STATE OF NORTH CAROLINA

BEFORE A STATE HEARING REVIEW OFFICER FOR THE STATE BOARD OF EDUCATION PURSUANT TO G.S. 115C - 109.9

[redacted] by and through his parent [redacted]

v.

Wake County Board of Education

DECISION

21 EDC 03727

This is an Appeal of the Final Decision of Administrative Law (ALJ) Judge Stacey B. Bawtinhimer issued on September 29, on September 20, 2021. The Petitioner appealed the Decision on October 28 and the undersigned Review Officer was appointed on October 29, 2021.

The records of the case received for review were contained on two CD's. The first CD had a 596 page PDF file containing: the Petition; Respondent's Response and Motion for Dismissal; Petitioners' Response to the Respondent's Motion for Dismissal; ALJ's Order Denying the Motion to Dismiss; ALJ's Pre-Hearing Order; ALJ's Amended Pre-Hearing Order; Petitioners' Motion for Additional Evidence and to Reopen Hearing; Respondent's Response to Petitioner's Motion for Additional Evidence and to Reopen Hearing; ALJ's Order Denying Motion to Reopen Hearing; First set of Proposed Final decision from both parties; ALJ's Request for Proposals of Remedies; Second set of Proposed Final decision from both parties; Stipulated Exhibits; Respondent's Exhibits; Petitioner's Exhibits; Supplemental Exhibits; Three Transcripts of the hearing conducted September 14 and 15, 2021; Miscellaneous correspondence and scheduling orders; and, the ALJ's Final Decision.

The second CD contained Stipulated Exhibits, Petitioners' Exhibits, and Supplemental Exhibits. The Stipulated Exhibits included a video recording and an audio recording of meetings.

APPEARANCES

For Petitioners:	Stacey M. Gahagan, Meghan Brown; Gahagan Paradis, P.L.L.C.,3326 Durham Chapel Hill Boulevard, Suite 210-C, Durham, NC 27707
For Respondent:	Stephen Rawson, Tharrington Smith, L.L.P.,150 Fayetteville Street, Suite 1800, Raleigh, NC 27602

For convenience and privacy, the following are used in this Decision to refer to the parties:
For the Student/Petitioner – Student.
For Parent/Petitioner – [redacted] mother; [redacted] father
For Respondent - Respondent; Wake County Schools; WCPSS

WITNESSES

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

For Respondent: [redacted], WCPSS Senior Administrator
[redacted] LEA Representative
[redacted], WCPSS School Psychologist

EXHIBITS AND TRANSCRIPTS

The following exhibits were received into evidence during 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.

ISSUES

The Parties identified the issues for hearing as follows:

1. Was the Manifestation Determination Review (MDR) decision made on May [redacted], 2021, substantively appropriate?
2. Was the Manifestation Determination Review (MDR) conducted on May [redacted], 2021, procedurally appropriate?

The primary issue before for the State Review Officer (SRO) was whether the ALJ's Final Decision to dismiss the petition was appropriate.

THE ALJ'S DECISION

On September 29, 2021the ALJ issued the following 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 May [redacted], 2021 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.

JURISDICTION/APPEAL

The SRO has jurisdiction in this matter. North Carolina provides specific guidelines for the appeal of a decision by an Administrative Law Judge in a special education due process case:

> N.C.G.S. § 115C-109.9. Review by review officer; appeals.
> (a) 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. 107.2(b)(9) to receive notices.

When reviewing an appeal of an ALJ's decision, the SRO may only review the specific issues being appealed by the parties. E.L. v. Chapel Hill-Carrboro Bd. of Educ., 975 F. Supp. 2d 528, 535 (M.D.N.C. 2013). E.L. at 535.

Jurisdictional questions became one of the issues as the case progressed through the hearing and appeal. In the end, jurisdiction turned out to be a determining factor in both the ALJ and SRO decisions.

The Petitioners appealed the entirety of the ALJ's Final Decision. In addition, the Petitioners stated that they appeal the ALJ's findings and decisions outside the scope of the issues in this hearing, erroneous evidentiary rulings related to the hearing and decision, denial of Petitioners' Motion for Additional Evidence, and effective denial of Petitioners' Motion to Consolidate.

Thus, this review is of the entirety of the ALJ's decision, and the SRO will address those additional specifics in the Petitioners' appeal.

STANDARD OF REVIEW

The State Review Officer (SRO) must render an independent decision, giving "due weight" to the administrative proceedings before the administrative law judge. Board of Education v. Rowley, 458 U.S. 176 (1982). In Doyle v. Arlington Cty. Sch. Bd., 953 F.2d 100 (4th Cir. 1991), the Fourth Circuit provided guidance regarding "due weight." The SRO, when "deciding what is the due weight to be given an administrative decision under Rowley ... a reviewing court should examine the way in which the state administrative authorities have arrived at their administrative decision and the methods employed." If an SRO determines that an ALJ's findings were made in accordance with the fact-finding norm, or "regularly made," these findings are entitled to be considered *prima facie* correct. *Id.* at 105. A decision or finding is not considered to be "regularly made" where it is so far from the accepted norm that the SRO cannot give "due weight" to that decision or finding. *Id.* At 104. On appeal from an administrative decision, if the SRO chooses to depart from the ALJ's decisions, the SRO should explain the departure. *Id.* at 105.

The SRO holds that most of the ALJ's findings were "regularly made," and agrees with many of those findings and the conclusions reached based on those findings. The SRO does disagree with several of the conclusions of the ALJ. Those will be apparent in this Decision. Some ALJ findings and conclusions are redundant and unnecessary to arrive at the final decision. Most, however, are well founded and will be incorporated into this Decision of the SRO. For the sake of brevity, many will be ignored, combined and/or consolidated.

The ALJ produced her Final Decision in only a few days, as required by law following an expedited hearing. The decision, however, was still quite lengthy. It was apparent that the ALJ's decision was written under a time constraint that prevented the ALJ from engaging in extensive research and contemplation. There are inconsistencies, which can probably be attributed to the inclusion of concepts from the proposed decisions submitted by the parties.

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 21 EDC 3373). In this 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 a Manifestation Determination Review conducted by Respondent. The Expedited Petition (21 EDC 03727) was assigned to Administrative Law Judge Stacey Bice Bawtinhimer. The First Petition was also reassigned to Judge Bawtinhimer.
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. On September 9, 2021, ALJ Bawtinhimer denied Respondent's Motion to Dismiss, and held that the ruling on Petitioners' Motion to Consolidate would be determined later. As part of her Final Decision, the ALJ found that the Motion to Consolidate was Moot.
4. On September 10, 2021, Petitioners filed an unopposed Motion to Permit Remote Testimony and Motion to Require Sequestration of Witnesses. Both were granted.
5. The Parties conducted mediation on September 13, 2021 but were unable to reach a mutually agreeable result.
6. On September 14 and 15, 2021, the ALJ held an in-person expedited hearing on the procedural and substantive appropriateness of the Manifestation Determination Review that had been conducted by Respondent.
7. On September 15, 2021, the ALJ issued a written Order Denying Respondent's Motion to Dismiss memorializing her verbal order of denial, which had been issued on September 9.
8. On September 22, 2021, Petitioners filed a Motion for Additional Evidence seeking to admit additional evidence regarding an [redacted] evaluation conducted by Dr. [redacted] after the hearing. This motion was opposed by the Respondent and denied by the ALJ.
9. Proposed Final Decisions were filed on September 27, 2021 with the Final Decision of the ALJ issued on September 29, 2021.
10. The Petitioners filed an Appeal of the ALJ's Final Decision on October 28 and the State Review Officer (SRO) was appointed on October 29, 2021.
11. On October 29, 2021 the SRO requested Written Arguments from the parties. The Arguments were received on November 18, 2021.

FINDINGS OF FACT

Based upon careful consideration of all the evidence the SRO makes the following Findings of Fact. The SRO accepts, without inclusion here, the ALJ's assessment of the credibility of witnesses and the authenticity of documents and other evidence submitted during the hearing process. 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.

1. As vividly stated by the ALJ, this case began with a "nightmare scenario" for the Wake County Schools. [redacted] threatened to blow up his high school and kill all the students and staff. Police were notified. [redacted] was involuntarily committed the next day and later diagnosed with depression and bipolar disorder. Questions about an [redacted] diagnosis were also raised. WCPSS acted quickly and decisively to protect its students and staff from harm. [redacted] not having been previously identified as a "child with a disability," 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. *[See the ALJ's Final Decision, Facts 50 – 59 for details of the "bomb threat" and subsequent actions of the police and WCPSS prior to holding an MDR meeting. The SRO does not see the need to include them in this Decision.]*
2. [redacted] was [redacted] years old at the time this petition was filed; his birthday is [redacted]. Stips. 5, 8.
3. [redacted] was born in [redacted], moving with his family to the [redacted]. Stip. 7.
4. [redacted] had been in attendance in a Wake County school since August [redacted] and attended [redacted] High School until April [redacted], [redacted]. Stips. 9, 11, 14. [redacted] attended [redacted] High School during the [redacted]th grade until the COVID-19 closure in March 2020, and virtually thereafter. Stip. Ex. 9. In [redacted]th grade, [redacted] received an A grade in 7 of his 8 courses (Honors Math, Healthful Living, Principles of Business and Finance, Earth/Environmental Science, English, Microsoft Word and PowerPoint, and Math 2). He received a B in Honors World History. Stip. Ex. 9.
5. His [redacted]th 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," and had 1 to 2 friends, and that there were "no major issues or alarming concerns." Stip. Ex. 22, pp.67-68.
6. For [redacted]th grade, beginning in the fall of [redacted] [redacted] and his family elected to attend school virtually. Stip. 15. This was a difficult adjustment. [redacted] attributed [redacted]'s depression in part because of the virtual learning setting. See Stip. Ex. 29 (recording of MDR meeting).
7. In the first semester of [redacted]th grade, [redacted] earned two A grades (Honors Healthful Living and Visual Arts), and two B grades (Honors American History and Honors English II). Stip. Ex. 12.
8. In the second semester of [redacted]th grade, [redacted] was enrolled in Honors Biology, Creative Writing, Honors Math 3, and Speech. In the third quarter, which ended just before [redacted] was suspended, he earned one A grade (Speech), two B grades (Math and Creative Writing), and one C grade (Biology). Stip. Ex. 12.
9. [redacted]s [redacted]th grade teachers indicated that he was "engaged and participated in art 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.
10. There is no evidence in the record that, prior to March [redacted] 2021, [redacted]s 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.
11. There is no evidence in the record that, prior to March [redacted] 2021, [redacted]s parent requested an evaluation of [redacted] Petitioners' witnesses acknowledged this. Tr. vol. 1, p. 153.

12. There is no evidence in the record that, prior to March [redacted] 2021, any of [redacted]s teachers or other personnel of Respondent expressed specific concerns about [redacted]s behavior that would cause concern. There was no information that would provide a basis of knowledge that [redacted] needed special education. Multiple witnesses acknowledged this. Tr. vol. 1, pp. 153-54.

13. [redacted] was not even on Assistant Principal [redacted] "radar" prior to April [redacted], 2021. Tr. vol. 2, p. 288. [redacted] had never been disciplined or suspended from school for any reason. Stip. 26.

14. 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 Final Decision, p. 36.

15. [redacted] had not been determined eligible for special education and related services prior to the "bomb threat."

16. WCPSS had no basis of knowledge that [redacted] was a "child with a disability" before the behavior that precipitated the disciplinary action occurred. (*See* 34 C.F.R. 300.534).

17. IDEA has conditions that apply if there is no basis of knowledge that a child is a "child with a disability." 34 C.F.R. 300.534(d).

18. IDEA defines "a child with a disability" as a child evaluated and determined to have one of 13 disabling conditions. 20 U.S.C. § 1401(3)(A)(i). Several of those conditions are possibilities in this case: the categories of Serious Emotional Disturbance ("ED"), Other Health Impaired ("OHI"), and Autism ("AU"). Having a disability does not, in and of itself, determine that a child meets IDEA's definition of a "a child with a disability." Another essential aspect of the determination that the child must, by reason of the disabling condition, needs special education and related services. 20 U.S.C. § 1401(3)(A)(ii).

19. At the time of the MDR meeting, it had not been determined if [redacted]s mental illness diagnosis met the categories of [redacted]. Nor had it been determined that he needed special education. Prior to, and at the MDR meeting, Petitioners offered no evidence that [redacted] met one of these disabling conditions as defined under IDEA or that he needed special education.

20. During the hearing in this case, Petitioners proffered no evidence that [redacted] met the definition of a "child with a disability." Their argument seemed to be that anyone who would do such a thing as [redacted] had done would automatically be a "child with a disability."

21. [redacted]s conduct did not involve controlled substance/illegal drugs, actual serious bodily injury or a weapon. If so, this would influence the actions available to WCPSS.

22. The "bomb threat" was received by Principal [redacted] of [redacted] High School on April [redacted], 2021. Police were notified. [redacted] was involuntary hospitalized until April [redacted] at which time he was discharged and released to return to school on April [redacted] 2021. Stip. 22.

23. During [redacted]s involuntary hospitalization, his Parents met with Principal [redacted] on April [redacted], 2021. They shared information about his hospitalization and diagnoses. Pet. Ex. 8, pp. 79-80.

24. On April [redacted] 2021, [redacted] and [redacted]s Parents met virtually with Principal [redacted] and Assistant Principal [redacted] to discuss the incident. This meeting was recorded. Stip. 23. That day, Principal [redacted] 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. Prior to the suspension, [redacted] had never been disciplined or suspended from school for any reason. Stip. 26.

25. On April [redacted] 2021, the WCPSS sent [redacted] a letter in English informing her of [redacted]'s 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.

26. On April [redacted] 2021 the school initiated a referral for special education. [redacted]'s Parents were invited to a special education referral meeting to consider whether to evaluate [redacted] for special education eligibility. The meeting was scheduled for April [redacted] 2021. Stips. 27, 28; Stip. Ex. 2.

27. A special education referral meeting was conducted on April [redacted] 2021. Though outside the scope of this appeal, some information from that meeting is included because this information was available to the team at the later MDR meeting:
    a. The IEP team for the Referral Meeting consisted of Petitioner [redacted] and [redacted]s. father, [redacted] LEA Representative, Assistant Principal [redacted] Regular Education teacher Mrs. [redacted] Special Education teacher Mrs. [redacted] SAP Counselor Mrs. [redacted] Special Education Services representative Mrs. [redacted] Principal [redacted] and interpreter Ms. [redacted] Stip. Ex. 3.
    b. 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.
    c. During the referral meeting, [redacted]'s 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.
    d. 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.
    e. 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.
    f. 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.
    g. The team documented [redacted] "will not fully engage" if he is not interested in a subject. [redacted]'s family stated he "only tends to interact with peers and teachers when he is interested in a topic." Stip. 33.
    h. [redacted]'s teachers from the 2019-2020 school year reported he was "very quiet and respectful," but only had "1 to 2 friends." Stip. 34.
    i. [redacted]'s 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.
    j. Assistant Principal [redacted] canvassed [redacted]'s [redacted]th and [redacted]th grade teachers sometime on or before April [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.
    k. The Referral Team decided to conduct an initial evaluation in the area of [redacted]. Stip. 36. [redacted]'s mother consented to the requested evaluations. Stip. Ex. 1.
    l. The expedited evaluations for eligibility were scheduled for the morning of May [redacted], 2021.
    m. On the morning of May [redacted], 2021, WCPSS conducted a Speech/Language/Communication evaluation and a psychoeducational evaluation. The report of these evaluations was not available to the team later that day during the MDR meeting.

28. On May [redacted], 2021 WCPSS sent an invitation in English to [redacted] and [redacted] to conduct a Manifestation Determination Review (MDR) on May [redacted], 2021. Stip. 6.

29. An MDR was held on the afternoon of May [redacted], 2021. As [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. Stips. 6, 7.

30. At the time of the MDR meeting, the team had available to it the following information: [redacted] s 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.

31. [redacted] s 10-day short term suspension began on April [redacted] 2021 upon [redacted] s discharge from the hospital and ended on April [redacted] 2021. Resp. Ex. 1, p. 1. Because Principal [redacted] had recommended long-term suspension and expulsion, the MDR had to be held within 10 days after April [redacted] 2021. Because of the expedited nature of a MDR, the IEP team did not have all the evaluation results or medical records at the MDR meeting. Stip. 43.

32. Although WCPSS had a Two-Way Release from [redacted] Services, the MDR team did not have complete [redacted] s mental health records at the time of the MDR meeting. Supp. Ex. 10.

33. Prior to the MDR meeting, on May [redacted], [redacted] sent one page of the [redacted] records which listed the contact information, admission date, and anticipated discharge date to WCPSS officials. 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.

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

35. A release for [redacted] s records from the [redacted] Center for Emotional Health was also provided on May [redacted]. Supp. Ex. 16.

36. Although these releases were potentially available, Mr. [redacted] did not fax the signed release until May [redacted], 2021, the day before the meeting. Stip. 38; Stip. Ex. 24, p. 80; Stip. Ex. 29, p.11; Tr. vol. 2, p. 371. Nor did Mr. [redacted] attempt to contact any of these mental health providers to gather additional information prior to the MDR meeting. Tr. vol. 2, p. 371.

37. If a more serious attempt were made to obtain mental health information prior to obtaining the full records, the MDR team may have had access to more clinical data that may have helped in making the MDR.

38. After interviewing [redacted] s [redacted]th and [redacted]th grade teachers, Assistant Principal [redacted] wrote that nothing stood out in middle or high school but noted 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. All of this information was not disclosed at the MDR meeting.

39. During his involuntary hospitalization initiated by law enforcement, [redacted] was diagnosed with [redacted]

[redacted]. Stip. 12. This information was presented to the team at the MDR meeting, although complete documentation was not available.

40. WCPSS did not have complete medical, psychological, or speech language reports at the MDR meeting. WCPSS did not wait for this information before convening the MDR meeting. There was no attempt to have mental health providers attend the MDR meeting. Although the psychologist who performed the psychological evaluation was in attendance, his complete evaluation had not been completed.

41. The IEP team for the MDR meeting consisted of [redacted]s father, [redacted]Mr. [redacted] Ms. [redacted] Ms. [redacted] Ms. [redacted] Ms. [redacted] Principal [redacted]interpreter Ms. [redacted] and school psychologist Mr. [redacted] Except for Mr. [redacted] the membership was identical to the group that participated in the referral meeting 10 days earlier. Stip. Ex. 7, p. 29.

42. The notes of the MDR meeting state that the "interpreter did not speak." Stip. Ex. 24, p. 80. Although [redacted]s primary language is English, his mother [redacted]cannot communicate effectively in English, even with her own son. [redacted]s primary language is [redacted] and probably was not able to effectively participate in the MDR meeting.

43. The team considered the required questions for an MDR decision. 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.

44. During the MDR meeting [redacted]s father shared current diagnoses from the mental health providers. It is important to note that the evidence of these diagnoses was obtained after the conduct that precipitated the suspension and expulsion. Also, as acknowledged by the Petitioners' expert, Dr. [redacted] a diagnosis alone does not equate to a behavior. The team should look at how the specific student's disability manifests. Tr. vol. 1, p. 148.

45. While Petitioners raised the possibility of [redacted] as an area of disability, there was no information before the IEP team other than the mother's statement that her pastor had raised the possibility of [redacted] and the fact that [redacted]had some social difficulties. The team specifically discussed [redacted]s social issues. School Psychologist [redacted] explained why he had no reason to suspect [redacted] following his evaluation of [redacted]on the morning of the MDR meeting. Tr. vol. 2, pp. 360-61. Mr. [redacted] however, had not perform any specific [redacted] assessments. Stip. 49.

46. Among the suspected disabilities the team considered were [redacted]s diagnoses of [redacted] and [redacted], as well as social communication deficits. Based on the information available at the meeting, these were appropriate suspected areas to consider. The team, however, decided to add the area of [redacted]to [redacted]s planned evaluation that had been decided earlier during the referral meeting. Stip. 52

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

48. 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.

49. The MDR 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. "The incident was not a direct result of the suspected disability." Stip. 44.

50. Petitioners' own expert, Dr. [redacted] provided confusing testimony regarding [redacted]s conduct. He stated that the MDR "team did not make the correct determination" in deciding that [redacted]s conduct was not a manifestation. Tr. Vol 1, p. 97. Moments later he testified "this is not a manifestation of his disability ." Tr. vol. 1, p. 99. The Petitioners focused on the first statement while the Respondent focused on the second.

51. The IEP team issued a Prior Written Notice for the May 7, 2021 meeting which notified the parents of the decision that [redacted]s "bomb threat" was not a manifestation of his disabilities. Stip. 53. Throughout the hearing and appeal process, Petitioners maintain that providing the MDR and resultant Prior Written Notice gave [redacted] the right to all the procedural safeguards afforded by IDEA.

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

53. The school made interpreters available at both IEP meetings, April [redacted]th and May [redacted]th. 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.

54. None of the MDR documents were written in [redacted] and none of the documents advised the parents that they could request translation of the documents. See Stip. Ex. 1-8.

55. [redacted] probably did not understand how the referral, MDR, and disciplinary processes differed, especially the consequences of an adverse MDR decision.

56. An interpreter was available during the Hearing for this case. The interpreter was used frequently. The ALJ observed that during the contested case hearing, [redacted] clearly needed interpreter services.

57. In her testimony for the Respondent, Senior Administrator [redacted] stated that 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. But, in the context of 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. 248-49. Unlike her experience with other students, at the time of the MDR [redacted] was not "suspected" to be an eligible student but had been referred to determine eligibility.

58. According to Senior Administrator [redacted] the MDR team did not have sufficient information at the time of the May [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 must reconvene the MDR "to make sure that [the student is] getting their services." Tr. vol. 2, pp. 251-52. 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 input from [redacted]s mental health providers

59. Petitioners raised a new argument of "equitable estoppel" in their revised proposed decision to the ALJ, even though the Parties were only asked to include updated transcript citations. Pet.'s Final Proposed Decision p. 34, 20-26. As this argument was raised for the first time after the hearing and without amendment of the Petition, it was not considered by the ALJ. Had this really been an important issue for the case, the Petitioners would have raised it earlier in the proceedings so that it could have been fully argued by the parties and considered by the ALJ. Also, it would seem to be an issue for a legal proceeding that may be outside the scope of IDEA's protections. The SRO did not give it serious consideration.

60. Many of the documents presented as exhibits were extracted from the ECATS digital file used by the Respondent for special education records. As such they did not have signatures. The attorneys, however, authenticated all documents.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings and the State Review Officer have 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 et seq. The provisions of 20 U.S.C. §1415 and N.C.G.S. § 115C- 109.6(a) control this review. Even though the Respondent initially disputed that the ALJ had jurisdiction over this case, the SRO holds that the ALJ and SRO have jurisdiction.

2. Respondent, Wake County Board of Education, is a local education agency receiving monies pursuant to the IDEA and is subject to the provisions of applicable federal and state laws and their implementing regulations.

3. N.C.G.S. 115C-109.6 provides that due process hearings under IDEA and state law be initiated by petition to the Office of Administrative Hearings (OAH). Except for a few restrictions imposed on OAH by N.C.G.S. 115C-109.6, OAH must conduct the hearing utilizing the provisions of N.C.G.S. 150B, Article 3.

4. Petitioners bear the burden of proof in North Carolina. The standard is by a preponderance of the evidence. Schaffer v. Weast, 546 U.S. 49, 62 (2005); N.C.G.S. 150B-25.1(a).

5. 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).

6. In cases based on IDEA, "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 County 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*.

7. In general, a parent may file a due process complaint on any of the matters described in 300.503(a)(1) and (2) relating to the identification, evaluation, or educational placement of a "child with a disability," or the provision of FAPE to the child. 34 CFR 300.507.

8. As indicated by the ALJ, 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 initial issue in this case. Here, the question was not whether [redacted] was entitled to an MDR, he was provided one. Having been provided an MDR, did IDEA's procedural safeguards apply? If so, was the MDR procedurally and substantively appropriate?

9. It is undisputed that at the time of the incident, [redacted] had not been identified as a "child with a disability" subject to the protections of the IDEA. A "child with a disability is defined by 20 U.S.C. 1401(3):

> The term "child with a disability means a child—
> (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
> (ii) who, by reason thereof, needs special education and related services.

10. Whether or not a child who has some sort of disability is eligible as a "child with a disability" under IDEA is a determining factor in this decision.

11. 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 may still assert any of the protections of the IDEA <u>if the LEA had knowledge that the child was a "child with a disability" before the behavior that precipitated the disciplinary action occurred</u>. 20 U.S.C. § 1415(k)(5); 34C.F.R. § 300.534(a). *(Emphasis added)*

12. 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:

> 1) The parent of the child expressed concern in writing to supervisory or administrative personnel of the educational agency, or a teacher of the child, that the child is in need of special education and related services;
> 2) The parent of the child must have requested an evaluation; or
> 3) The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child 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); 34 C.F.R. 534(b)(1-3).

13. Petitioners failed to prove that any of these criteria were met prior to the "bomb threat." Petitioners, therefore, have failed to meet their burden of proof that WCPSS had a "basis of knowledge" that [redacted] was a "child with a disability" and thus entitled to an MDR.

14. As WCPSS did not have any "basis of knowledge" to suspect that [redacted] may be a "child with a disability" prior to the incident, the protections of the IDEA do not apply to [redacted] with respect to the disciplinary actions taken by the school system.

15. The "protections" referred to in the IDEA 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).

16. Because WCPSS <u>had no</u> "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. 34 C.F.R. 300.534(d)(1). The ALJ and SRO have no jurisdiction regarding the disciplinary actions taken by WCPSS on April 15, 2021.

17. Respondent argues that the mere fact WCPSS provided a gratuitous MDR 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, even though [redacted] was not entitled receive a FAPE. As such, Petitioners argue that the MDR should have been conducted in a substantively and procedurally appropriate manner. Neither the IDEA nor implementing regulations address this unique situation.

18. Providing a gratuitous IDEA process to one not entitled to that process does not appear to have been litigated in the special education context. The concept, however, has been reviewed by federal courts several times regarding student discipline. Those courts tend to reject the concept that schools providing gratuitous processes to the student creates additional rights related to the adequacy of those processes. Heyne v. Metro. Nashville Pub. Sch., 655 F.3d 556, 569 (6th Cir. 2011), (Any such additional procedural protections are not required by due process nor do they give rise to any due process rights."); Smith on Behalf of Smith v. Severn, 129 F.3d 419, 429 (7th Cir. 1997), ("The completely gratuitous review by the school board neither is required by due process not does it give rise to any due process rights."); and McGrath v. Town of Sandwich, 22 F. Supp. 3d 58, 66 (D. Mass. 2014), ("Ty's claim that he received insufficient process in his appeal to Superintendent Canfield will be dismissed. Ty had no procedural due process right to appeal a decision to suspend him for ten days or fewer and therefore was not entitled to any due process protections in the gratuitous review of his suspension by Superintendent Canfield.").

19. Several school cases not involving students also provide some insight regarding a gratuitous process. Woodward v. Hereford Indep. Sch. Dist., 421 F. Supp. 93, 97 (N.D. Tex. 1976), (denying relief to terminated teacher, stating "[s]ince the plaintiff has no right to a hearing, the adequacy of the hearing gratuitously granted by defendants is not open to review."); and Clark v. Whiting, 607 F.2d 634, 642 (4th Cir. 1979), ("A governmental body may frequently extend to a disgruntled party a hearing, even though the party is not entitled of right to such a hearing. But, we do not subscribe to the view that such act of courtesy ripens automatically into an act of right generating all the requirements of a trial-type due process hearing, as the plaintiff would assert.").

20. WCPSS did not have to provide the gratuitous MDR, but it did so. WCPSS also provided a gratuitous Prior Written Notice. Although the Petitioners argue that this would invoke all the protections afforded by IDEA, these procedural safeguards were intended to ensure FAPE only for a "child with a disability," or in some cases a child suspected to have a disability.

21. Having received the Prior Written Notice, the Petitioners were entitled to file a petition. The procedural safeguards of IDEA would then be used to determine the rights [redacted] would have, if any.

22. To determine if [redacted] was legally entitled to all the protections afforded to a "child with a disability" IDEA's procedural safeguards themselves must be utilized. This would necessitate, at a minimum, a hearing before an ALJ. If the ALJ finds that the child is not a "child with a disability" at the time of the behavior, those rights granted by IDEA would not exist. The nonexistent rights would include the right to have an MDR that is procedurally and substantively compliant, and a hearing to contest that MDR. In a situation where there are no rights under IDEA, the ALJ would lack subject matter jurisdiction. *[Emphasis Added]*

23. In the hearing necessitated by the questions raised in this case, if the ALJ finds that that [redacted] is a "child with a disability," then a decision must be reached regarding whether the MDR is procedurally and substantively compliant. If, however, the ALJ finds that the [redacted] is not a "child with a disability," then the ALJ would lack subject matter jurisdiction regarding the MDR. The petition should be dismissed, for IDEA's additional procedural safeguards are not available.

24. The SRO finds that once the ALJ had held the hearing *(see 22 and 23 above)* and made the determination that [redacted] was not a "child with a disability" and entitled to the procedural safeguards of IDEA, the ALJ would lack subject matter jurisdiction regarding whether the MDR was procedurally and substantively compliant.

25. As there was a lack of jurisdiction, much of the ALJ's Final Decision was superfluous and unnecessary. The SRO, however, addresses and includes some of the facts and conclusions for a clearer understanding of the case.

Procedural Safeguards and the MDR

26. On the date on which the decision is made to make a removal that constitutes a change of placement of a "child with a disability" because of a violation of a code of student conduct, the LEA must notify the parents of that decision, and provide the parents the procedural safeguards notice described in § 300.504. 34 CFR 300.530(h).

27. Although a procedural notice (Prior Written Notice) was provided to Petitioners following the MDR meeting, it was not provided to the parents of a "child with a disability." Gratuitously providing a notice to one not legally entitled to receive such a notice does not automatically confer all the rights afforded by IDEA.

28. The information available to the MDR team supported that [redacted]s conduct was not a manifestation of his disability. Granted, the MDR team did not have all the information that was potentially available at the time of the hearing, but the Petitioners did not even produce sufficient evidence during the hearing to show a manifestation.

29. Having the burden, key evidence was still missing from Petitioners' case. At the time of the hearing, sufficient information was available from evaluations, medical records, and mental health records to possibly make the connection between [redacted]s behavior and his possible disability. The Petitioners, although they had the burden, provided no evidence from psychologists, psychiatrists, or other mental health clinicians who could make this essential connection. Qualified experts could interpret the evidence available to determine a that [redacted]s behavior was a possible manifestation of his disability. Such expert testimony would have been invaluable to prove that the decision made by Respondent's MDR team was wrong.

30. The Petitioners essentially expected that the ALJ (and now the SRO) to find that simply because [redacted] 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. Petitioners, throughout the documents for the case and in the hearing, seem to say that, simply because he committed an atrocious act and was committed involuntary that he is automatically entitled to be a "child with special needs." 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.

31. The ALJ put it succinctly: "This logic [of Petitioners] 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." ALJ Final Decision, Conclusion 55.

32. 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. Petitioners must also prove that he needs or, at a minimum, is "suspected" of needing special education and related services. They made no attempt to do so.

33. The Petitioners failed to prove by a preponderance of the evidence that the MDR was substantively flawed or even required.

34. The Petitioners failed to prove by a preponderance of evidence that [redacted]s behavior was a manifestation of his disability and that the MDR team's decision was substantively wrong. The Petitioners also failed to prove that [redacted] was a "child with a disability" and therefore entitled to an MDR.

35. The Petitioners, however, proved by a preponderance of the evidence that the MDR was procedurally flawed. The procedural violations, however, were harmless because [redacted]s conduct was not a manifestation of his disabilities as a "child with a disability."

36. 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); N.C.G.S. 115C-109.8(a).

37. 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.G.S. § 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. Rowley, 458 U.S. 205–06 (1982).

38. It is a procedural violation of IDEA if parents of a "child with a disability" are denied meaningful participation in making decisions regarding their child's education.

39. [redacted]s Parents probably were not able to meaningfully participate in the MDR meeting because their native language is [redacted] Other than providing an interpreter during the meeting, however, there is no requirement in IDEA for all the documents to be in the native language of the parent. The exception is the Prior Written Notice. 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)(1). This was not done.

40. "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). Even though an interpreter was provided in this case, there was evidence that the parents did not take advantage and use the interpreter effectively. The SRO concludes that it is doubtful the parents clearly understood the school's communications because of the language barrier.

41. During the hearing for this case, an interpreter was available throughout the hearing and was used extensively. The ALJ made a serious effort to ensure that [redacted]s limited proficiency in English did not prevent a successful hearing.

42. While Petitioner [redacted]and [redacted]s father may not have fully participated in the decision-making process during the MDR meeting, Petitioners failed to prove by a preponderance of the evidence that had procedural violations not occurred, the results would have been different.

43. WCPSS committed the following procedural violations in conducting the MDR meeting and impeded the Parents' meaningful participation in the decision-making process:
a) The Prior Written Notice was not provided or translated into [redacted]
b) While an interpreter was present during the MDR meeting, the interpreter was not used effectively to ensure that the Parents clearly understood the process and what was happening.
c) The MDR team did not obtain all medical documentation.
d) The MDR team did not have access to the psychological and speech-language evaluation reports.
e) The MDR team did not invite [redacted]s treating mental health providers to attend the meeting or solicit information from those providers to understand [redacted]s mental problems.

44. Petitioners failed to prove by a preponderance of the evidence that access to additional mental health and medical documentation that was not obtained prior to the MDR meeting would have changed the MDR team's decision. Failure to obtain and consider that information was a procedural violation. It was harmless, however, because the Petitioners did not show that the additional information would have caused a different result in the substantive decision.

45. The procedural violations are not sufficient to support a finding that a district failed to provide FAPE. Gadsby v. Grasmick, 109 F.3d 940, 956 (4th Cir. 1997). They certainly did not impede [redacted]s right to a FAPE, for that right did not exist.

46. There were procedural violations that may have impacted the Parents' opportunity to participate in the decision-making process at the MDR. The Petitioners, however, 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 found in 34 CFR 300.534. The procedural violations, therefore, were harmless.

47. Since Petitioners cannot prove the substantive issue that [redacted]was denied educational opportunities under the IDEA, the numerous procedural violations are essentially harmless. Again, the ALJ and SRO lack subject matter jurisdiction.

Other Issues

48. The Petitioners had questioned whether it was appropriate for the ALJ to choose not to consolidate the two petitions that were filed. The ALJ had the discretion to do so, and the Petitioners provided nothing to show that the ALJ abused her discretion.

49. As the ALJ and now the SRO have determined that there was no evidence to show that [redacted] was a "child with a disability" at the time of the incident, it was appropriate to declare the first

petition moot. That petition involved the question of whether the Respondent had failed to provide FAPE. The provision of FAPE is an entitlement only for a child who is eligible, or a "child with a disability" under IDEA. The evidence produced in this case confirmed that [redacted] was not eligible at the time of the incident..

50. The Petitioners also appealed the ALJ's denial of the Petitioners' Motion for Additional Evidence that became available after the hearing. The motion was made to introduce evaluative information that was not available at the time the MDR team made their decision, nor was it available during the hearing. Interestingly, the Petitioners knew of this evaluation prior to or during the hearing. They had ample opportunity to make this motion or otherwise attempt to introduce this evidence during the hearing, but failed to do so. The ALJ did not abuse her discretion in denying the motion. She had the authority under 34 CFR 300.511(d).

Summary of Conclusions

51. Although the MDR provided was procedurally flawed, [redacted] was not entitled to that MDR. WCPSS had no "basis of knowledge" and [redacted] had not yet been determined to be a "child with a disability" in need of special education.

52. If, however, [redacted] is later found eligible during the disciplinary period, he would then be entitled to all rights under IDEA. This would not include another MDR based on the previous incident, but would require WCPSS to provide special education and related services taking into consideration the updated information available. The guidance is in 34 CFR 300.534(d)(2)(iii):

> If the child 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, the agency must provide special education and related services in accordance with this part, including the requirements of §§ 300.530 through 300.536 and section 612(a)(1)(A) of the Act.

53. 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 prerequisites had not been met at the time as of May [redacted], 2021, the MDR at issue in this case was premature.

54. As a request was made to evaluate [redacted] for suspected disabilities after the "bomb threat," the evaluation must be conducted in an expedited manner. Meanwhile, [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 until or unless the School Board readmitted him, N.C.G.S. §§ 115C-390.11 - 390.12, or he is determined to be a "child with a disability." 34 CFR 300.534(d)(2)(iii).

55. [redacted] has been referred and is awaiting that determination. Based on his referral and subsequent evaluation, if [redacted] is found to be a "child with a disability," then CFR 300.534(d)(2)(iii) clearly states that the provisions of 34 CFR 300.530 must be applied. WCPSS must then institute the process to serve [redacted] with special education and related services. The SRO does not interpret this to mean that there is a retroactive right to an MDR based on the previous incident before WCPSS had a "basis of knowledge." Therefore, part of the ALJ's decision that specified that [redacted] might have the right to a new MDR must be reversed.

56. The right to an MDR at a particular point in time is not subject to alteration based on subsequent events. No matter what happens later, there was no "basis of knowledge" at the time of his conduct that led to this case. The regulations are clear. The time for making a

determination is established at the moment of the conduct itself. The "basis of knowledge" must exist "before the behavior that precipitated the disciplinary action occurred." 34 C.F.R. § 300.534(a).

57. The IEP team is directed to finish the eligibility determination. If [redacted] is found to be eligible, WCPSS must proceed in accordance with the requirements of 34 C.F.R. 300.534(d)(2)(iii). [redacted] will then have an ongoing right under the IDEA to an MDR for future incidents, along with a hearing to contest that MDR if the decision is adverse. 20 U.S.C. § 1415(k)(5)(D).

58. The ALJ made the following Conclusions 70 and 71:

> Given that, as of May [redacted], 2021, [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). (ALJ Final Decision, Conclusion 70.)
>
> 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. *(ALJ Final Decision, Conclusion 71.)*

59. The SRO finds that ALJ's Conclusions 70 and 71 are supported by the facts of the case and the applicable law. It was appropriate to dismiss the Expedited Petition.

60. During unique or novel cases similar to this in the future, it would behoove the ALJ to make a determination early in the hearing concerning a child's eligibility as a "child with a disability." This would dictate the need for further evidence, if any. Initially, however, it was probably not apparent to the ALJ and/or the parties that this unique case would raise jurisdictional questions concerning procedural safeguards available in IDEA.

DECISION

Based on the foregoing:

1. The ALJ's Final Decision is upheld. Dismissal of the Petition was appropriate.
2. Petitioners did not meet their burden of proof on all issues.
3. [redacted] was not entitled to the protections of the IDEA at the time of the conduct that led to his suspension. Prior to [redacted]s conduct, the Respondent did not have a "basis of knowledge" that [redacted] was a "child with a disability."
4. The Respondent was not required to hold a Manifestation Determination Review (MDR). The Petitioners were not entitled to challenge the MDR process because [redacted] was not a "child with a disability."
5. The ALJ was correct in determining that she lacked subject matter jurisdiction regarding the MDR. Petitioners, however, did have the right to file the petition and have a hearing to determine [redacted]s rights. Following a finding that he was not a "child with a disability," [redacted] was not entitled to the other protections of IDEA. Once the ALJ had made that finding, the ALJ would lack subject matter jurisdiction over the other issues.
6. In the alternative, even though the Respondent held a gratuitous MDR, the Petitioners failed to prove that [redacted]s conduct was a manifestation of his disabilities or that the gratuitous MDR created additional rights

7. WCPSS failed to comply with IDEA's procedural requirements during the gratuitous MDR. Petitioners, however, failed to meet their burden to prove that [redacted] was entitled to those procedural protections. The alleged procedural violations did not cause educational harm to a "child with a disability." Any harm that was caused cannot be remedied using IDEA's procedural safeguards.
8. Subsequent to his suspension, [redacted] has been referred for evaluation as a possible "child with a disability." This entitles him to the protections afforded by IDEA with regard to that referral and possible identification. In the event he is determined to be a "child with a disability," under the provisions of 34 CFR 300.534(d)(2)(iii) he would then become entitled to special education and related services. He, however, would not be entitled to a "redo" of the previous MDR as implied by the ALJ's Final Decision.
9. If it has not already done so, the Respondent must convene an eligibility meeting without delay to determine [redacted]s eligibility under IDEA.

This the 23rd day of November 2021

[redacted]
State Review Officer

NOTICE

Any party aggrieved by this Decision may institute a civil action in state court within 30 days after receipt of this Decision as provided in N.C.G.S. § 115C-109.9 or file an action in federal court within 90 days as provided in 20 U.S.C. § 1415.

CERTIFICATE OF SERVICE

I hereby certify that this Decision has been duly served on the attorneys for Petitioner and Respondent by electronic and certified U.S. Mail, and to others by U.S. Mail addressed as follows:

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This the 23rd day of November 2021

[redacted]
State Review Officer