



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 23-040

**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:**

Mobilization for Justice, attorneys for petitioner, by Andrew Gerst, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which upheld a manifestation determination review (MDR) team's determination that the student's behavior was not a manifestation of his disability and sustained a school imposed disciplinary suspension during the 2022-23 school year. The appeal must be dismissed.

### **II. Overview—Administrative Procedures**

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

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

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

In April 2021, the student was observed while in a district sixth grade 12:1+1 English language arts (ELA) special class, at which time eight students were completing written work (Parent Ex. C).<sup>1</sup> Reportedly, the student worked well by raising his hand to respond to questions and was well focused, but it was noted that he was not completing work at the same speed as his peers (id.). The student was observed to cover his ears and become upset when other students

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<sup>1</sup> The hearing record contains multiple duplicative exhibits (see e.g. Parent Exs. A; B; C; D; F; I; L; M; L; Dist. Exs. 1, 2, 3, 4, 5). For purposes of this decision, only parent exhibits were cited in instances where both a parent and district exhibit were identical. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5 [j][3][xii][c]).

were being "very loud," and the evaluator noted that the student did not participate voluntarily during a lesson (id.). According to the observation report, when the teacher left the front of the room to assist other students, the student began writing inappropriate things about his teacher on his desk and stated, in his writing, that he did not want to do work and wished to be left alone (id.). Reportedly, "[e]very time after that when the teacher approached his desk he would point to the statement that said he wished to be left alone" (id.).<sup>2</sup> The evaluator indicated that the student "present[ed] with [a]utism like behaviors" (id.).

An April 2021 administration of the Childhood Autism Rating Scale, Second Edition (CARS 2-ST) to the student yielded scores correlating to a designation of mild-to-moderate symptoms of autism spectrum disorder (Parent Ex. B at p. 1). In the areas of emotional response and listening response the evaluator, who was not identified within the April 2021 report, rated the student with a "4" on a scale of 1 to 4, which indicated that the student exhibited severely abnormal emotional and listening responses (id. at pp. 1, 2, 4). The evaluator rated the student at a level "3," indicating moderately abnormal intellectual function, and a level "2.5," indicating mildly to moderately abnormal verbal communication (id. at pp. 1, 4, 5).<sup>3</sup> In the remaining 11 areas rated, the student was found to have normal/appropriate or mildly abnormal behaviors (id. at pp. 1-5).

An April 18, 2021 Level 1 vocational assessment report reflected that the student had not demonstrated projected secondary expectations, any interest or understanding in the world of work, or any interest in post-secondary education or a career (Parent Ex. J). Reportedly, the student could apply knowledge and skills to different settings with prompting and it was determined that the student needed to develop his self-advocacy skills and interpersonal skills (working with classmates and teachers) (id.). In discussing activities that motivated the student, the report stated that he liked to work independently and enjoyed activities that had puzzles or "coloring (mystery pictures)" and that he did not enjoy working with other people and often did not ask for help unless he really needed it (id.).

A CSE convened on May 20, 2021, to conduct the student's annual review and develop his IEP for the 2021-22 school year (seventh grade) (Parent Ex. K). Finding the student eligible for special education and related services as a student with autism, the CSE recommended a 10-month 12:1+1 special class placement for ELA, math, social studies, and science and two 40-minute sessions per week of speech-language therapy in a group of five (id. at pp. 1, 16-17, 18, 22).<sup>4</sup>

The student attended the district school for the 2021-22 school year in a self-contained program (see Dist. Ex. 2 at p. 23). A May 3, 2022 Level 1 vocational assessment stated that the

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<sup>2</sup> The observation report stated that the observation had been conducted during remote/blended instruction and that as this is a novel learning environment there may be multiple variables that impact the assessment (Parent Ex. C).

<sup>3</sup> According to the CARS 2-ST, a rating of "3" indicated that the student's "overall intelligence is in the range from intellectually disabled to average . . . and there is significant variability in skills," with at least one skill in the average range (Parent Ex. C at p. 5).

<sup>4</sup> The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8 [c][1]; 8 NYCRR 200.1 [zz][1]).

student was "very aware that there [wa]s work to be done and completed" and that while he "stay[ed] focused" he could become "very frustrated easily when he [wa]s stuck or needed help" and since he did not vocalize that he needed help teachers needed to pay close attention to his behavior changes (id.). Reportedly, the student was able to complete computations and solve different level problems and he liked picking activities and completing puzzle-like activities but struggled on a social level as he did not express himself or his needs (id.). The assessment report stated that the student had shown improved participation in class and although he struggled with peer collaboration he had demonstrated improvement in that area (id.). While he was quiet and struggled with lengthier verbal explanations, the student had become more confident in sharing answers (id.). According to the assessment report the student was expected to attend high school and college (id.). These goals and expectations were deemed to be realistic and the evaluator identified areas needing development such as the student's expressive language skills, including expressing his needs when he needed help or clarification, "people skills," group work, and "participating more" (id.).

On May 3, 2022, a CSE convened to conduct the student's annual review and develop his IEP for the 2022-23 school year (eighth grade) (Parent Ex. L). Consistent with the May 2021 IEP, the CSE recommended a 10-month 12:1+1 special class placement for ELA, math, social studies and science and two 40-minute sessions per week of speech-language therapy in a group of five (compare Parent Ex. K at pp. 1, 16-17, 18, 22, with Parent Ex. L at pp. 1, 13-14, 19). The May 2022 IEP present levels of performance stated that the student did not like loud noises, experienced high anxiety in particular situations, struggled to express himself verbally, and could become easily frustrated (id. at p. 3). Regarding ELA, the student was performing on a third grade level and the IEP noted that the student had "come out of his shell little by little" as the year had progressed, participated more and more every week, responded "very well" to verbal positive reinforcement and encouragement, and worked well in small groups with a teacher or paraprofessional (id. at pp. 3-4). With respect to math, the student presented with skills at an early seventh grade level and as a very bright and focused student, constantly came to class prepared, and struggled to verbally express his reasoning (id. at pp. 1, 4). Reportedly, the student was "very reserved," had shown significant growth in sharing his answers and becoming more confident in speaking louder in class, but would not ask for help when he was confused or needed clarity on a topic; rather, a teacher or paraprofessional needed to check and monitor his behavior as he could become frustrated or start to fidget in his seat (id. at p. 4). During speech-language sessions, the student reportedly always arrived first and was always prepared, had made some progress over the course of the year with his oral expressive language skills, took a very long time to express that he was confused, and could get frustrated when he did not have an answer (id. at p. 5). Socially, the IEP reflected teacher report that the student was willing to work in groups when needed and when prompted, responded back to peers and tried to explain his work (id. at p. 6). The parent indicated that his only concerns were the student's social abilities and expressed how the student struggled to carry conversations and adjust to different social environments as the student had some delays (id.).

The student attended a district 12:1+1 special class during the 2022-23 school year (see Parent Ex. N at pp. 1, 2). In an October 31, 2022 email to the school counselor, the parents shared that they "would like [the student] to receive counseling on his IEP as a regular basis" and inquired as to "what we need to do or what information to provide to get service as soon as possible" (Parent Ex. F). On November 2, 2022, the school counselor forwarded the email regarding the parent's

request for counseling to the school psychologist (id.; see Parent Ex. I at p. 1). In connection with that request, the school psychologist began a reevaluation of the student (Dist. Ex. 8 ¶ 12).

A December 12, 2022 classroom observation was conducted by the school psychologist during the student's science class, which at the time consisted of nine students, one special education teacher, and one paraprofessional (Parent Ex. I). Reportedly, the student was easily distracted by outside stimuli and sensory input, struggled to remain on task, did not socialize with peers during "paired work," took a pencil from his partnered peer without asking, and appeared to work better independently (id.). It was further noted that the student was respectful of adults within the classroom and followed all school wide rules within the classroom (id.).

In a December 13, 2022 hand-written statement, the student acknowledged that he had brought a knife to school "yesterday" (December 12, 2022) "to kill or murder my paraprofessional" (Parent Ex. D).<sup>5</sup> In his statement, the student discussed that he had had these thoughts "ever since last week or so" and that they were caused by watching his phone late at night (id.).<sup>6</sup> The student stated that he had "other negative thoughts" including breaking into the school building to do "insane, crazy bad stuff" such as banging on each classroom door with a hammer, hitting everyone in each classroom with the hammer, and "then getting away with it and escaping for my life" (id.). Additionally, the student wrote about going to the school at midnight and "destroying or taking down the school building" by lighting it on fire or by "exploding the building with dynamite or grenades" (id.).

A December 13, 2022 hospital psychiatric emergency department provider note stated that the student walked into the "CPEP" accompanied by his parent, referred by the school, with a written statement endorsing homicidal ideation with plan/intent (student took a kitchen knife to school yesterday) and ideation to destroy the school (Parent Ex. G). The parent denied past CPEP visit/psychiatric inpatient admission, and the student denied history of suicide attempt/self-injurious behavior/abuse/bullying (id.). At that time, the student reported much of what was shared in his written statement and that he felt remorseful for his actions (id.). The student also reported that he did not want to hurt anyone and stated, "I want the negative thoughts to go away" (id.). Reportedly, a safety plan was completed and the student was to "contract for safety" (id.). A December 13, 2022 letter from the hospital stated that the student was evaluated in the emergency room that day and was then-currently able to return to school (Dist. Ex. 6).

A December 15, 2022 notice of superintendent's suspension informed the parent that the student had been suspended from school starting on December 15, 2022 and explained that the student was "being removed from school prior to the suspension hearing because [his] continued presence in school pose[d] a continuing danger to persons or property or an ongoing threat of disruption to the academic process" (Dist. Ex. 5 at p. 21). Specifically, the notice included the "[c]harge(s)" against the student, which included that he "[w]as in possession of a dangerous

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<sup>5</sup> The student dated the written statement form "12/23/22"; however, the incident occurred on December 12, 2022 (Dist. Exs. 5 at p. 3; 8 ¶ 17).

<sup>6</sup> The MDR worksheet included reporting from the student's parent that the student "did not sleep the entire week prior" and that they were unaware that he was watching "creepy videos" with "challenges to children" of "going out in the dark to hit people" and videos of "people burning places at night" (Dist. Ex. 5 at p. 4).

weapon" (knife) and that the student "[s]tated he was going to stab his [p]ara[professional]" (id. at p. 24). According to the suspension notice, that behavior constituted a danger to the health, safety, and welfare and morals of the student and others at the school (id.). The suspension notice identified the alternate instruction site to which the student was assigned to attend and indicated that a suspension hearing was scheduled for December 21, 2022, an MDR meeting was scheduled for December 23, 2022, and a suspension plan meeting was scheduled for January 5, 2023 (id. at pp. 21-22).

A December 22, 2022 eighth grade 12:1+1 special class math teacher report indicated that the student was an English language learner and identified his strengths in math (Parent Ex. N at pp. 1-4). According to the teacher report, the student sometimes required adult support, learned well individually, had not been successful with group work as he was described as "very shy," benefitted from guided notes/checklists/visual representations/graphic organizers, studied for exams, completed homework and classwork, reviewed material independently, attended class regularly, and arrived prepared and on time (id. at pp. 4-6). With respect to social/emotional functioning, the report identified "[s]elf-control" as the only skill displayed by the student, indicating that the student did not display skills such as collaborating and getting along with peers, respecting boundaries, responding to authority, coping strategies, accepting constructive criticism and responsibility, self-esteem, and self-advocacy (id. at p. 5). It was noted that the student demonstrated anxious behaviors such as "picking nails until he bleeds" (id. at p. 6).

A December 22, 2022 eighth grade 12:1+1 special class ELA teacher report stated that the student's estimated independent level for decoding and reading comprehension was second grade and that he was significantly below peers in sight word recognition, decoding, vocabulary, literal reading comprehension, and oral reading fluency (Parent Ex. M at pp. 1-3). The student was described as being very focused, successful in completing a reading task when prompted, and determined to do well and complete readings within a class period (id. at p. 3). The ELA report stated that the student displayed the following social/emotional skills; respected boundaries with adults and peers, responded to authority, and accepted responsibility (id. at p. 6). Notably, the following skills were not reported as being displayed; getting along and collaborating with classmates, self-control, coping strategies, accepts/applies constructive criticism, and self-advocacy (id.). It was noted that the student rarely spoke to other classmates, even when prompted (id. at p. 7).

A December 23, 2022 hospital behavioral health unit follow-up treatment report stated that the student came with his parent for a medication evaluation (Parent Ex. H at p. 1). The treatment report stated that the student presented with symptoms of depression and anxiety and that the student reported that he bit his nails, picked his skin, felt depressed, woke up in the middle of the night and found it hard to go back to sleep, felt tired and exhausted in the morning, and had trouble focusing (id.). According to the treatment report the student denied symptoms of hypomania/mania or psychosis and denied current illicit drug use (id.). The parent reported that the student was "doing okay in the school" (id.). The goals of the treatment sessions included the following: decrease symptoms of depression and anxiety, prevent relapse of symptoms, improve level of independent functioning, treatment adherence, assess mental status, review safety, and psychoeducation (id. at p. 2). The intervention plan included: medication adjustment, discussion of medication risks and benefits, stress management techniques, and discussion of crisis intervention and mobilizing support system (id.). The student was found to meet the criteria for

diagnoses of a "[c]urrent moderate episode of major depressive disorder without prior episode," generalized anxiety disorder, and "[a]utistic disorder" (*id.* at p. 3).

The district conducted an MDR on December 23, 2022, and concluded that the student's behavior that led to the incident in question was not caused by nor did it have a direct and substantial relationship to the student's disability, as per observation and discussed data (Parent Ex. O; Dist. Ex. 5 at pp. 1, 4-5, 7, 11).

### **A. Due Process Complaint Notice and Subsequent Events**

In a due process complaint notice dated December 28, 2022, the parent asserted that the district failed to adhere to the requirements of the IDEA and Article 89 of the New York State Educational Law, as well as federal and State regulations in the MDR held on December 23, 2022 (Parent Ex. A at p. 1). Specifically, the parent asserted that the district and the school made "[n]umerous, [s]erious, and [b]latant [v]iolations" of the law in: failing to consider special education documents appropriately; reaching a conclusion unsupported by the weight of the evidence; using an incorrect legal standard required for the MDR; withholding a witness statement of the incident from the parent; "punish[ing] the parent" for failure to produce other documents related to the incident; and making other unspecified procedural and substantive errors (*id.* at pp. 2-5). The parent also asserted that the behavior resulting in the suspension was a manifestation of the student's disability (*id.* at p. 5). According to the parent, the student experienced anxiety leading up to the incident, which was "triggered by [the student's] inability to express his fear and other emotions appropriately after watching upsetting and violent videos" (*id.*). As relief, the parent requested: (1) a finding that the school failed to provide the student with an impartial MDR, in violation of the IDEA and other relevant laws; (2) a finding that the behavior in the alleged incident was a manifestation of the student's disability of autism; (3) immediate reinstatement of the student into his classroom; and (4) expungement of all notation of the suspension from the student's educational records (*id.* at p. 6).

A January 3, 2023 district letter to the parent stated that the parent entered a plea of no contest to the charges contained in the December 14, 2022 letter of suspension and that the effective date of the suspension was December 15, 2022 and would continue for 11 school days at which time the student would be reinstated to "the regular program" on January 9, 2023 (Parent Ex. O). The letter indicated the notation on the student's record and subsequent expungement of the record "upon completion of the terminal grade of the current school" (Parent Ex. O).

Various January 9, 2023 emails among district staff discussed the resolution meeting for the MDR appeal regarding the expungement of the student's record (Dist. Ex. 7 at pp. 1-3).

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

The IHO conducted a prehearing conference on January 12, 2023 and the parties proceeded to a hearing on the merits on January 26, 2023 (Tr. pp. 1-154). In a decision dated February 13, 2023, initially, the IHO noted that as it was uncontested that the student brought a knife to school with the intent to harm another, as evidenced by the student's written admission and the parent's "no contest" plea, and the student's IEP was fully implemented at the time, the only remaining question was whether the manifestation determination review was incorrect in determining that

the student's conduct was not a manifestation of his disability, and as the student was already reinstated in the classroom, the only viable relief requested was whether the student's record should be expunged (IHO Decision at pp. 15-16. 19).

With respect to the procedural errors alleged, the IHO found the parent's assertion that the district failed to consider special education documents appropriately to be without merit and that it did not constitute a procedural violation or negatively impact the student or the parent's ability to participate at the MDR (IHO Decision at pp. 16-17). Second, with respect to the substantive issues, the IHO found the correct legal standard was applied—namely, whether the MDR team considered if "the conduct in question was caused by or had a direct and substantial relationship to the student's disability" and that statements to the contrary (requiring both causation and a direct relationship) were not credited and the MDR worksheet reflected the correct standard (*id.* at pp. 17-18). The IHO also found that the record supported the MDR's finding that the student's behavior was not caused by nor did it have a direct and substantial relationship to his disability as: the entirety of the student's history indicated that his autism, along with any observed anxious or anxiety-related behaviors, never manifested in weapons possession or thoughts of violence previously; although not formally diagnosed in his IEPs, the student's anxiety had been well-documented and the MDR correctly noted that his triggers for anxiety stem from school work; the parent suggested that "late-night scary videos" and a lack of sleep caused the student's conduct, but "what is missing from this train of thought" is how the student's disability factored into the equation; although the school psychologist acknowledged that the student's recent conduct of watching scary and violent videos is likely to have influenced his behavior, she concluded that bringing a knife to school was not a manifestation of his autism and anxiety; and overall there was no evidence in the hearing record to suggest that such an aberration from the student's usual conduct could be caused by or have a direct and substantial relationship to his disability (*id.* at p. 18).

The IHO concluded that the MDR was appropriately conducted and did not suffer from any procedural or substantive violations that would nullify its findings (IHO Decision at p. 18). The IHO agreed with the MDR team's determination that the student's conduct was not caused by and did not have a direct and substantial relationship to the student's disability (*id.*). Accordingly, the IHO declined to reverse the MDR team's findings and expunge the suspension from the student's record and denied the parent's requested relief in its entirety (*id.*).

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

The parent appeals and asserts that the hearing record does not support the IHO's decision to uphold the MDR team's finding of "no manifestation" with respect to the procedural deficiencies in the MDR and that the IHO materially misrepresented, and drew an impermissible inference from, the student's psychiatric hospital records and letter. The parent also asserts that the IHO made other reversible errors in discussing the MDR; for example, the parent contends that the MDR should have been paused to allow the parent to obtain the student's hospital record, that the IHO erred in finding *sua sponte* that having the hospital records would not have impacted the MDR, that the IHO should not have considered the safety of returning the student to school as that is not part of the legal standard for an MDR, and that the hospital records supported the parent's position that the student was experiencing anxiety. The parent argues that the hearing record does not support the IHO's decision to uphold a finding of "no manifestation," with respect to the



relationship of the conduct in question to the student's disability, as numerous documents, which the IHO "ignored outright," illustrate the direct and substantial relationship between the student's autism, anxiety, and behavior. According to the parent, the autism rating scales shows that the student exhibited "severely abnormal emotional response[s]," which were "seldom appropriate to the situation"; accordingly, the parent contended that the student's inappropriate reaction to the upsetting videos was a manifestation of his disability. The parent asserts that once the student became "overwhelmed with anxiety," he could not "change the mood." The parent contends that the IHO erred in finding the testimony of the district school psychologist credible due to inconsistencies in her testimony and further erred in finding the district school counselor credible as she had limited personal knowledge of the student. The parent also contends that the IHO made other errors in the conduct of the hearing, asserting that the IHO lost control of the hearing and allowed it to be controlled by the district's attorney, that the IHO did not address objections appropriately, that the IHO failed to render a decision within the applicable timeline, and that the IHO improperly granted the district an extension after the district failed to appear for a hearing. Finally, the parent argues that mootness does not apply as the parent filed the request for review prior to the end of the current school year. As relief, the parent requests (1) a finding that the district failed to provide the student with an impartial MDR; (2) a finding that the behavior in the alleged incident was a manifestation of the student's disability; and (3) expungement of the notation of the suspension from the student's records. The parent requests that this matter not be remanded as the student "is unable to receive an impartial MDR at the school."

The parent also submits additional evidence with his papers on appeal, consisting of email correspondence between the parties and the IHO regarding the district's request for an adjournment of the hearing and the parent's objection and a January 31, 2023 notice of teacher removal indicating the student was removed from math class for four days.

In an answer, the district argues that the SRO should reject the additional evidence submitted by the parent and the IHO's decision should be affirmed. As relief, the district requests the parent's appeal be dismissed.

In a reply, the parent responds to the arguments set forth in the district's answer.

## **V. Applicable Standards**

The IDEA includes specific protections with regard to the process by which school officials may seek to effectuate 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]; Educ. Law §§ 3214[3][g]; 4404[1]; 34 CFR 300.530-300.537; 8 NYCRR Part 201). State regulations provide that a disciplinary change in placement means a "suspension or removal from a student's current educational placement that is either: (1) for more than 10 consecutive school days; or (2) for a period of 10 consecutive days or less if the student is subjected to a series of suspensions or removals that constitute a pattern because they cumulate to more than 10 school days in a school year" (8 NYCRR 201.2[e]; see 20 U.S.C. § 1415[k][1][B]; 34 CFR 300.530[b][2], [c]).

If a district is considering a disciplinary change in placement for a student with a disability, the district must conduct an MDR "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][i]; 34 CFR 300.530[e][1]; 8 NYCRR 201.4[a]). The participants in an MDR 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]; Educ. Law § 3214[3][g][2][ii]; 34 CFR 300.530[e][1]; 8 NYCRR 201.4[b]). The manifestation team must "review all relevant information in the student's file including the student's IEP, any teacher observations, and any relevant information provided by the parents to determine if: "(1) the conduct in question was caused by or had a direct and substantial relationship to the student's disability; or (2) the conduct in question was the direct result of the school district's failure to implement the IEP" (8 NYCRR 201.4[c]; see 20 U.S.C. § 1415[k][1][E]; 34 CFR 300.530[e][1]).

If the result of the MDR is a determination that the student's behavior was not a manifestation of his or her disability, "the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities" (20 U.S.C. § 1415[k][1][C]; 34 CFR 300.530[c]; see Educ. Law § 3214[3][g][vi]; 8 NYCRR 201.7[d]). However, if the result of an MDR is a determination that the student's behavior was a manifestation of his or her disability, the CSE is required to conduct a functional behavioral assessment (FBA) and implement a behavioral intervention plan (BIP) or, if the student already has a BIP, review the BIP and modify it as necessary to address the behavior (20 U.S.C. § 1415[k][1][F][i]-[ii]; 34 CFR 300.530[f][1][i]-[ii]; 8 NYCRR 201.3). Except under "special circumstances," the district must also return the student to the placement from which he or she was removed or suspended, unless agreed otherwise by the parent and district as part of the modification of the BIP (20 U.S.C. § 1415[k][1][F][iii]; Educ. Law § 3214[3][g][3][viii]; 34 CFR 300.530[f][2]; 8 NYCRR 201.4[d][2][ii]).<sup>7</sup>

As part of a disciplinary proceeding, a superintendent may remove a student with a disability to an IAES (interim alternative educational setting) if the student's conduct involved serious bodily injury, weapons, illegal drugs or controlled substances (20 U.S.C. § 1415[k][1][G][i]-[iii]; 34 CFR 300.530[g]; 8 NYCRR 201.7[e]).<sup>8</sup> Additionally, if a district requests an expedited hearing, an IHO may order a placement to an IAES even if the student is not subject to a disciplinary proceeding if the IHO determines "that maintaining the current placement of the student is substantially likely to result in injury to the student or to others" (8 NYCRR 201.8[a], [c]; see 20 U.S.C. § 1415[k][3][A]-[B]; Educ. Law § 3214[3][g][3][vii]; 34 CFR 300.532[c]; 8 NYCRR 201.11). An MDR meeting must be conducted within 10 school days after a superintendent or IHO decides to place a student in an IAES (see 8 NYCRR 201.4[a][1]-[2]). A student who is placed in an IAES shall "continue to receive educational services so as to enable that student to continue to participate in the general education curriculum . . . and to progress toward meeting the goals set out in the student's IEP" (8 NYCRR 201.2[k][1]; see 20 U.S.C. § 1415[k][1][D][i]; 34 CFR 300.530[d][1][i]; 8 NYCRR 201.10[d]).

If the parent of a student with a disability disagrees with a school district's decision regarding the student's placement, or a determination of the manifestation team, the parent may

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<sup>7</sup> A district and parents may agree to a change in the student's placement (20 U.S.C. § 1415[k][1][F][iii]; 34 CFR 300.530[f][2]; 8 NYCRR 201.4[d][2][ii]).

<sup>8</sup> An IAES is "a temporary educational placement, other than the student's current placement at the time the behavior precipitating the IAES placement occurred" (8 NYCRR 201.2[k]).

request an expedited impartial hearing (20 U.S.C. § 1415[k][3][A]; 34 CFR 300.532[c]; 8 NYCRR 201.11[a][3]-[4]; see Coleman v. Newburgh Enlarged City Sch. Dist., 503 F.3d 198, 201-02 [2d Cir. 2007]).

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. Mootness**

The parent argues that mootness should not be at issue in this case, as the parent filed his appeal prior to the end of the school year. Conversely, the district argues that the parent's request that the student's record be immediately expunged will become moot at the end of the school year, no later than June 30, 2023.

The dispute between parties must at all stages be "real and live," and not "academic," or it risks becoming moot (Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; see Toth v. City of New York Dep't of Educ., 720 Fed. App'x 48, 51 [2d Cir. Jan. 2, 2018]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254 [S.D.N.Y. 2012]; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at \*12 [E.D.N.Y. Oct. 30, 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at \*3-\*4 [W.D.N.Y. Sept. 30, 2008]; see also Coleman v. Daines, 19 N.Y.3d 1087, 1090 [2012]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]). 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., V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010]; Patskin, 583 F. Supp. 2d at 428-29; J.N., 2008 WL 4501940, at \*3-\*4; but see A.A. v. Walled Lake Consol. Schs., 2017 WL 2591906, at \*6-\*9 [E.D. Mich. June 15, 2017] [considering the question of the "potential mootness of a claim for declaratory relief"]). Administrative decisions rendered in cases that concern such issues that arise out of school years 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]; 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, 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]; Toth, 720 Fed. App'x at 51; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040). 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]). 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). Many IEP disputes escape a finding of mootness due to the short duration of the school year facing the comparatively long litigation process (see Lillbask, 397 F.3d at 85). 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]; Toth, 720 Fed. App'x at 51; see Hearst Corp., 50 N.Y.2d at 714-15). 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. of Enlarged City Sch. Dist. of City of Watervliet, 260 F.3d 114, 120 [2d Cir. 2001]). 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; but see A.A., 2017 WL 2591906, at \*7-\*9 [finding that the controversy as to "whether and to what extent the [s]tudent can be mainstreamed" constituted a "recurring controversy [that] will evade review during the effective period of each IEP for the [s]tudent"]; see also Toth, 720 Fed. App'x at 51 [finding that a new IEP that did not include the service requested by the parent established that the parent's concern that the prior IEP would be repeated was not speculative and the "capable of repetition, yet evading review" exception to the mootness doctrine applied]). However, generally, courts have taken a dim view of dismissing a Burlington/Carter reimbursement case as moot because all of the relief has been obtained through pendency (see, e.g., New York City Dep't of Educ. v. S.A., 2012 WL 6028938, at \*2-\*3 [S.D.N.Y. Dec. 4, 2012]).

The district further argues that, as explained to the parent in a January 3, 2023 letter, the student was scheduled to be reinstated on January 9, 2023, and any notation of the suspension would be expunged from the student's record upon his eighth grade graduation, at the end of the 2022-23 school year (Tr. p. 28; Parent Ex. O).<sup>9</sup> As noted above, the parent argues that mootness does not apply because the 2022-23 school year has not yet ended (see Parent Mem. of Law at p. 8).

While I acknowledge and accept these statements by the parties, and note that it is undisputed that the student was returned to his classroom, I take issue with the assertion that aside from immediate expungement of the student's record, there is no other "viable" relief possible (Tr. pp. 17-18, 28; IHO Decision at p. 15-16; Answer ¶10). Here, I find that the parent's appeal is not moot because, in the event that the parent were to prevail in reversing the IHO's decision and the MDR's determination, for the sake of argument—to find that the student's behavior was a manifestation of his disability—under federal and State law and regulations as noted above, the CSE would be required to conduct an FBA and implement a BIP as necessary to address the student's behavior. In other words, the parent's claim is not moot because there is the potential for obtaining meaningful relief in the form of an FBA and BIP if the parent were to prevail on appeal.<sup>10</sup>

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<sup>9</sup> The IHO noted that while parent exhibits A through N were admitted into evidence at the hearing, "an additional document which was submitted via email after the hearing" was admitted as Parent Ex. O (IHO Decision at p. 2). This exhibit was not marked as "P-Ex. O," but was received by OSR as part of the hearing record.

<sup>10</sup> Although I have found that the parent's appeal is not moot, I will address the parent's argument that if mootness does apply, an exception exists as the conduct is "capable of repetition yet evading review," because it includes a request for the consideration of additional evidence. Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is

## 2. Conduct of the Hearing and Credibility Determinations

The parent argues that the IHO made procedural and substantive errors, and failed to conduct the hearing appropriately as the IHO "appeared to lose control of the hearing many times" and did not address objections appropriately; the parent also asserted that the IHO failed to render a decision within the required timeline and improperly granted the district an adjournment after the district failed to appear at the prehearing conference.<sup>11</sup> The parent also asserts the IHO made credibility determinations unsupported by the hearing record in its entirety.

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-064).

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should

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unable to render a decision]). The parent offers, as additional evidence, a Notice of Teacher Removal dated January 31, 2023 relating to the student's removal from math class due to an incident on January 30, 2023 (Parent Mem. of Law, Proposed Post-Hearing Ex. Q). In its answer, the district argues that the parent's proposed exhibit should be rejected as procedurally infirm because it was annexed to the memorandum of law rather than the request for review. It has long been held that a memorandum of law is not a substitute for a pleading (8 NYCRR 279.4; 279.6; 279.8[c][3]; [d]; see Davis, 2021 WL 964820, at \*11; see, e.g., Application of a Student with a Disability, Appeal No. 15-070). While the parent's argument that mootness does not apply is included in the request for review, additional specific arguments as to why mootness does not apply are included in the parent's memorandum of law (Parent Mem. of Law at pp. 8-10). For example, the parent asserts that the subject matter of the current appeal is "capable of repetition" as evidenced by the student having received a second disciplinary removal (Proposed Post-Hearing Ex. Q), and "the same procedural and substantive issues" may have continued (Parent Mem. of Law at p. 9). I note this document was not before the MDR team when they considered the conduct at issue in this appeal, nor can it retrospectively establish the conduct is capable of repetition. In any event, here, the additional evidence is not necessary to render a decision and, therefore, it has not been considered.

<sup>11</sup> The parent further offers as additional evidence, an email exchange dated January 12-13, 2023 relating to an adjournment request by the district due to a conflict rendering the district's counsel unavailable on the hearing date of January 17, 2023 (Parent Mem. of Law, Proposed Post-Hearing Ex. P). The district asserts that the SRO should reject the additional evidence as the "email communications between Petitioners' attorney, the DOE attorney and the IHO... are not relevant for the SRO to issue a determination on whether the MDR team made an appropriate determination" and "the IHO acted properly and allowed both parties a meaningful opportunity to present a case" (Answer ¶ 7). State regulation provides that the hearing record includes copies of "all briefs, arguments or written requests for an order filed by the parties for consideration by the impartial hearing officer," as well as "all written orders, rulings, or decisions issued in the case" (8 NYCRR 200.5[j][5][vi]; 279.9[a]). Here, the email exchange included the district's request for an adjournment, the parent's objection, and the IHO's statement that she "would like to adjourn this matter" to either January 24 or January 26, 2023; therefore, the email correspondence submitted by the parents with their memorandum of law should have been included as a part of the hearing record and will be considered as part of the hearing record on appeal.

be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (*id.*). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

Although the parent may have reason to disagree with the IHO's conclusions, upon a careful review of the record, there is no basis to support the parent's allegations or find that the IHO prejudiced the parent through her conduct of the hearing, particularly with respect to her "control" of the hearing or handling of objections.

Initially, the parent argues that the IHO's loss of control of the hearing led to the district's attorney "usurping" the role of the hearing officer and making "numerous" inappropriate comments, attempting to set rules for cross-examination length, attempting to rule on her own objection, and making inappropriate "sarcastic" comments (*see* Tr. pp. 32, 108, 125, 127). The parent also argues that the IHO did not address objections appropriately, either failing to rule at all or appearing not to understand the basis for the objection or question (*see* Tr. pp. 43-44, 120-21, 129, 131-133). Notably, the parent does not specify or assert with any particularity that the IHO's alleged conduct affected either the parent's opportunity to present evidence or the parent's opportunity to otherwise exercise his rights under due process in the request for review, but only referenced generally that the IHO "failed to comment on, or admonish, these [district] remarks in any way, depriving the parent of a 'meaningful opportunity'...to present [the student's] case in a judicially appropriate forum" in the memorandum of law (*see* 8 NYCRR 200.5[j], [k]; Parent Mem. of Law at pp. 28-29).

I see nothing in the hearing record that concerns me with respect to the parent's allegations regarding the IHO's conduct and management of the hearing (Tr. pp. 32, 108, 125, 127). In fact, a review of the hearing transcript reveals that both parties were treated fairly, with courtesy, and with respect by the IHO during the impartial hearing (Tr. pp. 1-154). The hearing record also demonstrates that during the course of the hearing, objections were made by the attorney for the district and the attorney for the parent which resulted in the IHO making rulings both in favor of and against both parties (*see, e.g.*, Tr. pp. 44, 130, 133, 134, 150). According to the hearing record, the IHO correctly requested and offered clarification of issues in dispute, questioned witnesses, and made efforts to maintain the decorum of the proceedings while ensuring that each party had the right to be heard in an orderly manner (*see, e.g.*, Tr. pp. 43-46, 72, 85-86, 100-01, 112-13, 120-21, 127-28, 129-30, 150). The IHO remained courteous and did not manifest prejudice in either her words or her conduct of the hearing, including when ruling on objections, therefore, I find that the parent's contentions regarding the IHO's alleged errors in conducting the hearing are without merit.

Next, I will address the parent's arguments that the IHO improperly granted the district an adjournment after failing to appear at the prehearing conference and failed to render a decision within the required timeline. First, I note that the hearing record indicates that the adjournment appears to have been granted after a request was made by the district due to a scheduling conflict with the date selected by the IHO and the parent at the prehearing conference (Tr. pp. 4-5; Parent Mem. of Law, Proposed Post-Hearing Ex. P). While one of the purposes of a prehearing

conference is for scheduling the hearing, and the district failed to appear, scheduling could also be accomplished outside of a prehearing conference and a prehearing conference is not part of the impartial hearing but precedes it (Tr. p. 2; 8 NYCRR 200.5[j][3][xi]). Further, while State regulations governing expedited due process hearings provide that "[n]o extension to an expedited impartial hearing timeline may be granted," the distinction to be made is that the adjournment of the scheduled hearing date did not result in the hearing taking place outside of the regulatory timeline, as here, the expedited due process hearing was held on January 26, 2023, which was firmly within 20 school days of the date of the filing of the due process complaint notice requesting the hearing on December 28, 2022, as required by State regulation (8 NYCRR 201.11[b][3][iii], [4]).<sup>12</sup> However, I find that the parent is correct that the IHO failed to make a determination within 10 school days after the hearing as required under State regulation, as the record shows the decision dated February 13, 2023 was issued 12 school days after the January 26, 2023 hearing and was thus issued two days late (8 NYCRR 201.11[b][3][iv]). However, I do not find that it prejudiced the parent as the student had already been returned to the classroom on January 9, 2023, prior to the start of the hearing (Tr. pp. 17, 27-28; Parent Ex. O).

Finally, with respect to the parent's allegations that the IHO made credibility determinations unsupported by the hearing record in its entirety, generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at \*16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076).

Specifically, the parent first asserts that the IHO erred in finding the school psychologist credible in her assertion that the district provided the Online Occurrence Reporting System (OORS) report to the parent, which the parent contends never actually took place. Specifically, when questioned about the report the school psychologist testified that she did not personally provide the parent with the document, she was unable to answer basic questions about how the report was shared with the parent, she could not provide any emails documenting the alleged delivery of the report, and she was "unsure" if the parent received the report at all (Tr. pp. 61-62). The parent also asserts the IHO found the school psychologist fully credible despite inconsistent answers regarding both classroom observations, specifically as to when the 2021 observation took place (September vs. April) and whether it took place in a remote learning environment or not, and with respect to the 2022 observation regarding how much time she spent observing the student and whether or not the student took a pencil from a peer (Tr. pp. 86, 87, 103, 104, 107-108; Parent Ex. C; Dist. Ex. 8).

Second, the parent asserts the IHO found the school counselor fully credible despite her limited personal knowledge of the student, e.g., she had only met with the student for two or two

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<sup>12</sup> I take notice of the district's school calendar that indicated that schools were closed from Monday, December 26 through Monday, January 2, 2023 for winter recess and on Monday January 16, 2023 for Rev. Dr. Martin Luther King Jr. Day, equaling 17 school days between December 28, 2022 and January 26, 2023 (see <https://www.schools.nyc.gov/docs/default-source/default-document-library/parent-facing-calendar-2022-23>).

and a half hours total prior to the incident; she had never observed him in a classroom setting; despite being his "at-risk" counselor, she was unable to say how long the student had experienced negative thoughts, any details about the thoughts, whether or not the student had received positive feedback from adults when he had done well in classes, or whether or not the student enjoyed group work, although she agreed, in fact, that she had no knowledge of how he acted in class (Tr. pp. 38-47; IHO Decision at p. 11). Although the parent frames this argument as an attack on the school counselor's credibility, there is no indication that the school counselor was untruthful or inconsistent in her testimony, rather, the parent appears to be asserting that the school counselor's testimony should have been given less weight because of her limited knowledge of the student. In reviewing the IHO's decision, it does not appear that the IHO placed significant weight on it in reaching her determination; the IHO does not reference the school counselor's testimony in the analysis portion of her decision, relying instead on the testimony of the school psychologist and the documentary evidence (see IHO Decision at pp. 15-18).

Here, I agree with the district that there are no documents in the hearing record that conflict with the school psychologist's testimony that she was not sure whether the parent was provided with a copy of the OORS report, noting that she believed the dean provided it to the parent prior to the meeting (Tr. p. 61; District Ex. 5; IHO Decision at p. 12). In addition, the IHO correctly weighed the testimony of both witnesses against the student's needs as described in the MDR worksheet and in the documents reviewed by the MDR team (IHO Decision at pp. 14-18). For example, the IHO noted that she credited the school psychologist's testimony as to the OORS report because it was supported by the OORS report being cited in the MDR worksheet (Dist. Ex. 5 at pp. 3-4).

To the extent that the parent disagrees with the IHO's credibility findings or conclusions reached by the IHO based on statements in the hearing record, such disagreement does not provide a basis for finding actual or apparent bias by the IHO (see Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 [2d Cir. 2009] [finding that "[g]enerally, claims of judicial bias must be based on extrajudicial matters, and adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality"]; see also Liteky v. United States, 510 U.S. 540, 555 [1994] [identifying that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"]; Application of a Student with a Disability, Appeal No. 13-083).

## **B. Manifestation Determination Review**

The parent argues that the hearing record does not support the IHO's decision to uphold the MDR team's finding of "No Manifestation."

### **1. Procedural Violations**

To begin, the parent argues that the evidence in the hearing record does not support the IHO's decision to uphold a finding of "No Manifestation," with respect to the procedural deficiencies in the MDR. Specifically, the parent contends that the IHO made a number of significant misrepresentations of and impermissible inferences from key hospital records regarding the student.



As detailed above, the hearing record includes three exhibits containing hospital records; the December 13, 2022 hospital psychiatric emergency department note, the December 13, 2022 hospital letter, and the December 23, 2022 hospital behavioral health follow-up treatment report (Parent Exs. G; H; Dist. Ex. 6).

As an initial matter, the parent argues that while "these hospital records were part of the impartial hearing record, the parent did not have them at the time of the MDR" and the IHO "materially misrepresented" the hearing record regarding the district's lack of willingness or eagerness during the MDR to allow the parent time to pause the MDR and obtain the student's psychiatric hospital records. In support of this position, the parent points to testimony in which the school psychologist acknowledged that the MDR team chose not to adjourn the meeting in order to allow time for the hospital records "to be received" (see Tr. pp. 58-59).

Regarding adjournment, the IHO correctly noted that it was unclear whether an adjournment was, in fact, requested at the time of the MDR, as the hearing record reflects that during the MDR the parents said that "they did not initially feel comfortable requesting the evaluation from the hospital" (IHO Decision at pp. 16-17; see Tr. pp. 117-18). In her written testimony, the school psychologist stated that the district had not received the "psychiatric evaluation," referring to the December 13, 2022 hospital psychiatric emergency department note, from when the student was assessed at the hospital after the incident, despite the district's requests (see Dist. Ex. 8 at ¶ 24). The school psychologist also noted that when the parent eventually obtained the hospital evaluation, it was provided to the district after the MDR, after the due process complaint notice was filed in this matter, and just two weeks prior to the hearing date (IHO Decision at p. 17; see Tr. pp. 117-18).

Accordingly, the evidence in the hearing record does not support the parent's position regarding the district's willingness to allow time for additional materials, namely the student's hospital records, to be included in the MDR.

The parent provides additional arguments with respect to the hospital records. The parent takes issue with the IHO's position that the MDR was not procedurally flawed despite the lack of any discussion of these hospital records and further, the parent contends that the IHO "erroneously" found that the "[p]arent's counsel points to no specific information in the hospital records which would have impacted the MDR process in any way, especially in light of the hospital's own letter to the [d]istrict stating that it was safe for the [s]tudent to return to school" (see IHO Decision at p. 17; Dist. Ex. 6).<sup>13</sup>

First, with respect to this issue, the parent argues that the IHO's statement that the hospital records would not "have impacted the MDR process in any way" appeared to be contrary to what both parties had contended. The parent correctly notes that the school psychologist testified that having the December 13, 2022 psychiatric emergency department provider note "would have been helpful" for the MDR (see Tr. pp. 58-59; Parent Ex. G). In the due process complaint notice, the parents contended that school staff had indicated "that they 'wished' they had a copy of the document for discussion at the MDR and urged the family to obtain a copy" (Parent Ex. A at p. 5).

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<sup>13</sup> I note that the December 13, 2022 hospital letter stated that the student was "currently able to return to school" (Dist. Ex. 6).

When the school psychologist was questioned if she "wished that the team had [the December 13, 2022 hospital psychiatric emergency department note]" she responded that "it would have been helpful in the determination" and when further pressed by counsel for the parent asking "So that's a yes, you did wish that it w[as] present, words to that effect?," she repeated that "it would have been helpful in the determination" (Tr. pp. 58-59). Here, I note that the school psychologist did not state that the December 13, 2022 hospital psychiatric emergency department provider note was required or that after reviewing the report that it contained some information which would have impacted the MDR process or the team's determination. Again, as noted above, the conduct of an MDR must take place, "in no case later than 10 school days" after a decision is made to impose a disciplinary change in placement of a student with a disability due to a violation of a code of student conduct (8 NYCRR 201.4[a]; see 20 U.S.C. § 1415[k][1][E][i]; 34 CFR 300.530[e][1]). Additionally, 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 (8 NYCRR 201.4[c]; see 20 U.S.C. § 1415[k][1][E]; 34 CFR 300.530[e][1]). In this instance, although the December 13, 2022 hospital psychiatric emergency department provider note could have provided additional information regarding the student, it was reasonable for the MDR team to move forward with the MDR to ensure that it was completed within the mandated timeline.

Second, the parent argues that the IHO appeared to indicate an incorrect understanding of the legal standard under which an MDR team must consider whether or not there is a direct and substantial relationship between the behavior and the student's disability. The parent contends that whether or not a student is "safe" to return to school is not relevant. In this case, while the parent is correct that the language used by the IHO with respect to the MDR team's need for additional documents noted that the hospital sent a letter to the district indicating it was safe for the student to return to school, the IHO treated this as a procedural issue and the use of this language does not demonstrate that the IHO applied an incorrect standard in her determinations (see IHO Decision at pp. 16-17). In particular, a review of the IHO's decision reveals that the IHO stated the legal standard for conducting an MDR on a number of occasions, including at the start of the IHO turning to the substantive issues in the paragraph after discussing the letter from the hospital, as well as in her review of the facts, in a discussion of the applicable legal standards, and in her determination that "the finding that the [s]tudent's behavior was not caused by nor had a direct and substantial relationship to his disability is supported by the MDR record" (see IHO Decision at pp. 10, 14-15, 17, 18).

Third, the parent argues that contrary to the IHO's statement, the parent pointed to many pieces of "specific information" in the hospital records which would have affected the MDR. The parent specifically notes the diagnosis of generalized anxiety disorder contained in the hospital behavioral health follow-up treatment report, despite the district's contention that the student presented with "anxious behaviors" but not anxiety (see Tr. pp. 37, 112; Parent Ex. H at p. 3). The school psychologist stated that in describing the student she could say that it appeared that he struggled with "anxious-like behaviors," but that she could not "diagnose" anxiety (Tr. p. 112). The student's May 2022 IEP does not reflect that the student had received a diagnosis of anxiety (see Parent Ex. L). Accordingly, the diagnosis of generalized anxiety disorder is information available in the hospital records that was not entirely available to the MDR team as part of the MDR.

Further, the parent argues that the student's hospital records were not discussed by the IHO and contends that they indicated that the student presented with a "chief complaint" of "autism spectrum" after the incident, that they indicated the student "want[ed] psychiatric services," and that the hospital "follow-up note" provided diagnoses of generalized anxiety disorder and major depressive disorder. As discussed earlier these hospital records were not available to the MDR team. However, a review of the MDR worksheet reveals that the team discussed the student's autism and its presentation for the student as well as his anxiety (Dist. Ex. 5 at pp. 2-5). Regarding the major depressive disorder, the December 2022 hospital behavioral health follow-up treatment report indicated that the student met the criteria for the diagnosis of "a current moderate episode of major depressive disorder without prior episode," suggesting that this behavior was new (Parent Ex. H at p. 3). The parent also points to the student's statement to psychiatric emergency department staff, "I want the negative thoughts to go away" as an indication that the student's negative thoughts were connected to his actions (see Parent Mem. Of Law at p. 13); however, as stated in the December 13, 2022 psychiatric emergency department provider note, this statement was connected to the student's feelings of remorse after the incident, rather than as a trigger for the incident, accordingly, it is unclear, and the parent provides no assistance, as to how this statement would have had an impact on the findings of the MDR team (see Parent Ex. G).

Generally, with respect to the procedural claims presented by the parent, based on the above, I concur in the IHO's finding that the parent's allegations were without merit and did not constitute a violation of the MDR process, much less violations "that could negatively impact the student or the parent's ability to participate at the MDR" (IHO Decision at p. 16).

## **2. Review of Relevant Information and Documents**

Next, the parent argues that the hearing record does not support the IHO's decision to uphold a finding of "No Manifestation," with respect to the relationship of the conduct in question to the student's disability. Specifically, the parent argues that numerous documents, which the IHO ignored outright, illustrate the direct and substantial relationship between the student's autism and anxiety and the student's conduct. At this time, a review of the MDR meeting is in order so as to provide necessary background with respect to the parent's substantive claims and a determination as to whether the conduct in question was caused by or had a direct and substantial relationship to the student's disability.

### **a. MDR Meeting**

The MDR was conducted on December 23, 2022 (Parent Ex. O; Dist. Ex. 5 at pp. 1, 7). The MDR worksheet identified the review meeting participants as the school psychologist, a special education teacher, the dean, the assistant principal, the parents, and the parents' advocate/attorney (Dist. Ex. 5 at pp. 1, 7). The December 2022 MDR worksheet contained a review of documents section, which included excerpts and notes from the January 2018 psychoeducational report, the April 2021 CARS 2-ST, the April 2021 classroom observation, the May 2021 IEP, the May 2022 vocational assessment, the May 2022 IEP, the December 2022 teacher observations, and the December 2022 classroom observation (*id.* at pp. 2-3). In addition, the worksheet included behavioral concerns that were not contained in the above documents and detailed that prior to the incident, the parents had expressed concerns about the student's social abilities with peers and requested that counseling be added to the student's IEP (*id.* at p. 3). The

worksheet indicated that the student was "in the process of a re-evaluation" to determine if counseling services were appropriate at that time (id.).

Based on their review of the documents and other information about the student's behavior, which was discussed at the MDR, the team described the student's disability and how it affected his behavior (i.e., disability-related behavior) with special attention to how the specific characteristics of the student's disability were evidenced (Dist. Ex. 5 at p. 3). The team found that the student's "disability appear[ed] to affect his socialization ability with peers" and that he was sensitive to sounds and easily distracted by peers (id.). In addition, the team found the student appeared to be having anxiety per teacher reports and prior evaluations (id.). The MDR worksheet noted that a psychiatric evaluation was requested but that consent had not been obtained from the parents (id.).

The MDR worksheet detailed information about the incident (Dist. Ex. 5 at p. 3). According to reports, another student reported to school staff that, on December 12, 2022, the student was in possession of a knife (id.). The following day the student was asked by the school counselor if he had been in possession of a weapon "the day before" and the student reported that he had brought the weapon to school to stab his paraprofessional (id.). The student did not carry the weapon to school on the day it was reported (id.). Reportedly, the police were not notified, but the parents were informed, and they arrived at the school and took the student to a "mental health hospital" to be evaluated (id. at pp. 3-4). According to the MDR worksheet the charges were sustained, and the family pleaded no contest (id. at p. 4).

The MDR team discussed what prompted the student's behavior and the triggering events that led to the incident, noting what occurred immediately prior to the incident and the motivation behind engaging in the behavior (Dist. Ex. 5 at p. 4). It was reported that the student was watching videos on his phone until 1:00 a.m. and that he slept four to five hours and according to his written statement he was having "negative thoughts racing in his mind" (id.). The parent reported that the student "did not sleep the entire week prior," and that they were unaware that he was watching "creepy videos" with "challenges to children" of "going out in the dark to hit people" and videos of "people burning places at night" (id.). The parent further stated that the student was "anxious and very irritable," did not sleep and woke up tired for the past two weeks but also noted that the student followed his normal morning routine (id.). According to the MDR worksheet, the parent added that the student's paraprofessional was asking the student to shorten the time he used the bathroom and that also "due to [the student's] Autism he ha[d] been having constipation" (id.).

Next the MDR team, using the documents and other observations, discussed the relationship between the student's disability and the incident to determine whether or not the incident was caused by or had a direct and substantial relationship to the student's disability (Dist. Ex. 5 at p. 4). The team discussed how the behavior that led to the incident was similar to, or related to, the disability related behaviors previously identified in the documents or other observations (id.). Triggering events were identified as lack of sleep, watching scary films, and the paraprofessional asking the student "to move quickly in the bathroom," and the MDR team determined that these behaviors that led to the incident were not related to the disability as per the documents reviewed (id.). The MDR worksheet stated that the documents had a common theme of sensory input weaknesses, communication weaknesses, and low frustration tolerance as situations that could lead to isolation and frustration (id.).

The MDR team determined that the behavior that led to the incident in question was not caused by the student's disability and did not have a direct or substantial relationship to his disability (Dist. Ex. 5 at p. 4). The team went on to explain that the student's behavior leading up to the incident appeared to be "manic behaviors" triggered by something outside of his autism, that he had never demonstrated in the past (not sleeping for weeks, watching scary movies, hyper focusing on the actions of these videos, irritability) (id.). The MDR team concluded that these behaviors did not have a direct and substantial relationship with how the student's disability manifests for him, as per observation and the discussed data (id. at pp. 4-5).

### **b. Documents Reviewed and Considered**

The parent argues that the IHO spent just a single brief paragraph discussing behavior and disability and contends that the IHO failed, and by extension the district failed, to acknowledge and properly review a number of documents. While the IHO's discussion of the relevant documents and the student's behavior and disability may not have met the parent's expectations, a review of the MDR worksheet reveals that the MDR team appropriately discussed, reviewed and considered the relevant documents and, as detailed earlier, discussed the relationship between the student's disability and the incident (Dist. Ex. 5 at pp. 1-13).

A review of the MDR worksheet shows that the team reviewed and considered the information included in the student's written statement including the student's explanation of why he brought the weapon to school and the events which led up to the incident (compare Dist. Ex. 5 at pp. 3-4, with Parent Ex. D).

The parent argues that the student's numerous social deficits, identified within the teacher reports, directly related to the incident. The MDR worksheet included a summary of the student's December 2022 teacher reports. According to the student's current ELA teacher report, the student respected boundaries with peers and adults and responded well to authority (Dist. Ex. 5 at 2). Notations from the student's math teacher report included that the student did not have skills in getting along with peers, leadership, friendship, collaborating with classmates, respecting boundaries with peers and adults, responding to authority, coping strategies, self-esteem, the ability to accept and apply constructive criticism, self-advocacy and accepting responsibility (id.). The MDR worksheet also reflected statements from the math teacher report that the student had self-control skills based on teacher observation and that the student demonstrated anxious behaviors (picking his nails until he bled) (id.).

The parent argues that the April 2021 classroom observation was important because it demonstrated the student's ongoing issues interacting with people at school beyond mere concern regarding coursework. The MDR worksheet included this "important" information from the 2021 observation by noting that the student covered his ears and became upset when other students were being "very loud" and he did not participate voluntarily during the lesson (compare Dist. Ex. 5 at p. 2, with Parent Ex. C). According to the MDR worksheet the student wrote "in[]appropriate things about his teacher on his desk," including that he did not want to do work and wished to be left alone (compare Dist. Ex. 5 at p. 2, with Parent Ex. C). When approached by the teacher, the student refused to speak and instead "point[ed] to the statement that said he wished to be left alone." (compare Dist. Ex. 5 at p. 2, with Parent Ex. C). The MDR worksheet's summary of the December 2022 classroom observation indicated that the student was easily distracted, would not

socialize with his peers, took a pencil without asking from his partnered peer, but was respectful of adults within the classroom (Dist. Ex. 5 at p. 3).

The parent claims that the IHO inappropriately decided that the MDR team appropriately considered the CARS 2-ST assessment and argues that the district had planned not to present the document at all (Parent Mem. Of Law at pp. 14-15; see Tr. pp. 69-70; Parent Ex. B). However, I note the MDR worksheet included the April 2021 CARS 2-ST in its list of documents that were discussed, reviewed, and considered (Dist. Ex. 5 at p. 2). Indeed, the MDR worksheet included the very information from the CARS 2-ST which the parent identified as "important," specifically, that the evaluator selected "severely abnormal emotional response" to indicate that the student struggled to respond appropriately to situations, and once in a certain mood it was difficult to change the mood (compare Parent Ex. B at p. 2, with Dist. Ex. 5 at p. 2; see Req. for Rev. at p. 4).

A review of the documents and evaluative information reveals that the student's "numerous social deficits," "ongoing issues interacting with people at school," and "severely abnormal emotional response" had not included carrying weapons and threats of harming others but had presented as the student covering his ears and becoming upset in response to other's being "very loud," informing the teacher he did not want to do work, and wishing to be left alone, being easily frustrated, and taking a pencil from a peer without asking (Parent Exs. C; I; L at pp. 3, 5; Dist. Ex. 2 at p. 23). Additionally, with respect to the parent's argument that the IHO failed to find that the student's autism-related "severely abnormal emotional responses" provided an explanation for what he characterizes as the student's "inappropriate reaction" to upsetting videos, the parameters of the student's abnormal emotional response are ill-defined outside of the very specific examples cited above and, therefore, it would be speculative to determine that the development of intrusive negative and violent thoughts and "acting out" on those thoughts by bringing a weapon to school would fit within the "abnormal emotional responses" contemplated by his evaluation, particularly where the videos as described contained violent and extreme content "challenging" him to do harm to others and to destroy property, stressors that apparently were new to the student and far removed from the stressors and related anxious behaviors that he had experienced at school and were documented in materials reviewed by the MDR team.

The school psychologist, in her written testimony, stated that at the MDR meeting she explained to the parent's counsel that one line from an evaluation did not determine a child's needs and she noted that "[e]ach evaluation must be reviewed in the context of all others, and in totality" (Dist. Ex. 8 ¶ 32). The MDR worksheet demonstrates that the team properly reviewed all the relevant information in the student's file and relevant information provided by the parent in making its determination.

In this case, the IHO found that the evidence in the hearing record supported the MDR team's finding that the student's behavior was not caused by nor did it have a direct and substantial relationship to his disability as the entirety of the student's history indicated that his autism, along with any observed anxious or anxiety-related behaviors, never manifested itself in weapons possession or thoughts of violence and that overall there was no evidence in the record to suggest that such an aberration from the student's usual conduct could be construed as either caused by or having a direct and substantial relationship to his disability (IHO Decision at p. 18). I understand the concerns of the parent with respect to the student's social-emotional functioning and psychological health and recognize that the student quite possibly has emerging needs in the areas

of anxiety, depression and his related behavior. I urge the parent and CSE to discuss these issues at the next IEP meeting for the student to the extent this has not already occurred. With respect to the specific issue before me on appeal, however, the IHO's finding upholding the MDR determination is supported by the evidence in the hearing record.

## **VII. Conclusion**

Having determined that the evidence in the hearing record supports the IHO's determinations that the district did not violate federal or State law, upholding an MDR team's determination that the student's behavior was not a manifestation of his disability, and declining to immediately expunge a school imposed disciplinary suspension in the 2022-23 school year from the student's record, the necessary inquiry is at an end.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

**THE APPEAL IS DISMISSED.**

**Dated:**           **Albany, New York**  
                          **April 26, 2023**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**