The University of the State of New York

The State Education Department
State Review Officer
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No. 11-064

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Half Hollow Hills Central School District

Appearances:
Long Island Advocacy Center, attorneys for petitioners, Diane E. Inbody, Esq., of counsel

Frazer & Feldman, LLP, attorneys for respondent, Laura A. Ferrugiari, Esq., of counsel

DECISION

Petitioners (the parents) appeal from a decision of an impartial hearing officer upholding a manifestation determination review (MDR) team's determination that their son's behavior was not a manifestation of his disability and sustaining a school-imposed disciplinary suspension from respondent (the district) during the 2010-11 school year. The district cross-appeals the impartial hearing officer's decision to the extent he found that the parents' private psychologist and the student's father testified credibility. The appeal must be dismissed. The cross-appeal must be dismissed.

According to the hearing record, the student was enrolled in a seventh grade general education program with related services consisting of resource room and counseling in a district middle school for the 2010-11 school year; however, at the time of the impartial hearing, he was serving a disciplinary suspension in an alternative educational setting[1] as a result of a January 2011 incident (Tr. pp. 87-88; Dist. Ex. 6 at pp. 1, 10; 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 has received diagnoses of Asperger's disorder and a major depressive disorder, recurrent, moderate (Dist. Ex. 6 at p. 26). His eligibility for

[1] The hearing record indicates that subsequent to the superintendent's hearing and February 3, 2011 MDR, the student received home instruction during the period of February 3, 2011 through June 30, 2011 (IHO Ex. 2 at p. 3).

special education and related services as a student with autism is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

Background

On November 16, 2010, the Committee on Special Education (CSE) convened for a requested review of the student's program (Dist. Ex. 6 at pp. 1-8).[2] Meeting participants included the CSE chairperson, a district administrator, a district special education teacher, the district school psychologist who provided counseling to the student, another district school psychologist, a district behavioral consultant who had worked with the student, a district guidance counselor, a district speech-language therapist, the student's resource room teacher, a district social worker, an additional parent member, a regular education teacher, the parents, the student's private psychologist, a district assistant principal, and a district school principal (Tr. pp. 152, 224-25, 249, 623, 730; Dist. Ex. 6 at pp. 4, 9). An additional private psychologist also participated in the meeting via teleconference (Dist. Ex. 6 at p. 4). The November 2010 CSE recommended a general education program with five 40-minute periods of resource room per week, one 30-minute session per week of group counseling, and two monthly 60-minute sessions of parent training and counseling (id. at p. 1). In addition, the November 2010 CSE recommended one weekly 30-minute behavior intervention consultation and one monthly 30-minute speech-language consultation (id.). The individualized education program (IEP) generated as a result of the November 2010 CSE meeting reflected that the student exhibited delays in social skills and attention that interfered with his participation in age appropriate activities and adversely affected his academic performance (id. at p. 3). Present levels of academic achievement, functional performance, and learning characteristics contained in the November 2010 IEP revealed that the student's cognitive abilities and academic skills were within age appropriate expectations (id.). The November 2010 CSE described the student's rate of progress as "average," and further stated that the student had a multisensory learning style (id.). According to the November 2010 IEP, the student could apply basic strategies for selecting the appropriate computational and operational method in problem solving (id.). The November 2010 IEP further reflected that the student demonstrated basic skills with the mechanics of writing and idea generation; however, the student demonstrated difficulty with reading comprehension in content areas (id.).

Although the November 2010 CSE determined that the student had some positive relationships with his peers and teachers, the resultant IEP also indicated that the student exhibited a delay in social skills related to authority and peers (Dist. Ex. 6 at p. 4). According to the November 2010 IEP, the student lacked a positive image, and the November 2010 CSE noted that the student needed to build self-confidence and self-worth as well as work on maintaining friendships (id.). Additionally, the November 2010 CSE found that the student needed to develop relationships with adults in his environment, and relate appropriately to peers and adults inside and outside of the classroom (id.). The November 2010 CSE further recommended that the student needed to develop age appropriate social/emotional skills with peers and that he required teacher support and guidance (id.). The resultant IEP detailed the student's management needs, including the additional support of special education services and a behavior support plan to be successful

[2] The hearing record indicates that the November 2010 CSE meeting was also an MDR meeting; however, the incident that precipitated the November 2010 MDR meeting is not described in the hearing record (Tr. pp. 165-66, 171, 175, 211, 415).

in the general education classroom (id. at p. 2). Additional environmental modification and human/material resources required by the student included teacher redirection to stay on task and the provision of breaks (id.). The November 2010 IEP stated that the student needed to complete tasks consistently, utilize learned strategies for coping with conflict and decreasing impulsivity in the moment, improve self-control, and comply with adult directives (id.). Annual goals were also developed relating to study skills, reading, writing, mathematics, speech and language, and the student's social/emotional and behavioral needs (id. at pp. 5-8).

Following the November 2010 CSE meeting, the district behavioral consultant and the school psychologist who provided the student with counseling reviewed the student's prior behavior plans, interviewed the student's teachers and bus driver, and solicited information from the student's parents, all of which culminated in a January 2011 functional behavioral assessment (FBA) and behavioral intervention plan (BIP) (Tr. pp. 175-76; 285-86; 346; 760; Dist. Ex. 6 at pp. 10-14). Disruptive behavior and an escalating aggression pattern were among the behavioral concerns listed in the January 2011 FBA (Dist. Ex. 6 at p. 10). Based on direct and indirect methods of assessment, the behavioral consultant and school psychologist hypothesized that among the factors maintaining the targeted behaviors were the student's desire to escape or avoid activities that he did not prefer during structured times and the student's desire to access preferred peer activities at a level not appropriate for the school setting, during less structured times (id.). The January 2011 FBA identified two target behaviors for the student to decrease: disruptive/non-compliant behaviors and escalating aggression/non-compliance (id. at pp. 10-11). In addition, the FBA set forth functionally equivalent behaviors targeted for increase in order to meet the same hypothesized function as the problem behaviors (id. at p. 11). These included the use of appropriate language to communicate wants and needs and/or make choices, requests for a break, and the choice of appropriate peer interactions during designated times during the school day (id.).

Based on the FBA, the behavioral consultant and school psychologist developed a BIP designed to decrease or eliminate the student's challenging behaviors (id.). Among the proactive strategies listed in the BIP were: (1) the provision of clear instructions and expectations to the student from teachers for behavior and work completed; (2) the provision of discreet cues to use language to communicate feelings or ask for a break when the student engages in "pre-cursor" behaviors; (3) the provision of acceptable choices during activities; (4) the provision of immediate behavior-specific praise for appropriate behaviors, including following directions, working appropriately during group and independent activities and engaging in appropriate peer interactions; (5) periodic reminders to be given to the student at lunch of acceptable activities from which to choose as well as outcomes from these choices; (6) utilization of a daily reward system with criteria needed to earn rewards; (7) the offer of a designated break area in the event the student expresses the need to decompress or if he is offered that option; (8) the incorporation of pragmatic and problem solving language recommended by the speech consult into resource room; and (9) the integration of expectations and responsibilities necessary to be successful in social interactions with peers at school into social skills group activities (Dist. Ex. 6 at pp. 11-13). The BIP also outlined numbered alternate strategies that staff should progressively follow in the event that the student exhibited a pre-cursor behavior, such as verbal protests or increased physical activity (id. at p. 13). According to the BIP, behavior data reports would be prepared upon the occurrence of escalated verbal or physical aggression (id.). Additionally, the BIP called for regular communication between team members regarding target behaviors (id.). Lastly, the BIP set forth mastery criteria which indicated that the student's disruptive behaviors, refusal, and incidences of

aggression must decrease to one or less episodes per week over a one-month period, with no instances of aggression during all class periods, in the hallways, and during the student's lunch period and bussing (id.).

On January 26, 2011, a notice of eight charges was issued against the student in relation to a series of incidents that occurred between January 3, 2011 and January 20, 2011 (Dist. Ex. 1). As a result, a superintendent's hearing was scheduled to take place on January 31, 2011 to determine whether the student engaged in the conduct set forth in the notice (id. at pp. 2-3).[3]

In a January 26, 2011 letter to the parents, the district advised that an MDR team meeting was scheduled to take place on January 31, 2011 (Tr. pp. 153-54; Dist. Ex. 4). Pursuant to the parents' request, the January 31, 2011 MDR team meeting was postponed and rescheduled to take place on February 3, 2011 (Tr. pp. 148, 154; Dist. Ex. 5).

On February 3, 2011, a superintendent's hearing convened (Tr. pp. 89, 92). In the first phase of the superintendent's hearing, the student was found to have engaged in all the conduct described in the January 2011 notice of charges (Tr. p. 150). Following the first phase of the superintendent's hearing, the disciplinary proceeding was recessed so that the MDR could take place (Tr. pp. 151-52; Dist. Ex. 5 at p. 2).

The MDR team meeting also convened on February 3, 2011 to determine whether any or all of the student's conduct during the period of January 3, 2011 through January 24, 2011 was a manifestation of the student's disability (Tr. pp. 151-52; Dist. Ex. 3). Meeting attendees included the parents, a district school psychologist, a district behavioral consultant, a district guidance counselor, a district speech-language therapist, the student's resource room teacher, a district social worker, the middle school principal, the district executive director of special education, a regular education teacher, and an attorney for the district (Tr. pp. 152-53; Dist. Ex. 3).[4] According to the meeting minutes, the student's behaviors that were at issue were outlined by the school principal and the MDR team reviewed the May 2009 psychological assessment report as well as the student's FBA and BIP (Dist. Ex. 3 at p. 1). The student's resource room teacher reviewed the student's IEP services and implementation (id.). The committee summary information also reflected that the district social worker and school psychologist reviewed the student's progress with respect to counseling (id.). Committee summary information further reflected that the district's behavioral consultant and school psychologist provided a "detailed account" of the characteristics of Asperger's disorder (id.). In addition, the meeting minutes revealed that the district guidance counselor, regular education teacher, and speech-language therapist reported on the student's classroom behavior, academics, and functioning (id.). According to the meeting minutes, the parents were provided with the opportunity to ask questions, fully participate, and provide any

[3] The hearing record suggests that the superintendent's hearing was postponed to February 3, 2011 pursuant to the parents' request (Tr. pp. 82, 148).

[4] The CSE chairperson, district school psychologist, behavioral consultant, guidance counselor, speech-language therapist, special education teacher, district social worker, and school principal also participated in the November 2010 CSE meeting (compare Dist. Ex. 6 at p. 4, with Dist. Ex. 3 at p. 1).

information they deemed important for the team to consider throughout the length of the meeting (id.).

The February 2011 MDR team determined that the student's behaviors relating to the first four charges enumerated in the January 2011 notice of charges were not directly and substantially related to the student's disability and that the student's November 2010 IEP had been implemented and that charges five through eight were a manifestation of the student's disability (Tr. pp. 150, 165, 174, 182; Dist. Ex. 3 at p. 2). According to the meeting minutes, the parents did not agree with the MDR team's determination with regard to the first four charges (Tr. pp. 181, 184; Dist. Ex. 3 at p. 2).[5] The superintendent's hearing then resumed, and the student received an out-of-school suspension from February 3, 2011 through June 30, 2011 as a penalty for engaging in the conduct set forth in the first four charges of the January 2011 notice of charges (Tr. pp. 84, 91; IHO Ex. 2 at p. 3).

Due Process Complaint Notice

By due process complaint notice dated March 4, 2011, the parents requested an impartial hearing (IHO Ex. 2). The parents alleged, in part, that during the period of December 1, 2010 through January 31, 2011, the student's father frequently communicated with the school assistant principal regarding the student's behavior; however, the behaviors identified in the notice of charges were not discussed with the student's father until January 21, 2011 (id. at p. 5). Further, the parents maintained that the student's conduct that was at issue during the February 2011 MDR meeting reflected a pattern of behavior that took place over the course of three separate days, during which time none of the strategies outlined in the student's BIP were utilized, although the behaviors had been identified as target behaviors (id.). The parents also referenced a May 2009 private psychological evaluation that indicated, among other things, that the student exhibited a substantial amount of difficulty adapting to his environment and that he presented with difficulty understanding social situations (id.). The parents requested a finding that the February 2011 MDR team erred in determining that the student's behaviors were not substantially related to his disability and that the student's IEP had been implemented (id. at pp. 5-6). In addition, the parents requested a finding that the student's conduct was a manifestation of his disability (id. at p. 6). As relief, the parents requested that the district be directed to expunge the record of the student's suspension and return the student to school (id.).

Impartial Hearing Officer Decision

An expedited impartial hearing convened on April 6, 2011, and after three days of testimony, concluded on April 11, 2011 (Tr. pp. 1-781). By decision dated May 4, 2011, an impartial hearing officer concluded that the MDR correctly determined that the student's conduct relating to the first four charges enumerated in the January 2011 notice of charges was not a manifestation of his disability (IHO Decision at p. 42). First, in response to the parents' claim that the February 2011 MDR team failed to review relevant information, including the student's entire disciplinary record and a private psychological evaluation, the impartial hearing officer determined that the MDR team properly reviewed all the relevant information, evaluations, disciplinary reports, and teacher reports and found that the parents did not avail themselves of the opportunity

[5] The latter four charges are not at issue in this appeal (Tr. pp. 82, 127,149, 214; see Dist. Ex. 1).

to provide other information (id. at pp. 27, 30). Furthermore, the impartial hearing officer found that the district complied with State regulations regarding the general requirements and process for conducting an MDR (id. at pp. 26-27). The impartial hearing officer also ruled that he lacked jurisdiction to hear claims pertaining to the implementation of the student's IEP, because that issue would only be relevant upon a finding that the student's conduct was directly and substantially related to his disability (id. at p. 28).

The impartial hearing officer determined that the student's conduct had no direct or substantial relationship to the student's disability, Asperger's disorder and a major depressive disorder (IHO Decision at pp. 41-42). He found that the hearing record did not contain evidence that the student's conduct resulted from an escalation in aggression or heightened levels of activity (id.; see id. at p. 20). According to the impartial hearing officer, the student's "Asperger's related behaviors would be exhibited in conjunction with a heightened level of activity" (id. at p. 42). The impartial hearing officer characterized the student's conduct as "not typical age appropriate misconduct," which he opined could not be considered "delayed developmentally inappropriate social conduct" resulting from the "delayed development of social skills" (id. at p. 41). Moreover, the impartial hearing officer did not believe that the student lacked "lightning fast reflexes" causing him to misread social cues and misunderstand subtle nuances of human interactions (id. at pp. 14-15, 41). The impartial hearing officer found that the student demonstrated "repeated misconduct" toward another student and he determined that the hearing record did not contain evidence showing that the student misread the other student's conduct nor any evidence suggesting that the student would be confused as to what constituted appropriate behavior (id. at p. 42).

Appeal for State-Level Review

The parents appeal and request that the impartial hearing officer's decision be vacated in its entirety. The parents argue that the impartial hearing officer committed reversible error by failing to allow them to introduce evidence regarding the implementation of the student's IEP. Among other things, the parents cited additional procedural errors that arose during the impartial hearing, including: (1) the impartial hearing officer precluded them from presenting a witness on the grounds that the witness' testimony would be duplicative and repetitive; (2) the impartial hearing officer improperly drew a negative inference against the parents based on their decision not to call a certain witness; (3) the impartial hearing officer failed to draw a negative inference against the district based on the spoliation of evidence, namely, video tapes from the school bus memorializing the incident that was at issue during the February 2011 MDR; (4) the impartial hearing officer erred by entering the transcript from the superintendent's hearing into evidence, because the parents were denied an opportunity to cross-examine witnesses who testified at the prior proceeding; (5) the impartial hearing officer erred by not admitting into evidence the student's private March 31, 2011 psychological evaluation on the basis that the parents failed to timely disclose it to the district; and (6) the impartial hearing officer erred by improperly excluding the student's entire disciplinary record from evidence. In addition, the parents maintain that the evidence at the impartial hearing showed that the student's diagnoses of Asperger's disorder and a major depressive disorder were directly and substantially related to his actions that resulted in his suspension from school. Lastly, the parents request consideration of the student's 22-page behavior log, which they claim was part of his student file and maintain was highly relevant to a determination whether the student's behavior was caused by or had a direct and substantial relationship to the student's disability.

In its answer, the district requests that the petition be dismissed in its entirety. The district argues that the hearing record supports the impartial hearing officer's decision to uphold the MDR team's determination that the student's conduct did not have a direct or substantial relation to his disability. The district also contends that the appeal has been rendered moot, because the CSE has since convened and the student has been placed in a private State-approved school for the remainder of the 2010-11 school year and the 2011-12 school year. As a result, the district submits that the student's suspension has been "lifted." Next, the district requests that the additional evidence consisting of the student's 22-page behavior log offered by the parents should not be considered on appeal. Furthermore, the district maintains that the expedited impartial hearing was conducted in a manner that comported with State regulations, in part, because, the impartial hearing officer properly determined that the issue of whether the district failed to implement the student's IEP was not before him. The district also asserts that the impartial hearing officer properly precluded the parents from presenting a witness who would have offered duplicative and repetitive testimony.

The district also cross-appeals the impartial hearing officer's decision to the extent that he found that all of the witnesses at the impartial hearing testified credibly. The district asserts that the parents' private psychologist did not credibly testify. Further, the district alleges that the hearing record demonstrates that the student's father's testimony was also improper, disingenuous, and that it did not add any probative value to refute the district's case. The district contends that the parents improperly used the student's father's testimony to circumvent the impartial hearing officer's ruling that denied the parents' request to enter the student's entire behavioral log into evidence.

The parents submitted an answer to the district's cross-appeal. The parents maintain that the instant appeal is not moot, because during the May 2011 CSE, there was no mention made of "lifting" the student's suspension. Moreover, notwithstanding the student's subsequent placement in a State-approved school, the parents contend that the underlying issues of the appeal remain unresolved. Among other things, the parents argue that the impartial hearing officer's decision to uphold the findings of the February 2011 MDR team was not supported by the hearing record and should be reversed. The parents request dismissal of the district's cross-appeal, arguing that it has no basis in law or in fact.

Applicable Standards – MDR

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).[6] 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

[6] 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]).[7] 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 MDR 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 MDR 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]

(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 MDR 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

[7] 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]).

[8] 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.

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 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 an FBA[9] and implement a BIP;[10] 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]).[11] 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]).[12]

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 MDR 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]).

[9] 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]).

[10] 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 a post-incident FBA was conducted.

[11] A district and parents may agree to a change in the student's placement and, 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]).

[12] As detailed below, although it is no longer necessary to reach the merits of the parents' appeal, I note that when the matter was a live controversy, the impartial hearing officer's determination that the student's conduct was not directly and substantially related to his disability was not the end of the inquiry in this case. The parents correctly assert that the impartial hearing officer erred to the extent that he failed to consider the issue of whether the student's conduct resulted from the district's failure to implement the student's IEP. When the parties dispute the finding of an MDR and that dispute encompasses the proper implementation of the student's IEP, State regulations require the impartial hearing officer to resolve the parties' implementation dispute on an expedited basis (8 NYCRR 201.4[a], [c][2]; 201[11][a][3]). However, in this instance a determination of the implementation of the student's November 2010 IEP will not have any actual legal effect upon the parties.

Discussion

Mootness

As an initial matter, I will address the parties' dispute regarding whether this appeal is moot. It is well settled that the dispute between the parties in an appeal must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Chenier v. Richard W., 82 N.Y.2d 830, 832 [1993]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]; Application of the Dep't of Educ., Appeal No. 10-066; Application of a Student with a Disability, Appeal No. 10-064; Application of a Student with a Disability, Appeal No. 09-077; Application of a Student with a Disability, Appeal No. 09-065; Application of a Student with a Disability, Appeal No. 08-104; Application of the Dep't of Educ., Appeal No. 08-044; Application of a Child with a Disability, Appeal No. 07-139; Application of a Child with a Disability, Appeal No. 07-085; Application of a Child with a Disability, Appeal No. 07-077). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 05-058; Application of a Child with a Disability, Appeal No. 04-027; Application of a Child with a Disability, Appeal No. 00-037; Application of the Bd. of Educ., Appeal No. 00-016; Application of a Child with a Disability, Appeal No. 96-37). Administrative decisions rendered in cases concerning such issues arising out of school years that have since expired may no longer appropriately address the current needs of the student (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]; M.S. v. New York City Dept. of Educ., 2010 WL 3377667, at *9 [E.D.N.Y. Aug. 25, 2010]; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007).

However, an exception provides that a claim may not be moot, despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318-23 [1988]; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040; Application of a Child with a Disability, Appeal No. 04-038). The exception applies only in limited situations (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]), and is severely circumscribed (Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). First, it must be apparent that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration" (Murphy v. Hunt, 455 U.S. 478, 482 [1982]; see Knaust, 157 F.3d at 88; Application of a Child with a Disability, Appeal No. 07-139). Second, controversies are "capable of repetition" when there is a reasonable expectation that the same complaining party would be subjected to the same action again (Weinstein v. Bradford, 423 U.S. 147, 149 [1975]; see Hearst Corp., 50 N.Y.2d at 714-15; Application of a Child with a Disability, Appeal No. 07-139). To create a reasonable expectation of recurrence, repetition must be more than theoretically possible (Murphy, 455 U.S. at 482; Russman v. Bd. of Educ., 260 F.3d 114, 120 [2d Cir. 2001]; Application of a Child with a Disability, Appeal No. 07-139). Mere speculation that the parties will be involved in a dispute over the same issue does not rise to the level of a reasonable expectation or demonstrated probability of recurrence (Russman, 260 F.3d at 120;

M.S., 2010 WL 3377667, at *9 [noting that each year a new determination is made based on a student's continuing development]; J.N. v. Depew Union Free School Dist., 2008 WL 4501940, at *4 [W.D.N.Y. Sept. 30, 2008]; Application of a Child with a Disability, Appeal No. 07-139). Mootness may be raised at any stage of litigation (In re Kurtzman, 194 F.3d 54, 58 [2d Cir. 1999]; Application of a Child with a Disability, Appeal No. 07-139).

As set forth in greater detail below, based on the hearing record before me, I am constrained to dismiss the instant matter on the ground that it has been rendered moot because a decision with regard to whether the student's conduct was a manifestation of his disability—including whether there was direct and substantial relationship existed between the student's conduct and his disability—would have no actual effect on the parties. First, the period of the student's out-of-school suspension expired on June 30, 2011 (IHO Ex. 2 at p. 3). Additionally, it is undisputed that on May 18, 2011, the CSE reconvened and developed a new IEP for the student (Dist. Answer ¶ 28; Parent Answer ¶ 2). Pursuant to the May 2011 CSE's recommendation, on June 16, 2011, the student was placed at a private residential State-approved school for the remainder of the 2010-11 school year and the upcoming school year, effectively ending the period of suspension (Dist. Answer ¶¶ 28-30). Notwithstanding the parents' contention that the instant appeal is not moot, in part, because a decision on the merits would alter the student's disciplinary record, the parents' request for relief more properly constitutes a claim made pursuant to the Family Educational Rights and Privacy Act (FERPA) (see 20 U.S.C. §1232g), and is not within the jurisdiction of a State Review Officer.[13] Based on the foregoing, the parents' appeal is moot.

Credibility of the Witnesses

Next, I will address the district's cross-appeal requesting a reversal of the impartial hearing officer's decision to the extent that he found that all witnesses that appeared at the impartial hearing testified credibly. In particular, the district asserts that a review of the hearing record reveals that the student's father and the parents' private psychologist provided testimony that was incredulous, irrelevant and lacking in probative value, therefore, their testimony should be stricken from the hearing or given diminished weight. I decline to do so. First, there is no need to reach this issue in light of my determination that the matter has been rendered moot. Even assuming for the sake of argument that the parties had a legally cognizable interest that would be affected by a decision, I note that a State Review Officer gives due deference to the findings of credibility of the impartial

[13] To the extent that the parents make reference to FERPA (20 U.S.C. § 1232g), the relevant procedures are set forth under that statute's implementing regulations (34 C.F.R. §§ 99.20-99.22). The IDEA regulations (34 C.F.R. § 300.621) provide that such hearings are to be conducted in accordance with the procedures specified in 34 C.F.R. § 99.22, rather than the due process hearing procedures under 34 C.F.R. § 300.511 (see 34 C.F.R. § 300.620[b]; see also Application of a Student with a Disability, Appeal No. 08-106; Application of the Dep't of Educ., Appeal No. 05-036; Application of a Child with a Disability, Appeal No. 01-099; Application of a Child with a Disability, Appeal No. 99-51; Application of a Child with a Disability, Appeal No. 94-9; Application of a Child with a Handicapping Condition, Appeal No. 92-38). Moreover, a primary purpose of the due process procedures challenging an MDR is to resolve whether the student may be permissibly removed from the educational placement described in his or her IEP as a result of a district's disciplinary procedures. The due process procedure in 8 NYRR 201.11 reviewing the MDR conducted pursuant to 8 NYCRR 201.4 does not encompass a review of the superintendent's findings pursuant to Education Law § 3214 regarding whether the student engaged in the alleged conduct or whether such alleged conduct constitutes a violation of the district's code of conduct.

hearing officer, unless the hearing record read in its entirety would compel a contrary conclusion (see Carlisle Area School v. Scott P., 62 F. 3d 520, 524 [3d Cir. 1995]; Application of the Bd. of Educ., Appeal No. 09-087; Application of a Student with a Disability, Appeal No. 08-157; Application of the Dep't of Educ., Appeal No. 08-105; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Bd. of Educ., Appeal No. 08-074; Application of the Dep't of Educ., Appeal No. 08-037; Application of the Bd. of Educ., Appeal No. 04-091; Application of the Bd. of Educ., Appeal No. 03-062; Application of the Bd. of Educ., Appeal No. 03-038; Application of a Child with a Disability, Appeal No. 03-025; Application of a Child with a Disability, Appeal No. 01-019; Application of a Child with a Disability, Appeal No. 97-73). Here, a review of the complete hearing record would not compel a contrary conclusion and I would therefore decline to modify the impartial hearing officer's findings of credibility.

Conclusion

I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED

Dated: **Albany, New York**
July 13, 2011

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JUSTYN P. BATES
STATE REVIEW OFFICER