



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 11-034

**Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education**

**Appearances:**

The Legal Aid Society Juvenile Rights Practice, attorneys for petitioner, Todd Smith, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, G. Christopher Harriss, Esq., of counsel

### DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer upholding a manifestation determination review (MDR) team's determination that her son's behavior was not a manifestation of his disability and sustaining a school-imposed disciplinary suspension from respondent's (the district's) high school during the 2010-11 school year. The appeal must be sustained in part.

According to the hearing record, at the time of the impartial hearing the student was enrolled in ninth grade in a district high school for the 2010-11 school year, but was serving a disciplinary suspension in an alternative educational setting<sup>1</sup> as a result of a November 2010 incident (Tr. p. 98; Dist. Exs. 1 at p. 1; 2 at p. 1; 15 at pp. 1-2; 16; 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 C.F.R. §§ 300.530[g], 300.532[b][2][ii]; Educ. Law § 3214[3][g][3][iv], [vii]). The student's performance on assessments demonstrated academic skills, with the exception of math, at or above those of his peers, and abstract reasoning abilities one year above grade level (see Tr. pp. 93-94; Dist. Exs. 1 at p. 3; 2 at pp. 3-4; Parent Ex. C at p. 3). The student's eligibility for special education and related services as a student with an emotional disturbance is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][4][i]; 8 NYCRR 200.1[zz][4]).

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<sup>1</sup> The hearing record indicates that the student attended two different alternative schools between the November 2010 incident and the convening of the impartial hearing in February 2011 (compare, Dist. Ex. 15 at pp. 1-2, and Parent Ex. D at p. 1, with Dist. Ex. 16). In the petition, parent's counsel references a third alternative school which the student was purportedly attending at the time the petition was filed (see Pet. ¶ 5).

## Background

The hearing record is sparse relative to the student's educational history prior to the 2010-11 school year, other than indicating that the student completed second grade and third grade in out-of-State schools and attended district schools during sixth grade (2007-08), seventh grade (2008-09), and eighth grade (2009-10), with a history of multiple disciplinary suspensions (see Tr. pp. 45-46, 70-72; Dist. Exs. 1 at p. 4; 2 at pp. 1, 4-5; 13; Parent Exs. C at p. 1; E at p. 4).<sup>2</sup>

On April 30, 2010, the Committee on Special Education (CSE) convened to conduct the student's annual review and develop an educational program for his ninth grade school year (2010-11) (Parent Ex. C at pp. 1-2).<sup>3</sup> In attendance at the CSE meeting were a district representative, a district regular education teacher, a district special education teacher, and the parent (id. at p. 2). The April 2010 CSE classified the student as a student with a learning disability,<sup>4</sup> and recommended a 10-month special education program consisting of a 15:1<sup>5</sup> special class in a community school; related services consisting of pull-out counseling, once per week for 30 minutes per session in a 5:1 setting; program modifications consisting of use of graphic organizers, a smaller classroom setting, 1:1 conferences, modeling, artistic activities, positive reinforcement, preferential seating close to the teacher, extended time for tests and classroom activities (1.5), a separate location for exams, and specific redirection; and transition services (id. at pp. 1-4, 7, 9-11, 14). The April 30, 2010 individualized education program (IEP) also contained annual goals and short-term objectives to address the student's needs in math, reading and writing, social/emotional functioning, executive functions, and for transition planning (id. at pp. 6, 10-13).

Academically, the April 2010 CSE characterized the student as one who "demonstrates great use of intellect in the classroom, but with massive behavior management concerns," and while acknowledging his "ability to perform academically close to his age-appropriate peers," observed that his "motivation to do classwork is a major issue" (Parent Ex. C at p. 3). In literacy, the April 30, 2010 IEP noted that the student was performing at a seventh grade level with respect to reading comprehension and fluency, but "struggles with his written work;" in math, the April 2010 CSE assessed the student as demonstrating problem solving and calculation skills also at a seventh grade level, but with weaknesses in performing algebraic functions and explaining his

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<sup>2</sup> According to the hearing record, the student was suspended four times, totaling 24 days during the 2007-08 school year, including 5 days for an altercation, 10 days for insubordination, and 9 days for "[c]oercion/threats" (Dist. Ex. 13). During the 2008-09 school year, he was suspended for a total of 10 days, including 3 days for smoking, 5 days for insubordination, and 2 days for "[h]orseplay" (id.).

<sup>3</sup> The hearing record lacks any reference to the student's classification or the specifics of the special education program in effect for him prior to the April 30, 2010 CSE meeting beyond the fact that he was enrolled in a 12:1 special class (see Parent Ex. C at p. 2).

<sup>4</sup> State regulations define a "learning disability" as a "disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which manifests itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations," and includes the following conditions: "perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental disabilities" (8 NYCRR 200.1[zz][6]; see 34 C.F.R. § 300.8[10]).

<sup>5</sup> The April 30, 2010 individualized education program (IEP) contains an inconsistency, listing the recommended special class in both a 12:1 setting and a 15:1 setting (compare Parent Ex. C at pp. 1, 7, with Parent Ex. C at p. 2; see Tr. p. 13). In the answer, the district explains that this was a clerical error, and confirms that the April 2010 CSE in fact recommended a 15:1 special class for the student (see Answer ¶ 49 n.4).

calculations in writing (id.). Overall, the April 30, 2010 IEP described the student as one "who excels in the classroom academically when he puts in the effort" (id.).

With respect to social/emotional functioning, the April 2010 CSE noted on the IEP that the student "struggles with authority figures in school, ... has difficulty following classroom and school rules," and "does not possess the necessary skills to cope with frustration" and identified the student's social/emotional management needs as "positive reinforcement, clear definitions of classroom rules and encouragement of specific positive behaviors" (Parent Ex. C at p. 4).

According to the hearing record, the student began the 2010-11 school year in a district high school in a 15:1 special class pursuant to the April 30, 2010 IEP, but due to recurring absences, was performing poorly academically and did not receive counseling services through early November 2010 (see Tr. pp. 47-52, 63-64, 95-96; Dist. Exs. 2 at p. 1; 3; 7; 8; 9; 10; 11; 12). On October 28, 2010, the parent wrote to the district requesting that her son be reevaluated for a more restrictive educational setting (Dist. Ex. 4; see Tr. pp. 69-70; Dist. Ex. 2 at pp. 1, 4-5).

On November 8, 2010, pursuant to the parent's request, the district's school psychologist conducted a psychoeducational evaluation of the student (Dist. Ex. 2; see Tr. pp. 70-81, 93-94; Dist. Ex. 5).<sup>6</sup> According to the undated psychoeducational evaluation report, the evaluation consisted of a parent interview of the student's mother; a clinical interview of the student; administration of two standardized tests, the Woodcock-Johnson Tests of Academic Achievement-III (WJ-III ACH), and the Behavior Assessment System for Children-Second Edition (BASC-2); administration of the Rorschach Inkblot Test; and the analysis of projective drawings (Dist. Ex. 2 at pp. 1, 3-4). Academically, the student's present levels of performance as measured by the WJ-III ACH were, with respect to reading, at an 8.5 grade level equivalent in decoding/word attack, at a 10.1 grade level equivalent in reading comprehension, and at a 9.1 grade level equivalent in reading fluency; with respect to math, the student's calculation and numerical abilities were measured at a grade level equivalent of 7.3 (id. at p. 3; see Dist. Ex. 1 at p. 3).<sup>7</sup>

In the social/emotional area, the school psychologist noted that the parent informed her that she "has had great difficulty with [her son's] increasingly oppositional and defiant behaviors, which include non-attendance at school, substance abuse ..., stealing, lying, and remaining out of the home overnight," and further advised that the student "recently took his mother[']s car keys and proceeded to drive the car in a heavily trafficked area before being stopped by the police" (Dist. Ex. 2 at p. 1). Upon clinical observation of the student, the school psychologist described him as "an immature highly defiant and oppositional youngster," and noted that his mother "fe[lt] that a therapeutic residential setting w[ould] best suit him at th[at] point in time as she ha[d] exhausted her options to help keep him in control" (id. at pp. 1, 4). The school psychologist suggested that the student was "unable to manage in a [c]ommunity high school" and "would benefit from a highly

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<sup>6</sup> Although the evaluation report contained in the hearing record indicates that the psychoeducational evaluation of the student took place on November 8, 2010, the content of the evaluation report also refers to the disciplinary incident occurring two days after the evaluation took place, suggesting that the evaluation report was issued after November 10, 2010 (see Dist. Ex. 2 at pp. 1, 4-5). However, the evaluation report contained in the hearing record does not specify the date upon which it was issued.

<sup>7</sup> The hearing record contains duplicative exhibits. For purposes of this decision, only District exhibits were cited in instances where both District and Parent exhibits were identical. I remind the impartial hearing officer that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]).

restrictive environment with counseling, behavior modification and close supervision" (id. at pp. 4-5).

On November 9, 2010, the CSE scheduled a meeting for November 18, 2010 to further discuss the student's educational program for the 2010-11 school year (Dist. Ex. 6; see Dist. Ex. 5). On November 10, 2010, the student was allegedly involved in an incident in which he took part, with two other individuals, in striking another student and stealing his electronic device (see Tr. pp. 43-46, 82, 102-03, 106; Dist. Exs. 2 at pp. 1, 4-5; 13; 14; 15 at p. 3; Parent Exs. D at pp. 4-6; E at pp. 1-5). The district suspended the student from school effective November 12, 2010 and scheduled both a superintendent's hearing and an MDR meeting for November 18, 2010 (Dist. Exs. 14 at p. 1; 15 at p. 3; Parent Ex. D at p. 1).<sup>8</sup> However, the hearing record indicates that neither the student nor his mother attended the meetings scheduled on November 18, 2010 (Parent Ex. E at p. 2; see Dist. Exs. 5; 14 at p. 3).

On November 22, 2010, the CSE reconvened to conduct an educational planning conference (EPC) on behalf of the student (Dist. Ex. 1). In attendance were the school psychologist, who also served as the district representative, the district's assistant principal for special education (assistant principal), a district special education teacher, and the parent (id. at p. 2). The November 2010 CSE recommended changing the student's classification from a student with a learning disability to a student with an emotional disturbance, and recommended a 10-month special education program consisting of a 12:1+1 special class in a special school; related services consisting of pull-out counseling, once per week for 30 minutes per session in a 5:1 setting; testing accommodations consisting of a flexible schedule, extended time for tests (1.5), a flexible setting, and a separate location; annual goals and short-term objectives for the student to address his needs in social/emotional functioning, reading, and transition planning; transition services; and a behavioral intervention plan (BIP) (id. at pp. 1-2, 4, 6-9, 11-14).<sup>9</sup>

Academically, the November 22, 2010 IEP reiterated the student's standardized test results and described his present levels of performance consistent with the school psychologist's November 8, 2010 psychoeducational evaluation (compare Dist. Ex. 1 at p. 3, with Dist. Ex. 2 at p. 3). The student's social/emotional functioning as reflected in the November 22, 2010 IEP was also consistent with the school psychologist's report, except that the November 2010 CSE further concluded "[w]hile [the student] may be cognizant of rules he cannot follow them ... at hom[e], in the community and at school" (compare Dist. Ex. 1 at p. 4, with Dist. Ex. 2 at pp. 3-4). The student's November 22, 2010 IEP further indicated that the student's behavior required "highly intensive supervision" (Dist. Ex. 1 at p. 4). The BIP contained in the November 22, 2010 IEP identified the student's behavior that needed to be addressed as his failure to attend school, and noted that when he did, he was "disruptive, aggressive and prone to power struggles with authority" (Dist. Ex. 1 at p. 14). The CSE proposed strategies in the BIP to prompt the student to attend school on a regular basis and to comply with school rules and boundaries, including group

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<sup>8</sup> The school psychologist noted in her evaluation report that the student was arrested as a consequence of this incident (see Dist. Ex. 2 at pp. 1, 4). However, it is unclear from the hearing record whether any criminal charges resulted from this incident.

<sup>9</sup> A behavioral intervention plan (BIP) means a plan that is based on the results of a functional behavioral assessment (FBA) and, at a minimum, includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs, and intervention strategies that include positive behavioral supports and services to address the behavior (8 NYCRR 200.1[mmm]; see 8 NYCRR 201.2[a]).

counseling, weekly meetings with the dean and parent, and conduct sheets, with accompanying supports in the form of counseling, peer tutoring, and parent contact (id.).

According to the hearing record, a superintendent's hearing was conducted on December 7, 2010; however, there is conflicting evidence regarding the date that an MDR was conducted, with the parties suggesting it could have been conducted two days later on December 9, 2010 (see Dist. Ex. 15 at p. 3; Parent Exs. E; F at p. 1). On December 14, 2010, the district issued a written confirmation of disposition regarding the student's suspension subsequent to the superintendent's hearing and MDR (Parent Ex. E). With respect to the suspension, as against the student, the district sustained only the charge of theft of the electronic device; consequently, the student's disciplinary suspension for 90 school days was upheld (id. at pp. 2-5; see Dist. Ex. 15 at pp. 2-3). With respect to the MDR, the manifestation team determined that the student's behavior was not a manifestation of his disability (Parent Ex. E at p. 4; see Tr. p. 105; Dist. Exs. 14 at p. 2; 15 at p. 3).<sup>10, 11</sup>

### **Due Process Complaint Notice**

On January 10, 2011, the parent filed a due process complaint notice, alleging, among other things, that the student's behavior at the time of the November 10, 2010 incident was caused by and had a direct and substantial relationship to his disability, and that the services contained in the April 30, 2010 IEP in effect at the time of the incident were inadequate (Dist. Ex. 15 at pp. 3-4). The parent sought an order reversing the determination of the MDR, expunging the student's suspension from his educational records, and reinstating the student at the district's high school (id.).

### **Impartial Hearing Officer Decision**

An impartial hearing convened on February 9, 2011, and concluded after one day of testimony. On February 23, 2011, an impartial hearing officer issued a decision upholding the manifestation team's determination that the student's behavior during the November 10, 2010 incident was not a manifestation of his disability (IHO Decision at pp. 4-6). Specifically, the impartial hearing officer determined that although the district established that the student's classification should be an emotional disturbance, the school psychologist clearly explained that a classification of an emotional disturbance does not necessarily justify a student's conduct (id. at p. 5). The impartial hearing officer determined that the district had "clearly and convincingly" stated that the classification of an emotional disturbance was for educational purposes (id.). The impartial hearing officer further found that the student was an "active participant" in the November 2010 incident and that the parent failed to provide evidence to support her position that the student's "classification" should "cover actions outside of school or school related activities" (id.).

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

The parent appeals, alleging, among other things, that the impartial hearing officer erroneously upheld the manifestation team's determination that the student's behavior during the

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<sup>10</sup> The assistant principal confirmed that the manifestation team considered the student's "involvement in the incident," in arriving at its determination (Tr. p. 106).

<sup>11</sup> I note that at the time of the November 10, 2010 incident, the student was classified as a student with a learning disability pursuant to the April 30, 2010 IEP; it appears that at the time of the MDR, the student was classified as a student with an emotional disturbance pursuant to the November 22, 2010 IEP (compare Parent Ex. C at p. 1, with Dist. Ex. 1 at p. 1).

November 10, 2010 incident was not a manifestation of his disability. In essence, the parent contends that the impartial hearing officer erred by applying an incorrect standard of review. In particular, the parent argues that: (1) the impartial hearing officer failed to appropriately consider the relationship of the student's disability to the November 2010 behavior that was subject to discipline; (2) the location of the incident for which the student was suspended should not have factored into the impartial hearing officer's decision; (3) in arriving at her decision, the impartial hearing officer erroneously considered a charge against the student that had been dismissed at the superintendent's hearing; and (4) the district predicated its case upon outdated guidelines from the district's procedures regarding MDRs. The parent seeks an order annulling the impartial hearing officer's decision, reversing the MDR finding, and directing the district to "update" a district procedure applied by the manifestation team in arriving at its determination.

The district answers, asserting, among other things, that the impartial hearing officer correctly affirmed the manifestation determination, that her decision is supported by testimonial evidence in the hearing record, and that the "updating" of the district regulation sought by the parent is beyond the scope of review.

## **Discussion**

### **Procedural Matters**

As an initial matter, I note that the parent seeks an order directing the district to "update" the district's policies regarding MDR procedures "to reflect 8 NYCRR [201.4]." I decline to do so under the circumstances of this case.<sup>12</sup> First, the standard of review that the parent asks me to apply (Pet. ¶ 23; see Application of a Child with a Disability, Appeal No. 02-064) relies upon the same State regulation underlying the district's procedure and actually predates promulgation of the district's procedure by several years. Moreover, while the parents have described the district's procedure as "outdated," they have not actually described how the elements of the district's procedure are inconsistent with the current federal and State requirements for a manifestation review.

### **Applicable Standards – MDR Determination**

The procedure under the Individuals with Disabilities Education Act (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 USC § 1415[k]; 34 C.F.R. §§ 300.530 – 300.537; Educ. Law § 3214[3][g]; 8 NYCRR Part 201).<sup>13</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

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<sup>12</sup> The petition references "8 NYCRR § 204.1," which appears to be a typographical error. 8 NYCRR 201.4 (c)-(d) provides the standard for determining whether the conduct in question must be deemed to be a manifestation of a student's disability for the purposes of an MDR.

<sup>13</sup> The procedures also apply to a student presumed to have a disability for discipline purposes (20 USC § 1415[k][5]; 8 NYCRR 201.2[n], 201.5; see 34 C.F.R. § 300.534).

(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 C.F.R. § 300.530[b][2], [c]).<sup>14</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 C.F.R. § 300.530[e]; 8 NYCRR 201.4[a][3]). An MDR meeting must also be conducted within 10 school days after a superintendent or impartial hearing officer 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 C.F.R. §§ 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 C.F.R. § 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<sup>15</sup>

(8 NYCRR 201.4[c]; see 20 U.S.C. § 1415[k][1][E]; 34 C.F.R. § 300.530[e][1]; Educ. Law § 3214[3][g][3][vii]; Gunter v. Malverne U.F.S.D., 2008 WL 5641581, at \*1 [E.D.N.Y. Feb. 11, 2008]). While courts have not interpreted this requirement to be exhaustive, requiring review of every piece of information contained in a student's educational file, it does require that the manifestation team "review 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 C.F.R. § 300.530[c]; see Educ. Law § 3214[3][g][vi]). However, if

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<sup>14</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 the student's guilt of the alleged misconduct is first determined and, if found guilty, a threshold determination is made regarding whether a disciplinary change in placement will be considered as a possible penalty (Educ. Law § 3214 [3][c]; 8 NYCRR 201.9[c][1]).

<sup>15</sup> Neither the statutory nor regulatory provisions cited herein address whether the IEP in effect at the time of the conduct in question is appropriate for the student.

the result of the MDR is a determination that the student's behavior was a manifestation of his or her disability, the district's CSE is required to conduct a functional behavioral assessment (FBA)<sup>16</sup> and implement a BIP;<sup>17</sup> 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 C.F.R. § 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 C.F.R. § 300.530[f][2]; 8 NYCRR 201.4[d][2][ii]).<sup>18</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 C.F.R. § 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 C.F.R. § 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]).

### **MDR Determination**

In this case, the hearing record does not clearly indicate when the manifestation team met to conduct the MDR. One exhibit in the hearing record is dated November 12, 2010 and indicates that the district determined that the student's conduct was not a manifestation of his disability (Dist. Ex. 14 at p. 2; see Tr. p. 105). A letter to the parent scheduling the MDR bears a November 18, 2010 meeting date (Dist. 14 at p. 1); however, an attendance sheet for the MDR bears a date of November 12, 2010 (id. at p. 3). The impartial hearing testimony of the district's witnesses is equivocal, with one MDR participant indicating that the manifestation team considered both charges related to striking the victim and theft of the electronic device, from which an inference may be drawn that the MDR was conducted prior to the December 7, 2011 suspension hearing determination dismissing the former charge and upholding the latter (Tr. p. 83). The other MDR participant testified that the manifestation team considered only the theft charge, suggesting that the MDR was conducted sometime after December 7, 2010 (Tr. p. 103). The parent's "best information" was that the MDR was conducted on December 9, 2010 (Dist. Ex. 15 at p. 3). The district appears to agree with the December 9, 2010 date only "upon information and belief,"

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<sup>16</sup> An FBA means the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment. It shall include, but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors), and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it (8 NYCRR 200.1[r]).

<sup>17</sup> A school district is not required to conduct a second FBA if the district had conducted an FBA prior to the behavior that resulted in the change of placement (34 C.F.R. § 300.530[f][1][i]; 8 NYCRR 201.3). In the instant appeal, there is no indication in the hearing record that an FBA was conducted.

<sup>18</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 C.F.R. § 300.530[f][2], [g]; 8 NYCRR 201.7[e], 201.8[d], 201.9[c][3]).

relying on evidence showing that the MDR determination had been transmitted between two district offices on that day (Tr. p. 18; Parent Ex. F at p. 1; Answer ¶ 60).

I also note that there is no evidence that the parent participated in the MDR meeting. Aside from a single notation that the district called the parent and left a message on November 12, 2010 (Dist. Ex. 14 at p. 3), there is no evidence documenting the district's efforts to attain the parent's participation in the MDR. Although a technical violation of the procedures for disciplining a student with a disability does not automatically render the determination of a manifestation team invalid (Fitzgerald, 556 F. Supp. 2d at 551; Farrin v. Maine Sch. Admin. Dist. No. 59, 165 F. Supp. 2d 37, 51 [D. Me. 2001] [holding that the delay in conducting an MDR meeting under the circumstances did not result in harm]; see generally A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]), scant evidence regarding the district's compliance with the procedures for conducting the MDR, including its efforts to obtain the parent's participation, may not suffice to uphold the determination of the MDR (Application of the Bd. of Educ., Appeal No. 10-028).

### **Relationship of Conduct to the Student's Disability**

Turning to the first element of the manifestation determination, according to the hearing record, the school psychologist who conducted the student's fall 2010 psychoeducational evaluation and participated in the MDR testified that the manifestation team reviewed teacher reports, attendance records, the psychoeducational evaluation report, and "the IEP" (Tr. p. 82). Although the school psychologist testified regarding the conclusions that she reached during the MDR, the hearing record in this instance does not contain sufficient evidence to support the conclusion that there was procedural or substantive compliance with the IDEA in conducting the MDR.

With regard to reviewing the student's IEP, the hearing record does not identify which of the two IEPs created during the 2010-11 school year the manifestation team reviewed in reaching its manifestation determination (see Tr. p. 82). The Office of Special Education Programs of the United States Department of Education (OSEP) has interpreted the MDR process as contemplated by the IDEA and federal regulations as including a review of the student's current IEP and placement; however, OSEP also noted that the MDR process does not preclude an IEP team from convening and reviewing a student's IEP within the 10-day MDR timeline or from concluding that additional evaluations may be required and then deciding to reconvene after additional review has been completed (see Letter to Yudien, 39 IDELR 242 [OSEP 2003]).

In this case, the hearing record includes the April 2010 IEP, but during the impartial hearing there were multiple references to the student's eventual classification as a student with an emotional disturbance, which suggests that the manifestation team may have considered the November 22, 2010 IEP during the MDR, rather than the April 30, 2010 IEP, which was the IEP in effect on the date of the incident (see e.g., Tr. pp. 57-58, 77-81, 85-87, 89-93; see Dist. Ex. 1 at p. 1; Parent Ex. C at p. 1).<sup>19</sup> However, none of the witnesses actually identified which IEP(s) the manifestation team reviewed.

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<sup>19</sup> I note also that on the November 12, 2010 notice of referral to conduct the student's MDR, the district identified the student's program as "ED 12:1:1," which is troubling insofar as it predates the November 22, 2010 CSE's determination to change the student's classification to an emotional disturbance and his placement in a 12:1+1 special class setting (Dist. Ex. 14 at p. 2; see Dist. Ex. 1 at pp. 1-2).

The school psychologist characterized teacher reports as being "very important" to the assessment process, "because they tell us how the child is doing in each class" (Tr. p. 72). However, the psychologist noted that little information was gleaned from the student's teachers (id.) A review of the four teacher reports contained in the hearing record provides negligible information regarding the student's behavior in those classes or the teachers' perceptions of the student related to his disability, noting only that he was excessively absent in all four of the classes and was not passing at least three of them (Dist. Ex. 3). One teacher commented that the student had been absent "over 30" days from class, was "talkative" with peers and teachers, and that he "[could] not follow any direction" (id. at p. 1). Another reported that as of November 12, 2010, the student had attended class twice, and, on both occasions, the student wore sunglasses, sat in a corner playing with his skateboard, and left in the middle of class (id. at p. 3). The hearing record reveals that the student was recorded as absent from school 23 days during September and October 2010 (Tr. pp. 42-43, 47; Dist. Ex. 11).<sup>20</sup> The assistant principal, who also acted as the student's Spanish teacher and "attendance teacher," added that occasionally the student was observed in the school building but not attending classes, and, at times, he exhibited insubordinate behaviors at school (Tr. pp. 26, 49-52, 57). The hearing record reflects that in October 2010, the parent and the assistant principal approached the school psychologist about assessing the student, to address concerns that he was becoming "defiant" with his mother, failing to attend school, stealing, lying, and exhibiting a substance abuse problem (Tr. pp. 25, 69-70; Dist. Ex. 4).

Although unclear, it also appears that the school psychologist relied upon her observations of the student during her November 8, 2010 psychoeducational evaluation to reach a conclusion with regard to the manifestation team reviewing the November 10, 2010 incident (Tr. p. 78). According to the evaluation report, the school psychologist observed that the student presented as "angry, somewhat grim and contemptuous," and "quite restless and annoyed" (Dist. Ex. 2 at p. 2). His approach to tasks was "highly variable ranging from impulsive to dismissive," and he exhibited a low frustration tolerance for certain academic tasks, which at times resulted in the student becoming "distressed and angry" (id. at pp. 3-4). She added that "sustaining mental effort and staying on task" was not very difficult for the student, unless he was disinterested in the task (Tr. p. 74; Dist. Ex. 2 at pp. 2-3). On those occasions when the student did exhibit difficulty sustaining mental effort and remaining on task, the school psychologist characterized it as "the result of both poor executive functioning and preoccupation with inner distractions" (Dist. Ex. 2 at p. 3). The school psychologist observed that the student "dislike[d] rules and conventional behaviors," and "perceive[d] himself as beyond the need for restrictions and adult supervision" (id. at p. 2). Regarding the student's social/emotional functioning, the school psychologist commented that the student presented as "an immature highly defiant and oppositional youngster" who took "little responsibility for his actions; rather he maintain[ed] an entitled stance without much remorse" (id. at p. 4). The student reported to the school psychologist that he "already knew what was wrong with his behavior," stating that it stemmed from "bad influences" from older friends (id. at p. 2; see Tr. pp. 74-75).

With regard to the standardized test data resulting from the November 8, 2010 psychoeducational evaluation, the school psychologist concluded that "the data reveal[ed] a youngster who harbor[ed] considerable anger and aggression" (Dist. Ex. 2 at p. 4). The BASC-2 results reflected that the student sensed a lack of control with respect to his family, and that he felt "things 'just happen to him,'" and he also demonstrated his "negative attitudes towards school, teachers and parental figures" (id.). The BASC-2 Parent Report results yielded clinically

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<sup>20</sup> The hearing record reflects efforts made by the district to address the student's attendance problem (see Tr. pp. 26-27, 40-43, 48-50, 52-53; Dist. Ex. 11 at p. 2).

significant scores in the areas of conduct problems and aggression, which included disruptive behaviors, stealing, lying, truancy, substance abuse and running away from home; all of which, according to the parent, the student had exhibited within the past year (*id.*). The school psychologist offered that the data revealed the student's "mistrustful attitude" toward family and peers and "poor self-esteem and feelings of inadequacy, which he attempt[ed] to cope with by acting out and engaging in power struggles with the adults in his life" (*id.*). She further opined that the student had "no investment in academic endeavors at th[at] point in his life," and cautioned that "[d]ue to his impulsive and defiant behaviors, coupled with his immaturity, [he was] at risk for increasingly dangerous behaviors" (*id.*).

The hearing record does not clearly indicate whether any other manifestation team participants reviewed the school psychologist's undated psychological evaluation report or the extent to which the school psychologist's observations during the assessment were considered during the MDR. Both the school psychologist and the assistant principal testified that their rationales for determining that the student's behavior was not a manifestation of his disability turned upon their assessment of the student's ability to "know[] right and wrong," and because, in their estimation, the student "[knew] everything that he was doing" (Tr. pp. 57-58, 75, 77-79, 82-84, 89-90, 93-94; *see* Parent Ex. F at p. 1).<sup>21, 22</sup> Following her November 8, 2010 evaluation, the school psychologist testified that the student demonstrated the ability to "evaluate a situation and know what the appropriate response is," but qualified that "[w]hether or not [the student] chooses to is a whole other story" (Tr. pp. 93-94). The school psychologist opined that at the student was "in full control of his behavior and [in] full control of understanding what is appropriate and what isn't appropriate in conventional social settings," she characterized the student as "impulsive" and someone who sought out "high risk behaviors" because they stimulated him (Tr. pp. 77-78, 83-84).

However, the school psychologist also contradicted herself insofar as she testified that "while [the student] may be cognizant of the rules he cannot follow them" (Tr. p. 81; *see* Dist. Ex. 1 at p. 4). Both the school psychologist and the assistant principal testified that despite the student's awareness of school rules, during fall 2010, the student broke school rules by exhibiting insubordination toward teachers, failing to attend classes and complete work, and, on those occasions when he was present, attending class without necessary materials (Tr. pp. 63-64, 95).

Thus, with regard to the first element of the MDR determination, the hearing record does not clearly indicate what information the manifestation team considered, whether the parent attended, or when the MDR was conducted, and furthermore, the information developed at the impartial hearing was contradictory. Therefore I decline to adhere to the conclusion that the student's behavior at the time of the November 10, 2010 incident was not caused by or had a direct and substantial relationship to the student's disability. Nor do I find that the impartial hearing officer's decision to uphold the district's manifestation determination with respect to the relationship of the conduct in question to the student's disability to be adequately supported by evidence contained in the hearing record.

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<sup>21</sup> Other than indicating that the manifestation team determined that the student's behavior during the November 10, 2010 incident was not a manifestation of his disability, the hearing record does not contain a transcript of the MDR or any other documentation pertaining to it (*see* Dist. Ex. 14 at p. 2; Parent Ex. E at p. 4).

<sup>22</sup> The school psychologist testified that her determination that the student exhibited "vulnerability and [] emotional immaturity" did not factor into her determination at the MDR (Tr. pp. 77-78; *see* Dist. Ex. 2 at pp. 4).

## **Implementation of the Student's IEP**

Turning to the second element of a manifestation determination – whether the conduct in question was the direct result of the district's failure to implement the student's IEP – the hearing record shows that the student's April 30, 2010 IEP, which was effective at the time of the November 10, 2010 incident, classified the student as having a learning disability, and placed him in a 15:1 special class with pull-out counseling services (Parent Ex. C at pp. 1-2, 9). The description of the student's present levels of performance cited the student's "massive behavioral concerns" in the classroom, "struggle[s] with authority figures in the school, and his "difficulty following classroom and school rules" (*id.* at pp. 3-4). Additionally, the April 30, 2010 IEP reflected that the student did not "possess the necessary skills to cope with frustration," and that he "often [left] situations in which he [felt] frustrated" (*id.* at p. 4). The hearing record shows the student thereafter remained absent from school during fall 2010 for substantial periods of time, despite the efforts of the assistant principal and the dean of the district's high school to impress upon him that "[t]he rules really apply in high school" and the importance of attendance in order to progress from grade to grade, to which, according to the assistant principal, the student's response was "usually blank faced" (Tr. pp. 27, 45, 52-54).

The hearing record establishes that district staff and the parent also expressed concerns about the appropriateness of the student's placement prior to the November 10, 2010 incident (Tr. pp. 56-57, 69-70; Dist. Ex. 4). The assistant principal explained that during an October 28, 2010 meeting with the parent, "there were concerns on all of our parts that IEP needed to be – he needed to be reevaluated," and that she and the parent "realized [the student] needed more supports . . . than the ones being provided" (Tr. pp. 56, 59).

The hearing record contains some evidence suggesting that the district attempted to implement the counseling component of the student's April 30, 2010 IEP (Tr. p. 51; Dist. Ex. 7). However, aside from the fact that the student frequently failed to attend school, the hearing record lacks testimonial or documentary evidence that explains which IEP was reviewed during the MDR or how the manifestation team reached its determination regarding whether the student's conduct may have been a failure to implement the student's IEP. Consequently, the hearing record is inadequate to support a determination regarding whether the manifestation team appropriately concluded that the November 2010 conduct in question was or was not the direct result of the district's failure to implement the student's IEP.

### **Additional Evaluation**

As noted above, there is nothing that precludes the district from convening the CSE to review the student's IEP while contemporaneously following the procedures for an MDR (see Letter to Brune, 40 IDELR 46 [OSEP 2003]; see also Letter to Yudien, 39 IDELR 242 [OSEP 2003]). In this case, the evidence shows that the district convened the CSE, modified the student's IEP, and developed a BIP. There is no indication regarding whether an FBA was conducted prior to developing the student's BIP or whether the manifestation team reviewed such information prior to arriving at its manifestation determination (*cf. Fitzgerald*, 556 F. Supp. 2d at 559).<sup>23</sup> In light of these circumstances, I encourage the district to consider, if it has not already done so, conducting additional evaluation of the student that includes, but is not limited to an FBA in order to ascertain

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<sup>23</sup> I note that the student's BIP specifically identified the issue of school attendance, but there is little information regarding whether the district believes his school attendance problems are a function of his disability or result from other causes.

the contextual factors that contribute to the student's negative behaviors and probable consequences that serve to maintain them (see 8 NYCRR 201.4[d][2][i], 201.10[d]).

## **Conclusion**

In summary, the evidence in this case fails to show whether the parent participated in the student's MDR. It is also unclear when the MDR occurred, what information the manifestation team had before it, and it is not clear the degree to which the manifestation team reviewed the district's implementation of the April 2010 IEP. Accordingly, I find that the MDR determination cannot stand on these bases.

I also conclude that the evidence contained in the hearing record is insufficiently developed to reach a conclusion regarding whether the student's conduct during the November 10, 2010 incident was a manifestation of his disability, and consequently, I will annul the impartial hearing officer's February 23, 2011 decision upholding the district's manifestation determination. I will remand this matter to the manifestation team to determine whether the student's behavior during the November 10, 2010 incident was: (1) caused by or had a direct and substantial relationship to the student's disability; or (2) the direct result of the district's failure to implement the student's April 30, 2010 IEP.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

### **THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the impartial hearing officer's decision dated February 23, 2011, is annulled; and

**IT IS FURTHER ORDERED** that the district shall, unless the parties otherwise agree, reconvene the manifestation team to reconsider whether the student's behavior during the November 10, 2010 incident was: (1) caused by or had a direct and substantial relationship to the student's disability; or (2) the direct result of the district's failure to implement his April 30, 2010 IEP.

**Dated:** Albany, New York  
May 16, 2011

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