

**DC Office of the State Superintendent of
Education**

Office of Review & Compliance
Student Hearing Office
1150 5th Street, S.E.
Washington, D.C. 20003

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STUDENT HEARING OFFICE
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CONFIDENTIAL

<p>STUDENT¹, by and through Student's Parent</p> <p>Petitioners,</p> <p>v.</p> <p>DCPS</p> <p>Respondent.</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p><u>Impartial Hearing Officer:</u> Joseph Selbka</p>
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I. Introduction and Procedural Background

Before the undersigned is the expedited portion of a complaint filed by Parent on behalf of her son, Student.

1. Student is a _____ year old who is currently attending _____ School.
2. On February 21, 2012, Parent filed the instant complaint. DCPS has argued that it requires no response because prior written notice was given to Parent. Parent disagrees with this contention, and contends that no written notice which complies with the

¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

pertinent regulations occurred as the District has never explained why it found that Student's behaviors on January 25 and 26, 2012, was not a manifestation of Student's disability(ies). The undersigned disagrees. The manifestation notes (DCPS Ex. Pp. 3-5) explain the District's position. Moreover, any failure to provide a response is harmless error.

3. On February 23, 2012, the parties conducted an initial resolution conference. The parties have not waived the resolution period for all nonexpedited issues, and thus the resolution period for all nonexpedited issues continues for thirty days.

4. On February 28, 2012, the undersigned held a prehearing conference and bifurcated the complaint.

5. At the prehearing conference, the undersigned bifurcated the complaint. Part of the complaint alleged a wrongful decision at a manifestation conference and a possible change in placement due to disciplinary removals.

Other portions of the complaint concerned a subsequent IEP conference wherein the Parent claimed that the District predetermined Student's placement and that the District failed to place Student in a therapeutic Day School. Parent contends that a therapeutic day school placement is the least restrictive environment that Student can be provided FAPE.

The undersigned bifurcated the hearing without objection from either the District or the Parent so as to hear the expedited issues (the allegations related to the manifestation conference and disciplinary removals) on an expedited timeline.

6. The initial hearing as to the expedited issues occurred on March 6, 2012. There were three witnesses: Parent and DIH on behalf of the Parent, and TC on behalf of the District. Parent Exhibits 1-11, 14-18, and 21 were admitted without objection. Parent Exhibits 12 and 13 were admitted over objection. Parent Exhibits 19, 20, and 22 were withdrawn. DCPS Exhibits R1-R4 were admitted into evidence without objection.

7. This decision will only address the expedited issues.

II. Issues to Be Decided

8. The only issues to be decided by this decision (as set forth in the prehearing order) are:

a. Whether, during the January 30, 2012, manifestation determination conference, the District properly found that Student's behaviors: (1) were not caused by and/or had a direct and substantial relationship to Student's disability; and (2) not caused by a failure to implement Student's IEP.

b. Whether the District improperly changed Student's placement through disciplinary removals pursuant to 34 CFR 300.536.

c. If the undersigned finds for the Parent on issues a or b, whether: (1) an interim placement or return to Student's original placement as allowed by 34 CFR 300.532(b)(2); (2) compensatory education arising from any proved violation of IDEA; (3) an order for the District to undertake the requirements of 34 CFR 300.531; (4) any other equitable relief necessary to make Student whole.

III. Jurisdiction

9. The due process hearing was held and a decision in this matter is being rendered, pursuant to 4 U.S.C.A. 1400 et seq., and its implementing regulations, 34 CFR 300 et seq. and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

IV. Findings of Fact

Student's Disability as Testified to By Experts and as Set Forth in Student's IEP and Student's Performance in the Classroom

10. Student is eligible for special education. He has oppositional defiant disorder ("ODD") and attention deficit hyperactivity disorder ("ADHD") (DCPS Ex. Pg. 10). He also has been diagnosed with chronic adjustment disorder, and anxiety and depression (DCPS Ex. Pg. 10). He is eligible under the OHI disability term category² (P3-1).

11. Student's disability affects his educational experience in a number of ways. Student cannot regulate his emotions properly. His anger and frustration can quickly escalate in ways which he has problems controlling. When Student's emotions escalate, he has great difficulty controlling his behaviors, and he acts out.

12. Student's ADHD causes him to be impulsive and have difficulty controlling his emotions (See DIH and TC testimony, P14-4). Student will need to walk out of class and attempt to deescalate. Student also has problems with any type of change and can escalate when he has to deal with change (DIH Testimony).

13. Student's ODD causes him to irrationally challenge and confront power figures and peers. See uncontradicted DIH testimony and October, 2011, FBA. Student engages in power struggles with male authority figures and male peers (P7-1,2; S.D. Ex. pp 12-14, P14-6, DIH Testimony). Student also sexually harasses (through words and inappropriate touching) female peers (DCPS Ex. pp. 12-14). Student also bullies and fights with his peers (See DIH testimony, P4-1, P5-1).

14. Student's ODD and ADHD interact in a problematic manner. Student will irrationally confront an authority figure or peer, and then his emotional state will escalate and he will begin undertaking more extreme impulsive and aggressive behaviors (See DIH Testimony, S.D. Ex. pg. 14).

² The findings of fact set forth above are related to only aspects of Student's disability which are related to the behaviors which are relevant to this decision and are not meant to be exhaustive.

15. Student is currently attending _____ School and has been attending _____ School beginning in the 2010-2011 school year. Student's behavior and grades started out fairly good, but both his behavior and his grades have declined ever since. Student is currently getting straight F's (Parent testimony; TC Testimony).
16. Student has also had numerous absences at _____ School.
17. Since being placed at _____ School, Student has consistently acted inappropriately and violated the Student Code of Conduct.
18. Student can escalate into physical aggression towards staff and peers (P14-8).

Suspensions, Manifestations Conferences, and BIP Implementation of Student Before January 26, 2012

19. The District convened several IEP meetings and a manifestation conference before January 26, 2012 wherein Student's behaviors were addressed at length.
20. On September 14, 2011, Student was disruptive and argumentative (P16-1). On September 12, 2011, Student was disciplined for sexual harassment of another Student (P16-2). On September 26, 2011, Student was disciplined for using profanity towards other students and a teacher (P16-3,4). On October 1, 2011, Student was disciplined for calling a teacher a bitch (P16-4). Student was again disciplined for inappropriately bumping a teacher who Student had previously called a name (P16-5). On October 5, 2011, Student refused to stop yelling in class after two verbal warnings (P16-6).
21. On October 6, 2011, the District conducted an IEP meeting wherein behavior concerns were an issue (DIH testimony, P5-1). Student had been suspended for inappropriately touching another student's breasts; calling a teacher a bitch; bumping teachers; and other disrespectful behaviors (P5-1). Student also often left class without permission (P5-1, DIH testimony).
22. Student was suspended for two days for these infractions (P16-2, P16-5).
23. On October 6, 2011, the District conducted a functional behavior analysis wherein the District attempted to address Student's various behaviors (DCPS Ex. pp. 7-14). The FBA noted that Student's disability manifests in a number of ways. Student's October, 2011, FBA notes that Student's externalizing behaviors (wherein Student "acts out") arising out of his disabilities include: ignoring or avoiding required tasks; vindictive behaviors such as threatening, tattling, defacing property; disrupting class; rebellion against authority figures; starting physical fights and/or verbal arguments with others; deliberate breaking of rules or defying authority; teasing, complaining and other disruptive behaviors of those around Student; selfish behaviors without regard for the needs or desires of others; inappropriate touching of female peers; and power struggles with peers and adults (DCPS Ex. pp. 10-13).

24. On November 2, 2011, Student kicked one of his teachers and was suspended for five days for this behavior (P9-2, 3). On November 10, 2011, the District convened a manifestation determination conference wherein Student's behaviors were found to be a manifestation of his disability (P9-1 to P9-3).

25. On January 5, 2012, Student was disciplined for stealing property (P10-1). Student went through another Student's bag and property in front of a teacher, took another student's mints out of the bag, and then passed the mints around class (DCPS Ex. pg. 60). Student refused a teacher's prompts to stop his actions (DCPS Ex. pg. 60). This was determined in a manifestation determination conference not to be a manifestation of his disability³. Student was suspended for this behavior as well for five days (See Exhibit #1, Due Process Complaint⁴, DCPS Ex. pg. 62, 65-66).

26. The undersigned makes the inference that Student's behavior for which he was suspended as described in the District's positive behavioral plan was a manifestation of his disability as it clearly was oppositional behavior based on the fact that Student was clearly disregarding authority as well as engaging in selfish behavior without considering the needs and desires of the other student—all behaviors set forth in the October, 2011, FBA.

27. The week of January 5, 2012, Student bullied another Student and slapped the other student's head on two occasions. When the other student did not react, Student put his hands around the other student's neck and threatened to choke the other student (DC Ex. pg. 59).

28. The week of January 23, 2012, Student pushed a teacher into a door when the teacher asked Student to return a pencil that Student had stolen from a fellow student (DCPS Ex. pg. 82). That same week, Student also used a stapler and a claw staple remover as a weapon during one of his classes (DCPS Ex. pg. 82).

29. TC testified that he made counseling services available to Student, but that Student doesn't often take advantage of the counseling services (TC testimony). TC also testified that the BIP has not been overly successful because Student is not invested in the plan.

30. The undersigned makes an inference that Student's suspensions before January 25 and 26, 2012, were caused by Student's oppositional defiance and/or oppositional defiant behaviors exacerbated by Student's impulsivity. The undersigned bases this inference on the testimony of DIH who set out that Student has great difficulty making appropriate choices; and because Student's behaviors are consistent with manifestations and

³ DCPS presented no testimonial evidence on this matter despite DCPS' burden pursuant to local law in these cases. Therefore, for purposes of this case, the undersigned presumes DCPS failed to properly determine whether Student's behaviors on January 5, 2012, were a manifestation of Student's disability. That presumption is bolstered by the description of Student's behaviors in District logs (DCPS Ex. pg. 60).

⁴ Although a due process complaint is generally not evidence, it was admitted without objection as an evidentiary exhibit, and thus the undersigned can use its allegations as evidence even though the complaint is technically hearsay.

symptoms of ODD. Specifically, Student's symptoms of ODD are to question adults, challenge adults, refuse to follow rules, take actions without concern for others' needs and desires; and bully and challenge peers. The behaviors also appear to occur when Student is escalating after undertaking oppositional conduct.

31. From September, 2011, to January, 2012, Student has also consistently been disruptive, walked out of class, swore, was inappropriate, was off task, and challenged authority figures and bullied peers (See DCPS Ex., positive reinforcement plan, R4).

The January 26, 2012 Suspension and January 30, 2012, Manifestation Conference

32. Student was suspended for nine days for various incidents which occurred on January 25 and 26, 2012. On January 25, 2012: Student threw things on the basketball court at a basketball game. Student lunged at a passerby at the Metro Stop and swore at her; Student pushed a police officer at the basketball game. Student also acted out in his first period class by refusing to sit in his seat; taking a phone from his teacher; and acting defiantly to his math teacher.

33. On January 26, 2012: Student left art class and started yelling and screaming while entering other classrooms; during recess, Student swore at other students and teachers; Student also got into a verbal altercation with his science teacher over a seating assignment; Student stole assignments from his classmates in science; Student took pencils from other students and baited another Student. Student also was defiant to his math teacher. He refused to sit properly in class; He took a phone away from the math teacher and attempted to bully the math teacher.

34. The District conducted a manifestation determination on January 30, 2012. At the January 30, 2012, manifestation conference, DIH testified to the following District admissions: that the District was not attempting to diminish the power struggles between Student and District personnel; and that the District was not attempting to properly deescalate Student.

35. TC is the social worker at _____ School. He is on Student's IEP Team and attended the January 30, 2012 manifestation determination conference.

36. TC testified that some of the incidents for which Student was suspended on January 25 and January 26, 2012, were a manifestation of his disability. TC testified that the IEP Team agreed that some of the behaviors were a manifestation of Student's disability. TC, however, testified that the incident in the science class was not a manifestation of Student's disability. From TC's understanding of the incident, Student's behavior was not a result of impulsivity. According to TC, the science teacher was responding properly to Student's defiance, and Student should not have been in an escalated emotional state at the time Student defied his teacher. Rather, according to TC, Student's defiance to his science teacher was a choice by Student.

37. TC testified that teachers are attempting to chart and influence Student's behavior and implementing the current BIP.

38. TC could not contradict that Student has ODD as well as ADHD and TC has witnessed behaviors in Student which appear to be ODD. Moreover, TC's BIP addresses Student's oppositional behaviors—which clearly means TC knew Student's oppositional behaviors were manifestations of Student's disability.

39. The undersigned makes an inference that Student's challenges to his science teacher and math teacher were caused by and substantially related to Student's disability. The undersigned bases this inference on the fact that Student has not only impulsive behaviors from his ADHD, but also oppositional behaviors arising from his ODD. Moreover, Student's ODD causes him to make bad choices-- including undertaking irrational confrontations with authority figures. Student makes bad choices (as the District contends)—but those choices are often manifestations of and caused by Student's ODD. The District was incorrect, at the manifestation conference, in assuming that impulsivity was the only way that Student's disability manifests. Rather, Student also manifests his disability through oppositional defiance to superiors and peers as Student's October, 2011, FBA clearly demonstrates. The District failed to take this into account at the manifestation determination conference. TC admitted that Student's actions towards the science teacher appeared to be oppositional behavior. Moreover, the October, 2011 FBA clearly indicates that oppositional behaviors are manifestations of Student's disability.

40. The undersigned makes a credibility finding that Student's other behaviors on January 25 and 26, 2012, were manifestations of Student's impulsivity or oppositional conduct or both-- based upon the agreement of TC and DIH that all other violations of the code of conduct were manifestations of Student's disability- and the fact that all such behaviors arose from Student's impulsive and/or oppositional behaviors as set forth in the October, 2011 FBA.

Student's Violations of the Code of Conduct Generally

41. The undersigned also makes an inference that the behaviors for which Student was suspended generally are related to Student's impulsivity, oppositional defiance and/or oppositional defiant behaviors exacerbated by Student's impulsivity as set forth in the October, 2011 FBA. The undersigned bases this inference on the similarity of the behaviors to the behaviors caused by Student's disability listed in Student's FBA.

42. The undersigned makes the inference that the Student's behaviors for which he was suspended are similar behaviors within the meaning of 34 CFR 300.536. Specifically, all the behaviors for which Student was suspended are similar because all such behaviors are "acting out behaviors"-- behavior related to or caused by impulsivity, oppositional defiance and/or oppositional defiant behaviors exacerbated by Student's impulsivity. The District admitted that most of the behaviors at issue were caused by

Student's impulsivity. It is clear the behaviors for which Student was suspended were also caused by his oppositional behaviors as well.

43. Student was suspended for more than 10 school days for behaviors which were caused by his disabilities. Student was ultimately suspended for 16 full school days by January 30, 2012. This was 16 days of suspensions in a time period slightly greater than one semester.

44. The undersigned makes an inference that the proximity of the suspensions—16 days over the course of a few months and 14 days within a few weeks of one another, suggest a change of placement. The undersigned bases this inference on the fact that missing 16 days without services (More than three full school weeks) constitutes a relatively large percentage of school days for slightly more than one semester, and that Student has certainly lost a substantial part of the educational benefit which he would have received from his placement as a result of the suspensions. Moreover, 14 days of suspension in less than a month and a half means that the Student was suspended for nearly three weeks out of seven school weeks.

45. The undersigned makes an inference that the length of the suspensions, especially in January, 2012, (5 days and 9 days) suggest a change in placement. Student was removed from his classroom environment for nearly three full weeks.

Facts Related to Compensatory Education

46. DIH testified that in order to make up for lost time from the disciplinary removals, Student would need approximately 10-15 hours of tutoring and 10-15 hours of mentoring or counseling. The above stated amount of tutoring should be able to make up for the lost time out of school because Student is quite intelligent, and should be able to absorb what he lost academically as a result of the suspensions with 10-15 hours of private tutoring. Counseling/mentoring should be provided so as to allow Student to obtain some insight into his behaviors and emotions. Moreover, the counseling/mentoring should be provided so as to rebuild Student's self-esteem which has been damaged by the various suspensions and should be of a sufficient duration to allow Student to develop a trusting relationship with his mentor or counselor. This, according to DIH, will compensate Student for the lack of counseling which he would have received while in school and for the inappropriate suspensions.

47. DIH provided uncontradicted testimony that Student was not provided any services while on suspension.

48. The undersigned makes an inference that it will take 15 hours of tutoring and 15 hours of mentoring or counseling to provide Student with the educational benefit he would have received, but for the disciplinary removals by the District. The undersigned relies upon the reasoning of DIH set forth above which was unchallenged at the hearing.

49. In making the above stated inference, the undersigned takes into account the following factors: Student's unique educational abilities and needs (he is quite intelligent, thus allowing for Student to make up for sixteen lost days of teaching through 15 hours of tutoring); Student's needs (he needs to develop a trusting relationship with his mentor and rebuild his self esteem arising from the suspensions thus requiring more extensive counseling/mentoring services); and the link between Student's disability, the District's violation of the law, and the services provided as compensatory education (as previously explained).

Facts Related to the District's Implementation of the BIP and Student's Proposed Interim Placement

50. The Parent made a claim that Student's IEP (specifically, his BIP and counseling services) was not being implemented properly, and that the District's failure to implement Student's IEP caused the behaviors for which Student was suspended on or about January 26, 2012.

51. The undersigned makes a credibility finding that the Student's BIP was being implemented in January, 2012, and that the District properly so found at the January 30, 2012, manifestation conference. The undersigned makes a credibility finding in favor of TC and against DIH in that regard. The undersigned bases his credibility finding on two bases: (1) the District was trying to manage power struggles with Student as the final incident with the science teacher demonstrates (the science teacher was responding to Student's defiance properly, per the terms of the BIP); (2) the District was trying to provide counseling, but Student often refused to take part in the counseling sessions. Moreover, TC was attempting to build a trusting relationship with Student, and there is no evidence presented by Student or Parent that the process was taking an unreasonably long time. In general, the fact that IEP services are unsuccessful in implementation does not demonstrate the District is not implementing an IEP.

52. Based upon the above stated credibility finding, the undersigned finds that a failure to implement the BIP (and Student's IEP more generally) did not cause the behaviors for which Student was disciplined.

53. More to the point, the BIP was being implemented, but the BIP wasn't particularly effective in addressing Student's oppositional behaviors. The undersigned bases this inference on the credibility finding that the BIP was being implemented-- but Students' behaviors are not improving and/or are still very serious; Student was not achieving academically because he refused to do his work; Student was not attending school; not attending counseling; engaging in bullying and stealing; and consistently challenging teachers and other authority figures through oppositional behavior (leading to his suspensions wherein Student then missed more school).

54. DIH testified repeatedly, that Student needs a much more structured environment which deals with his behaviors across the school day in order for Student to achieve an educational benefit from school. This fact is bolstered by the fact that Student was quite

often absent from school—thus further hampering his ability to obtain an educational benefit from his current placement (whether at School or at School). On the other hand, there was uncontradicted testimony from DIH that Student was successful and able to function while attending a therapeutic day school.

55. DIH testified that an appropriate placement for Student needs all personnel to be trained to deal with Student's behaviors; consistent expectations of Student's behaviors daily; rapid access to 1:1 teaching; structuring classes for academic success; and a quiet room for de-escalation of behaviors.

56. The undersigned makes an inference that Student is substantially likely to be injured or to injure another in his current placement (whether at School or at any other general education setting envisioned by Student's current IEP). The undersigned bases this inference on: (1) the October, 2011, FBA which notes that Student can become aggressive and escalate into undertaking physical violence; (2) While at

School, Student exhibited the following violent behaviors: Student kicked an administrator; Student almost started a fight in his science class; Student slapped and then threatened to choke a classmate who would not respond to Student's bullying and baiting; Student used a stapler and staple remover as a weapon; Student pushed a teacher into a wall; and Student pushed into and nearly got into an altercation with a police officer; (3) Student has also engaged in other aggressive behaviors such as stealing, baiting other students into fights, yelling and screaming in class; and challenging school authority figures; and (4) Student's impulsivity combined with his oppositional defiant behaviors make him dangerous to both authority figures and his fellow classmates. Student's escalations and lack of ability to control his behavior (as demonstrated by his behaviors above) coupled with his aggressiveness and oppositional defiance create a substantial likelihood that Student will escalate in front of someone who will react aggressively and injure Student or who will not react and then be injured by Student as Student escalates.

V. Conclusions of Law

Disciplinary Removals and Manifestation Conferences

57. School districts generally have a right to remove children with disabilities for up to ten days in a school year without providing the student services under his/her IEP. 34 CFR 300.530(b)(2). When school districts remove a child with a disability for more than 10 cumulative days in a school year, the district generally may continue to remove the student from his/her placement, but the district must provide services to the student for all times over the initial 10 days of removal. 34 CFR 300.530(b)(2); 34 CFR 300.530(d).

58. Generally, school districts also may remove children with disabilities on multiple occasions for not more than 10 consecutive school days (as long as the district continues to provide services for all time periods after the first ten days). 34 CFR 300.530(b)(1). However, districts may not remove children with disabilities for more than 10 cumulative school days if the reasons for the disciplinary removal constitute a pattern of behavior under the regulations. *Id.*

59. The hearing officer determines whether there has been a pattern of disciplinary removals by reviewing the following factors: total time removed; the similarity of behaviors which cause the removals; the length of each removal; the total amount of time the child has been removed; and the proximity of the removals to one another. 34 CFR 300.536. In determining what constitutes a pattern, the hearing officer should determine the matter on a case by case basis and use the student's IEP and manifestations of a student's disability to determine whether a pattern exists. Comments on the Rules and Regulations, Federal Register, Vol. 71, No. 156, pg. 46729 (August 14, 2006).

60. School districts also cannot allow for a student's placement to change as a result of a pattern of disciplinary removals. 34 CFR 300.530(b)(1), 34 CFR 300.536.

61. If the district decides to change a student's placement due to violations of the student code of conduct, the district must conduct a manifestation conference and make a manifestation determination. 34 CFR 300.530(e). The members of the manifestation conference must determine whether the violation(s) of the code of conduct was/were caused by, or had a direct and substantial relationship to Student's disability(ies); or whether conduct which violated the student code of conduct was a direct result of the District's failure to implement the IEP. 34 CFR 300.530(e)(1)(i,ii).

62. If the manifestation determination conference members determine that the Student's misconduct arose because of a failure to implement the Student's IEP, the District must take immediate steps to remedy any deficiencies in implementing an IEP. 34 CFR 300.530(e)(3).

63. If the manifestation determination conference members determine that the Student's misconduct was a manifestation of Student's disability(ies), then the district must either conduct a functional behavior analysis ("FBA") and implement a behavioral intervention plan ("BIP"), or if a BIP already is in place, revisit the BIP and modify it to address the Student's behavior. 34 CFR 300.530(f)(1).

64. Regardless of the ultimate determination, the District generally must return the Student to his/her placement unless the parent and district agree to a change of placement. 34 CHR 300.530(f)(2).

65. Parents have a right to appeal a change in placement due to disciplinary removals or the results of the manifestation determination on an expedited basis through a due process hearing. 34 CFR 300.532.

66. In general, a party who files a due process complaint has the burden of proof in a due process proceeding. *See Schaffer v. Weast* 546 U.S. 49 (2005). However, states can switch the burden to the nonfiling party. In cases like this, the District of Columbia has switched the burden of proof to the District in part. Specifically, in cases where the determination made at a manifestation conference is at issue, DCPS has the burden of

demonstrating that the student's actions for which he/she has been disciplined is not a manifestation of the student's disability. (Ch. 25, DCMR 2510.16).

Remedies for Violations of the Law

67. If the undersigned finds against the District regarding the manifestation determination or a change in placement for disciplinary referrals, the hearing officer may: (1) put the student back in his/her former placement; or (2) place the student in an alternative education setting for up to 45 days if the undersigned finds that maintaining the current placement of the child is substantially likely to result in the injury to the child or to others. 34 CFR 300.532(b)(2)(i, ii). The types of behaviors which Student manifested in this case are generally the types of behaviors which hearing officers have relied upon to place students in interim placements. *See e.g. Dunklin R-5 School District*, 51 IDELR 202 (MO SEA 2008); *Lawrence Township Board of Education*, 48 IDELR 170 (NJ SEA 2007); *Indian Springs District No. 109*, 41 IDELR 169 (Ill. SEA 2004).

68. The interim alternative placement can be in "a different setting" as the student's current placement as long as the student has access to the general education curriculum and the student can continue to work on the goals of the IEP. 34 CFR 300.530(d); *Questions and Answers on Discipline Procedures*, OSEP, June 2009, Question C-1.

69. The undersigned must also provide other relief (including declaratory relief and compensatory education) to make the child whole if the undersigned finds a violation of IDEA in any context. *A.G. v. District of Columbia*, 57 IDELR 9 (D.D.C. 2011).

70. Compensatory education is an equitable remedy hearing officers can award to parents and students. The purpose of compensatory education is to replace lost educational opportunity. *Board of Education of Oak Park, District 200 v. Illinois State Board of Education*, 79 F.3d 654 (7th Cir. 1996). Compensatory education, if awarded, should compensate Student for the District's failure to provide FAPE. *Branham v. the Government of the District of Columbia*, 427 F.3d 7, 44 IDELR 149 (D.C. Cir. 2005); *Reid v. District of Columbia*, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005). The award should be based upon the equitable factors present in each case. *Id.*

Miscellaneous Legal Conclusions

71. The District also objected to the admission of DIH as an expert in special education on the basis that, apparently, District counsel doesn't know how one can be an expert in special education. In general, courts allow expert testimony on any matter which requires scientific or technical specialized knowledge. The test in the federal courts is whether the testimony in question regarding will aid the trier-of-fact. Knowledge of special education obviously concerns knowledge of psychology, physiology, educational methodology, and medical and educational technology. These are all areas where technical, specialized knowledge can aid the trier-of-fact. Therefore, it is appropriate to allow expert testimony in regard to special education. DIH, from her resume entered into evidence and testimony, clearly possesses thorough training and

education, specialized knowledge in psychology and educational methodologies in providing services to students with disabilities and special needs. As such, it was appropriate to enter an order qualifying DIH as an expert in special education.

72. Inferences are conclusions of fact derived from the evidentiary facts introduced at hearing. *Smith v. Tri-R Vending*, 249 Ill.App.3d 654, 661 (1993). Hearing officers can make reasonable inferences from the evidence adduced at hearing. However, like in all administrative adjudications, the inferences must be supported by facts proved or admitted. *National Labor Relations Board v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 814-815 (1990)(Scalia, j. dissenting). The inferences must be drawn from facts through a process of logical reasoning. *Id.* Thus, the hearing officer must draw an accurate and logical bridge between the evidence and result. *Frobes v. Barnhart*, 467 F.Supp.2d 808, 817 (N.D. Ill. 2006). Moreover, any inference a hearing officer makes must be supported by substantial evidence. Substantial evidence means relevant evidence that a reasonable mind might accept as adequate to support his/her conclusions. *Frobes v. Barnhart*, 467 F.Supp.2d 808, 817 (N.D. Ill. 2006).

73. In administrative proceedings, hearsay is admissible as long as it is relevant and material. *Otto v. Securities and Exchange Commission*, 253 F.3d 960, 966 (7th Cir. 2001). To the extent hearsay is admitted without objection, the evidence can be given its natural weight. *Sykes v. District of Columbia*, 518 F.Supp.2d 261, 49 IDELR 8 (D.D.C. 2007).

74. Hearing officers are entitled to and often need to make credibility findings. However, in such cases, hearing officers should provide reasons for why they found testimony credible or not credible. *Marshall Joint School District No. 2. v. C.D. ex rel Brian D.*, 616 F.3d 632, 638 (7th Cir. 2010)

VI. Application of Law to Fact and Decision

75. The undersigned finds that the District erred in its manifestation determination made at the manifestation conference of January 30, 2012. The undersigned finds that the behaviors for which Student was suspended should have been found to be a manifestation of Student's disability as the behaviors for which Student was suspended. As such, the undersigned finds that the District improperly suspended Student for nine days.

76. The undersigned finds that, after taking into account the total time removed from the classroom this school year; the proximity of suspensions to one another (especially in January and early February, 2012); the similarity of behaviors which caused Student to be suspended (in that all suspensions arose from interconnected manifestations of Student's disability); and the length of the removals (especially in January and February, 2012), that Student's placement changed through a pattern of disciplinary removals.

77. The undersigned finds that there is a substantial risk that if Student remains in his current placement, Student will be injured or injure another.

78. The undersigned finds that Student's placement was improperly changed through a pattern of disciplinary removals all of which were caused by or related to aspects of his disability(ies).

79. The undersigned finds that 15 hours of tutoring and 15 hours of mentoring or counseling will make Student whole for the missed school time as a result of Student's disciplinary change of placement and improper manifestation determination.

80. The undersigned finds that Student should be provided with an updated functional behavior assessment and behavioral intervention plan which would have been required if the District had properly found that Student's behaviors were a manifestation of his disability at the January 30, 2012.

81. The undersigned, in an exercise of discretion, finds that Student should be placed in a full day, therapeutic day school with the requirements set forth by DIH as an interim placement until Student can be provided with a permanent placement in the second part of this case.

82. The undersigned finds that failure to implement the IEP did not cause Student's behaviors on January 25 and 26, 2012, and led to his suspension. The Parent did not meet her burden on this aspect of her complaint.

83. The Parent met her burden on the other expedited portions of her complaint decided in this proceeding.

84. The undersigned finds that the District failed to meet its burden that the January 30, 2012, manifestation conference came to the correct conclusion.

VII. Order

85. Within seven days of issuance of this order, Student shall be placed in an interim placement as described in this paragraph. The interim placement must have the following characteristics: (1) Student must have access to the general education curriculum; (2) the placement must be a full day therapeutic program; (3) all staff at the interim placement who are in contact with Student must be trained to provide therapeutic interventions to Student; (4) the placement must provide Student with a daily points system (at least initially) which can then be changed as Student's behavior improves; (5) the placement must have small classes of no more than 4 or 5 students per class and access for Student to 1:1 teaching if necessary for Student to achieve academic success; (6) the placement must have a quiet room if Student needs to deescalate; (7) the interim placement shall be completely segregated from the general education population; (8) the personnel at the interim alternative placement must be able to implement the Student's current IEP (except for the mainstreaming component of Student's current IEP). Within 48 hours of receipt of this HOD, counsel for the parties are ordered to meet and determine the location of the appropriate interim placement described in this order. If counsel cannot

agree, the IEP Team shall meet and determine an appropriate interim placement for Student under the terms of this order within seven days of issuance of this HOD. Student shall remain in the interim placement until his permanent placement can be determined or for 45 calendar days, whichever is shorter.

86. Counsel for the parties are to provide a written status report to the undersigned within three days of issuance of this order as to the agreed upon location of the interim placement.

87. Within fourteen days of the issuance of this order, appropriate members of Student's IEP Team shall meet with personnel from the interim placement and create an updated functional behavior analysis and updated behavioral intervention plan to address all behaviors which caused Student's suspensions as found by this HOD.

88. Within fourteen days of the issuance of this order, the District shall begin to provide Student with 15 hours of tutoring. The tutoring shall address every subject which Student was taking at _____ School, and the tutoring shall be designed to provide Student with instruction on the topics which Student missed while suspended in January and February, 2012. The District may use its own qualified personnel for tutoring or use private tutors at no cost to Petitioner. The tutoring must be provided on a schedule approved by Parent except that the tutoring must be completed within 45 days of issuance of this order.

89. Within fourteen days of the issuance of this order, the District shall begin to provide Student with 15 hours of counseling or mentoring services. The counseling or mentoring shall address Student's self esteem issues associated with the suspensions; regulation of Student's emotions; and relationships with Student's peers. The District may use its own social workers or psychologists for the counseling or use private social workers or psychologists at no cost to Petitioner. The counseling/mentoring must be provided on a schedule approved by Parent except that the counseling must be completed within 45 days of issuance of this order.

Dated this 20th day of March, 2012.

/S Joseph P. Selbka
Joseph Selbka, Esq.
Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).