

**STATE OF CONNECTICUT  
DEPARTMENT OF EDUCATION**

Student v. West Haven Board of Education

Appearing on Behalf of the Student: The Mother, appearing *Pro Se*

Appearing on Behalf of the Board: Attorney Michelle C. Laubin  
Berchem, Moses & Devlin, P.C.  
75 Broad Street  
Milford, CT 06460

Appearing Before: Attorney Scott P. Myers, Hearing Officer

**FINAL DECISION AND ORDER**

**ISSUE:**

Whether the Board properly complied with its obligation to provide the Student with FAPE in the LRE in the 2001-2002 academic year, specifically with respect to certain behavioral and disciplinary issues that arose during the course of that year.

**PROCEDURAL HISTORY:**

- The Parent commenced this proceeding by request dated on or about July 25, 2002, marked as Hearing Officer Exhibit 1. The Parent raised a concern that the Student was suspended improperly on “opinions and assumptions from [Mr. Lopes] and other students” and a concern regarding the accuracy of the Board’s records regarding the number of days the Student was placed in in-school suspension (“ISS”) during the 2001-2002 academic year.
2. A Pre-Hearing Conference was convened on August 6, 2002. The Parent appeared on behalf of the Student and the Board appeared through its counsel, Ms. Laubin. By agreement, and pursuant to a Scheduling Order dated August 6, 2002, hearing was scheduled to commence on August 30, 2002 and a schedule for submission of witness lists and exhibits was established. Paragraph 10 of that Order provided in pertinent part:

**Reporting Settlement or Withdrawal.** Should this matter be settled or withdrawn, each party is to notify the Hearing Officer as soon as possible in writing and by telephone . . . Unless this matter is reported settled or withdrawn by each party by telephone before or by 5:00 p.m. on August 29, 2002, the parties and their counsel if any are to appear at hearing on August 30, 2002 ready to proceed. At that time, the parties can jointly report a settlement or withdrawal as appropriate if the matter is being settled or withdrawn. Failure of a party and its counsel to appear at hearing under the circumstances described in this paragraph may constitute grounds for entry of a dismissal or a default as appropriate, without regard to whether the matter has been settled or withdrawn . . .

3. The Board timely submitted its witness list and exhibits, but the Parent did not and, by order dated August 27, 2002, was directed to contact the Hearing Officer to advise as to her intention to proceed with hearing on August 30, 2002.
4. On August 29, 2002, the Parent advised the Hearing Officer that she was not prepared to go forward on August 30, 2002 and was in the process of engaging an attorney. By supplemental order dated August 29, 2002, the Hearing Officer, at the request of the Parent, extended the date for issuing the final decision through and including October 10, 2002, continued the hearing until September 30, 2002 and directed that the Parent submit her witness list and record on or before September 10, 2002.
5. As of September 26, 2002, the Parent had not submitted either a witness list or any record, and no attorney representing the Parent had contacted the Hearing Officer. By Supplemental Order dated September 26, 2002 and sent by e-mail and first class mail to the Parent and the Board's counsel, the Hearing Officer directed the parties to appear at hearing on September 30, 2002 (a Monday) unless this matter was reported to the Hearing Officer as withdrawn or settled by or before 5:00 p.m. on September 27, 2002.
6. At 7:30 a.m. on September 30, 2002, the Parent left a voice mail message for the Hearing Officer that she was "canceling" the hearing because she was not prepared to go forward at this time, but indicated that she was still considering whether to retain an attorney and may decide to go forward in the future. The Hearing Officer did not receive that message until approximately 9:00 a.m., when he arrived at the location for the hearing.
7. The Board appeared as directed, ready to proceed with its case. The Board moved at the outset of hearing to dismiss this case due to the failure of the Parent to appear and prosecute her case. The Hearing Officer took that motion under advisement and ultimately denied it at the conclusion of the evidentiary phase of the hearing, as set forth below.
8. The Board's documentary record consists of: (1) Exhibits B-1 through B-60 submitted on August 13, 2002; (2) A revised Exhibit B-54 and Exhibits B-61 through B-66 submitted on September 26, 2002; (3) Exhibit B-67 (the Board's Parent-Student Handbook for middle school for the 2001-2002 academic year, which includes the Board's disciplinary code) submitted at the Hearing Officer's request; and, (4) Exhibit B-68, a June 21, 2002

decision and order in DOE Case Number C02-080 redacted to remove identifying information regarding the student at issue. That case concerned certain aspects of the Board's record keeping practices in the 2001-2002 academic year regarding student disciplinary actions. All of these documents were admitted as business records.

9. Testimony was taken from Mr. Lopes (Principal of Carrigan Middle School) and Mr. Palermo (current Director of Pupil Personnel Services). Ms. Laubin provided additional information regarding some matters, which was treated as an offer of proof and not considered in making any Findings herein.

### **SUMMARY:**

#### **Ruling on the Board's Motion to Dismiss.**

The Board's motion to dismiss is denied for the following reasons. (1) The Parent is the Student's representative and is the only person currently identified who can act to vindicate the Student's interests under the IDEA and applicable Connecticut law. The Parent, however, appears to have difficulty in organizing herself to prosecute a case on the Student's behalf. If implementation of the Board's disciplinary policies as to the Student in the 2001-2002 academic year resulted in a denial of FAPE, and if that issue is not addressed, the Student will have been harmed not only by the actions of the Board but also by the Parent's inability to represent his interests. The Student may also experience a continuing harm in the 2002-2003 academic year to the extent any improper disciplinary practices carry into that year. (2) The issues raised by the Parent (accuracy of disciplinary records and propriety of a manifestation determination made in a prior academic year) are limited and do not relate to the substance of the Student's current educational program. Further, any relief that can be offered will be similarly limited (e.g., an order to correct the disciplinary records and/or that the Board provide compensatory education) and is also unlikely to affect the substance of the Student's current educational program. (3) Regardless of who commences a due process proceeding, the Board ultimately has the burden of demonstrating by a preponderance of the evidence that it has complied with the requirements of the IDEA. *See* Regulations of Connecticut State Agencies ("CT Regulations") Section 10-76h-14. The documentary record submitted by the Board in this case was sufficient, in and of itself, to raise questions about whether the Board complied with its obligations under the IDEA and related Connecticut law with respect to disciplinary action taken against the Student in the 2001-2002 academic year. (4) The Parent at no time identified any witnesses she would call to present her case other than Board employees. Those witnesses were available to the Hearing Officer for examination as well, such that an appropriate testimonial evidentiary record could be developed upon which to decide the issues presented by the Parent. Accordingly, given the unique circumstances of this case and for all of these reasons, the Board's motion is denied and hearing proceeded in the absence of the Parent.

### **SUMMARY:**

The Board's records regarding the number of ISS days served by the Student in the 2001-2002 academic year understate the number of actual ISS days served by the Student. Based on the

record herein, the Student served 23 days in ISS in the 2001-2002 academic year as a result of 11 separate referrals. The Board is directed to correct the Student's ISS record for the 2001-2002 academic year in accordance with this Final Decision if requested to do so by the Parent.

The Board's actions with respect to ISS did not constitute a "change of placement" for purposes of the IDEA and were in compliance with the requirements of the IDEA. However, the Hearing Officer is concerned that during the 2001-2002 academic year the Student was excluded (either due to ISS or an out-of-school suspension) from his placement for a total of 34 days (23 days of ISS and 9 days of out-of-school suspensions), which is approximately 1 day of exclusion for every 5.4 days of school. Accordingly, the Board in the 2002-2003 academic year is directed to convene a PPT to review the Student's classification, placement, IEP and any behavior intervention plan ("BIP") when the Student has accrued 10 days of suspension (whether ISS or out-of-school). That PPT is to be convened within 10 school days of the date on which the 10<sup>th</sup> day of exclusion has occurred. If, as of the date of this Decision, the Student has already served 10 or more days of suspension (whether ISS or out-of-school) and no PPT for the purposes set forth herein has been convened already, the PPT required by this Decision is to be convened within 10 school days of the date that the Board receives this Decision. Thereafter, for the balance of the academic year, a PPT is to be convened for these purposes each time the Student accrues an additional 5 days of suspension (whether ISS or out-of-school).

The Board's decision to give the Student a 9 day out-of-school suspension starting June 10, 2002 was a reasonable response to the conduct which gave rise to the referral, and was authorized by the IDEA, its implementing regulations, applicable Connecticut law and the Board's publicized student disciplinary code.

The Hearing Officer makes no Findings of Fact or Conclusions of Law as to whether the program offered to the Student for the 2001-2002 academic year satisfied, or for the 2002-2003 academic year satisfies, the requirements of the IDEA.

### **FINDINGS OF FACT:**

To the extent that the procedural summary includes findings of fact or conclusions of law, that the findings of fact are conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to their given labels. *See, e.g., Bonnie Ann F. v. Callahan Independent School Board*, 835 F.Supp. 340 (S.D. Tex. 1993). The factual findings stated herein are based in part on the Hearing Officer's assessment of the credibility of witnesses. Citations to testimony or documentary exhibits are for illustrative purposes and not meant to exclude other admissible evidence in the record supporting that finding.

1. At all pertinent times, the Student was eligible to receive and was receiving special education, including related services, through the Board pursuant to the IDEA, 20 U.S.C. Secs.1401 *et seq.*, and its implementing regulations codified at 34 C.F.R. Secs. 300 *et seq.* (the "IDEA Regulations"), and under Connecticut's special education laws, Conn. Gen. Stat. Secs. 10-76. *See, e.g.,* B-5; B-6; B-10; B-11. At all pertinent times his primary exceptionality was seriously emotionally disturbed ("SED") and he was diagnosed as having Attention Deficit Hyperactivity Disorder ("ADHD") for which he was being treated

medically. *See, e.g., Id.* Some of the Student's behavioral problems in the 2001-2002 academic year appear to be related to inconsistent compliance with his medication regimen. *See, e.g., B-7.*

2. In the 2000-2001 academic year, the Student entered the Board's public school system as a 6th grader and began attending Carrigan Middle School. The Student attended Carrigan in the 2001-2002 academic year as a 7th grader and is currently attending Carrigan as an 8th grader. Since October 2000, the Student has been placed in a self-contained special education classroom at Carrigan. *See, e.g., B-5; B-6; B-10; B-11; Lopes Test.*
3. A psychological evaluation in December 1997 and January 1998 revealed, among other things, that the Student had "extreme difficulty accepting responsibility for his behaviors." (B-1) A social work assessment completed at that time notes, among other things, that the Student "lies to [his] peers and adults." (B-2)
4. A psychoeducational assessment performed in January 2001 as part of a triennial evaluation revealed low average overall intellectual functioning, below grade level academic performance in all areas assessed, clinically significant indicators for the inattentive and hyperactive/impulsive characteristics of ADHD, and a link between behavioral difficulties at school and inconsistent compliance with his medication regimen for ADHD. (B-7)
5. A social work assessment completed in March 2001 noted among other things that the Student was having significant behavioral difficulties in both the inclusion and self-contained settings at Carrigan, linked to some degree to extended lapses in compliance with his medication regimen and that the Student although the Student "tends to make temporary behavioral gains [he] often has difficulty accepting responsibility of his behaviors." (B-9)
6. The Board submitted extensive documentation which reveal the Student's behavioral difficulties throughout the 2001-2002 academic year. These documents included Exhibit B-65 (113 pages of behavior charts and similar materials prepared by his teachers) and numerous other "Disciplinary Referral" forms and other disciplinary and attendance records (*e.g., Exhibits B-18, 19, 26, 32, 33, 34, 35, 39, 41, 43 and 52, among others identified elsewhere herein*). All of these records show that the Student typically manifested argumentative, disruptive and disrespectful behavior, periodically manifested physical aggression toward staff and peers, and frequently violated various minor school rules (such as gum chewing). In addition to receiving In-School Suspensions ("ISS") for these behaviors, these records also show other disciplinary actions such as detention.
7. Mr. Lopes was involved in administering disciplinary action as to the Student both while he was in the 6<sup>th</sup> grade and in the 7<sup>th</sup> grade, and testified that the Student's disciplinary record in the 7th grade represents a substantial improvement over his disciplinary record for the 6th grade. (Lopes Test.)
8. Comparing various Board exhibits reveals substantial discrepancies regarding the number of days the Student served time in ISS during the 2001-2002 academic year. The Board

acknowledged at hearing that these discrepancies were caused, in part, by problems with the record keeping procedures at Carrigan, which the Board also stated have been corrected at a systemic level. (Lopes Test.) The confusion caused by these discrepancies was compounded, in part, by the multitude of forms used by the Board to record disciplinary actions and by the confusing nature of some of those forms. To facilitate resolution of factual issues regarding the Student's service in ISS, the Board submitted Exhibit B-66 (a copy of the ISS room attendance log for the 2001-2002 academic year), redacted to mask the identity of students in ISS other than the Student. Unfortunately, the Board inadvertently redacted the Student's name on several dates. Using the original unredacted version at hearing, Mr. Lopes was able to address some discrepancies in the documentary record regarding dates the Student was in ISS. Based on Mr. Lopes testimony, and the information in Exhibits B-56 and B-65, in the original unredacted version of Exhibit B-66, and in other documents specifically identified in the table below in the column labeled "Exhibit #," the Hearing Officer concludes that in the 2001-2002 academic year the Student served in ISS and in out of school suspensions ("Suspensions") as follows:

<b>Date</b>	<b>Event</b>	<b>Exhibit #</b>
Thu, JUN 20, 2002 <sup>1</sup>	Suspension	
Wed, JUN 19,	Suspension	
Tue, JUN 18,	Suspension	
Mon, JUN 17,	Suspension; Manifestation Determination PPT held	
Fri, JUN 14,	Suspension	
Thu, JUN 13,	Suspension	
Wed, JUN 12,	Suspension; Notice of Manifestation Determination PPT issued for June 17	B-51
Tue, JUN 11,	Suspension	B-50
Mon, JUN 10,	Suspension	B-50
Fri, JUN 7,	Notice issued for 9 day suspension starting June 10 and ending June 20	B-49
Thu, JUN 6,	Dog feces incident leading to the Suspension	
Wed, JUN 5,	Struck a teacher	B-48; B-52
Tue, JUN 4,		
Mon, JUN 3,	"Sexual harassment" of another student	B-47; B-52
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<sup>1</sup> Indicates the date and day of the week that school was in session during the 2001-2002 academic year. Unless otherwise noted in the column labeled "Event," the Student was recorded as present and attending school on a given day.

<sup>2</sup> The symbol "^" indicates a gap in the sequence of school days.







Fri, SEP 28,		
Wed, SEP 26,	ISS served	B-18; B-19; B-24; B-26; B-52; B-66 at 7
Tue, SEP 25,	Student “attacked” teacher; 1 day of ISS to be served on September 26th	B-15; B-18
Mon, SEP 24,	Unexcused absence	B-18; B-24; B-50
Fri, SEP 21,	Unexcused absence	B-18; B-24; B-50
Thu, SEP 20,	Unexcused absence	B-18; B-24; B-50
Wed, SEP 19,	Unexcused absence	B-18; B-24; B-50
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Tue, SEP 11,	Approximate date initial behavior intervention plan implemented	Lopes Test.; B-13
Mon, SEP 10,	Unexcused absence	B-18; B-24; B-50
Fri, SEP 7,	ISS served	B-66 at 3
Thu, SEP 6,	ISS served	B-18; B-24; B-26; B-50; B-66 at 2
Wed, SEP 5,	ISS served	B-18; B-24; B-50; B-66 at 1
Tue, SEP 4,	Student earns 3 days of ISS for fighting with another student, served on September 5 <sup>th</sup> – 7 <sup>th</sup> .	B-14
Fri, AUG 31,		
Thu, AUG 30, 2001	School year starts	

9. As of the end of September 2001, the Student had served 4 days of ISS, or 1 day of ISS for every 4.75 days of school to that date. All 4 days of ISS in September were assigned because the Student was fighting with other students or otherwise physically aggressive toward other students. A behavioral intervention plan (“BIP”) was implemented on or about September 11<sup>th</sup> and provided, among other things, for a daily behavior chart/checklist to be mailed home and implementation of a positive reinforcement system to desirable behaviors. *See* B-13; Lopes Test.
  
10. As of the end of October 2001, the Student had earned an additional 6 days in ISS, for a cumulative total of 10 since the beginning of the academic year, or 1 day in ISS for every 4.1 days of school to date. The Student had been assigned five days of ISS for exposing himself in class, but only served 4 of those days.
  
11. On November 5, 2001, Mr. Lopes sent a notice to Ms. Gilchrist, who was the Student’s special education teacher, which advised that the Student had then accrued “5-7 days of suspensions” and recommended that a PPT be held and a behavior modification plan be implemented. The notice then stated “Once a student has cumulated 10 days either in or out of school suspension you will need to set up a manifestation determination and . . . [complete] a Functional Behavioral

Assessment as soon as possible.” (B-61)

12. Notwithstanding that as of November 5, 2001, the Student had already accrued ten days of ISS, a manifestation determination PPT (“MDPPT”) was not convened. Mr. Lopes was not able to explain why the MDPPT was not convened as suggested in his November 5, 2001 memo. (Lopes Test.)
13. During November, the Student continued to manifest low level periodic violations of school rules but his conduct overall appeared to have improved. In November, 2001, the Student earned one day of ISS, for a cumulative total of 11 days of ISS as of the end of November, or 1 day in ISS for every 5.6 days of school to date.
14. By notice dated December 4, 2001, the Board scheduled a PPT for December 13, 2001 for the purpose of conducting a manifestation determination. (B-17)
15. As of December 7, 2002, the Student had earned an additional two days of ISS, making a cumulative total of 13 days in ISS, or 1 day in ISS for every 5.2 days of school as of that date.
16. The PPT noticed for December 13, 2001 did not take place. (Lopes Test.)
17. On December 12, 2001, the Student’s BIP was modified and expanded. (B-20) The goal of the new BIP was to increase the Student’s ability to remain on task during class, to complete all in-class and home-work assignments, arrive at class on time, “refrain from making inappropriate physical contact with peers” and “refrain from making obscene gestures.” To implement the BIP, the Student was to be provided with access to counseling services weekly and as needed; a daily behavioral chart completed by his teachers to be signed by the Parent; and, if he is given a late to class referral, a paraprofessional to escort him between classes for the remainder of the week. A system of home consequences and home reinforcers was implemented to encourage appropriate behaviors. If the Student manifested inappropriate behavior, under the system he would lose reward points at home and would “receive a disciplinary referral and/or detention or in school suspension.” (B-20) Although the version in the record was unsigned, Mr. Lopes testified that the BIP was signed by the Parent and thereafter implemented. (Lopes Test.)
18. The Student earned two additional days of ISS in January 2002 for fighting (bringing the cumulative total to 15 days of ISS to date) as well as an additional 3 days of ISS in February 2002 for disrespectful and disruptive behavior (bringing the cumulative total to 18 days of ISS through the end of February). The Student had no additional days of ISS in March 2002, and 4 additional days of ISS in April 2002 due to disruptive and disrespectful behavior and for leaving classes without permission (bringing the cumulative total to 22 days of ISS through the end of April or 1 day of ISS for every 6.8 days of school to date). The Student had 1 additional ISS day in May related to an incident in which he bit another student, bringing the total to 23 cumulative days of ISS through the end of May 2002, or 1 day in ISS for

every 7.4 days of school through May 31, 2002.

19. On January 18, 2002, a notice of PPT for the purpose of reviewing the Student's BIP was issued. (B-27) The parties were unable, however, to reach agreement on a mutually satisfactory date for the PPT, which was tentatively rescheduled for February 13, 2002 but never actually took place. (B-62; Lopes Test.) The materials in B-30 were prepared in anticipation of that February 13, 2002 PPT. (Lopes Test.)
20. During this period, the administration became aware that the Student and his family were involved with the Juvenile Court system and the possibility of a Court-ordered "outplacement" had been raised. (B-62; Lopes Test.)
21. No further events of significance occurred between January 18, 2002 and June 6, 2002. On June 6, 2002, an incident occurred in which dog feces were brought to the Student's classroom in a bag by another student, the bag was placed on the teacher's desk by yet another student, the teacher subsequently threw the bag with the dog feces into a waste basket in the classroom, and the bag was subsequently retrieved from the wastebasket and thrown into a hallway/stairwell area adjacent to the classroom while other students were in the hallway. (Lopes Test.)
22. Mr. Lopes testified that he interviewed a number of students, who confirmed that the Student had not brought the dog feces to school or placed the bag on the teacher's desk, but had retrieved the bag containing the dog feces from the waste basket and thrown it into the hallway. Based on this information, Mr. Lopes concluded that the conduct at issue was volitional and intention. (Lopes Test.)
23. By letter dated June 7, 2002, Mr. Lopes notified the Parent that the Student was being given an out-of-school suspension for 9 days commencing on June 10 and ending on June 20, 2002 as a result of the Student's involvement in the June 6, 2002 dog feces incident. (B-49) On June 12, 2002, the Board noticed a PPT for June 17, 2002 to conduct an annual review and a manifestation determination. (B-51)
24. Mr. Lopes testified that Ms. Perkins, a school social worker who had been working with the Student in the 2001-2002 academic year, also investigated the incident and reached a conclusion that the Student had not thrown the dog feces into the hallway/stairwell. (Lopes Test.) The Student's version of events is reported in a functional behavioral assessment ("FBA") completed on June 12, 2002, as follows: Another student brought dog feces to school and tried to get someone to place the bag on the teacher's desk. The Student refused to handle the bag and swept it to the floor when it was placed on his desk. Later, the Student was standing near the doorway and someone behind him threw the bag over his head and into the hallway. The Student claims he does not know who threw the bag into the hallway, was upset about being suspended for something he did not do and felt that he demonstrated good control because he did not participate in the activity with the other students. (B-53; B-54)

25. The FBA, which was considered by the MDPPT on June 17, 2002, notes: (1) that the Student had 32 disciplinary notices to date in that academic year; (2) that the dosage of his medication for ADHD had been increased 3 weeks previously; (3) that approximately 3 weeks previously his step-father had moved out of the home and the Student had begun having contact with his birth father, who is incarcerated; (4) that there was no evidence to suggest that the behavior at issue was predictable given the Student's disability; (5) that although the Student is impulsive and has demonstrated "poor judgment in the past he has no history of similar behaviors or pranks;"(6) that some of the Student's disruptive behaviors reflect as "release for his impulse and motor needs;" and (7) that the Student will sometimes "act-out when . . . he is experiencing personal difficulty." (B-53)
26. The Parent participated in the June 17, 2002 MDPPT. According to Mr. Lopes and the minutes of that PPT, 5 members concluded that the Student had thrown the dog feces and that that act was not a manifestation of the Student's disability, while 3 members (the Parent, Ms. Perkins and a guidance counselor) concluded that the Student had not thrown the dog feces and therefore should not be disciplined. (Lopes Test.; B-54)
27. The manifestation determination check list completed by Ms. Perkins (B-54) for the MDPPT indicates that the Student had accrued 16 ISS days and 6 out-of-school suspension days as of June 17, 2002. (B-54) The number of ISS days was in fact incorrectly recorded since the Student had served 23 days of ISS as of that date. The minutes of the MDPPT indicate that the Parent had questioned the accuracy of the Board's ISS figure.
28. The manifestation determination checklist completed at the June 17, 2002 MDPPT indicates in one place that the Student's disability does impair his ability to understand the impact and consequences of the behavior in question, while stating at another place that the Student's disability did not impair his ability to understand the impact and consequences of his behavior. (B-54) Mr. Lopes testified that the former statement did not reflect the consensus at the MDPPT and was in error, whereas the latter statement did reflect the consensus. (Lopes Test.)
29. The Student's 7<sup>th</sup> grade report card (B-55) shows mild improvement in GPA over the academic year as follows: MP1 2.2; MP2 2.4; MP3 2.5; and MP4 2.6, all of which reflects an approximately C+ average over the year. (B-67 at 17)
30. When a student is sent to ISS, the student's classwork is sent to the ISS with the student for completion and that the student will in effect receive one-on-one attention and teaching. The ISS supervisor is a certified teacher and that the ISS class typically consists of up to 12 students, some of whom are receiving special education services and some of whom are not. To the extent the ISS program would contravene or fail to provide services required under an IEP, the procedures and requirements of the ISS program would give way to the requirements of the

IEP. (Lopes Test.) *See also* B-59; B-68 at 20.

31. The Student Handbook defines an “In-School Suspension” as an “exclusion from regular classroom activity for no more than five (5) consecutive school days, but not exclusion from school, provided such exclusion shall not extend beyond the end of the school year in which such in-school suspension was imposed; and provided further that no pupil shall be placed in in-school suspension more than fifteen (15) times or a total of fifty (50) days in one year, whichever results in fewer days of exclusion. If the in-school suspension limits are exhausted, other disciplinary alternatives may be considered.” (B-68 at 30)
32. The Student Handbook further provides that “a pupil may be assigned an in-school suspension if his/her conduct endangers persons or property, or is seriously disruptive of the educational process, or violates a publicized policy of the Board of Education. No pupil shall be placed in in-school suspension without an informal hearing before the principal or his/her designee. Whenever administration seeks to impose an in-school suspension period on a pupil with a disability requiring special education or accommodations, the administrator shall determine the number of days of in-school suspension or suspension already imposed on said pupil during the school year, and to initiate compliance with state and federal special education laws and regulations with respect to holding an IEP team or [Section] 504 team meeting if necessary.” (B-68 at 32) The term “informal hearing” is defined to mean “an opportunity for the pupil to meet with an administrator, be informed of the reasons for the disciplinary action proposed, and be given an opportunity to explain the situation.” (B-68 at 31)
33. The Student Handbook defines a “Suspension” to mean “an exclusion from school privileges or from transportation services for no more than ten (10) consecutive school days, provided such exclusion shall not extend beyond the end of the school year in which suspension was imposed; and further provided no pupil shall be suspended more than ten (10) times or a total of fifty (50) days in one school year, whichever results in fewer days of exclusion, unless such pupil is granted a formal hearing as provided below.” (B-68 at 31)
34. With respect to out-of-school suspensions, the Student Handbook provides, in pertinent part, that “[w]henver administration seeks to impose a suspension period on a pupil with a disability requiring special education or accommodations, the administrator shall determine the number of days of in-school suspension or suspension already imposed on said pupil during the school year, and to initiate compliance with state and federal special education laws and regulations with respect to holding an IEP team or 504 team meeting if necessary.” (B-68 at 33)
35. During the 2001-2002 academic year, either Mr. Lopes (as Principal of Carrigan) or his designee was involved in determining whether the Student should be placed in ISS and for how many days for every instance in which the Student was placed in ISS. (Lopes Test.)

**CONCLUSIONS OF LAW:**

1. The first issue to be addressed is whether during the 2001-2002 academic year through June 10, 2002, the Student was subjected to an improper “change of placement” by being placed in ISS on 11 separate occasions for a cumulative total of 23 days in ISS. For purposes of disciplinary action and pursuant to IDEA Regulation 300.519(b), a “change of placement” occurs if the “child is subjected to a series of removals [from his “current educational placement”] that constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another.”
2. Although the Student was removed from his self-contained classroom and placed in ISS for 23 days in a “series of removals,” the “series of removals” did not constitute a “pattern.” The Student was placed in ISS on several occasions as a response to a variety of inappropriate behaviors which violated various school rules. The length of each term of ISS was determined on a case-by-case basis, not every behavioral episode resulted in placement in ISS, and there was no specific pattern to the timing or frequency of referrals to ISS.
3. Further, the comments to IDEA Regulation 300.520 provide, in pertinent part, that “[a]n in-school suspension would not be considered a part of the days of suspension addressed in [Section 300.520(a)] as long as the child is afforded the opportunity to continue to appropriately progress in the general curriculum, to continue to receive the services specified on his or her IEP and continue to participate with non-disabled children to the extent they would have in their current placement.” Mr. Lopes testified that while in ISS the Student was afforded an opportunity to continue to progress in the general curriculum, to receive the services specified on his IEP and to participate with non-disabled children. Accordingly, the Student’s term served in ISS would not count toward the days of suspension addressed in that IDEA Regulation for purposes determining whether there has been a “change of placement” under the IDEA’s disciplinary provisions.
4. IDEA Regulation 300.520(b)(i) provides that not later than 10 business days after first removing the child for more than 10 school days in a school year for disciplinary reasons, the district must convene an IEP meeting to develop an assessment plan if the district has not already conducted a functional behavioral assessment and implemented a behavioral intervention plan for the child prior to the occurrence of the behavior which resulted in the removal. IDEA Regulation 300.520(b)(2) provides that if the district already has a behavioral intervention plan in place, the district must convene the IEP team to review the plan and its implementation and modify the plan and/or its implementation as necessary to address the behavior.
5. As of November 2<sup>nd</sup>, the Student had served 11 days of ISS. In September 2001, a BIP had been implemented for the Student. Accordingly, the Board was required pursuant to

IDEA Regulation 300.520(b)(2) to convene on or by November 19, 2001 an IEP team to review the BIP and its implementation and determine whether any modifications were required. The Board failed to convene that IEP team meeting. The Student continued to participate in his program and successfully completed his program in the month of November 2001. The September 2001 BIP remained in place for one more month until it was modified on December 12, 2001.

6. The failure of the Board to precisely follow these IDEA procedures does not, in and of itself, automatically require a finding that the Student was denied FAPE. Rather, FAPE is denied due to failure to follow procedures only where the failure results “in the loss of educational opportunity, or seriously infringe[s] the parents’ opportunity to participate in the IEP formulation process.” *See, e.g., W.G., B.G. v. Board of Trustees of Target Range School District No. 23*, 960 F.2d 1479 (9<sup>th</sup> Cir. 1995). The Board’s failure to convene an IEP team at this point did not result in a loss of educational opportunity or seriously infringe on the Parent’s opportunity to participate in the IEP formulation process. It is unlikely that a modified BIP would have prevented subsequent referrals to ISS or the Student’s involvement in the dog feces incident leading to his suspension.
7. IDEA Regulation 300.520(c)(1) provides that if subsequent to the steps undertaken pursuant to Section 300.520(b), the child (who now has a behavioral intervention plan in place and who has been removed from his/her current educational placement for more than 10 school days in a school year) is subjected to a removal which does not constitute a change of placement, the IEP team must meet to review the intervention plan and its intervention, and make modifications as necessary.
8. After November 2, 2001, the Student next engaged in a behavior for which an ISS was imposed in early December 2001. At that point, the Student was given two additional days of ISS and the Board noticed an MDPPT to take place on December 13, 2001. That PPT did not convene, but the IEP team did meet on December 12, 2001 and significantly revised the September 2001 BIP. With the Parent’s consent, the modified BIP was implemented. This procedure reflects substantial compliance with the IDEA’s requirements, and was not a violation which deprived the Student of an educational opportunity or the Parent of an opportunity to meaningfully participate in the process.
9. Pursuant to IDEA Regulation 300.523, the manifestation determination review (“MDR”) process is triggered where “an action is contemplated . . . involving a removal that constitutes a change of placement under Sec. 300.519 for a child with a disability who has engaged in other behavior that violated any rule or code of conduct of the LEA that applies to all children.” Since there had not yet been a “change of placement,” it was not necessary for the Board to convene an MDPPT at this point. Therefore, the failure of the Board to convene an MDPPT on December 13, 2002 or prior to June 6, 2002 was not a violation of the IDEA.
10. The second issue to be addressed is whether the Board’s June 7, 2002 decision to suspend the Student for 10 days beginning June 10, 2002 for his involvement in the dog feces incident was appropriate and done in a manner consistent with the requirements of

the IDEA and related State law.

11. The Board could reasonably conclude that the conduct at issue was violative of the publicized policies of the Board governing student conduct, as reflected in the Parent-Student Handbook (B-68), and was therefore properly the subject of a disciplinary action such as suspension.
12. The Board decided on June 7, 2002 that the Student should be suspended for 9 days beginning Monday June 10, 2002 for his involvement in the dog feces incident, and notified the Parent by letter dated June 7, 2002 that an MDPPT would be convened on June 17, 2002, which is less than 10 school days later. That MDPPT took place on June 17, 2002. Accordingly, the Board complied with IDEA Regulation 300.523(a)(2) and (b) which provides that “[i]mmediately, if possible, but in no case later than 10 school days after the date on which the decision to take that action is made, a review must be conducted of the relationship between the child’s disability and the behavior subject to the disciplinary action.” The review is to be done by the “IEP team and other qualified personnel in a meeting.”
13. IDEA Regulation 300.523(c) provides that at an IEP meeting, the personnel conducting the MDR “may determine that the behavior of the child was not a manifestation of the child’s disability only after considering all relevant information, including but not limited to “(i) Evaluation and diagnostic results, including the results of other relevant information supplied by the parents of the child; (ii) Observations of the child; and, (iii) The child’s IEP and placement.” The MDR team in this case complied with this IDEA Regulation by considering prior evaluations of the Student on file, reports of his classroom behavior and current family situation, the Student’s IEP and placement, the Student’s description of his involvement in the incident, and the arguments of the Parent as to why the Student should not be disciplined. *See, e.g.*, B-52; B-53; B-54.
14. After reviewing all of the required information, IDEA Regulation 300.523(c) then provides that the MDR personnel must then make a set of specific findings as follows: (1) In relationship to the behavior subject to disciplinary action, that the child’s IEP and placement were appropriate and the special education services, supplementary aides and services, and behavior intervention strategies were provided consistent with the child’s IEP and placement; (2) That the child’s disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and (3) That the child’s disability did not impair the ability of the child to control the behavior subject to the disciplinary action. IDEA Regulation 300.523(d) provides that unless all three of the required findings are made, the “behavior must be considered a manifestation of the child’s disability” and the child may not be subject to disciplinary action.
15. In reviewing the outcome of an MDR process and a decision of an MDPPT, IDEA Regulation 300.525(b) provides that a hearing officer “shall determine whether the public agency has demonstrated that the child’s behavior was not a manifestation of the child’s disability . . .”



16. The findings of the MDPPT in this case are reasonable, given the nature of the Student's disability and the Student's disciplinary record in the 2001-2002 academic year.
17. As to the first finding, since the Parent has not challenged whether the Student's IEP or BIP in the 2001-2002 academic year were appropriate and were being appropriately implemented, the Hearing Officer will assume for purposes of this proceeding that the MDPPT could reasonably conclude that that IEP and BIP were appropriate to meet the Student's educational needs and were being implemented appropriately.
18. As to the second and third required findings, the MDPPT could have reasonably concluded that the Student's disability did not impair either the Student's ability to understand the impact and consequences of his behavior or to control the behavior at issue. There is no evidence that the Student's disability left him unable to tell right from wrong or unable to recognize that he would receive consequences for inappropriate behavior, including removal from his class. In addition, a child with SED does not manifest the same characteristics of a child with a conduct disorder or who is socially maladjusted. *See generally* the diagnostic definition of SED set forth in IDEA Regulation 300.7(b)(9). *See also, e.g., Springer v. Fairfax County School Board*, 134 F.3d 659, 664 (4<sup>th</sup> Cir. 1998) (conduct disorder is marked by pattern of violating societal norms associated with drinking, smoking, drug use, and reckless and risk taking acts; social maladjustment is marked by persistent pattern of violating societal norms with truancy, drug use, "perpetual struggle with authority," low frustration tolerance, impulsivity and manipulative behaviors; courts and special education authorities have "routinely declined . . . to equate conduct disorders or social maladjustment with serious emotional disturbance") (citations omitted). The MDPPT could reasonably conclude that throwing a bag of dog feces into a hallway at school where students are present is not a characteristic of SED, which is reflected, among other things, by academic difficulties, difficulties in maintaining interpersonal relationships, and the manifestation of inappropriate behaviors or feelings under normal circumstances, occurring over a long period of time and to a marked degree.
19. IDEA Regulation 300.523(a) provides that if the personnel conducting the MDR process determine that the behavior was not a manifestation of the disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities.
20. Having reasonably concluded that the Student's behavior was not a manifestation of his disability, the Student could be subject to a suspension if such disciplinary measures would be applied as to non-disabled students who committed the same act. Throwing dog feces into a hallway where students are present is conduct on school grounds that is disruptive of the educational process, may endanger other students by presenting a health risk to them, and is violative of the Board's publicized policies regarding Student conduct as set forth in Exhibit B-68.
21. Conn. Gen. Stat. Sec. 10-233c(a), which concerns suspensions, provides that a board of

education may authorize the administration of its schools to suspend a pupil whose conduct on school grounds is violative of a publicized policy of the board, or is seriously disruptive of the educational process, or endangers other students or school property, provided that the student is given an “informal hearing by the administration” at which the student is informed of the disciplinary action and given the opportunity to explain the situation and further provided that no student is suspended more than ten times or a total of fifty days in one school year, whichever results in fewer days of exclusion. A suspension is defined in Conn. Gen. Stat. Sec. 10-233a(d) in pertinent part as an “exclusion from school privileges . . . for no more than 10 consecutive school days . . .” The Board’s actions in suspending the Student in this case were in compliance with Section 10-233c(a).

22. Conn. Gen. Stat. Sec. 10-233f, which concerns in-school suspensions, provides that a board of education may authorize the administration of its schools to impose an in-school suspension on any pupil whose conduct endangers persons or property or is violative of a publicized policy of the board, or is seriously disruptive of the educational process, provided that the student is given an “informal hearing” before the principal at which the student is informed of the disciplinary action and given the opportunity to explain the situation; and further provided that no student is placed in an in-school suspension for more than fifteen times or a total of fifty days in one school year, whichever results in fewer days of exclusion. The term “in-school suspension” is defined in Conn. Gen. Stat. Sec. 10-233a(c) to mean, in pertinent part, “an exclusion from regular classroom activities for no more than five consecutive school days, but not exclusion from school . . .” The Board’s actions with respect to the in-school suspensions given to the Student in the 2001-2002 academic year were in compliance with Section 10-233f.
23. The Board complied with the procedural aspects of its student disciplinary policies with respect to the ISS and out-of-school suspensions given to the Student in the 2001-2002 academic year, as reflected in the Student Handbook, Exhibit B-68.

### **FINAL DECISION AND ORDER**

1. The Board shall correct the Student’s record of time served in ISS in the 2001-2002 academic year to reflect the determinations in this Decision, if the Parent makes a written request that it correct the records.
2. For the 2002-2003 academic year, within 10 school days of the date on which the Student accrues 10 days of any type of a suspension (whether ISS or out-of-school), the Board is to convene a PPT for the purpose of reviewing the Student’s classification, placement, IEP and any BIP to determine whether the Student’s classification, placement, IEP and/or BIP are appropriate or need to be modified, and determine whether the IEP and BIP are being implemented consistently. If the Student has already accrued 10 days of suspension (whether in-school or out-of-school) as of the date the Board receives this Decision, that PPT is to be convened within 10 days of the date the Board receives this Decision if a PPT for this purpose has not already been convened. The Board is further

directed for the balance of the 2002-2003 academic year to reconvene a PPT for the purposes described herein at each point at which the Student has accrued an additional 5 days of suspension of any kind (whether in-school or out-of-school). Any such PPT is to be convened within 10 school days of the date on which the Student accrues the required number of days of suspension.