The University of the State of New York

The State Education Department
State Review Officer
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No. 23-171

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Brian J. Reimels, Esq.

The Legal Aid Society, attorneys for respondent, by Joel Pietrzak, Esq. and Marie Mombrun, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO), in an expedited due process hearing pursuant to 8 NYCRR Part 201, which annulled a manifestation determination review (MDR) team's finding that the behavior of respondent's (the parent's) son was not a manifestation of his disability and ordered that the student's expulsion from his charter school during the 2022-23 school year be expunged from his educational records. 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]). When an expedited hearing is requested pursuant to Part 201, a resolution meeting shall occur within seven days of the filing of the due process complaint notice unless the parent and district agree in writing to waive it or use mediation, the expedited due process hearing may then proceed within 15 days of the filing of the due process complaint and shall occur within 20 school days of the filing of the due process complaint notice; and the IHO shall then have 10 school days after the hearing to render a decision (8 NYCRR 200.1.11[b][1-3]). "No extension to an expedited impartial hearing timeline may be granted" (8 NYCRR 200.1.11[b][4]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, during the 2022-23 school year, the student attended a charter school in the district (Dist. Ex. 2 at p. 1).[1] A CSE reconvened during the school year, on October 18, 2022, to develop an IEP for the student (id. at pp. 1, 28).[2] The October 2022 CSE continued to find the student eligible for special education and related services as a student with an other health impairment (OHI) (id. at pp. 1, 5).[3] The October 2022 CSE recommended that the student receive five periods per week of integrated co-teaching (ICT) services in English language arts (ELA), five periods per week of ICT services in math, five periods per week of direct, group service of special education teacher support services (SETSS) in ELA and five periods per week of direct, group service of SETSS in math (id. at pp. 22, 28). The October 2022 CSE further recommended that the student receive one 40-minute session of individual counseling services and one 40-minute session of individual speech-language therapy (id. at pp. 22, 28-29). In addition, the October 2022 IEP included resources and strategies to address the student's management needs consisting of individual teacher check-ins, directions broken down, color coding texts to locate evidence, mathematical steps broken down, number lines in math, use of a calculator, graphs and charts for visual representations in math, algebra tiles and equation mats, and chunking steps in math in order to solve multistep word problems (id. at p. 5).

According to the October 2022 IEP, there had been numerous incidents during the 2021-22 school year and the 2022-23 school year where the student had "used inappropriate language towards his classmates and staff, [the student] [] had numerous suspensions including one this year due to these incidents" (Dist. Ex. 2 at p. 4).

By letter dated November 14, 2022, the parent was notified by the principal and assistant principal that the student had been suspended from school for one day (November 15, 2022) to be served in school for violating the charter school's student code of conduct (Dist. Ex. 10 at p. 1).

[1] The parent also submitted a copy of the October 18, 2022 IEP as parent exhibit B. The parent's copy has fewer pages and has some pages collated incorrectly therefore the district's copy of the October 2022 IEP (Dist. Ex. 2) will be cited in this decision.

[2] As indicated above, the student was suspended from school by notice dated October 12, 2022 (Dist. Ex. 9). However, the purpose of reconvening the CSE was not reflected on the October 18, 2022 IEP (Dist. Ex. 2 at p. 28; see Dist. Ex. 17 at ¶15). The October 2022 IEP indicated that the student had been receiving two 40-minute sessions of speech-language therapy in a group beginning on September 14, 2022 (Dist. Ex. 2 at p. 2). The October 2022 IEP recommended that the student receive one 40-minute session per week of individual speech-language therapy to allow the student to become less distractible and maintain focus when given both structured and unstructured tasks (id.).

[3] The hearing record includes a May 1, 2023 psychiatric evaluation that postdates the student's disciplinary hearing and MDR (Parent Ex. D at p. 7). The May 1, 2023 psychiatric evaluation reflects that the student had been previously diagnosed as having an oppositional defiant disorder (ODD) (id. at p. 3). The district maintains that the parent did not share this diagnosis or that the student was receiving private psychiatric care until the disciplinary hearing and MDR (Dist. Ex. 17 at ¶17). There is no evidence in the hearing record to demonstrate that the parent disclosed this information to the district prior to the disciplinary hearing on April 25, 2023.

According to the notice, the student had committed a "Level 3" violation for "[c]utting [s]chool" on November 10, 2022 (Dist. Ex. 10 at p. 1; see Dist. Exs. 6 at p. 1; 7 at p. 9; 12 at p. 41).

Additionally, the assistant principal reported that on December 12, 2022, the student argued with another student over a seat and they pulled the chair back and forth from each other and the parent was notified of the student's conduct (Dist. Ex. 6 at p. 1).

By letter dated January 6, 2023, the parent was notified by the principal and assistant principal that the student had been suspended from school for one day (January 9, 2023) to be served in school for violating the charter school's student code of conduct (Dist. Ex. 11 at p. 1). According to the notice, the student had committed a "Level 3" violation, which was described as "[t]hreatening the safety of others through words and actions (i.e. excessive bullying or making threatening remarks towards any member of the" charter school community (id.; see Tr. pp. 43-44; Dist. Exs. 7 at p. 9; 12 at p. 41).

The hearing record also includes multiple messages sent by the student to his teachers and other students (see Dist. Exs. 6; 7 at pp. 7-8). Of particular note, the hearing record includes pictures of an extended text message thread exchanged between the student and another student, which according to the district's evidence, occurred on April 20, 2023, wherein the student initially stated, "[i]f there was two words to describe you and everyone at school it's annoying and deaf" and then "[l]ike y'all make me wanna commit a school shooting," which the student later recanted asking the other student not to show the messages to the teachers because he did not want to get suspended again (Dist. Exs. 6 at pp. 10-20; 17 at ¶20; 18 at ¶16).[4]

By letter dated April 20, 2023, the principal notified the parent that the student had committed two "Level 3" violations and one "Level 4" violation of the charter school's code of conduct (Dist. Ex. 7 at p. 1). The notice indicated that the student's conduct included "[t]hreatening the safety of others through words and actions (i.e. excessive bullying or making threatening remarks towards any member" of the charter school community; "[c]reating an extremely unsafe and dangerous environment for any member" of the charter school community; and "[s]ending, receiving, or displaying offensive/obscene language or pictures via cell phone or computer" (id.). The notice further provided that the student had created an unsafe environment for members of the charter school community "by threatening the safety of students and staff members through social media platforms and texts" (id.). The letter further stated that the school had concluded an investigation and that the student's severe and/or repeated infractions of the school's discipline code warranted expulsion from the school (id. at p. 2). A disciplinary hearing was scheduled for April 25, 2023 (id.). The April 20, 2023 notice indicated that the student would remain on out of school suspension until the disciplinary hearing on April 25, 2023 (id.). The letter also stated that the student could receive alternative instruction from the charter school beginning on April 20, 2023 (id.).

[4] No dates can be seen on the messages. According to the district, the first threat of violence occurred on April 20, 2023. The charter school also suspended the student on April 20, 2023.

By notice dated April 25, 2023, the district notified the parent that an MDR was scheduled to be held remotely on April 27, 2023 to determine whether the student's misconduct was the result of his disability (Dist. Ex. 8 at p. 1).

According to the district's disciplinary hearing evidence, the student repeated the same threat to another student on April 25, 2023, after receiving notice of the scheduled disciplinary hearing and MDR by stating, "[y]ou and everyone at school make me want to commit a school shooting" and "[o]r worse actually" and "I'm not joking either" and then stating after two additional messages were sent that he was joking and did not "actually think that" (Dist. Ex. 6 at p. 21; 17 at ¶ 20; 18 at ¶ 18).

According to an MDR worksheet used as part of the MDR conducted on April 27, 2023, the MDR team determined that the behavior that led to the incident in question was not caused by, nor did it have a direct and substantial relationship to the student's disability (Parent Ex. C at pp. 1, 5). As a result of the April 25, 2023 disciplinary hearing and the determination of the MDR team on April 27, 2023, the student remained expelled from the district's charter school as of April 20, 2023 (Dist. Exs. 3 at p. 5; 6 at pp. 1-22; 7 at p. 2; see Parent Ex. A at p. 2).

A. Due Process Complaint Notice

By due process complaint notice dated May 26, 2023, the parent requested an expedited impartial hearing to challenge the outcome of the April 27, 2023 MDR (Parent Ex. A at p. 1). The parent alleged that the student was suspended from his charter school on April 20, 2023 for behaviors that were clear manifestations of his disability (id. at p. 2). The parent further asserted that the MDR team improperly concluded that the student's behaviors were not a manifestation of his disability and improperly expelled the student following the MDR (id. at pp. 2-3). As relief, the parent requested that the findings of the April 27, 2023 MDR team be reversed and that the student's behaviors be declared a manifestation of his disability; that the expulsion be expunged from the student's "permanent record"; that the student be immediately reinstated at the charter school for the remainder of the 2022-23 school year; that the evaluation process that had already been initiated be expedited; and that the CSE reconvene "to explore a more appropriate placement for [the student]" (id. at pp. 3-4).

B. Impartial Hearing Officer Decision

On June 1, 2023, the IHO issued a prehearing conference summary and order, which indicated that the parties had convened via WebEx on June 1, 2023 for a prehearing conference (Pre-Hr'g Conf. Summ. & Order at p. 1). The parties reconvened for an impartial hearing on June 22, 2023 (Tr. pp. 1-170). By decision dated July 3, 2023, the IHO found a number of procedural deficiencies in the conduct of the MDR and further found that the MDR team incorrectly determined that the student's behavior was not a manifestation of his disability (IHO Decision at pp. 16-18). As relief, the IHO overturned the MDR team's determination and found that the student's behavior was a manifestation of his disability (id. at p. 19). The IHO further ordered that the student's expulsion from his charter school be expunged from "his record" (id.). In addition, the IHO ordered the district's CSE to reconvene within 15 days of the date of his decision to develop an IEP consistent with his decision, to conduct a functional behavioral assessment (FBA) and to create a behavioral intervention plan (BIP), if appropriate (id.). Lastly, the IHO directed

the district's CSE to consider whether the student's current classification should be changed and to consider the classification of emotional disability (id.).[5]

IV. Appeal for State-Level Review

The district appeals and initially argues that the IHO exceeded his jurisdiction in reaching several issues which were not raised in the parent's due process complaint notice. Specifically, the district contends that the IHO found at least four procedural errors with the MDR, which included that the MDR did not adequately discuss the student's behaviors as they related to his disability, that the MDR worksheet was incomplete, that conversations which occurred prior to the MDR amounted to predetermination, and that the meeting was pro forma in nature and the school psychologist was the sole arbiter of the ultimate determination. The district further argues that the IHO found that the IEP had multiple deficiencies, which included lacking a definition for threat and that none of these issues were raised by the parent in the due process complaint notice. The district argues that the parent challenged the substantive determination of the MDR, did not assert any procedural claims relative to the MDR, and did not allege that the IEP was deficient. The district alleges that it did not open the door to these claims, and therefore, the IHO erred in making these findings. Next, the district asserts that the determination of the MDR team should be affirmed. The district argues that each of the procedural violations found by the IHO did not render the MDR team's ultimate determination inappropriate. The district further asserts that the MDR team engaged in a full discussion of whether the student's behavior was a manifestation of his disability and that the IHO's substantive findings are belied by the hearing record focusing on the use of the word "threat" and its meaning as well as an assertion that the IHO made improper credibility determinations. As relief, the district requests that the IHO's decision be annulled and that all relief awarded to the parent be annulled.

In an answer the parent responds to the district's request for review with denials and admissions and argues that the IHO's decision should be upheld in its entirety. The parent further asserts that the IHO did not exceed his jurisdiction by addressing procedural issues regarding the manner in which the MDR was conducted and that the IHO's witness credibility determinations should be upheld.[6]

V. Applicable Standards

The IDEA includes specific protections with regard to the process by which school officials may seek to effectuate a disciplinary change in placement of a student with a disability who violates a code of student conduct (see 20 U.S.C. § 1415[k]; Educ. Law §§ 3214[3][g]; 4404[1]; 34 CFR 300.530-300.537; 8 NYCRR Part 201). State regulations provide that a disciplinary change in placement means a "suspension or removal from a student's current educational placement that is either: (1) for more than 10 consecutive school days; or (2) for a period of 10

[5] The IHO's decision used the term "emotional disturbance"; however, the term "emotional disturbance" was changed to "emotional disability" in State regulation beginning on July 27, 2022 (see 8 NYCRR 200.1[zz][4]).

[6] During the impartial hearing, the parent's requested relief included reinstatement at the charter school. The IHO did not award that relief and the parent has only requested in her Answer that the IHO's order reversing the MDR determination and award of expungement of the student's expulsion be affirmed.

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]).[7]

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]).[8] 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

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

[8] 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]).

student who is placed in an IAES shall "continue to receive educational services so as to enable that student to continue to participate in the general education curriculum . . . and to progress toward meeting the goals set out in the student's IEP" (8 NYCRR 201.2[k][1]; see 20 U.S.C. § 1415[k][1][D][i]; 34 CFR 300.530[d][1][i]; 8 NYCRR 201.10[d]).

If the parent of a student with a disability disagrees with a school district's decision regarding the student's placement, or a determination of the manifestation team, the parent may request an expedited impartial hearing (20 U.S.C. § 1415[k][3][A]; 34 CFR 300.532[c]; 8 NYCRR 201.11[a][3]-[4]; see Coleman v. Newburgh Enlarged City Sch. Dist., 503 F.3d 198, 201-02 [2d Cir. 2007]).

VI. Discussion

A. MDR-Procedural Issues

The IHO ruled that the MDR could not be sustained due to a number of procedural violations including that:

1. The discussion at the MDR focused on the severity of the student's behavior rather than whether it was a manifestation of his disability;
2. A worksheet that was being used by members of the MDR was incomplete;
3. The director of student support services at the charter school had a discussion with the executive director of the charter school prior to the MDR, which led to a predetermined outcome at the MDR; and
4. The district's school psychologist was the sole arbiter at the MDR and did not include the participation of all members of the MDR team.

(IHO decision at pp. 16-17). During the impartial hearing, the district attempted to explain that the student's behavior was qualitatively different than what was described in the student's IEP and, therefore, not a manifestation of his disability. In response, the IHO rejected that argument and found that

> to attempt to create a sub-category of 'violent threat' when such sub-category is not in Student's IEP is an attempt to justify a disciplinary act after the fact. The severity of the threat is something that is certainly an important consideration, but [the district] should have considered the consequences of inartfully drafting an IEP when it is evident it had information (not documented anywhere in the record) that Student's threatening behavior meant something else

IHO Decision at p. 18). On appeal, the district argues that the IHO exceeded his jurisdiction in reaching issues that were not raised in the parent's due process complaint notice. Specifically, the district asserts that the IHO erred in finding several procedural errors with the manner in which the MDR was conducted, and in further finding multiple deficiencies with the October 2022 IEP. The parent contends that the IHO did not exceed his jurisdiction in reaching procedural issues regarding the conduct of the MDR. The parent argues that because the IHO reversed the district's MDR team's determination on substantive grounds, the IHO's procedural findings were observations, "essentially dicta," intended "to put the [district] on notice that they need to conduct more than pro forma MDRs" (Answer ¶ 13).

As indicated above and according to the facts in this matter, the procedural requirements for an MDR as set forth in State regulation require that: (1) it must be held no later than ten school days after a decision is made by a building principal to impose a suspension that constitutes a disciplinary change in placement; (2) it must be conducted by a manifestation team in a meeting, which includes a representative of the school district knowledgeable about the student and the interpretation of information about student's behavior, the parent and relevant members of the CSE as determined by the parent and the school district; (3) the parent must receive written notice prior to the manifestation team meeting, the district must ensure that the parent has an opportunity to attend and be notified of the purpose of the meeting and the names of the individuals attending and of the parent's right to include relevant CSE members; and (4) 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 (8 NYCRR 201.4 [a][3]; [b]-[c]).

With regard to the IHO's findings that suggest the MDR should have been invalidated due to procedural errors, there is no evidence that the MDR was not conducted in accordance with the procedures above and, instead, the IHO delved into procedural matters such as the level of completion of worksheets and the level of discussion that was had among the MDR participants. The evidence shows that the instructions on the district's MDR worksheet direct the MDR team to "[i]nclude a response for all questions" and to "include the contributions of all meeting participants" (Parent Ex. C at p. 1). While the IHO had leeway to allow some questioning related to the district's use of a form, the IHO should also have noted that the completion of the worksheet was raised for the first time during cross-examination at the impartial hearing, during which the parent's attorney inquired about a district policy that required use of an MDR worksheet. However, there is no federal or State statutory or regulatory requirement for the MDR team to complete an MDR worksheet (Tr. pp. 23-24; see Parent Ex. C at p. 1). Furthermore, there is no federal or State policy that requires a school district to document a minimum level of participation from all of the MDR team members at the risk of a finding of a procedural violation.

As a factual matter, the IHO correctly stated that the MDR worksheet was incomplete, and the parent's contributions were not recorded. While it may have seemed wiser for the district's substantive case to follow the instructions on the form and it would certainly have further benefited the district as the party with the burden of production and persuasion at an impartial hearing to explain the reasoning of the MDR team with the aid of a worksheet, the document—such as it is—demonstrated that the student's MDR was procedurally compliant (see Educ. Law § 4404 [1][c]; 8 NYCRR 201.4 [a][3]; [b]-[c]). It documented the names of the individuals attending, included the date the parent received written notice, listed the relevant information that was reviewed, and noted the date of the meeting, which was held within the requisite ten school-day period (Dist. Ex. 3 at pp. 1-6; see Tr. pp. 80-81).

Next, contrary to the IHO's findings, it was not an impermissible procedural violation for the executive director of the charter school and the director of student support services to have a discussion prior to the MDR regarding the potential long term suspension or expulsion of the student as the result of disciplinary proceedings, if in fact, such a discussion actually occurred (IHO Decision at pp. 16). There is scant evidence in the hearing record regarding the substance of the discussion, only speculation at best regarding its effect on the MDR team. The decision to impose a disciplinary change in placement is a condition precedent to an MDR; but for the decision to suspend the student for ten days or more, there would be no need to conduct an MDR (8 NYCRR

201.4[a][3]). Under these circumstances, it would be reasonable, if not expected, for the director of student support services at the charter school to communicate in some manner with the leadership of the charter school to ensure a common understanding of the severity of the infraction and potential imposition of discipline that could result in a penalty that included a suspension exceeding ten school days or more or expulsion, and the charter school's handbook notes the need for an MDR for potential suspensions and expulsions under these circumstances (Tr. pp. 134; see Dist. Ex. 12 at p. 45).[9] There would be little point for arranging and conducting an MDR if there was no communication regarding these potential consequences to the student. The IHO's speculation that the MDR was somehow polluted by a discussion outside of the MDR was not a procedural error and must be reversed.

The district also correctly notes that the parent did not allege that the district failed to implement the October 2022 IEP (see Parent Ex. A). The IHO correctly acknowledged that the parent did not allege that the student's conduct was the direct result of the district's failure to implement the October 2022 IEP (IHO Decision at p. 8; see 8 NYCRR 201.4 [c][2]). State regulations contain a heading called "Deficiencies in the IEP," but go further to explain the context of that provision which involves the MDR team's determination that the conduct in question was the direct result of the district's failure to implement the IEP (8 NYCRR 201.4 [e]).

As for the IHO's determination that there was inadequate participation by the participants while the MDR team was meeting as opposed to reviewing documentation in advance of the meeting (IHO Decision at p. 17), federal and State regulations do not mandate that a MDR be conducted in a particular style or that the absence of an attendee's verbal input during an MDR negates the individual's qualification as a "participant" in the MDR (see 34 CFR 300.530[e]; 8 NYCRR 201.4). While the IHO's observations regarding the participation and reasoning of various MDR team members is relevant to the reliability of the MDR team's substantive determination (which is addressed further below), a lack of definitive verbal input by each member during the team's review was not a defect that by itself required reversal of the MDR's determination on procedural grounds alone.[10]

Next, with regard to the quality of the IEP at the time it was designed, I find the IHO exceeded his jurisdiction in this matter by determining any deficiencies in the drafting of the IEP (IHO Decision at pp. 7, 8, 13, 15, 18).[11] The district is correct that to the extent the IHO improperly

[9] The executive director was one of the individuals identified in procedures for appeals from the principal's findings as to disciplinary proceeding (Dist. Exs. 11 at p. 2; 12 at pp. 36-37, 41-42). Additionally, expulsion decisions were made by the executive director (Dust. Ex. 12 at p. 43).

[10] After the conclusion of the testimony of the school psychologist, the attorneys for the parties and IHO debated the specific type of input both she and the district director of student support services should have had during the MDR (Tr. pp. 101-106)

[11] An IHO generally has broad authority to fashion appropriate equitable relief (see, e.g., Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see Forest Grove v. T.A., 129 S.Ct. 2484 [2009]); however, an IHO may not generally use this authority to order relief to reach new issues that were not raised in a party's due process complaint notice.

addressed the appropriateness of the October 2022 IEP, as it was drafted, the IHO erred. In the former version of the IDEA prior to 2004, Congress required that the

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

(20 U.S.C. § 1415[k][4][c] (as amended April 29, 1999). However, the provision for reviewing the adequacy of the student's IEP and placement as part of the MDR was explicitly removed by Congress when the IDEA was last revised. Initially, the IHO stated during the impartial hearing that the appropriateness of the October 2022 IEP was not an issue in the impartial hearing and nonetheless made findings related to the IEP in his decision (Tr. pp. 8-9). However, despite initially setting forth in his decision that the IDEA no longer required that the appropriateness of the IEP be considered in an MDR, he nonetheless continued and made a finding that the October 2022 IEP was deficient in its drafting (IHO Decision at pp. 7, 13; see Tr. pp. 8-9, 157-58). During the impartial hearing and in his decision, the IHO was focused on the district's use of the word threat on the student's IEP and its meaning (Tr. pp. 82-86, 120-21, 141-42, 144, 146, 153-57; IHO Decision at pp. 13, 15). However, the hearing record reflects that the parent was in agreement with the recommendations set forth in the October 2022 IEP at the time it was written IHO Decision at p. 8).

In view of the foregoing, the IHO's reasoning regarding procedural deficiencies in the MDR process was error and must be reversed. What remains for review is the weighing of the evidence regarding the MDR's substantive determination regarding the student's conduct.

B. MDR-Substantive Findings

Turning to the IHO's substantive finding that the student's conduct was a manifestation of his disability, the hearing record supports the IHO's ultimate determination that it was; however I reach the conclusion under different reasoning.

According to the hearing record, the student was suspended on April 20, 2023, a disciplinary hearing was held on April 25, 2023, and the MDR was conducted on April 27, 2023, wherein the MDR team determined that the student's misconduct consisting of a threatening the safety of students and staff members of the charter school through social media platforms and texts was not a manifestation of his disability (Dist. Exs. 5 at p. 1; 7 at pp. 1-2). In conducting an MDR and in accordance with the facts specific to this matter, State regulation requires that the MDR team review all relevant information in the student's file including the student's IEP, any teacher observations, and any relevant information provided by the parents to determine if the conduct in question was caused by or had a direct and substantial relationship to the student's disability (8 NYCRR 201.4 [c][1]).

As noted above, the MDR team utilized a worksheet, which reflected that the MDR team reviewed a November 21, 2014 psychiatric evaluation, a January 16, 2015 psychological update, and the student's then-current October 18, 2022 IEP (Parent Ex. C at pp. 2, 3, 4; see Dist. Exs. 2; 13; 14).

According to the November 2014 psychiatric evaluation report, the student had received a diagnosis of autism at age two and had received Axis I diagnoses of attention deficit hyperactivity disorder (ADHD) and language disorder as of the last psychiatric evaluation (Dist. Ex. 14 at p. 1).[12] Via interview with the student, the evaluator noted that he continued to be oddly related and had a hard time with back and forth conversation, did not face the evaluator or make eye contact unless specifically requested, engaged in play that would be consistent with that of a younger child, reported that there was one child at school who bullied him, admitted to frequent arguments with this child and other children at school, and reported anxiety at times about something bad happening to his sister, like dying (id.). The evaluator found the student attempted to be compliant but was easily distracted, was difficult to understand due to very soft speech and odd speech patterns including echolalia and articulation issues, displayed thoughts which were linear but quite concrete, demonstrated fine motor skills and a fund of knowledge less developed than would be expected for same age peers, and he did not seem to understand questions about suicidal/homicidal ideation, intent, and plan and there was no evidence of these things by observation or parent report (id. at p. 2). In sum the evaluator reported that the student met the criteria for diagnoses of ADHD-combined type, language disorder, and social communication disorder; had fetal alcohol syndrome and a history of frequent ear infections; and received a global assessment of functioning (GAF) score of 53 (id. at p. 2).[13]

A January 16, 2015, psychological update indicated that the student was then-currently receiving ICT services, speech-language therapy individually and in a group, and occupational therapy (OT) in a group, all as a student with autism (Dist. Ex. 13 at pp. 1-4). With respect to social/emotional functioning the evaluator reported that when asked if he enjoyed living with his family members the student reported "'fight bad guys at home'" and that the student reported to like school and his teachers but indicated that sometimes other students "'bully'" him and that they would say "'get off my line'" and "'I'm going to punch you in your face'" (id. at p. 3). The evaluator opined that the student may be negatively affected by the inappropriate behaviors of the peers in his classroom (id. at p. 4). The evaluator found the student's full-scale IQ to be 77 (borderline range) and in sum described the student as a respectful and cooperative youngster who presented with attentional and speech-language difficulties (id. at p. 4).

In addition to the information above, the counseling report included in the October 2022 IEP indicated that the student had "a tainted and poor relationship with his peers" (Dist. Ex. 2 at p. 4). The report noted that although the student had attended the charter school since fifth grade he

[12] It appears that this exhibit is incomplete, however it was offered into evidence and submitted with the hearing record as a two-page document. The second page of the exhibit appears to be labeled as page three, and the evaluation appears to end abruptly (see Dist. Ex. 14 at pp. 1-2). While it is well-settled that the formal rules of evidence do not apply in an administrative proceeding, the IHO should ensure that the evidence submitted is complete prior to admitting it..

[13] The student and his sibling were placed with the parent shortly after the student's birth (Dist. Ex. 14 at p. 1).

struggled to maintain relationships and friendships with those around him (id.). The counseling report reflected that the student stated he did not want friends because he considered other people to be problematic (id.). According to the IEP counseling report, in one-on-one settings the student was able to communicate well and engage in conversation; however, the student struggled with displaying appropriate interpersonal skills and showed low frustration tolerance (id.). When frustrated, the counseling report noted that the student struggled with focusing in class and in counseling sessions due to becoming fixated on what had triggered him such as a bad grade, negative encounter, or consequence; or because he was distracted by external stimuli (id.). The IEP also reflected the student's diagnosis of fetal alcohol syndrome (Dist. Ex. 2 at p. 5).

The counseling report included in the October 2022 IEP also stated that the student needed assistance to work towards maintaining socially appropriate behaviors (Dist. Ex. 2 at p. 4). The October 2022 IEP reflected that the student's inappropriate language use and altercations with others were often unprovoked and occurred virtually (id.). The counseling report indicated that the student demonstrated a lack of social awareness in that he was often unable to recognize others' emotions (id.). The student was also described as lacking self-awareness of his emotional state which resulted in "unhealthy vocalizations, facial expressions, and gestures when presented with likes, dislikes, and physical discomfort" (id.). According to the October 2022 IEP, counseling sessions would be utilized to practice appropriate social skills such as active listening, taking turns, and considering the natural consequences to inappropriate behaviors (id.). It was further recommended that counseling be changed to individual services in order to improve the student's interpersonal skills prior to reintegrating in a group (id.).

With regard to social strengths, the student was noted to persevere when given assignments of interest and was able to interact well and follow directives with adults in a one-on-one exchange (Dist. Ex. 2 at p. 4). The October 2022 IEP further indicated that the student was interested in working past his outbursts and doing better (id. at pp. 4-5). The student also expressed interest in making friends in the future (id. at p. 5). The parent reported that she would like the student to continue working on understanding social cues and interacting appropriately with peers (id.).

The October 2022 IEP also reflected that there had been a history of incidents both within the 2021-22 school year as well as the then-current 2022-23 school year in which the student had used inappropriate language toward his classmates and staff and had received suspensions due to these incidents, including one recently (Dist. Ex. 2 at p. 4). The IEP stated that the setting where the problem behavior most frequently and consistently occurred was at home when the student "[wa]s not doing anything" and "nothing [wa]s catching his attention" and he was alone and away from adult attention, peer attention, or sensory stimulation (id.). Reportedly, the student would then verbally harass, threaten, and/or bully an individual target, for example the student would warn peers to "watch out" or call them slurs (id.). The IEP stated that during counseling sessions, incidents and the reasoning behind comments and inappropriate language were discussed and the IEP noted that the student had made the active effort to remove himself from social media in order to avoid being "'tempted to send messages when bored'" (id.).

In an affidavit in lieu of direct testimony, the district school psychologist (school psychologist) stated that the student was previously suspended for two days for bullying in October 2022 as he had sent offensive comments through social media (Dist. Ex. 17 at ¶15; see Dist. Ex. 9). She explained that the October 2022 CSE addressed this behavior in the student's IEP through

counseling and it seemed to be consistent with his tendency to make impulsive, socially inappropriate comments, as described in his present levels of performance, and so the CSE did not take additional action (Dist. Ex. 17 at ¶15).

The school psychologist reasoned that the conduct was not a manifestation because none of the student's previous school suspensions were "reasonably related to threats of school shooting" as they involved "cutting school," cursing at another student, and making offensive comments (Dist. Ex. 17 at ¶¶ 26, 28). She further explained that had the pattern of behavior been caused by the student's disability, she would have expected the student to curse at the student or make an offensive comment, but that neither she nor the student's teachers could have anticipated the "two back-to-back threats to commit a school shooting" that were made by the student (id. at ¶29).[14]

During cross-examination, the school psychologist acknowledged that the MDR team discussed that the student was then-currently seeing a psychiatrist, and the parent discussed the student's psychiatric treatment during the MDR (Tr. p. 22). The school psychologist also testified on cross-examination that the student's suspension during the 2022-23 school year was discussed at the MDR, but his past history of behavior incidents in 2021 and 2022 was not examined, but that it would have been helpful to understand (Tr. pp. 38-40). The school psychologist further testified that she considered the student's past behavior pattern to consist of socially inappropriate remarks and comments, and she did not see a specific threatening pattern prior to the April 2023 school shooting threats (Tr. p. 58). However, when asked if the student exhibited a pattern of bullying and threatening, she responded affirmatively (Tr. pp. 58-59). Additionally, the school psychologist described that "[a] lot of these incidents are also… where [the student] is on social media at home… or he's using inappropriate language communicating [with] peers that was more outside of the school" (Tr. p. 61). The school psychologist also conceded that the threat the student made on April 20, 2023 and later recanted in the same text message thread could be considered impulsive and not thought out (Tr. pp. 63, 90). The school psychologist acknowledged on cross-examination that in her view, the turning point for whether or not the behavior was a manifestation of a disability was the type of threat, specifically, a threat of committing a school shooting and that her concern was the severity of the behavior since it was not consistent with the other patterns of the student making socially inappropriate remarks (Tr. p. 71). In sum the school psychologist explained that the student had previously engaged in cyberbullying his peers and would curse, or curse at the other students and say inappropriate remarks, however, the student did not make "a specific targeted threat overall to any particular student or even at the whole school" or something so egregious as saying "that he will commit a school shooting" (Tr. p. 72).

With regard to the "watch out" language that the student used in the past and was included on the October 2022 IEP, the school psychologist testified that to her "watch out" did not "seem as it was a, a violent threat compared to committing a school shooting" and that to the best of her recollection, prior to April 2023 the student did not display any pattern of violence, physical or verbal (Tr. p. 73). The school psychologist stated that it seemed to her that the student had a pattern of "just saying impulsive remarks and cursing or saying inappropriate comments to students" and that it did not rise to "that level" of "saying specific violent threat" (Tr. p. 74). In response to the

[14] A review of the evidence in the hearing record indicates that the student made three references in text messages of feeling like or wanting to commit a school shooting although the wording was slightly different in each text message (Dist. Ex. 6 at pp. 5, 10, 21).

IHO's question about whether the MDR team discussed what threaten meant as it was used on the October 2022 IEP, the school psychologist testified that the MDR team discussed that the student would tell peers to "watch out" and that it was more a warning than an actual threat (Tr. pp. 81, 82). She further testified that "threat" meant "more of a dangerous or a violent behavior or a statement being said" (Tr. p. 82). The school psychologist distinguished the threat contemplated by the October 2022 IEP from the April 2023 threat of a school shooting by stating "I don't believe" the April 2023 threat was contemplated by the October 2023 IEP, "that again is more of an egregious threatening statement that he would have made. It doesn't again seem to be something that is a pattern or I would have expected of him" (Tr. p. 83; see Tr. pp. 84-85, 86).

In an affidavit in lieu of direct testimony, the charter school's director of student support services (director), averred that, in her view, the student's history of inappropriate behavior did not prepare school personnel for the threats of violence the student made in April 2023 (Dist. Ex. 18 at ¶¶ 12-15). The director further testified that "[g]iven the current environment, [the charter school] took this threat incredibly seriously" (id. at ¶17). The director testified that the student "repeated the threat to commit a school shooting days later, following his suspension, on April 25, 2023," law enforcement was alerted, and "[a]t the same time" the student began engaging in highly inappropriate communication with teachers both during school hours and non-school hours (id. at ¶¶18, 19, 20; Dist. Ex. 6 at pp. 8-9; 7 at p. 8).

During cross-examination, the director acknowledged that in her affidavit she stated that prior to April 2023, the student's inappropriate behavior never included threats of violence or aggressive use of slurs; however, she conceded that language on the October 2022 IEP did mention that the student used threats and slurs (Tr. pp. 115, 116-17, 124-25; Dist. Exs. 2 at p. 4; 18 at ¶25). The director further responded by stating that on the IEP, threats referred to the student telling peers he would not talk to them or would post inappropriate things about them on social media; and that "watch out" meant the student was going to post these types of things (Tr. pp. 118-19, 123). The director also explained that at the time of the October 2022 CSE meeting, the types of threats the IEP contemplated were related to bullying peers (Tr. p. 123). The director appeared to differentiate the April 2023 threats by indicating that the school shooting threat was "aggressive and violent," while the student's prior behaviors were not (Tr. p. 141). The director testified that the school psychologist was primarily responsible for the MDR meeting and that she participated alongside the counselor/social worker, the assistant principals, and the parent (Dist. Ex. 18 at ¶21). The director testified that she was present at the meeting but did not make any determination and did not have anything to say verbally during the MDR as there was a packet of evidence submitted, and the school psychologist made the determination based on the evidence presented (Tr. pp. 98-100, 111).

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]).

In its worksheet documentation, the reason that the MDR team provided for its determination that the conduct was not a manifestation of a disability was that "[the student]" was able to differentiate right and wrong as evidenced by his remark 'I'm joking btw' after saying that he will commit a school shooting" (Dist. Ex. 3 at p. 5). However, whether the student was sufficiently aware of right and wrong with respect to the conduct in question, once again, reflects

a mode of MDR analysis that is no longer used. In the prior version of the statute, before determining that the student's conduct was not a manifestation of a disability, the MDR team was required to determine that

> (II) the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and
>
> (III) the child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

(20 U.S.C. § 1415[k][4][c] (as amended April 29, 1999). That the student recanted one of his statements about a shooting and was concerned about being suspended does tend to show that he understands and has some ability to control his actions, but that does not change the fact that the provisions of the statute quoted above—which align with the reasoning in the MDR worksheet, were eliminated when IDEA was amended in 2004. Thus, I am not convinced that the MDR team was using the correct standard in its reasoning when the determination was made.

Instead, there need only be a direct and substantial relationship of the behavior to the student's disability. As indicated above, during the 2021-22 school year and during the then-current school year, there had been numerous incidents where the student had used inappropriate language towards his classmates and staff and had been suspended for it (Dist. Ex. 2 at p. 4). The October 2022 IEP reported that during the student's counseling sessions, "incidents and reasoning behind comments and inappropriate languages" were discussed (id.). It was further noted that the student needed "continuous counseling in efforts to work on social skills and socially appropriate behaviors" and that he had made the active effort to remove himself from social media in order to avoid being "tempted to send messages when bored" (id.). The October 2022 IEP stated that the setting where the problem behavior most frequently and consistently occurred was when the student was at home, when he was not doing anything and nothing was catching his attention (id.). What occurred immediately before the problem behavior was the student being alone and away from adult attention, peer attention, and sensory stimulation (id.). The student would then "verbally harass, threaten, and/or bully the individual target" (id.). There is little question that the student's behavior in April 2023 had a direct and substantial relationship to his disability which was described previously in his IEP as harassing, threatening, and bullying other individuals, especially when alone and using social media or devices, and for which he was already receiving counseling services.

The school psychologist and director considered the severity of the threat made over several days and not targeted to an individual but to the entire charter school as demonstrative of a lack of impulsivity and a change from the student's behavior pattern targeted by the October 2022 IEP. The fact that the behavior escalated in severity did not render it no longer related to his disability, and the student appeared to continue to send the threatening texts to other individuals. Furthermore, the number of messages the student sends at a time was indicative of his impulsivity (Dist. Exs. 6 at pp. 10-20; 7 at p. 8). As noted above, even the school psychologist conceded at the impartial hearing that the student's April 20, 2023 threat could have been considered impulsive (Tr. pp. 63, 90). The director testified the student repeating the threat of violence on April 25, 2023, after he knew he was being investigated for the April 20, 2023 threat of violence "demonstrated… that it was not a result of lack of impulse control or an inability to distinguish

appropriate behavior from inappropriate" (Dist. Ex. 18 at ¶23). However, the student repeating the threat, not once but twice, could also be interpreted as very impulsive.

There is also other evidence in the hearing record which indicates that the student's behavior pattern targeted by the October 2022 IEP was evolving and escalating.[15] The hearing record includes pictures of three written exchanges with teachers; however, only one screenshot shows the date as April 20, 2023. All three include the time they were sent with two of the messages occurring during school hours and the third exchange occurring at 1:34 a.m. (Dist. Exs. 6 at pp. 8, 9; 7 at p. 8). The district asserts that all three messages were sent around the same time as the student's threats of violence against the charter school on April 20, 2023 and April 25, 2023 (Dist. Ex. 18 at ¶19). The two messages sent during school hours were clearly disrespectful to the teachers and used inappropriate language in a way that was consistent with the behavior targeted by the October 2022 IEP. Although these acts were a clear escalation of the student's behavior pattern, they are not so distinguishable from the socially inappropriate behavior in his IEP as to be as to lack a direct or substantial relationship to his disability.

When the student made the threat "[l]ike y'all make me wanna commit a school shooting" on April 20, 2023, the evidence shows that such behavior is inconsistent with the charter school's code of conduct and that a disciplinary process to consider suspending the student was necessary. (Dist. Exs. 6 at pp. 10-20; 17 at ¶¶ 20, 23; 18 at ¶¶ 16, 17). The school in this case sought a disciplinary change in placement that would result in suspending the student for ten days or more. As a student with a disability subject to a disciplinary change in placement, the student was entitled to an MDR. The only issue under review herein, is whether the district met its burden of demonstrating that the student's conduct in question was not caused by or did not have a direct and substantial relationship to the student's disability in order to effectuate a disciplinary change in placement. In review of the parent's challenging the outcome of the MDR in a due process proceeding, I am not convinced that the student's conduct was not a manifestation of the student's disability as there were considerable similarities to behavioral problems that the student was already experiencing which the charter school was attempting to address through special education services. Accordingly, there is insufficient reason to overturn the IHO's conclusion on this point.

C. Relief

The district also argues that the IHO erred in awarding the parent her requested relief of expunging the student's expulsion from the charter school from his school records and requests reversal. The parent merely states in her answer that the IHO's expungement directive should be upheld, presumably because the parent also argues that the MDR outcome should be upheld.[16]

[15] The district's "pattern of behavior" defense is a two-edged sword. On the one hand if the behavior does not fit within the student's areas of deficits, one could argue that it doesn't fit the pattern, so to speak, and therefore does not have any significant relationship to the student's disability. However, if the behavior falls within the student's areas of deficit there is a risk that the escalation in severity will be perceived as the continuation of a pattern, and that is closer to the circumstances found in this case. Whether or not the behavior was expected by school personnel is not particularly probative because in many circumstances it does not answer the question of whether it is related to a student's disability.

[16] At the time of the administrative due process proceedings, it does not appear that the parent was or is currently

As further described below, the IHO exceeded his jurisdiction regarding the student's educational records and the district's request to reverse the IHO's expungement directive must be granted. In this matter, the parent sought review of the district's MDR determination which occurs on an expedited basis as described above. The question in a due process proceeding that addresses an MDR is whether a disciplinary change in placement that exceeds ten school days is permissible under the IDEA under the particular factual circumstances. However, 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. Furthermore, 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 school's code of conduct (see e.g. Dist. Ex. 12 at p. 37).

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[*l*]). 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 10 school days.

With regard to the evidence in this case, the charter school's student handbook states that in accordance with § 3214, students subject to an out of school suspension in excess of five days are afforded rights which include but are not limited to a hearing by the principal or a designated hearing officer; and an appeal, first to the Executive Director, then to the Board of Trustees and finally to the Commissioner of Education (Dist. Ex. 12 at p. 37). The relief sought by the parent in her due process complaint notice also included expungement of the student's suspension from the charter school. However, while an IHO or SRO may rectify an flawed change in the student's

seeking to return the student to the charter school. The hearing record includes a May 1, 2023 psychiatric evaluation obtained by the parent after the disciplinary hearing and MDR but before the May 26, 2023 due process complaint notice (Parent Ex. D at p. 7). Notably, the parent told the psychiatric evaluator that she had requested reevaluation from the district, that the student was not in the right school and that she needed support (id. at p. 3). The parent further stated that the student "does not belong in [the charter] school and they aren't providing him with the services and support he needs" (id.). The parent also told the psychiatric evaluator that she had noticed the student's behavior changing in April 2021 and that the charter school had ignored her (id.). Based on the parent's statements to the psychiatric evaluator, it would appear the parties agree that the student required a change in placement in April 2023, albeit the parent does not agree that it should be a disciplinary change in placement and thus seeks expungement.

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 before the executive director of the charter school, then the board of trustees and then properly appealed to the Commissioner of Education similar to the proceedings involving expungement described above (see Educ. Law § 310; 34 CFR 99.22, 300.621).[17, 18] 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.

VII. Conclusion

Based on the forgoing, the evidence in the hearing record does not support reversal of the IHO's ultimate conclusion that the student's conduct was a manifestation of his disability and, therefore, a disciplinary change in placement was not permissible.[19, 20] However, to the extent the

[17] 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.

[18] 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).

[19] I recognize that the charter school was faced with a significant challenge when confronted with any student who has made threats of a school shooting, but verbal threats of using a firearm do not appear to fall within the provisions for carrying or possessing a weapon that would allow school officials to move the student to an interim alternative educational setting (IAES) as a temporary measure, and thus provides little reassurance in the current string of school shootings that have occurred in recent years since the Columbine shooting (34 CFR 300.530[g]; 8 NYCRR 201.7[e]). It can be very difficult to assess what is likely to occur with a particular student who is making serious threats. On the other hand, the student in this case has needed support for appropriate social behavior and appears to have made some progress at times with the assistance of special education services, but as the facts of this case demonstrate, that progress has not been consistent. There were other options available to the parties for changing the student's placement, other than a disciplinary change in placement. as of April 20, 2023, the student had been suspended for four days during the 2022-23 school year so the student could have been suspended for up to an additional five days before the suspension constituted a disciplinary change in placement (8 NYCRR 201.2[e][2]). For instance, in the time between the student's conduct and the MDR, if the district believed the student's behaviors were significantly different from those identified in the October 2022 IEP, the district could have held a CSE meeting with the parent to discuss the increasing severity of the student's behavior and his need for a more supportive placement, and the CSE could have made the decision to change the student's educational placement under those procedures (see 8 NYCRR 200.5[c][1] [under ordinary circumstances, a district must provide a parent five days written notice prior to a CSE meeting]). Consistent with such a change, the hearing record reflects that the student was attending a different district school at the time of the impartial hearing; however, it does not provide any further information about the circumstances surrounding the student's transition to the new school. In addition, if the district needed additional time to locate or revise the student's educational placement, the district could have requested an expedited due process hearing and sought an order from an IHO to change the student's placement to an appropriate IAES for up to 45 school days, if the IHO found that maintaining the current placement of the student was substantially likely to result in injury to the student or others (34 CFR 300.532 [b][2]; 8 NYCRR 201.8[a]).

[20] As one final note, if the district changed the student's educational placement and the parent challenged that

IHO made determinations that the district's MDR was procedurally inadequate, those findings were error and must be reversed. Furthermore, the IHO conflated the MDR procedures that address the permissibility of a disciplinary change in placement that applies to an IDEA due process proceeding with the broader disciplinary procedures conducted by school principals and superintendents under Education Law § 3214 whether a student is disabled or not, and therefore the IHO's order of expungement of the student's records must be reversed. To the extent the remaining aspects of the IHO's award of relief are required by State regulation following a finding by an MDR team that the student's conduct was a manifestation of his disability, those awards are affirmed.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision dated July 3, 2023 is modified, by reversing those portions which directed the district to expunge the student's record of suspension.

Dated: **Albany, New York**
September 13, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER

change in placement and invoked pendency, the IDEA's procedural safeguards also provide a vehicle for the district to obtain any relief the court determines is appropriate in a civil action (20 U.S.C. § 1415[i][C][iii]). The Fourth Circuit, citing the U.S. Supreme Court in Honig v. Doe, explained that when agreement cannot be reached between the parties, the court has the equitable power to order a change in placement upon a sufficient showing (Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 302–03 [4th Cir. 2003] [the availability of injunctive relief "is consistent with the understanding that circumstances do exist where maintaining the child in the then-current educational placement would cause irreparable harm"]; see Honig v. Doe, 484 U.S. 305, 327-28 [1988]).