

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Fairfield Board of Education

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Appearing on behalf of the Board: Attorney Michelle Laubin
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Appearing before: Attorney Brette H. Fitton
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Did the Board err when it found that Student's conduct was not a manifestation of his disability?
2. Was the Interim Alternative Educational Setting (hereinafter, "IAES")¹ provided to Student upon removal inappropriate?
3. Is the Student entitled to compensatory education for the period of time Student has been placed in the Interim Alternative Educational Placement?

PROCEDURAL HISTORY:

On August 14, 2013, the Fairfield Board of Education received a Request for an Expedited Special Education Due Process Hearing. The undersigned hearing officer was appointed on August 20, 2013. A prehearing telephone conference was held on Wednesday August 28, 2013. Pursuant to 34 CFR § 300.532 (c)(2), the hearing was required to occur within 20 school days of the filing of the complaint and the decision was to be mailed within 10 school days after the hearing. Per the academic calendar of the Fairfield Public School System, the first school day took place on August 29, 2013. Utilizing the August 29, 2013 start date and not counting scheduled school holidays, the 20th school day fell on September 27, 2013. When the hearing concluded on September 25, 2013, the deadline for mailing the decision was 10 school days thereafter, October 9, 2013. The hearing convened on September 12, 2013, September 17, 2013, September 19, 2013 and September 25, 2013.

The Board's witnesses were Director of Pupil Services Andrea Leonardi (hereinafter "Director"), Halley Ceglia (hereinafter "Social Worker"), Special Education Teacher/Case Manager Dawn Jara (hereinafter

¹ The original statement of issues referred to an Interim Alternative Educational *Placement*. The correct term is Interim Alternative Educational Setting, and that term is utilized in this decision.

“Case Manager”), Detective Beth Irizarry, Mr. Paul Zhitomi, (hereinafter “Regular Education Teacher”, and Mr. James Coyne, (hereinafter “Headmaster”).

The Parent’s witnesses were Parent, Doctor Paul Krubiner (hereinafter “Parent Psychologist”), and IT Professional, Lee Solt.

The Parent submitted exhibits numbered P-1 to P-19. Objections were made to P-10, P-11 (in part), P-13, P-14 and P-15 on the basis of relevancy. The relevancy objections were overruled in an order issued by the hearing officer on September 16, 2013, in which she found that the objections made would go to the weight of the evidence not the admissibility. The right to make objections on other grounds was preserved for the time of introduction. Objections to portions of P-11 that could not be properly authenticated were sustained. All other exhibits were entered as full exhibits.

The Board submitted exhibits numbered B-1 to B-73. Objections to B-1 through B-38, B-41 and B-43 through B-47 were overruled and were entered as full exhibits.

Parent’s Request for an Expedited Special Education Due Process Hearing was entered as a full exhibit as Exhibit HO-1.

All motions and objections not previously ruled upon, if any, are hereby overruled.

To the extent that the procedural history, summary, and findings of fact actually represent conclusions of law, they should be so considered, and vice versa. For reference, see *SAS Institute Inc. v. H. Computer Systems, Inc.*, 605 F.Supp. 816 (M.D. Tenn. 1985) and *Bonnie Ann F. v. Calallen Independent School District*, 835 F.Supp. 340, 20 IDELR 736 (S.D. Tex. 1993).

STATEMENT OF JURISDICTION:

This matter was heard as a contested case pursuant to Connecticut General Statutes (C.G.S.) §10-76h and related regulations, 20 United States Code §1415(f) and related regulations, and in accordance with the Uniform Administrative Procedure Act (U.A.P.A.), C.G.S. §§4-176e to 4-178, inclusive, §§4-181a and 4-186.

FINDINGS OF FACT:

After considering all the evidence submitted by the Parties, including documentary evidence and testimony of witnesses, I find the following facts:

1. Student is presently in the 11th grade and is eligible for special education under the category of Autism. (Testimony of Parent, Testimony of Social Worker, B-56). Student’s primary eligibility was changed from LD to Autism after his 8th grade triennial. (Testimony of Parent). Student’s disability places him on the high-functioning end of the autism spectrum, in what formerly would be categorized as Asperger Syndrome. (Testimony of Social Worker).
2. Student’s present levels of academic achievement and functional performance described in May 6, 2013 Individualized Education Program (hereinafter “IEP”) are similar to those presented in Student’s May 7, 2012 IEP. (B-49, B-56).

Description of Student's Disability

3. Student has weaknesses in language arts in the area of writing. (B-56). Student's weaknesses impacted his ability to clearly express his understanding of content area concepts and text without specialized instruction and accommodations. (B-56).
4. Student has weaknesses in the area of organization which impact his ability to efficiently access the general curriculum without specialized instruction and accommodations. (B-56). Despite these organizational challenges, Student is usually able to find required items and is prepared for class. (B-56).
5. Student has weaknesses in the behavioral and social spheres in that he has difficulty maintaining social interaction with others, especially during unstructured time and when an activity or subject does not interest him. (Testimony of Parent, Testimony of Social Worker, B-56). Student has difficulty initiating conversations with peers and maintaining interactions with them. (Testimony of School Social Worker, B-56).
6. Student has a delayed social and emotional understanding of himself and relationships in general. (Testimony of School Social Worker) Developmentally the Student presents in a social and emotional framework as 10 years old rather than his actual chronological age. (Testimony of Parent Psychologist).
7. While Student has weaknesses in the behavioral and social spheres, he has expressed contentment with his social life. (B-56). Student prefers to spend time alone focusing on his interests. (Testimony of Social Worker, Testimony of Case Manager, B-56). Student had social difficulties with other students in Biology in the 2012-2013 school year; students picked on him when he mispronounced the teacher's name or talked about things that weren't relevant to the topic at hand. (B-52).
8. Communication weaknesses for Student include pragmatic language deficiencies and difficulty initiating conversations with peer and maintaining interactions with them. (B-42, B-56) The ability to understand ambiguous language is a challenge area. (B-56) Student is very concrete and literal in his thinking. (Testimony of Case Manager, Parent Psychologist).
9. Intelligence and Achievement Testing show that the Student has average to low average intelligence. (Testimony of Parent's Psychologist, B-18, B-39).
10. Student's processing ability in general is slow, although the speed varies depending on the type of task he is doing. (Testimony of Parent and Parent Psychologist, B-39). Rapid picture naming and visual matching are in the very low range. (Testimony of Parent Psychologist; B-39). The more complex a visual task the more difficult it will be for Student and the longer it will take him to complete the task. Tasks involving copying, writing and visual matching are more difficult for him. (Testimony of Parent Psychologist).
11. Student, if provided with sufficient time is able to produce work with same accuracy as non-disabled peers working at an average level. (Testimony of Parent Psychologist).
12. Student's reading levels were commensurate with his peers. (Testimony of Case Manager).

13. Student shares characteristics of other students with Aspergers in that, if he there is information he really likes, he is very fast to retrieve and receive and express that information. (Testimony of Social Worker).
14. Student can appear disinterested when engaging peers and lacks follow through with social plans, engagement and school involvement. (Testimony of Parent Psychologist).
15. A Planning and Placement Team meeting (hereinafter "PPT") was held on May 6, 2013 to plan the triennial evaluation, conduct an annual review and address transition planning. The PPT recommendations for services in the IEP were 2.1 hours per week of special education services 3 times in the learning center, .7 hours per week of speech and language and .7 hours per week of social work. (B-56).
16. At the May 6, 2013 PPT Meeting, the team reviewed student's current progress, reviewed and revised present levels of performance, reviewed goals and objectives and new goals and objectives were presented and accepted. (Testimony of Case Manager, B-56). A change in services was recommended for Student's junior year, in that Student's services were going to be provided in the context of the learning center rather than through a co-taught class. (Testimony of Case Manager). The change in setting was agreed to in order to allow Student to participate in honors level classes. (Id.)
17. At the annual review on May 6, 2013, the team discussed what evaluations and tests should be conducted as part of Student's Triennial evaluations. (B-57). Areas to be assessed included dysgraphia, cognitive, achievement, social skills and adaptive academics and pragmatic and written expression and expressive language. (B-57). Parent gave written consent for the evaluations on May 6, 2013. (Id.)
18. At the time of May 6, 2013 PPT, the only confirmed computer misuse by Student was behavior which Student had admitted, and had received after school detentions. (Testimony of Case Manager)
19. Student acknowledged receipt of the Student Handbook in writing. (B-50). The Student handbook includes the District Network Guidelines, which describes a computer code of conduct for students. (B-51). The Guidelines contain "I" statements such as "I will not damage computers, alter systems or networks." (B-51).
20. Student has the ability to differentiate between right and wrong. (Testimony of Parent Psychologist and Social Worker). Student demonstrated that he is able to follow the rules and meet expectations outlined for him. (Testimony of Case Manager and Social Worker).
21. Student had no disciplinary issues in 9th grade. (Testimony of Parent).
22. Student was given a week's worth of detention beginning on March 25, 2013 for remotely shutting down another student's computer twice. (Testimony of Parent; B-53). Parent was unaware of the detention until April 10, 2013 when she had a conversation with the Dean who informed Parent of the detention by phone. (Testimony of Parent). The Dean indicated in this April 10, 2013 phone call that he had spoken to Student about the detention and not engaging in the behavior again. (Testimony of Parent). After Parent and Dean spoke by phone, the Dean followed up with an email listing "possible list of mischief behavior" which he indicated he would continue to investigate and requested mom find out

about from Student. (Testimony of Parent, B-60). When Parent reviewed the list with Student, he admitted only to changing the background color on one computer. (Testimony of Parent).

23. A meeting was held on April 26, 2013 with Parent and Dean and Case Manager to discuss Student getting his netbook computer back and files that had been found in Student's H drive, where Fairfield Warde students save their work. (Testimony of Parent).

24. On May 30th, Student's Netbook and mouse were confiscated by Student's English teacher and Student's H drive was shut down. (Testimony of Parent).

25. Student was able to successfully work with peers when asked, but was not the type of student to actively try to start conversations or make friends. (Testimony of Case Manager).

26. Student has demonstrated the ability to follow the rules in context of weekly social skills group. (Testimony of Social Worker). General rules for computer usage discussed in same group with a discussion about house computer use was for school work related behavior (Id.) In the context of a social skills group session discussing bullying, Student related that he had not been bullied and that he did not feel uncomfortable. (Id.)

27. Student was encouraged to discuss problems related to computer issues with school psychologist and school social worker. (Testimony of Social worker).

28. Student is able to understand that hacking is illegal. (Testimony of Social Worker).

29. Student spends a lot of time on the computer and playing video games which he can play online with other people. (Testimony of Parent Psychologist, Testimony of School Social Worker). While Parent indicated that Student does not socialize outside of school. (Testimony of Parent), Student does engage in social activities online. (Testimony of Parent Psychologist). Student expressed an interest in hacking and researched hacking on the internet. (Testimony of Parent Psychologist).

30. Student admitted to remotely shutting down computers and changing screen on his English teacher's computer, but denied any other actions. (Testimony of Parent Psychologist).

31. As of the date of the suspension, Student had a cumulative GPA of 3.0532. (B-65).

32. For the 2012-2013, school year, the majority of Students time in school was spent in general education curriculum. (B-59).

33. Student's transcript for 9th grade 2011-2012 school year shows that the Student earned 4 As 2 B+s 1 B 2 B- 2 Cs and a Pass. Student's transcript for 10th grade demonstrated improvement over the 2011-2012 year. (B-65).

34. During the hearing Parent characterized Student's two computer courses in 10th grade as "slightly unstructured", which Parent defined as classes in which a Student is given a free opportunity to work on assignments and there is a little bit more verbal interaction. (Testimony of Parent). Parent contrasted the computer classes with math and science which Parent believed to be more task-oriented with worksheets and direct instruction. (Testimony of Parent).

35. Student excelled in his Computer Games D and P receiving a final grade of A+ (B-63, and P-19) and a final grade of B in his CAD Computer class. (P-19) Student received a C in Geometry and B- in Biology. (P-19).
36. Student sought and was given permission to take an AP computer course in his Junior year. (Testimony of Regular Education Teacher).
37. Student presents as a child who is not vulnerable to pressure to do anything outside his very narrow areas of interest. (Testimony of Director).
38. Subsequent to a reprimand from the Dean, Student's computer teacher had a conversation with Student about the conduct on the computers which teacher characterized as being "naughty". Student acknowledged being "naughty" and said the behavior wouldn't happen again. (Testimony of Regular Education Teacher).
39. On April 10, the dean sent an email to Parent with a possible list of mischief behavior including: deleting a '32 bit system in a school computer lab, installing an administrative profile in the command prompt so that student can remotely shut English teacher's computer, resetting mac computers in the library mac lab, overloading the project drive by filling it up with games that have large memory - asked mom to let him know what she found out and continue to investigate from his end. (B-60).
40. On May 27, 2013, an email was sent by Parent to Case Manager P-16. Pursuant to this request an informal meeting was scheduled for June 7, 2013. (Testimony of Case Manager). This meeting did not take place due to Student's suspension on June 3, 2013. (Testimony of Case Manager). In lieu of an informal meeting, the MD PPT was held on June 12, 2013. (Testimony of Case Manager).
41. The suspension report dated June 3, 2013, indicated that Student admits to some activity on the network but denied causing the network to crash. Student was found in possession of flash drives with computer "hacking" tools installed. Some of these tools were also found on his H drive. (B-64). Preventative measures taken were after school detentions and conferences with dean and teachers. (B-64).
42. Suspension report dated June 3, 2013 from Housemaster to Superintendent 10 day suspension reason for suspension - violation of acceptable use policy causing major disruption to school computer network. (B-64).
43. On June 4, 2013, Student was suspended. (B-64).
44. On June 7, 201, the Superintendent sent a letter to Parents, in which he informed Parents that depending on the outcome of the MD PPT scheduled for June 12, 2013 at 8:30 a.m. an expulsion hearing would be held at 12:30 p.m. on that same day. The allegations contained in the letter were that during a period of time including but not limited to March 20, 2013 through June 3, 2013 Student engaged in various acts of misconduct in violation of the Code of Conduct of the Fairfield Public schools, including unauthorized use of the school system's computer network, unauthorized access into the school system's computer network, destruction and manipulation of teacher and student electronic files, and unauthorized interference with the operation of school computers, electronic devices, and network administration systems. The Board further alleged that Student's misconduct caused serious

disruption of the educational process throughout Fairfield Warde High School and the Fairfield Public Schools. (B-67).

45. On June 6, 2013, the District sent out a notice inviting parents and school based PPT members to a PPT meeting which was scheduled to take place at 8:30 a.m. on June 12, 2013. (B-66) The notice identified the purpose of the meeting was to determine whether or not the student's alleged misconduct was a manifestation of his disability. (B-66).

46. On June 12, 2013, the manifestation determination PPT meeting was held at Student's high school. (Testimony of Parent). In attendance were Student, Parents, Mother's Boyfriend, Family Member acting as Family Attorney, Student's Special Education Teacher/Case Manager, School Social Worker, Director of Pupil Services, Board Attorney, Dean, Student's Regular Education Teacher, Special Education Coordinator and Fairfield Warde High School Housemaster. (B-70). Two invitees, the school psychologist and the school speech and language professional were not in attendance. (Testimony of Parent).

47. The MD PPT discussed the misconduct in question, which was presented by team members, including the Dean of Students who was present at the meeting. (Testimony of Case Manager, Testimony of Director). Student's disciplinary history was reviewed and attendance records were reviewed. (Testimony of Case Manager and Director). The annual review which had been conducted in March, grades, results of assessments, nature of Student's disability and how it could potentially relate to his conduct, Student's current IEP and reports of teachers were reviewed. The Student's special education file was present in the meeting room and the meeting lasted approximately 2 hours. (Testimony of Case Manager, Testimony of Director).

48. The behavioral/diagnostic characteristics of the student that were the subject of the review at the MD PPT were: difficulty developing and maintaining relationships, articulating and expanding on ideas via oral or written communication, comprehension of ambiguous language, pragmatic language, perspective taking skills, paying attention to details given an assignment or directions, self-advocacy and articulation of specific needs. (B-70).

49. At the meeting, members of Student's family expressed their opinions. (Testimony of Parent). Family members expressed the belief that Student has not committed the alleged misconduct that was the subject of the disciplinary matter. (Testimony of Parent, Testimony of Director). Family members raised issues of whether or not the accommodation of preferential seating had been implemented and whether or not classes were structured. (Testimony of Parent). Family members raised the possibility that Student engaged in this behavior to get attention from peers. The School Based Team members understood and considered family's contentions, but rejected them when coming to the ultimate conclusion that Student's conduct was not a manifestation of his autism. (B-69).

50. At MD meeting School Based Team members discussed behavior of Student taking down the network, shutting down computers, having flash drives which were confiscated and network crashes or shutdowns. (Testimony of Case Manager, Testimony of Parent, Testimony of School Psychologist)

51. During MD PPT meeting Parents raised the issue of whether or not the IEP was being implemented, specifically questioning whether or not preferential seating was implemented. (B-69). Team determined

that preferential seating was utilized, but that the accommodation of preferential seating would not have prevented the misconduct. (B-69).

52. Family members also questioned whether or not positive reinforcement had been implemented at the MD PPT. (Testimony of Case Manager). Accommodation of positive reinforcement and preferential seating were implemented in Student's co-taught English class. (Testimony of Case Manager).

53. The School Based Team members present at the MD PPT meeting determined that the conduct in question was not a manifestation of Student's disability. (Testimony of Parent, Testimony of Director, B-69, B-70). The family members, including family member acting as family's attorney disagreed with the School Based Team's findings. (Testimony of Parent, Testimony of Director, B-69).

54. As of the last date of hearing in this matter the expulsion hearing had not yet concluded and the Student had yet to be expelled. (Board's Brief).

55. Parent received an email of IEP document from MD PPT meeting on either July 11, 2013 or July 12, 2013. (Testimony of Parent).

56. At the June 12, 2013 MD PPT meeting, the potential need for an Interim Alternative Educational Setting was discussed and the school based team members identified Cooperative Educational Services-Therapeutic Day Program (hereinafter "CES-TDP") as an appropriate IAES, should the Student be expelled. (Testimony of Director, Social Worker, Case Manager; B-70).

57. Parents did not agree that CES-TDP was an appropriate placement for Student for any length of time, believing that remaining at Fairfield Warde High School was the appropriate placement. (Testimony of Parent, Testimony of Director, B-69).

58. Student attended a program at CES from Kindergarten through 1st grade. (Testimony of Parent). Parent's current concerns are based on her child's experience with that K-1 program, during which she observed that her son's behavior deteriorated and staff were not receptive to input from parents or outside professionals. (Testimony of Parent).

59. Structure at CES-TDP is different from when Student previously attended in Kindergarten and First grade and the high school setting is distinct from the elementary school setting. (Testimony of Social Worker).

60. The CES-TDP would not provide Student with interaction with non-disabled peers. (B-69). There are two CES-TDPs offered for high school students, Student would be placed in the program for Students who internalize rather than externalize their behavior. (Testimony of Director).

61. There was discussion at MD PPT meeting about concern about student being in a program at home alone leading to social isolation and the impact on his mental health. (Testimony of School Social Worker and Director).

62. Placement at CES-TDP would provide student with 6 hours of daily instruction with a therapeutic component with access to related services through speech and language pathologists, social workers and school psychologists. (Testimony of Director, Testimony of Social Worker, B-69). The alignment

between curriculum at CES-TDP and Fairfield Warde will facilitate Student's transition back into his original placement. (Testimony of Director) The CES-TDP's close proximity to Fairfield Warde will facilitate contact between Student's teachers and service providers in both locations and aid in planning for the transition back into a regular education setting. (Testimony of Director).

63. Per the June 12, 2013, the PPT is scheduled to review child's IEP placing child at CES-TDP 30 days after the child was enrolled. (B-69).

64. As Student has yet to be expelled, Student has never attended the CES-TDP and has instead been receiving homebound services. (Testimony of Parent, Testimony of Social Worker, Testimony of Director).

CONCLUSIONS OF LAW AND DISCUSSION:

Manifestation Determinations

1. The removal of a special education student from his placement for more than 10 consecutive school days constitutes a change of placement. 34 C.F.R. § 300.536(a)(1).
2. In instances when a school district determines it is necessary to change the placement of a special education student because of a violation of a code of student conduct, the student is afforded certain procedural protections. 20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530-533.
3. A school district must notify parents of a PPT meeting, including a manifestation determination PPT meeting, early enough to ensure that they will have an opportunity to attend, and must schedule the meeting at a mutually agreed upon time and place. 34 C.F.R. § 300.322(a)(1) and (2). In the case of a manifestation determination PPT meeting, the notice must inform the parent of the decision to change the student's placement and must be accompanied by a copy of the parent's procedural safeguards. 20 U.S.C. § 1415(k)(1)(H).
4. A manifestation determination must be made by the district, the parent, and relevant members of the IEP team as determined by the parent and the district. 20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1).
5. The manifestation determination results from an analysis of the child's behavior as demonstrated in different environments and over time. All relevant information in the student's file, including the IEP, any observations of teachers, and any relevant information from the parents must be reviewed to determine if the conduct was caused by, or had a direct and substantial relationship to the student's disability, or was the direct result of the district's failure to implement the student's IEP. 34 C.F.R. § 300.530(e).
6. Incidences where a Student has exercised bad judgment have been determined to be unrelated to the child's disability. *Fitzgerald v. Fairfax County Sch. Bd.*, 50 IDELR 165 (E.D. Va. 2008) *Lancaster Elementary Sch. Dist.*, 49 IDELR 53 (SEA CA 2007).

7. The district cannot provide its own interpretation of the child's actions -- it must provide the MD team with information about the child's actual conduct. *See South Lyon Community Schs.*, 50 IDELR 237 (SEA MI 2008)

8. "...When a child's misbehavior does not result from his handicapping condition, there is simply no justification for exempting him from the rules, including those regarding expulsion, applicable to other children ... To do otherwise would amount to asserting that all acts of a handicapped child, both good and bad, are fairly attributable to his handicap. We know that not to be so." (*Doe v. Maher* (9th Cir, 1986 793 F.2d 1470, 1480, fn 8, *aff'd., sub nom., Honig v. Doe* (1988) 484 U.S. 305).

Discipline of Special Education Students

9. If the PPT team decides that the student's conduct was caused by, or had a direct and substantial relationship to the child's disability, then the conduct must be determined to be a manifestation of the child's disability, and the child must continue to receive education services that allow the child to progress toward the goals set forth in the IEP. 20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(c) and (e)(2). If the IEP team determines the conduct is not a manifestation of the student's disability, then normal school disciplinary procedures may be used to address the incident in the same way as they would be applied to non-disabled students. 20 U.S.C. § 1415(k)(1)(C); 34 C.F.R. § 300.530(e).

Appeal of Manifestation Determinations

10. A parent who disagrees with any decision regarding placement or the manifestation determination may request a hearing. 20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532(a).

11. Pursuant to the authority granted under 20 U.S.C. § 1415(k)(3)(B)(ii), a hearing officer may return a child with a disability to the placement from which the child was removed; or order a change in placement for a child with a disability. 34 C.F.R. § 300.532(b)(1) and (2).

12. A hearing requested challenging a manifestation determination or a placement decision under 34 C.F.R. § 300.530 or 34 C.F.R. § 300.532 is conducted on an expedited basis and must occur within 20 school days of the date the hearing request is filed. 34 C.F.R. § 300.532(c)(2). A decision must be rendered within 10 school days of the conclusion of the hearing. *Id.*

No Authority for Factual Findings Contrary to Board

13. As evidenced by the testimony and documents provided by Parent, Parent does not believe that Student committed the conduct in question and on that basis is seeking a finding that the Board's decision to expel the student was incorrect. The merits of Board's decision to expel the student are currently being challenged by Parent in the context of an expulsion hearing. Board's Brief. Arguments as to the merits of the Board's factual findings of misconduct are properly brought in the forum of an expulsion hearing, and not a special education due process hearing.²

² To permit concurrent hearings on whether or not student committed misconduct results in both parties incurring the costs of fighting about the same issue on two fronts. The potential clearly exists for the expulsion hearing officer and the special education hearing officer to reach different conclusions as to the merits of the board's findings regarding the student's conduct. Should the decisions conflict, the

14. No legal authority could be found for the proposition that a manifestation determination PPT must evaluate the merits of the district's findings as to whether or how the student's conduct occurred. A similar request to invalidate a manifestation determination on the basis that the conduct in question did not actually occur was addressed in *Danny K. v. Department of Education, State of Hawaii* 57 IDELR 185; 111 LRP 69834. In that case, the U.S. District Court held that to require MD PPTs to engage in such analysis:

“... would essentially deputize manifestation determination teams, and in turn, administrative hearings officers and federal courts, as appellate deans of students. This would be inconsistent with Congress's intent in streamlining the IDEA in 2004. See H. Rep. No. 108-77, at 143-45 (“One of the explicit goals of the discipline improvements within the bill is to ensure classroom safety. The Committee often hears from classroom teachers and school principals that Federal law ties their hands in responding quickly and effectively to very serious student behavior problems and effective management of their classrooms.” Id.

15. The Office of Special Education has stated that “The IDEA and its implementing regulations neither preclude nor require that a hearing officer determine whether a certain action by a student with a disability amounts to a violation of the school district's Student Code of Conduct.” Letter to Ramirez, 60 IDELR 230 (OSEP 12/5/12)

16. OSEP Memorandum No. 13-08 Question E-2 describes the authority of hearing officers in expedited hearings as follows: “An impartial hearing officer conducting an expedited due process hearing under 34 CFR §300.511 hears, and makes a determination regarding, the due process complaint. Under 34 CFR §300.532(b)(2), a hearing officer also has the authority to determine whether the child's removal from his or her placement violated 34 CFR §300.530 (authority of school personnel); whether a child's behavior was a manifestation of his or her disability; and whether maintaining the child's current placement is substantially likely to result in injury to the child or to others.” None of the regulations cited in this section of the Memorandum contain language permitting the hearing officer to independently evaluate the claims of misconduct. 34 CFR §300.511 confers general authority on the hearing officer to conduct special education hearings. 34 CFR § 300.530 (a) provides school personnel with the authority “...to consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this section, is appropriate for a child with a disability who violates a code of student conduct”. Thus, this ensures that a cookie-cutter approach is not applied to change in placement decisions. When read in the context of the rest of section 34 CFR §300.530, in which the permissible actions of school personnel when they are determining whether or not to discipline children with disabilities are clearly delineated, no mention is made of the authority to overturn the factual findings of the body proposing disciplinary action, and 34 CFR §300.530 (a) cannot be read to confer authority on the MD PPT (or by extension, the hearing officer) to reach the merits of the results of Board's investigation.

17. The argument that 34 C.F.R. §530(c), rather than setting out requirements for expedited hearings for a limited set of issues, permits parents to request expedited hearings on *any issue*, provided the hearing conforms to 34 C.F.R. §507, 34 C.F.R. §508 (a) through (c) 34 C.F.R. §532, and 34 C.F.R. §§510 to 514 is contrary to the plain language of the regulations. 34 C.F.R. §532 (a) states in relevant part “The

spectre is raised of two separate court appeals arising out of the same factual dispute with all the associated fees and costs, both pecuniary and intangible.

parent of a child with a disability who disagrees with any decision regarding placement under §§300.530 and §§300.531 or the manifestation determination under 300.530 (e) ...may appeal the decision by requesting a hearing.”

18. Subsection (1) of 34 C.F.R. §532 (c) titled “Expedited due process hearings” provides that due process hearings are available on an expedited basis for hearings requested under 34 C.F.R. §532 (a). As 34 C.F.R. §532 (a) provides only four regulatory bases for the application of the expedited timeline, a claim that expedited hearings are available for *any issue* cannot stand.

Constitution of PPT Team

19. Parents claim that the PPT was not properly constituted, because the school psychologist and school speech and language professional were invited to the MD PPT but were not in attendance when the meeting occurred. The MD is to be conducted by the LEA, parent, and relevant members of the child’s IEP team (as determined by the parent and the LEA. 34 C.F.R. §530 (e) (1). The term “complete team” is not found in the regulation and it is not for the parents to define what constitutes a complete team. See *Fitzgerald v. Fairfax County Sch. Bd.*, 50 IDELR 165 (E.D. Va. 2008) in which plaintiff’s claimed an equal right to determine the composition of the MDR PPT. The court in that case found that when read in context of IDEA’s statutory scheme as a whole, 1415 (k) (1)(e)(i) does not require parental consent or unanimous agreement to PPT members, rather the “language means that the LEA determines the school system’s MDR members and the parents may determine whom they wish to invite in addition to those designated by the school and the LEA”. *Id.*

20. The MD PPT is a subset of PPT. The PPT is to be comprised of the following categories:

1. child’s parents;
2. at least one of the child’s regular education teachers;
3. at least one of the child’s special education teachers;
4. a representative of the LEA who is qualified to either provide or supervise special education instruction and who is knowledgeable about the schools general education curriculum and other available resources;
5. someone who can interpret the instructional implications of evaluation results, but who otherwise may be one of the aforementioned individuals;
6. any other individuals who have knowledge or special expertise who may attend at the discretion of the parent or the LEA and the child when appropriate; and
7. the child, when appropriate 20 U.S.C 1414(d)(1)(B)

The PPT was properly constituted with members of each of these categories.

Consideration of Special Factors

21. Parent alleges that the Consideration of Special Factors were present based on the checking of the box on page 10 of the June 12, 2013 IEP, a copy of which was received by Parent in July 2013. No evidence was presented that any family members or PPT members discussed any of the Consideration of Special Factors listed on Page 10 of the IEP, either in substance or to determine whether or not the box indicating that IEP Goals and Objectives have been developed to address the behavior on the IEP should be checked. District staff averred credibly that this box was checked in error, in effect a typographical error.

Interim Alternative Educational Setting

22. The student's IEP team determines the student's interim alternative educational setting (hereinafter "IAES"). 34 CFR §300.531. What constitutes an appropriate IAES will depend on the circumstances of each individual case. 71 Fed. Reg. 46,722 (2006). Although CES-TDP was selected by the MD PPT as the appropriate IAES, that placement has yet to actually occur. The CES-TDP is in effect a contingency placement should the student be expelled. Currently the Student is receiving homebound services.

23. While the IDEA does not specify the alternative setting in which educational services must be provided, the alternative educational setting must be selected "so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP." 34 CFR §300.530 (d)(1).

24. The appropriateness of home instruction as an IAES must be evaluated on a case-by-case basis. If there is no alternative school or other similar public facility in the district, the IDEA does not appear to require a district to place a student in a private school or facility for the duration of an IAES, assuming placement at home meets the criteria for an appropriate IAES. In order to comply with the modified FAPE requirement, it also should include consideration of the child's needs and educational goals. 64 Fed. Reg. 12,624 (1999).

Compensatory Education

25. Compensatory Education is an equitable remedy recognized by the courts to address past deprivations. *Pihl v. Massachusetts Dept. of Educ.*, 20 IDELR 668 (1st Cir. 1993); *Letter to Kohn*, 17 IDELR 522 (OSERS 1991). See also, *Letter to Riffel*, 34 IDELR 292 (OSERS 2000).

Summary Findings

26. Based on Legal Conclusions 13, 14, 15 and 16, this Hearing Officer does not have the authority to overturn the factual findings of the District as to what the Student's misconduct was and whether or not he committed that behavior. Even if the rationale in the OSEP letter cited by Parent was binding legal authority, it would only serve to place the decision of whether or not to address a claim to overturn Board's factual findings of misconduct within the discretion of the hearing officer. Under the circumstances of this case, where the parties are fully engaged in contentious litigation of whether or not the misconduct occurred in front of an expulsion hearing officer, this hearing officer would decline to utilize that discretion even if she found she had the authority, which she does not.

27. Based on Factual Findings 1 through 55 and Legal Conclusions 1-9, the District members of the MD PPT correctly determined that Student's conduct was not caused by Student's autism and was not directly and substantially related to Student's autism.

In the course of the hearing it was established that one characteristic of Student's disability is slow processing speed. Testing indicated that certain simple tasks such as copying down things from the board will take excessive time for Student in comparison with peers. No evidence of a causal or direct and substantial relationship between slow processing speed and Student's misconduct was produced. To the contrary, evidence was produced showing Student has a facility with computers and programming that is not impeded by his slow processing speed. Student's slow processing speed did not impede his performance in his Computer D and P class, in which he had projects with deadlines to complete and in which he received an A+. There was no evidence to show that Student could not fully comprehend what

he was doing when he committed the misconduct because the nature of misconduct somehow involved the completion of a series of tasks in a limited period of time. Evidence showed that Student had significant access to computers at school throughout the day and at the home of each parent. Student also spent a lot of time on his computer particularly at one Parent's home. Further, Student admitted to having the ability to hack into other students' computers in order to remotely shut them down, thereby demonstrating his ability to gain the technical skills necessary to engage in hacking behavior despite his low processing speed. The same findings hold true when looking for any connection, causal, direct or otherwise between Student's lower than average intellect and the misconduct in question. No such connection can be found, especially given Student's academic performance in the field in which he is accused of committing misconduct and admitted acts of hacking.

In the area of communication, Student's disability manifests itself as a deficiency in the area of pragmatic language. Student is literal and struggles with nuance. The language in the Network Guidelines in the Student Handbook is clear and unambiguous, and does not require inferences be drawn or the application of knowledge of social nuance. Sufficient evidence was not produced to establish a causal or direct or substantial relationship was established between Student's difficulties in pragmatic language and the misconduct. Student's struggles with communication are at their most evident in areas of little interest to Student. Computer hacking was an area of interest for Student. Student did not have the same struggle with speaking when he was speaking about topics that interested him, rather he had trouble remembering to pause and give another person an opportunity to contribute. It cannot be said that but for Student's pragmatic language difficulties, the misconduct would not have occurred. Nor can it be said that but for Student's social difficulties the misconduct would not have occurred. The Student's autism manifests itself in the social sphere in the following ways: Student has difficulty initiating and maintaining social interaction during unstructured time or when topics discussed are not within his areas of interest. Student does not appear to socialize with other Students outside of school, except through online computer gaming. Computer hacking does not require social interaction, with the advent of youtube and the utilization of search engines, anyone can educate themselves on the topic without ever interacting with another human being. Student indicated he had researched hacking on the internet. He obtained the skills to remotely shutdown another student's computer and change the background on a teacher's computer and applied those skills. There is no evidence that pragmatic language or social interaction were utilized or required in order to successfully engage in hacking.

28. Based on Factual Findings 1 through 55, and Legal Conclusions 1 through 9, the MD PPT correctly concluded the Student's conduct was not the result of a failure to implement the Student's IEP. The goals, objectives and accommodations developed in the course of the annual review PPT meeting held on May 6, 2013 as set out in the IEP in effect at the time of the MD meeting were agreed upon by parents and the school based team. No concerns regarding implementation were raised during the annual review PPT meeting. (Testimony of Parent; B-56).

The concerns about implementation regarding the IEP raised by family at the MD PPT meeting centered around the accommodations of preferential seating. (B-69). "Preferential seating - close to instruction" was listed as an environmental accommodation in the May 6, 2013 IEP. No evidence was presented during the hearing to establish conclusively that Student did not receive preferential seating when appropriate. No evidence was presented that there was or could be a relationship between Student's need for a preferential seating accommodation to access the curriculum and Student's behaviors relating to the intentional misuse of computers. Concerns were raised during the hearing about whether the Student's computer classes were unstructured environments, which could have led to the misconduct in question. Student excelled in his Computer Game D and P course, and was also receiving a B in his other computer course, Computer Aided Design. If Student's disability manifested itself in

such a way that he did better in structured settings than unstructured ones, it would appear from Student's achievement in that coursework that the computer classes had a structure that worked for Student.

Student's academic success in 10th grade, which showed academic improvement over Student's freshman year indicates that services and accommodations were successfully being utilized. Student successfully accessed the general curriculum with the supports and accommodations in place through Student's IEP for the 2012-2013 school year. Student's social skills were addressed in group sessions with other students with disabilities, in which they addressed challenges and identified areas for growth.

29. Based on Factual Findings 56 through 64, and Legal Conclusions 22, 23 and 24, the IAES into which the Student has been placed is appropriate. Parent's objections to the CES-TDP were based solely on experiences with a program for elementary school children at CES over 9 years ago. In contrast to homebound instruction, the CES-TDP provides a structured environment for a Student who requires structure to succeed. The Program's therapeutic component will assist Student, who has difficulty with transitions, in navigating a new school setting until such time as it is possible to transition him back into a regular education setting. The Student will receive the services and special education instruction in his IEP through the CES-TDP. In addition, the relative proximity of the CES-TDP to Fairfield Warde High School will facilitate contact between service providers at Fairfield Warde and Student and his CES-TDP teachers and providers. This proximity will aid monitoring of Student's progress and planning for transition back into a regular education setting. A PPT meeting is scheduled one month into Student's placement at the CES-TDP to review the Student's IEP will allow for modifications to the program at the CES-TDP, should the need arise.

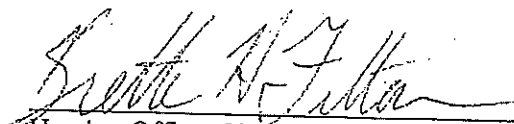
30. Based on Legal Conclusion 25, the Student is not entitled to an award of Compensatory Education. The current Interim Alternative Educational Setting of homebound instruction, in which the Student has been enrolled since being removed from school in June of 2013, was chosen by Parents *over* the recommendations of the MD PPT, which determined the CES-TDP to be the appropriate placement. Action regarding placement of the Student at CES-TDP has been held in abeyance, pending the outcome of the expulsion and special education due process hearings being held concurrently. No evidence was produced that Parents informed school that they were rejecting the homebound instruction and services being provided by the Board during the pendency of the two hearings. No evidence was produced that the homebound instruction and services were not reasonably calculated to provide student with an educational benefit or that Student has not made progress towards his goals and objectives as a result of his homebound instruction. Parents' presentation during the hearing focused on the perceived deficiencies of the proposed IAES, not the actual IAES. As the proposed IAES of CES-TDP has been deemed appropriate, and no deficiencies in the current IAES of homebound tutoring program were identified, an award of compensatory education is not appropriate.

FINAL DECISION AND ORDER:

1. The Board did not err when it found that Student's conduct was not a manifestation of his disability.
2. The Interim Alternative Educational Setting of the CES-TDP offered to the Student for the period of his expulsion is appropriate.
3. Student is not entitled to an award of compensatory education.

If the local or regional board of education or the unified school district responsible for providing special education for the student requiring special education does not take action on the findings or prescription of the hearing officer within fifteen days after receipt thereof, the State Board of Education shall take appropriate action to enforce the findings or prescription of the hearing officer.

Appeals from the hearing decision of the hearing officer may be made to state or federal court by either party in accordance with the provisions of Section 4-183, Connecticut General Statutes, and Title 20, United States Code 1415(i)(2)(A).


Hearing Officer Signature

Brette H. Fitton
Hearing Officer Name in Print