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STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
21 EDC 03727

[redacted] by and through his parent [redacted] Petitioner, v. Wake County Board of Education Respondent.	**FINAL DECISION**

THIS MATTER was heard before the Undersigned Honorable Stacey B. Bawtinhimer, Administrative Law Judge presiding, on the following dates: September 14-15, 2021, at the Office of Administrative Hearings in Raleigh, North Carolina.

After considering a trial on the merits held on the above-mentioned dates, arguments from counsel for all parties, all documents in support of or in opposition to the parties' motions, all documents in the record including the Proposed Decisions as well as all stipulations, admissions, and exhibits, the Undersigned concludes that the Petitioners failed to prove that [redacted]s conduct was a manifestation of his disability. Although Petitioners failed to meet their burden on the substantive issue, WCPSS' manifestation determination review ("MDR") was procedurally flawed but as [redacted] was not a "child with a disability" and WCPSS had no "basis of knowledge", the procedural violations are harmless.

INTRODUCTION

This case began with a "nightmare scenario" for WCPSS; [redacted] threatened to blow up his high school and kill all the students and staff. [redacted] was involuntarily committed the next day and diagnosed with depression and bipolar disorder. Questions about an autism diagnosis were also raised.

WCPSS acted quickly and decisively to protect its students and staff from harm. [redacted] was suspended and ultimately expelled from school. Once aware of [redacted]s mental illnesses, WCPSS also acted to protect [redacted]s educational rights. After he was released from the hospital and during his suspension period, WCPSS initiated the referral process for special education eligibility and voluntarily held a MDR while eligibility was pending.

This case appears to be a case of first impression in North Carolina and possibly nationally. While there is much case law regarding whether a student who has not yet been found eligible is entitled to a Manifestation Determination Review ("MDR"), that is not the issue in this matter. Here, the question is not whether [redacted] was entitled to an MDR, he was provided one; the question

is once having been provided an MDR, was [redacted]s MDR procedurally and substantively appropriate. The Undersigned finds that the MDR provided to [redacted] by WCPSS was not procedurally appropriate but because WCPSS had no "basis of knowledge" and [redacted] had not yet been determined a "child with a disability" in need of special education, he is not entitled to another MDR. If, however, [redacted] is later found eligible during the disciplinary period, he would then be entitled to another MDR and WCPSS should not make the same procedural violations or others during the next MDR.

APPEARANCES

For Petitioners: Stacey M. Gahagan
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Durham, NC 27707

For WCPSS: Stephen Rawson
Tharrington Smith, L.L.P.
150 Fayetteville Street, Suite 1800
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WITNESSES

For Petitioners: David F. [redacted] Ph.D., Expert Witness
Petitioner [redacted] Mother of [redacted]

For Respondent: Barbara Liggett, WCPSS Senior Administrator
Rodney Smith, LEA Representative
Daniel McGrogan, WCPSS School Psychologist

EXHIBITS AND TRANSCRIPTS

The following exhibits were received into evidence during the course of the hearing. The page numbers referenced are the "Bates stamped" numbers.

Stipulated Exhibits: 1-15, 16 (pp. 47-48), 17-19, 21 (pp. 65-66), and 22-29.

Petitioners' Exhibits: 3 (p. 10), 8 (pp. 79-81, 83), and 10-12.

Respondent's Exhibits: 1, 2, and 4.

Supplemental Exhibits: 5, 10, 14, and 16.

The exhibits have been retained as part of the official record of this contested case.

OTHER DOCUMENTS

Transcript Volumes 1 and 2 were received and have been retained in the official record of this case.

ISSUES

The Parties identified the issues[1] for hearing as follows:

1. Was the Manifestation Determination Review decision made on [redacted] substantively appropriate?

2. Was the Manifestation Determination Review conducted on [redacted] procedurally appropriate?

BURDEN OF PROOF

Petitioners bear the burden of proof in North Carolina. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). The standard of proof is by a preponderance of the evidence. *See id.*; "Courts give educators "deference . . . based on the application of expertise and the exercise of judgment by school authorities." *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S.Ct. 988, 999 (2017). "By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement," and a "reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of [the child's] circumstances." *Id.*

Due regard in administrative cases is given "to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency." N.C.G.S. § 150B-34(a).

PROCEDURAL BACKGROUND

1. On August 3, 2021, Petitioners filed a Petition for a Contested Case Hearing ("First Petition") in the Office of Administrative Hearings ("OAH") against the Wake County Board of Education case file number 21 EDC 3373. In the First Petition, Petitioners alleged violations of the IDEA and other relevant laws. The First Petition was assigned to Administrative Law Judge J. Randolph Ward.

2. Subsequently, on August 30, 2021, Petitioners filed a separate Expedited Petition for a Contested Case hearing alleging violations of the IDEA surrounding the Manifestation Determination Review conducted by Respondent. The Expedited Petition was assigned to Administrative Law Judge Stacey Bice Bawtinhimer, and the First Petition was reassigned to Judge Bawtinhimer.

[1] The Undersigned has reversed the issues from how they were numbered in the Prehearing Order. The reasons for which will become obvious later in the decision.

3. Petitioners sought to Consolidate the Expedited Petition with the First Petition on August 31, 2021 which Respondent opposed on September 7, 2021 and moved to dismiss.

4. On September 9, 2021, Judge Bawtinhimer informed the Parties she was denying Respondent's Motion to Dismiss, and that the ruling on Petitioner's Motion to Consolidate would be determined by the Chief Administrative Law Judge after the expedited hearing if still applicable. Based on this Final Decision, the Motion to Consolidate is now moot.

5. On September 10, 2021, Petitioners filed an unopposed Motion to Permit Remote Testimony and Motion to Require Sequestration of Witnesses. Both were granted.

6. The Parties conducted mediation on September 13, 2021 but were unable to reach a mutually agreeable result.

7. On September 14-15, 2021, Judge Bawtinhimer held an in-person expedited hearing on the procedural and substantive appropriateness of the Manifestation Determination Review conducted by Respondent.

8. On September 15, 2021, Judge Bawtinhimer issued a written Order Denying Respondent's Motion to Dismiss which memorialized her verbal order of denial on September 9, 2021.

9. On September 22, 2021, Petitioners filed a Motion for Additional Evidence seeking to admit additional evidence regarding an autism evaluation conducted by Dr. Peter Duquette which was opposed and denied.

10. On September 23, 2021, the Parties filed Draft Proposed Final Decisions.

11. All admitted exhibits and the Parties' respective verifications were filed on September 27, 2021.

12. Amended Proposed Final Decisions were filed on September 27, 2021 to incorporate transcript citations unavailable when the initial proposals were filed and to include proposed remedies as requested.

13. The Final Expedited Decision was issued within ten (10) school days of the hearing on September 29, 2021.

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, the exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned Administrative Law Judge ("ALJ") makes the following Findings of Fact. In making these Findings of Fact, the ALJ has weighed the evidence presented and has assessed the credibility of the witnesses by taking into account the appropriate factors for

determining credibility, including but not limited to the demeanor of the witnesses, any interests, bias, or prejudice the witnesses may have, the opportunity of the witnesses to see, hear, know, and remember the facts or occurrences about which the witnesses testified, whether the testimony of the witnesses is reasonable, and whether the testimony is consistent with other believable evidence in the case, including but not limited to verbal statements made at meetings as documented in the admitted exhibits, meeting minutes, MDR documents, Prior Written Notices, correspondence, notes, texts messages, evaluations, medical documents, recordings, and all other competent and admissible evidence.

At the start of the hearing in this matter, the Parties agreed to Jurisdictional, Party, and Legal Stipulations and Factual Stipulations in an Amended Proposed Pre-Hearing Order, which was approved and filed in the Office of Administrative Hearings on September 21, 2021. To the extent that Stipulations are not specifically stated herein, the Stipulations of Fact in the Order on Pre-Hearing Conference are incorporated fully by reference.

Based upon the stipulations of record and the preponderance of admissible evidence, the Undersigned finds as follows:

Unless specifically contradicted, this Order incorporates and reaffirms all Findings of Fact and Conclusions of Law contained in previous Orders entered in this litigation either orally at the hearings or in written format. Such Orders are appealable after issuance of this Final Decision.

To the extent the Findings of Fact contain Conclusions of Law or the Conclusions of Law are Findings of Fact, they should be considered without regard to their given labels.

Credibility of Witnesses

1. The Undersigned determined the credibility of the witnesses in this case based on any inconsistencies in the record and the witnesses' testimony as well as the Undersigned's observations of witnesses' demeanor, voice inflection, tone, hesitation in responding to questions, facial features, body language, as well as any leading nature in the questioning by and the witnesses' interactions with legal counsel. The transcript of the hearing cannot record these mannerisms of witnesses.

2. In this case, as in all others, the Undersigned has not indicated in the record to legal counsel how she intended to rule on the credibility of the witnesses. Occasionally in hearings, the Undersigned has noted on the record when a witness significantly and routinely delays answering a question. There is no legal authority requiring that an administrative law judge, or any judge, make any credibility determinations on the record or advise legal counsel on how the administrative law judge intends to rule on the credibility of witnesses.

3. Even though this Final Decision may incorporate language from the Parties' respective Proposed Final Decisions, credibility determinations are made independently from any proposals by the Parties. The Undersigned notes that legal counsel of both Parties also heard and/or observed each witness testify.

Petitioners' Witnesses

4. Petitioners called one expert witness: David [redacted] Ph.D. and one fact witness, [redacted]

Expert Witness: David [redacted] M.Ed., Ph.D. (Tr. vol. 1)

5. Dr. David [redacted] was qualified as an expert in the Discipline of Students with Disabilities, Manifestation Determination Reviews, and Manifestation Determination Review Policy. Tr. vol. 1, p. 32:17-19. He was the only expert witness received in this hearing; Respondent proffered no qualified opposing expert testimony.

6. Dr. [redacted] professional experience includes working as a special education teacher, due process hearing officer in which he conducted five-hundred eighty-eight (588) hearings, professor of special education with tenure, and working as an educational consultant to assist school districts in eligibility meetings and manifestation determination reviews. Pet. Ex. 12, pp. 108-110; Tr. vol. 1, pp. 38:19-24, 39:6-17 (T. of [redacted]

7. Dr. [redacted] has published twenty-five (25) books, thirty-five (35) journal articles, eleven (11) monographs, and thirty-six (36) chapters; provided consultation to forty (40) school districts and thirteen (13) law firms; and presented at hundreds of conferences, workshops, and meetings in the area of special education. Pet. Ex. 12 (117-page curriculum vita)

8. Although Dr. [redacted] reviewed the MDR records, [redacted]s medical records, and listened to the recordings of the Referral meeting and MDR, he has never met or observed [redacted]

9. Despite his credentials and experience as a hearing officer, as explained further below, Dr. [redacted] did not opine that [redacted]s conduct was a manifestation of his disabilities. He stated the opposite that "this is not a manifestation of his disability." Tr. vol. 1, p. 99:9. At best, Dr. [redacted] only questioned whether [redacted] was "completely rational" at the time.

[redacted]s Mother, [redacted] (Tr. vol. 1)

10. [redacted]s mother, Petitioner [redacted] was credible, even though, as [redacted]s parent, she has an explicit and implicit bias for the best interests of [redacted] As [redacted] was a credible witness, her testimony will be given weight as applicable.

11. Petitioner [redacted]s testimony was corroborated by [redacted]s educational record, other documentary evidence admitted at hearing, and the testimony of other witnesses.

Respondent's Witnesses

12. Respondent called three (3) fact witnesses: Barbara Liggett, Rodney Smith, and Daniel McGrogan.

Barbara Liggett, WCPSS Senior Administrator (Tr. vol. 2)

13. Ms. Barbara Liggett is a Senior Administrator in the WCPSS. As part of her duties, she provides training and advice on the proper administration of an MDR and reviews and participates at MDRs when requested by schools in the county. Ms. Liggett estimated she has participated in fifty (50) to one hundred (100) MDR meetings and reviewed close to two-hundred (200) MDRs. Tr. vol. 2, pp. 205:7-9; 206:9. Ms. Liggett received her training in how to conduct MDRs from the WCPSS and subsequently developed training for the district on how to conduct MDRs. Tr. vol. 2, pp. 208:3-23; 211:17-18 (testifying to creating the training that WCPSS' administrators were required to view for the MDRs to comply with the corrective action).

14. Ms. Liggett has a bachelor's degree in Developmental Psychology, a master's degree in Clinical Social Work, and a master's degree in School Administration. Resp. Ex. 4; Tr. vol. 2, pp. 203:22-204:1.

15. Ms. Liggett did not participate in the MDR or any other meetings regarding [redacted] and has never met him. Tr. vol. 2, p. 211:11-14. She agreed it was appropriate for WCPSS to "re-do" a MDR when new information becomes available which may alter the original decision. Tr. vol. 2, pp. 243-244.

16. Ms. Liggett was a credible witness and insightful in her testimony regarding WCPSS' MDR procedures. Based on her experience and training in the WCPSS, her testimony will be given appropriate weight throughout the opinion.

Rodney Smith, LEA Representative (Tr. vol. 2)

17. Mr. Rodney Smith is the Principal of [redacted] School. During the 2020-2021 school year he was an Assistant Principal at [redacted] School. Tr. vol. 2, pp. 277:17-18; 278:2-3. Mr. Smith holds a bachelor's degree in Psychology and a master's degree in Teaching. Tr. vol. 2, p. 278:13-17. Mr. Smith served as the Local Education Agency ("LEA") Representative and was responsible for taking meeting minutes during [redacted]s Initial Referral Meeting on [redacted] and the MDR on [redacted] Tr. vol. 2, p. 336:25-337:2; Stip. Ex. 3; Stip. Ex. 25. Mr. Smith knew of [redacted] but did not meet [redacted] prior to the MDR. Tr. vol. 2, pp. 287:15-16; 281:12-13.

18. Mr. Smith lacked understanding regarding conducting a procedurally and substantively appropriate MDR and the necessity for conducting expedited evaluations; Stip. Ex. 29 at 01:34:25 (Smith telling Mr. McGrogan there was "no rush" in completing the evaluation report); but compare Tr. vol 2, p. 339:1-8 (did not recall saying "no rush"). Mr. Smith was credible but his testimony was of limited value and not worthy of deference due to his lack of understanding of MDRs.

Daniel McGrogan, WCPSS School Psychologist (Tr. vol. 2)

19. Mr. McGrogan holds a specialist degree in School Psychology and is a Nationally Certified School Psychologist. Tr. vol. 2, p. 347:8-13.

20. Mr. McGrogan is in his nineteenth ([redacted] year as a school psychologist, primarily evaluating high school students. Tr. vol. 2, p. 347:16-20.

21. Mr. McGrogan first met [redacted] the morning of [redacted] prior to the MDR meeting, to conduct the psychological evaluation. Stip. 40; Supp. Ex. 5; Tr. vol. 2, p. 350:19-21.

22. Although Mr. McGrogan is competent in conducting psychological evaluations and making academic recommendations, like Dr. [redacted] he is not a clinical psychologist or psychiatrist. Mr. McGrogan's testimony about the evaluation results was given deference in this decision.

[redacted]s Unique Circumstances and Needs

23. Petitioner [redacted] was [redacted] years old at the time the first petition was filed; his [redacted]. Stips. 5 & 8.

24. [redacted] was born in [redacted] and [redacted] in [redacted]. Stip. 7.

25. [redacted] began attending school in WCPSS in [redacted] and attended [redacted] based on his domicile in Wake County [redacted]. Stips. 9 & 14.

26. After the "bomb threat" during his involuntary hospitalization, [redacted] was diagnosed with Unspecified Depression, Unspecified Bipolar Disorder, Adjustment Disorder, and Generalized Anxiety Disorder. Stip. 12.

"Basis of Knowledge"

Prior to Bomb Threat Received by Principal Hendrick on [redacted]

27. [redacted] has been a student in the Wake County Public School System since [redacted] Stip. 11.

28. [redacted] began [redacted] grade at [redacted] School in [redacted]. He attended in-person until the COVID-19 closure in March 2020, and virtually thereafter. Stip. Ex. 9.

29. In [redacted] grade, [redacted] received an A grade in 7 of his 8 courses [redacted] Stip. Ex. 9.

30. [redacted]s [redacted] grade teachers described him as "very quiet and respectful," "really nice and always smiling," "an active participant and part of the social group in English." They noted that he "hardly spoke in class," "had [redacted] friends," and that there were "no major issues or alarming concerns." Stip. Ex. 22, p.67-68.

31. For [redacted] grade, beginning in the fall of [redacted], [redacted] and his family elected to attend school virtually. Stip. 15. This was a difficult adjustment for [redacted] and [redacted] attributed his depression in part because of the virtual learning setting. *See* Stip. Ex. 29 (recording of MDR)

32. In the first semester of [redacted] grade, [redacted] earned two [redacted]. Stip. Ex. 12.

33. In the second semester of [redacted] grade, [redacted] was enrolled in [redacted]. In the t[redacted], which ended just before [redacted]. Stip. Ex. 12.

34. [redacted] [redacted] grade teachers indicated that he was "engaged and participated in [redacted] class," that he "does not interact with other students" (in Ms. [redacted]' math class, *see* Stip. Ex. 12), and that he "participates in science class." Stip. Ex. 22.

35. There is no evidence in the record that, prior to [redacted] [redacted] Parents expressed concern in writing to supervisory or administrative personnel, or a teacher of [redacted] that [redacted] was in need of special education and related services. Petitioners' witnesses acknowledged this. Tr. vol. 1, p. 153:14-18.

36. There is no evidence in the record that, prior to [redacted] [redacted] parent requested an evaluation of [redacted] Petitioners' witnesses acknowledged this. Tr. vol. 1, p. 153:19-23.

37. There is no evidence in the record that, prior to [redacted] any of [redacted] teachers or other personnel of Respondent expressed specific concerns about a pattern of behavior demonstrated by [redacted] directly to the direction of special education or other supervisory personnel. Multiple witnesses acknowledged this. Tr. vol. 1, pp. 153:24-154:4.

38. [redacted] was not even on Assistant Principal Smith's "radar". Tr. vol. 2, p. 288:1-4 (T of Smith).

39. In their Final Proposed Final Decision, Petitioners inserted in a proposed conclusion of law that "the Undersigned agrees with Respondent that it did not have a basis of knowledge before [redacted] sent the threatening text message . . .". Pet's Final Proposed FD, p. 36, #34. In light of this turnabout, Petitioners also raise the new argument of "equitable estoppel" in their revised proposed decision even though the Parties were only asked to include updated transcript citations. Pet's Final Proposed FD p. 34, ¶¶ 20-26. As this argument has been raised for the first time after the hearing and without amendment of the Petition, it will not be considered.

40. [redacted] had not been determined eligible for special education and related services prior to the "bomb threat". As a student who has not been determined eligible for special education and related services and who engages in behavior which violates the code of student conduct, [redacted] may still assert any of the protections of the IEP if the LEA had knowledge that the child was a

child with a disability before the behavior that precipitated the disciplinary action occurred. 34 C.F.R. § 300.534. One of those protections is the continuation of educational services. Because his conduct did not involve controlled substance/illegal drugs, actual serious bodily injury or a weapon, unless ordered otherwise by an ALJ, he would be placed back in the regular education setting pending any appeal.

41. To assert that WCPSS had a "basis of knowledge" that [redacted] was a child with disability before his bomb threat, one of three criteria must be met. They are: 1. his Parents must have expressed concern in writing to WCPSS that he is in need of special education and related services; 2. his Parents must have requested an evaluation; or 3. his teachers or other school personnel of WCPSS must have expressed specific concerns about a pattern of behavior demonstrated by [redacted] directly to the director of special education or other supervisory personnel of WCPSS. 34 C.F.R. § 534(b)(1-3).

42. Prior to [redacted] was not on the "radar" for suspected disabilities. Although he had had depression and suicide attempts prior to making the bomb threat, even his "[p]arents appeared blindsided by the events of today [redacted]". Supp. Ex. 16, p. 20 (not Bate stamp) ([redacted] record noting parent's verbal report). As of [redacted], however, [redacted] was on everyone's radar.

43. However, prior to his bomb threat, Petitioners failed to prove that any of these criterions fit [redacted]s case. Dr. [redacted] also did not opine that any one of these three criteria were applicable. As such, Petitioners have failed to meet their burden of proof that WCPSS had a "basis of knowledge" that [redacted] was a "child with a disability" and he was not entitled to a MDR.

Conditions Applicable If There Is No "Basis of Knowledge"

44. IDEA has "conditions that apply if there is no basis of knowledge" as in this case. 34 C.F.R. § 300.534(d). But first, what "a child with a disability" means for entitlement to protections under the IDEA must be addressed.

45. IDEA defines "a child with a disability" as a child evaluated and determined to have one of the 13 disabling conditions of which include the categories of Serious Emotional Disturbance ("ED"), Other Health Impaired ("OHI"), and Autism ("AU"). In addition, the child must by reason of the disabling condition require special education and related services. 20 U.S.C. § 1400(a)(1).

46. Whether [redacted] mental illness met the categories of ED, OHI, or AU and he needed special education had not yet been determined. Prior to and at the MDR, Petitioners offered no evidence that [redacted] met one of these disabling conditions as defined under IDEA or that he needed special education. At the hearing, Petitioners proffered no evidence that [redacted] met the definition of a "child with a disability."

47. Because WCPSS had no "basis of knowledge" that [redacted] was a "child with a disability" as defined by IDEA, [redacted] was subject to the same disciplinary measures applicable for children without disabilities.

48. Since a request was later made to evaluate him for suspected disabilities after the incident, the evaluation had to be conducted in an expedited manner but [redacted] was still subject to the disciplinary procedures. Even after completion of the evaluation, [redacted] would remain in the education placement, long term suspension then expulsion, without educational services.

49. If later after the evaluations and an eligibility meeting [redacted] is determined to be a "child with a disability", WCPSS would have to provide special education and related services and comply with the due process procedures of IDEA including conducting another MDR. The MDR at issue here occurred before any Eligibility Determination. If at the Eligibility Meeting, the IEP team finds [redacted] eligible for special education, the MDR would have to be redone.

Behavior Incident

50. On [redacted] a student sent an e-mail to a counselor at [redacted] School attaching text messages from [redacted] Stip. Ex. 14.

51. The text messages read as follows:

> Dude I really have to tell you something urgent. I'm planning some very big, like really big. When I say don't show up to school, probably should give it a good listen. Just, don't look to [sic] much into it, it'll be my best revenge ever conceived . . . I want to blow up the school by collapsing the structural weak points, and killing potentially thousands of students, because I don't like people and I feel hateful. And don't tell anyone else, I need as many people in the building . . . My soul is just not on a good path right now, but I'm afraid to tell anyone but you, like you've never seemed to have a problem with me until now.
>
> Stip. Ex. 14, pp. 42-44 (other students' statements omitted).

52. [redacted] intended to blow up the school on September 11, 2021 which incidentally was a Saturday. Supp. Ex. 16 p. 9 (not Bate stamped)

53. In her e-mail to the school counselor Katherine Tarr, the student indicated that:

> I'm extremely concerned about [redacted] I'm not entirely sure of what I should do but over quarantine they [sic] have expressed increasingly more and more disturbing behavior. They [sic] have expressed wanting to commit various levels of violence and are currently showing signs of suicidal ideation. I have attached screenshots of our most recent conversation below, I'm not entirely sure if this is supposed to be a long term very bad joke or not but I figured it was best to contact someone anyway.
>
> Stip. Ex. 14, p. 41.

54. The following day, on April 1, 2021, Ms. Tarr forwarded the email to Principal Hedrick. Stip. 18.

55. When Principal Hedrick received the email and attached text messages, she notified the [redacted] Police Department. Stip. 18. The [redacted] police went to [redacted] house and interviewed [redacted] During the interview, [redacted] admitted to writing the text messages. Stip. 19.

56. After the police interview, [redacted] was admitted to [redacted] Crisis and Assessment ("[redacted]") for emergency care, where it was determined he met involuntary commitment criteria and was then admitted to [redacted] Services ("[redacted]") on [redacted] 2021. Stips. 20 & 21.

57. [redacted]s Parents met with Principal Hedrick on [redacted] 2021, and shared information about his hospitalization and diagnoses. Pet. Ex. 8, pp. 79-80.

58. [redacted] mother signed a Two-Way Release of Information with [redacted] on [redacted] which was faxed to [redacted] School on [redacted] Supp. Ex. 10.

59. On [redacted], [redacted] was discharged from [redacted] and released to return to school on [redacted] Stip. 22.

60. After his release, [redacted] and his parents attended and participated in a due process disciplinary meeting on [redacted]. Stip. Ex. 28.

61. On [redacted], [redacted] and [redacted] Parents met virtually with Dr. Hedrick and Mr. Smith to discuss the incident. This meeting was recorded by school staff. Stip. 23. That day, Principal Hedrick suspended [redacted] for ten (10) days with a recommendation for long-term suspension and expulsion for violating three policies: L3-8 Threats of Mass Violence; L2-14 Threat/False Threat; and L2-4 Substantially Disruptive or Dangerous Behavior. Stip. 24. The Notice of Suspension was not signed by the Principal or her designee. *See* Resp. Ex. 1, p. 2.

62. On the last page of the disciplinary notice, a "Language Assistance Notification" for translation/interpretation services to understand the document or other school processes was written in multiple languages including [redacted] Resp. Ex. 1, p. 2. None of the MDR or IEP documents had this notice about language assistance in [redacted] or any other foreign language.

63. Following the meeting, school staff invited [redacted] Parents to a special education referral meeting ("Referral Meeting") to consider whether to evaluate [redacted] for special education eligibility. The meeting was scheduled for [redacted]. Stips. 27-28; Stip. Ex. 2.

64. On [redacted]he WCPSS sent [redacted] a letter in English informing her of [redacted] suspension and recommended expulsion for aiding or abetting a bomb threat and stating [redacted] would be assigned to "an alternative education program unless there is any reason to deny this assignment." Stip. 25.

65. Prior to the suspension on [redacted], [redacted] had never been disciplined or suspended from school for any reason. Prior to the suspension, [redacted]s grade point average was 3.75. Stip. 26.

66. On [redacted], [redacted] School initiated a referral for special education services. Stip. 27.

The Referral Meeting for IEP Eligibility Determination

67. Even though WCPSS did not have a "basis of knowledge" before the bomb threat, Principal Hedrick knew soon after when [redacted] advised Dr. Hedrick of [redacted] involuntary hospitalization and diagnoses. Arguably, the school counselor's forwarding of the student's email, with [redacted]s bomb threat text attached, to Principal Hedrick met the "basis of knowledge" criterion 3; this notice occurred merely seconds before seeing the attached bomb threat.

68. To WCPSS' credit, on [redacted], the IEP team met to conduct a Special Education Referral. Stip. 28.

69. At this time, the disciplinary due process action, the juvenile court action, and the eligibility process were occurring simultaneously. Understandably, [redacted] was confused about the various processes and their interplay. Even without the language and cultural barriers, the purposes and consequences of them are often confusing.

70. The IEP team for the Referral Meeting consisted of Petitioner [redacted] and [redacted]s father, [redacted] LEA Representative and Assistant Principal Smith; Regular Education teacher Mrs. Burwell, Special Education teacher Mrs. Browning; SAP Counselor Mrs. Eason; Special Education Services representative Mrs. Jenkins; Principal Dr. Hedrick; and interpreter Ms. Kim. Stip. Ex. 3.

71. Petitioners provided information about [redacted]s diagnoses, his therapy, and more. They specifically noted his diagnosis of unspecified depression and the possibility of bipolar disorder. They shared information about family dynamics and how [redacted] described his school day to them. Stip. Ex. 3, pp.12-14.

72. During the [redacted], referral meeting, [redacted] Parents reported [redacted] "is having a hard time making friends because at school he does not have anyone to talk to. He feels that it is hard to engage with others. He sometimes feels that he just goes to classes and comes home without talking to any friends." Stip. 29.

73. The team documented [redacted] "does not seem to have a lot of friends or interacts [sic] with peers either in school or outside of school. Data also indicates that he only interacts with teachers and peers if he is interested in the class or subject." Stip. 30.

74. The minutes report: "Parents feel his social skills are lacking . . . [[redacted] will not demonstrate any facial expressions and doesn't want to talk to anyone." Stip. 31.

75. When describing [redacted]s "School life," the team reported: "[redacted] felt alone at school, coming to classes and then getting on the bus and then going home and not talking to anyone." Stip. 32.

76. The team documented [redacted] "will not fully engage" if he is not interested in a subject. [redacted] family stated he "only tends to interact with peers and teachers when he is interested in a topic." Stip. 33.

77. [redacted] teachers from the 2019-2020 school year reported he was "very quiet and respectful[,]" but only had "1 to 2 friends." Stip. 34.

78. [redacted] teachers for the 2020-2021 school year stated "they have not had any behavioral issues with him[,]" but none had ever met [redacted] in person and at least one had never seen his face or heard him speak. The referral document noted, "School staff has also reported no previous issues." Stip. 35.

79. The Referral Team decided to conduct an initial evaluation in the area of Serious Emotional Disability ("ED"). Stip. 36. [redacted]s mother timely consented to the requested evaluations. Stip. Ex. 1.

80. Assistant Principal Smith canvassed [redacted] and [redacted] grade teachers sometime on or before [redacted] and reported that nothing stood out during middle school or high school, he rarely participated in class, does not interact with other students, is active in church but has no friends, Mom reported he was going through a "tough time" before hospitalization, and he "wore a black trench coat in middle school." Stip. Ex. 22, p. 67. Otherwise, he was "very quiet and respectful. Really nice and was always smiling." Stip. Ex. 23, p. 68.

81. On [redacted], WCPSS sent an invitation in English to [redacted] and [redacted] to conduct an MDR on [redacted]. Stip. 37.

82. On [redacted], Mr. McGrogan, WCPSS' school psychologist, sent requests for information to [redacted]. Stip. 38.

Suspension Appeal Hearing

83. Prior to the MDR on [redacted]1, the school system held a suspension appeal hearing requested by Petitioners through the Office of Student Due Process. *See* Pet. Ex. 10.

84. In attendance were Principal Hedrick, Paul Walker, Merri Dunn, Jamal Woods, Interpreter Jesse Kim, [redacted] and both his parents, [redacted] and [redacted] Pet. Ex. 10, p. 90.

85. At that hearing Principal Hedrick presented information regarding the incident, including the original text messages and the e-mail reporting them. *See* Pet. Ex. 10, p. 95 and Stip. Ex. 14.

86. Petitioners were present during this hearing but [redacted] did not recall hearing Dr. Hedrick review the student's email. Pet. Ex. 10, p. 90. It is not clear if [redacted]s Parents were aware of how the student had described the concerns about [redacted]s mental state.

87. None of the MDR team members were aware of the student's comments that [redacted] was "express[ing] increasingly more and more disturbing behavior" during the "quarantine". Stip. Ex. 14; Resp. Ex. 2, p. 3. Tr. vol. 2, pp. 375:23-376:12 (T of McGrogan); p. 255:15-23 (T of Liggett); p. 338:5-16 (T of Smith).

Expedited Evaluations for Eligibility - [redacted]

88. WCPSS requested evaluations and [redacted] consented. The expedited evaluations for eligibility were scheduled for the morning of [redacted].

89. On the morning of [redacted], WCPSS' Speech-Language Pathologist (SLP), Ms. Ulrey, completed a Speech/Language/Communication evaluation on [redacted] and conducted the Oral and Written Language Scales-2 (OWLS-2), Expressive One Word Picture Vocabulary Test-4 (EOWPVT-4), and the Test of Pragmatic Language-2 (TOPL-2). Stip. 39.

90. After the speech-language evaluation, Mr. McGrogan conducted a psychoeducational evaluation on [redacted] that included the following assessments: Behavior Assessment System for Children, 3rd Edition (BASC-3)-Parent Report Form, Self-Report Form, and Teacher Report Form; Parent Interview; Records Review; Reynolds Intellectual Assessment Scales (RIAS); Student Interview; and Wide Range Achievement Test, 4th Ed (WRAT-5). Stip. 40.

Premeeting - [redacted]

91. Prior to the MDR, a group of school staff met on [redacted] in a "premeeting." This group included Principal Hedrick, School Psychologist McGrogan, and Assistant Principal Smith. Stip. Ex. 24, p. 79.

92. Notes from that meeting disclose discussion of where the testing for the approved evaluations should be conducted, when the MDR could occur, some of the questions to be asked at the MDR, and a note that HH (presumably Home Hospital services) had begun. Stip. Ex. 24, p. 79. Nothing in these notes suggests any inappropriate discussion or decision-making by the team.

93. Respondent's witnesses described the purpose of the Premeeting as preparation to ensure they had the necessary documentation and people for the meeting, not to make any decisions ahead of time.

94. Yet, prior to the MDR, WCPSS failed to obtain critical medical documentation or request [redacted]s mental health providers to attend. Similarly, WCPSS did not wait for completion of the psychological evaluation or speech language reports prior to convening the MDR.

Manifestation Determination Review - [redacted]

95. The same day as the evaluations, in the afternoon of [redacted] Respondent held the Manifestation Determination Review ("MDR"). Stip. 41. Since [redacted] did not have an IEP and its implementation was not at issue, the sole purpose of this MDR was to determine if the conduct, bomb threat, was caused by, or had a direct and substantial relationship to [redacted]s disabilities of depression, bipolar disorder, and possibly communication deficits.

96. A recording of the meeting is in the record. Stip. Ex. 29. Handwritten notes from Principal Hedrick and Assistant Principal Smith also disclosed some of the content of the meeting. Stip. Exs. 24 and 25. The review of information for the manifestation decision was brief; less than 30 minutes of the 1 ½ hour meeting.

97. The IEP team at the MDR meeting consisted of [redacted] and [redacted] father, [redacted] Mr. Smith, Ms. Browning, Ms. Eason, Ms. Burwell, Ms. Jenkins, Dr. Hedrick, interpreter Ms. Kim, and school psychologist Dan McGrogan. With the exception of Mr. McGrogan, the membership of the IEP team was identical to the group that participated in the referral meeting 10 days earlier. Stip. Ex. 7, p. 29. WCPSS did not invite [redacted] treating therapist or psychiatrist to the MDR meeting.

98. The meeting notes state that the "[i]nterpreter did not speak." Stip. Ex. 24, p. 80. [redacted] could not communicate effectively with her own son because his primary language was English. Stip. Ex. 24, p. 90 (noting that [redacted] "primary language is [redacted] and [[redacted]s is English so she cannot communicate with him.").

99. The team discussed whether [redacted] had a history of any behaviors that would shed light on how his suspected disability might manifest and determined that he did not. The team also discussed any behavioral patterns that might connect to his suspected disability and found none. Stip. Ex. 24, pp. 81-83. [redacted] father again shared [redacted]s current diagnoses.

100. While Petitioners have raised the possibility of autism as an area of disability, there was no information before the IEP team other than the parent's statement that her pastor had raised the possibility of autism, and the fact that [redacted] had some social difficulties, to support such a suspicion. The team specifically discussed the social issues, and School Psychologist McGrogan cogently explained why he had no reason to suspect autism following his evaluation of [redacted] the morning of the MDR meeting. Tr. vol. 2, pp. 360:1-361:8.

101. As acknowledged by Petitioners' expert, Dr. [redacted] the same diagnosis may manifest differently for different students, and an MDR team should look at how the specific student's disability manifests, because a diagnosis alone does not equate to a behavior. Tr. vol. 1, p. 148:10-22.

102. The team considered the required questions for an MDR decision. Specifically, they reviewed whether the conduct was caused by the suspected disability and whether the conduct was directly or substantially related to the suspected disability. Stip. Ex. 24, pp. 80-85; Stip. Ex. 7, p. 28.

103. Among the suspected disabilities the team considered were [redacted]s diagnoses of depression and bipolar disorder, as well as social communication deficits. Based on the information available at the meeting, these were appropriate suspected areas to consider, and there were no other areas that should have been suspected.

104. In the MDR documentation, the team noted [redacted]s conduct did not involve a weapon, drugs, or cause serious bodily injury. Stip. 42.

105. The IEP team determined "the incident was not a direct result of the suspected disability." Stip. 44.

106. The team determined there was not a "pattern" of previous disciplinary incidents. Stip. 45.

107. The team noted [redacted] was "currently in the initial phase of the referral process and we will have more data once we meet to determine eligibility after all assessments and probes are completed." Stip. 46.

108. In the PWN, the team reported it considered the following information: "past grades, medical information, home life, referral information along with observations from current or past teachers." Stip. 47.

109. The team also reported it "discussed the area of Autism, however, based on the conversation—not able to begin a conversation, and not able to make friends" and determine "no other characteristics of Autism is [sic] present at this current moment in time." Stip. 48. Mr. McGrogan did not perform any autism assessments. Stip. 49.

110. The team wrote: "Presently, these new diagnosis [sic] for [redacted] does [sic] not currently indicate that we can identify a pattern or need presently." Stip. 50.

111. The team documented in the [redacted] manifestation determination meeting PWN that no actions were refused. Stip. 51.

112. At the meeting, the IEP team also decided to evaluate [redacted] in the area of Other Health Impaired ("OHI"). Stip. 52.

113. The IEP team issued one Prior Written Notice for the [redacted] meeting. Stip. 53.

114. The team ultimately decided:

> Due to the lack of patterns when looking at [redacted]s behaviors, the team determined that it *did not have enough information* at this time to determine if this was a direct result based on a suspected disability.

Stip. Ex. 8, p. 30 (PWN) (emphasis added)

115. The MDR team determined that [redacted] bomb threat was not a manifestation of his disabilities and that he could be suspended long-term and expelled without any educational services.

Information Not Obtained By WCPSS Prior to the MDR

116. At the time of the MDR, the team had available to it the following information: [redacted] parents' input at the referral meeting and the MDR meeting; the suspension notice with a description of the conduct leading to the discipline; academic information, teacher observations, the psychologist's observations, and several medical diagnoses.

117. As WCPSS had no basis of knowledge, [redacted] was not entitled to an MDR within 10 days of the long-term suspension and expulsion decision; therefore, WCPSS did not have to hold a MDR at all. Senior Administrator Liggett admitted that "this was a unique case because it was—the referral started kind of as a result or around the time of the suspension. And it was an MDR for a student that was not identified yet, which is not a process that the schools normally do." Tr. vol. 2, p. 253:1-4 (T of Liggett).

118. Plus [redacted] 10-day short term suspension began on [redacted] upon [redacted]s discharge from the hospital and ended on [redacted] Resp. Ex. 1, p. 1. Because Principal Hedrick had recommended long-term suspension and expulsion, the MDR had to be held within 10 days after [redacted] Because of the expedited nature of a MDR, the IEP team did not have the evaluation results at the MDR meeting (Stip. 43) or the medical records.

119. WCPSS had a Two-Way Release dated [redacted] from [redacted] Behavioral Health Services. The MDR team did not request [redacted]s mental health records. Supp. Ex. 10.

120. WCPSS knew the contact information of [redacted]s mental health providers. Assistant Principal Smith's notes dated [redacted] acknowledged that when the school initiated the referral; that [redacted] had been diagnosed with depression and listed both [redacted] outpatient therapist ([redacted] and Juvenile Court Counselor ([redacted] Stip. Ex. 22, p. 67.

121. After interviewing [redacted] and [redacted] grade teacher sometime before the [redacted] meeting, Assistant Principal Smith wrote that nothing stood out in middle school or high school but he did note that [redacted] "does not interact with other students," is "active in church but has no friends," and "wore a black trench coat in middle school." Stip. Ex. 22, p. 67. This information was not disclosed at the MDR meeting.

122. On [redacted] Stephanie Eason, Student Assistance Program Counselor, sent a release of information to [redacted] to obtain [redacted] therapist's information. Stip. Ex. 15.

123. On [redacted], [redacted] sent one page of the [redacted] records which listed the contact information, admission date, and anticipated discharge date. Stip. Ex. 17, p. 53. The same day, [redacted]

emailed one page of the crisis team report which noted that [redacted] had "verbalized thoughts to hurt or kill others." Stip. Ex. 18, p. 55. A discharge order was also emailed which indicated that the discharge diagnosis was "unspecified Bipolar Disorder." Stip. Ex. 19, p. 57. The Hospital Course section with mental health status, condition, and treatment procedures is illegible. *See* Stip. Ex. 19, p. 57.

124. [redacted] signed a second release on [redacted] for [redacted] M.D., [redacted]s psychiatrist, to release information. Supp. Ex. 14. As of May 4, 2021, WCPSS had all of [redacted] contact information: phone number, fax number, and email address documented on its release form. *See* Supp. Ex. 14.

125. Also on [redacted] [redacted] signed a release for [redacted]s records from [redacted] (psychiatry P.A.) and [redacted] (therapist) at the [redacted] [redacted] [redacted] [redacted]. Supp. Ex. 16 (last page).

126. Mr. McGrogan did not fax the signed release until [redacted], the day before the meeting. Stip. 38; Stip. Ex. 24, p. 80; Stip. Ex. 29 at 11:12; Tr. vol. 2, p. 371:1-6.

127. After he faxed the release, Mr. McGrogan did not attempt to contact any providers to gather additional information. Tr. vol. 2, p. 371:14-19.

128. At the meeting, [redacted] mother explained all the times she had provided releases and shared information, but the team refused to consider the information from the medical providers shared by the Parents because the team claimed it did not have the records. Stip. Ex. 29, 01:33:00 ([redacted] – "you didn't look it up even though I provide the release"); Stip. Ex. 24, p. 88.

129. Had WCPSS obtained [redacted] mental health records, they would have discovered the following disturbing information about [redacted] mental health status. The [redacted] records are particularly disturbing and include 16 pages of clinical information, diagnoses, and recommendations.

130. A summary of clinical findings includes the following:

> In interview, patient presents as calm, cooperative, and engaging. He indicates that he "is weird," has difficulty making friends and maintaining meaningful relationships with his peers, has abnormal extracurricular and sexual interests . . . and has been the victim of bullying for many years. States two female friends recently blocked him from social media communication which was hurtful. Patient also voices several frustrations with political and social interworkings of this country. For the past several months, patient has endorsed frequent thoughts, elaborate plan, and intent to blow up his entire school with homemade bombs on September 11, 2021. States he will make several homemade bombs using a substance called nitro thermite, hide them in sweatshirts, place them at the bottom of several structural pillars within the school, and make a thermodynamic detonation device using radio waves in hopes that the ceiling will fall down and crush all 2000 students. States he stays awake late at night developing this plan. Patient states, "I feel like everyone hates me in school and I wanted to say 'I hate

you too' in the most extreme way possible." Patient indicates that he also thought about purchasing a firearm and shooting students in the school, but aborted that plan as that would not be as effective, stating "If everyone doesn't die, the mission will be a failure." He states, "change comes from tragedy" and hopes his actions will insight political and social action. Patient has been researching how to make explosives and obtain firearms on the Internet in the recent past. States his mother recently gave him $5000 in cash for food and plans to use this money to purchase the materials he needs to carry out his plan. He also harbors thoughts, plan, and intent to blow himself up after he blows up his school because he does not want to deal with the aftermath of the situation. He has attempted to hang himself with a belt in his closet twice in the past at ages 14 and 15. He has a history of aggression towards younger brother ([redacted]), but not within the recent past.

Supp. Ex. 16, pp.10-11.

131. Petitioners failed to prove by a preponderance of the evidence that access to this documentation would have changed the MDR team's decision. However, failure to consider it was a procedural violation.

Parental Participation

132. Petitioners have alleged that the Parents were denied full participation in the special education process because of language barriers and procedural errors.

133. Petitioners' native language is [redacted] [redacted] primary language is English.

134. The school made available interpreters at the two relevant IEP meetings on April [redacted] and May [redacted]. At both meetings, attendees testified that the interpreters were not used very much by Petitioners, but that Petitioners appeared to understand the conversation. That is doubtful.

135. WCPSS admits that the MDR documentation "should have been provided in the Petitioners' native language" but it was not provided in [redacted] and not requested by the parents. Resp. Pro FD p. 17, ¶ 68. The Parents are not responsible for requesting a translation of the MDR documentation. The Prior Written Notice must contain a full explanation of the procedural safeguards written in the native language of the parents and written in an easily understandable manner. 20 U.S.C. § 1415(d)(2); 34 C.F.R. § 300.503(c)(iii).

136. None of the Referral Meeting or the MDR documents were written in [redacted] and none of the documents advised the Parents that they could request translation of the IEP documents. *See* Stip. Ex. 1-8.

137. During the contested case hearing, [redacted] clearly needed interpreter services. She also did not understand how the Referral, MDR, and disciplinary processes differed, especially the consequences of the adverse MDR decision.

138. While Petitioner [redacted] and [redacted] father were significantly denied participation in the decision-making process during the MDR meeting, Petitioners failed to prove by a preponderance of the evidence that had the violations not occurred, the results would have been different.

The MDR Team Could Reconvene to "Redo" the MDR if [redacted] is a "Child With a Disability"

139. However, the alleged procedural violations, even if established, did not impede [redacted] right to a FAPE. The alleged violations would not have changed the MDR outcome, and Respondent had legal authority for the expulsion. It was [redacted] conduct, not the procedural issues, that impeded his access to a FAPE.

140. According to Senior Administrator Liggett, if outside evaluation information comes in after the MDR, the IEP team could reconvene to discuss a "redo" of the MDR. Tr. vol. 2, p. 243:12-22. (T of Liggett) But, in the context for a student who is not yet eligible for special education, the IEP team is not expected to "redo" the MDR because that student has no rights. Tr. vol. 2, pp. 248:18-249:5 (T of Liggett) Unlike other students, at the time of the MDR [redacted] was "suspected" to be an eligible student and in the eligibility process.

141. The MDR team did not have sufficient information at the time of the [redacted] meeting to make the manifestation determination. If the MDR team later obtains additional information, it may change the initial MDR decision. There is no set time in which they have to reconvene the MDR "to make sure that [the student is] getting their services." Tr. vol. 2, pp. 251:21-252:4 (T of Liggett). But it is usually within the same school year. *Id*. The MDR needs to be "redone" to consider additional information including all the mental health records, WCPSS evaluation reports, and receive input from [redacted]s mental health providers.

Summary of Procedural Violations

142. The Undersigned finds that WCPSS committed the following procedural violations in conducting the MDR meeting and significantly impeded the Parents' meaningful participation in the decision-making process.

1. The Parents were not advised that the IEP documents could be translated in [redacted]
2. While an interpreter was present, the Parents were not advised that this was their right to use the interpreter's services without concern of imposition to the team.
3. The MDR team did not obtain all medical documentation.
4. The MDR team did not have access to the psychological and speech-language evaluation reports.
5. The MDR team did not invite [redacted] treating mental health providers to attend the meeting.

143. While the MDR meeting was procedurally flawed because Petitioners failed to prove the substantive denial of FAPE and the "basis of knowledge", Petitioners cannot prove [redacted] was denied a free and appropriate public education. But that does not mean they have no remedy because even without a denial of FAPE, a hearing officer can order WCPSS to reconvene the MDR

and comply with the procedural requirements under IDEA. However, as the Eligibility Determination Meeting is pending, if [redacted] is found ineligible, there would be no need for another MDR. If found eligible, the MDR would have to be reconvened without judicial intervention.

CONCLUSIONS OF LAW

Based on the above Findings of Fact, relevant laws, and legal precedent, and by a preponderance of the credible evidence, the Undersigned concludes as follows:

General Legal Framework

1. The Office of Administrative Hearings has jurisdiction over claims relating to the identification, evaluation, educational placement, or provision of a free appropriate public education ("FAPE") pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq*. and implementing regulations, 34 C.F.R. Part 300. 20 U.S.C. § 1415 and N.C. Gen. Stat. § 115C-109.6(a) control the issues to be reviewed. Stip. 1.

2. This Final Decision incorporates and reaffirms the conclusions of law contained in the previous Orders entered in this litigation.

3. The Individuals with Disabilities Education Act ("IDEA") is the federal statute governing education of students with disabilities. The federal regulations promulgated under IDEA are codified at 34 C.F.R. Part 300. Stip. 2.

4. The controlling State law for students with disabilities is N.C. Gen. Stat. § 115C, Article 9 and the corresponding State regulations. Stip. 4.

5. To the extent that the foregoing Findings of Fact contain Conclusions of Law, or that these Conclusions of Law are Findings of Fact, they are intended to be considered without regard to their given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011). *Warren v. Dep't of Crime Control*, 221 N.C. App. 376, 377, 726 S.E.2d 920, 923, *disc. rev. den*., 366 N.C. 408, 735 S.E.2d 175 (2012); *Watlington v. Rockingham Co. Dep't of Social Servs*, COA17-1176 (2 October 2018).

6. The Petitioners, [redacted] by and through his mother, [redacted] and Respondent Wake County Board of Education are correctly designated, the Parties received proper notice of the hearing, and venue is proper.

7. Respondent, Wake County Board of Education, is a local education agency receiving monies pursuant to the IDEA. Stip. 3. The WCPSS is subject to the provisions of applicable federal and State laws and regulations, specifically 20 U.S.C. § 1400 *et seq*.; 34 C.F.R. § 300 *et seq*.; and N.C. Gen. Stat. § 115C-106 *et seq*.

8. As the Party requesting the hearing, the burden of proof lies with Petitioners, and the standard of proof is by a preponderance of the evidence. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005); N.C. Gen. Stat. § 150B-25.1(a).

Jurisdiction

9. "Subject matter jurisdiction, more specifically, is 'the power to pass on the merits of [a] case.'" *Matter of A.P.*, 371 N.C. 14, 17, 812 S.E.2d 840, 842 (2018) (quoting *Boyles v. Boyles*, 308 N.C. 488, 491, 302 S.E.2d 790, 793 (1983)); *see also* 6A Strong's North Carolina Index 4th: Courts § 8, at 423-27 (2013) (discussing subject matter jurisdiction generally). The jurisdiction of a court over the subject matter of an action depends upon the authority granted to it by the Constitution and laws of the sovereignty, and is fundamental." *Henderson Cty. v. Smyth*, 216 N.C. 421, 421 (1939).

10. Upon receipt of a Prior Written Notice ("PWN"), parents of students who are not yet eligible to receive services under the IDEA are entitled to file a due process complaint regarding the district's decisions related to the identification, evaluation, educational placement, or provision of FAPE. 34 C.F.R. § 300.507(a). Parents challenging the decisions made during a Manifestation Determination Review ("MDR") as documented in a Prior Written Notice are entitled to an expedited hearing. 34 C.F.R. §§ 300.532(a), (c).

11. The Parties stipulated to the jurisdiction of the Office of Administrative Hearings over claims relating to the identification, evaluation, educational placement, or provision of a free appropriate public education ("FAPE") pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. and implementing regulations. 34 C.F.R. Part 300; 20 U.S.C. § 1415, and N.C. Gen. Stat. § 115C-109.6(a) controls the issues to be reviewed (specifically including manifestation determinations). Stip. 1.

12. At hearing, Respondent refused to orally stipulate to this Tribunal's jurisdiction over the expedited hearing challenging [redacted]s right to an expedited hearing. Tr. vol. 1, pp. 27:20-28:4. After the hearing, the Parties jointly submitted an Amended Pre-Hearing Order including the above stipulation. *See* Amend. Pre-Hearing Order, p. 1.

13. Prior to the hearing, Respondent moved to dismiss the expedited petition for lack of subject matter jurisdiction because WCPSS had no "basis of knowledge" that [redacted] was a "child with a disability"; therefore, he was not subject to the protections of the IDEA and had no right to an expedited hearing. Respondent does not dispute that this Tribunal has jurisdiction over expedited hearings under 20 U.S.C. § 1415(k)(4)(B).

14. Regardless of the Parties' stipulation, this Tribunal can dismiss for lack of subject matter jurisdiction anytime and herein reconsiders this jurisdictional question. N.C. Gen. Stat. § 1A-1, Rule 12(h)(3).

Professional Judgment and Due Regard to Educators

15. The professional judgment of teachers and other school staff is an important factor in evaluating an IEP. "Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment." *Hartmann by Hartmann v. Loudon Cty. Bd. of Educ*., 118 F.3d 996, 1001 (4th Cir. 1997); *see also, Rowley*, 458 U.S. at 207 (stating that "courts must be careful to avoid imposing their view of preferable educational methods upon the States."). The IDEA "requires great deference to the views of the school system rather than those of even the most well-meaning parents." *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 328 (4th Cir. 2004).

16. When deciding an administrative case, "due regard" must be given "to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency." N.C. Gen. Stat. § 150B-34(a).

17. When disagreements arise between parents and schools over the provision of FAPE, "[b]y the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement." *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1001 (2017). Therefore, the Court empowered any reviewing court to "fairly expect" the school district "to be able to offer a cogent and responsive explanation for their decisions . . ." *Id.*

18. Respondent asserts that School Psychologist McGrogan is due deference because of his expertise because he is a school psychologist. While Mr. McGrogan is trained to evaluate students, he is not a clinical psychologist or psychiatrist. During the hearing, Mr. McGrogan made general observations about depression and bipolar symptoms, but he was not asked about his expertise in how symptoms of depression or bipolar disorder manifest for this particular student, [redacted] After the MDR decision, he acknowledged he needed to speak with [redacted] mental health providers as he did not ask any of them before the MDR meeting their opinions about how [redacted] disabilities manifested. Stip. Ex. 29, 01:18:21-01:18:51 (statements of McGrogan). Little deference was given to his testimony that the MDR decision was correct. However, because Petitioners failed to meet their burden of proof on the substantive issue, this lack of deference did not penalize Respondent.

Protections for Students Not Yet Eligible for Special Education Services

19. It is undisputed that at the time of the incident, [redacted] had not been identified as a student with special needs subject to the protections of the IDEA. *See* 20 U.S.C. § 1415(k)(5) & (6).

20. "A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in this part if the public agency had knowledge (as determined in accordance with paragraph (b) of this section) that the child was a

child with a disability before the behavior that precipitated the disciplinary action occurred." 34 C.F.R. § 300.534(a); 20 U.S.C. § 1415(k)(5).

21. A child who has not been determined to be eligible for special education and related services must be afforded various protections under certain circumstances. 20 U.S.C. § 1415(k)(5)(B); 34 C.F.R. § 300.534.

"Basis of Knowledge"

22. Even though [redacted] was not eligible for special education at the time of the incident, certain exceptions apply which can afford him protection if applicable. The protections and services that *must* be provided differ depending on whether a district is deemed to have a "basis of knowledge" that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred or whether the district did not have knowledge that a child is a child with a disability "*prior to taking disciplinary measures against the child*." *Compare* 34 C.F.R. § 300.534(a) *with* 34 C.F.R. § 300.534(d)(1) (emphasis added).

23. WCPSS must be deemed to have a "basis of knowledge" that [redacted] is a child with a disability if before the behavior that precipitated the disciplinary action occurred -

> (1) [redacted] parent(s) expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;
>
> (2) [redacted] parent(s) requested an evaluation of the child pursuant to §§ 300.300 through 300.311; or
>
> (3) The teachers of [redacted] or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by [redacted] directly to the director of special education of the agency or to other supervisory personnel of the agency.
>
> 20 U.S.C. § 1415(k)(5)(B)(i-iii); 34 C.F.R. § 300.534(b)(1-3).

24. If a school district does not have a "basis of knowledge" pursuant to § 300.534(b), the child *may* be subjected to disciplinary measures applied to children without disabilities who engage in comparable behaviors while the district conducts an expedited evaluation of the child; but the district is not *obligated* to provided educational services during that time. 34 C.F.R. § 300.534(d)(1)-(2)(i-ii) (emphasis added). Such children are neither entitled to the protections of the IDEA, including the right to a MDR and an expedited hearing, nor is the school district required to conduct a MDR.

25. If [redacted] is determined to be a "child with a disability", taking into consideration information from the evaluation conducted by the agency *and information provided by the parents*, WCPSS *must* provide special education and related services, and the child is entitled to all protections related to discipline under Section 300.530 through 300.536. 34 C.F.R. § 300.534(d)(iii) (emphasis added). The term "child with a disability" is a legal term of art under

20 U.S.C. § 1401(3)(A)(i)&(ii) (meets one of 13 disabling conditions and requires special education).

26. In summary, if [redacted] engages in behavior that violates a code of student conduct prior to a determination of his eligibility for special education and related services and the public agency is deemed to have "knowledge" of his disability, [redacted] may assert the disciplinary protections under IDEA, including the manifestation determination review (MDR) provisions under 20 U.S.C. § 1415(k)(1)(E) and 34 C.F.R. § 300.530(e) even if [redacted] has not been found eligible for special education and related services." *Letter to Nathan*, 73 IDELR 240 (OSEP 2019).

27. Prior to the bomb threat, WCPSS did not have any "basis of knowledge" to suspect that [redacted] may be a "child with a disability". The protections of the IDEA do not apply to [redacted] with respect to the disciplinary incident that occurred prior to WCPSS actually having a "basis of knowledge."

28. The "protections" referred to in the regulations include, among other things, the right to an MDR under 34 C.F.R. § 300.530(e), the right to prior written notice under 34 C.F.R. § 300.503, the right to file a due process complaint under 34 C.F.R. § 300.507, the right to an expedited due process hearing under 34 C.F.R. § 300.532(c), and the right to appeal the decision from such a hearing under 34 C.F.R. § 300.532(c)(5).

29. Respondent argues that the mere fact WCPSS provided a gratuitous MDR anyway does not create a right for [redacted] and that this "gratuitous process does not create additional rights" to IDEA's protections. Resp. Final Pro. FD, p. 18, ¶ 35. Petitioners counter that the protections do apply because WCPSS choose voluntarily to hold the MDR and issued a Prior Written Notice. As such, Petitioners argue that the MDR should have been conducted in a substantively and procedurally appropriate manner. The IDEA does not address this unique situation.

30. While the IDEA does not prohibit WCPSS from voluntarily conducting an MDR, it does state specific conditions that apply if there is no "basis of knowledge". Such as, [redacted] does not have to be subjected to the disciplinary measures applied to nondisabled students and that any requests for evaluations must be expedited. 34 C.F.R. § 300.534(d)(1) & (2).

31. Arguably due to the school counselor sending the student email to Principal Hedrick with [redacted] threatening text message, the behavior incident and "basis of knowledge" occurred almost simultaneously. In addition, the WCPSS initiated the eligibility process after Principal Hedrick met with [redacted]s Parents on [redacted] [redacted] and the Principal documented in writing their concerns. Resp. Ex. 8 (Dr. Hedrick's notes of the [redacted] meeting). Thereafter, the eligibility determination and the manifestation determination processes tracked at the same time. Moreover, the requested evaluations were expedited to accommodate the MDR deadline.

32. Foremost, WCPSS is commended for deciding to conduct the MDR in this case. Based on its unique factual configuration, although WCPSS was not required to have an MDR because the eligibility determination was ongoing before the MDR meeting, it was reasonable for them to conduct a MDR.

33. Although not mandatory, once WCPSS choose to conduct the MDR, the MDR process should have been procedurally and substantively in compliance with the IDEA.

34. In conducting the MDR, WCPSS committed several procedural violations which will be addressed further below. Because procedural violations are harmless if [redacted]s conduct was not a manifestation of his disabilities as a "child with a disability", the substantive issue will be considered first.

ISSUE 1: WAS THE MDR DECISION SUBSTANTIVELY APPROPRIATE?

Based on Findings of Fact and Conclusions of Law, as well as the evidence in the record and credible testimony, the Petitioners failed to prove by a preponderance of the evidence that the MDR was substantively flawed or even required as discussed below.

Manifestation Determination Reviews

35. In general, a student with a disability (or one protected as described above) may be removed from school for a disciplinary violation for more than ten (10) days only if "the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability." 34 C.F.R. § 300.530(c). Any removal for more than 10 consecutive school days is a change of placement. 34 C.F.R. § 300.536(a)(1).

36. The team must conduct an MDR within ten (10) days of the student's change of placement to determine "[i]f the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability . . . ." 34 C.F.R. §§ 300.530(e)(1).

37. During the MDR "the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents . . . ." 34 C.F.R. § 300.530(e). However, this list is not exhaustive because it would be "impractical to list all the possible relevant information that may be in a child's file . . . ." 71 Fed. Reg. 46,719 (2006).

38. The behavior is considered a manifestation (1) "if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability," or (2) "if the conduct in question was the direct result of the LEA's failure to implement the IEP." 34 C.F.R. § 300.530(e)(1). The second basis is not relevant to this case because [redacted] did not have an IEP.

39. The IDEA is "sufficiently clear that decisions regarding the manifestation determination must be made on a case-by-case basis" because "the child should not be punished for behaviors that are a result of the child's disability." 71 Fed. Reg. 46720 (2006).

40. If the behavior was a manifestation of the child's disability, the school must "return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement . . . ." 34 C.F.R. § 300.530(f)(2).

41. Needless to say in a situation like this case, the stakes are high for both [redacted] and WCPSS. For [redacted] because he is out of school completely or in an alternative setting without education services and for WCPSS, because of the egregious nature of his conduct and safety concerns for students and staff.

42. Punishment is not the goal of a MDR proceeding; the focus is the education of a disabled student who needs specially designed instruction. When Congress reauthorized the IDEA in 2004, it revised the manifestation provisions to provide a "simplified, common sense manifestation determination process" to assure that the manifestation determination is done carefully and thoroughly with consideration of any rare or extraordinary circumstances presented." 71 Fed. Reg. 46720 (2006). "[W]hether a child's conduct is a manifestation of the child's disability is broad and flexible, and would include such factors as the inter-related and individual challenges associated with many disabilities." *Id.*

43. A manifestation determination review for a not-yet-identified student is handled similarly, but without some of the information available to an IEP team for a student who has been previously identified. (quoting the H.R. Rep. No. 108-779, at 237-245 (2004) (Conf. Rep.)). Because of the rigid 10-day timeline, any requested evaluations must be expedited but the MDR process does not include an exception to allow additional time to complete an evaluation prior to conducting the MDR. *Letter to Nathan*, 73 IDELR 240 (OSEP 2019). As a result, as in this case, the MDR team may be unable to obtain all necessary information, including finalized evaluation reports, before the MDR deadline.

44. A parent who disagrees with the results of the manifestation determination may request, and is entitled to, an expedited due process hearing, which must occur within twenty (20) days of receipt of the complaint. 34 C.F.R. § 300.532(a) & (c). [redacted] obviously disagreed with the MDR results and hence, the reason for this case.

Expedited Evaluations

45. Whether or not the conduct is a manifestation of the child's disability, the child is still entitled to expedited evaluations if requested by [redacted] parent(s) or as in this case, school staff.

46. Under the IDEA, "[i]f a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under § 300.530, the evaluation must be conducted in an expedited manner." 34 C.F.R. § 300.534(d)(2)(i); 20 U.S.C. § 1415(k)(5)(D)(ii).

47. There is no specific timeframe for conducting the expedited evaluation; however, it "should be conducted in a shorter period of time than a typical evaluation," which must be conducted within sixty (60) days of receiving parental consent. 20 U.S.C. § 1414(a)(1)(C)(i)(I).

48. The psychological and speech-language evaluations were expedited in this case, but the reports were not completed until the end of May [redacted], after the MDR decision.

Information Available to the MDR Team Supported that [redacted] Conduct Was Not A Manifestation of His Disability But the MDR Was Premature

49. Ultimately, the substantive issue in this case turns on whether there is evidence that [redacted] conduct was a manifestation of a suspected disability. Petitioners' case fails for three reasons: 1) Petitioners did not meet their burden of proof at the hearing; 2) all available evidence does not sufficiently connect [redacted] conduct to any suspected disability; and 3) the MDR was premature.

1. ***Petitioners Did Not Meet Their Burden of Proof***

50. First, key evidence missing from Petitioners' case included:

- Any testimony from a physician, therapist, psychologist, or psychiatrist who could connect a general diagnosis of depression, bipolar disorder, or even autism to a planned-out threat of mass homicide against the school;
- Any evidence to show how [redacted] diagnoses manifested themselves, other than statements in various parts of the record that he felt lonely or isolated, and two attempts to commit suicide;
- Any specific documentary evidence connecting [redacted] diagnoses with his behavior;
- Any expert testimony identifying aspects of [redacted] history or current behavior that would actually connect [redacted] diagnoses to his misconduct.

51. Petitioners did not produce sufficient evidence that [redacted] conduct was a manifestation of a suspected disability. In their Draft Proposed Final Decision, Petitioners appear to have abandoned this issue because Petitioners offered no legal argument that [redacted] conduct was a manifestation of his disabilities. *See* Pet's Draft Proposed FD pp. 15-23 (Conclusions of Law).

52. But, in their Final Proposed Decision, Petitioner implies that Petitioners' expert testified that the "MDR team reached the wrong conclusion regarding whether [redacted] conduct was a manifestation of his disabilities. Tr. vol. 1, p. 91:1-19 ([redacted] testified team reached incorrect conclusion)." Pet's Final Pro. FD, p. 31, ¶ 175. Petitioners misstate Dr. [redacted] testimony. Dr. [redacted] testified that the team did not have enough information to suspect that autism was a factor, not that autism, or any other suspected disability of [redacted] was causally linked to his misconduct.

53. The most glaring omission in Petitioners' case was the lack of any testimony from a clinical psychological, psychiatric expert, or even [redacted] treating mental health providers. Without such evidence, Petitioners cannot prove that the manifestation determination decision was wrong.

54. In effect, Petitioners ask this Tribunal to find that simply *because* [redacted] now has several mental health diagnoses and *because* he made a threat of mass homicide, those two must be substantially related such that the misconduct was a manifestation of a suspected disability. Put

differently, Petitioners assume that because the misconduct was so egregious, it could only be the product of a disability. Petitioners did not present sufficient evidence to make that causal connection.

55. This logic is also deeply problematic from a standard-setting perspective. A threat of mass violence against a school is always so egregious that it raises questions about the mental health of the student making the threat. If that alone is sufficient to find a manifestation of a suspected disability in the absence of any other evidence, then threats of mass violence will effectively be *per se* manifestations of previously unknown disabilities.

56. Most importantly, the fact that [redacted] had a mental illness diagnosis or even multiple diagnoses does not mean he was a "child with a disability" under the IDEA. *See* 20 U.S.C. § 1401(3). Petitioners must also prove that he needs or, at a minimum, is "suspected" of needing special education and related services to access the general curriculum either academically and/or functionally, for his entitlement to the protections of the IDEA. While Petitioners alluded to communication deficits and social skills training, they proffered no expert testimony or other evidence that [redacted] actually needed special education.

57. It is also Petitioners' burden to prove that the IEP team's decision was substantively wrong. To do so, Petitioners needed to prove that the misconduct was, in fact, a manifestation of [redacted] suspected disabilities. *See, e.g., Farrin v. Maine Sch. Admin. Dist. No. 59*, 165 F. Supp. 2d 37, 52 (D. Me. 2001) ("Plaintiffs apparently assume that drug selling and "impulsivity" are related. However, they have failed to support their assumption with any concrete evidence beyond suggesting that the decision to sell drugs is such a poor one that only a behavioral disability could prompt Jacob to make it."); *Princeton City School District*, 108 LRP 71164 (OH SEA 2008) (finding that the petitioner failed to meet her burden of proof because "there was no qualified expert offered by Plaintiff to support her apparent argument that student's behavior on May 16, 2008, was a manifestation of his possible diagnosis of oppositional defiant disorder," "there was no credible testimony as to exactly what, if any, connection there would be between the possible or preliminary diagnosis . . . and the actions of student on May 16, 2008," and "[t]here was no evidence presented as to what that diagnosis means [or] how it may manifest itself in this student").

58. Petitioners failed to prove by a preponderance of evidence that [redacted] behavior was a manifestation of his disability or that [redacted] was a "child with" or "suspected of" having a disability and therefore entitled to an MDR.

2. *No Evidence in [redacted] History Behavior Was a Manifestation*

59. Second, even had Petitioners crossed the threshold of the burden of production in this case, the greater weight of the evidence, combined with the presumption of correctness afforded to the school's decisions and where deference is due, requires a decision in favor of the Respondent.

60. Here, the evidence in the record shows that there was nothing in [redacted] history to suggest that a behavior like this was a manifestation of his suspected disabilities. While Petitioners accuse the MDR team of focusing too heavily on a behavioral "pattern," Respondent's witness Barbara Liggett cogently explained why that is a relevant factor in the determination. Petitioners'

own expert admitted that an MDR team should be examining past behavior as part of its consideration. Tr. vol. 2, p. 247:6-17 (T of [redacted]

61. On the other hand, Respondent goes too far in its assertion that only School Psychologist McGrogan was "qualified to speak to the conditions [redacted] has been diagnosed with" and that "[a]mong the witnesses presented at this hearing, Mr. McGrogan's testimony is deserving of the greatest weight." Resp. Pro. FD p. p. 23, ¶ 73 (*citing* Tr. vol. 2, 356:1-358:7 (T of McGrogan)). The Undersigned disagrees and questions whether a school psychologist, with no clinical experience or training, could authoritatively address the causal connection between [redacted] severe mental illnesses and his conduct without at least some consultation with [redacted] mental health providers.

62. Mr. McGrogan even admitted as much at the end of the MDR meeting, when he said he wanted to talk to [redacted] "therapist if he could get a release", which he already had at that time, "to have a conversation about what's going on." Stip. Ex. 29, 01:18:21-51 (recorded statements of McGrogan). In fact, during the MDR meeting, School Psychologist McGrogan offered no explanation about how [redacted] depression, bipolar, or social-communication deficits did or did not manifest. *See* Stip. Ex. 29 (recording of MDR meeting).

63. Mr. McGrogan also did not draw attention at the MDR meeting to the behavioral patterns which he later detailed in final report. In his Psychological Evaluation report completed on May [redacted], he explained that [redacted] has a "previous history of suicidal attempts in [redacted] and [redacted], along with a history of chronic and severe depressive symptoms such as feelings of hopelessness, helplessness, worthlessness, and isolation." Supp. Ex. 5, p. 2 (not Bate stamp number). During [redacted] evaluation, [redacted] reported to McGrogan that he made the threat because "he felt hopeless and that he does not have any friends . . . he just comes to school but does not interact with people , . . . he does not know what to talk about and is scared to talk to others, so he does not interact." Supp. Ex. 5, p. 3.

64. Granted, the information available to the MDR team at the time of the MDR clearly had its deficiencies, but Petitioners' own expert testified that [redacted] conduct: "was – this is not a manifestation of his disability . . .". Tr. vol. 1, p. 99:9 (T of [redacted]

3. *The MDR Was Premature Because [redacted] Was Not Yet a "Child With A Disability"*

65. Third, the MDR was not required because [redacted] had not been determined as a "child with a disability" prior to the MDR meeting. So, the MDR was held prematurely.

66. If there is no "basis of knowledge", certain conditions must apply for even holding the MDR. 34 C.F.R. § 300.534(d).

67. One of the conditions has already been met that a request for an evaluation must be made during the time period that [redacted] is subjected to disciplinary measures including his suspension or expulsion. 34 C.F.R. § 300.534(d)(2)(i). In that situation, as it was in this case, the evaluation must be expedited, but the child's educational placement, home bound or otherwise, cannot change.

68. An eligibility meeting must be held to determine if [redacted] is a "child with a disability" as defined by IDEA. 34 C.F.R. § 300.534(d)(iii). That means not only must [redacted] meet one of the disabling conditions but also that he is in need of special education. 20 U.S.C. § 1401(3)(A)(i). If [redacted] is determined to be a "child with a disability" then, and only then, are the protections of 300.530 through 300.536 (MDR and expedited hearing) made available to him.

69. Since WCPSS had no "basis of knowledge", an MDR was not required until such time as: 1. the evaluations were completed, *and* 2. [redacted] was actually determined to be a "child with a disability". As both of these prerequisites had not been met at the time as of [redacted] the MDR was premature.

70. Given that, as of [redacted] was not entitled to the protections of the IDEA as laid out in 20 U.S.C. § 1415 and its implementing regulations, he cannot sustain a claim under IDEA against the disciplinary action taken against him. He cannot, for example, invoke the right to an expedited hearing under 20 U.S.C. § 1415(k)(4)(B). He cannot, in fact, invoke the right to a manifestation determination or a due process hearing regarding his discipline at all. *See* 20 U.S.C. § 1415(k)(5)(A).

71. At the time of the behavioral incident that led his expulsion, [redacted] was not entitled to any IDEA protections, and subsequent developments (such as the school's referral after his release from involuntary commitment) do not create retroactive rights. Because of this, this Tribunal lacks subject matter jurisdiction, and the Expedited Petition must be dismissed.

72. That does not mean, however, that [redacted] can never have another MDR or that his rights in that regard are not further protected.

73. If at any time during the disciplinary period, [redacted] is later determined by the IEP team or adjudicated to be a "child with a disability", [redacted] has an ongoing right under the IDEA to another MDR and to an expedited hearing to contest that MDR if the decision is adverse. 20 U.S.C. § 1415(k)(5)(D). This decision does not foreclose his future rights.

74. Since Petitioners cannot prove the substantive issue that [redacted] was denied educational opportunities under the IDEA and the MDR decision was premature, the numerous procedural violations are essentially harmless.

ISSUE 2: WAS THE MDR PROCEDURALLY APPROPRIATE?

75. Even though a denial of FAPE did not occur, WCPSS could be ordered to "redo" the MDR and properly follow the procedural requirements for a MDR under 20 U.S.C. § 1415((f)(3)(E)(iii). While this is an option, the better course is for the IEP team to finish the eligibility determination and then, if [redacted] is found eligible, conduct another MDR. 34 C.F.R. § 300.534(d)(2)(iii).

76. For purpose of review and to prevent recurrence of these procedural violations in any subsequent MDR, the Undersigned concludes that based on Findings of Fact and Conclusions

of Law as well as the evidence in the record and credible testimony, the Petitioners proved by a preponderance of the evidence that the MDR was procedurally flawed as discussed below, but that the procedural violations were harmless as follows.

Procedural Violations

77. A hearing officer may find that a child with as disability did not receive a free appropriate public education **only if** the procedural inadequacies (i) impeded the child's right to a free appropriate public education; (ii) significantly impeded the parents' opportunity to participation in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or (iii) caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii) (emphasis added); N.C. Gen. Stat. § 115C-109.8(a).

78. A substantive procedural violation is one that causes a "child with a disability" including a "child with a suspected disability" to lose any educational opportunity. *Burke Cnty. Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990). [redacted] does not fit into either one of these categories because WCPSS had no "basis of knowledge" to know or suspect he was a "child with a disability."

Parental Participation and Predetermination

79. Parents are guaranteed the right "to examine all records relating to [their] child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to that child." 34 C.F.R. § 300.322(a); N.C. Gen. Stat. § 115C-109.3(a). Meaningful participation occurs where a parent has the opportunity to ask questions, express his or her opinions, and explain disagreement with components of the IEP, *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1001 (2017) (during the IEP process, parents and staff should have the opportunity to "fully air their respective opinions."). "When Congress passed the IDEA, it placed great importance in the role of parents in crafting an adequate and individualized education for each disabled student." *Hendrick Hudson Bd. of Educ. v. Rowle*y, 458 U.S. 205–06 (1982).

80. "IDEA grants parents independent, enforceable rights. These rights, which are not limited to certain procedural and reimbursement-related matters, encompass the entitlement to a free appropriate public education for the parents' child." *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 533 (2007).

Native Language

81. [redacted] Parents were not able to meaningfully participate at the MDR meeting because the documentation and proceeding was not delivered in their native language. [redacted] is the Parents' primary language.

82. "The public agency must take whatever action is necessary to ensure that the parent understands the proceedings of the IEP Team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English." 34 C.F.R. § 300.322(e).

83. Parents of children with disabilities must receive all discipline notices regarding the removal of their child because of a violation of a code of student conduct and the procedural safeguards notice in their native language. 34 C.F.R. § 300.530(h).

84. Likewise, parents must receive all prior written notices in their native language. 34 C.F.R. § 300.503(c); *see also Adams County Sch. Dist.*, 55 IDELR 210 (SEA CO 2010) (state complaint officer finds a district's failure to provide PWNs in the native language of the parent of a student with a disability resulted in a denial of FAPE to the student.); *Oakland Unified Sch. Dist.*, 66 IDELR 175 (SEA CA 2015) (administrative law judge held district denied parent meaningful participation due to the failure to provide IEP documents in parent's native language).

85. The duty is on the district to provide such notices in the parents' native language. It is not the responsibility of the parent to request a translated document. 34 C.F.R. § 300.503(c)(ii) (the notice "must be provided in the native language of the parent . . ."); 34 C.F.R. § 300.504(d) (the procedural safeguards "must meet the requirements of § 300.503(c)); 71 Fed. Reg. 46723 (2006) (emphasizing the district must "provide notice" to the parent consistent with § 300.504).

86. WCPSS admits that the MDR documentation should have but was not provided in [redacted] But, because an interpreter was present at the MDR meeting, WCPSS asserts that it met its obligation to conduct the meeting in the Parent's native language and the Parents choose not to take advantage of the interpreter.

87. While WCPSS technically may have met its obligation by providing an interpreter, the recording of the MDR meeting (Stip. Ex. 29) shows that the moderator Ms. Browning spoke too quickly for interpreting and [redacted] communicated in broken English throughout the MDR. [redacted] admitted during the MDR to having difficulty communicating with her own son because he only spoke English. Her ability to understand the MDR members' English would have been similarly if not more difficult.

88. The cultural differences were also evident during the meeting with [redacted] being very submissive and not speaking until after the decision was made. *See* Stip. Ex. 29 (recording). Based on the recording, it is not clear how much [redacted] understood of the meeting, but she credibly testified at the hearing that in other meetings she "tried to understand what they [the teachers] were saying" but had difficulty. Tr. vol. 1, p. 112:12-15.

Predetermination

Premeeting Meeting Held on May [redacted]

89. Petitioners complain that all of the MDR members, except for them, attended a Premeeting meeting on May [redacted] and that during this Premeeting, school staff predetermined the MDR decision. Stip. Ex. 24, p. 79. Respondent counters that the purpose of the Premeeting was for "preparing roles and making sure the paperwork was in order for the meeting." Tr. vol. 2, pp. 304:25-305:9 (T of Smith).

90. Predetermination occurs when the LEA makes educational decisions too early in the planning process, in a way that deprives the parents of a meaningful opportunity to fully participate as equal members of the IEP team. *R.L. v. Miami-Dade Cnty. Sch. Bd*., 757 F.3d 1173, 1188 (11th Cir. 2014). A denial of meaningful participation by the parent, including predetermination by the IEP team, is a procedural violation. *See, e.g., Hanson ex. rel. Hanson v. Smith*, 212 F.Supp.2d 474, 486 (D. Md. 2002).

91. School district team members' preparation for an IEP meeting, or entering the meeting with opinions and recommendations, does not constitute predetermination. *Doyle v. Arlington Cnty. Sch. Bd*., 806 F. Supp. 1253, 1262 (E.D.Va. 1992), *aff'd*, 39 F.3d 1176 (4th Cir. 1994) ("[S]chool officials must come to the IEP table with an open mind. But this does not mean they should come with a blank mind."). Schools should give thought to the issues to be discussed at the meeting. *E.g. Doyle*, 806 F.Supp. at 1262 ("[W]hile a school system must not finalize its placement decision before an IEP meeting, it can, and should, have given some thought to that placement.").

92. "[A]ny pre-formed opinion the state might have must not obstruct the parents' participation in the planning process. Parental '[p]articipation must be more than a mere form; it must be *meaningful*.' It is not enough that the parents are present and given an opportunity to speak at an IEP meeting." *R.L. v. Miami-Dade Cnty. Sch. Bd*., 757 F.3d 1173, 1188 (11th Cir. 2014) (quoting *Deal v. Hamilton Cnty. Bd. of Educ., 392 F.3d 840, 858* (6th Cir. 2004) (emphasis in original)).

93. A school has predetermined the outcome of a meeting when it is "clear that 'there was no way that anything [the student's parents] said, or any data [they] produced, could have changed the [Board's] determination of the appropriate placement." *R.L. v. Miami-Dade Cnty. Sch. Bd.*, 757 F.3d 1173, 1188 (11th Cir. 2014).

94. Assistant Principal Smith credibly testified that the MDR team did not discuss the manifestation questions or make any decision at the Premeeting. Tr. vol. 2, pp. 304:22-305:5. However, he did not explain why the team had not collected all the medical records or communicated with [redacted] mental health providers which cast doubt on the stated purposes of the Premeeting. Nor did School Psychologist McGrogan explain why he had not contacted [redacted] therapist even though he admitted after the MDR decision that he "wanted to talk to the therapist . . . to have a conversation about what's going on . . .". Stip. Ex. 29, 01:18:21-01:18:51 (recorded statements of McGrogan).

95. While WCPSS did not predetermine the outcome of the MDR meeting at the Premeeting, they did not gather all necessary information for making the determination despite having releases from [redacted]

Adequacy of the Manifestation Determination Review on [redacted]

96. The MDR team did not adequately consider all the information available at the MDR meeting. The MDR decision was made within the first 30 minutes of the 1½-hour meeting.

97. During those 30 minutes, the moderator did not review the disciplinary event or discuss data including the teacher observations from [redacted] and [redacted] grade teachers as documented in Assistant Principal Smith's notes of [redacted] (Stip. Ex. 22) and Dr. [redacted] notes of [redacted] about [redacted] therapies (Stip. Ex 23). *See* Stip. Ex. 29. The case manager did not obtain all disciplinary records related to the suspension including the historical information contained in the student's transmittal e-mail sent to the school counselor and then to Principal Hedrick. Nor did Principal Hedrick disclose its contents to the entire MDR team.

98. After the MDR decision, [redacted] spoke at length in broken English trying to explain that "lots of people teasing [[redacted] because he is weird," "his sensitivity and definitely had a problem in that he "cannot tell them not to tease him," "it is smothering in his mind"; he is "miserable"; "Covid-19 really big for him because he is not in school," and "this change is routine really hard for [redacted] Stip. Ex. 29. The MDR team did not address the significant negative impact of virtual instruction, due to Covid-19, on [redacted] mental state.

99. The MDR team also did not address the "fact" that [redacted] was mentally ill when he made the threat. Dr. [redacted] opined that the MDR team "over fixated" on the "pattern of [redacted] behavior" and did not pay attention to what the doctors said, "who formally spent time with him and diagnosed the depression and the bipolar." Tr. vol. 1, p. 84:19-85:14 (T of [redacted] What was "sorely lacking" is that the MDR team did not address any of this. Tr. vol. 1, p. 85:15-18.

100. The MDR team did not invite [redacted] therapist/mental health providers to the MDR meeting even though [redacted] provided their contact information on May [redacted]. Stip. Exs. 17-19. [redacted] mentioned several times during the MDR meeting that he was "not a doctor" and that "the therapist or doctor could judge not by us." Stip. Ex. 29. Dr. [redacted] even questioned whether [redacted] was "completely rationale" at the time of the incident and that consideration of his mental health diagnoses was "sorely lacking." Simply having a mental health diagnosis or being irrational at the time of the conduct does not, however, mean that [redacted] needed special education and related services.

101. Had the MDR team invited the therapist/mental health providers, they would have had important information about [redacted] mental state close to the time of the incident. During his involuntary hospital admission, the [redacted] records documented that [redacted] was "delusional", had "current feeling of hopelessness, helplessness, worthlessness and isolation;" "reported history of chronic severe depression symptoms, includes at least two previous suicide attempts;" "current presentation is also concerning for possible psychosis which need to be ruled out;" his thought processes presented as "circumstantial, bizarre, illogical thinking with indications of paranoid delusions and grandiose thinking." Supp. Ex. 16, p. 15 (not Bate stamp).

102. WCPSS' failure to consider all relevant and obtainable information at the MDR meeting denied Petitioners, and the school-based members of the MDR team, meaningful opportunity to fully participate as members of the MDR.

Procedural Violations Did Not Interfere With the Provision of FAPE to [redacted]

103. Again, despite the numerous procedural violations, to the extent that the procedural violations do not actually interfere with the provision of FAPE, these violations are not sufficient to support a finding that a district failed to provide a FAPE. *Gadsby v. Grasmick,* 109 F.3d 940, 956 (4th Cir. 1997). If a disabled child received (or was offered) a FAPE in spite of a technical violation of the IDEA, the school district has fulfilled its statutory obligations. *Burke County Bd. of Educ. v. Denton,* 895 F.2d 973, 982 (4th Cir.1990).

104. In a manifestation determination review, a procedural failure such as not reviewing certain relevant information is harmless unless it is shown that the additional information would have caused a different result in the substantive decision. *Farrin v. Maine Sch. Admin. Dist. No. 59*, 165 F. Supp. 2d 37, 51 (D. Me. 2001) (finding procedural error of failing to consider relevant assessment would only have caused harm "[i]f the information would have caused the PET to find that Jacob's behavior was indeed a manifestation of his disability").

105. While there were a number of procedural violations that significantly impacted the Parents' opportunity to participate in the decision-making process at the MDR, ultimately Petitioners failed to prove at the hearing the substantive issue that WCPSS had a "basis of knowledge" or the prerequisite conditions applicable for the "no basis of knowledge" analysis; therefore, the procedural violations were harmless.

106. In rendering this decision, the Undersigned recognizes that [redacted] has been diagnosed with mental illness that was not of his making, and like [redacted] is relieved that he is finally getting the ongoing treatment he needs to manage his disorders and be able to access his education when made available to him.

FINAL DECISION

BASED ON THE FOREGOING, the Undersigned hereby finds proper authoritative support of the Conclusions of Law noted above, and it is hereby **ORDERED, ADJUDGED, AND DECREED** that:

1. Petitioners did not meet their burden of proof on all issues pending in this matter.

2. [redacted] was not entitled to the protections of the IDEA at the time of the conduct that led to his suspension because WCPSS did not have a "basis of knowledge" prior to the conduct, and therefore, WCPSS was not required to hold a Manifestation Determination Review ("MDR"). This Tribunal lacks subject matter jurisdiction to grant him relief for a denial of a FAPE on the substantive violation issue.

3. In the alternative, even though WCPSS held a gratuitous MDR, Petitioners failed to prove by a preponderance of the evidence the substantive issue that [redacted]s conduct was a manifestation of his disabilities.

4. Although WCPSS failed to comply with the procedural requirements during the MDR, Petitioners failed to meet their burden to prove that any of the alleged procedural violations caused educational harm to [redacted] as a "child with a disability".

5. Petitioners' Motion to Consolidate is **MOOT**.

6. Respondent is the prevailing party.

7. Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED** that all of Petitioners' claims are **DISMISSED WITH PREJUDICE**.

8. **While Petitioners' claims regarding the [redacted] MDR are DISMISSED, this Final Decision cannot and does not foreclose [redacted]'s right to another MDR along with substantive and procedural protections afforded to [redacted] and his Parents during that process.**

NOTICE OF APPEAL

In accordance with the Individuals with Disabilities Education Act and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights regarding this Final Decision.

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C-106.1 *et seq*.) and particularly N.C.G.S. §§ 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 or G.S. 115C-109.8 may **appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board** under G.S. 115C-107.2(b)(9) to receive notices. The State Board, through the Exceptional Children Division, shall appoint a Review Officer from a pool of review officers approved by the State Board of Education. The Review Officer shall conduct an impartial review of the findings and decision appealed under this section."

Inquiries regarding further notices, timelines, and other particulars should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina prior to the required close of the appeal filing period.

IT IS SO ORDERED.

This the [redacted] day of September, 2021.

Stacey Bice Bawtinhimer
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service.

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This the [redacted] day of September, 2021.

Jerrod Godwin
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