The University of the State of New York

The State Education Department
State Review Officer
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No. 23-253

Application of a STUDENT WITH A DISABILITY, by her 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:
Staten Island Legal Services, attorneys for petitioner, by M'Ral Broodie-Stewart, 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 her disability and sustained a school imposed disciplinary suspension during the 2021-22 school year. The petitioner also appeals from a portion of the IHO's decision which denied, in part, his requested relief for the respondent's failure to offer the student a free appropriate public education (FAPE) for the 2021-22 and 2022-23 school years. Respondent (the district) cross-appeals from the IHO's awarded relief. The appeal must be sustained to the extent indicated. The cross-appeal must be sustained. The matter must be 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

The student in this appeal has been the subject of a prior State-level administrative review involving the MDR team's determinations during the 2021-22 school year (see Application of a

Student with a Disability, Appeal No. 22-120; SRO Ex. I).[1] The parties' familiarity with the facts and procedural history preceding this appeal—as well as the student's educational history—is presumed and, as such, will not be repeated herein unless relevant to the disposition of this appeal. Additionally, the issues raised in the parent's July 6, 2022 due process complaint notice will not be repeated as the due process complaint notice was already described in Application of a Student with a Disability, Appeal No. 22-120.

A. Impartial Hearing Officer Decisions

1. Impartial Hearing Officer's Interim Decision

The parties convened for an expedited impartial hearing regarding the MDR team's determinations on July 29, 2022 before an IHO with the Office of Administrative Trials and Hearings (OATH) (Jul. 28, 2022 Tr. pp. 1-56; see IHO Ex. II at pp. 3-15; SRO Ex. I at p. 4).[2] In an interim decision dated August 11, 2022, the IHO found that that the student's conduct described in the March and May 2022 MDR determinations was not caused by a direct or substantial relationship to the student's disability (IHO Ex. II). Specifically, the IHO found that both the March and May 2022 MDR teams were legally constituted and that the meetings consisted of participants who were knowledgeable of the student's needs and behaviors (id. at pp. 9-10). The IHO also found that both MDR teams considered relevant information about the student and there were multiple IEPs which included evaluative information about the student's present levels of performance (id. at p. 10). Ultimately, the IHO agreed with the MDR teams' determinations that the student's behaviors were not connected to the student's speech or language impairment (id.). According to the IHO, "[t]he purpose of the MDR team [was] not to reevaluate the student for suspected disabilities, but to determine if the behavior in question [was] a manifestation of the known disability" (id.). The IHO further determined that there was no evidence indicating that "the incidents in question were substantially tied to the student's speech and language disability" (id.). Further, the IHO found that there was no evidence to support finding that the student's IEP was not correctly implemented (id. at p. 11). Therefore, the IHO denied the parent's request to reverse the March and May 2022 MDRs (id.).

2. Impartial Hearing Officer's Findings of Fact and Decision

The parties then convened for an impartial hearing on March 12, 2023 and concluded on August 14, 2023 after 4 days of proceedings (Mar. 14, 2023 Tr. pp. 1-30; June 21, 2023 Tr. pp. 1-

[1] The parent appealed the IHO's interim decision regarding the MDR to the Office of State Review (see Application of a Student with a Disability, Appeal No. 22-120; SRO Ex. I). A State Review Officer determined that the parent's appeal was premature, at that time, and dismissed the parent's request for review, indicating that State regulations do not allow for an interlocutory appeal on issues other than pendency disputes (id.). The SRO decision was attached to the district's answer and cross-appeal and is now accepted into the hearing record as SRO Exhibit I and will be referenced as such in this decision.

[2] The transcript of the July 29, 2022 hearing date was not included in the hearing record for this appeal; however, it was included in the hearing record of the prior appeal and has been referenced as part of the proceeding. As the July 2022 hearing date was not consecutively paginated with the subsequent hearing dates, it is cited to with reference to the date (Jul. 29, 2022 Tr. pp. 1-56).

16; June 28, 2023 Tr. pp. 1-7; Aug. 14, 2023 Tr. pp. 1-16).[3, 4] In a decision dated October 11, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2021-22 and 2022-23 school years (IHO Decision at pp. 10-14).[5] Specifically, the IHO found that, although triennial evaluations "were waived in 2017 and 2020," the district did not show why those evaluations of the student were not necessary (id. at p. 12). The IHO also found that even though the parent "effectively impeded" the district's ability to gather any updated information about the student because of the parent's lack of consent, the district failed to demonstrate that it made appropriate attempts to seek parental consent for a reevaluation or that it provided the parent with prior written notices requesting a reevaluation (id. at pp. 11-12). Regarding the April 2021 and March 2022 IEPs, the IHO determined that both IEPs failed to mention the student's then-present functioning levels and cognitive strengths or weaknesses (id. at 13). Additionally, the IHO determined that despite being found eligible for special education as a student with a speech or language impairment, both IEPs did not contain any information regarding the student's needs or abilities, nor were there any speech-language services recommended for the student (id. at pp. 13-14). The IHO also found that the March 2022 IEP failed to address, or even discuss, the student's maladaptive behaviors despite the fact that an MDR meeting had been held just six days prior, and March 7, 2022 would have been the student's first day back from a 15-day suspension (id. at p. 14).

As relief, the IHO ordered: (1) the district to conduct a neuropsychological evaluation, a functional behavioral assessment (FBA), and if necessary, develop a behavioral intervention plan (BIP) for the student; (2) the district to convene a CSE within 15 days of the completion of such evaluations or within 75 days of the date of the order and to use all available data to develop an appropriate IEP for the student and to determine whether the student was in need of and could benefit from academic tutoring; (3) if the CSE determined the student was in need of academic tutoring, for the district to provide the student with 1:1 or group instruction by a qualified provider of the district's own choosing, unless the parties agreed otherwise; and (4) if the district failed to complete such evaluations or failed to reconvene the CSE in the aforementioned time, for any reason other than failure to obtain parental consent after making at least three attempts to secure

[3] The transcripts were not paginated consecutively. As such, the transcripts will be cited to in this decision by the hearing date and the corresponding pages.

[4] According to the first page of the IHO's decision, twelve impartial hearings were held in this matter beginning January 18, 2023 and concluding August 14, 2023; however, only transcripts from the March 14, 2023, June 21, 2023, June 28, 2023 and August 14, 2023 impartial hearings were included in the hearing record (see IHO Decision at p. 1; Mar. 14, 2023 Tr. pp. 1-30; June 21, 2023 Tr. pp. 1-16; June 28, 2023 Tr. pp. 1-7; Aug. 14, 2023 Tr. pp. 1-16). Upon a further review of the hearing record, it appears that at the eight impartial hearings held off the record, the IHO issued orders of extension (see IHO Ex. I). In a written clarification of the hearing record from OATH dated November 13, 2023, it appears that the parties also convened for five status conferences between September 8, 2022 and February 15, 2023 which were not transcribed.

[5] At the outset of the IHO's decision, he stated that "[i]n light of the foregoing and as more fully discussed below, I find that the District met its burden to demonstrate that it offered the student FAPE for the 2023-2024 school year and the parent is not entitled to relief" (IHO Decision at p. 4). However, after a full review of the IHO's decision, including his ordered relief, it appears this was a typographical error, as the parent's July 2022 due process complaint notice only included claims relating to the 2021-22 and 2022-23 school years and the IHO made findings that the district did not offer the student a FAPE for the 2021-22 and 2022-23 school years (see Parent Ex. A; IHO Decision at pp. 10-14).

such consent consistent with State and federal law, the district was required to fund a neuropsychological evaluation, an FBA, and if necessary, a BIP, at reasonable market rates, including appropriate interpretation services, and to provide the student with 324 hours (1.5 hours each in writing, math, and reading per week, for a total of 72 weeks) of 1:1 or group instruction by a qualified provider of the district's own choosing, unless the parties agreed otherwise (IHO Decision at pp. 16-17). The IHO also ordered the district to provide compensatory education, to be used within two years, consisting of two 30-minute sessions per week of individual counseling services, for 72 weeks for a total of 72 hours, and three 30-minute sessions per week of individual speech-language therapy for a total of 108 hours.

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in failing to reverse the determinations made by the March and May 2022 MDR teams. The parent argues the IHO erred in finding that the district considered all relevant information during both the March and May 2022 MDR team meetings. Next, the parent argues that the evidence in the hearing record supports a finding that the disciplinary incidents were a manifestation of the student's disability. Additionally, the parent argues that new evaluations were not needed for the district to comply with the disciplinary due process procedures and MDRs "can be made" without evaluations. However, the parent also argued that the IHO erred in finding that the MDR process was not an appropriate process for conducting a reevaluation.

Next, the parent asserts the IHO erred in determining the student's 2017 and 2020 triennial evaluations were waived, asserting that they could only be waived by signed agreement and that the district believed an evaluation was necessary in 2020, and that the parent interfered with the district's evaluation process. The parent also asserts that the IHO's adverse determination with respect to his credibility is not supported by the hearing record and should be reversed.

Regarding the IHO's ordered relief, the parent alleges that the IHO should have developed the hearing record further if he was uncertain about the appropriate compensatory relief and that it was improper for the IHO to order the CSE to determine whether the student required academic tutoring. Additionally, the parent alleges that the IHO's awarded compensatory education was not appropriately reasoned because there was no evidence to support the IHO's decision to reduce compensatory counseling services, the IHO's alternative lump sum award of 324 hours of compensatory education was not developed using a fact-specific inquiry, and the IHO improperly shifted the burden onto the parent.

As relief, the parent requests an order reversing the determinations made by the March and May 2022 MDR teams, expunging the suspensions from the student's school record, reversing the adverse findings against the parent, and directing the district to fund compensatory education consisting of 911 hours of 1:1 tutoring and 145 hours of 1:1 counseling.[6]

[6] In the parent's memorandum of law in support of the request for review, the parent asserts that if the requested compensatory award is not granted, in the alternative, a remand back to the IHO for consideration of additional evidence regarding an appropriate compensatory education award is warranted.

In an answer with cross-appeal the district responds to the parent's material allegations and asserts that the IHO's decision should mostly be upheld. In its answer, the district states it is not appealing the IHO's determination that the student was not offered a FAPE for the 2021-22 and 2022-23 school years or the IHO's award of compensatory related services in the form of a bank of 72 hours of individual counseling services and a bank of 108 hours of individual speech-language therapy. The district contends that the record supports the IHO's determination regarding the MDRs and that there is no evidence to support the parent's request for 911 hours of 1:1 compensatory tutoring and 145 hours of compensatory 1:1 counseling.

In a cross-appeal, the district contends that the IHO erred in ordering it to conduct a neuropsychological evaluation, an FBA and a BIP and erred by ordering it to provide the student with 324 hours of 1:1 tutoring services or group instruction in the event it failed to complete the evaluations or failed to convene the CSE within the ordered timeframe. The district alleges that such a reward is moot and unnecessary given that the parties entered into a partial due process resolution in which the district agreed to fund additional evaluations of the student and to convene a CSE to consider the new evaluative information. In an answer to the district's cross-appeal, the parent responds to the district's allegations.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist.,

346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[7]

[7] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

The IDEA also 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 a manifestation of his or her disability, the CSE is required to conduct a functional behavioral assessment (FBA) and implement a 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" as defined in the IDEA and State and federal regulations, the district must also return the student to the placement from which he or she was removed or suspended (20 U.S.C. § 1415[k][1][F][iii]; Educ. Law § 3214[3][g][3][viii]; 34 CFR

300.530[f][2]; 8 NYCRR 201.4[d][2][ii]).[8] If the MDR team determines that the student's conduct was the direct result of the school district's failure to implement the student's IEP, the district must take immediate steps to correct the deficiencies in the implementation of the student's IEP (34 CFR 300.530[e][1][ii], [3]; 8 NYCRR 201.4[e]).

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. Preliminary Matters

Prior to addressing the merits of the parent's claims, I first address the district's cross-appeal from that portion of the IHO's orders which directed it to conduct a neuropsychological evaluation, an FBA, and a BIP and to provide the student with 324 hours of 1:1 tutoring services or group instruction in the event the district failed to complete the evaluations or failed to convene the CSE in the ordered timeframe. The district alleges that these issues were rendered moot based on a partial resolution agreement the parties entered into on September 28, 2022 and the CSE meetings that took place or were scheduled after the partial resolution agreement was executed. The district submits five exhibits with its answer with cross-appeal as additional evidence in support of this argument: a copy of the prior SRO decision relating to this student and the IHO's interim decision dated October 21, 2022, a copy of the September 28, 2022 due process resolution agreement, a copy of a prior written notice dated March 22, 2023, a copy of an attendance page of a CSE meeting that took place on March 17, 2023, and a copy of a CSE meeting notice dated November 13, 2023. [9]

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer'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 the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068).

[8] A district and parents may agree to a change in the student's placement (20 U.S.C. § 1415[k][1][F][iii], [G]; 34 CFR 300.530[f][2], [g]; 8 NYCRR 201.7[e], 201.8[a], 201.9[c][3]).

[9] As noted above, for ease of reference, the prior SRO decision in this matter will be accepted as additional evidence and referred to as SRO Exhibit I (SRO Ex. I). The IHO's interim decision dated October 21, 2022 is already a part of the hearing record (IHO Ex. II). Accordingly, it is not necessary to accept the IHO interim decision as additional evidence.

The factor specific to whether the additional evidence was available or could have been offered at the time of the impartial hearing serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination and to prevent the party submitting the additional evidence from withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). However, both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]).

In this instance, information regarding the due process resolution agreement, including the agreement itself, should have been included in the hearing record initially (8 NYCRR 200.5 [j][4][iii], [5][vi][a]). Therefore, because it should have been included in the hearing record in the first instance, the partial due process resolution agreement has been accepted and will be referenced as SRO Exhibit II.

Regarding the copy of the prior written notice, dated March 22, 2023, and the copy of an attendance page of a CSE meeting that took place on March 17, 2023, such documents were created during the impartial hearing— after the parties submitted their evidence disclosures and evidence was entered into the hearing record. The district could have asked permission from the IHO during the impartial hearing to enter the documents into the hearing record but elected not to do so. Regardless, both documents are relevant to the discussion of whether the IHO's order is now moot, and accordingly, I will exercise my discretion and accept the March 2023 prior written notice and March 2023 CSE attendance page into the hearing record which shall be referenced as SRO Exhibit III and SRO Exhibit IV respectively (SRO Exs. III-IV).

The copy of the CSE meeting notice dated November 13, 2023 was not created until after the impartial hearing concluded and thus could not have been offered at the time of the impartial hearing. The meeting notice generally supports the district's argument that it was attempting to schedule a CSE meeting to update the student's IEP based on the new evaluative information it received. Accordingly, I will exercise my discretion and accept the CSE meeting notice dated November 13, 2023 as a part of the hearing record, which shall be referenced as SRO Exhibit V (SRO Ex. V).

Turning to the district's arguments as to mootness, 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]).

Based on the additional evidence submitted by the district with its answer with cross-appeal, the parties entered into a due process resolution agreement which was signed by the parent on September 13, 2022 and by the district on September 28, 2022 (SRO Ex. II). As per the partial resolution agreement, the district agreed to conduct the following evaluations—a speech evaluation, a neuropsychological evaluation, a vocational assessment, and an FBA—and the district agreed to reconvene the CSE within 30 days from the completion of the evaluations.

The attendance page indicates a CSE meeting was held on March 17, 2023 and further reflects that CSE participants included the parent and his legal aid attorney, as well as a district school psychologist who also served as the district representative, a general education teacher, a related services provider/special education teacher, and a guidance counselor (SRO Ex. IV). According to a prior written notice dated March 22, 2023, the CSE reviewed a December 13, 2022 FBA, a December 23, 2022 speech and language assessment, a January 24, 2023 vocational assessment, and a March 1, 2023 teacher report (SRO Ex. III).[10] The parent in his request for review also confirmed that the district conducted a speech and language evaluation, and a functional behavior assessment in December 2022 and that such evaluations were discussed at the March 2023 CSE meeting (Req. for Rev. ¶¶ 29, 32). According to the prior written notice, the CSE was still awaiting the results of neuropsychological testing, but convened to add counseling to the student's educational programming and review the results of the FBA for consideration of a BIP (SRO Ex. III).

According to the parent in his request for review, a neuropsychological evaluation was conducted in March 2023; however, the neuropsychologist did not upload the report into the district's special education student information system (SESIS) until mid-September 2023, after closing statements were due to the IHO (Req. for Rev. ¶ 33). Moreover, at the August 14, 2023 impartial hearing, the parent's attorney represented to the IHO that a neuropsychological evaluation was completed but the neuropsychologist who performed the evaluation advised her that the evaluation was "lost" due to the hospital she worked with switching computer systems (Aug. 14, 2023 Tr. pp. 4-5).

Further, according to the district in its answer with cross-appeal, the school psychologist of the district school the student is currently enrolled in for the 2023-24 school year, represented that the district has not been able to reconvene the CSE to consider the results of the March 2023 neuropsychological evaluation because the student and parent had been out of the country for two months since September 23, 2023. The district sent a meeting notice, dated November 13, 2023, to the parent inviting him to attend a CSE meeting on November 29, 2023 (SRO. Ex. V).

Based on the representations by both parties, it appears that the IHO was unaware at the time of issuing his decision that the neuropsychologist who performed the March 2023 neuropsychological evaluation finally submitted her evaluation report for consideration by the

[10] The district did not submit copies of the March 2023 IEP, the December 13, 2022 FBA, the December 23, 2022 speech and language assessment, the January 24, 2023 vocational assessment, or the March 1, 2023 teacher report as additional evidence to be considered on appeal with its answer with cross-appeal.

CSE (see Aug. 14, 2023 Tr. pp. 4-6). The parent's attorney represented during the August 14, 2023 impartial hearing that, despite the September 28, 2022 partial resolution agreement and the neuropsychological evaluation being complete, due to the fact it was August 14, 2023 and no report was filed by the neuropsychologist, the parent was looking for a new neuropsychological evaluation (Aug. 14, 2023 Tr. pp. 4-6). The IHO responded that because it appeared the matter could conclude that day, he was not willing to delay the matter further for another neuropsychological evaluation to be completed (Aug. 14, 2023 Tr. p. 6). As such, the IHO's order directing the district to conduct a neuropsychological evaluation, an FBA, and a BIP were moot as of the time the IHO issued his decision and, accordingly, the IHO's order directing those evaluations must be vacated, as well as the IHO's order directing the CSE to determine if the student should be provided 1:1 tutoring services, or in the alternative, for the district to provide the student with 324 hours of or group instruction in the event the district failed to complete the evaluations or failed to convene the CSE within the ordered timeframe must also be vacated.

I would also like to quickly note that to the extent the parties' raised arguments related to section 504 of the Rehabilitation Act of 1973 (section 504), 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"]). Additionally, to the extent that the parent challenges the disciplinary proceedings regarding the student's conduct, those proceeding are separate from the MDR. 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. Thus, suspensions, while disciplinary in nature, are not subject to the MDR procedures under IDEA. 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).[11]

Additionally, the district does not appeal from the IHO's determination that it failed to offer the student a FAPE for the 2021-22 and 2022-23 school years or the IHO's determination that the student is entitled to 108 hours of compensatory individual speech-language therapy and 72 hours of compensatory individual counseling services; as such, the IHO's determination on those points is final and binding on the parties and will not be further discussed, except when discussing the parent's request for additional compensatory tutoring and individual counseling services as relief

[11] An SRO does not have jurisdiction to review a disciplinary proceeding pursuant to Education Law § 3214, as such appeals are submitted to the Commissioner of Education in accordance with Education Law § 310. 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).

on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

Moreover, a review of the parent's allegations regarding the IHO's determination as to the parent's credibility and district's attempts at conducting a triennial reevaluation show that they are without merit. In particular, although the IHO noted that the parent's testimony was self-serving and the IHO expressed disbelief as to the parent's preferred language, these findings all related to the district's reevaluation of the student and the parent's refusal of consent for a reevaluation (IHO Decision at pp. 10-11). This is of consequence, as, on the issues of the district's evaluations of the student, the IHO specifically found that the IEPs at issue did not sufficiently describe the student's present levels of performance and the IHO held that failure against the district noting that the district failed to show that it made appropriate attempts to obtain parental consent for a reevaluation (id. at p. 12). Finally, to the extent that the parent argues that the IHO considered parent participation as part of the IHO's consideration of the parent's assertions that the district engaged with the parent in a language other than his native-language, this type of allegation would result in a procedural violation, which would then require the IHO to consider if the procedural inadequacy (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits, before finding a denial of a FAPE (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). Considering the parent's arguments on these points, even if the IHO erred in her factual findings, the ultimate FAPE issues were determined in the parent's favor and there is no additional relief other than compensatory education that could be granted in this matter. As such, I now turn to the merits of the parent's MDR claims and his request for additional compensatory education.

B. Manifestation Determination Reviews

The parent argues that the hearing record does not support the IHO's decision to uphold the March 2022 and May 2022 MDR teams' findings of "No Manifestation." The parent argues that the IHO erred in her determination that the March 2022 and May 2022 MDR teams considered all relevant information in the student's file during the MDRs. A review of the MDR meetings are made in order so as to provide necessary background with respect to the parent's substantive claims and a determination as to whether the incidents in question were caused by or had a direct and substantial relationship to the student's disability.

1. March 2022 MDR Meeting

The first MDR was conducted on March 1, 2022 in review of an incident that occurred at school on February 3, 2022 (Parent Ex. E; Dist. Ex. 1 at p. 2).[12] The MDR worksheet identified the review meeting participants as the school social worker, the assistant principal of special education, the dean, the parent, and the parent's attorney (id. at p. 1; see Dist. Ex. 8 ¶¶ 2, 6). The March 2022 MDR worksheet contained a review of documents section, which included excerpts and notes from the April 2014 psychological update, the April 2021 IEP, a February 2022 written

[12] The MDR worksheet is dated February 28, 2022; however, the intervention log report indicates that the parent was called on February 28, 2022 and, with the parent's agreement, the MDR was scheduled for March 1, 2022 (Dist. Ex. 1 at pp. 1, 2).

teacher observation, the student's report card, attendance, transcript, and the dean's anecdotal record (Dist. Ex. 1 at pp. 3-5).

On the MDR worksheet, the team described the student's disability and how it affected her behavior (Dist. Ex. 1 at pp. 2-5). The team indicated that the student had a disability classification of speech or language impairment and a history of academic delays for which she received special education supports in the form of small class instruction (id.). The team noted that there was no documented history of aggressive behaviors or behavior interventions related to the student's disability (id.).[13]

The MDR worksheet detailed information about the incident (Dist. Ex. 1 at pp. 5-6). According to the worksheet, the student attempted to enter the cafeteria through a restricted exit (Dist. Ex. 1 at p. 5; see Tr. pp. 18-19). Then, when a school safety agent (SSA) attempted to stop the student by giving a verbal warning, the student refused to comply and became physically aggressive (Dist. Ex. 1 at p. 5). The student pushed and shoved the SSA several times until other school staff responded (id.). The student continued to ignore directives and was escorted to the dean's office (id.). Following the initial incident, the student continued to refuse to follow directives, and ran out of the dean's office and up several floors to her classroom where the incident continued to escalate (id. at pp. 5-6). The student continued to show aggression (pushing and shoving) toward other school staff and the dean while in the classroom (id. at p. 6). In order to remove the student from the classroom, the other students had to be evacuated and after about 15-minutes, the student "finally complied" and walked to the dean's office where the parent was notified (id.).

The MDR team noted what occurred immediately prior to the incident, namely that the student was told she could not enter the cafeteria through a "fenced off exit" (Dist. Ex. 1 at p. 6). It was reported that the student became physically aggressive with the SSA after being told several times she could not enter the cafeteria through the exit and that she refused to comply and/or follow the SSA's and the dean's directives (id.).

[13] The student had demonstrated some insubordinate behaviors that appeared to stem from her attempted school refusal. For instance, the hearing record contains a "Dean's Anecdotal Record" that details a student's interactions with the Dean's Office, including disciplinary issues (July 29, 2023 Tr. p. 16; see Dist. Ex. 2). According to the assistant principal for school tone and safety, the majority of incidents that the student was involved in during Fall 2021 were related to her refusal to listen to staff directions (July 29, 2003 Tr. p. 17; Dist. Ex. 2 at p. 1). He noted that the student had "a couple of incidents where she would push by staff or [] physically . . . push another student" and that she refused to go to class and to follow directions (July 29, 2023 Tr. p. 17). The assistant principal indicated that the district tried to handle these issues by "hav[ing] the parent up multiple times" (July 29, 2023 Tr. p. 17; Dist. Ex. 2 at p. 1). He reported that the district tried to handle things progressively, in accordance with its discipline code, and the student was given restorative practices and also minor disciplinary consequences such as detention or removal from class (July 29, 2023 Tr. p. 17; Dist. Ex. 2 at p. 1). Also, The assistant principal explained that when district staff met with the student's father he indicated that he was unhappy that the student was cutting classes but also unhappy with staff trying to get the student where she needed to go (July 29, 2023 Tr. p. 18; Dist. Ex. 2 at p. 1). The assistant principal recalled that he offered the student counseling but she refused it and said she would not go (July 29, 2023 Tr. p. 18). In addition, he recalled that the student's father did not push her to go to counseling and the district would not provide the service without the parent's consent (July 29, 2023 Tr. p. 18).

Next 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 her disability (id.). The MDR team concluded that there was no direct or substantial relation of the student's aggressive behavior to the student's disability and that the student's April 2021 IEP was fully implemented (id. at pp. 6-7).

2. May 2022 MDR Meeting

The second MDR was conducted on May 26, 2022 in review of an incident that occurred on May 13, 2022 (Dist. Ex. 3 at pp. 1, 4; see Parent Ex. G). The MDR worksheet identified the review meeting participants as the school social worker, the assistant principal, and the parent's attorney (Dist. Ex. 3 at p. 1).[14] The worksheet noted that the meeting was scheduled at 12:00 p.m. at the request of the parent and the parent's attorney, however, the parent was not available, and the parent's attorney requested to move forward with the meeting with her being the parent's representative (id. at p. 2). The March 2022 MDR worksheet contained a review of documents section, which included excerpts and notes from the March 2022 IEP, the April 2014 psychological update, a May 2022 written teacher observation, the student's report card, transcript, and the dean's anecdotal record (id. at pp. 2-4).

In the worksheet, the team described the student's disability and how it affected her behavior (Dist. Ex. 3 at p. 4). The team indicated that the student had a disability classification of speech or language impairment and that she had a history of academic delays for which she received special education support of small class instruction (id.). The team further indicated that there was no documented history of aggressive behaviors as it related to her disability classification and that when the student was disengaged from her academics, she would either not engage when present in class or cut class, which was frequent (id.).

The MDR worksheet detailed information about the incident (Dist. Ex. 3 at p. 4). According to the worksheet, on May 13, 2022, the student was "cutting class in the cafeteria [and] tried to leave without a pass" (id.). An SSA informed the student she could not leave without a pass and the student refused to comply (Dist. Ex. 3 at p. 4; see Tr. pp. 23, 36-38). It was reported that the situation escalated with the student attempting to leave and arguing with the SSA (id.). When the SSA attempted to stop the student from leaving the cafeteria without a pass, the student punched the SSA causing injury; the student was removed from school, taken to a police precinct, and charged with assault (id.). At some point, the parent was contacted (id.).

The MDR team noted what occurred immediately prior to the incident, namely that the student was given a directive not to leave the cafeteria without a pass (Dist. Ex. 3 at p. 5). It was reported that the student became physically aggressive with the SSA after being told several times she could not leave the cafeteria (id.).

Next the MDR team determined that there was no direct or substantial relationship of the student's recent maladaptive aggressive behavior to the student's disability classification of speech

[14] According to the assistant principal, the district attempted to reach the parent by telephone, but he did not attend the MDR (Tr. p. 24; see Dist. Ex. 3 at p. 1). The parent's attorney participated in the meeting with the parent's permission (Tr. pp. 24-25).

or language impairment and that the student's May 2022 IEP was fully implemented (id. at pp. 5-6). The worksheet further indicated that the parent's attorney disagreed with the team's finding that the student's behavior was not a manifestation of her disability (id. at p. 6).[15]

3. Documents Reviewed and Considered

The parent claims that both MDR teams did not consider recent relevant information regarding incidents that occurred prior to the incidents which led to the student's suspensions, including incidents where the student hit another student and pushed past the deans and SSAs. The parent alleges that the hearing record is replete with uncontroverted testimony and documentary evidence that the disciplinary incidents were manifestations of the student's disabling conditions as the student had a history of not following directions, engaging in truancy, aggression, fighting, punching, pushing, and bumping others prior to the suspensions. The parent also claims that the teachers reported troubling behavior all school year and that the reason why the student's aggression may not have been evident during the 2020-21 school year was because the student was learning remotely.

The IHO determined that both MDR teams considered all relevant information regarding the student during the meetings (IHO Ex. II at p. 8). The IHO specifically stated that the MDR teams considered multiple IEPs, which included evaluative information about the student's present levels of performance, the severity of her disability, and that her behavior and disposition were reviewed by both MDR teams (id.) 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 worksheets reveals that the MDR teams appropriately discussed, reviewed and considered the relevant documents and as detailed earlier, discussed the relationship between the student's disability and the incident (Dist. Exs. 1 at pp. 1-7; 3 at pp. 1-7). In conducting an MDR and in accordance with the facts specific to this matter, State regulation requires that the MDR team 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 the conduct in question was caused by or had a direct and substantial relationship to the student's disability (8 NYCRR 201.4 [c][1]).

The student's April 2021 and March 2022 IEPs do not indicate that the student had maladaptive behaviors that were impeding her learning or that of others in school (see Parent Exs. B at p. 5; F at p. 7). The hearing record shows that the student's maladaptive behaviors began to emerge during the 2021-22 school year and the behaviors were mainly directed towards district staff who caught the student avoiding class and then attempted to escort her to class (see generally Dist. Exs 1-3). Additionally, the IEPs included concerns of the parent, none of which indicated

[15] The assistant principal testified that the district was not able to offer to reevaluate the student because the parent was not present (July 29, 2023 Tr. p. 25). He indicated that the student was given the opportunity to complete her schoolwork at an alternate learning center, although based on attendance records it appeared that she did not attend (July 29, 2023 Tr. pp. 25-26). The assistant principal was asked if based on the student's classification of speech or language impairment and the regulations whether her behavior could be found to be a manifestation of her disability (July 29, 2023 Tr. p. 26). The assistant principal responded that in his limited time as a related service counselor or as "DAP security" that it was "very, very difficult" to have a "manifestation in which a student has a speech and language impairment with no history at all in the IEP of behavior issues" (July 29, 2023 Tr. p. 26).

the parent had concerns regarding the student's behaviors in school or at home (see Parent Exs. B at p. 15; F at pp. 5, 17).

As noted by the parent in the request for review, the information available to the MDR showed that beginning in October 2021, the student had several incidents that involved cutting class, being disrespectful towards school staff, and refusing to following directions (Parent Ex. C). Additionally, prior to the February 2022 incident, the dean's anecdotal record also showed that, in September 2021, the student had one incident where she student pushed past another student, then hit the other student after the student pushed her back (id. at p. 1). The assistant principal testified that, in Fall 2021, the student "was a student who would not listen [to] direction from staff" and who had a couple of issues where she would push by another student or staff member and the district tried to address those actions through restorative practices and "minor disciplinary things like detention, or maybe a class removal" (July 29, 2023 Tr. p. 17). He also testified that the school offered counseling for the student, but the student refused counseling services (July 29, 2023 Tr. p. 18).

The assistant principal further testified that, after the March 2022 MDR, he reviewed the MDR worksheet and noted that the team reviewed the documents they had and "there was not a history anywhere in the documents of any type of this behavior whether it's not cooperating with . . . staff . . . lack of impulse control, any behavioral issues at all in any of her history from, . . . the beginning until now" (July 29, 2023 Tr. pp. 20-21).[16] The assistant principal was then asked about the general types of behaviors exhibited by the student in terms of cutting class and being disrespectful and confirmed that there were students who did not have IEPs who cut classes and who were insubordinate and disrespectful toward staff (July 29, 2023 Tr. p. 41). In terms of differentiating when those types of behaviors might be considered a manifestation of a student's disability the assistant principal explained that the student did not have a history of a lack of impulse control, so while cutting classes and insubordination were negative things, the MDR team did not see them as a manifestation of the student's disability (July 29, 2023 Tr. p. 42). He also explained that those behaviors did not always lead to violence against staff as it had in the student's case (July 29, 2023 Tr. p. 42).

Based on the above, and, in particular, reviewing the MDR teams' determinations based on the information available to it, the MDR teams' conclusions that the student's behaviors leading to the suspensions, particularly the violent actions towards staff, were not a manifestation of the student's disability were reasonable.

As a final note, in reading through the hearing record and the parent's request for review, it appears that the gravamen of the parent's argument concerning the MDR process and determinations is that the MDR teams did not have sufficient information regarding the student and should have conducted a reevaluation of the student as part of the MDR process; however, as noted above, the purpose of the reevaluation process is to review the appropriateness of the student's educational programming. The MDR process does not include a mechanism for conducting a reevaluation of a student prior to the MDR. It must be stressed that the MDR process

[16] The assistant principal testified that he did not participate in the March 2022 MDR but that after each MDR he met with the team "to see what the situation was" and in this instance he also met with the school social worker (July 29, 2023 Tr. p. 20).

is separate from reviewing the appropriateness of the student's educational program. In the former version of the IDEA prior to 2004, Congress required that the

> IEP Team may determine that the behavior of the child was not a manifestation of such child's disability only if the IEP Team--
>
> (i) first considers, in terms of the behavior subject to disciplinary action, all relevant information, including. . .
>
> (III) the child's IEP and placement; and consideration of the adequacy of the IEP

(20 U.S.C. § 1415 [k][4][c] (as amended April 29, 1999). This language was removed from the IDEA and is no longer the requirement. As such, any assessment of the MDR teams' review and determinations must be made separate and apart from considerations as to whether the April 2021 and March 2022 IEPs were appropriate and, as discussed above, the IHO determined they were not appropriate. An MDR review is not a proper mechanism by which a student with a disability can be reevaluated as the MDR team does not have an obligation to determine the adequacy of the student's IEP, but rather the MDR team is tasked solely with determining if the conduct in question was caused by or had a direct and substantial relationship to the student's disability and that the conduct in question was not the direct result of the school district's failure to implement the IEP as written (8 NYCRR 201.4[c]; see 20 U.S.C. § 1415 [k][1][E]; 34 CFR 300.530 [e][1]).

That being said, it is understandable that the parent would find MDR determinations made without reference to current evaluative material reflecting the student's needs as related to her disability, as of the time of the incidents leading to the disciplinary actions, to be lacking. It is inevitable that a district's continued failure to reevaluate a student, particularly where the student's needs, both academic and social-emotional, may have changed over time, can potentially result in an incomplete record and less than accurate determinations in the context of an MDR. However given the tight time frame and limited mandate of an MDR, the failure of a district to sufficiently evaluate a student is more properly remedied within the conceptual framework of the district's obligations to provide the student with a FAPE, and the award of compensatory education as relief for a district's failure to provide the student with an appropriate educational program.

C. Compensatory Education

As indicated above, neither party challenges that IHO's ordered compensatory education in the form of 72 hours of individual counseling services and 108 hours of individual speech-language therapy. However, the parent seeks additional compensatory education in the form of 911 hours of individual tutoring and 145 hours of individual counseling services to make up for the district's denial of a FAPE to the student for the 2021-22 and 2022-23 school years.

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 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 & n.12 [2d Cir. 2014]; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015]; 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"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

Generally, compensatory services are not designed for the purpose of maximizing a student's potential or to guarantee that the student achieves a particular grade-level in the student's areas of need (see Application of a Student with a Disability, Appeal No. 16-033; cf. Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Rather, an award of compensatory education should place the student in the position that he would have been in had the district acted properly (see Parents of Student W., 31 F.3d at 1497 [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA" and finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]).

Moreover, an IHO generally has broad authority to fashion appropriate equitable relief (see, e.g., Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see Forest Grove v. T.A., 129 S.Ct. 2484 [2009]).

In this matter, the parent in his memorandum of law argues that the IHO erred in not awarding his request for 911 hours of individual compensatory tutoring despite the fact that the student's IEPs placed her at a fourth-grade level academically (Parent Memo. Of Law at p. 24). The parent also argues that the IHO improperly shifted the burden of proof onto him to establish the appropriate compensatory education. The parent further argues that because the district did not offer evidence to the contrary, the IHO should have ordered all of his requested compensatory education or, in the alternative, the undersigned should remand this matter back to the IHO for consideration of additional evidence to determine an appropriate compensatory education award for the district's two-year denial of FAPE.

After an independent review of the evidence in the hearing record, a remand to the IHO is warranted in this matter to determine the appropriate amount of compensatory education relief for the district's two-year denial of FAPE during the 2021-22 and 2022-23 school years.

D. Remand

State regulation provides that an SRO may remand a matter to an IHO to take additional evidence or make additional findings (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]).

A remand is necessary in this matter in order for the IHO to develop the hearing record such that it includes evidence as to what compensatory services are necessary to place the student in the position she should have been in had the district provided the student with a FAPE for the 2021-22 and 2022-23 school years.

Here, as discussed above, the IHO found the district did not provide the student a FAPE for the 2021-22 and 2022-23 school years in part because the district did not have sufficient evaluative information to identify the student's then-current present levels of performance (IHO Decision at -p. 11-13). The IHO then went on to find that she did not have sufficient information in the hearing record to identify the students then-current functioning, and used that as a reason for ordering additional evaluations and contingent compensatory relief (id. at pp. 15, 16). As noted above, the IHO's ordered relief is being vacated as moot due to the fact that the ordered evaluations were completed as of the date of the IHO's decision. Additionally, to the extent that the IHO delegated the authority for formulating an appropriate compensatory award to the CSE upon review of the ordered evaluative information, such an award was an improper delegation of her authority. It has been repeatedly held that such delegations of the IHO's authority to an IEP team that is largely comprised of school district officials is impermissible because it is at odds with the remedial scheme set forth by the IDEA (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]; M.S. v. Utah Sch. for Deaf & Blind, 822 F.3d 1128, 1135-36 [10th Cir. 2016]; Bd. of Educ. of Fayette Cty., Ky. v. L.M., 478 F.3d 307, 317-18 [6th Cir. 2007]; Reid v. Dist. of Columbia, 401 F.3d 516, 526-27 [D.C. Cir. 2005]; see also, Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *24 [E.D.N.Y. Oct. 30, 2008]).

Because the IHO's award does not address the substantial lack of academic instruction the student missed because of her chronic absences during the two school years at issue, a remand is necessary to allow the district to present its view before the IHO, based on the available evaluative information, as to whether the student requires compensatory education in the form of 1:1 academic tutoring and additional 1:1 counseling services, and for the IHO to otherwise develop the record as to an appropriate compensatory remedy.

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 with respect to the MDRs at issue, that the MDR teams correctly determined that the student's behavior was not a manifestation of her disability, and declining to immediately expunge a school imposed disciplinary suspension in the 2021-22 school year from the student's record, the necessary inquiry with respect to the MDRs is at an end.

With respect to an appropriate award for the district's two-year denial of FAPE to the student, this case must be remanded to the IHO to address the parent's request for compensatory education in the form of 1:1 educational tutoring and 1:1 counseling services based on the available evaluative information, which must be submitted into the hearing record with arguments as to what would be an appropriate compensatory remedy for the student.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated October 11, 2023, is modified by vacating those positions delineated as paragraphs 1, 2, 3 and 4, which ordered the district to conduct a neuropsychological evaluation, an FBA, and a BIP and ordered that the student be provided with 324 hours of 1:1 tutoring services or group instruction in the event the district failed to complete the evaluations or failed to convene a CSE in the ordered timeframe; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO for further determinations on the appropriate award for compensatory education to remedy the district's denial of FAPE to the student for the 2021-22 and 2022-23 school years.

Dated: **Albany, New York**
December 20, 2023

CAROL H. HAUGE
STATE REVIEW OFFICER