



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-083

Application of the BOARD OF EDUCATION OF THE Minisink Valley Central School District 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, Michael K. Lambert, Esq., of counsel.

Legal Services of the Hudson Valley, attorneys for respondents, Mary Jo Whateley, Esq., of counsel

DECISION

Petitioner (the district) appeals from a decision of an impartial hearing officer which reversed a manifestation determination review (MDR) team's April 25, 2011 finding that the conduct of respondents' (the parents') son was not a manifestation of his disability. The appeal must be sustained in part.

At the time of the impartial hearing, the student was enrolled in a ninth grade special education program in a district high school for the 2010-11 school year (see Dist. Ex. 9 at p. 1).¹ The student has received diagnoses that include an attention deficit hyperactivity disorder (ADHD) and a learning disability in math (Dist. Exs. 9 at p. 1; 26 at p. 1; 30 at p. 4). The student's eligibility for special education services as a student with an other health impairment (OHI) is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

¹ 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 his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]).

Background

The student was initially referred by his parents to the Committee on Special Education (CSE) while enrolled as an eighth grade student on October 21, 2009 due to "failing academic grades [and] behavioral difficulties ... impairing his ability to reach his potential" (Dist. Ex. 32 at p. 1). A private neuropsychological evaluation was conducted with initial testing on November 16, 2009 (Dist. Ex. 12). Regarding general intellectual abilities, the neuropsychological evaluation report indicated that the student's general intellectual abilities were in the high average range; verbal reasoning skills were a significant strength; and other cognitive parameters were within the average range (id. at p. 1). Regarding academic achievement, the student's reading skills were within the superior range, mathematical concepts and operations were within the average range, and writing skills were within the borderline to average ranges (id. at p. 2). Regarding attention, the student's ability to mobilize attentional processes rapidly and keep information in mind was in the average range; however, sustained attention was affected by mood related variability in arousal and impulsivity (id. at pp. 2-3). The student presented with mild deficits in executive functions (id. at p. 5). As to psycho-social and emotional factors affecting the student's school performance, the student's responses to projective material indicated excessive stress, low self-esteem, and use of much effort to suppress angry and depressive thoughts, affect, and behavior (id.). A subsequent private neuropsychological follow-up evaluation was conducted on January 14, 2010 (Dist. Ex. 19). The January 2010 follow-up evaluation indicated that on his current medications, the student was able to sustain attentional processes and reflected better modulation of aggressive and impulsive behaviors than previously noted during the initial testing in November 2009 (id. at p. 2). The January 2010 follow-up report noted, however, that the student was "vulnerable to a break through" of aggressiveness and irritability (id.).

A district educational evaluation was conducted on December 14, 2009 by a district special education teacher (Dist. Ex. 14). The December 2009 educational evaluation report indicated that the student's performance was in the high average range in reading, below average range in math, and average range in written language (id.).

A district psychological evaluation conducted by the school psychologist on December 15, 2009 revealed the student's overall high average cognitive ability with scores in the superior range on the verbal comprehension and working memory composites, which signified the student's exceptional understanding and use of language and his significant ability to process and recall auditory information (Dist. Ex. 15 at p. 8). In addition, the student exhibited an excellent vocabulary, excellent verbal reasoning ability, and was articulate with conveying an understanding of his social environment (id.). Administration of the Behavior Assessment System for Children, Second Edition (BASC-2) yielded scores in the clinically significant range on scales related to externalizing behaviors suggesting that aggressiveness and opposition existed in his interactions with others (id. at p. 9).

The CSE met on February 18, 2010 for an initial eligibility determination meeting (Dist. Ex. 3 at p. 1). The February 2010 CSE found the student eligible for special education programs and related services as a student with an other health impairment and recommended a general education class with two hours of consultant teacher support per week in an integrated location (id.). The student's February 2010 individualized education program (IEP) included testing and program modifications as well as a behavior management plan (id. at pp. 1-2, 4-5, 7).

A functional behavioral assessment (FBA)² report dated February 17, 2010 and revised on March 1, 2010, was prepared by the district school psychologist (Dist. Ex. 20). The FBA was conducted to provide insight into the student's behavioral difficulties in the educational setting and focused on reducing the student's impulsive behavior and eliminating the use of improper language (id. at pp. 1, 4). A behavioral intervention plan (BIP)³ dated March 25, 2010 was also developed by the district school psychologist to address the student's target behaviors (impulsivity, particularly during unstructured time in the classroom, and inappropriate language) (Dist. Ex. 21). Classroom observations were conducted on two dates in May 2010 (Dist. Ex. 22).

On April 9, 2010, a subcommittee of the CSE convened for a program review, but that meeting was tabled to allow more time to put the BIP in place and give the case manager time to work with the student (Dist. Ex. 4 at p. 5). On May 17, 2010, the CSE subcommittee met to review the student's educational program (id. at p. 1). The May 2010 CSE subcommittee recommended IEP modifications including the addition of an integrated co-teaching (ICT)⁴ math class, and additional program modifications (id. at pp. 1-2, 6).

The CSE subcommittee convened to conduct the student's annual review on June 22, 2010, but that meeting was tabled based upon parent concerns and the CSE subcommittee reconvened on July 30, 2010 (Dist. Ex. 5 at pp. 1, 5). The July 2010 CSE subcommittee recommended an ICT science class, two hours of consultant teacher support (one hour per week of direct in the general education class and one hour per week of indirect in the general education class) to support the student in math, resource room five days per week for 40 minutes in a 5:1 non-integrated setting, and 1:1 counseling one time per week for fifteen minutes on a "monitor basis," program modifications and testing accommodations (id. at pp.1-2, 5). There was no change to the student's BIP and the CSE subcommittee noted that there would be a five week program review in the fall (id. at pp. 4, 6).

² 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]).

³ A BIP means a plan that is based on the results of an 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]).

⁴ 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>).

The CSE subcommittee convened for another program review on September 8, 2010 (Dist. Ex. 6 at p. 1). The September 2010 CSE subcommittee recommended that the direct consultant teacher support in math change to indirect services, and the implementation of additional program supports (id. at pp. 1-2). On October 6, 2010, the CSE subcommittee convened for another program review and recommended that support in science be changed from ICT to indirect consultant teacher for one hour per week in a general education class (Dist. Ex. 7). The next CSE subcommittee program review occurred on November 12, 2010 (Dist. Ex. 8). At the November 2010 CSE meeting, the parents provided a psychiatric summary dated October 26, 2010 completed by the student's private psychiatrist (Dist. Ex. 8 at p. 5; see Dist. Ex. 23). At this time, the parents consented to a district psychiatric evaluation of the student, and the CSE subcommittee also recommended an updated neuropsychological evaluation, an FBA to be conducted by an outside consultant, and an updated BIP (Dist. Ex. 8 at pp. 5-6).

In a document dated January 20, 2011, a psychiatric consultant provided the district with notes for the next CSE meeting, which included the student's strengths as well as interventions/plans that could maximize the student's strengths (Dist. Ex. 26).

In a report dated January 23, 2011, the FBA prepared by an educational consultant for the district provided hypothesized functions for the student's behaviors and identified areas of need and strength (Dist. Ex. 27 at p. 11). The January 2011 FBA identified the following strengths of the student: intellectual capability in areas of verbal comprehension and working memory; creativity; strong visual-spatial skills; above average language ability; reading skills; well-related; and the ability to be personable and engaging (id. at p. 6). The January 2011 FBA identified the following needs/areas of liability contributing to problem behaviors: math difficulties; organizational deficits regarding writing; poor coping skills; difficulty asking for help when experiencing stress; desire to provoke others; impulsivity; and hyperactivity (id.). The January 2011 FBA identified the following problem behaviors: coming to class unprepared; refusing to follow teacher directives; passive noncompliance; exhibiting distracting or annoying behaviors; insubordination; encouraging other students to not listen to teachers; and using obscene language (id. at p. 7). In a report dated January 23, 2011, the educational consultant for the district prepared a BIP for the student that included four interventions: manipulating the antecedents and providing immediate consequences for the behavior; teaching the student "pro-social replacement behaviors," including cognitive and behavioral skill development; implementing changes in the curriculum and instructional strategies; and modifying the physical environment (Dist. Ex. 28 at pp. 1-4).

An updated district neuropsychological evaluation based on tests administered on February 9, 2011 and February 16, 2011 yielded results that revealed weaknesses in executive functions, including difficulties with focused attention, impulsivity, and hyperactivity, among other areas (Dist. Ex. 29 at pp. 6-15). While the testing revealed an executive functions deficit in the area of impulse control, the findings also indicated that in the individual test situation the student demonstrated executive skills that he did not consistently display in his daily life, including the ability to attend to rote tasks, plan, and exhibit mental flexibility, self-monitoring and problem solving skills (id. at p. 15).

On February 4, 2011, the CSE subcommittee met for a program review (Dist. Ex. 9). The CSE reviewed the January 20, 2011 psychiatric evaluation report, and the FBA and BIP developed by the educational consultant dated January 23, 2011 (id. at p. 5). The CSE subcommittee

recommended continuation of the student's current academic program with implementation of the January 23, 2011 BIP (id. at p. 6).

A psychiatric evaluation report dated March 3, 2011 was prepared by a psychiatric consultant (Dist. Ex. 30 at p. 7). The March 2011 evaluation report indicated that the student's strengths included that he was bright, engaging, liked school, a good athlete, could engage respectfully, excellent oratory skills, strong auditory learner, access to support, broad range of interests and skills, good awareness of world, capacity to engage mutually, emerging skills to self-reflect and appreciate onset of a conflict, independent spirit, thrived on attention, and excelled in preferred activities (id. at p. 4). The student's weaknesses were described as impulsivity, poor skills to tolerate conflict, difficulty submitting to authority figures, stuck in pattern of negative attention, did not have a mature view of himself as a student, visual motor weaknesses, grapho motor weaknesses, and immaturity in the area of personal responsibility and accountability, and the report included suggested interventions/plans to support and improve the student's weaknesses (id. at p. 5).

In a letter dated April 14, 2011 to the parents, the school's principal advised that he was proposing to suspend the student from school for five days for conduct occurring on April 7, 2011, April 11, 2011, and April 14, 2011 (Dist. Ex. 34). It was alleged that on April 11, 2011 the student after numerous warnings, continued to "bully" a student; that on April 14, 2011 the student damaged a monitor in the school's computer room; and that on April 7, 2011, the student used "vulgar" language in the classroom (id.).

At an MDR meeting conducted on April 25, 2011, the participants included the director of pupil personnel, the district guidance counselor, the district psychologist, a district special education teacher, the parents, a parent advocate, and the psychiatric consultant who prepared the January 20, 2011 and March 3, 2011 reports regarding the student participated by telephone (Tr. p. 207; Parent Ex. 31). The assistant principal attended the meeting toward the end (id.). The MDR team issued its determination by letter dated May 5, 2011 to the parents finding that, as to each of the incidents charged, the student's conduct was not a manifestation of the student's disability (Dist. Ex. 39 at p. 1). Manifestation team meeting minutes reflect that the MDR team considered, among other things, the student's cognitive functioning, as well as the student's capabilities in executive functions, and in particular the student's impulse control deficit and rating scale results indicating problem areas with focused attention, impulsivity and hyperactivity as well as other areas of executive functions as rated by the parent, two regular education teachers and one special education teacher (id. at p. 2). In addition, meeting minutes reflect that the student's low frustration tolerance, oppositional tendencies, and a lack of emotional self-regulation were considered (id. at pp. 2-3). The student's weaknesses were identified as impulsivity, poor conflict resolution skills, difficulty submitting to authority figures, and immaturity in the areas of personal responsibility (id. at p. 3). The MDR meeting minutes reflect that the members of the team reviewed a summary of the behaviors resulting in suspension and did not find a direct and substantial relationship between the student's conduct and his disability, and further did not find that the student's conduct was the direct result of the district's failure to implement the IEP (id.).

Due Process Complaint Notice

In a due process complaint notice dated April 28, 2011, the parents asserted that the student had a history of behavior problems related to his disability, characterized by impulsive behavior

and poor judgment, particularly regarding social interactions (Dist. Ex. 1 at p. 1). The parents further asserted that at the April 25, 2011 MDR meeting, the MDR team determined that the student's alleged behavior was not a manifestation of his disability, "despite overwhelming evidence to the contrary" (*id.* at p. 2). The parents' due process complaint notice included assertions that at the MDR meeting: (1) the district mischaracterized the student's conduct and failed to provide the MDR team with evidence of the student's actual conduct; (2) the district predetermined that the student's alleged behavior was not a manifestation of his disability; (3) the district failed to consider or determine whether the student's IEP was being properly implemented; (4) the district failed to consider or determine whether the student's behavior was the direct result of any failure of the district to implement the student's IEP; (5) the district failed to review all relevant information in the student's file; (6) the district failed to properly consider the input of experts who opined that the student's alleged behaviors were "unquestionably manifestations of his disability;" and (7) the district failed to provide the parents with written notification of its decision to impose the suspension constituting a change in the student's placement and failed to provide the parents with a procedural safeguards notice (*id.* at pp. 2-3). As relief, the parents requested, among other things, that the MDR team's determination that the student's behaviors were not a manifestation of his disability be rescinded (*id.* at p. 3).

Impartial Hearing Officer Decision

An expedited impartial hearing convened on May 20, 2011 and concluded after one day of testimony (Tr. pp. 1-257). In a decision dated June 6, 2011, the impartial hearing officer found that each of the three acts of conduct reviewed at the April 25, 2011 MDR team meeting were caused by or had a direct and substantial relationship to the student's disability (IHO Decision at p. 18). Based upon his review of the audio recording of the MDR team meeting and the testimony at the impartial hearing, the impartial hearing officer also found that the MDR team did not review all relevant information in the student's file and he rejected the district's assertion that review of and familiarity with documents by the MDR team from previous CSE meetings warranted a finding that it was not necessary for them to review such documents again at the MDR meeting (*id.* at pp. 10-11). In addition, the impartial hearing officer found that the MDR team had predetermined that the student's alleged behavior was not a manifestation of his disability (*id.* at p. 11). In support of his decision, the impartial hearing officer indicated that the audio recording of the MDR team meeting indicated that the meeting began without the consultant psychiatrist in attendance, and that when the consultant psychiatrist joined by telephone shortly after the meeting began, the pupil personnel director advised the consultant psychiatrist that the MDR team had found that the student's behaviors were not a manifestation of his disability; however, according to the impartial hearing officer no prior recorded discussion supported that conclusion (*id.* at pp. 11-12). The impartial hearing officer noted that there were discussions thereafter among the participants at the meeting, mainly between the pupil personnel director and the consultant psychiatrist, and that the consultant psychiatrist expressed the opinion that the student's actions were either a result of the student's impulsiveness or his inability to consider others reactions to his conduct (*id.*).

Regarding the specific incidents, as to the "bullying," the impartial hearing officer noted that the date on the referral form was not the date of the incident, and that while the district members of the MDR team found that the student was aware of his actions and their inappropriateness and willfully engaged in the conduct, there was a vast amount of information in the student's file describing the student's impulsivity and inability to perceive the effects of his

conduct on others (IHO Decision at p. 14). The impartial hearing officer also found the statements of the consultant psychiatrist to be persuasive that the student's conduct was a manifestation of the student's disability (id.). The impartial hearing officer further found that while the team in its discussions appeared to place emphasis upon the ongoing nature of the student's conduct, after the April 25, 2011 MDR meeting, on April 28, 2011, the assistant principal wrote to the parents about an error regarding the beginning date of the student's "bullying" conduct (id. at p. 15). As to the incident charging that the student damaged the monitor of a computer with a magnet, the impartial hearing officer concluded that "I am not convinced that [the] [s]tudent's action was not in some manner related to his established impulsivity" (id.). The impartial hearing officer stated that, although the consultant psychiatrist agreed with the rationale that the student knew that placement of a magnet on a computer monitor might cause damage, she continued to assert that it was just as possible that impulsivity was the cause of the student's conduct (id. at pp. 15-16). Regarding the "vulgar" language incident, the impartial hearing officer found that the record that should have been before the MDR team identified that the student was prone to engage in inappropriate activity in unstructured settings, and that such language and the student's challenge to authority when confronted were documented behaviors addressed in the student's evaluations that should have been before the team (id. at pp. 16-17). Accordingly, the impartial hearing officer ordered that each of the determinations made by the MDR team at the April 25, 2011 meeting be annulled (id. at p. 18).

Appeal for State-Level Review

In a petition, the district asserts that the impartial hearing officer improperly concluded that the district did not review information in the student's file relevant to the matters before the MDR team and that the district ignored information describing the student's impulsivity and inability to understand the effects of his conduct. In addition, the district asserts that the impartial hearing officer erred in finding that the MDR team had predetermined that the student's behavior was not caused by his disability; that the impartial hearing officer erred in applying an incorrect legal standard to the MDR team determination; that the impartial hearing officer's decision inadequately set forth the reasons and factual basis for the determination; and that the determination by the MDR team was rational and had ample support in the hearing record.

In an answer, the parents admit some and deny other allegations. The parents assert that the district failed to demonstrate that the MDR team reviewed all relevant information in the student's file; that the impartial hearing officer properly found that the MDR team had predetermined that the student's behaviors were not a manifestation of his disability; that the impartial hearing officer properly found that the district had failed to follow procedural requirements; that the impartial hearing officer properly annulled each of the determinations made by the MDR team at the April 25, 2011 meeting; and that certain allegations in the petition are not relevant and beyond the scope of allegations asserted in the district's answer to the parents' due process complaint notice.

In a reply, the district requests that the parents' verified answer be rejected based upon its failure to comply with the practice requirements of Part 279 of State regulations.⁵ The district specifically asserts that the answer fails to set forth citations to the record on appeal, and identify the relevant page numbers in the impartial hearing officer decision, transcript, and exhibits.

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 U.S.C. § 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

(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

⁵ Pursuant to State regulations, an answer shall set forth the allegations of the parties in numbered paragraphs and the pages of the answer shall be consecutively numbered and fastened together (8 NYCRR 279.8[a][3], [4]). Additionally, State regulations require that assertions in an answer be supported with references to the hearing record, that identify "the page number in the hearing decision and transcript, the exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number" (8 NYCRR 279.8[b]). Upon review, I find that the parents' answer is legally sufficient.

⁶ 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 C.F.R. § 300.534).

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]).

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 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]). 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, an MDR team must "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 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 and implement a BIP;⁸ 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]).⁹ 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 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

⁸ 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).

⁹ 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]).

201.11[3]-[4]; see Coleman v. Newburgh Enlarged City Sch. Dist., 503 F.3d 198, 201-02 [2d Cir. 2007]).

Discussion

MDR

Procedural Issues

I will first consider the district's contention that the impartial hearing officer erred in finding that the MDR team did not 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, as required in determining whether the student's conduct is a manifestation of the student's disability (see 8 NYCRR 201.4[c]; see also 20 U.S.C. § 1415[k][1][E]; 34 C.F.R. § 300.530[e][1]; Educ. Law § 3214[3][g][3][vii]). Upon review, I find that the district reviewed information in the student's file relevant to the matters before the MDR team. In making this finding, I note that the district participants in the MDR meeting on April 25, 2011, namely the director of pupil personnel, the district guidance counselor, the district psychologist, and the district special education teacher participated in numerous CSE meetings during the school year reviewing and revising the student's IEP (see Tr. p. 207; Dist. Exs. 6; 7; 8; 9). Specifically, the hearing record reflects that the director of pupil personnel, the school psychologist, and the district special education teacher participated in program reviews for the student on September 8, 2010, October 6, 2010, November 12, 2010, and February 4, 2011 (Dist. Exs. 6 at p. 5; 7 at p. 5; 8 at p. 5; 9 at p. 5). The district guidance counselor participated in program reviews for the student on October 6, 2010, November 12, 2010, and February 4, 2011. In addition, the consultant psychiatrist participated in the student's February 4, 2011 program review (Dist. Ex. 9 at p. 5). Moreover, upon review of the student's February 4, 2011 IEP, I note that the CSE subcommittee based its recommendation upon review of the student's January 23, 2011 FBA and BIP developed by the educational consultant, which included observation of the student in different classroom settings, the student's recent January 20, 2011 psychiatric evaluation report, classroom observation reports from January 21, 2010 and January 26, 2010, the student's December 15, 2009 psychological evaluation report, the student's December 14, 2009 educational evaluation report, and the student's October 21, 2009 social history (*id.* at pp. 5-6). In addition, I note that the MDR team meeting minutes indicate that the team considered all information in the student's file that was deemed relevant to the issue (Dist. Ex. 39 at p. 2), and moreover, that at the MDR meeting, the team reviewed the student's IEP, that the team discussed aspects of the student's BIP, and that the team appropriately reviewed the student's most recent neuropsychological evaluation, which had not been available to the team members at the prior CSE subcommittee meetings, but was slated to be reviewed the next time that the CSE convened (Dist. Ex. 39 at pp. 2-3; Parent Ex. 31). In addition, the hearing record reflects that the district considered the most recent March 3, 2011 psychiatric evaluation and that the psychiatric consultant who prepared the report actively participated in the MDR meeting (Parent Ex. 31). Accordingly, upon review of the hearing record, I find that members of the MDR team had met numerous times as part of a CSE subcommittee to review the student's program during the 2010-11 school year, and had reviewed the student's file as recently as February 4, 2011, and moreover reviewed the information from the student's file pertinent to making a decision in the instant case on April 25, 2011 (see Fitzgerald, 556 F. Supp. 2d at 559).

Next, I find that the impartial hearing officer erred in determining that the MDR team predetermined that the student's behavior was not caused by his disability. A review of the hearing record does not support the impartial hearing officer's conclusion that shortly after the psychiatric consultant joined the MDR meeting which was in progress, the pupil personnel director advised her that the team had already found that the student's behaviors were not a manifestation of his disability (Parent Ex. 31). In contrast, the audio recording indicates that before the student's psychiatric consultant joined the meeting, the pupil personnel director introduced the participants, discussed the focus of the meeting, outlined the charges resulting in the suspension, and the applicable standard, and that when the student's psychiatric consultant joined the meeting, the pupil personnel director reiterated what had been noted on the record and did not make a finding about whether the student's behavior was caused by his disability at that time (*id.*). Moreover, the hearing record reflects that the parents had the opportunity to participate at the April 25, 2011 MDR meeting, that team members considered the student's background and the conduct charged in the April 2011 referrals, and at the conclusion of the meeting, determined that the student's conduct was not a manifestation of his disability (*id.*; *Fitzgerald*, 556 F. Supp. 2d at 561). Accordingly, I find that the impartial hearing officer's predetermination finding is unsupported by the hearing record.

Substantive Issues

Relationship of Conduct to the Student's Disability

The district further asserts that the impartial hearing officer erred in determining that the student's conduct, as described in three referrals from April 2011, was a manifestation of his disability. I will now review the impartial hearing officer's determination as it relates to the three conduct referrals at issue concerning incidents of "bullying," using improper language in an after school academic study hall, and using a magnet to damage a computer monitor (Tr. pp. 73-84; Dist. Ex. 34).

Regarding the bullying incident, I initially find that the information presented at the MDR and the impartial hearing lack a clear description and timeline of incidents, making it difficult to determine whether the conduct in question was caused by or had a direct and substantial relationship to the student's disability; or was the direct result of the school district's failure to implement the IEP (*see* 8 NYCRR 201.4[c]). At the MDR meeting, the information presented indicated that the bullying took place over an extended period of time and was directed toward the same individual, that the student ignored directives to stop his behavior including a directive resulting from a prior mediation session (Parent Ex. 31). The exact timeline of the directives and the behavior, however, are unclear, and although it was presented as ongoing, it was noted that the conduct was not mentioned in weekly reports that had been provided to the parents (*id.*). The behaviors comprising the bullying were described as waving and making apparently benign comments in a sarcastic manner to another student (*id.*). It was further noted that there was a mediation on December 9, 2010 for the behavior, which also included clapping when the other student stated a wrong answer, trying to draw class attention to her, and making her feel uncomfortable (*id.*). I note that at the MDR, the assistant principal indicated that he could not establish a timeline related to the frequency of the behavior, that the teacher indicated that he had been dealing with the situation, and that the student had been redirected and spoken to by the teacher (*id.*). In addition, I note testimony at the impartial hearing by the assistant principal regarding the "bullying" incident: "I can't give you dates but both students and the teacher ha[ve]

suggested to me that it occurred throughout the semester and the teacher when I interviewed him said again he didn't have dates either but he had redirected [the student] on the behavior himself and he felt he had handled it" (Tr. pp. 74-74). Upon review, I note the reasoning of the MDR team in finding that the behavior was not substantially related to the student's disability included that the conduct had been ongoing (Parent Ex. 31). However, after the conclusion of the MDR meeting on April 25, 2011, and specifically on April 28, 2011, the assistant principal wrote to the parents advising about an error in asserting that the bullying of the named individual dated back to middle school (Tr. p. 89; Dist. Ex. 35) and the letter further indicated that the student had only been documented for two instances of bullying the named individual for the 2010-11 school year, but the letter does not indicate which two instances were documented (Dist. Ex. 35). Accordingly, the hearing record regarding the description of the conduct in question is unclear and the extent of the ongoing nature and/or frequency of this conduct and timeline are also unclear. Accordingly, I find insufficient information in the hearing record to determine whether the student's conduct had a direct and substantial relationship to the student's disability, based on the lack of clarity described above. In addition, I note that the student's BIP provides that when the student is given consequences for behavior that violates the school code of conduct, it is important for consequences to be given immediately or as soon as possible, for them to achieve maximal impact and for them to have meaning for the student (Dist. Ex. 28 at p. 2). Upon review of the hearing record, although there are indications that the student was redirected, I do not find support for a finding that consequences were given consistently, immediately or as soon as possible and this finding is tied to the lack of a clear timeline and description of behaviors comprising the "bullying." Also, while the student's BIP indicates that counseling can be employed for the student's cognitive skill development, there is no indication that it was employed regarding this incident. Accordingly, I find the hearing record insufficient to make a determination as to whether the student's conduct regarding the "bullying" incident was a manifestation of the student's disability.¹⁰ Notwithstanding the above determination, I find that it is not necessary to remand this matter for the MDR team to meet for further evidence based upon the discussion and relief indicated below.

Regarding the incident of inappropriate language at the after school general education study hall, which was for students engaged in extracurricular activities with grades falling below a certain level, I find that the hearing record supports a finding that the student's conduct had a direct and substantial relationship to the student's disability. The student's teacher of the study hall testified that the student had lost focus, was looking around the classroom, made the inappropriate comment in response to newspaper articles about a professional football team that were displayed in the classroom, did not respond to the teacher's attempt to correct his language, and that the student became argumentative (Tr. pp. 115-16). A review of the hearing record reflects that this type of behavior is one of the types of impulsive behaviors that are targeted by the student's BIP, referenced in the student's most current evaluations, and has a direct and substantial relationship to the student's ADHD (see Dist. Exs. 26; 27; 28; 29; 30). Moreover, I note that at the MDR meeting, the consultant psychiatrist stated that the medication that the student takes for ADHD would have lost effect at the time that the student participated in the after school study hall (Parent Ex. 31). Accordingly, I find that the hearing record supports a finding that the student's conduct,

¹⁰ Although the hearing record does not support a finding that the student's BIP was properly implemented regarding this incident, I also find that the hearing record does not support a finding that the conduct in question was the direct result of the school district's failure to implement the IEP.

inappropriate language, at the after school study hall had a direct and substantial relationship to the student's disability.

Regarding the magnet incident, it was alleged that the student had placed a magnet on a computer monitor that caused damage to the monitor (Parent Ex. 31). Upon review of the hearing record, I initially find that the impartial hearing officer's statement that "I am not convinced that [the] student's action was not in some manner related to his established impulsivity," (see IHO Decision at p. 15) does not constitute the proper standard to apply. In reviewing whether or not this conduct is a manifestation of the student's disability, I note the student's acknowledgement of the wrongfulness of his actions, his admission that he would never touch the Macintosh computers "because they are very expensive" and find that his knowledge and selection of the monitor that would be damaged by the magnet indicates an awareness and strongly weighs against a finding of impulsivity (see Tr. pp. 81-82; Parent Ex. 31). Moreover, I note that at the end of the MDR meeting, the consultant psychiatrist indicated that the act of damaging the district's computer did not appear to be the product of impulsivity (Parent Ex. 31; see also Dist. Exs. 26; 27; 28; 29; 30). In addition, a review of the student's IEP and BIP in effect on the date of the incident does not indicate that this type of conduct (e.g. property damage) was an ongoing concern needing to be addressed (see Dist. Exs. 9; 28). Accordingly, I find that the hearing record does not support a finding that the student's conduct with the magnet and computer screen had a direct and substantial relationship to the student's disability or that the student's conduct was the direct result of the school district's failure to implement the student's IEP.

Conclusion

In sum, I find that the impartial hearing officer erred in determining that the MDR team failed to review all relevant information in the student's file and that the MDR team predetermined that the student's conduct was not a manifestation of his disability. In addition, I find that the impartial hearing officer erred in determining that conduct regarding the April 2011 referrals for the "bullying" and "magnet" incidents had a direct and substantial relationship to the student's disability.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that those portions of the impartial hearing officer's decision dated June 6, 2011 that find that the MDR team failed to review all relevant information in the student's file and predetermined that the student's conduct was not a manifestation of his disability are hereby annulled; and

IT IS FURTHER ORDERED that the part of the impartial hearing officer's decision dated June 6, 2011, that finds that the student's conduct regarding the April 2011 "bullying" referral had a direct and substantial relationship to the student's disability is hereby annulled; and

IT IS FURTHER ORDERED that the part of the impartial hearing officer's decision dated June 6, 2011, that finds that the student's conduct regarding the April 2011 "magnet" referral had a direct and substantial relationship to the student's disability is hereby annulled; and

IT IS FURTHER ORDERED that the district shall, unless the parties otherwise agree, review the student's BIP and modify it as necessary to address the student's behaviors which have a direct and substantial relationship to the student's disability (20 U.S.C. § 1415[k][1][F][i]-[ii]; 34 C.F.R. § 300.530[f][1][i]-[ii]; 8 NYCRR 201.3) and the district shall take immediate steps to correct any deficiencies in the implementation of the student's BIP (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 district has not already taken such actions.

Dated: **Albany, New York**
 August 12, 2011

STEPHANIE DEYOE
STATE REVIEW OFFICER