



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-471

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 Board of Education of the Batavia City School District

Appearances:

Kanazawa Day, PLLC, attorneys for petitioner, by John T. Kanazawa, Esq.

Webster Szanyi LLP, attorneys for respondent, by Melanie J. Beardsley, 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 the decisions of an impartial hearing officer (IHO) which severed the parent's claims in a due process complaint notice into separate proceedings, upheld a manifestation determination review (MDR) team's determination that the student's behavior was not a manifestation of her disability, sustained a school imposed disciplinary suspension, and determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for her daughter for the 2023-24 school year was appropriate. The appeal must be sustained in part.

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

This appeal arises from an IHO's final determination of the parent's claims set forth in a June 7, 2024 due process complaint notice (Joint Ex. I). The parent initially appealed from the IHO's decision upholding an MDR team's finding that the student's behavior was not a manifestation of her disability and sustaining a school imposed disciplinary suspension during the 2023-24 school year (see Application of a Student with a Disability, Appeal No. 24-358). In that matter, the IHO had issued multiple decisions; however, none of them constituted a final

determination on the merits of the parent's due process complaint notice, thus, the parent's appeal was dismissed (id.).

According to the hearing record, the student began attending school in the district for the 2023-24 school year (Parent Exs. H at pp. 1-4; HH at ¶ 5). The student's prior school district conducted a functional behavioral assessment (FBA) and developed a behavioral intervention plan (BIP) for the student during the 2022-23 school year (Parent Exs. E; F). A CSE from the student's prior district convened on June 14, 2023, and found the student continued to be eligible for special education and related services as a student with an other health impairment (OHI) and developed an IEP for the student for the 2023-24 school year (Joint Ex. III at p. 1). The June 2023 CSE recommended that the student receive the support of integrated co-teaching (ICT) services and one 30-minute session per week of individual counseling (id. at p. 6). The June 2023 IEP from the prior school district also indicated that the student needed strategies, including positive behavioral interventions, supports, and other strategies to address behaviors that impeded the student's learning or that of others and that the student needed a BIP (id. at p. 4).

In July 2023, the parent and the district began corresponding about the student attending school in the district for the 2023-24 school year (Parent Ex. H at pp. 1-4). The district's CSE convened on September 21, 2023 and found the student eligible for special education and related services as a student with an OHI (Joint Ex. IV at p. 1).¹ The district recommended one 40-minute session per week of direct consultant teacher services in each academic class and one 15-minute session per week of individual psychological counseling services (id. at pp. 1, 7).

According to the hearing record, the student was the subject of 20 disciplinary referrals from September 21, 2023 through January 4, 2024 (Dist. Ex. 1 at pp. 1-20).²

By letter dated January 5, 2024, the district superintendent of schools advised the parent that the principal of the student's school had informed him that the student was suspended from January 5, 2024 through January 11, 2024, and that "[d]ue to the serious nature of [the student]'s conduct," the principal recommended that a further period of out-of-school suspension be imposed (Dist. Ex. 4 at p. 13). The letter further indicated that the student was charged with disorderly and/or disruptive conduct, conduct endangering the safety, morals, health, or welfare of herself

¹ The student's eligibility for special education as a student with an OHI is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

² The hearing record contains multiple duplicative exhibits. For purposes of this decision, only one exhibit is cited in instances where duplicates exist and when multiple copies of the same documents are part of a larger exhibit which includes identical content. The IHO is reminded that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]). Due to the IHO's severance of the parent's due process complaint notice into two separate proceedings, the district did not submit the entire hearing record for both proceedings as part of the certified hearing record in this appeal. The IHO also allowed exhibits to be admitted into evidence in the second proceeding, which had been admitted as different exhibits in the first proceeding. Thus, it became necessary to combine all of the documents which comprised the Office of State Review's record in Application of a Student with a Disability, Appeal No. 24-358 into one "Record Exhibit" to be consecutively paginated (i.e., "Bates Stamping") (Record Ex. at pp. 001-648; see Application of a Student with a Disability, Appeal No. 20-135). In the case of those aspects of the hearing record in Appeal No. 24-358, which were not made part of the hearing record in this appeal, those documents will be cited as Record Exhibit with the corresponding page number.

and/or others (id.). Specifically, it was alleged that the student punched another student in the head multiple times and in the process, punched a teacher in the arm while trying to hit the student (id.). The January 5, 2024 letter further stated that a fair hearing would be held on January 10, 2024 (id.).

A suspension hearing and MDR were conducted on January 10, 2024 (Dist. Ex. 4 at pp. 12, 13).³ A hearing officer appointed pursuant to Education Law 3214 found that there was substantial and competent evidence to support the charges and, after the MDR team met, recommended that the student be suspended for the remainder of the school year (Dist. Ex. 4 at pp. 6, 11). The MDR team found that there was not a "direct and substantial relationship" between the conduct in question and the student's disability (Parent Ex. V). The MDR team further determined that the student's conduct in question was not the direct result of the school district's failure to implement the student's IEP (id.). By letter dated January 11, 2024, the superintendent advised the parent that he affirmed the report and recommendation of the hearing officer, and that the student's conduct was not a manifestation of her disability (Dist. Ex. 4 at p. 1). The superintendent further advised the parent that the student was suspended from school for the remainder of the 2023-24 school year but that the district would consider holding a portion of the suspension in abeyance and offer early reinstatement in April 2024 pursuant to a "Contract of Conduct," provided the student met certain conditions (Dist. Ex.4 at p. 1; see Dist. Ex. 1 at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated June 7, 2024, the parent requested an expedited hearing to challenge the findings of the January 10, 2024 MDR team that the student's behavior was not a manifestation of her disabilities, the implementation and adequacy of the student's then-current IEP, and the implementation and adequacy of the student's then-current FBA and BIP (Joint Ex. I at pp. 1, 3-4). The parent alleged that the district conducted a procedurally and substantively invalid MDR, that the September 2023 IEP was not appropriate and did not offer the student a free appropriate public education (FAPE), that the district failed to develop an FBA and BIP for the 2023-24 school year, that the district engaged in the improper use of aversive techniques consisting of removals from the classroom and suspensions from school, and violated the Americans with Disabilities Act (ADA) and section 504 of the Rehabilitation Act of 1973 (section 504) for the 2023-24 school year (id. at pp. 7-10).⁴ As relief, the parent requested that the January 10, 2024

³ The hearing record in Application of a Student with a Disability, Appeal No. 24-358 included an audio recording of the January 10, 2024 superintendent's disciplinary hearing as district exhibit 2, and a video recording of the January 4, 2024 incident as district exhibit 4. Neither of these exhibits were included in the hearing record in this appeal and neither exhibit could be Bates stamped. Both exhibits were reviewed in their entirety and have been considered by the undersigned in this matter.

⁴ State law does not make provision for review of ADA or section 504 claims through the State-level appeals process authorized by the IDEA and the Education Law (see 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"]). Therefore, an SRO has no jurisdiction to review any portion of the parents' claims regarding the ADA and section 504 and such claims by the parent's will not be further discussed herein (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] ["Under New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]; see also D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]).

MDR be declared invalid and further requested determinations that the student's conduct was a manifestation of her disabilities, that the student's academic records be expunged, that the student was denied a FAPE and discriminated against on the basis of her disability, as well as funding and/or reimbursement for independent educational evaluations (IEEs), compensatory education, and development of an IEP with specific program recommendations and a safety plan (*id.* at p. 11).

The district submitted a response to the parent's due process complaint notice, dated June 17, 2024 (Joint Ex. II).

B. Impartial Hearing and Decision

A prehearing conference was held on June 19, 2024, which was not transcribed or recorded (IHO Decision on Bifurcation at p. 1; June 21, 2024 Parent Mem. of Law at p. 1). By motion dated June 21, 2024, the district requested that the IHO bifurcate the expedited and non-expedited claims set forth in the parent's due process complaint notice into two cases with two separate timelines in accordance with State guidance (Dist. Mot. to Bifurcate at p. 1).⁵ In a memorandum of law dated June 21, 2024, the parent objected to the district's motion and asserted that the expedited and non-expedited issues raised in the parent's due process complaint notice should be heard together on an expedited basis (Parent Mem. of Law in Opp.).

On June 24, 2024, the IHO ordered that "the due process complaint filed by the Parent dated June 7, 2024 is deemed to be bifurcated with Claim One of the complaint being determined pursuant to 8 NYCRR 201.11 and the remaining claims to be determined pursuant to 8 NYCRR 200.5" and further ordered the district to "take all necessary steps to enter the appropriate data into IHRS" (IHO Decision on Bifurcation at p. 4).⁶

On July 1, 2024, the parties proceeded to an expedited due process hearing (July 1, 2024 Tr. pp. 1-178).⁷ By decision dated July 16, 2024, the IHO determined that the MDR team correctly found the student's conduct was not a manifestation of her disability and denied the parent's requested relief (July 16, 2024 IHO Decision at pp. 10-11).

On August 1, 2024, the parties reconvened for an impartial hearing relating to the non-expedited matters (Aug. 1, 2024 Tr. pp. 1-195). In a decision dated September 16, 2024, the IHO

⁵ The State guidance relied on by the district is no longer available on the New York State Education Department's (NYSED's) website. While it describes entering two types of issues into the impartial hearing reporting system (IHRS) for tracking purposes of those issues subject to expedited and non-expedited time frames, it does not state that IHOs may sever the expedited claims out of the due process complaint notice such that a decision in the expedited matter would constitute a final decision separate from the other issues contained within the due process complaint notice (*see* Dist. Mot. to Bifurcate, Ex. A).

⁶ The IHO cited two IHO exhibits that were never marked as IHO exhibits or admitted into the hearing record (IHO Decision on Bifurcation at p. 2). Notwithstanding, the district submitted both documents with the certified hearing record in Application of a Student with a Disability, Appeal No. 24-358 (Record Ex. at pp. 294-307).

⁷ As a result of the IHO's decision to sever the parent's due process complaint notice into separate proceedings, the transcripts are not consecutively paginated and must be cited by date and page number.

found that the district offered the student a FAPE for the 2023-24 school year (Sept. 16, 2023 IHO Decision at pp. 11-17).

In a request for review dated August 22, 2024, the parent challenged the IHO's determination on bifurcation and appealed the IHO's July 16, 2024 decision on the student's MDR. In a decision dated September 20, 2024, the undersigned dismissed the parent's request for review as the parent had not appealed from a final determination on all the issues raised in her June 7, 2024 due process complaint notice (Application of a Student with a Disability, Appeal No. 24-358). The second impartial hearing had concluded on August 1, 2024 and, as noted above, the IHO rendered his final decision on September 16, 2024 (Sept. 16, 2023 IHO Decision).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in improperly severing the parent's June 7, 2024 due process complaint notice into two separate cases (IHO Case Nos. 629050; 630069), when "all facts and claims were inextricably intertwined" and that "severing the cases only prejudiced the [s]tudent" (Req. for Rev. ¶ I). The parent further asserts that the IHO improperly precluded multiple exhibits related to the MDR and supportive of the parent's case, that the IHO did not apply the correct legal analysis or legal standard in determining that the MDR was appropriate, that the IHO narrowly interpreted the meaning of aversive techniques, that the IHO unilaterally limited the scope of the claims raised in the parent's due process complaint notice, and that the IHO erred in finding that the district offered the student a FAPE as the district failed to develop an FBA/BIP for the student.

With regard to the conduct of the impartial hearing, the parent asserts that the IHO predetermined the outcome, allowed a law student to observe the impartial hearing over the objection of the parent, displayed bias, and improperly shifted the burden of proof to the parent. The parent also argues that the district and its counsel acted inequitably toward the student and the parent, and that the IHO failed to address the district's conduct in his decisions.

For relief, the parent requests declarations that the due process complaint notice was improperly severed, the impartial hearing violated the parent's and student's due process rights, that the MDR was invalid and that the district failed to provide the student with a FAPE for the 2023-24 school year. The parent further requests a finding that the student's behaviors were a manifestation of her disability, requests reversals of the IHO's decisions on the MDR and on FAPE, and seeks "all relief sought in the originally filed" due process complaint notice.

In an answer, the district responds with general denials to the parent's allegations and initially argues that the request for review should be dismissed for failure to comply with the practice regulations.⁸ The district argues that the parent's claims related to bifurcation and the law clerk's attendance at the impartial hearing are moot and should be dismissed. The district contends

⁸ While the parent's request for review is not robust and does not include citations to the hearing record as required by regulation, it sufficiently specified the reasons for challenging the IHO's decision, including the findings, conclusions, and orders to which exceptions were taken (see 8 NYCRR 279.4[a]; 279.8[c]). Additionally, the district responded to each of the issues raised in the request for review. Accordingly, in an exercise of my discretion, I will not reject the parent's request for review in this instance for failure to comply with the practice regulations.

that the parent's allegations related to the conduct of the district and its counsel are outside the jurisdiction of the SRO and should be dismissed. The district also argues that the parent's memorandum of law and supplemental documents submitted with the request for review are not pleadings and should not be considered in the appeal.⁹ The district also generally asserts that it complied with "all applicable laws, rules, regulations and procedures" in connection with the MDR and development of the student's IEP for the 2023-24 school year. As relief, the district requests that the SRO deny the request for review in its entirety.

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

⁹ Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; Landsman v. Banks, 2024 WL 3605970, at *3 [S.D.N.Y. July 31, 2024] [finding a plaintiff's "inexplicable failure to submit this evidence during the IHO hearing barred her from taking another bite at the apple"]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). The parent annexed supplementary documents to her memorandum of law in support of her request for review. Review of the parent's supplementary evidence reveals that the documents are unrelated to the substance of the claims in the parent's due process complaint notice and purport to illustrate the inequitable conduct of the district and its counsel. This evidence was available during the impartial hearing and further is not necessary to render a decision in this matter. Thus, the parent's supplementary evidence will not be considered.

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" (Andrew 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 Andrew 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]).¹⁰

¹⁰ 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

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).

VI. Discussion

A. Scope and Conduct of the Impartial Hearing

Initially, the parent asserts that the IHO erred in severing the claims in her due process complaint notice into two separate proceedings.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056).

State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]).

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (Letter to Anonymous, 23 IDELR 1073). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

As stated in Application of a Student with a Disability, Appeal No. 24-358, it makes sense to conduct one proceeding with issues that are closely related as the parent has alleged. But if speed for certain aspects of the case is paramount (and at the cost of the opportunity for a more developed argument of intertwined issues), there are strategic options to consider prior to filing a due process complaint notice. The IDEA does not preclude a parent from filing two separate due process complaint notices on issues separate from each other (34 CFR 300.513[c]). Therefore, had the parent filed two separate due process complaint notices; one for the claims related to the

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).

MDR determinations and one for the claims related to the provision of a FAPE, the IHO's determination in Appeal No. 24-358 would have constituted a final determination that was reviewable by the Office of State Review. In this matter, the parent filed one due process complaint notice and objected to bifurcation. While the IHO indicated in his decision that he was granting the district's motion for bifurcation, he went much further in implementing his order by completely severing the parent's claims into two separate proceedings, with two separate case numbers.

State regulation does not specifically provide for severance of claims from a due process complaint notice. The IHO could have held one impartial hearing date with an expedited timeframe, issued interim decisions on the motion practice before him and on the MDR. The IHO could then have proceeded to an impartial hearing record on the non-expedited claims and rendered a final determination with a complete, coherent hearing record, which would have then been subject to appeal.

Instead, severance caused the hearing record issues described above, and in issuing a decision that appeared to the parties to be a July 16, 2024 final determination—which was in fact an unappealable interim decision on the MDR—the resultant confusion could have imperiled the parent's right to appeal the MDR decision, had she not reasserted all of her claims from Application of a Disability, Appeal No. 24-358 in this appeal. Substantively, as discussed below, severance of the two matters appears to have caused the IHO to review the evidence in isolation, which led to incorrect results in his decisions for both the expedited and non-expedited matters. Overall, the IHO conducted the impartial hearing in a manner that did not comport with the requirements of due process. As discussed more fully below, the hearing record supports the parent's contentions that her claims were inextricably linked. Further, it was the parent's choice to pursue all of her claims in one due process complaint notice, and one proceeding, and the IHO erred in severing the claims over the parent's objection.¹¹

B. FAPE - FBA/BIP

In her June 7, 2024 due process complaint notice, the parent alleged that the district failed to offer the student a FAPE for the 2023-24 school year by failing to develop an appropriate IEP and by failing to conduct an FBA and develop a BIP for the student.¹² The IHO found that the

¹¹ I have considered the parent's claims of the district's misconduct during the impartial hearing, of IHO bias and predetermination and find that they primarily arise from the IHO's decision to sever the due process complaint notice claims. In finding that the conduct of the impartial hearing violated due process, it is unnecessary to consider each of the parent's claims alleging violations of due process.

¹² The parent also alleged in her due process complaint notice and on appeal that the district engaged in improper aversive techniques consisting of removals from the classroom and suspensions from school (Joint Ex. I at p. 9). State regulation defines an aversive intervention as an intervention that is intended to induce pain or discomfort for the purpose of eliminating or reducing student behavior, including such interventions as: contingent application of noxious, painful, intrusive stimuli or activities; strangling, shoving, deep muscle squeezes or other similar stimuli; any form of noxious, painful or intrusive spray, inhalant or tastes; contingent food programs that include the denial or delay of the provision of meals or intentionally altering staple food or drink in order to make it distasteful; movement limitation used as a punishment, including but not limited to helmets and mechanical restraints; or other stimuli or actions similar to the interventions described above (see 8 NYCRR 19.5[b][1][i-v]). Notably, the term does not include such interventions as voice control, limited to loud, firm commands; time-

September 2023 IEP was appropriate for the student at the time it was developed because the parent did not want the student to start the school year with a BIP in place and "the [s]tudent had not yet demonstrated behaviors that required a BIP, (within the District)"; therefore, the CSE "was reasonable in determining that informal interventions may [have been sufficient to] alleviate the behavioral concerns" (September 16, 2024 IHO Decision at p. 12). With respect to the FBA/BIP issue specifically, the IHO found that because there was not "clear evidence that suggest[d] that a BIP and FBA was needed" . . . "prior to the disciplinary incident in January 2024," the district was not required to conduct an FBA or develop a BIP "on its accord" before the January 2024 incident and the parent did not request the district to do so (*id.* at pp. 14-15). On appeal, the parent argues that the district deprived the student of a FAPE by failing to conduct an FBA and develop a BIP for the student during the course of the 2023-24 school year.

Prior to the student moving into the district, an FBA of the student was conducted by the prior school district in November 2022 (Parent Ex. E). According to the November 2022 FBA, the student was "[d]iagnosed with ADHD [and] [a]djustment [d]isorder," and the FBA was conducted because of a "suspension/manifestation" and the "prevention of a more restrictive setting" (*id.* at p. 1). The targeted behaviors of the November 2022 FBA included "[i]nappropriate comments that [were] sexual and harassing in nature to students/staff" and "[d]isruption of class (call out/off topic questions/comments/noises)" (*id.*). The November 2022 FBA indicated that the student's inappropriate comments occurred during science and in the hallway, and the behavior occurred to "gain" the "attention/control" of both adults and peers (*id.* at p. 2). The November 2022 FBA indicated the student's disruption of class occurred during science and physical education, and the behavior occurred to "gain adult attention/control" (*id.* at p. 3). At the time of the November 2022 FBA, the student had 15 referrals and two suspensions in September 2022, 7 referrals and 6 suspensions in October 2022, and two referrals and zero suspensions in November 2022 (*id.* at p. 9). The November 2022 FBA indicated that "[t]he student's behavior patterns may require instructional modifications or accommodations only" with no BIP recommended (*id.* at p. 3). The student's prior district created a BIP on April 13, 2023, after a "[m]anifestation [h]earing and subsequent CSE meeting" (Parent Ex. F at p. 1). The April 2023 BIP targeted two behaviors: "[i]nappropriate and/or disruptive words or actions" and "[t]ask [a]voidance ([e.g.] asking to leave classroom, creating confrontations, talking out of turn, putting head down, avoiding work completion, rushing through classwork)" (*id.*). A variety of strategies to address the behaviors were included in the April 2023 BIP such as individual teaching and prompts, preferential seating, extra time for assignments, re-do of assignments for higher grades, quiet correction of behavior, personal escort from a teacher aide, liberal access to the counselor in addition to what was already on the student's IEP, and an anytime pass or walks with an adult (*id.* at pp. 2-3). Additionally, the April 2023 BIP included praise and positive reinforcement whenever the student exhibited appropriate replacement behaviors, the earning of a reward at the end of the week, and free time or a walk outside during lunch on Fridays (*id.* at p. 3). The April 2023 BIP indicated that the

limited ignoring of a specific behavior; token fines as part of a token economy system; brief physical prompts to interrupt or prevent a specific behavior; interventions medically necessary for the treatment or protection of the student; or other similar interventions (*see* 8 NYCRR 19.5[b][1][v]). On appeal, the parent asserts that the IHO narrowly defined the term "[a]versive [t]echniques"; however, review of the allegations made in the parent's request for review, memorandum of law, and the parent's affidavit does not lead me to conclude that the IHO erred in finding that the conduct complained of constituted an improper use of aversive techniques as that term is defined in 8 NYCRR 19.5[b][1]).

student was provided positive reinforcement at home based on successful achievement of tasks in that setting as well as shared data from the student's successes at school (*id.*). The April 2023 BIP indicated that the plan was scheduled for review on May 12, 2023 (*id.* at p. 4).

On June 14, 2023, the prior district's CSE met to review the student's educational program and developed an IEP for the student (Joint Ex. III at pp. 1-2). The June 2023 IEP included evaluation results obtained between 2018 and 2021, as well as a teacher report and a behavior log from April 2023 (*id.* at pp. 1-2). According to the June 2023 IEP, on an I-Ready reading diagnostic conducted in January 2023, the student's scores corresponded to the 25th percentile and "[o]verall, she [wa]s [at] a [g]rade 4 reading level" , (*id.* at p. 2). The June 2023 IEP indicated the student "ha[d] trouble paying attention and following along with texts read," "often rushe[d] through instead of reading carefully," and demonstrated a "weakness" in the "[c]omprehension of [i]nformational [t]ext" (*id.*). The June 2023 IEP also reported the student "miss[ed] a lot of instruction due to time out of the classroom" (*id.*). The June 2023 IEP further indicated that, in writing, the student "require[d] teacher assistance to find evidence from the text to prove [a] claim, as well as explain the evidence" (*id.* at pp. 2-3). The June 2023 IEP also described the student's math performance based on January 2023 testing that indicated skills at the 10th percentile, which corresponded to a third-grade level (*id.* at p. 3).

In terms of study skills, the June 2023 IEP indicated the student "want[ed] to do well" but "sometimes there [were] factors that prevent[ed] her from being successful" (Joint Ex. III at p. 3). The June 2023 IEP described that the student had difficulty with her ability to focus and organize along with her ability to use "study guides before tests" (*id.*). The June 2023 IEP indicated the student responded to prompts and assistance from "a trusted adult" (*id.*).

According to the June 2023 IEP, the student's specific academic and functional needs included the need to improve skills related to reading comprehension, spelling, editing written work, basic math facts and fluency, answering multi-step word problems, stamina and confidence, focus, and her "ability to deal with frustration and maintain appropriate behavior" (Joint Ex. III at p. 3).

Socially, the June 2023 IEP included information from the student's counselor with whom she met for 30-minutes once per week (Joint Ex. III at p. 3). According to the June 2023 IEP, the student participated in her sessions and was "willing to engage with [the] social worker" (*id.*). Further, the June 2023 IEP indicated that the student was able to "verbalize her stressors and frustrations . . . very easily, but struggle[d] at times to take ownership of some of her actions/reactions to peers or situations that cause[d] distress" (*id.*). The June 2023 IEP described the student's specific social/emotional needs including her ability to "[u]nderstand[] and accept[] ownership of behaviors that d[id] not follow school rules," "[v]erbaliz[e] when she [was] frustrated or upset and utiliz[e] a coping skill prior to reacting to peers/adults," and "[m]inimiz[e] use of inappropriate language/comments/gestures within the school setting" (*id.* at pp. 3-4).

According to the June 2023 IEP, the student no longer required OT services as of March 2023, and there were no concerns noted regarding the student's physical development (Joint Ex. III at p. 4).

The June 2023 IEP included the following management needs: directions re-read, checks for understanding, refocus and redirect, graphic organizers, and a BIP (Joint Ex. III at p. 4).

According to the June 2023 IEP, the student had a diagnosis of ADHD-inattentive type, specific learning disability with impairment in reading, writing, and math, as well as an unspecified adjustment disorder (*id.*). The June 2023 IEP further described an accident in 2012 that resulted in a brain injury, although the student did not have a "formal diagnosis of [t]raumatic [b]rain [i]njury" (*id.*). According to the June 2023 IEP, given the student's diagnoses, the student "struggle[d] within the classroom environment across all academic domains, including social skills" (*id.*). The special factors section of the June 2023 IEP indicated the student required strategies, including positive behavioral interventions, supports, and other strategies to address behaviors that impeded her learning or that of others and, as such, required a BIP (*id.*).

The annual goals included in the June 2023 IEP addressed the student's ability to answer comprehension questions, prepare a written response that included evidence and explanations, and solve multistep math problems (Joint Ex. III at p. 5). In addition, the June 2023 IEP included a social/emotional goal that targeted the student's ability to use positive strategies and appropriate problem-solving skills to solve conflicts with peers or adults (*id.*).

The June 2023 IEP recommended that the student receive the support of ICT services for math, English language arts (ELA), social studies, and science, along with one 30-minute session per week of individual counseling (Joint Ex. III at p. 6). The June 2023 IEP included checks for understanding, use of graphic organizers, use of graph paper, directions read, refocusing and redirection, pre-teaching of material, an additional set of books at home, and an academic support period to address the student's study skills as supplementary aides and services, program modifications, and accommodations for the student (*id.* at pp. 6-7). Additionally, the June 2023 IEP included a team meeting "within the first [three] weeks of school to discuss [the student's] BIP and supports" that was "[i]nclusive of [the] [p]arent" as a support for school personnel (*id.* at p. 7). The student's June 2023 IEP testing accommodations included directions read, extended time, a location with minimal distractions, and waiver of spelling requirements (*id.* at p. 8).

After the development of the June 2023 IEP, the student moved to the district and the parent registered the student for school in July 2023 (Parent Ex. H; Aug. 1, 2024 Tr. p. 114). A transfer meeting was held when the student transferred into the district, which included the participation of the parent, the district director of special education, a general education teacher, a special education teacher, a school psychologist, a school counselor, and a student assistance counselor (July 31, 2024 Aff. of director of special education ¶¶3-4).¹³ According to the director of special education, during the transfer meeting the parent "ask[ed] that [the student] ha[ve] a fresh start" and that the BIP be removed and the team agreed to start the year without a BIP in place for the student (*id.* ¶6; Aug. 1, 2024 Tr. p. 62). The director testified that the team also discussed parental requests to remove counseling and the test accommodation of 'tests read' from the student's IEP and the team agreed to those changes as well (July 31, 2024 Aff. of director of special education ¶¶ 4-7).

¹³ The affidavit indicated that the transfer meeting occurred in June 2023, but since the student was not registered in the district until July 2023, it appears this was an error (compare Parent Ex. H, with July 1, 2024 Aff. of director of special education ¶ 4; Aug. 1, 2024 Tr. pp. 48-51, 58).

The hearing record contained an email dated September 13, 2023 from the student's "case manager for special education" who indicated the student had "a great start to the year," and that she would see the parent at the student's "transfer meeting" the following week (Parent Ex. I).

The parent testified the student was diagnosed with "other traumatic and stressor related disorder" in September 2023 which the parent indicated was "a working diagnosis . . . while more information [was] gathered to determine which of the trauma and stressor related disorders her behaviors [] f[ell] under" (July 1, 2024 Tr. pp. 120-21; Aug. 1, 2024 Tr. p. 137). The parent further testified that this information was shared during the "transfer meeting" in September 2023 (July 1, 2024 Tr. pp. 121, 132). Additionally, the parent testified that she shared the student's specific trauma with the principal and assistant principal during "the first week of school" (July 1, 2024 Tr. pp. 131-32).

The student's transfer meeting was held on September 21, 2023, at which point the district developed an IEP for the student (Joint Ex. IV). A review of the September 2023 IEP showed that the district copied nearly verbatim the information from the student's June 2023 IEP created by her previous school district with a few changes (compare Joint Ex. III, with Joint Ex. IV).

While there were no changes to the information included in the student's present levels of performance, the district's September 2023 IEP eliminated a BIP from the management needs section (compare Joint Ex. III at p. 4, with Joint Ex. IV at p. 5). Additionally, the special factors section of the September 2023 IEP indicated the student required strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impeded her learning or that of others but, in contrast to the June 2023 IEP, the September 2023 IEP went on to indicate that the student did not require a BIP (compare Joint Ex. III at p. 4, with Joint Ex. IV at p. 5).

In terms of goals, the September 2023 IEP included the same social/emotional goal from the June 2023 IEP that targeted the student's ability to use positive strategies and appropriate problem solving skills to solve conflicts with peers or adults, but the September 2023 IEP changed the criteria for the goal from "75 [percent] success over [two] weeks" to "75 [percent] success over 10 weeks" (compare Joint Ex. III at p. 5, with Joint Ex. IV at p. 6).

The September 2023 IEP also made changes to the student's recommended program. Specifically, the September 2023 IEP recommended direct consultant teacher services for math, ELA, social studies, and science, along with one 15-minute session per week of counseling (Joint Ex. IV at p. 7). In comparison, the June 2023 IEP recommended the support of ICT services for math, ELA, social studies, and science, along with one 30-minute session per week of counseling (Joint Ex. III at p. 6). The September 2023 IEP included the same modifications and accommodations as the June 2023 IEP, except that the September 2023 IEP eliminated an academic support period to address the student's study skills along with an additional set of books that were kept at home (compare Joint Ex. III at pp. 6-7, with Joint Ex. IV at pp. 7-8). Three of the testing accommodations in the September 2023 IEP were the same, but instead of directions read as recommended in the June 2023 IEP, the September 2023 IEP replaced it with a check for understanding (compare Joint Ex. III at p. 8, with Joint Ex. IV at p. 9).

The director of special education testified that during the first three weeks prior to the September transfer meeting, the student's BIP as developed by the previous district was

implemented at her current district (Aug. 1, 2024 Tr. p. 65). The director of special education testified that at the transfer meeting in September, they "had about three weeks[]" worth of data" and had not observed the behaviors on the student's previously implemented BIP from her former district, and "discussed that if [they] saw other behaviors that [they] would put interventions in place to support her and then potentially do a new FBA . . . since she [was] also in a new setting" (Aug. 1, 2024 Tr. pp. 64-65).

The director of special education indicated, in her affidavit, that, at the September 2023 meeting, the team "agreed" to include counseling "one time weekly" and "[t]he [p]arent did not request that [the student's] BIP . . . be reimplemented or that [the district] consider a BIP for the [s]tudent" (July 31, 2024 Aff. of director of special education ¶ 9). The director of special education further testified that the district "did not see evidence of those behaviors that were in that BIP" at the time of the September 2023 transfer meeting (Aug. 1, 2024 Tr. pp. 62-63).

The parent testified that she believed, based on the discussion that occurred during the September 2023 transfer meeting, that the district would "take what [was] useful [from the BIP] and appl[y] [it] in the new environment and test that for efficacy" (Aug. 1, 2024 Tr. pp. 129-30, 131, 135, 186-87). The director of special education testified in her cross-examination that the district provided positive behavioral interventions to the student including weekly counseling, "different supports" that were provided by "[h]er special education teacher," and breaks (Aug. 1, 2024 Tr. pp. 42-43).

The director of special education testified that she "regularly" discussed with school staff whether they "needed to look at either putting in behavior supports through the building level or if [they] needed to conduct a new FBA" after the September meeting (Aug. 1, 2024 Tr. p. 65). The director of special education further testified that she believed she "checked in with the team . . . at least every three to four weeks" (Aug. 1, 2024 Tr. p. 66).

The hearing record indicated that the same day as the student's transfer meeting (September 21, 2023), she received a disciplinary referral for "unacceptable language" that resulted in an out-of-school suspension (Dist. Exs. 1 at p. 19). According to the disciplinary referral, on September 21, 2023, the student shouted at another student in the hallway and when a teacher intervened, the student responded by swearing at the teacher and "walked out of the building" (*id.*). The student was suspended for one day (*id.*). According to the disciplinary referral, the assistant principal previously talked to the student "about processing the moment" and that she should "hav[e] a plan when agitated" such as going to the assistant principal's or counselor's office (*id.*). A further comment on the September 21, 2023 disciplinary referral indicated that the assistant principal "talked with [the parent] about STEP" and that the district would "provide more information moving forward" (*id.*). The September 21, 2023 disciplinary referral also indicated that the parent "will have a plan in place for the time between dismissal and practice" (*id.*).

On September 22, 2023, the parent sent an email to the assistant principal in response to the disciplinary referral and indicated that "[t]his event will be discussed with her outside support team to continue to work on her response during escalating situations" (Parent Ex. K). In this email, the parent also shared with the assistant principal that a learned strategy "was not effective" in that situation and the parent asked to discuss this at an upcoming meeting (*id.*). The parent also indicated in the email that the student "suggested a few things to handle the 30 minute delay

between dismissal and practice and now has a plan" (id.). In the September 22, 2023 email, the parent also requested to "discuss [the] ear bud policy as part of this" (id.).

The student received a second disciplinary referral for "unacceptable language" on September 26, 2023, for which she received one day of detention (Dist. Exs. 1 at p. 18). According to the disciplinary referral, the student swore "several times" while she conversed with another student in the hallway and, when a teacher intervened, the student "walked away" (id.). The disciplinary referral indicated that the student was previously warned "several times about the inappropriate language she use[d] in [the] hall" (id.).

The student received a third disciplinary referral for "unacceptable language" on October 3, 2023 (Dist. Exs. 1 at p. 17). According to the disciplinary referral, while the student was in the hallway she "yell[ed] at someone," "approached the student" and continued to yell, then yelled and swore at a teacher who intervened (id.). As a consequence, the student received one day of out-of-school suspension (id.).

The parent sent an email on October 5, 2023 to the director of special education and copied the assistant principal (Parent Ex. L at p. 3). In this email, the parent wrote that the student had "a few challenges during class changes" and asked if the district would "revisit ear buds as an option" since the student found "listening to music [was] an effective way for her to reduce stress" (id.). The parent specifically stated that she wanted "to add this to [the student's] IEP" (id.).

On October 10, 2023, the parent wrote to the assistant principal regarding some out-of-school social interactions and indicated she "reminded [the student] to go to the [assistant principal] with issues" (Parent Ex. M). The parent further indicated that she thought "the ear buds" would "help" limit potentially problematic interactions while in school (id.). The assistant principal responded to the parent and indicated he would speak with the student about "extra [] passing time" in the hallways and that if the use of ear buds was approved, he would "make sure everyone [was] aware so no power struggles pop[ped] up regarding" their use (id.).

In response to the parent's October 5, 2023 email, the director of special education wrote, on October 12, 2023, that the district was "worr[ie]d [] that unfamiliar staff will ask [the student] to remove [the ear buds] and that this will cause a conflict" (Parent Ex. L at p. 2). Instead, the director of special education wrote the parent that the assistant principal "started [the student] leaving class early" so that she was "out of the hall during passing time" and that the issue could be "revisit[ed]" in "a week or two" (id.). After asking a question about the strategy and receiving a response, the parent wrote, on October 12, 2023, that she "wanted to be sure" everyone was "on the same page" and that she wanted "to leave earbud use on the table;" the parent specifically "suggested an 'earbuds pass'" on the student's phone "if questioned in a hallway" (id. at p. 1).

On October 16, 2023, the student received three disciplinary referrals at 11:30 a.m., 12:40 p.m., and 2:24 p.m. (Dist. Ex. 1 at pp. 14-16). According to the disciplinary referrals, the student was "insubordinate[e]" and "disruptive/uncooperative" (id.). The behaviors described in the disciplinary referrals included talking when told not to, use of a "threatening demeanor" while standing outside a room looking for a student, and refusal to leave a room while talking inappropriately to a teacher (id.). As a result of these incidents, the student received 20 days of "pass restriction" and one day of instructional support (id.).

On October 23, 2023, the student received two disciplinary referrals at 1:15 p.m. and 3:04 p.m., that resulted in three days of out-of-school suspension (Dist. Ex. 1 at pp. 12-13). According to the disciplinary referrals, one was for "threats to staff/student" and the other was for "insubordination, unacceptable language" (id.). The disciplinary referrals indicated the student swore, walked away from a teacher, and "pushed a staff member to leave the office" (id.). One of the October 23, 2023 incidents indicated that the student consistently exhibited "explosive" behavior each time a particular teacher, who was not the student's teacher, "confronted" the student (id.).

The student received another disciplinary referral, this one labeled "disruptive/uncooperative," on October 30, 2023, for screaming during class despite a request "to stop" (Dist. Ex. 1 at p. 11). The disciplinary referral indicated that "[s]he was sent to the AP office" (id.). On November 1, 2023, the student received three disciplinary referrals at 8:45 a.m., 9:24 a.m., and 12:19 p.m. for "insubordination," "disruptive/uncooperative," and "minor altercation" (id. at pp. 8-10). According to the disciplinary referrals, the student "was sent home for the day" after she called two students inappropriate names; she received one day of instructional support for walking out of a room as she "threw a binder clip that hit" an adult; and one day of instructional support for "walk[ing] out of [a] room without permission" (id.). The November 1, 2023 disciplinary referral that involved throwing a binder clip indicated that the "[assistant principal] had a meeting with [the parent] [] to discuss a plan moving forward" (id. at p. 9).

The student received a disciplinary referral on November 3, 2023 for "inappropriate use of school property" (Dist. Ex. 1 at p. 20).¹⁴ The disciplinary referral indicated that the student threw a roll of paper towels from the third floor "almost hitting a student below" (id.). As a result of this incident, the disciplinary referral indicated the student received one Saturday detention (id.).

Also on November 3, 2023, the parent sent an email to the assistant principal that indicated school staff were discussing the student in front of other students, and that this was not a new issue (Parent Ex. N). The email included a screen shot of a text message that was sent to the student from a peer who indicated the peer overheard an inappropriate conversation about the student in the nurse's office (id.).

The student received a disciplinary referral labeled "disruptive/uncooperative" on November 7, 2023 (Dist. Ex. 1 at p. 7). According to the disciplinary referral, the student had been brought to a classroom by the assistant principal, and when she arrived, she used her phone (id.). The disciplinary referral indicated the student "walk[ed] out of the class" in response to the teacher indicating she would take the phone away, and then repeatedly called another student an inappropriate name (id.). The disciplinary referral indicated the student's parent was called as a result (id.).

On November 14, 2023, the student received a disciplinary referral labeled "disruptive/uncooperative, insubordination" (Dist. Ex. 1 at p. 6). The disciplinary referral indicated the student "left class without permission," and when she returned, the student made an

¹⁴ The disciplinary referral indicated that the date of the incident was November 30, 2022 and the "date seen" was October 31, 2023. Given that the student was not enrolled in the district in 2022, and the date of the detention listed was November 4, 2023, it seems likely that the actual date of the incident was November 3, 2023.

inappropriate gesture towards another student (id.). According to the disciplinary referral, the student then proceeded to yell at the teacher "and left the room" (id.). The disciplinary referral did not indicate a consequence for the behavior (id.).

Similarly, the student received a disciplinary referral with no reported consequence on November 30, 2023 (Dist. Ex. 1 at p. 5). According to the disciplinary referral labeled "insubordination," the student refused to put her phone away and then refused to give it to the teacher (id.).

The student received another disciplinary referral on December 4, 2023, labeled "disruptive/uncooperative, insubordination" (Dist. Ex. 1 at p. 4). The disciplinary referral indicated the student "grabbed another student and pulled them off their chair to the ground" and despite "directives" to stop, the student "ignored" the adult and "laugh[ed]" (id.). The disciplinary referral indicated the student "ignored" directions to sit, then "jump[ed] up on the table," at which "point she was asked to go to the [assistant principal's] office" (id.). Other than being told to go to the assistant principal's office, there was no specific consequence listed on the disciplinary referral (id.).

On December 12, 2023, the student received a disciplinary referral labeled "disruptive/uncooperative" for screaming in class after she did not take her seat, at which point she was told "that she needed to wait in the hallway for someone to bring her to the [assistant principal's] office" (Dist. Ex. 1 at p. 3). According to the disciplinary referral, the student "did not wait and broke her pass restriction" (id.). The disciplinary referral did not identify a consequence for the behavior (id.).

On December 20, 2023, the student received three days of out-of-school suspension for "unacceptable language, disruptive/uncooperative, insubordination" (Dist. Ex. 1 at p. 2). According to the disciplinary referral, after the student did not receive a condiment in the cafeteria, she "jumped over the counter," repeatedly "scream[ed] at the workers," then left the room (id.). Further, the disciplinary referral indicated that the student proceeded to another room which she "refused to leave" and a guard was called to remove her (id.). The disciplinary referral indicated that the student continued to "us[e] profanity" while she "g[ot] louder" and the other students were "removed from the [] room" which upset the student more (id.). The disciplinary referral indicated the student "walked out of the room" at which point the guard "physically grab[bed] [the student's] arm" to keep her "from going after another student" (id.).

The parent sent an email to the assistant principal and principal on December 28, 2023 (Parent Ex. P). According to the email, the parent asked them if there was a room or a place within the school that offered students the opportunity to calm and self-regulate (Parent Ex. P). The email included a picture of a self-regulation room from another elementary school (id.).

On January 4, 2024, the student received a disciplinary referral labeled "minor altercation" for which she received five days of out-of-school suspension (Dist. Ex. 4 at p. 15). According to the disciplinary referral, the student was "argumentative with another student" and she then "approached" the "student and punched him multiple times" (id.). The disciplinary referral also indicated that "[d]uring this physical altercation, the teacher was punched in the arms" as well (id.).

By letter dated January 5, 2024, the superintendent of schools advised the parent that the principal of the student's school had informed him that the student was suspended from January 5, 2024 through January 11, 2024, and that "[d]ue to the serious nature of [the student]'s conduct," the principal recommended that a further period of out-of-school suspension be imposed (Dist. Ex. 4 at p. 13).

Overall, the hearing record reflects that from September 21, 2023 through December 20, 2023, the student received 19 disciplinary referrals and had received out of school suspensions for a total of eight days along with various other in school discipline (Dist. Ex. 1 at pp. 2-20). When asked if it became evident at some point that a BIP was necessary for the student, the director of special education testified that the district "discussed more of those behavior supports at the building level" and that they "did not get to the point of needing to do an FBA or a BIP until [the student's] suspension [] when [they] decided that [they] needed to do a new FBA because they were new behaviors" (Tr. p. 66). Accordingly, the CSE did not reconvene at any time prior to the January 2024 suspension.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a BIP for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). Additionally, a district is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]).

State regulations define an FBA as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and

include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

(8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.).

With regard to a BIP, the special factor procedures set forth in State regulations note that the CSE shall consider the development of a BIP for a student with a disability when:

the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to [8 NYCRR 201.3]

(8 NYCRR 200.22[b][1]).

If the CSE determines that a BIP is necessary for a student "[t]he [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals" (8 NYCRR 200.22[b][4]).

The district's failure to develop a BIP in conformity with State regulations does not, in and of itself, automatically render the IEP deficient, as the IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. Jan. 8, 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190).

The student was registered with the district in July 2023 and after implementing the prior district's June 2023 IEP without counseling services or a BIP for the start of the 2023-24 school year, the CSE convened for a transition meeting on September 21, 2023 (see Joint Exs. III; IV; July 31, 2024 Aff. of director of special education at ¶3-8). The IHO specifically noted that the parties were in agreement that an FBA and BIP were not necessary at the start of the 2023-24 school year because the parties agreed to a "fresh start" for the student (Sept. 16, 2024 IHO Decision at p. 12). Indeed, the hearing record does support the district's position that as of the September 2023 CSE, the student had not yet exhibited the behaviors that were targeted by the November 2022 FBA in the school district. In some instances, delaying an FBA until a student begins attending the recommended educational environment or the student becomes acclimated to a new school environment does not necessarily constitute a denial of FAPE (see Bd. of Educ. of

Wappingers Cent. Sch. Dist. v. M.N., 2017 WL 4641219, at *11 [S.D.N.Y. Oct. 13, 2017] [reversing the SRO's determination that the failure of a district to conduct its own FBA at the time of the CSE meeting was a serious procedural violation]; Cabouli v. Chappaqua Cent. Sch. Dist., 202 Fed.Appx. 519, 522 [2d Cir. 2006]; M.N. v. Katonah-Lewisboro Sch. Dist., 2016 WL 4939559, at *15 n.24 [S.D.N.Y. Sept. 14, 2016]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *13 [S.D.N.Y. Aug. 5, 2013]).

However, at some point the student's behaviors, as presented in the district during the 2023-24 school year should have alerted the district to conduct an FBA. The student received the first disciplinary referral which resulted in an out-of-school suspension on September 21, 2023, which was the same day as the CSE meeting (Dist. Ex. 1 at p. 19). Review of the hearing record indicates that the behaviors targeted by the November 2022 FBA and addressed by the April 2023 BIP were consistent with the behaviors for which the district disciplined the student over the course of the school year (Parent Exs. E; F; Dist. Ex. 1). Additionally, the specific behaviors exhibited by the student in the district were very similar to those she exhibited in the prior district, including verbal aggression, swearing, and the creation of confrontations (see Dist. Ex. 1). However well-intentioned the members of the September 2023 CSE were, the student's disciplinary record during the course of the school year clearly demonstrated an escalating pattern of behavior, which was predictable based on the evaluative information available to the September 2023 CSE, including the November 2022 FBA and April 2023 BIP developed by the prior school district (see Parent Exs. E; F).

In her July 31, 2024 affidavit, the director of special education offered that between "September 21, 2023" and "January 10, 2024, the [p]arent did not request a CSE meeting, [p]rogram [r]eview, or [t]eam [m]eeting for [the student]" (July 31, 2024 Aff. of director of special education ¶ 11). However, a review of the hearing record indicates that on multiple occasions the parent reached out to district staff regarding specific strategies that might be used with the student (Aug. 1, 2024 Tr. p. 136; Parent Ex. HH ¶ 11; see Parent Exs. K, L, M, N, O, P;). One of these email exchanges, sent on October 5, 2023 to the director of special education, included a specific request to add a strategy to the student's IEP (Parent Exs. L; HH ¶ 22).

The IHO noted in his questioning that "[a]t some point, I think you would agree that the interventions of the district may not have been working optimally for your daughter. Did you ever ask for an IEP meeting prior to the suspension?" The parent responded that she requested "meetings to discuss a plan" and "multiple requests to convene meetings through [the principal and vice principal]" (Aug. 1, 2024 Tr. p. 190).

The IHO also noted in his decision that

Any parent, but in particular this [p]arent, is one with a unique understanding of their child and it is clear from her testimony in this matter the [p]arent has very strong opinions as to the [s]tudent's needs and how they should be supported. It is worthy to note, that during this time of building level interventions, the [p]arent had not requested the CSE reconvene to perform an FBA and develop a BIP during this time. While it is not the [p]arent's burden to request one,

it would have been clear to the [d]istrict that an FBA and BIP were needed

(Sept. 16, 2024 IHO Decision at pp. 14-15).

The parent's due process complaint notice challenged the September 21, 2023 IEP and also asserted that the district denied the student a FAPE for the entire 2023-24 school year by failing to conduct an FBA/BIP. The IHO found that the September 2023 IEP offered a FAPE at the time it was written and found that the student's conduct was "manageable within the context of building level supports" (Sept. 16, 2024 IHO Decision at pp. 11-16).

In his decision, the IHO stated in similar fashion to his questioning of the parent above, that "the record suggests to the undersigned that [the p]arent's position of a denial of FAPE is predicated on information not available to the team at the time of the IEP was drafted" (Sept. 16, 2024 IHO Decision at p. 13). The hearing record does not support the IHO's assertion given the CSE's knowledge of the student's behavioral issues at the time it developed the student's IEP and the district's awareness of the multiple behavioral incidents that occurred between the September 2023 CSE meeting and the January 2024 incident which the IHO erroneously determined to be the "inflection point" with regard to the CSE's obligation to conduct an FBA and develop a BIP for the student (id. at p. 15). Moreover, the IHO's commentary on the parent's knowledge of the student appears to fault the parent for advocating on behalf of the student's interests and the district "cannot excuse their failure to satisfy the IDEA's procedural requirements by blaming the parents" (see Anchorage Sch. Dist. V. M.P., 689 F.3d 1047, 1056 [9th Cir. 2012] ["it would be antithetical to the IDEA's purposes to penalize parents—and consequently children with disabilities—for exercising the very rights afforded to them under the IDEA"]).

In light of the facts set forth above, the failure to conduct an FBA and have a BIP in place to address the student's behaviors resulted in a denial of a FAPE for the 2023-24 school year. Although the September 2023 CSE reviewed the November 2022 FBA and the April 2023 BIP from the prior district, and the district's September 2023 IEP indicated that the student required strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impeded her learning or that of others, the CSE failed to recommend sufficient interventions, reconvene the CSE, or conduct a new FBA once the student began exhibiting behaviors that aligned with those she had exhibited at her prior school district and which were described in the present levels of performance section of the September 2023 IEP. As a result, the district's failure to conduct an FBA constituted a procedural violation that impeded the student's right to 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]). While the district contends that it did not implement a BIP at the request of the parent, the CSE's failure to conduct an FBA, develop a BIP, or otherwise recommend appropriate behavioral supports or strategies for the student either in the September 2023 IEP or in response to her escalating behaviors, when its reliance on the use of informal and inconsistent building level support and repeated disciplinary actions was ineffective, constituted a denial of FAPE to the student. As a result, the IHO's finding that the district offered the student a FAPE for the 2023-24 school year must be reversed.

C. MDR

Turning to the incident in January 2024, which resulted in the student's suspension for the remainder of the 2023-24 school year, in a decision dated July 16, 2024, the IHO determined that the MDR team correctly found the student's conduct was not a manifestation of her disability and denied the parent's requested relief (July 16, 2024 IHO Decision at pp. 10-11). Based on my independent review, the hearing record does not support the IHO's determination.

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]).¹⁵

¹⁵ 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

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]).¹⁶ 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]).

The student received a disciplinary referral on January 4, 2024 at 11:15 a.m. for what was described as a "Minor Altercation" in a "Teacher's Classroom" (Dist. Ex. 4 at p. 15). According to the description of the incident, the student became argumentative with another student, approached the student, and then punched him multiple times (*id.*). The referral also stated that "[d]uring this physical altercation, the teacher was punched in the arms while trying to help" (*id.*). The referral indicated that the student was suspended from school for a period of five days beginning on January 5, 2024 (*id.*).

By letter dated January 5, 2024, the parent was notified that following the incident and the five-day suspension instituted by the school principal, the student had been referred to the superintendent of schools for a disciplinary proceeding to determine whether a longer suspension should be considered (Dist. Ex. 4 at p. 13). A disciplinary hearing convened on January 10, 2024 and in a January 11, 2024 decision a hearing officer found that the student violated the code of conduct by engaging in the behavior she was charged with (*id.* at pp. 4-612, 13). During the disciplinary hearing, the IHO "recessed" the matter and she "left the room to allow the Manifestation Team to make a determination about the conduct in question" (*id.* at p. 6). According to the hearing officer's report, after the conclusion of the MDR, she was "advised that they determined the conduct was not a manifestation" (*id.*).¹⁷ The IHO then initiated the "penalty

300.530[f][2]; 8 NYCRR 201.4[d][2][ii]).

¹⁶ 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]).

¹⁷ 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

phase" of the hearing and ultimately recommended suspension through the end of the 2023-24 school year (id. at pp. 6-11).

The worksheet completed by the MDR indicated that the "team d[id] not find a relationship between the conduct in question and the student's disability" (Parent Ex. V). Other than a vote tally, there were no other comments included on the worksheet (id.). As a result of the superintendent's hearing and MDR, the student was found to be in violation of the district's code of conduct and she was suspended for the rest of the school year beginning on January 11, 2024 (Dist. Ex. 4 at p. 1).

The hearing record contained several affidavits from the district staff who participated in the student's manifestation determination review (see generally Record Ex. at pp. 266-293).¹⁸ The director of special education included in her affidavit that she "led" the MDR and participated in the "superintendent's hearing" to discuss the student's behavioral incident (id. at pp. 272, 273). The director of special education indicated in her affidavit that the "Manifestation Team" reviewed the student's IEP, including her diagnosis of ADHD and "the entry" in the IEP that the student had experienced "a brain injury . . . in 2012" (id. at pp. 273, 276). The director of special education also indicated that the parent shared that there was no formal diagnosis of a traumatic brain injury and, as such, the director of special education explained to the team that this was "not enough information to use as a diagnosis" (id. at pp. 273-74).

In her affidavit, the director of special education described the participants' discussion surrounding the student's September 2023 "diagnosis of Other Specified Trauma and Stressor Related Disorder," her treatment plan, and warning signs (Record Ex. at p. 274; Parent Ex. CC). The director of special education indicated that after she reviewed the treatment plan, participants discussed what it was like when the student "hurt others" and she "asked" if "punching someone [22] times [was] what [the student] d[id] when she 'hurt[] others'" and the parent shared that the student "doesn't hurt others like that" and relayed the student's "typical warning signs," which included clenching her fists, putting in earbuds, and listening to music (Record Ex. at pp. 274-75; Parent Ex. CC). At this point, it is worth noting that while "[h]urting others" is identified as a warning sign on the treatment plan which are identified as "ways to know that stress/feelings are becoming unmanageable," a more appropriate focus for the MDR team would have been an explanation of the identified problem which, on the treatment plan, included repeated angry outbursts out of proportion to the triggering event and poor peer relationships due to aggressiveness and anger difficulties (Parent Ex. CC at pp. 1-2, 4).

The director of special education further indicated in her affidavit that "[a]fter reviewing the treatment plan, [she] reviewed the diagnosis from the DSM-V for 'Other Specified Trauma and Stressor-Related Disorder'" along with the student's ADHD diagnosis, and the student's IEP and "most recent psychological evaluation" (Record Ex. at p. 275). While reviewing the IEP, the

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. At the time of the disciplinary hearing and MDR, the student had been suspended from school for 12 days during the 2023-24 school year.

¹⁸ The various affidavits from district staff each contained similar information.

director of special education indicated that she "discussed the entry" in the "'student needs' section of the IEP" that "not[ed] [] [the student] had a Specific Learning Disability with Impairment in Reading and Writing" and that the student's "test scores did not indicate that she qualified as a student with a Specific Learning Disability" (id. at pp. 275-76).¹⁹ Additionally, the director of special education indicated in her affidavit that "the reference to an adjustment disorder in [the student's] IEP . . . was to the 'Other Specified Trauma and Stressor Related Disorder'" (id. at p. 276).

The director of special education offered in her June 28, 2024 affidavit that the parent "wanted to talk about other incidents outside of the [January 2024 incident] that was the subject of the MDR" including "a previous suspension" but the director of special education indicated that she understood the parent had "other concerns at this time, but the [MDR team] must determine whether the conduct at question is a direct and substantial relationship between the conduct in question and [the student's diagnoses" (Record Ex. at p. 277). The director of special education also indicated in her affidavit that the team discussed the possibility "of updating the [FBA]" and she indicated that "[they] could revisit" that "outside of MDR" (id. at p. 276).

The student assistance counselor, who was the student's then-current counselor, indicated in her affidavit that she shared at the MDR meeting the student "talk[ed] about [] conflict but ha[d] a hard time applying those skills" when she was "heated" (July 1, 2024 Tr. p. 89; Record Ex. at p. 292). The student assistance counselor testified during the hearing that this was "[n]ot necessarily" a manifestation of her disability "because [they] teach a specific skill to use within a range" and the student's behavior was "not losing control and hitting someone 22 times" (July 1, 2024 Tr. p. 89). The student's school counselor further testified that the student's disability "c[ould] be yelling" or "screaming" but that it was not "repeatedly hitting someone and getting violent" (July 1, 2024 Tr. p. 89).

The student assistance counselor also indicated in the hearing that she did not consider the student's previous behavior incidents during the MDR, and she further indicated that a pattern of behavior was not relevant to the MDR (July 1, 2024 Tr. pp. 94-95). The student assistance counselor testified that the student had not previously demonstrated this level of "severity" of physically aggressive behavior (July 1, 2024 Tr. p. 96).

Similarly, the special education teacher testified that she did not feel the student's behavior was a manifestation of the student's disabilities because she "thought it was [] above and beyond what the diagnoses were describing and the symptoms related to the disability" (July 1, 2024 Tr. p. 100). Also during the hearing, the school counselor, who did not work directly with the student, testified that she "just d[id not] believe that [the student's] behavior was due to" her diagnoses (July 1, 2024 Tr. pp. 78-79, 80). The school counselor testified that she had observed the student "in the classroom setting," "in the hallways," and "with [her] friends" and in that moment she "just [did not] think that that was [the student] having control," which the school counselor followed up with what can only be described as an inconsistent statement wherein she stated she "t[hought] [the student] was just acting how she wanted to act" (July 1, 2024 Tr. p. 80).

¹⁹ The hearing record is unclear as to what the director of special education meant by this statement as there were no additional details provided.

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 team members explained that the finding that there was not a direct and substantial relationship between the student's conduct and her disability was based on the fact that in their view, punching someone 22 times was behavior that the student had not previously engaged in and was not a symptom of any of the student's diagnoses (July 1, 2024 Tr. p. 78-79, 80, 89, 94-96, 100; Record Ex. at pp. 399-405).

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 personnel demonstrate an overreliance on the symptomatology and diagnostic criteria of the student's mental health diagnoses, ADHD, as well as her 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 an OHI is the vehicle to her eligibility for IDEA services, it does not fully describe the student's needs nor does it encapsulate her disability within the meaning of Part 201.²⁰

When the student engaged in an altercation with another student and a teacher on January 4, 2024, 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 (Dist. Ex. 4 at pp. 5, 8). 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

²⁰ 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]).

disability subject to a disciplinary change in placement, the student was entitled to an MDR. The only issue to be determined relative to the MDR, 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 prior district's November 2022 FBA and April BIP and reflected in the student's September 2023 IEP, as well as in the treatment plan reviewed by the MDR team. Based on the foregoing, the IHO erred in finding that the student's conduct was not a manifestation of her disability.

D. Relief

As relief for the above denials of FAPE, the parent requested that the district be directed to expunge the student's records of the January 4, 2024 incident, that the district fund an IEE in all areas of the student's suspected disability, including a neuropsychological evaluation and an educational evaluation, an award of compensatory education of an unspecified type and in an unspecified amount, specific program modifications to the student's IEP, an FBA and BIP developed by a Board Certified Behavior Analyst (BCBA), training for school personnel, and the development of a safety plan in collaboration with the parent and the student's medical providers.

1. Expungement

Although the IHO erred in finding that the student's conduct was not a manifestation of her disability, 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 partial admission of the alleged conduct is not relevant to the determination of whether or not the conduct constituted a manifestation of the student's disability.

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).^{21, 22} 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 student's educational records and should remain available to assist with planning for the student's special education programming. Based on the foregoing, the parent's request for expungement is denied.

2. IEE with FBA/BIP

With respect to the parent's request for an IEE, I find that such relief is warranted to remediate the denial of a FAPE to the student for the 2023-24 school year. Accordingly, the district is directed to fund an IEE consisting of all areas of the student's suspected disability, including but not limited to neuropsychological and educational evaluations. The district shall fund an independent FBA conducted by a BCBA in the student's current school setting and if necessary, fund the development of a BIP by the BCBA. The district shall also develop a school safety plan in the student's current school setting in collaboration with the parent and the student's medical providers.²³

VII. Conclusion

In summary, the IHO erred in severing the parent's claims in her due process complaint notice into separate cases, erred in finding that the student's conduct was not a manifestation of her

²¹ 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.

²² 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).

²³ The parent's request for compensatory education is unwarranted. While the district inappropriately responded to the student's interfering behaviors by suspending her for the remainder of the 2023-24 school year, the hearing record reflects that the student received tutoring in excess of the required amount of home instruction and that the parent declined counseling services (Dist. Exs. 12-15; 32). The student's third quarter report card for the 2023-24 school year, which covered the time the student was receiving tutoring, showed that the student achieved passing grades in all of her academic classes and earned a quarterly average of 89.62 (Parent Ex. FF). In addition, the hearing record reflects that the district agreed to provide up to 60 hours of summer tutoring services for the student during summer 2024 (July 31, 2024 Aff. of director of special education at ¶33).

disability, and erred in finding that the district offered the student a FAPE for the 2023-24 school year.

I have considered the parties' remaining contentions and find that I need not address them in light of the determinations made herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision on bifurcation dated June 24, 2024, decision on the MDR dated July 16, 2024, and decision on the parent's remaining claims dated September 16, 2024 are reversed;

IT IS FURTHER ORDERED that the district shall within 10 days of this decision, provide funding for an IEE consisting of all areas of the student's suspected disability, including but not limited to neuropsychological and educational evaluations to be completed by the parent's chosen evaluator, as well as funding for an independent FBA in the student's current school setting and, if necessary, funding for the development of a BIP by the parent's chosen evaluator, and the district shall also develop a school safety plan in the student's current school setting in collaboration with the parent and the student's medical providers;

IT IS FURTHER ORDERED that within 10 days of receipt of the IEE, FBA, and safety plan, the CSE shall reconvene to consider the evaluations and develop an appropriate IEP for the student.

Dated: **Albany, New York**
 November 22, 2024

STEVEN KROLAK
STATE REVIEW OFFICER