

Received

AUG 27 2009

Dispute Resolution & Administrative Services

Virginia Department of Education

Due Process Hearing

School Division: Public Schools
LEA Counsel: Derek A. Mungo, Assistant City Attorney
LEA Representative: , Direction of Special & Gifted Education Services

Parents: Ms. &
Name of Parents' Advocate: Cheryl A. Poe, Special Education Advocate

Party Initiating Hearing: Parents, &
VDOE Reviewer: Reginald B. Frazier, Sr., Esquire

Hearing Officer: Sarah Smith Freeman, Esquire

In Re: , ("Student") or ("Child")

Date of Birth: June 21,

Witnesses called by the parents (in order of appearance):

, Parents' "family friend,"

, "Assistant Principal" of

School

, "school social worker,"

" of

School

Dr. , Ph.D., expert witness, "outside psychological evaluator"

, "first grade teacher" formerly at

School

, "school counselor"

, "school psychologist", expert witness

, "school social worker"

, "school nurse"

, parent

In Re: , "student"

& , "parents",
Petitioner

v.

School Board of the
Respondent

## **DECISION**

### **Introduction:**

This matter came for hearing on July 27, 28, August 3, 5 & 12 at School \_\_\_\_\_, Virginia and at the Virginia before a duly appointed hearing officer. Present, in addition to the court reporter, were the parents, parents' advocate, LEA counsel, the LEA representative, and the VDOE reviewer.

The parents requested this due process hearing in order to resolve this dispute and request a written decision in conformity with special education law, the Individuals With Disabilities Education Act, ("the IDEA), 20 U.S.C. 1400 et seq., as amended by the Individuals with Disabilities Education Improvement Act of 2004, effective July 1, 2005, the regulations at 34 C.F.R., Part B, Section 300, et seq., the Virginia Special Education Regulations, ("the Virginia Regulations") at 8 VAC 20-80, et seq., and Section 504, of the Rehabilitation Act of 1973, as amended, 29 U.S.C.A. 701 et seq.

### **ISSUES PRESENTED:**

**(1) (a)** Has the LEA failed to provide student a FAPE program and placement for the 2008 to 2009 school year by failing to identify student's disability pursuant to the IDEIA?

**(b)** Has the LEA violated IDEIA's child find regulations by failing to properly interpret student's evaluation results?

**(2)** Has the LEA discriminated against student by violating Section 504 mandates?

**(3)** Has the LEA failed to assess, evaluate & provide services and accommodations for student's bi-polar disorder, a medical condition, which adversely

affects student's educational performance and prevents her from fully accessing her curriculum?

(4)(a) Was student's mother, alleged to be disabled, denied her right to meaningful parental participation when the LEA did not provide her accommodations at the May 14, 2009 child study meeting?

(b) Did the LEA's failure to provide parent with accommodations for her medical condition prevent the parent from providing consent to the Child Study team at the May 14, 2009 meeting?

(5) Did the LEA violate student's or parents' right to privacy by conversing with student's neighbor about personal confidential information related to student?

(6) Did the LEA deny parent, who is alleged to be disabled, her right to be represented by an individual with specialized education knowledge or training or an attorney to assist her to obtain a FAPE for student?

During the pre-hearing conference occurring on June 29, 2009, the parties discussed the above issues as the same were originally set forth in the due process request and are incorporated by reference herein. During the above pre-hearing conference, the parties agreed that the forgoing issues were ripe for due process hearing and the issues were therefore deemed legally sufficient. By way of addendum thereto, LEA counsel requested permission to summarize the above issues as follows:

(7) Is student's parent disabled?

(8) If parent is disabled, did her medical condition prevent or limit her from fully participating in and requesting special education services for student?

(9) Did parent's disability and lack of accommodations during the 2008-2009 school year cause the LEA to deny student a FAPE?

#### **ARGUMENT:**

In support of the LEA's Motion to Strike the Evidence for insufficiency of law and fact, the LEA asserts that parents' due process request should be dismissed in its entirety.

1. Even if student has been diagnosed with Pediatric Bipolar 1, parents cannot produce any evidence demonstrating that student is eligible for special education services because of her progressing and satisfactory academic performance, and the due process hearing request should be dismissed as to this claim as a matter of law.

When parent raises a concern regarding student's possible disability, a public school system **must** conduct a "full and individual initial evaluation" before special

education services can be provided. 20 U.S.C. 1414(a); 34 C.F.R. 300.531. A variety of assessment tools may be used, and the assessment tools must provide information on all areas of suspected disability. 20 U.S.C. 1414(b)(3)

In this instance, the LEA asserts that this student's alleged disabling medical condition, Pediatric Bipolar 1, does not indicate any need for additional evaluation or for eligibility for services under the IDEA unless the suspected disability **adversely affects** the child's educational performance. 34 C.F.R. 300.534(b)(2); 34 C.F.R. 300.7(c)(9)(2). Thus, the LEA asserts that the medical diagnosis of Pediatric Bipolar 1 is legally insufficient, in itself, to invoke the protections of the IDEA for student.

The LEA asserts that it has fully complied with the two provisions of the law governing whether student was eligible for services. Initially, the LEA considered appropriate assessment tools for all "suspected" disabilities (the outside psychological evaluation creating the Pediatric Bipolar 1 diagnosis and the educational/classroom observations addressing student's academic performance.) Thus, the LEA fully complied with 20 U.S.C. 1414(b)(3) as to its use of assessment tools. Second, the LEA examined but did not find the necessary adverse impact of the medical diagnosis on student's academic performance

2. There were only three different instances when the Child Find provisions of IDEA were invoked. Factual evidence and testimony presented by the parents' witnesses revealed that the LEA did comply with its duty to screen this student for suspect disabilities in all three instances when the LEA's Child Find duties became an issue. On April 17, 2008, March 5, 2009 and May 14, 2009, the LEA screened student pursuant to Child Find regulations at 34 C.F.R.300.121(e); 34 C.F.R.300.125.

Local school divisions are required to maintain an active and continuing child find program which is designed to "identify, locate and evaluate" those children, from birth to 21, "who are in need of special education and related services", 34 C.F.R. 300.121(e).

This LEA asserts that, as a matter of law, the evidence presented by the parents showed that no violation of Child Find provisions have been shown. Even if the facts are considered in a light most favorable to parents, there is no evidence that the LEA has been irrational or oblivious to student's educational needs. Conversely, LEA personnel find no rational justification for the student's difficulties in a school setting. In fact, in order to discover the source of student difficulties in school, the LEA proved to be "hypervigilant" in its effort to best assist this child's educational needs.

3. Parents' evidence does not reflect any actions connoting bad faith or gross misjudgment on the part of the LEA educators and, therefore, factual circumstances do not exist indicating that parents have made a prima facie showing of a Section 504 violation.

Fourth Circuit case law indicates that parents may only bring a claim against the LEA if the LEA has shown bad faith or gross misjudgment in the LEA's actions. These factors are not reflected by parent's evidence of a Section 504 violation. "

### **Findings of Fact**

1. Student is a 7 year old female child who attended elementary school at this LEA beginning in kindergarten on April 3, 2008. Student was recently promoted to second grade at the end of the 2008-2009 school year. Prior to entry into this LEA, Student attended a private school. (R-35)
2. A child study (SST) team meeting occurred on May 14, 2009 to address her mother's concerns regarding the child's work habits. "Student is described as gifted but the parent feels that she is not performing at that level." Minutes indicate that there is also a parental concern about student's "bipolar disorder." Parent also notes concerns for student's "lack of academic progress, mood, impulsivity and lack of friends." Testimony at the hearing revealed that the child study meeting began late because student's advocate did not attend the meeting until after it had begun. Thereafter, a loud verbal exchange ensued between the advocate and one of the LEA administrators. Shortly, the child study meeting abruptly terminated because the advocate believed that an LEA administrator had threatened her by physically pointing her pen in the advocate's direction. Parent elected to leave the meeting with the advocate. The SST meeting did not provide much pertinent information to LEA administrators or to parent regarding student's special education needs. At the due process hearing, a recordation of the meeting was replayed. It is apparent that the SST meeting convened for the stated purpose and ended soon. In the words of one attendee, "It was just very confusing." Other than those facts, this hearing officer draws no substantive conclusions from the emotionally charged discourse between the LEA and parent's advocate. (R-2, R-3, T190/20)
3. On February 5, 2008, student underwent a psychological evaluation at her mother's election. The evaluation was the result of parent's effort to "assess student's current level of functioning." Student's verbal IQ of 121 is in the superior range according to the Wechsler Preschool and Primary Scale of Intelligence. Student's diagnosis of Pediatric BiPolar 1 was based largely upon information derived from parent rating scales of subjective observations. The outside evaluator who created student's diagnosis of Pediatric Bipolar 1 also "suspects" that ADHD co-exists along with the diagnosis of Pediatric BiPolar 1. The diagnosis of Pediatric BiPolar 1 is not definitive nor reliable, by itself, as a school assessment tool because the diagnosis contained therein was created without the benefit of any objective school criteria. (R-30)
4. The outside evaluator has obtained a bachelor's degree which was a dual degree in psychology and education, two master's degrees and a doctorate in counseling,

psychology and in clinical psychology. (T5/11-25, T6/1-4) The outside evaluator admits that she only recently earned a doctorate and that she is not a school psychologist. The outside evaluator qualified as an expert in conducting psycho educational evaluations for children with special needs and in providing psychological counseling services to children with disabilities and mental health conditions. (T8/5-22)

5. The outside evaluator describes student as a “very, very shy child” who has an “overarching social anxiety” which she later quantified as in the “mild” range. Regarding student’s habit of urinating on herself, the evaluator inferred that social anxiety likely “gets in the way of a lot of functions in [student’s] life like asking for permission [to use the bathroom.]” (T23/17-25, T24/1, T73/9)

6. Student’s outside evaluator candidly admitted during her testimony that her information for the report from the prior school was primarily subjective information of anecdotal content. In preparation for her psychological evaluation, the outside evaluator related that she “talked to staff on a number of occasions” to obtain information to create her evaluation of student. The outside evaluator admitted that she did not review report cards, she did not make school visits of either the private school or the LEA and she obtained her information for her written report, mostly, through teacher notes from the prior school given to her by parent and from parent’s perceptions. (T76/24-25, T85/1-8, T92/8-11, T98/23-25, T99, 1-5)

7. The evaluation provided to LEA staff in which student is described as having a “pediatric bipolar disorder” is of little use to this LEA: No academic information whatsoever was provided by the prior school: no information about student’s assignment completion, organizational skills, written expression, following instructions, mathematical performance. Parent and the outside evaluator attempted to obtain objective school data from the prior school to utilize toward a diagnosis of ADHD for student. The prior school elected not to comply with parent’s and the outside evaluator’s requests to assist in a diagnosis of this student as a child with ADHD. (T62/22-25, T63/17-21, T63/1-21)

8. The outside evaluator was adamant in her assertion, “I didn’t diagnose [student] with ADHD.” The outside evaluator admitted that the DSM-IV requires that ADHD symptoms be present in more than one setting for a diagnosis to be accurate. Though the outside evaluator was not clinically able to diagnose student with the disorder of ADHD, student was sent to a medical doctor, without benefit of academic input, for prescription of medications for the treatment of ADHD symptoms in this child. A medical doctor has prescribed amphetamines, such as Ritalin and Adderall, for student to utilize during school hours though no medical testimony was provided at the hearing in support of the treatment. (R-31, T64/9, T26/4-9, T64/1-9)

9. The outside evaluator testified regarding the standard mean deviation in a composite score of 85 for “processing speed” for a child whose IQ is 121. Processing speed generally relates to “how quickly and accurately a child can perform a task.” Processing speed can be affected, the outside evaluator testified, if a child is distracted with attention

issues or with significant emotional issues. Obviously, processing is much harder for a child with these kinds of issues. Whether student's processing speed will become an issue in her academic career is a matter for future determination. Student appears to have compensated well for any processing speed difficulties. Student's grades are good to outstanding. Student will be working with the "gifted" teacher next year. (T14/1-14, T20/19-25)

10. On April 10, 2008, student's assistant principal referred this student for evaluation by a child study team or Student Study Team (SST) because review of student's record revealed that she had a psychological evaluation completed on February 5, 2008. On the face of the referral notice, the assistant principal notes that the child study committee's purpose is to review the evaluation and "to determine if any additional concerns need to be addressed." Describing student as "very articulate when she does speak," the referral notes that student is on grade level in math skills. Difficulties are noted: 28 out of 40 Dolch words, that she has a hard time doing any work or even putting her name on her paper. Student is termed to be "very, very quiet." When "things" don't go her way though, she becomes talkative and "very emotional with crying." The report notes that student has missed two out of three days at school on the date the referral was made. On the face of the referral the assistant principal has written, "today should be her third day and she's not here." Periodic bathroom incidents are also noted as follows, "bathroom accident 2<sup>nd</sup> day of school + again 2<sup>nd</sup> week twice." The assistant principal has checked off the "Behavior/Emotional Difficulties" section of the form as the primary reason for the referral. (R-32(a))

11. Student's record reflects many absences. A court order entered in a local J& D Court on March 12, 2009 orders parents to ensure student's attendance to school every day. Testimony at the due process hearing indicated that student had missed a quantity of days comparable to one quarter of school in her first grade year and there are numerous instances when student is tardy to school. (R-28)

12. Later Dolch word lists completed by student show that student mastered Dolch word lists. Her scores on many subsequent Dolch word tests given to her reflect that she vacillated between nearly perfect and completely accurate word lists of 40 to 52 words in the first, second, third & fourth quarters of her first grade year. (R-24)

13. Student's reading fluency level test completed on May 22, 2009 reflects that she read a fifth grade level passage with 90-97% accuracy in three minutes and twenty-eight seconds. (R-22)

14. Student has passed the entry level testing for the LEA's Gifted Program. (T126/17-22)

15. In Reading Comprehension student scored Level 23 which percentile places student at the independent reader skill level for comprehension. (R-22)

16. A Health Information Form signed by parent indicates that student is required to take medication for ADHD on a continuing basis. Student takes an amphetamine daily, .05 milligrams, ½ pill at breakfast and ½ pill at lunch. (R-31(f), T/77,18-22, PE-8, T81/3)

17. Upon student's enrollment at this LEA in April, 2008, parent notified the LEA that student "needed to be reminded to go to the restroom." Parent notes that student is "extremely sensitive," "needs unlimited access to water and restroom" and that student has a small stutter in her speech." Under the heading "emotional and mental," parent asserts that she informed the LEA that student "cries sometimes," "has a short attention span" and that student is "very shy." Further, parent notified the LEA that student needed special education screening. Also, the LEA was informed by the parent of the fact that student had received "another diagnosis" in addition to the parent's allegation of ADHD and a medical authorization for amphetamines at the time of her admission to this LEA. Parent notified the LEA that she had removed student from a prior private school because the prior school did not have any special education services. Parent and student reported that the prior school student attended "would not complete the questionnaire" in spite of many requests by the parent and independent evaluator to do so. (T/7617-25, PE-7, PE-9, T79/17-19, PE/10-B, T/ 15-21, T80/3-4)

18. In response to the above information provided by the parent and to comments by her then teacher, the LEA's assistant principal convened a child study meeting. Student's classroom teacher had expressed "concerns" regarding student's urinating on herself, student's need for encouragement for her to complete academic assignments and to discuss student's "attendance at school." The purpose of the meeting explicitly was to discuss the child's school behavior with LEA personnel. The Student Support Team Meeting (SST meeting) occurred on April 17, 2008. (R-32 (a), (b), (c) & T84/6-22, PE-66A, PE-66B, PE-66-C, PE-66D)

19. The assistant principal admitted that although the SST team was convened and many LEA personnel expressed "concerns" about student, no evaluations or interventions were undertaken by the LEA. Student Support Team (SST) minutes taken on April 17, 2008 indicate that student that has been diagnosed with Pediatric BiPolar 1. Parent relates that she also shares the BiPolar diagnosis. Noting student's superior range IQ of 122, parent reports that student enjoys computer games and reading. Current educational performance addresses certain educational concerns: completing work and "needs one-on-one attention," "articulate but very quiet," "becomes very emotional with crying," and that student has had three bathroom accidents since she started school (about 2 weeks prior.) Also noted is that student "does not complete her class work" and "struggles to complete her journals." A note in the upper portion of the minutes indicates that "the committee is meeting to discuss the results of an evaluation from the Christian Psychotherapy Center." Under the circumstances, the SST recommendation that the LEA will "monitor progress and counseling is being pursued and school will begin communication with counselor" is entirely appropriate and timely. SST minutes corroborate LEA testimony to the effect that the LEA convened child study as soon as the LEA learned of the student's outside evaluation indicating the existence of a possible

disabling condition with the potential to adversely affect student's educational performance. (R-32, T95/13-15)

20. For the 2007-2008 school year, student received passing marks in all academic subjects though she was tardy 63 days and absent 41 days and she was promoted to first grade. (R-19)

21. When the SST team was convened on April 17, 2008, the team ascertained that there was no information contained in the outside evaluation relating to a negative impact upon student's academic performance at student's prior school. When the SST meeting occurred on April 17, 2008, student had only been enrolled at this LEA for about two weeks prior to the meeting. The SST team acknowledged the necessity to collect more data on student because there were no indications, by her academic performance or from teacher reports, that student's Pediatric BiPolar 1 diagnosis was negatively impacting her academic performance. The SST team did determine that parent's claim did have some validity at school: extremely sensitive, bathroom issues and shyness. Student was described by the teacher reports as very articulate. Parent reports alone supported an ADHD diagnosis. ADHD was not reported to the LEA by the outside evaluator though student's medication is typically prescribed for a student who is medically diagnosed with ADHD. (T120/15-19, T121/1-6, T121/8-11, 17-23, T125/3-12)

22. In kindergarten, LEA objective testing proves that student mastered oral language and communication skills so the SST team determined that student's "small stutter," reported by parent, did not indicate a need for a speech screen. Student's small stutter did not adversely impact student's classroom performance. Report cards, standardized testing and student's academic performance all reflected no adverse impact upon student at this LEA. (T29/18-25, R-18, T130/1-25)

23. Neither did the SST team find that a Section 504 plan was indicated by student's shyness. Bathroom accidents, the assistant principal testified, are "not unusual for a new transfer at the end of the school year at age five.." (T133/20-25)

24. During her testimony, the assistant principal examined student's first grade report card for the end of the 2008-2009 year: The report card reflected 30 days absent and 27 days tardy for the year. Student had the most days absent (18) in her second quarter. For that quarter, the assistant principal testified that student received these grades: a "B" in math, an "A" in reading, a "C" in science, a "C" in social studies, and a "C" in writing, a "V" (very good) in art, an "O" (outstanding) in music, and a "O" in P.E.. For behavior, she received a "V," for respecting authority, a "V" for respecting others, a "V" for obeying school rules, an "S" for class participation, a "V" for "listening," an "S" for "follows directions," and an "S" for "has needed materials." Student's report card during this quarter reflected an "N" ("needs improvement") for "completing homework," "completing class work," and for "using time wisely." Although student's report card reflects that she experiences difficulty in "completion" of her assignments, her overall report card, even with an "E" in writing at the end of the school year, indicates "outstanding" academic success. Student's kindergarten and first

grade year report cards do not indicate any need for special education services. In conformity with earlier testimony and notwithstanding that she missed 30 days from school in her first grade year and 12 days after her transfer to this LEA at the end of her kindergarten year, student's academic record reflects success. (T131/6-25, T132/1-8, R-13, R-16, R-17, R-18, R-19, T135/9)

25. The LEA assistant principal testified that the SST did not believe that the difficulties noted on student's registration form and by student's classroom teacher were "concerns" that were "negatively impacting" student's access to the kindergarten curriculum. (T96/7-9)

26. The assistant principal was designated as an educational expert with respect to the Child Find or child study process and in determining eligibility for special education students. Regarding the depth of her educational and work experience, the assistant principal testified that, "as a facilitator of SST teams at each of my elementary schools," she is fully competent in the implementation of the IDEA and Section 504: During the assistant principal's five year tenure on the job, she has participated in a child study meeting every week up to six to seven meetings per week. The assistant principal has attained a bachelor's degree in elementary and middle education and a master's degree in administrative supervision. She is currently finishing her doctoral dissertation on educational leadership wherein she has focused upon the study of behaviors and implementing the character education program. The assistant principal was a classroom teacher for eight years, a math specialist for a year and a supervisor of staff development for a year prior to becoming an assistant principal for five years. (T106/16-25, T107/1-3, 2-7, 13-17, 16-17)

27. At the end of the 2008-2009 school year, Student had missed 30 days of school and she was tardy on 27 occasions. (R-17) Student's cognitive abilities reflected by her verbal scores show that this student scores a composite ranking of 96 which is a rating of "High" on the national age percentile ranking for student's age group. The percentile ratings on the Cogat (Cognitive Abilities Test) reflects also weaker scores (66) for student in the non-verbal area, however, student's score in the 6<sup>th</sup> stanine indicates above average non-verbal cognitive skills for student. (R-16)

28. The school social worker also testified in this matter regarding the SST meeting. She admitted that she did not review the Request for Administration of Medication Form for student indicating that student is to take Adderall for ADHD in the public school setting. This witness testified that LEA personnel were told that student had ADHD symptoms, "Therefore, the Adderall had been prescribed." In fact, testimony at the hearing indicated that LEA personnel were not clear if a diagnosis of ADHD had been made by a medical doctor. (T171, 1-12, PE-11D)

29. The school social worker has participated regularly in child study meetings at this LEA for the purpose of identifying children pursuant to Child Find for two and one half years at the rate of two meetings weekly. The school social worker confirmed that the SST meeting on April 17, 2008 was convened for the purpose of reviewing the report

from an outside psychological service prepared on student's behalf. The school social worker, who has attained the doctorate level of education and who regularly conducts SST meetings for this LEA, has been trained extensively in the IEP process, Child Find processes, and all processes relating to IDEA and to Section 504. The school social worker confirmed that there was no evidence presented at the SST meeting on April 17, 2008, regarding student's school experience or suggested by the outside psychological report, to indicate adverse impact upon student's school performance. The school social worker acknowledged that there was very little information regarding student's school experience at all and that student's progress should be monitored.(T187, 1-9, T187/18-25, R-30, T186/8-12, T188/)

30. Numerous LEA personnel report that student walks around the school "like a zombie" and that student seems "disconnected" from the school environment. No credible evidence was presented at the due process hearing by the parents to explain that the amphetamine dosages provided to student twice daily are required for her success in school or for symptoms of ADHD. Student's therapist admitted that she was ethically unable to diagnose ADHD in this student because she had acquired no objective materials from prior or current school personnel on this issue. Reports of ADHD symptoms have only been reported via subjective parental rating scales. No medical doctor appeared at the hearing of this case to explain why dosages of amphetamines being given daily to this student are necessary for her academic success. No credible evidence was presented by parents to inform this hearing officer that the doses of amphetamines, given twice daily to a then six year old child, did not singularly cause student's "zombie like" state in school. (T181/7-8)

31. Student's principal testified that she was unaware of academic problems experienced by student in kindergarten. In first grade, however, student's homeroom teacher began to discuss student with her during quarterly meetings. Student's first grade teacher expressed concerns about student's "actions...things that happen in class." But, there is "...not a concern for academics. She's an A-B student. In fact, I think she's gifted. (T210/12-15)

32. The principal indicated that some of the "actions" she discussed with student's first grade teacher were the bathroom accidents student frequently had in class. "She would urinate in her seat, in her chair" and often "on a rug in the classroom." The principal testified that, "usually, another child would tell her she had had an accident." She [student] wouldn't usually say. And mom would send clothes. She'd go get dry clothes and move on." "A friend would walk her down to the clinic so she could change clothes. I wouldn't say there's a disruption of instruction. The custodian would come. He would clean it up." Although the teacher did not develop a special plan or effectuate accommodations for the bathroom incidents, the teacher would remind student of the necessity to go to the bathroom which was located inside the classroom. Testimony revealed that student did not seem embarrassed by the bathroom incidents though she had urinated on herself in front of her peers. (T213/3, 14-16, T214, 3-11, 23-25, T215/4-11 )

33. The principal related that student appeared to be confused when she was in the school building. She did not seem to know which direction to go when she entered into the school building and this caused her concern. "I remember one time when she came out of the lunch line with her tray and stood there as if she didn't know where to sit. And this wasn't September. This was much later. She just appeared to be confused by the situation." It didn't appear to her to be the way in which most first graders act but it was not impacting her academically. (T238/12-25, T239/4-9, t239,18-25)

34. Student's first grade teacher referred to student being "shut down" during the last quarter of her first grade year. Student sat in seat with a "blank" stare during class. Student refused to write anymore for her first grade teacher. When asked if those behaviors impacted or "got in the way of" student "living up to her full potential in writing," the first grade teacher responded affirmatively but "just for the last quarter." ( T181, 12-15)

35. LEA personnel uniformly express concern about the frequency of student's bathroom accidents during class. Describing the frequency of occurrence as "a little odd," Student's first grade teacher testified that the number of accidents daily was excessive. Student had accidents about "two and three times a day." Student teacher reports that there were no adverse repercussions from the incidents that she noted. "The other kids were very supportive." Student's classmates did not tease her about the wetting incidents. (T123/5,6,19-25, T124/1)

36. Student's mother sent an e-mail to student's first grade teacher in which parent responded to the teacher's inquiries about student's crying in the last quarter of student's first grade year. This e-mail was also forwarded to the school counselor who reviewed it. In response to the first grade teacher's inquiries about student's distraction level, parent replies as follows on February 17, 2009: "... around that time frame, she [student] got her Ritalin increase, which seems fine, but they also really tweaked her sleeping medication, and that actually made it much more difficult for her to fall asleep and to stay asleep...Lots of nights in the past couple of weeks, she woke up in the middle of the night crying because she didn't do her homework." This e-mail is dated February 6, 2009. (PE-15 & T130/1-17, T256/8-18)

37. Student's first grade teacher describes student as a "higher level" thinker who has an extensive vocabulary. And, further, that student "was probably the most fluent and expressive reader in my class out of everybody." (T125/20-23)

38. Parents were notified on several occasions by the LEA to address student's attendance problem. Eventually, on March 3, 2009 the school counselor reported to the school social worker that a court order entered regarding the student's truancy requires (1) parental participation with all school meetings and enters a (2) protective order for student requiring that she has an attorney specifically to represent her interest as her guardian ad litem for the court proceeding. The judge set a review date of April 23, 2009 "to find out the medical/psychological condition of [student] and to see if these conditions are truly impacting her attendance." (R-11, R-12)

39. The first grade teacher communicated parent's February 17, 2009 e-mail to the school psychologist, the school social worker, the school counselor and to the school's principal. All parties met on March 5, 2009 informally to discuss concerns about student's school behaviors: Student had numerous bathroom accidents, student "kind of walked around in a zombie-like state." The first grade teacher generally discussed student's social and emotional displays at school. Another concern was student's perfectionism. "She would write and erase, write and erase. And so she never got it done." Another concern expressed was student's antisocial behaviors in that she did not interact with children much. Student didn't initiate play or conversation with her peers. Student is fearful, her teacher noted. She is afraid of doing things wrong such as homework which often leads to tears. (T133/1-25, T142/1-5, T143/7-14, T144/19-22)

40. Conversely, when someone brought her into playing with them, "she really got into it." "They would climb monkey bars and slides and go down the slides, and she would seem just like a regular old kid." (T144/15-18)

41. Student would become emotional when she forgot to bring in her homework folder. Her teacher would settle her down by saying to student, "You can bring it in tomorrow." Student would then calm down and relax. (T145/ 1-5)

42. At the informal parent meeting, student's first grade teacher reported that student is "distant." "Occasionally, she walks around as if she's in new surroundings, walks very slowly, as if she has never been in the place [school] before..." (T145/18-22)

43. Parent has asserted to the first grade teacher that student was spanked at student's prior school. No credible evidence of this incident was presented at the due process hearing. No CPS reports were introduced and none of student's prior teachers were called as witnesses regarding the details of the alleged "spanking." Thus, no there is no independent corroboration of the "spanking" incident. (R-16, T146/1-12)

44. Parent and student's first grade teacher participated in various e-mails wherein both parties speculated regarding various "psychological disorders." No credible evidence was presented at the hearing of this matter to suggest that student has post traumatic stress disorder. (R-16)

45. At the time of the parent-teacher meeting on March 5, 2009, student was "close to an A" in writing and student "seemed to be doing fine" in school. There was no impulsivity or hyperactivity, yet the first grade teacher admits that student would not focus on her work. Though the first grade teacher did not believe student to have an educational disability, disabling condition or impairment, she desired "to make everybody aware of it [teacher concerns] "so that we could figure out something to do for [student]." (T204, 1-25, T205/1-4, 16-20, 23-25)

46. Student received a failing grade in writing, the first grade teacher testified, because she refused to complete her written work in the fourth quarter. Cumulatively, student received a “C” for the year. Student’s refusal to complete writing samples did not extend to her other academic subjects in the fourth quarter and did not impede student’s progress in class. Also, student’s first grade teacher did not attribute student’s refusal to write to a disabling condition: “[student] wrote beautiful stories before, very expressive and very good.”(R-17, T214/20-25, T215/1-18, T216/1-7)

47. Student has “superior” comprehension in reading, her level on the PALS reading tests indicates that student generally scores on the 3<sup>rd</sup> and 4<sup>th</sup> grade level. Student’s first grade teacher commented often regarding student’s expressive language and her creative thinking. To illustrate this point, the teacher provided an example of student’s transformation of a story, “The Tortoise and the Hare.” The teacher related that student takes a given story, interprets it and makes it into yet another story through her understanding of the story’s motto. (T218/1-18, R-21(a)(b)(c)(d), R-22, R-23, R-24)

48. Student’s first grade teacher admitted that one of the reasons why the March 5, 2009 meeting was planned was to obtain more medical information about student’s medications because of her “zombie like state.” LEA educators and the school social worker obtained releases of information from the parent in an effort to determine if the medications contributed to student’s puzzling demeanor. (T206/23-25, T207/1-10)

49. The school social worker contacted parent on March 3, 2009 because of the truancy issue and because student’s teacher had reported to her student’s lethargy in class. Initially, the school social worker indicated that she made contact with parent in order to assist parent to get student to school. During this contact, parent “shared all of this about the medication.” The witness was asked, “Did you connect the appearance of lethargic behavior with the description of the medication that the child was taking?” The witness responded: “That was my thought, but, you know, I’m not a psychiatrist.” As a follow-up to the social worker’s visit to student’s home, a letter was sent to parents and the March 5, 2009 meeting was scheduled. (T249/5-16, T250/1-6, R-11)

50. The school counselor testified that she attended the March 5, 2009 parent meeting. She stated that she was “pretty sure” that the LEA educators reviewed the private evaluation indicating that student has been diagnosed with Pediatric BiPolar disorder. There were still “unanswered questions” regarding student’s school behavior. That is why, she explained, the school sought medical and psychological records about this student. This was more than a truancy issue, she testified. (T300/20-23, T301/22-23, 2-7)

51. The school psychologist testified that she attended the March 5, 2009 meeting which was convened, partly, to ascertain exactly what the medication dosages were that student was taking and to confirm parent-reported information. (T184/1-11)

52. The school psychologist testified that student’s parent had no difficulty expressing her needs or articulating her concerns at the meeting. Parent was “very concerned” about the truancy issue and the consequences of it. The school psychologist confirmed that

parent did not have difficulty understanding what the “team” was asking, sharing or communicating with her. Parent had no problem understanding the school psychologist. (T184/12-17, 20-25, T185/1-5)

53. The school psychologist qualified as an expert witness in this matter. The witness testified that she has extensive experience with the identification of students pursuant to the IDEA and to Section 504. The witness has extensive experience doing psychological evaluations for the purpose of special education. This witness is a certified school psychologist. (T114/17-23, T114/14)

54. Student’s first grade teacher asked the school psychologist to informally observe student in class in preparation for the March 5, 2009 meeting. The witness testified that she did not observe anything “unusual” about student during her ten minutes of observation. No disabling condition was suggested by student. (T185/12-25)

55. Regarding the outside evaluation, the school psychologist testified that she reviewed the document and did not consider the report to be complete because it did not utilize school data. Further, she testified, she believes it is inappropriate to make a diagnosis based upon one report, the Child Behavior Checklist, which the outside evaluator used to create student’s Pediatric BiPolar diagnosis. “Best practice report yielding would look at behavior in more than one environment.” Student’s diagnosis emanated from parent’s CBCL checklist. (T149/19-25, T150/-4)

56. Regarding the outside evaluator’s report that student experiences processing difficulties, the school psychologist testified, “Processing speed doesn’t measure anything. Processing speed is a construct.” It is “the amount of time it basically takes you to process and respond to information.” A low average score of 85 on one sub-test is not necessarily indicative of a valid standard deviation from an IQ of 122. Variables that exist in any testing situation can affect the speed at which one processes information such as effort, discomfort, fatigue or alertness. (T133/18-25, T134/1-25, T135/1-16, T138/20-25, T139/1-6, PE-13D)

57. Parent executed releases of information forms to the LEA on behalf of all medical and psychological providers to provide information on student’s absences and medications. The school social worker reported that parent did not hesitate to release the information to the LEA. On March 10, 2009 parent delivered a document to the LEA in which she revoked consent for the release of information to this LEA. (R34(a)(b)(c), T255/5-11, T256/1-3)

58. On April 27, 2009 the school counselor sent an e-mail to the school psychologist stating therein that student’s parent “all of a sudden wants the school to perform the testing as opposed to an outside agency.” The school counselor explained to the school psychologist that parent was informed by her about the “process for such requests” and, further, that “there’s no guarantee it [school’s psychological evaluation of student] would occur (if at all) before May 20<sup>th</sup> (the court review date).” (R-4, R-5)

59. The school psychologist testified that she does not believe that a child of six years of age who “wets herself” presents an indication that a disabling condition is present. Urinating on oneself does not impair one’s ability to access the curriculum or to derive educational benefit from it, she testified. (T186/11-18)

60. On April 28, 2008 the school psychologist e-mailed the school counselor that testing is completed by the school only if the “team” elects to complete testing. Indicating the necessity for an SST (child study) meeting with parent to discuss student’s testing needs, the psychologist comments that she is not inclined to complete additional testing on student. Testing is only indicated, she states, “when we feel there is a disability that is significantly negatively impacting the child’s school performance and learning. That is not the case.” (R-5)

61. Student’s mother testified at the due process hearing. Parent agreed that student missed 41 days and was tardy 63 days at the prior school. Parent testified that she did have difficulty getting student to school because of parent’s illness. In kindergarten, student missed 12 more days at this LEA for a total of 53 days missed that year. (R-18, R-19, T117/16,17, T118/6-7, T121, 12-15, R-36)

62. Parent testified that there were many days marked as “absent” for student when student was “just fragile.” “I can’t write ‘emotional issues,’” parent testified. (T125/13-16)

63. Regarding student’s excessive number of absences at this LEA, parent attributed a great deal of the absences in November, 2008, to croup and pneumonia. Parent admitted that she did not provide “BiPolar” symptoms as an excuse to the LEA when questioned by them about student’s absences. Parent did provide that she referred to student’s BiPolar condition in an excuse for absence which she read into the evidentiary record. It reads as follows: “Please excuse [student] for being so late today. She had a very difficult night and did not get much sleep and then had a real struggle this morning getting ready.” (T152/1-9, PE-12D,E, T150/19-25,T1-19)

64. Parent admitted that she has difficulties at home when she becomes “stressed out.” In her own words, parent testified that the following statement is true: “But when my illness gets tilted, it affects everyone.” Parent admitted student may become “uptight” and student “can feel the tension.” (R-9,T158/10-13)

65. Parent testified that when student’s teacher moved student to another table, where a quiet little girl was sitting, the bathroom accidents stopped. Student had been sitting near a disruptive little boy. Parent also believes that student refused to write because she was angry with her first grade teacher for moving her away from the teacher’s desk. (T160/1-24)

66. When the parent was ordered to bring student to school or face a judicial hearing in the matter, student’s attendance was “good” in the fourth quarter of the 2008-2009 school year. (R-26)

## BURDEN OF PROOF

In Schaffer v. Weast, 126 S.Ct. 528, the United States Supreme Court ruled that under the IDEA, in an administrative hearing, the burden of proof properly rests upon the party seeking relief. The Court stated therein: “[T]he burden of proof in an administrative hearing challenging an IEP, is properly placed upon the party seeking relief, whether that is the disabled child or the school district.”

In the instant case, the parents bear the burden of sufficiency of the evidence. Therefore, the parents bear the burden of proof in this case.

## APPLICABLE LAW

Child Find regulations at 34 C.F.R. 300.121(e);300.125 and at 8 VAC 20-80-50 generally state, in part, that “[E]ach local school division shall maintain an active and continuing Child Find program designed to **identify, locate, and evaluate** children who are “in need of a special education and related services.” Further, Child Find regulation defines the school division’s duty to identify, locate and evaluate children of appropriate age who are “suspected of being children with disabilities.” The limitation is that the child to be screened is described as one who is “in need of special education and related services.” Even if the child is “advancing from grade to grade,” Child Find requires that the child must be screened if a disabling condition is indicated.

## DISCUSSION AND CONCLUSIONS OF LAW

Evidence presented at this hearing does not meet the prima facie burden of showing that the school district ignored or even received any effective notice that student is a child in need of special education and related services. The facts are that this child, who is described by the LEA as “gifted,” takes daily doses of amphetamines and later, she takes a medication to make her sleep. She was only five years old when this psychotropic diet began. For academic purposes at the very least, these medications must be stopped to discover if these medications are required for academic success.

There is overwhelming evidence that this little girl’s physical and emotional health in a school environment are disturbed by these medications which were erroneously prescribed to treat ADHD. There is not one scintilla of truth presented by this evidence to show that this child has a valid diagnosis of Pediatric BiPolar disorder or ADHD symptoms adversely affecting her academic performance. Excessive absences can adversely affect school performance. In this child’s case, remarkably, student has excelled largely because of her innate intelligence and the keen interest of student’s first grade teacher notwithstanding excessive absences from school.

In Board of Education v. Rowley, 458 U.S. 176, 188-89, 102 S.Ct. 3034, 3042,73 L.Ed.2d 690 (1982), the Supreme Court held that “a free and appropriate public

education” under the Act “consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.” Provision of a FAPE does not mean that school age children must be provided a means to achieve full potential. Parent’s concerns expressed to the child study team on May 14, 2009, are not actionable: Parent’s concern that student is not performing “at that [gifted] level” is not a valid IDEA complaint.

There were three different instances in this case when child find provisions could have been violated: On April 17, 2008 at the SST meeting, on March 5, 2009 at the informal parent study meeting, and on May 14, 2009 at the re-convening of the SST team. In no instance was the LEA either oblivious to student’s special education needs or without rational justification for failing to convene a child study team to consider student’s behavior or academic performance.

Although the Fourth Circuit is relatively silent on the issue of Child Find, a case from the Sixth Circuit provides guidance on the parameters of the LEA’s duty: As a matter of first impression, to establish a procedural violation of the IDEA that caused substantive harm to student, student had to show that school officials overlooked clear signs of disability and were negligent in failing to order testing or that there was no rational justification for not deciding to evaluate, Board of Education of Fayette County, Kentucky v. L.M., 478 F.2d 307, 216 Ed. Law Rep. 354 (2007)

In the instant case, there were not one but three instances when student’s case was visited and re-visited as completely demonstrated by the factual findings as earlier set forth. Each time that student’s case was examined, LEA personnel correctly attributed student’s situation to external events, excessive absences, and unanswered questions regarding the necessity for medicating a very young, shy child who did very well in school. Until the medication and absence issues are fully resolved, it is likely that the LEA will continue to see “odd” unexplained behaviors from this child in a school setting.

In any event, LEA educators proved to be appropriately vigilant in convening a formal SST meeting on April 17, 2009 at the request of the assistant principal to consider the outside evaluation, in contacting the parent and conducting informal discussions on March 5, 2009 at the request of the first grade teacher who was concerned about student’s lethargy, and in re-convening a formal SST meeting on May 14, 2009 at the request of the mother though the meeting ended abruptly.

Pursuant to the standard set for determination of Section 504 claims in Sellers v. the School Board of the City of Manassas, Virginia, 141 f3D 524, 125 Ed. Law Rep. 1078 (1998), discrimination, in an education context, under Section 504 of the Rehabilitation Act of 1973, must reflect either bad faith or gross misjudgment to be actionable.

Regarding the claim pursuant to the IDEA in Sellers, plaintiff’s claim for compensatory education was dismissed, and the Fourth Circuit Court of Appeals held as follows:(1) neither compensatory nor punitive damages were available for alleged IDEA

violations; (2) alleged failure to diagnose student's learning disability did not state a claim under the Rehabilitation Act; and (3) parties may not sue under Section 1983 for a statutory violation of IDEA.

Review of the factual findings in this case reveals, the LEA has, acted in good faith and with sound judgment with regard to this student's educational needs. Further, in the case of A.P.v Woodstock Board of Education, 572 F.Supp.2d 221, 237 Ed. Law Rep. 324, United States District Court, Connecticut (2008) held that Child Find IDEA provisions were not violated where student, who was not originally identified with ADD, was later screened and determined to have ADD. In the Powers case, the LEA was not liable because of all of the "special interventions" used by the classroom teacher to assist him with inattention, handwriting & behavioral issues.

In the instant case, even if this student is later determined to have a special education need, all of her educational needs have been met by her attentive classroom teacher: student sat at a table directly near the teacher, student was prompted to use the restroom, and she received a great deal of one-on-one direction and attention from her teacher.

Further, it appears that student's parent's needs have been fully met. There was no evidence presented that student's mother is prevented from assisting student because of a psychological disorder. The school psychologist testified regarding the parent's competency to fully understand all special education processes and procedures. Further, the extensive e-mails authored by parent fully attest to her intelligence level and competence. Parent does not require accommodations to participate in student's educational needs.

### **PROVISION OF FAPE**

Based upon parents' evidence presented in this matter, applicable statutes, regulations, case law, and the arguments presented by the parties, this Hearing Officer makes the following conclusions of law:

1. Student is not a handicapped child and does not come within the Purview of IDEA;
2. This student does not require specific conditions and related services in order to derive educational benefit from her education;
3. At all times relevant hereto, student's parents have resided in Virginia, thus the local educational agency, the LEA, is responsible for educating student by providing her with a free and appropriate public education, a FAPE;

In consideration of the parent's evidence presented at this due process hearing, testimony of the witnesses and presentation of the exhibits, it does appear that student now receives a FAPE.

4. I find that parental notice requirements were satisfied by this LEA.

Accordingly I find that:

5. Parents properly requested a due process hearing because they believe that: Child Find provisions of the IDEA and Section 504 violations have occurred. Also, parents request a ruling on the following issues:

(1)(a) Has the LEA failed to provide student with a FAPE program and placement for the 2008-2009 school year by failing to identify student's disability pursuant to the IDEA? NO

(b) Has the LEA violated IDEA's Child Find regulations by failing to properly interpret student's evaluation results? NO

(2) Has the LEA discriminated against student by violating Section 504 mandates? NO

(3) Has the LEA failed to assess, evaluate & provide accommodations for student's bipolar disorder, a medical condition, which adversely affects student's educational performance? NO

(4) (a) Was student's mother, alleged to be disabled, denied her right to meaningful parental participation when the LEA did not provide her accommodations at the May 14, 2009 Child Study meeting? NO

(b) Did the LEA failure to provide parent with accommodations for her medical condition prevent the parent from providing consent to the Child Study team on May 14, 2009? NO

(5) Did the LEA violate student's or parent's right to privacy by conversing with student's neighbor about personal confidential information? No evidence was presented on this issue. This is not a matter of IDEA determination.

(6) Did the LEA deny parent, alleged to be disabled, her right to be represented by an individual with specialized education knowledge or training or an attorney to assist her to obtain a FAPE for student? NO

(7) Is student's parent disabled? No, for the purpose of parental participation in IDEA matters for student.

(8) Did parent's medical condition prevent or limit her from fully participating and requesting special education services for student? NO.

(9) Did parent's disability and lack of accommodations during the 2008-2009 school year cause the LEA to deny student a FAPE? NO.

(10) Has student's alleged disability of Pediatric BiPolar or ADHD resulted in any adverse impact upon her educational performance or access to her curriculum? NO.

6. The parents did not prove that the LEA has violated Child Find provisions of the IDEA or that a Section 504 service plan is required to accommodate this student's educational needs or to facilitate any life functions necessary thereto and in all respects the LEA has provided a FAPE to student.

7. The LEA's Motion to Strike Parent's Evidence is hereby granted.

### **IDENTIFICATION OF THE PREVAILING PARTY**

Pursuant to 8 VAC 20-89-76K.11 the Hearing Officer has the authority to determine the prevailing party on each issue as follows:

The LEA prevails on all issues as set forth herein and numbered: 1(a)&(b), (2), (3),(4)(a) & (b), (5), (6), (7), (8), (9), (10).

### **APPEAL INFORMATION**

8 VAC 20-80-76 O.1 states as follows:

1. This decision shall be final and binding unless either party appeals in a federal District court within 90 calendar days of the date of this decision or in a state circuit court within 180 calendar days of the date of this decision.

2. The appeal may be filed in a state circuit court or in a federal district court without regard to the amount in controversy.

3. If the Hearing officer's decision is appealed in court, implementation of the Hearing Officer's order is held in abeyance except in those cases where the Hearing Officer has agreed with the child's parent or parents that a change of placement is appropriate in accordance with Subsection E of this section. In those cases, the Hearing Officer order must be implemented while the case is being appealed.

## IMPLEMENTATION PLAN

It is the LEA's responsibility to submit an implementation plan to the parties, the Hearing Officer and the Virginia Department of Education within 45 calendar days.

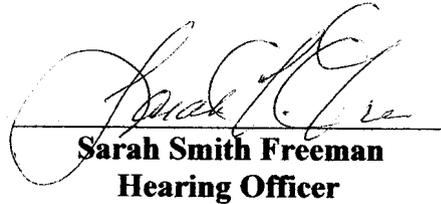
Dated: August 21, 2009



Sarah Smith Freeman  
Hearing Officer

## CERTIFICATE OF MAILING

I do hereby certify that I have mailed/faxed a copy of the foregoing decision to Derek A. Mungo, Assistant City Attorney for the School Board of the Virginia, at Street, , Virginia and to Cheryl A. Poe, Advocate, Advocating 4Kids, 3788 Stoneshore Road, Virginia Beach, Virginia 23452 on this 21<sup>st</sup> day of August, 2009.



Sarah Smith Freeman  
Hearing Officer

**Sarah Smith Freeman, VSB# 21354**  
**Attorney at Law**  
**210 East Road**  
**Portsmouth, Virginia 23707**  
**(757) 399-8105 (telephone)**  
**(757) 399-2004 (facsimile)**  
[esqfreeman@aol.com](mailto:esqfreeman@aol.com)