



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 23-244

### Application of the BOARD OF EDUCATION OF THE BUFFALO CITY 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:**

Nathaniel J. Kuzma, Esq., General Counsel, attorney for petitioner

Disability Rights New York, attorneys for respondent, by Erin G. McGuinness, 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 district) appeals from a decision of an impartial hearing officer (IHO), in an expedited due process hearing pursuant to 8 NYCRR Part 201, which annulled a manifestation determination review (MDR) team's finding that the behavior of respondent's (the parent's) son was not a manifestation of his disability and ordered that the student's suspension from his district school during the 2022-23 school year be expunged from his educational records. The parent cross-appeals from those portions of the IHO's decision that did not order expungement of others records. The appeal must be sustained in part. The cross-appeal must be dismissed. For reasons set forth below, the matter is remanded for further administrative proceedings.

#### **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**

As of the first day of school of the 2022-23 school year, the student was receiving special education and related service in accordance with an IEP developed on September 30, 2021 and attending a district school (Joint Ex. E at p. 1; Parent Ex. 1 at p. 1; see Tr. pp. 46-49). A CSE convened on September 30, 2022, to develop an IEP for the student for the remainder of the 2022-23 school year (10th grade) (Joint Ex. D at p. 1). The September 2022 CSE continued to find the

student eligible for special education and related services as a student with autism (*id.*). The September 2022 CSE recommended an 8:1+1 special class for six periods each of English, math, science and social studies per six-day cycle and two 30-minute periods per six-day cycle of group speech-language therapy (*id.* at pp. 1, 12). In addition, the September 2022 IEP included resources and strategies to address the student's management needs consisting of a highly structured, small environment with clear, consistent rules and routines, small group instruction to encourage comprehension and maintaining focus, use of break periods between activities, especially if the student was showing frustration, prompting, refocusing and redirection to task, adult proximity, reviewing and reteaching new concepts, checks for understanding, frequent positive reinforcement, pre-teaching vocabulary, modeling appropriate social cues, providing clear and concise directions, which could be written steps with visual cues, use of graphic organizers for writing assignments and multistep math word problems, use of a daily planner to go back and forth from school to home, and a copy of class notes (*id.* at pp. 8-9). The student's needs relating to special factors as reported on the September 2022 IEP indicated that the student needed strategies, including positive behavioral interventions, supports, and other strategies to address behaviors that impeded his learning or that of others; however, it also indicated the student did not need a behavioral intervention plan (BIP) (*id.* at p. 9).

According to an entry on a behavior detail report dated October 6, 2022, the district's social worker submitted an incident report wherein the student was described as the offender with the location of the incident described as her office (Joint Ex. R at p. 1). The entry described the incident details as the "[s]tudent [was] sent to speak with [the] social worker expressing [a] desire to self-harm" (*id.*). The "[p]articipant [d]etails" reflected that the "[s]tudent self-disclosed that he wanted to hurt himself and others," and the event was described as a "[t]hreat of [s]chool [v]iolence" (*id.*). The district social worker also administered the Columbia-Suicide Severity Rating Scale (C-SSRS) to the student on October 6, 2022 (Joint Exs. N; O).<sup>1</sup>

On October 7, 2022, the principal of the student's school provided the parents with a notice of out-of-school suspension from October 7, 2022 through October 14, 2022, with the student permitted to return to school on October 17, 2022 (Joint Ex. U at p. 1). The principal's notification further indicated that a recommendation had been made for a superintendent's disciplinary hearing to be held to determine if an out-of-school suspension in excess of five days should be considered (*id.*). According to the notice, the student's classroom teacher initially referred the student to the district social worker after a classroom outburst (Level 1 intervention) and the district social worker met with the student, contacted district student support team members, and was advised to contact the school resource officer and transport the student to the comprehensive psychiatric emergency program of a local hospital (Level 2 intervention) (*id.*). The notification further indicated that the student's statements violated the district's code of conduct (*id.*). The student was not permitted on the property of any district school during the suspension, and the parent was instructed to contact the student's school to obtain alternative instruction during the suspension (*id.* at p. 2).

By notice dated October 7, 2022, the superintendent of schools informed the parent that at the request of the principal of the student's school, "and in view of charged serious misbehavior,"

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<sup>1</sup> The C-SSRS was a two-page document that was admitted as two separate exhibits (Tr. p. 105).

the student had been suspended from school (Joint Ex. T at pp. 1, 3). The charge stated that on or about October 6, 2022, the student had self-disclosed to the district social worker, assistant principal, and other student support team personnel "a desire to harm himself and other students" that "[h]e created a list on his phone which began 'I wish I can target . . .' He stated that he started to bring a knife to school that day but changed his mind, and that he believed a gun would be easy to obtain" (id. at p. 1). The October 7, 2022 notice further stated that a virtual, long-term suspension hearing was scheduled for October 14, 2022 and that an MDR meeting would be held immediately following the long-term suspension hearing (id. at pp. 1, 3).

The hearing record reflects that the virtual long-term suspension hearing and MDR were rescheduled four times before being conducted on December 1, 2022 (Joint Exs. A at pp. 1-12; B at pp. 1-12; F at p. 1). The information sheet provided for the MDR indicated that the charge was upheld at the suspension hearing (Dist. Ex. A). According to the worksheet completed by the MDR team, the student's misconduct was not caused by the student's disability, and although the student's actions related to the suspension were affected by his autism diagnosis, there was not a "direct and substantial relationship" between the misconduct and the student's disability (Dist. Ex. D at pp. 1, 2). The MDR team further determined that the student's misconduct was not the direct result of the school district's failure to properly implement the student's IEP (id. at p. 2). The post determination considerations section of the MDR worksheet was not completed (id. at p. 3). The MDR team reconvened as the CSE immediately following the MDR to amend the student's September 2022 IEP (compare Dist. Ex. C at p. 1, with Dist. Ex. D at p. 1). The CSE recommended an interim alternative educational setting (IAES), indirect consultant teacher services, and speech-language therapy (Dist. Ex. C at p. 1). The December 2022 CSE meeting minutes further reflect that "[d]ue to a finding of Manifestation DOES NOT exist" the student was "assigned to [the] IAES with [i]ndirect CT and speech therapy during the period of suspension" (id. at p. 3). The December 2022 CSE meeting minutes also stated that a "counseling evaluation [was] recommended as a follow up per family request and the need for additional social emotional support during the school day," and that peer relations were a source of sadness for the student (id. at pp. 2, 3). The CSE meeting minutes noted that the parent requested compensatory IAES and speech-language therapy for the time period between the initial suspension through the December 1, 2022 MDR meeting (id. at p. 3). According to the CSE meeting minutes, the parent reported that the student had only received ten hours of instruction since the suspension to date (id.).

By prior written notice dated December 1, 2022, the parent was informed of the December 1, 2022 CSE's recommendations that the student receive indirect consultant teacher services and speech-language therapy in an IAES for the duration of the suspension period (Dist. Ex. B at p. 1). The MDR outcome was summarized in a notice to the parent dated December 2, 2022 (Dist. Ex. E).

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

By due process complaint notice dated February 6, 2023, the parent alleged that the December 1, 2022 MDR team failed to consider all relevant information during the MDR meeting (Joint Ex. K at pp. 2, 4, 8, 10).<sup>2</sup> The parent further alleged that the district failed to conduct the

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<sup>2</sup> The February 6, 2023 due process complaint notice is a ten-page document that is paginated 2-11, however it

penalty phase of the superintendent's disciplinary hearing after the MDR meeting and the student was prevented from presenting evidence of unaddressed bullying, the failure to provide counseling services, and other mitigating factors, such as the fact that the student had self-reported his feelings to the district social worker, which resulted in his suspension (*id.* at pp. 9-10). The parent also argued that as a result of the district's violation of 8 NYCRR 201.4 and 201.9, the student was wrongfully denied access to school from December 2, 2022 through December 8, 2022, and that the student's educational records "wrongfully contain[ed] damaging information" (*id.* at p. 10). As relief, the parent requested a finding that the district wrongfully disregarded relevant records and information while conducting the December 1, 2022 MDR meeting in violation of the IDEA and of section 504 of the Rehabilitation Act (section 504); a finding that the district's failure to conduct a compliant MDR deprived the student of a free appropriate public education (FAPE) under the IDEA and section 504; a finding that the student's conduct on October 6, 2022 was a manifestation of his disability; a finding that the district violated the student's right to due process under the federal and State constitutions by denying him the procedural protections of Part 209; an order compelling the district to provide compensatory education for all missed educational and related services during the suspension; and an order compelling the district to expunge the manifestation determination and all reference to the outcome in the student's record (*id.* at pp. 10-11).

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

The parties convened for an impartial hearing on June 16, 2023, which concluded on July 20, 2023 after two days of proceedings (Tr. pp. 1-307). By decision dated October 4, 2023, the IHO found that the student's conduct did not clearly express homicidal intent or an actual homicidal plan and was an expression of the student's feelings (IHO Decision at p. 11). The IHO further found that the student's conduct was reflective of his agitated state and disability (*id.*). The IHO also determined that the student was deprived of education and services during the period of suspension, when the student could have and should have been in school, which was a violation of the IDEA (*id.*). The IHO stated that the student should receive compensatory educational services (*id.*). Next, the IHO determined that because the suspension should not have occurred, all reference to the student's suspension should be expunged from the student's educational records (*id.* at p. 12). The IHO further ordered that compensatory education should compensate the student for the fall 2022 semester (*id.*).

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

The district appeals and alleges that the IHO erred in concluding that the suspension of the student should not have occurred and argues that this was not the issue before the IHO as the student had plead no contest to the long-term suspension charges that resulted from the student's actions on October 6, 2022. Next, the district argues that the IHO erred in failing to reach a determination and appropriately address whether the student's actions on October 6, 2022 were a manifestation of the student's disability as a student with autism. The district further contends that, to the extent the IHO discussed the issue of manifestation, he erred in inserting his subjective determination in finding that the student's actions were a manifestation of his disability rather than basing his decision on the record before him. The district also alleges that the IHO erred in finding

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does not appear to be missing any pages (Joint Ex. K pp. 2-11).

that the December 1, 2022 MDR team did not consider all relevant information before it when it found that the student's actions on October 6, 2022 were not a manifestation of his disability. The district further argues that the IHO erred in ordering that all references to the student's suspension should be expunged from his record. Lastly, the district asserts that the IHO erred in ordering compensatory education and services for the student despite the fact that the student plead no contest to the charges resulting from his actions on October 6, 2022 and the MDR team properly found that those actions were not a manifestation of his disability.

In an answer and cross-appeal, the parent alleges that the IHO erred by failing to order that all reference to the student's suspension be expunged, including the MDR and the outcome of the MDR. The parent further argues that the CSE should determine the amount of compensatory education to which the student is entitled, and that the IHO's order be affirmed in all other respects.

In an answer to the parent's cross-appeal, the district asserts that the parent failed to provide notice of her intent to cross-appeal and further argues that the cross-appeal should be dismissed based on the merits.

## **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>3</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>4</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 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. Scope of Review and Jurisdiction**

At the outset, I note that an SRO lacks jurisdiction to consider a parent's challenge to an IHO's failure or refusal to rule on section 504, or Part 209 of the Commissioner's regulations, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]).

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<sup>3</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>4</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]).

With regard to the district's arguments that the IHO erred in finding the suspension should not have occurred, in this matter, the parent sought review of the district's MDR determination. The question in a due process proceeding that addresses an MDR is whether a disciplinary change in placement that exceeds ten school days is permissible under the IDEA under the particular factual circumstances. Review of an MDR does not encompass a review of the findings of the school officials conducting the disciplinary hearing, which is held pursuant to Education Law § 3214 regarding whether the student, factually speaking, engaged in the alleged conduct or behavior or whether such alleged conduct constituted a violation of the district's code of conduct. The student's plea of no contest to the alleged conduct is not relevant to the determination of whether or not the conduct constituted a manifestation of the student's disability. While the student may have plead no contest to the alleged conduct, he did not waive his right to an MDR, nor did he consent to the long-term suspension as is implied in the district's appeal.

Notwithstanding the above, an MDR that results in a finding of a direct and substantial relationship does not serve to exempt a student with a disability from all forms of discipline but only those that result in a disciplinary change in placement. School officials are at times called on to impose discipline in a variety of forms and students with disabilities are not exempted from the application of the discipline procedures. For example there are numerous cases in which discipline has been imposed by a school upon a student with a disability and the Commissioner of Education has decided appeals regarding expungement in matters related to the Education Law § 3214 procedures for disciplinary proceedings (see Appeal of a Student with a Disability, 60 Ed Dept Rep, Decision No. 17,998 [expunging and annulling all references to the student with a disability's short-term suspension]; Appeal of a Student with a Disability, 59 Ed Dept, Decision No. 17845 [ordering expungement of a student with a disability's short term suspension]; Appeal of a Student with a Disability, 58 Ed Dept, Decision No. 17553 [noting the distinctions between proceedings conducted under Education Law § 4404 and § 3214 and expunging a short-term suspension]; see also 8 NYCRR 100.2[1]). Short term suspensions, while disciplinary in nature, are not subject to the MDR procedures under IDEA and serve as an example of permissible discipline that may be imposed even if there is a direct and substantial relationship to the student's disability, but do not constitute a disciplinary change in placement provided the cumulative period of suspension within a school year is less than ten school days.

While an IHO or SRO may rectify any flawed change in the student's special education placement due to an error within the IDEA's MDR process, the parent's other requests related to the disciplinary process including modification of the student's educational records in the form of expungement must first be brought according to the appeals process set forth in the district's code of conduct and/or properly appealed to the Commissioner of Education (see Educ. Law § 310; 34 CFR 99.22, 300.621).<sup>5</sup> <sup>6</sup> I remind the parties that the student's educational records before the MDR, the CSE, and the administrative decisions resulting from due process remain part of the

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<sup>5</sup> An SRO does not have jurisdiction to review a disciplinary proceeding pursuant to Education Law § 3214, such appeals are submitted to the Commissioner of Education in accordance with Education Law § 310.

<sup>6</sup> The Commissioner has expunged records of suspension in cases where a student's suspension was annulled and denied requests for expungement when the suspensions were upheld (see Appeal of L.O., 62 Ed. Dept. Rep. 18,267; Appeal of a Student with a Disability, 58 Ed. Dept. Rep. 17,503; Appeal of K.M., 42 Ed. Dept. Rep. 14,699).



student's educational records and should remain available to assist with planning for the student's special education programming. Based on the foregoing, the IHO exceeded his jurisdiction in expunging the suspension from the student's educational records. Additionally, that portion of the parent's cross-appeal seeking expungement of additional records must be dismissed.

The issues that remain for review are whether the IHO properly determined that the student's conduct was a manifestation of his disability and whether the IHO correctly awarded an unspecified amount of compensatory education.

## **B. Manifestation Determination Review**

Turning to the IHO's substantive finding that the student's conduct was a manifestation of his disability, the district's arguments on appeal do not warrant reversal of the IHO's decision. Further, based on my independent review, the hearing record supports the IHO's ultimate determination that the student's conduct was a manifestation of his disability.

According to the hearing record, the student was suspended for a period of five days on October 7, 2022 and referred to the superintendent of schools for a disciplinary proceeding to determine whether a longer suspension should be considered (Joint Ex. U). The student's suspension was upheld at a disciplinary hearing convened on December 1, 2022 (Dist. Ex. A). Immediately after the disciplinary hearing, on December 1, 2022, the MDR was held, wherein the MDR team determined that the student's misconduct of verbalizing a desire to harm himself and other students at his school and at a location outside of school was not a manifestation of his disability (Dist. Ex. D at pp. 1-2).<sup>7</sup>

The school psychologist who led the MDR testified that the MDR team determined that the "incident and the behavior resulting in suspension were not directly or substantially related to [the student's] disability, considering both ADHD and autism," and "there was not a causal relationship" or a failure to implement the student's IEP (Tr. pp. 107-08). She testified that, generally, the MDR team looked at patterns of behavior and how a student's disability typically presented, as well as the "disability itself," and she noted that she always had the Diagnostic and Statistical Manual-Fifth Edition (DSM-5) "on my table open to the area of disability" to use as a reference (Tr. pp. 108-09). The school psychologist testified that, "based on [the] symptomology of autism," she concluded that the student's behavior was not related to "either of those things in terms of inattention," and "[i]t wasn't coming out related to the way [the student's] autism present[ed]" (Tr. p. 109). She noted that "typically these types of threats" were "not part of the diagnostic criteria for autism" (*id.*). Additionally, she testified that the MDR team "examined what [the student's] communication and social impairments looked like" and the behavior was "not found to be typical of students with autism" (*id.*).

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<sup>7</sup> While not directly at issue in this matter, I note that the timing and order of the superintendent's hearing and the MDR violate State regulation, which requires that any determination of a suspension beyond 10 days must not occur until an MDR is completed and that the MDR be conducted no later than the tenth day of suspension (8 NYCRR 201.4[a], 201.9[c][1]; *see also* 20 U.S.C. § 1415[k][1][E][i]; 34 CFR 300.530[e][1]), the premise being that the process would take place before the long-term suspension occurs, not after the student had already been out of school for almost eight weeks.

Despite the school psychologist's reasoning that the student's behavior did not reflect the way his autism "typically" presented, the information the December 2022 MDR team reviewed showed that the student had language delays and social/emotional needs related to his diagnoses of autism and ADHD.

The MDR team used a worksheet, which reflected that the MDR team reviewed the student's then-current September 2022 IEP, a September 14, 2022 "408," unspecified "documents from the underlying misconduct," teacher observations, parent input, a July 26, 2018 psychological evaluation, a September 28, 2021 speech summary, a June 1, 2022 care coordination plan, the student's transcript, a November 9, 2022 letter from Child and Family Services, and the student's grades, attendance, and behavioral information (Dist. Ex. D at p. 1; see Parent Ex. 2; Joint Exs. C; D; E; G; H; V).<sup>8</sup> The school psychologist who participated in the student's MDR testified that, in preparation, she looked at student information maintained in the district's "Infinite Campus" and "IEP Direct" systems that included educational history, prior behavior office discipline referrals, grades, report cards, parent/teacher correspondence, attendance history, special education history (including information from prior IEPs), and any other "relevant reports" including psychological and related service reports (Tr. pp. 63-64, 91-92). Additionally, the school psychologist testified that she specifically reviewed the student's IEP from the 2021-22 school year and a behavior detail report and that information from the student's physician was presented verbally at the MDR (Tr. pp. 95-96, 99-100, 137-38; see Parent Ex. 1; Joint Exs. I; R).

According to the July 2018 psychological evaluation report, the student had received diagnoses of autism and attention deficit hyperactivity disorder (ADHD), was identified as an English language learner, and the assessments were administered using an interpreter to translate test directives and minimize issues regarding second language acquisition (Joint Ex. G at pp. 1-3).<sup>9</sup> The July 2018 psychological evaluation report related that the student presented as "happy and somewhat emotionally immature," tended to avoid eye contact, and occasionally spoke in a silly or baby voice (id. at p. 3). He demonstrated a "desire to meet testing expectations and the approval of the evaluator," but as the testing session progressed, he had increasing difficulty with focus, and frequent prompting and breaks were only "modestly effective" (id.). Administration of the Universal Nonverbal Intelligence Test indicated that the student's memory quotient, reasoning quotient, and full scale IQ all fell within the average range and were consistent with the student's results on a prior psychological assessment conducted in 2015 (id.; see Parent Ex. 6).

The hearing record reflects that the student exhibited delays in receptive and expressive language skills (Parent Exs. 1 at pp. 4-5; 4; 7; Joint Ex. D at p. 6). The September 19, 2022 speech-

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<sup>8</sup> The "408" form was a document entitled IEP implementation responsibility checklist and reflected the date each of the student's providers received a copy of the student's IEP (Joint Ex. E). Notably, the document shows the providers received the student's IEP on September 12, 2022 and September 14, 2022, when the student was being educated pursuant to his 2021-22 IEP (id.). The document, which was considered by the December 1, 2022 MDR team, does not indicate when the student's providers received the student's then-current September 2022 IEP (see id.).

<sup>9</sup> The psychological evaluation report noted that the interpreter conducted an informal assessment of the student's native language skills and concluded that, while the student possessed some receptive language skills in his native language, his expressive language skills were low (Parent Ex. G at p. 3).

language summary report and the September 2022 IEP reflected that, in the classroom, the student may require verbal prompts to attend and maintain a topic during a social exchange or academic discussion, and that teachers may check for understanding when answering "wh" questions, and provide the student with verbal prompts to speak at an appropriate rate (Parent Ex. 4; Joint Ex. D at p. 6). The student "continue[d] to display deficits in expressive/receptive language skills," and deficits in receptive language impair[ed] the student's ability to "understand orally presented and written format information" (Parent Ex. 4; Joint Ex. D at p. 6). The September 2022 CSE recommended speech-language therapy "as expressive language deficits interfere[d] with [the] student's ability to participate in interactive learning settings (Joint Ex. D at p. 6).<sup>10</sup> The September 2022 IEP also noted that the student's transition needs included displaying appropriate communication skills (*id.* at p. 10). The student's speech-language pathologist, who participated in the December 2022 MDR meeting testified that the student's deficits were "[p]rimarily pragmatic language skills," which included expressive and receptive language, and he "display[ed] typical behaviors of [students] diagnosed with autism as far as his language skills" (Tr. pp. 182, 184; Dist. Ex. D at p. 1).

Next, the information reviewed by the December 2022 MDR team also reflected the student's delays in social/emotional functioning. The student's September 2021 IEP (which was in effect at the start of the 2022-23 school year), indicated that the student was working on being more aware of noises he made as well as his personal self-care, and included a "social/emotional/behavioral" annual goal focused on displaying appropriate social skills while interacting with peers as evidenced by staying on topic, less frequent staring at peers, engaging in reciprocal conversation, and being aware of body noises (Parent Ex. 1 at pp. 6, 9).

The student's September 2022 IEP described the student's difficulties with peer interactions and noted that, while the student had a "good relationship" with his teachers and the peers he sat with during lunch, he struggled to read social cues when speaking about his own interests and did not acknowledge others who may want to speak or who were no longer listening (Joint Ex. D at p. 8). The September 2022 IEP further related that the student had difficulty "expressing his thoughts or telling an adult if there [was] a problem," and needed an adult to "prompt him with questions" so he could explain the situation fully (*id.*). The student's social needs included developing social skills, practicing socially appropriate peer interactions, working on reciprocal conversation, focusing on staying engaged in the topic at hand, raising his hand and waiting his turn rather than calling out during class, sticking to relevant conversation topics, and being aware if he was making noises during quiet class times (*id.*). In terms of the student's social strengths, the September 2022 IEP related that the student was a polite, kind, respectful and inquisitive student who enjoyed playing and talking with peers, put forth his best effort, and asked for help or clarification when needed (*id.*).

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<sup>10</sup> Speaking to the effect of the student's needs on involvement and progress in the general education curriculum, the September 2022 IEP noted that the student demonstrated delays in language skills and social skills and struggled to maintain focus for extended periods of time (Joint Ex. D at p. 9). The student's communication difficulties adversely affected his educational performance, and he demonstrated significant challenges applying academic knowledge in the classroom (*id.*). The September 2022 IEP further related that the student required specially designed instruction to "master new material, increase academic knowledge, develop social skills, and to manage his behavior" (*id.*).

The student's special education social studies (special education) teacher who participated in the December 2022 MDR testified that the student's needs were "mainly" social (Tr. pp. 25, 27-28, 34; Parent Ex. D at p. 1). According to the special education teacher, the student tended to focus on his own interests and had difficulty initiating conversation and maintaining a topic (Tr. p. 34). The special education teacher testified that the student was "very social and interested in developing friendships with other students but need[ed] assistance in understanding the proper social interactions he should have with other students" (*id.*). She testified that she reported to the MDR team that she had observed "typical characteristics of autism," in that the student had "areas of social deficits," and "need[ed] help in communicating and maintaining conversations and initiating conversations with peers and classmates" (Tr. pp. 39-40). The special education teacher also testified that the student occasionally had difficulty communicating with adults and had difficulty understanding "the conventions of a conversation," but was knowledgeable regarding the information shared in class on history, politics, and religious events (Tr. pp. 58, 60-61).

Further, the hearing record described that the student was the target of bullying by a classmate during the 2019-20 school year, which resulted in increased anxiety, depression, and difficulty sleeping (Tr. pp. 138-39; see Joint Ex. R).<sup>11</sup> While it appears from references in the student's IEPs that he received counseling during the 2018-19, 2019-20, and 2020-21 school years, it is unclear what the counseling addressed and none of the counseling summaries referenced in the student's September 2021 and September 2022 IEPs were included in the hearing record (Parent Ex. 1 at p. 1; Joint Ex. D at p. 2). Review of the student's September 2021 IEP and September 2022 IEP showed that the student was not recommended to receive counseling during the 2021-22 and 2022-23 school years (see Parent Ex. 1; Joint Ex. D).

The hearing record shows that, during the 2021-22 school year, the student demonstrated increased social/emotional difficulties which led to multiple requests for counseling. On December 13, 2021, the student's nurse practitioner wrote a letter to the district requesting "in school counseling" to help the student with coping strategies and an occupational therapy consult for sensory integration therapy to help with the student's anxious behaviors (Joint Ex. L at p. 4). The letter also noted that the student's parents were pursuing counseling outside of school (*id.*). In April 2022, the student's nurse practitioner again requested school counseling to help the student with coping and conversation skills (*id.* at p. 2).

The student's social/emotional functioning continued to be impacted during the 2022-23 school year. At the September 2022 CSE meeting the student's mother related that the student would like to make friends but other students "[were] not friends" and that the student came home from school "sad" (Parent Ex. 3 at p. 1). The September 2022 CSE meeting minutes further reflected that the student's mother was "looking for information for counseling" (*id.*).<sup>12</sup> The student's mother testified that she raised concerns to the district about the student being bullied during the 2022-23 school year (Tr. p. 280). She stated that at the September 2022 CSE meeting

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<sup>11</sup> The district's behavior detail report reflected that there had been more than one episode of bullying from the same classmate, who had made "hurtful and mean remarks to and about [the] student right in front of him" (Joint Ex. R at p. 1).

<sup>12</sup> The hearing record contains duplicate exhibits (compare Parent Ex. 3, with Joint Ex. S; compare Joint Ex. I, with Joint Ex. P). For purposes of this decision, citation will be made to Parent exhibit 3 and Joint exhibit I.

she told the CSE that the student was being bullied at school and because he had autism, he needed help (Tr. p. 283). She further stated that the CSE told the student that his mother didn't know the "school environment" so if he needed help, he should come to them, and they would help him (Tr. p. 283).

The student's mother testified that she thought if there was a problem in school, they would help the student (Tr. p. 284).<sup>13</sup> According to the parent, in the days following the September 2022 CSE meeting and before October 6, 2022, the student came home from school and appeared to be "upset," demonstrated by crying, laying on the floor, biting his hand, and "not eating well" (Tr. pp. 284-85, 287). The student's mother testified that the student told her the "kids [were] bullying him" and stated that he could not explain it to school staff because they did not understand him (Tr. p. 285). She described that on the morning of October 6, 2022, the student was upset and did not want to go to school and face bullying (Tr. pp. 288-89). The student's mother related that she told him that if people were bullying him, to tell his teachers and they would help him (Tr. pp. 287-89).

The school psychologist testified that the student's mother expressed concern about the student's "emotional state related to his verbalizing to her that he was being bullied" during the MDR and at the time, the building principal reported that the "one documented incident in 2020" was investigated and the student who had done the bullying was no longer in the program and since that time there had been no "indication or report of bullying behavior" (Tr. pp. 116-17). According to the school psychologist, during the MDR, the student's teachers and social worker reported that "as part of his autism spectrum, [the student] ha[d] difficulty reading social cues and initiating and sustaining relationships with his peers," and his "way of approaching peers [was] sort of pushing back those peers a bit" (Tr. p. 117). The school psychologist testified that, according to the building principal, the student was seeking interaction with students who were enrolled in the general education program at his school, "maybe waiting outside their classrooms or knowing their schedule and kind of following to try and see them" during the school day, and when those approaches were not received, the student felt he was being bullied (*id.*). She noted that, during the MDR, this interaction was described "as more of a perception issue versus a true case of bullying like the 2020 incident had been" (Tr. pp. 117-118). According to the school psychologist, the student's "making of the list of people he wanted to harm at school was reported to be in response to his perception that he [was] being bullied by other students" (Tr. p. 118).

The school psychologist further testified that the MDR team discussed that there had been requests for counseling but noted that the student was in the specialized "students with autism rising to success" (STARS) program, and there was "some social/emotional built into the program because all of the students in the program need[ed] to work on those social skills and peer relationships" (Tr. pp. 120-21; *see* Tr. p. 26). She noted that, at the time of the MDR, she could not comment on the request for counseling because she was not aware of it, but based on the discussion, the December 1, 2022 CSE recommended a counseling evaluation as a follow-up that

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<sup>13</sup> During redirect examination, the school psychologist confirmed that the student's September 2022 IEP did not contain any reference to the counseling recommendation letter and script from the nurse practitioner and noted that these documents were not considered during the MDR (Tr. pp. 168-70). Through his questions on redirect, the district's attorney attempted to demonstrate that the parent had never shared them with the September 2022 CSE (*id.*).

could be "explored at the building level" (Tr. p. 121). The school psychologist confirmed that deficits in social/emotional functioning was included in the diagnostic criteria for autism and based on her knowledge of the district programs and information shared at the MDR meeting, the STARS program provided social/emotional support (Tr. pp. 122-23). When asked if it was "common" for students with autism to "make threats" against other students or list individuals the student intended to harm the school psychologist replied "[n]o" (Tr. p. 123). As for whether it was common for students with autism to have "suicidal ideations," the school psychologist testified that anxiety and depression occurred at higher rates in individuals with an autism diagnosis, "especially in individuals with autism who don't have a cognitive impairment" such as the student (Tr. p. 123). She added that the student was a "very bright young man, and dealing with some of that social/emotional stuff can be very challenging, and wanting those friendships can lead to a lot of depression and sometimes suicidal ideation" (Tr. pp. 123-24).

Although not identified specifically in the MDR worksheet, during her testimony the school psychologist confirmed that the October 6, 2022 results of the C-SSRS were "reviewed and discussed" during the December 1, 2022 MDR meeting (Tr. p. 104; see Joint Exs. N; O). She noted that the school social worker "shared some information about this because it detailed what happened on the date of the incident resulting in [the student's] suspension" (Tr. p. 104). The school social worker who met with the student on October 6, 2022 testified that the student's special education teacher brought the student to her after he "made a statement in class related to suicide" (Tr. pp. 207, 210). The social worker testified that the student spoke about his suicidal thoughts and that he had experienced bullying in school and mentioned a specific student who he said he was in love with and felt rejected by (Tr. p. 212).

Review of the C-SSRS revealed discrepancies between the student's responses on the screening page and the identification of level of risk. The screening page reflects that the student responded "No" to questions asking if he had suicidal thoughts with some intention of acting on them, if he had started to work out the details of how to engage in suicide and intended to carry out this plan, and if he had done or prepared to do anything to end his life (Joint Ex. N). However, on the level of risk scale, the student was assigned a "High" level of risk for the corresponding behaviors of "[s]uicidal intent (without specific plan)," "[s]uicidal intent (with specific plan)," and "[p]ast suicide behavior," despite having answered "No" to the corresponding questions on the screening page (compare Joint Ex N, with Joint Ex. O). A hand-written note indicated that the student was a "Medium Risk for C-SSRS" (Parent Ex. N).

The social worker testified that she "started to complete" the C-SSRS and "at that time [the student] also disclosed to [her] that he was having homicidal thoughts," showed her a list of students on his phone that he said he was planning to target, and added more names to the list as he spoke to her (Tr. pp. 210-11). Although the C-SSRS did not include any questions related to homicide, the district social worker hand-wrote on the form "High risk for Homicidal Ideation" (id.). The district social worker also wrote that the student:

reported homicidal ideation with intent [and] plan. He indicated having access to a gun stating[,] "I was thinking of buying a gun for a small price." He reported he started to bring a knife to school this morning with the plan to bring the knife to school [and a location outside of school] "to kill everyone in my path." [The student]

stated[,] "I wish I could kill everyone and myself to teach them a lesson." He stated students have been bullying me. [The student] reported active homicidal ideation, stating[,] "I'm also thinking of targeting more people to assassinate them." He was actively creating a list entitled, "I wish I can target . . ." This list includes names of 20+ students.

(Joint Exs. N; O).

The school social worker stated that she was "concerned for the student's safety" as he was discussing "extensive suicidal thoughts in addition to the homicidal thoughts" (Tr. pp. 216-18). She further testified that, at the December 2022 MDR meeting, she shared the details of what happened on October 6, 2022, but did not offer or have an opinion regarding whether the student's behavior was a manifestation of his disability (Tr. pp. 219-20).

The student's perception of continued bullying reflected the impact of his social/emotional delays on his behavior and was identified by the student's teachers and discussed by the MDR team. The MDR worksheet reflected that the ultimate decision that there was not a direct and substantial relationship between the student's misconduct and his disability was based on the fact that, while the MDR team acknowledged that the student's "social skills and perception of social situations" were affected by his autism diagnosis, "[t]he threat and thoughts of harming others [was] not a behavior pattern that ha[d] been seen, and [was] beyond the scope of an [a]utism spectrum disorder, and [was] not reflective of how [the student's] [a]utism ha[d] manifested" (Dist. Ex. D at p. 2). However, the district's behavior detail report reflected a May 2015 incident in which the student blamed other students for "stealing his tiles" and "began yelling" that he was "going to blow up the school" (Joint Ex. R at p. 2). The behavior report reflected that, at that time, the student had a recent medication change and noted that "doctors stress[ed] that he [did] not understand what he mean[t] when he says words as in this case" (*id.*). According to the behavior report, when asked "what he mean[t] about 'blowing up the school,' the student reportedly "dr[ew] a blank unresponsive face," and it did not appear that he "underst[ood] the severity of saying such things" (*id.*). The school psychologist testified that the student was about nine years old at the time of the May 2015 incident and "it sounded like he reacted in frustration and [the district] characterize[d] it as threatening to do harm to the school" (Tr. pp. 176-77; *see* Joint Ex. R at p. 2). She testified that they would look at the behavior of a nine-year-old differently than a teenager, which was why the "threat assessment process was utilized, to see if it was an actual threat" (Tr. p. 177).

The threat of violence assessment (threat assessment) that the district crisis prevention and response team social worker completed on November 3, 2022, showed that the student had "unusual or encompassing preoccupations such as a belief that he [was] being bullied as evidenced by his belief that he was suspended due to being bullied" (Joint Ex. J at pp. 1, 5, 6). The evaluator reported that the student's physician indicated that the student "recently ha[d] verbalized intense feelings of frustration and rejection" (*id.* at p. 5). According to the report, the student had not "demonstrated an ability to organize behavior," and that he did "not present with the ability to plan and or carry out an act of violence" (*id.* at p. 3). The student was unable to identify any coping skills, which the evaluator opined was "indicative of not having the opportunity to learn those skills through counseling" (*id.* at p. 5). The evaluator determined that the student was a "low risk

of concern," and while he had "some static risk factors," also determined that there was "no identifiable threat of violence or disruption" (*id.*). The threat assessment report further indicated that while the student's behavior on October 6, 2022 was "noted to cause concern, it . . . appear[ed] to be clinically related to his diagnosis specifically his deficits in social-emotional reciprocity," which ranged "from abnormal social approach and failure or normal back-and-forth conversation; to reduced sharing of interests, emotions or affect; to failure to initiate or respond to social interactions" (*id.*). The evaluator recommended that the student "begin IEP counseling to develop coping skills related to frustration and rejection," and "begin IEP counseling possibly in [a] group setting to make friends and develop social skills" (*id.*).

The school psychologist testified that the November 2022 threat assessment was discussed at the December 2022 MDR and that she disagreed with the threat assessment evaluator's conclusion that the behavior was related to the student's autism because the purpose of the threat assessment was not to "execute the student's due process and compliance with Part 201," but "to determine a risk level of executing the actions as well as making a plan for intervention" (Tr. pp. 110-11). She opined that the conclusion in the November 2022 threat assessment "was not based on extensive knowledge of conducting a manifestation determination review and understanding the impact of the statement that was made" (*id.*). The school psychologist noted that she considered the threat assessment summary statement, which the parent's attorney read aloud during the MDR, but did not "have the full document in front of [her]" (Tr. pp. 115-16). She added that her review of the full threat assessment report after the conclusion of the MDR did not change her opinion that the student's behavior was not a manifestation of his disability (*id.*).

In this matter, the MDR team was tasked solely with determining if the conduct in question was caused by or had a direct and substantial relationship to the student's disability (8 NYCRR 201.4[c]; *see* 20 U.S.C. § 1415[k][1][E]; 34 CFR 300.530[e][1]).

As described above, the MDR worksheet explained that the finding that there was not a direct and substantial relationship between the student's conduct and his disability was based on the fact that, while the student's social skills and perception of social situations were affected by his autism diagnosis, "threats and thoughts of harming others [was] not a behavior pattern that ha[d] been seen, and [was] beyond the scope of an [a]utism spectrum disorder, and [was] not reflective of how [the student's] autism ha[d] manifested" (Dist. Ex. D at p. 2). Although the MDR worksheet sets forth the questions presented for an MDR, the testimony of the district's witnesses and the documents in the hearing record reflect reasoning that focused too prominently on the student's diagnoses rather than on the student's discrete presentation of strengths and deficits. In particular, the MDR worksheet and the testimony of the district's school psychologist demonstrate an overreliance on the symptomatology and diagnostic criteria of the student's diagnoses of autism and ADHD, as well as his IEP classification. The MDR team is tasked with consideration of the student's disability, which is captured by the totality of the evaluative information used to develop the student's then-current IEP, the needs derived from that evaluative material, the special education and related services recommended to address those needs, as well as all relevant information reviewed during the MDR, which includes information provided by the parent. The student's classification as a student with autism is the vehicle to his eligibility for IDEA services,



it does not fully describe the student's needs nor does it encapsulate his disability within the meaning of Part 201.<sup>14</sup>

When the student made the "[t]hreat of [s]chool [v]iolence" by disclosing to the social worker that "he wanted to hurt himself and others" on October 6, 2022, the evidence shows that the student did not challenge that such behavior was inconsistent with the district's code of conduct and that a disciplinary process to consider suspending the student was necessary (Joint Exs. K at p. 8; R at p. 1). The district in this case sought a disciplinary change in placement that would result in suspending the student for ten days or more. As a student with a disability subject to a disciplinary change in placement, the student was entitled to an MDR. The only issue under review herein, is whether the district met its burden of demonstrating that the student's conduct in question was not caused by or did not have a direct and substantial relationship to the student's disability in order to effectuate a disciplinary change in placement. In review of the parent's challenging the outcome of the MDR in a due process proceeding, I am not convinced that the student's conduct was not a manifestation of the student's disability as the student's conduct was not dissimilar to the social/emotional and behavioral needs that were targeted by the September 2022 IEP. Accordingly, there is insufficient reason to overturn the IHO's conclusion on this point.

### **C. Compensatory Education—Remand**

Even if a student's behavior is deemed to not be a manifestation of his disability, during a period of suspension, the student must receive educational services in the IAES to enable him to continue to participate in the general curriculum and progress toward meeting IEP goals (20 U.S.C. § 1415[k][1][D][i]; 34 CFR 300.530[d][1][i]; 8 NYCRR 201.10[c]). In addition, except in limited circumstances not at issue here, if the student's behavior is deemed to be a manifestation of his disability, he must be returned to his educational program unless the CSE convenes and

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<sup>14</sup> CSEs are not supposed to rely on the disability category to determine the needs, goals, accommodations, and special education services in a student's IEP. That is the purpose of the evaluation and annual review process, and the resulting IEP must address all the student's needs whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304 [c][6]; 8 NYCRR 200.4[b][6][ix]). Similarly, on the question of disability classification, courts have given considerably less weight to identifying the underlying theory or root causes of a student's educational deficits and have instead focused on the process of identifying the academic skill deficits to be addressed through special education and through the formulation of the student's IEP (Navarro Carrillo v. New York City Dep't of Educ., 2023 WL 3162127, at \*2 [2d Cir. May 1, 2023] [agreeing that the classification issue was a "red herring" and that the disability categories served only the purpose of ascertaining the student's eligibility for special education]; B.D. v. Eldred Cent. Sch. Dist., 2023 WL 3025308, at \*10 [S.D.N.Y. Apr. 20, 2023] [characterizing the eligibility category as "a distinction without a difference"]; Polanco v. Porter, 2023 WL 2242764, at \*6 [S.D.N.Y. Feb. 27, 2023] [finding that "well-reasoned decisions in other circuits have clarified that a student's disability classification is generally immaterial in determining whether a FAPE was provided if the IEP otherwise sufficiently met the needs of the disabled student"]; see Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [noting the IDEA's strong preference for identifying the student's specific needs and addressing those needs and that a student's "particular disability diagnosis" in an IEP "will, in many cases, be immaterial" because the IEP is tailored to the student's individual needs]; Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331, 1342 [N.D. Ga. 2007]). "Indeed, [t]he IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education" (Heather S. v. State of Wisconsin, 125 F.3d 1045, 1055 [7th Cir.1997]).

recommends a different program (20 U.S.C. § 1415[k][1][F][iii]; 34 CFR 300.530[f][2]; 8 NYCRR 201.11[d]).

Here, as stated above, the IHO correctly found that the district inappropriately effected a disciplinary change in placement that exceeded 10 days and, that the student was deprived of education and services during the period of suspension (IHO Decision at pp. 11-12). However, the IHO erred in ordering an unspecified amount of compensatory educational services and did not sufficiently develop the hearing record on this issue.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]).

The hearing record indicates that the student was suspended on October 7, 2022; however, the parent asserted in her due process complaint notice that the student was only wrongfully denied access to school from December 2, 2022 through December 8, 2022 (Joint Exs. K at p. 10; T at p. 1). According to the hearing record, the student was supposed to be receiving instruction in an IAES during the length of the suspension (Joint Exs. F at p. 3; T at p. 3; U at p. 2; Dist. Exs. B at p. 1; C at pp. 2, 3). The alternate instruction attendance sheet reflects the dates November 28, 2022 through December 1, 2022, December 5, 2022 through December 6, 2022, and January 5, 2023 (Joint Ex. M at pp. 1-2). The attendance sheet further reflects that the student did not attend on the November 2022 dates (id. at p. 2). There is no indication in the hearing record of the type of instruction the student received, no progress reports and no evidence that the student ever received speech-language therapy services during the time of suspension.

In her answer and cross-appeal, the parent suggests that the CSE can determine appropriate compensatory education; however, it is the IHO's role to fashion appropriate relief (see Sch. Comm. of Burlington v. Dep't of Educ. of the Commonwealth of Mass., 471 U.S. 359, 369 [1985] [noting that, while the IDEA "confers broad discretion on . . . court[s]" and administrative agencies to fashion "appropriate" relief, an agency or court may not delegate this responsibility to a school district]; see e.g., Application of a Student with a Disability, Appeal No. 20-149).

Accordingly, the appropriate course is to remand this matter to the IHO. When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at \*9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at \*3 [S.D.N.Y. Jan. 22, 2013]).

As the IHO correctly determined that the student's conduct was a manifestation of his disability, the district should not have removed the student to an IAES as part of a disciplinary change in placement. The student is entitled to compensatory education for missed services during the time of suspension. On remand, the IHO should develop the hearing record to determine the length of the student's suspension and the amount of instruction he would have received pursuant to his September 2022 IEP had he attended school. The district should be prepared to demonstrate via documentary evidence whether the student received any instruction or speech-language therapy services during the time of suspension and whether such instruction conferred any quantifiable educational benefit to the student, as well as to present an argument to the IHO as to what appropriate relief would be for any missed educational services. The IHO should then, relying on the hearing record and the arguments presented by the parties, determine the amount of instruction the student should have received according to the September 2022 IEP, less the amount of IAES instruction he received, if any, during the period of suspension and fashion an appropriate compensatory education award.

## **VII. Conclusion**

Based on the foregoing, the evidence in the hearing record does not support reversal of the IHO's ultimate conclusion that the student's conduct was a manifestation of his disability and, therefore, a disciplinary change in placement was not permissible. However, the IHO conflated the MDR procedures that address the permissibility of a disciplinary change in placement that apply to an IDEA due process proceeding with the broader disciplinary procedures conducted by school principals and superintendents, whether a student is disabled or not, and therefore the IHO's order of expungement of the student's records must be reversed. The matter is remanded to the IHO to develop the hearing record on the issue of the student's missed services during the period of suspension and to determine appropriate relief in the form of compensatory education.

**THE APPEAL IS SUSTAINED IN PART.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the impartial hearing officer's decision dated October 4, 2023 is modified, by reversing those portions which directed the district to expunge the student's record of suspension; and

**IT IS FURTHER ORDERED** that the matter is remanded to the IHO to determine an appropriate amount of compensatory educational and, in doing so to develop the hearing record, if necessary.

**Dated:**           **Albany, New York**  
                          **December 8, 2023**

\_\_\_\_\_  
**STEVEN KROLAK**  
**STATE REVIEW OFFICER**