. 9).

The parent attached a note from the student's treating psychiatrist dated December 22, 2011 to the due process complaint notice, which stated that the student's decision to stop taking his medication in October 2011, "may have led to an increase in impulsivity which may have lead to the student striking a student" (Dist. Ex. 1 at p. 3). However, this information was provided to the district only after the MDR was concluded and the hearing record does not contain any information supporting this statement. Further, as discussed above, the Conner's-3 results demonstrated that the student's primary area of weakness with regard to the ADHD criterion was inattention and not impulsivity (see Dist. Ex. 14 at pp. 18, 44). Based on the foregoing, the evidence shows that the manifestation team considered the parent's input regarding the cessation of the student's medication and the hearing record does not support a determination that the manifestation team improperly concluded that the student's behavior was not caused by or had a direct and substantial relationship to the student's disability.

## **VII. Conclusion**

Based on the evidence above, I find that the IHO exceeded the scope of the impartial hearing when she determined that the manifestation team did not consider enough evaluative information and assessments, particularly the Conners-3, in order to make a proper determination. Even if these issues had been raised, I find that the evidence in the hearing record supports the manifestation team's conclusion that the student's behavior on December 13, 2011 was not caused by or had a direct and substantial relationship to the student's disability.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the impartial hearing officer's decision dated February 17, 2012 is hereby reversed and the parent's challenge to the MDR review is dismissed.

**Dated:** Albany, New York  
May 03, 2012

  
**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**