Received

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Dispute Resolution &
Administrative Services

DECISION OF THE HEARING OFFICER

I. Findings of Fact[1]

The hearing officer finds the following facts by a preponderance of the evidence:

1. The requirements of notice to the Parents were satisfied[2]. The Student is a first grade/rising second grade student whose date of birth is September 21, 2006. SB D 17[3]. The Student suffers from multiple disabilities, and is eligible to receive special education and related services. SB H, CD ROM of SEC Screening on 2/4/14 ("2/4/14 CD"); and SB H, CD ROM of SEC Eligibility Meeting on 3/28/14 ("3/28/14 CD").

2. The issues for decision by the hearing officer in this proceeding are:

IDEA ISSUES

1. The Parents contend that the LEA improperly rejected the Parents' request for a formal and comprehensive Functional Behavior Assessment (FBA) in order to allow for evaluation of all of 's suspected disabilities at the [February 4, 2014] SEC meeting. It is solely the issue of the requested formal and comprehensive FBA that will be addressed at the hearing concerning items that the Parents contend need to be evaluated. The Parents allege that this failure caused significant educational and emotional harm to this student in addition to denying him access to a Free and Appropriate Public Education (FAPE).

2. The Parents contend that the LEA improperly rejected the Parents' request for a formal and comprehensive FBA in order to allow for evaluation of all of 's suspected disabilities at the March 28, 2014 Eligibility Meeting. It is solely the issue of the requested formal and comprehensive FBA that will be addressed at the hearing concerning items that the Parents contend need to be evaluated. The Parents allege that this failure caused significant educational and emotional harm to this student in addition to denying him access to FAPE.

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[1] To the extent the other section entitled, "Additional Findings, Conclusions of Law and Decision" includes findings of fact, these findings are incorporated into this section.

[2] The Parents and the Student are referred to generically herein to preserve privacy.

[3] Exhibits submitted by the LEA and admitted into evidence in this proceeding are cited as "SB <Exhibit Number> <page reference, if any>". Exhibits submitted by or on behalf of the Student and admitted into evidence in this proceeding are cited as "PE<Exhibit Number> <page reference, if any>". References to the verbatim transcript of the hearing held on June 9-13, 2014 are cited in the following format "Tr. <volume number> <page number>." References to the Parents' post-hearing Closing Statement are cited in the following format: "POB<page number>". References to the LEA's post-hearing Written Closing Argument are cited in the following format "SOB<page number>".

SECTION 504 ISSUES

1. The Parents contend that the LEA improperly failed, under applicable legal authorities, to evaluate to determine if was or is eligible for services and/or protection against discrimination on the basis of disability under Section 504. The Parents' claims are, of course, subject to the applicable limitations period. *See Smith by Duck v. Isle of Wright County Sch. Bd.*, 402 F. 3d 468, 105 LRP 13459, 43 IDELR 30 (4th Cir. 2005).

SB A 1-5 and 63-64.

3. The Student began attending Elementary School, City Public Schools (" CPS", the "school division" or the "LEA") in September 2012 as a kindergarten student. SB D 170.

4. On March 28, 2014, an eligibility committee determined that the Student was eligible for special education and related services in order to access the general curriculum and to benefit from his educational setting. SB D 131.

5. The eligibility committee or, as the LEA calls it, the Special Education Committee ("SEC"), determined that the Student met the criteria for special education as a student with multiple disabilities. SB D 131. The LEA determined that the student's primary disability was Emotional Disability ("ED"), his secondary disability was Specific Learning Disability ("SLD") and the tertiary disability was Other Health Impairment ("OHI"). 3/28/14 CD. At this eligibility meeting on March 28, 2014, the Parents strongly objected to any identification of ED as a category of disability. The Parents also strongly objected to the LEA's practice of ranking the disabilities as primary, secondary and tertiary. 3/28/14 CD[4]. For these and other reasons, the Parents did not consent to the LEA's initial eligibility determination at the meeting or thereafter. 3/28/14 CD.

6. The Parents rejection, at the March 28, 2014 SEC meeting, of the eligibility category of ED contrasts with the comments of the Mother at the earlier SEC screening meeting on February 4, 2014.

7. When the SEC Chairperson, , read the definition of ED, the Mother acknowledged that the Student "covers a lot of those." 2/4/14 CD. The relations between the LEA and the Parents deteriorated between the 2 SEC meetings largely because of a disciplinary incident involving the Student on March 26, 2014, when the police were called. Tr. Vol. 1 at 211.

8. At the February 4, 2014 SEC screening meeting, the SEC Team including the Parents and their advocate, who participated in the meeting, reached a consensus that the SEC

[4] A recent federal court decision adopted precisely this method of ranking disabilities as appropriate. *See, R. C. v. Keller Indep Sch. Dist.*, 958 F. Supp. 2d 718, 61 IDELR 222 (N.D. Tx 2013).

Team would as part of the screening process, consider the four categorical identifications of Autism, ED, OHI and SLD. SB D 162.

9. At the screening meeting on February 4, 2014, the Parents consented in writing to educational, sociocultural and psychological evaluations and to observation of the Student. D 177; D 162. Significantly, the parents did not check the box for:

> Functional Behavioral Assessment: Review of existing data or new testing data to determine the underlying cause or functions of a child's behavior that impedes the learning of a child with a disability or the learning of the child's peers.

SB D 177.

10. At the February 4, 2014 meeting, the SEC Team reached a consensus that concerning the escalation of the Student's bad behaviors, the LEA would look at behavioral supports and interventions in the general education setting. The consensus was that while the behavioral component would not be a function of determining eligibility of the Student for special education and related services, the option of a more formal, comprehensive functional behavioral analysis ("FBA") would be left open for the consideration of the Student's IEP Team at the initial IEP meeting.[5] 3/28/14 CD; Tr. 207.

11. No consent for evaluation from the Parents concerning behaviors of the Student was required or sought by the LEA because "[t]he team also discussed and agreed to collect informal data toward the implementation of a general education behavior plan while going through the special education process." D 162.

12. The LEA adopted this position because it already had a lot of data, the Student was subject to material changes in his medication at the time which potentially could affect behaviors, because of the attempt to expedite the eligibility process and because the LEA did not believe that the behaviors needed to be addressed at the initial eligibility stage but could and would be more appropriately addressed at the initial IEP stage.

13. The Parents did not request a FBA at the screening meeting on February 4, 2014. 2/4/14 CD.

14. However, near the beginning of the March 28, 2014 Eligibility Meeting, the Parents, by and through their advocate (Ms.), did insist on a FBA as part of the eligibility determination. 3/28/14 CD.

15. The SEC Team was able to reach a consensus on certain agenda items, such as the

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[5] The hearing officer adopts the term functional behavior analysis to denote a formal, comprehensive behavioral evaluation for which parental consent is required, as explained by , the Board Certified Behavioral Analyst ("BCBA"); Tr. 832-835. This FBA should be distinguished from the less formal review of existing data concerning behaviors, which would not require parental consent.

Student meeting the criteria as a student with a disability under IDEA under the categories of SLD and OHI and, by reason of the disabilities, requiring specially designed instruction. D 131.

16. When the parties reached an impasse on certain issues such as the ED classification, the Mother made it clear that she would not consent to the eligibility determination and after meeting for about 2 hours and 54 minutes, the Mother who was very upset, left the meeting for a short period. 3/28/14 CD.

17. The LEA explained to the Mother that the LEA has an obligation to propose what it considered appropriate when the Mother made comments to the effect that she felt that she was not being included in Team decisions and that the LEA was not listening to her. 3/28/14 CD.

18. About a minute before the 3 hour mark, Ms. informed the LEA that the Parents would be filing a due process complaint because of the LEA's refusal to conduct the FBA. 3/28/14 CD.

19. The Parents have not provided consent to the LEA's eligibility determination.

20. Nevertheless, the LEA proceeded to develop a draft initial IEP to inform the Parents about the services that may be provided with parental consent.

21. To this end, on March 31, 2014, the LEA sent to the Parents a Meeting Notice for an April 2, 2014 proposed initial IEP meeting. SB D 115-116. On April 1, 2014, the LEA sent to the Parents a Meeting Notice for an April 4, 2014 proposed initial IEP meeting. SB D 113-114.

22. On April 9, 2014, the LEA sent to the Parents a Meeting Notice for an April 11, 2014 initial IEP meeting. SB D 41-42. The Parents signed this notice indicating they would attend. SB D 41-42. The Parents received from the LEA a draft of the proposed initial IEP about 48 hours before the meeting. SB H, CD Rom of IEP Meeting on 4/11/14 ("4/11/14 CD").

23. On April 1, 2014, the Parents' Request for Due Process Hearing was received by the LEA and the SEA. SB A 189-197.

24. At the IEP meeting for the proposed initial IEP on April 11, 2014, the Parents provided to the LEA what purported to be a signed "partial consent" to the LEA's eligibility determination made on March 28, 2014:

> **We reject the LEA's position that our son should be given the Eligibility Category of "Emotional Disability." We <u>ACCEPT</u> that our son is a student in need of special education services based on all the disabilities identified in the private evauations [sic] we have provided to the team and were discussed during the March 28, 2014 meeting.**

SB D 40 (Emphasis in original).

25. On April 11, 2014 or April 14, 2014, the Parents provided a premature, purported partial consent to the incomplete draft initial IEP discussed by the parties at the April 11, 2014 meeting. SB D 29[6].

26. On April 11, 2014, numerous IEP team members convened to develop the Student's initial IEP, including the Parents, the Student's general education teacher (Ms.), a special education teacher, 2 special education coordinators, Ms. , (the Assistant Principal or "AP"), a speech/language pathologist, a Board Certified Behavior Analyst ("BCBA"), Ms. , Ms. and others. SB D 28.

27. The proposed initial, incomplete, draft IEP provides daily, 5 days per week, amongst other things, for: 30 minutes of math calculation from a special education teacher in a special education classroom; 110 minutes of reading from a special education teacher in a special education classroom; 15 minutes of organizational skills from a special education teacher in a special education classroom; and 202 minutes of social/emotional specially designed instruction from a special education teacher in a special education classroom. Accordingly, the draft initial IEP proposed 1,785 or approximately 1,800 minutes per week of specially designed instruction in a self-contained classroom by a special education teacher to provide the Student the highly structured educational setting, which all IEP Team participants recognized that the Student now needed to receive educational benefit. SB D 14; 4/11/14 CD. The placement proposed in the draft is a public day school. SB D 14. The draft IEP also proposed as a related service, once per month, 60 minutes of psychological services. SB D 15.

28. Additionally, the draft initial IEP offers the Student numerous accommodations and modifications, including visual and verbal prompts, a visual schedule; tests read aloud; testing in a small group environment; allowing for a "cool down" space within the classroom for when the Student is experiencing frustration; breaking assignments involving reading and writing down into smaller, manageable parts; allowing for reduced work; and allowing the Student an assigned spot on the carpet. SB D 14.

29. Annual goals address the Student's specific weaknesses in reading, writing and mathematics. SB D 12. The IEP Team worked hard for almost 2 hours, reaching consensus on many items within the 20-page draft initial IEP. 4/11/14 CD. Because certain additional evaluations were undertaken and because people had to leave for other commitments, the meeting adjourned before all the potential different placement options could be fully considered. The IEP Team agreed to meet again to finalize the initial IEP at a mutually convenient time. The administrative record before the hearing officer does not contain this final initial IEP.

30. The School Board provided the Parents a prior written notice ("PWN") which, amongst other things, stated:

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[6] From the 4/11/14 CD, it would appear that the Parents signed on April 11, 2014, although the "consent" is dated April 14, 2014 by both Parents.

1. CPS conducted a screening/records review meeting on February 4, 2014, and determined that a comprehensive evaluation should be completed due to a suspicion of a disability under IDEA. The assessments were completed with parental consent and an eligibility meeting was held on March 28, 2014, where the team determined [the Student] met the criteria as a student with a disability under IDEA.

2. The parents were provided prior written notice of the proposed assessments and gave informed written consent to the proposed assessments.

3. The school division is currently conducting a FBA. The FBA is based on readily available data and teacher observation and does not rise to the level of an evaluation for which consent is required. Therefore, it would not be an assessment for which the parents could seek an IEE. Furthermore, the division continues to work with the parent and their representatives to collaborate to develop an initial IEP in order to provide a free appropriate public education to [the Student]...

Description of other options considered and why those options were rejected:

CPS considered the parents' request for an IEE for a FBA but rejected this request as the division is in the process of conducting a FBA. Furthermore, the FBA the division is conducting through the IEP team does not rise to the level of an evaluation for which consent is required...

CPS maintains an FBA is not required to determine eligibility under IDEA. At the screening/records review meeting on February 2, 2014, a FBA was not a requested assessment by the parent or the team in order to determine eligibility. The team did discuss a general education behavior plan to aid in working with the behaviors the student was exhibiting in the classroom.

On March 28, 2014, at the eligibility determination meeting, the parents with their representatives, requested a FBA. The team explained this data was not needed to determine eligibility and the team proceeded to review the assessments for which consent had been obtained and made an eligibility determination. The parents disagreed with the team's decision. The parents agreed he was a student with a disability but did not agree with the categorical identification identified by the team as the primary disabling condition.

> CPS maintains [the Student] is eligible as a student with a primary disability of emotional disability, a secondary disability or specific learning disability and a tertiary disability of other health impairment.

SB D 1-2.

31. The Parents again signed and submitted to the LEA a partial or conditional consent. However, the IEP process was never completed by the IEP Team. The conditional/partial consent ostensibly signed on April 14, 2014 and submitted by the Parents to the LEA after the close of the IEP meeting on April 11, 2014 provided:

> I consent to the IEP services specific to Public Day school service in a self-contain [sic] class. They reject a SECP placement.

SB D 29.

32. While the Student did exhibit certain problematic behaviors in his kindergarten year, (again mainly in the fourth quarter of such year), such behaviors were not markedly different in frequency or degree from his peers; Tr. 716; 690-698.

33. The Student, in his kindergarten year, performed comparably to his typically developing peers and received educational benefit. SB E 18-19; Tr. 390-392; Tr. 769.

34. The Mother provided to the LEA a letter dated December 21, 2012 from the Student's pediatricians' office which declared that the Student had been diagnosed as having ADHD, Oppositional Defiant Disorder ("ODD"), Anxiety and behavior problems. SB E 17. The letter went on to provide, "As to a child with these diagnosis [sic], he may be eligible for services under Section 504." SB E 17.

35. As the Student's 2012-13 kindergarten year at Elementary School progressed, the Mother became increasingly concerned about the Student's classroom performance, and ultimately referred him to the SEC for consideration of special education services. SB E 6.

36. A SEC screening meeting was scheduled for January 22, 2013 and this meeting was attended by the Mother, the general education teacher (Ms.), the AP, a psychologist, a school social worker, a special education teacher and a special education case manager who also was a special education teacher. SB E 5.

37. After reviewing existing data on the Student and input from the Parents, the SEC Team determined that no further action was needed.

38. The AP, the PALS instructor ( ) and Ms. testified credibly and consistently that there was no reason to make a Section 504 referral in the Student's kindergarten year because there was no reason to suspect that the Student's

disabilities were substantially limiting a major life activity and because the Student was performing and behaving in approximation of his typically developing peers, especially in view of the fact that kindergarten is such a developmental year. Tr. Vol. 2 at 390-392; Tr. 444-446; and Tr. at 621.

39. The testimony of the LEA's educational professionals was both credible and consistent on the major issues before the hearing officer. The demeanor of such professionals at the hearing was open, candid and forthright.

II. Additional Findings, Conclusions of Law and Decision[7]

In this administrative due process proceeding initiated by the parent, the burden of proof is on the Parents. *Schaffer, ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

In Virginia, there are three actions for which a school board must obtain written consent from a parent before services can be provided to a student and before a student is entitled to a free appropriate public education ("FAPE") under the IDEA. Written consent from a parent is required before:

1. Conducting an initial evaluation, including a functional behavioral analysis;

2. An initial eligibility determination; and

3. The initial provision of special education and related services.

8 VAC 20-81-170(E)(1)(a)-(c).

In this case, the parents have only provided written consent to the first action, which allowed the School Board to conduct the initial evaluations. The parents have not provided consent to the initial eligibility determination, and they have not provided consent to the initial provision of special education and related services. As a result of their refusals to provide the required written consents, the Parents and the Student are not yet eligible for the IDEA's protections, and "[t]he local educational agency's failure to provide the special education and related services to the child for which consent is required is not considered a violation of the requirement to provide FAPE". 12 VAC 20-81-170(E) 4(b)(2).

In Virginia, a parent must provide written consent to the initial provision of special education and related services before a student is entitled to the benefits of FAPE. As a result of the Parents' refusal to consent to the initial provision of special education and related services, the Student is not entitled to the benefits of FAPE and its protections under the IDEA, including the discipline procedure of a manifestation determination review ("MDR"). *See*, 8 VAC 20-81-170 (E)(1)(c) and (E)(4).

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[7] To the extent the above section entitled, "Findings of Fact" includes conclusions of law, these conclusions are incorporated into this section.

Nevertheless, while again not required to do so, the School Board did afford the Student the benefit of a MDR on April 7, 2014, finding the subject behavior of the Student was a manifestation of the Student's disability and referring the matter to the IEP Team. SB B 3-6(c).

Consent which is conditional or partial does constitute consent within the meaning of such definition in the *Regulations Governing Special Education Program or Children with Disabilities in Virginia* (effective July 7, 2009) (the "Virginia Regulations"). 8 VAC 20-81-10.

This proceeding is somewhat akin to *Colbert County Bd. of Educ. v. B.R.T.*, 51 IDLER 16 (N.D. Ala. 2008). In *B.R.T.*, the parent attended the initial IEP meeting, but refused to provide consent to the initial IEP because the parent objected to the proposed placement. The U.S. District Court determined that because the parent did not provide consent to the initial IEP, the parent had not consented to the initial provision of services. As a result, the school board could not obtain the parent's consent through mediation or due process and it also could not be held liable for not providing FAPE to the student.

Unlike the parent in *B.R.T.*, the Parents in this case have not even completed the IEP process and in this regard, the parent in *B.R.T.* occupied a stronger position. Similarly, *a fortiori*, the Parents in this case have not even provided consent to the eligibility determination.

Accordingly, because the Parents did not provide consent to the eligibility determination "[t]he local educational agency is not required to convene an IEP meeting or to develop an IEP for the child for the special education and related services for which the local educational agency requests consent. However, the local educational agency may convene an IEP meeting and develop an IEP to inform the parents about the services that may be provided with parental consent." 12 VAC 20-81-170 (E)(4)(b)(3).

The LEA was not required to go the extra mile and attempt to develop the initial IEP but did so in order to apprize the Parents of some of the proposed educational programming.

Like the parent in *B.R.T.*, the Parent in this matter attended the initial IEP meeting, and refused (albeit prematurely) to provide written consent to implement the IEP because she disagreed with one potential placement which could be a potential consideration but which had not yet been fully discussed or determined upon by the IEP Team. Thus, the Parent has not consented to the initial provision of services.

In *B.R.T.*, the United States District Court for the Northern District of Alabama rejected the basis for the hearing officer's decision in favor of the parent at the administrative level in such case that the parent was not required to consent to services which she believed to be inappropriate in order to be entitled to a due process hearing.

The reasoning of Judge Ellis in *Fitzgerald v. Fairfax County Sch. Bd.*,, 556 F.Supp.2d 543 (E.D.Va. 2008) is instructive. In the instant case, the legal obligation to provide FAPE to the Student

is squarely imposed on the LEA. This is precisely what the IEP Team tried to explain to the Mother when she became upset in the April 11, 2014 IEP Team meeting complaining that she felt she was not being listened to. 4/11/14 CD.

The IDEA, its implementing regulations and the provisions cited by the Parents supporting their position, do not require the School Board to accede to a parents' demands concerning the initial provision of services. While the IDEA and the IEP process are designed to ensure parental participation in decisions concerning the educational programming for their child, the IDEA does not permit parents to usurp or otherwise hinder a LEA's authority and duty to provide FAPE to the Student in this case in the context of an initial provision of services.

If the hearing officer were to adopt the Parents' asserted position, such a reading could result, in the language of *Fitzgerald,* in delays, stalemates and impasses that would leave educators hamstrung. The Parents cite no case in support of their position, nor has any been found.

Because the mechanism of a partial or conditional consent is ineffective, the Parents have refused to provide consent to the initial provision of special educational and related services. Once a parent refuses to provide consent for the initial provision of services, the parent is considered to be refusing the benefits of FAPE and its protections under the IDEA, including the discipline procedures. Letter to Yudien, 38 IDELR 267 (OSEP 2003) ("[W]here a parent of a child with a disability refuses consent for the initial provision of services, we would consider the parent to have refused the benefits of FAPE and its protections under the IDEA, including the discipline procedures...."); see also Letter to Gantwerk, 39 IDELR 215 (OSEP 2003) (School divisions are not required to apply the IDEA's disciplinary protections to children who are not receiving special education because the parents have refused to provide consent). Furthermore, under such circumstances, the Student "may be disciplined in the same manner as nondisabled students." Letter to Fulfrost, 42 IDELR 271 (OSEP 2004).

The Parents in this case refused to provide consent for the initial provision of special education services and, therefore, the protections that could have been afforded the Student under the IDEA, including a MDR, were no longer applicable until the Parents provide the requisite consent[8].

IDEA defines FAPE as special education and related services that (i) have been provided at public expense and under public supervision and direction; (ii) meet the standards of the state educational agency; (iii) include an appropriate preschool, elementary or secondary school education in the state involved; and (iv) are provided in conformity with an IEP. 20 U.S.C. § 1401(8).

The IEP is the backbone of a student's special education program. To that end, the Supreme Court of Virginia has recognized that an appropriate set of IEP goals is in and of itself is a significant factor in determining whether a school district has offered an appropriate program. *See School Bd. v.*

[8] If the parents refuse to consent to the initial provision of special education services, the school division cannot be considered in violation of the requirement to make available a free appropriate public education to the student. 8 VAC 20-81-170(E)(4)(b). In addition, under such circumstances, a school division may not even initiate a due process hearing or seek mediation to override the lack of parental consent. Id.

Beasley, 238 Va. 44, 52, 380 S.E.2d 884, 889 (1989).

The School Board must provide the parent with an IEP constituting a formal written offer showing a clear record of the educational placement and services proposed so that the Parents know what they can reasonably expect and the School Board knows what to implement to meet its legal obligation to provide FAPE. In evaluating whether the School Board offered a FAPE, a court generally must limit its consideration to the written terms of the IEP itself. See, *County Sch. Bd. v. Z. P. ex. rel. R. P.*, 399 F. 3d 298, at 306 n.5 (4th Cir. 2005).

The parents bear the burden to establish by a preponderance of the evidence that they consented to the initial provision of special education and related services in this proceeding and they have not sustained this burden.

In a situation where the parents have never consented to the initial provision of services for the student, the School Board cannot obtain parental consent through due process or mediation and it also cannot be held liable for failing to provide FAPE. This distinction indicates a clear congressional and regulatory intent to support parents' rights to choose whether their children would be enrolled initially in a special education program. The express language of IDEA and its implementing regulations also provide that there is no entitlement to FAPE until such consent is provided.

In *Hendrick Hudson Dist. Bd. of Educ. v. Rowley,* 458 U.S. 176, 102 S.Ct. 3034 (1982), the Court held that "the intent of the Act was more to open the door of public education to handicapped children on appropriate terms". Perhaps, nowhere is this more pronounced than in the context of initial parental consents where essentially the parents might have to consent to initial eligibility determinations or to the implementation of initial IEPs which the parents believe are inappropriate for their child, in order for the parents to be able to challenge such appropriateness in due process.

Rowley and subsequent court decisions have also been careful to recognize the importance of leaving the business of running schools to the considered judgment of local educators.

In *Hartmann v. Loudoun County*, the Court stated:

> Although section 1415(e)(2) provides district courts with authority to grant 'appropriate' relief based on a preponderance of the evidence, 20 U.S.C. 1415(e)(2), that section 'is by no means an invitation to courts to substitute their own notions of sound educational policy for those of the school authorities which they review.' (citations omitted)... [t]hese principles reflect the IDEA's recognition that federal courts cannot run local schools. Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment.

118 F.3d 996, 1000-1001 (4th Cir. 1997).

See also Springer v. Fairfax County, 134 F.3d 659, 663 (4th Cir. 1998) (holding that "[a]bsent some statutory infraction, the task of education belongs to the educators who have been charged by society with that critical task"); *Barnett v. Fairfax County School Board*, 927 F.2d 146, 151-52 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991) (recognizing Congressional intent to leave education decisions to local school officials and recognizing the importance of giving school officials flexibility in designing educational programs for students); and *Tice v. Botetourt County, supra*, at 1207 (once a "procedurally proper IEP has been formulated, a reviewing court should be reluctant . . . to second-guess the judgment of education professionals" – rather, the court should "defer to educators' decisions as long as an IEP provided the basic floor of opportunity that access to special education and related services provides").

Educators exercising their considered professional judgments to implement a procedurally correct IEP should be afforded significant academic autonomy and should not be easily second-guessed by reviewing persons. *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1000-1001 (4th Cir. 1997); *Johnson v. Cuyahoga County Comm. College*, 29 Ohio Misc.2d 33, 498 N.E.2d 1088 (1985). Accordingly, hearing officers must not succumb to the temptation to substitute their judgment for that of local school authorities in IEP and educational matters. *Arlington County Sch. Bd. v. Smith*, 230 F.Supp. 2d 704, 715 (E.D. Va. 2002).

The Virginia Regulations allow special education hearing officers to "[d]etermine when an IDEA due process notice also indicates a Section 504 dispute whether to hear both disputes in order to promote efficiency in the hearing process and avoid confusion about the status of the Section 504 dispute." 8 VAC 20-81-210(O)(5)(b).

In this proceeding, the hearing officer exercised the discretion vested in him by the above regulation to hear the Parents' asserted Section 504 claims in order to promote efficiency in the hearing process and to avoid confusion about the Section 504 dispute. The hearing officer notes the LEA's objection to the exercise of his discretion. Tr. Vol. 1 at 17-25.

Section 504 prohibits schools from excluding or denying students with disabilities an equal opportunity to receive program benefits and services. It defines the rights of students with disabilities to participate in, and have access to, program benefits and services. Section 504 applies to both regular and special education.

34 CFR § 104.33(b) provides in part:

> "...the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of 104.34, 104.35, and 104.36."

Essentially, this is a nondiscrimination provision with substantially the same substantive FAPE requirements concerning the needs of students with disabilities as those under the IDEA. *See, Sellers v. School Bd. of the City of Manassas*, 27 IDELR 1060 (4th Cir. 1998); *W.B. v. Matula*, 23 IDELR 411 (3rd. Cir. 1995); and *Ms. S. v. Vashon Island Sch. Dist.*, 39 IDELR 154 (9th Cir. 2003).

A parent may not require a school division to provide services and accommodations under Section 504 when a student is eligible under the IDEA and the parent has refused to accept such IDEA services. *See, Yankton Sch. Dist. v. Shramm,* 24 IDELR 704 (8th Cir. 1996).

OCR has also ruled that a parent's rejection of services offered under the IDEA constitutes a rejection of services under Section 504. *Letter to McKethan*, 25 IDELR 295 (OCR 1996).

In this case, the Parents have simply not shown upon a preponderance of the evidence that the LEA violated Section 504 by not evaluating the Student's eligibility for a Section 504 Plan. The Parents have not proven that the LEA exhibited bad faith or gross misjudgment in making or implementing its educational decisions and that the Student was discriminated against solely on the basis of disability. *See, Sellers, supra;* Tr. 431-437.

Finally, the hearing officer agrees with the LEA that the case of *D.K. v. Abington School* District, 696 F. 3d 233 (3rd Cir. 2012), is analogous to this proceeding and that the reasoning therein is applicable to the facts of this proceeding and is highly persuasive. The hearing officer adopts and incorporates herein by this reference the LEA's painstaking analysis of *D.K.* SOB at 10-13.

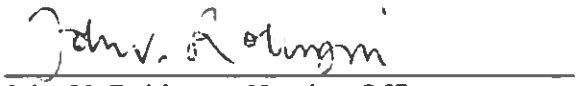
Accordingly, the hearing officer decides in favor of the LEA concerning all the issues delineated in Paragraph 2 of the Findings above.

The LEA is reminded of its obligations concerning 8 VAC 20-81-210(N)(16) to develop and submit an implementation plan to the parents and the SEA within 45 days of the rendering of this decision.

Right of Appeal. This decision is 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.

The hearing officer attaches hereto the form of Protective Order previously sent to the parties which the hearing officer will enter in the event the parties elect to sign it and return it to the hearing officer.

ENTER: 7 / 31/ 2014



John V. Robinson, Hearing Officer

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