

9/3/02



VIRGINIA DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION DUE PROCESS HEARING

In the Matter of:

[REDACTED]

v.

[REDACTED]

[REDACTED], Esq. for [REDACTED]  
[REDACTED], Esq. and [REDACTED], Esq. for  
[REDACTED]

Hearing Officer Decision

Preliminary

This matter was instituted by an [REDACTED] letter from  
[REDACTED], of [REDACTED] (" [REDACTED]"), to [REDACTED]  
[REDACTED] (" [REDACTED]") requesting a due process hearing.

By letter dated [REDACTED] the undersigned was appointed  
hearing officer for this proceeding.

The parties held a telephonic prehearing conference on [REDACTED]  
[REDACTED]. Because the parents were in the process of obtaining an  
independent evaluation, and because the parties were to be —  
involved in mediation in the near future, it was difficult to  
formulate the precise issues which were involved. Nevertheless,  
the parties agreed that one issue would be whether [REDACTED] was  
receiving a free appropriate public education ("FAPE") in  
accordance with the law. The parties also set the hearing date.

Prior to the hearing the parties engaged in several discovery requests, and submitted their respective list of witnesses and exhibits within the five day rule\*.

The hearing was held in [REDACTED], Virginia, on [REDACTED] and [REDACTED], [REDACTED]\*. Thereafter each party submitted a brief by [REDACTED] and a rebuttal brief by [REDACTED].

#### Statement of the Case

[REDACTED] was born on [REDACTED]. [REDACTED] was first diagnosed as depressive and having suicidal ideation at the age of [REDACTED]. In the second grade at public school [REDACTED] was diagnosed as having Attention Defecit Hyperactivity Disorder ("ADHD")\*\*\*, and placed in a special education program. However, by the fourth grade [REDACTED] was removed from the special ed program and put into the gifted and talented program. [REDACTED] attended parochial school for grades five through eight, then transferred to a public school, [REDACTED], [REDACTED], for [REDACTED] grade in [REDACTED]. In [REDACTED], after an episode of auditory hallucinations, [REDACTED] was diagnosed with bipolar disorder.\*\*\*\* (Ex. 21; Tr. 147-150).

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\* 20 U.S.C. 1415(f)(2); 34 C.F.R. 300.509(b); 8 VAC 20-80-76(K)(2)

\*\* Procedural Note: The transcript pages for both hearing days were numbered consecutively, starting with "1". In order to avoid confusion, transcript references to the second day proceedings are *italicized*.

\*\*\* The National Institute of Mental Health defines ADHD as a diagnosis applied to children and adults who consistently display certain characteristic behaviors over a period of time. The most common behaviors fall into three categories, i.e., inattention, hyperactivity, and impulsivity.

\*\*\*\* The National Institute of Mental Health defines bipolar disorder as a brain disorder which causes unusual shifts in an individual's mood, energy, and ability to function. These periods of "highs" and "lows", often with normal periods in between, are referred to as episodes of mania (high) and

When [REDACTED] entered [REDACTED] in [REDACTED] [REDACTED] was not identified as having a disability and, consequently, not placed in the special ed program. Although [REDACTED] transition into the new school environment initially went smoothly, [REDACTED] developed academic problems, such as not turning in [REDACTED] homework, and also developed certain personal problems with a few of [REDACTED] peers. At no time did [REDACTED] ever become a behavioral problem. Some of [REDACTED] problems were due to [REDACTED] medication, which was being continually adjusted. During this time [REDACTED]'s parents were in communication with school personnel, keeping them appraised of [REDACTED]'s situation (Exs. SB 2 - SB 6; Tr. 151, 205-206). In [REDACTED], [REDACTED] an instructional plan for [REDACTED] (Ex. SB 7) was completed and distributed to [REDACTED]'s teachers. In [REDACTED] an evaluation to determine whether [REDACTED] was eligible to receive special ed services was proposed by school personnel and agreed to by [REDACTED]'s parents (Ex. SB 9). During [REDACTED] and [REDACTED], [REDACTED] emotional and academic difficulties increased, and in [REDACTED], [REDACTED] was approved for homebound education (Tr. 152-154). In mid- [REDACTED], [REDACTED] was determined to be eligible for special ed services (Ex. SB 14).

[REDACTED]'s Individualized Education Program ("IEP") was agreed to by school personnel and [REDACTED]'s parents on [REDACTED]. Of [REDACTED]

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depression (low). Bipolar disorder can be viewed as a continuum, with severe mania (often including symptoms of psychosis) at one end of the spectrum, severe depression at the other, and mild mania, mild depression, and normal mood and behavior in between. Bipolar I involves recurrent episodes of mania and depression, whereas bipolar II involves mania combined with milder episodes of hypomania that alternate with depression. In some individuals the symptoms of mania and depression may occur simultaneously, which is referred to as a mixed bipolar state.

necessity, the aims and objectives of the IEP were to be implemented during the school year, which was to commence in September, (Ex. 5,, SB 16; Tr. 155-156).

's school year did not get off to a great start in [REDACTED], [REDACTED]. [REDACTED] was experiencing auditory and visual hallucinations, and exhibiting suicidal tendencies and, on [REDACTED], [REDACTED] was hospitalized at [REDACTED], where [REDACTED] remained for twenty-six days. [REDACTED] returned to school in [REDACTED], [REDACTED] but, in spite of schedule adjustments and other accommodations, was unable to make up for the missed time. This, and continuing problems with [REDACTED] medications, caused a reoccurrence of [REDACTED] problems, and [REDACTED] was readmitted to [REDACTED] Hospital on [REDACTED]. [REDACTED] was released from the hospital several days later and returned to school, but [REDACTED] problems continued (Exs. SB 20- SB 33; Tr. 157).

In early [REDACTED], [REDACTED]'s parents met with [REDACTED] teachers to discuss [REDACTED] schoolwork. One particular problem which [REDACTED] was having was that [REDACTED] medication was making [REDACTED] drowsy, further inhibiting [REDACTED] ability to remain attentive in class. [REDACTED] parents continued to work with [REDACTED] doctor to adjust the medication (Ex. SB 29 - SB 33; Tr. 157 ).

In early [REDACTED], [REDACTED] the school proposed, and the parents agreed to, an early reevaluation of [REDACTED] (Ex. SB 37 & SB 38; Tr. 158). Several educational reports were compiled by [REDACTED]'s teachers. The reoccurring theme which was woven through these reports was that [REDACTED] was continually tired and had rather poor work habits (Ex SB 39).

On [REDACTED] the school again found [REDACTED] eligible for special ed services (Ex. SB 40), and another IEP meeting was convened. This IEP report - which was not signed by [REDACTED]'s parents - concluded that [REDACTED] had been unsuccessful at [REDACTED] base school, i.e., [REDACTED], and that [REDACTED] required a small school setting with a high degree of structure and supervision (Exs. 11,, SB 41 & SB 42). At this meeting one of the alternative schools discussed was [REDACTED] (Tr. 161-163).

Yet another IEP meeting was held on [REDACTED] P. Prior to the meeting [REDACTED]'s parents had submitted a list of goals (Ex. 13; Tr. 174) to the school which were, for the most part, incorporated into the IEP (Tr. 175). Once again, private placement for [REDACTED] and various alternative schools were discussed at the meeting (Tr. 176). Although a written IEP was presented, it was not signed by [REDACTED]'s parents (Ex. 15, SB 43). [REDACTED]'s parents subsequently requested a Central Office review of this latest IEP proposal (Ex. 17; Tr. 176).\*

This particular meeting ended prematurely when [REDACTED] the [REDACTED] representative, was forced to leave because of a family emergency (Tr. 115, 176, 75-76). According to the [REDACTED] witnesses, at the time of [REDACTED]'s departure all of the elements of the IEP except placement had been agreed upon by the parties (Tr. 25, 76), whereas witness [REDACTED] recollected that a

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\* The review was deferred until [REDACTED]'s release from the hospital, and the medical information from this hospitalization made available to the IEP team (Ex. SB 48)

discussion of the goals and objectives was ongoing when the meeting was terminated (Tr. 92).

However, on [REDACTED] was admitted to

Hospital with severe depression, where [REDACTED] remained until

[REDACTED] (Ex. 19; Tr. 177, 187).

On [REDACTED] another meeting\*\* was held, and an addendum to an earlier IEP was prepared and presented at this meeting. This addendum - which was not signed by [REDACTED]'s parents - recommended that [REDACTED] be placed in a private school ( [REDACTED] ), and indicated that the "stay put" school was a public day school. Of some significance is the wording on the addendum that, "To compromise the placement of [REDACTED] is offered to avoid due process. If either side files a due process stay put will be IEP of [REDACTED] at [REDACTED]." (Ex. 16, SB 45).

[REDACTED]'s condition improved subsequent to [REDACTED] release from [REDACTED], and another IEP meeting was scheduled for [REDACTED]. One of the purposes of this meeting was to amend the earlier IEP, get [REDACTED] back into the system, and salvage what they could for the [REDACTED] - [REDACTED] academic year. (Ex. SB 51; Tr. 192-194, 207, 214-215). This addendum to the [REDACTED] IEP was agreed to by [REDACTED]'s parents.

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\*\* Whether this was an IEP - as opposed to an "administrative" - meeting is a matter of some controversy. Witness [REDACTED] was sure that it was not an IEP meeting, as not all of the required individuals were present (Tr. 82). On the other hand, Witness [REDACTED] was under the impression that it was an IEP meeting (Tr. 95), and a proposal from [REDACTED] was drafted on a form described as an "IEP Addendum" (Ex. PS 45).



█'s schedule for the remainder of the school year involved physical education, art, and English days alternating with composition skills and learning lab days - these courses also being primarily English writing skills in nature (Ex. SB 72; Tr. 194). This schedule would enable █ to get credit for the phys ed and English requirements for the school year (Tr. 30, 32).

██████████ is the of █. testified that █ was initially diagnosed with ADHD when █ was in the █ grade in public school, and placed in special ed. In the █ grade █ was removed from the special ed program and installed in the gifted and talented program. In the █ grade █ transferred to a private school, which had smaller classes than the public school, where █ remained through the █ grade. In the █ grade, the █ - █ school year, █ attended █ School. █ began experiencing academic problems in the █ grade. █ grades slipped, █ was not turning in assignments, and █ was experiencing social problems with █ peers (Tr. 147-150).

█ had been diagnosed as bipolar in █. In the Fall of █, █ first year at █, █ was frequently in a manic state (Tr. 150-151).

On █, █ attended an IEP meeting with █ personnel. The result of that meeting was a change in some of █'s instructional provisions, and the implementation of a child study plan. The result of this plan was a determination that █ was eligible for special ed (Ex. SB 7 - 9; Tr. 152).

In spite of these adjustments ■'s academic performance continued to deteriorate, and was placed on homebound education (Tr. 154).

On ■ an IEP was signed off on by the parents and ■. This IEP mandated that ■ remain at ■, but provided ■ with such general curriculum supports as preferential seating in the front of the classroom, away from distractions, extended time and small group setting for taking tests, breaking up longer projects into more manageable tasks, and multiple test sessions with breaks (Ex. 5, SB 16; Tr. 155-156).

However, when ■ returned to ■ in ■, ■ continued to experience difficulties, and on ■ was hospitalized in ■, where ■ remained until ■. When ■ returned to school it was perceived that ■ was unable to make up the school work ■ had missed, even with the various adjustments implemented by ■. In ■, ■ was hospitalized for an additional three days (Tr. 157).

■ attended an IEP meeting on ■ where ■'s difficulties were discussed, and it was concluded by all that ■ was simply not the proper educational environment for ■. The programs at other schools were discussed, and ■ undertook an investigation of those facilities (Tr. 158, 161-162).

The first school which ■ visited was ■. ■ found very small classes, which would be attractive to ■, but many students occupying the "time out" room, which indicated behavioral problems to ■. ■ was informed that no ■ students matriculated and attended college, and that if ■ was



interested in taking a course which was not offered at

would have to be bused to another school. ██████ thought that ██████ did not provide the therapeutic support and safety which ██████ needs (Tr. 167-171, 199-200).

██████ also visited ██████ and other private schools, and, in ██████, visited ██████. ██████ was unable to observe any classes in session on ██████ visit to this facility. However, ██████ was of the opinion that ██████ did not provide the therapeutic support and safety which ██████ needs either (Tr. 173, 196).

In preparation for the ██████ IEP meeting ██████ prepared various goals which ██████ thought needed to be incorporated into ██████'s IEP. For the most part these goals were incorporated into the IEP. However, a conclusion satisfactory to all involved was not reached, and ██████ requested a central office review of the decision (Exs. 13, 15, 17 & SB 43; Tr. 174, 177-178, 211, 92-93).

On ██████ another meeting was held with ██████ personnel. From this meeting a purported draft IEP addendum was generated, which ██████ thought mandated ██████'s attendance at ██████ (Ex. 16, SB 45; Tr. 187, 190).

During this time ██████ was in and out of school and

██████. The central office review of the earlier decision was delayed by ██████'s hospitalization. Subsequent to the hospitalization and the adjustment of ██████'s medication, there has been a marked improvement in ██████'s academic habits and accomplishments (Tr. 177, 203, 94)

A further meeting was held on \_\_\_\_\_ ; which resulted in an addendum to the \_\_\_\_\_ IEP, which basically set the goals as expressed in the \_\_\_\_\_ IEP in place, and provided for a revised schedule for \_\_\_\_\_ for the remainder of the \_\_\_\_\_ school year (Exs.20, SB 51, 52 & 53; Tr. 192-194).

\_\_\_\_\_ testified that \_\_\_\_\_ dealings with \_\_\_\_\_ were very traumatic. \_\_\_\_\_ thought that the only offer on the table was to place \_\_\_\_\_ in \_\_\_\_\_, a school which \_\_\_\_\_ thought would put \_\_\_\_\_ at risk. Basically, \_\_\_\_\_ is seeking a school setting where \_\_\_\_\_'s medical situation can be continually monitored, which is highly structured, where supervision and safety are assured, where there is a one-on-one opportunity for teacher/student interaction, and which has a therapeutic setting (Tr. 200-201).

Two expert witnesses testified in support of the positions advanced by \_\_\_\_\_.

\_\_\_\_\_, Ph.D. is a licensed Clinical Psychologist who prepared a Neuropsychological Evaluation of \_\_\_\_\_ (Ex. 21). \_\_\_\_\_ has been working with children and adolescents for the past six years (Tr.). \_\_\_\_\_ obtained \_\_\_\_\_ Ph.D. in \_\_\_\_\_, and \_\_\_\_\_ license to practice as a Clinical Psychologist in Virginia in \_\_\_\_\_ (Tr. 27-28).

\_\_\_\_\_ spent a total of seven hours with \_\_\_\_\_ on \_\_\_\_\_ and \_\_\_\_\_, one hour of which involved educational achievement testing (Tr. 55). In addition to \_\_\_\_\_ interview, \_\_\_\_\_ was provided a medical history of \_\_\_\_\_ by \_\_\_\_\_ parents (Tr. 61). \_\_\_\_\_ findings regarding \_\_\_\_\_'s developmental history, medical history, school history, and family history (Ex. 21) are consistent with the

description of these histories previously made in this decision, and will not be repeated herein. [REDACTED] also reviewed previous testing records, including Wechsler Intelligence Scale for Children test, Stanford Achievement Test, and others (Ex. 21; Tr. 32, 60). However, [REDACTED] has never observed [REDACTED] in class or spoken with any of the [REDACTED] teachers or administrators who worked with [REDACTED] (Tr. 67). At the time the tests were given to [REDACTED], [REDACTED] found [REDACTED] to be under control, in touch with reality, and not particularly depressed (Tr. 63).

The tests which [REDACTED] gave to [REDACTED] included the following: Wechsler Intelligence Scale for Children, 3rd edition, Wisconsin Card Sort, Halstead Reitan Sensory Perceptual Examination, Halstead Reitan Speech Sounds Perception, Purdue Pegboard, Stanford Binet, 4th edition, Underlining, Woodcock-Johnson Tests of Cognitive Abilities-III, Woodcock-Johnson Tests of Academic Achievement-III, Boston Naming, Benton Controlled oral Word Association, Word Fluency, Connors CPT II, Comprehensive Attention Battery, Wide Range Assessment of Memory and Learning, Gray Oral Reading, Achenbach CBCL, Minnesota Multiphasic Personality Inventory - Adolescent Version, and Rorschach Inkblot.

In taking the tests [REDACTED] presented the picture, according to [REDACTED], of a pleasant individual, eager to cooperate and put forth a good effort, albeit highly anxious concerning the outcome of the testing. [REDACTED] was also moderately distractible, occasionally impulsive and fidgety, and did not do particularly

well on those portions of the tests where stress, i.e., time deadlines, were a factor (Ex. 21; Tr. 31).

██████████'s findings were grouped into seven primary categories, each of which shall be discussed seriatim.

In the "Intellectual Functioning" category ██████ fell in the "average" range, although this estimate was somewhat tempered by the discrepancy between ██████ high average language based abilities (115) and ██████ average visually based abilities (95). ██████ processing speed (77) was well below average. The results of the tests in this category led ██████ to conclude that ██████ had graphomotor speed deficits and mild social reasoning difficulties, although ██████ visually based cognitive abilities were developing normally (Ex. 21; Tr. 31-33,35).

In the "Sensory and Motor Functioning" category it was noted that ██████ apparently did not receive good information through fingertips, particularly insofar as ██████ left hand was involved. This resulted in below average testing results where graphomotor speed and skills were involved. The results of the tests in this category led ██████ to conclude that ██████ had left sided fingertip dysgraphesthesia, which raises practical concerns for the efficiency of ██████ writing, particularly where time limited and lengthy tasks are involved (Ex. 21; Tr. 36).

In the "Visual Perception and Constructional Functioning" category ██████'s abilities were normal. Speeded visual processing for complex designs was normal, but for single numbers and letter groupings was below average. The results of the tests in this

category led ██████████ to conclude that ██████ may have reading fluency skill problems (Ex. 21; Tr. 36).

In the "Language Related Functioning" category ██████'s abilities were above average. However, although ██████ vocabulary was high average, ██████ ability to use complex language to express reasoning in socially based situations was below average. The results of the tests in this category led ██████ to conclude that ██████ may have word retrieval inefficiencies (Ex. 21; Tr. 37).

In the "Memory and Learning Related Functioning" category ██████'s visual recall of geometric designs and visual recognition skills were average. ██████ visual spatial encoding was excellent, and ██████ visual auditory encoding was above average. ██████ immediate auditory verbal recall of paragraph length stories was high, auditory verbal encoding of word lists was average, and ability to consolidate new auditory verbal information into long term storage over a delay was normal. However, on the visual and aural reaction time tasks, and the discriminant reaction time tasks, ██████ was inattentive. The results of the tests in this category led ██████████ to conclude that ██████ had a mild, residual attention dysregulation, and that ██████ auditory verbal memory retrieval difficulties could obscure normal auditory verbal learning and memory skills in the presence of excellent visual spatial and visual auditory learning abilities (EX. 21; Tr. 37-38).

In the "Academic Achievement" category ██████'s sight word reading was high average, whereas ██████ reading fluency and

comprehension was average. spelling and mathematical calculation skills were above average, but written expressive skills were below average. handwriting revealed moderate to severe graphomotor dyscontrol. The results of the tests in this category led ██████████ to conclude that ██████ could encounter difficulties in academic tests where time was a factor (Ex. 21; Tr. 38-39).

In the "Emotional Development" category the MMPI-A scales yielded a valid clinical profile which demonstrated depression, anxiety, anger, and bizarre sensory experiences. ██████ tested as being socially insecure, withdrawn, and having a low self-esteem. The Rorschach results indicated situationally related stress that results in impulsive behavior, cognitive disorganization, and emotional instability (Ex. 21; Tr. 39-40).

████████ concluded that ██████ suffered from certain processing deficits which limited functioning ability. ██████ had left sided fingertip dysgraphesthesia, left sided fine motor dyspraxia and moderately severe dysgraphia, all of which raise concerns regarding writing efficiency, particularly where time limited tasks were involved. Speeded visual processing deficits for letters and letter groupings, and inefficient word retrieval abilities further limit reading fluency. Although ██████'s visual learning skills are excellent, reading fluency and comprehension and written language skills are below expectations, given intelligence. ██████ concluded that prognosis is best if ██████ continues to receive medical and psychological services and the educational accommodations



necessary to enable to perform to the best of abilities  
(Ex. 21)

made fourteen specific recommendations for  
's future: (1) That continue to be treated medically for  
bipolar disorder and attention dysregulation. (2) That continue  
to participate in individual psychotherapy to address the symptoms  
of depression, anxiety, anger and low self esteem. Ideal short  
term goals would include stress management training. (3) That  
would benefit most from a classroom environment that provides a  
high degree of intellectual stimulation, while continuing to  
provide necessary structure, one on one attention, minimal  
distractions, psychological services on site, and support for  
academic weaknesses and emotional difficulties. (4) That  
participate in a social skills training program. (5) That be  
referred to a reading specialist to address dyslexia. (6) That  
continue receiving educational adaptations under a classification  
that can address attention dysregulation, dyslexia,  
dysgraphia, and emotional difficulties. (7) That lengthy school  
assignments be broken down into smaller, briefer sections. (8)  
That teachers and parents continue to work with to improve  
organizational skills. (9) That be allowed to take written  
exams in a quiet, isolated environment. (10) That those working  
with understand that has a dysgraphia that limits the  
efficiency of writing, and that unnecessary copy requirements  
be removed from assignments. (11) That have access to, and  
instruction on, a word processor to compensate for dysgraphia.  
(12) That could benefit from the use of voice recognition

software for written assignments. (13) That be allowed to take classroom orally. (14) That be reevaluated neuropsychologically in two years time (Ex. 21; Tr. 40).

, who qualified as an expert witness (Tr. 28), was of the opinion that the school operated by would not meet 's requirements. opined that transferring students for certain courses would not fit in with need for on site only locations, that there would be a lack of intellectual stimulation for at , that the behavioral problems of the other students attending would distract , and that the extra stress engendered by attending would have an adverse effect on performance (Tr. 48, 50). Although had not observed the student population at , nor spoken to any of the staff, received the impression that student behavioral problems were rife at that school (Tr. 49-50, 68-69).

believes that the correct educational setting for is one where has adequate intellectual stimulation, adequate support for learning disabilities, and emotional and psychological support on site, with as few transitions as possible to minimize disruptions (Tr. 53).

, Ph.D., is a licensed professional counselor, marriage and family therapist who has been seeing on an outpatient basis for over one year (Tr. 73, 76). Approximately sixty percent of practice consists of treating adolescents, and about twenty percent of clients have been diagnosed by a psychiatrist with bipolar disorder and are receiving medication

for that condition. works closely with psychiatrists and with the hospitals which patients attend (Tr. 74-75). [REDACTED] qualified as an expert witness (Tr. 76).

[REDACTED] has found that bipolar disorder has a detrimental effect on the learning ability of adolescents. In the depression stage the students are extremely tired, and have trouble paying attention and staying awake in class. In the manic stage it is very difficult for them to pay attention to just about anything. In the quiescent periods - those between the depressive and the manic - students must spend a considerable amount of time attempting to catch up on the school work they missed (Tr. 76-77).

[REDACTED] began meeting [REDACTED] and providing weekly outpatient psychotherapy for [REDACTED] during the [REDACTED] of [REDACTED]. At that time [REDACTED] was taking several different medications for [REDACTED] bipolar disorder, which seemed to be under control. At the time [REDACTED] began treating [REDACTED], [REDACTED] diagnosed the latter's problems as being primarily in the family and interpersonal areas. [REDACTED]'s transition into a new school were going smoothly, although [REDACTED] was beginning to experience ideation, sometimes significantly morbid and violent (Exs. 18 & 22, SB 46A).

During the [REDACTED] of [REDACTED] - [REDACTED] [REDACTED] began treatment with a new psychiatrist, and [REDACTED] medication changed. [REDACTED] noticed an increase in [REDACTED]'s behavioral control, anger, and suicidal ideation. In addition, [REDACTED] began having academic problems. [REDACTED] attended a meeting at [REDACTED] where a plan was developed which was designed to produce some short term remedial solutions to [REDACTED]'s problems. These efforts included

assistance by an education specialist, progress reports, and "drop-in" privileges for [REDACTED] with the education specialist and the school nurse (Ex. 18, SB 46A).

During the [REDACTED] of [REDACTED] became more delusional. [REDACTED] began hearing music when none was playing, seeing a teacher with a dragon's head, and other visual and auditory phenomena. [REDACTED] medication was adjusted, and [REDACTED] began a period of homebound instruction, and [REDACTED] condition improved somewhat (Exs. 18 & 22, SB 46A).

During the [REDACTED] of [REDACTED] attended school, and began expressing some disturbing violent ideation, including a shoving incident with [REDACTED] mother and father. [REDACTED] concluded that [REDACTED] medication was not effective, as [REDACTED] symptoms of mania and [REDACTED] distorted thinking were accelerating (Exs. 18 & 22, SB 46A).

In [REDACTED], [REDACTED] telephoned [REDACTED] on two occasions, both calls evincing a deterioration in [REDACTED] condition. [REDACTED] was experiencing auditory and visual hallucinations, and exhibiting suicidal tendencies. [REDACTED] strongly recommended that [REDACTED] be admitted to [REDACTED], which [REDACTED] was on [REDACTED]. [REDACTED] remained in the hospital for approximately one month, where [REDACTED] medication was changed and adjusted, and [REDACTED] was observed. [REDACTED] responded positively to these changes. (Exs. 6, 18 & 22, SB 46A; Tr.78).

Prior to [REDACTED]'s return to school, [REDACTED] contacted the school to explain [REDACTED]'s condition and to make several suggestions concerning [REDACTED] academic situation. [REDACTED] recommended that [REDACTED]'s grades from school work [REDACTED] completed while in the hospital be

incorporated into regular school grades, that a reentry plan be formulated which would apprise [redacted] of what work missed, what work had to make up, and the time frame for the catch up period (Ex. 8, SB 19).

Although [redacted] returned to school, [redacted] continued to experience significant problems. [redacted] medication was making [redacted] drowsy and inattentive in class, and [redacted] academic motivation was lacking. On [redacted] [redacted] was readmitted to [redacted], where [redacted] remained for several days while [redacted] medication was again changed and adjusted (Ex. 22).

[redacted] returned to school in mid [redacted], [redacted], but [redacted] academic problems persisted through the remainder of [redacted] and into [redacted] (Ex. 22)

An IEP meeting was scheduled for [redacted] [redacted] Prior to that meeting, on [redacted], [redacted] wrote to the

Eligibility Committee, explaining that [redacted] was now suffering from bipolar I disorder, exacerbated by paranoia. In

[redacted]' opinion, this condition made [redacted] an excellent candidate for placement in an intensive therapeutic day or residential school setting. In addition, [redacted] required on-site psychiatric services. These conclusions were concurred in by [redacted]'s psychiatrist (Ex. 10). The recommendations contained in the [redacted] IEP report (Ex. 11, SB 41) are discussed at another point in this decision, and will not be repeated here.

Another IEP meeting was called for [redacted].

[redacted] attended this meeting. [redacted] also wrote to [redacted] [redacted] on [redacted] reiterating [redacted] diagnosis of [redacted]'s

disorders, and concluding that [REDACTED] was neither a candidate for the public school setting or homebound instruction. In [REDACTED]' opinion, [REDACTED] would be better served by a therapeutic residential or day school which could provide for [REDACTED] education by staff trained to handle students with major mental disorders (Ex. 12, SB 43).

Possible private placements for [REDACTED], including [REDACTED], [REDACTED], and [REDACTED] were discussed by those present at the meeting, but no definite plans regarding these facilities were finalized. Again, the recommendations contained in the

IEP report (Ex. 15, SB 45; Tr. 105) are discussed at another point in this decision, and will not be repeated here.

[REDACTED] testified that [REDACTED] has never had full recovery between [REDACTED] bipolar episodes. [REDACTED] is perpetually in a state of depression or mania, or some combination thereof. This leads to social problems with [REDACTED] peers, who tend to tease [REDACTED]. [REDACTED] is fearful of attending school, as [REDACTED] thinks that bad things are going to happen to [REDACTED] there. Stress simply aggravates these problems, and activates [REDACTED] paranoia. [REDACTED]'s psychosis is activated if [REDACTED] is placed with students who have behavioral problems, or are simply robust, disruptive, shoving, and otherwise engaging in typical teenage behavior, and [REDACTED] cannot learn properly if psychosis is activated. If [REDACTED]'s educational environment is even moderately stressful [REDACTED] will be unable to learn because [REDACTED] experience of the stress is the actual stress. [REDACTED] had neither visited [REDACTED] nor spoken to any of the teachers here, so [REDACTED] could not specifically comment on the behavioral situation at that facility (Tr. 82, 88, 122).



██████████ concluded that ██████ needs a structured, entire year, educational program. ██████ needs a school setting which is as free from stressful situations as possible, and one where medication can be monitored by school personnel. ██████ current medication is successful in reducing ██████ mania, but needs to be closely monitored in the future (Tr. 100, 116-117).

In addition, ██████ ██████████ testified on ██████'s behalf. ██████ holds a Master's degree in education. ██████ attended the ██████████ IEP meeting at ██████'s parents' request. At the meeting ██████'s agenda was discussed, including placement in ██████████, which was thought to be inappropriate, under the circumstances. An independent evaluation was also requested at the meeting (Tr. 140-142).

██████████ accompanied ██████'s parents when they visited ██████████. they were given a guided tour of the facility by ████████████████████, but saw no students during their visit. They inquired about the curriculum, particularly the advanced placement courses which ██████ hoped to participate in. They were also told by ██████ personnel that there were approximately ten students per class, individual therapy was available for students, and many of the students were behaviorally involved (Tr. 144-145).

Three witnesses, all of whom qualified as experts, testified in support of the positions advanced by ██████████.

██████████ has been a special ed teacher at ██████████ since ██████████ is but two classes away from obtaining ██████████ Master of Arts degree in special education. ██████████ is

licensed by the State of Virginia, and qualified as an expert witness (Ex. SB 57; Tr. 6-8).

met in , when was assigned as case manager. At that time worked with homebound teacher, and participated in the IEP meetings. As 's case manager is responsible for all facets of educational career at (Tr. 8-12).

In had concerns regarding 's progress. found unable to concentrate, unwilling to finish homework, and unable to keep abreast of the progress of classes. pressed for a reevaluation of , which was duly performed. The reevaluation resulted in the issuance of the IEP (Exs. SB 36-SB 39, SB 40; Tr. 12-18, 44-45).

taught in learning lab class during the Spring of . This class was designed to permit the student to work in a separate environment on whatever area of skills which he or she preferred. In 's case, the learning lab was primarily used to supplement English classes (Tr. 20-21).

As case manager teacher, was of the opinion that the best educational option for would be attendance at . had worked with the teachers and other personnel at , and was familiar with the program and its implementation, and felt that would benefit from the program. thought that the IEP which was presented at the IEP meeting had been agreed to - except for the placement question - by both the parents and the (Ex. 12, 15, SB 43; Tr. 22-25).

██████████ also participated in the IEP meeting which resulted in the altered schedule for ██████████. ██████████ stated that ██████████ schedule was changed because ██████████ wanted to get ██████████ back into the system and permit ██████████ to salvage whatever ██████████ could from the school year (Exs. 20, SB 51, SB 72; Tr. 26-27).

According to ██████████, ██████████ is particularly skilled in English, and was in the top percentage of ██████████ class in that area.

██████████ noted that ██████████ made academic progress except when ██████████ was unable to attend school, when ██████████ fell behind. ██████████ did not note any dysgraphia in ██████████, and did not think that a word processor or extended school year would particularly improve ██████████'s academic performance. ██████████ has never noted any behavioral problems with ██████████, and was unaware of any such problems at ██████████. ██████████ did note that since ██████████'s medication was changed ██████████ performance had been much improved (Tr. 32, 35-39, 42, 48).

██████████, Ph.D., is a licensed clinical psychologist employed by ██████████ is responsible for the development and maintenance of the ██████████ and ██████████ programs Ex. SB 38; Tr. 226, 229-230).

The mission statement of the ██████████ school provides for the following services to enable it to reach its goal of delivering an environment where each student has the opportunity to be empowered as a learner while developing at his or her own rate: a safe and nurturing environment that is conducive to learning; a small highly structured environment for learning; individual and group counseling; work with students with their

\* " ██████████ " is the acronym for ██████████, the name of the program (Tr. 229).

physical wellness; work cooperatively with the base schools and outside agencies; working towards standards of learning goals and graduation requirements, smooth transition into the least restrictive environment, using the special education child study/eligibility process, using a level system to track the progress of individual students, teachers accommodations for academic success, low staff-to-student ratio, modeling respect for diverse cultures, teaching proficiency in use of technology as a tool, teaching decision making through the use of behavioral management techniques, and enlightening students to the realities of living in a global community (Ex. SB 70; Tr. 265).

During the . - school year the [REDACTED] program had forty-eight academically oriented students. There are usually six to eight students per class, and the students are grouped according to their respective academic abilities and personalities. Each class room is staffed with a teacher and an assistant. All of the teachers have master's degrees (Tr. 231-233).

The programs offered at both and are highly structured. They focus on the individual student's IEP goals, which are viewed as the minimum goals to be attained. The classes themselves are self contained, so that, with the exception of phys ed, the students can remain in the same room or rooms throughout the day (Tr. 235, 237-238).

The teachers and staff at coordinate their efforts with the individual student's physicians and parents regarding medication, actions, etc. through the means of daily faxes. In

addition, teachers make weekly telephone calls to the parents regarding the students activities during the week (Tr. 239).

The [REDACTED] program has a psychologist and two social workers on staff. The staff also includes a behavioral specialist who deals with the students during times of stress or crises, and math and reading specialists. Staff members provide group and individual therapy, and coordinate with the student's doctors and other care givers. The program at [REDACTED] had several students with bipolar I in attendance during the past school year, and experienced no particular problems in meeting their needs.

[REDACTED] considers the [REDACTED] program to be therapeutic, in that it provides unlimited individual counselling for the student (Tr. 240-244, 255-256, 277).

[REDACTED] spent some time with [REDACTED]'s teachers, and observed [REDACTED] in the class room environment. [REDACTED] opined that [REDACTED] could be accommodated by one of [REDACTED]'s academic classes, probably in either a low keyed environment or perhaps in a slightly more active environment. [REDACTED] would be placed in the quieter of the two environments initially. The staff at [REDACTED] would tailor a program to give [REDACTED] the academic work at [REDACTED] level which [REDACTED] required, including courses in trigonometry and chemistry. [REDACTED] would not be placed in a class room with aggressive students. [REDACTED] was of the opinion that [REDACTED] could fulfill the goals and objectives of [REDACTED]'s IEP, and that [REDACTED] would feel comfortable at that facility (Tr. 235-237, 244-246, 254, 263, 275, 285-287, 288-290).

Insofar as the specific recommendations of [REDACTED] are concerned, [REDACTED] believed that [REDACTED] had the ability to fulfill numbers two through fourteen (Tr. 271-273).

As far as behavioral problems at [REDACTED] are concerned, during the [REDACTED] - [REDACTED] school year there were reported a total of seventeen physical contacts with students, fifteen of which occurred in the reorientation room, which is the room where misbehaving students are sent to calm down. There were no student assaults on another student at [REDACTED] during the past year. [REDACTED] has a policy of accepting only emotionally disturbed students, not students who are socially maladjusted (Tr. 252-255).

[REDACTED] is the administrative coordinator for the [REDACTED] special ed department. [REDACTED] holds a Master's degree in administration and is licensed in Virginia. [REDACTED] has [REDACTED] years experience as a teacher, school principal, special ed acting supervisor and Summer school principal. [REDACTED] has been involved in the special ed program since [REDACTED], was the principal of a special ed elementary school, and temporary principal of [REDACTED]. In [REDACTED] present position [REDACTED] supervises the homebound program, works on IEP's, and other related special ed activities. [REDACTED] qualified as an expert (Tr. 60-65).

[REDACTED]'s familiarity with [REDACTED] arises from [REDACTED] review of [REDACTED]'s records and conversations with [REDACTED] teachers. [REDACTED] attended the [REDACTED] and the [REDACTED] IEP meetings, and was of the opinion that [REDACTED]'s proper placement should be in [REDACTED].

[REDACTED] based this opinion on the facts that [REDACTED] had a very therapeutic program, had the right student/teacher ratios for a



student of [redacted]'s needs, had a high academic reputation, and a psychologist on staff (Tr. 67-72).

Insofar as [redacted]'s specific academic needs were concerned, [redacted], who had taught chemistry, opined that they could easily create a chemistry lab at [redacted] for [redacted]'s benefit. [redacted] testified that any courses which [redacted] was unable to provide could be found at [redacted] but [redacted] did not believe that it would be necessary for [redacted] to attend any classes there (Tr. 61, 72-75, 88).

[redacted] attended the [redacted] IEP meeting but had to leave prematurely because of a personal emergency. However, [redacted] thought that the IEP was completed prior to [redacted] departure. Everyone had agreed on its contents - except for the private placement provision. [redacted] indicated that [redacted] had proposed additional counseling for [redacted] at the meeting, but that this proposal was rejected by the parents, who were of the opinion that [redacted] was receiving sufficient counseling at the time (Tr. 75-77).

[redacted] testified that there was no pressure exerted on the family by [redacted] to force [redacted] to attend school, and that [redacted] never told [redacted]'s parents that the truant officer would be paying them a visit if [redacted] continued to miss classes (Tr. 78-79).

The [redacted] meeting which resulted in the purported IEP addendum (Ex. 16; SB 45) was not, in [redacted]'s view, actually an IEP meeting, but rather an administrative meeting between [redacted]'s parents and [redacted] personnel. The offer of placement at [redacted] was an specification of one of the options put forward for the parent's consideration, as [redacted] had no

authority to authorize private placement for [REDACTED] at that meeting. Exhibit 16 (Ex. SB 45) was not a settlement offer, nor was it an attempt to coerce the parents or induce them to waive any of their rights (Tr. 80-82, 83, 84).

### Positions of the Parties

Initially, [REDACTED] takes the position that the burden of proof falls upon [REDACTED] to establish the appropriateness of the IEP. Needless to say, [REDACTED] takes a contrary position, arguing that [REDACTED], as the moving party in this proceeding, has the burden of proof.

[REDACTED] asserts that [REDACTED] did not comply with the procedural requirements of the Individuals with Disabilities Education Act ("IDEA"), and thereby failed to develop a valid IEP for [REDACTED]. [REDACTED] maintains that [REDACTED] did not offer any goals or objectives of its own for [REDACTED]'s IEP, but instead merely adopted those proposed by [REDACTED]. This failure constitutes a procedural violation. Furthermore, [REDACTED] contends that the IEP team must reach a consensus about the goals and objectives before placement can be discussed. In this case, [REDACTED] was forced to depart from the [REDACTED] IEP meeting prior to the reaching of a consensus, thus the discussion of placement was a procedural violation. [REDACTED] avers that the [REDACTED] IEP Addendum was fraught with procedural irregularities, including the fact that it was not written by the IEP team, that it incorrectly states that the stay put school is [REDACTED], and that it offers [REDACTED] as an alternative school. Finally [REDACTED]

states that ██████ purposefully provided incorrect information, which also constituted a procedural violation.

██████ also asserts that the IEP which involves placement at ██████ does not meet the requirements of a free and appropriate public education ("FAPE"), as that term is defined in the Act. Specifically the IEP fails to take into account ██████'s special and unique needs, including the fact that ██████ cannot learn in a stressful environment and that ██████ requires an academically challenging environment. ██████ argues that ██████ is designed for students with behavioral problems, which is not the type of environment for ██████. Furthermore, ██████ professes that ██████'s testimony regarding ██████ is not credible, as ██████ is too closely involved in its operation. Finally, ██████ protests that the ██████ witnesses recommending ██████ as the placement for ██████ did not properly understand ██████'s disability, thus the recommendations are faulty.

██████ initially argues that IDEA does not require that ██████ fund private placement for ██████, there were no procedural defects in the development of the IEP, but that, if there were any, they were *de minimus*, and ██████'s early departure from the ██████ IEP meeting do not render that IEP invalid. ██████ contends that ██████ does provide a FAPE for ██████, and is appropriate for ██████. Furthermore, ██████ avers that the ██████ satisfies the "least restrictive environment" requirements\* of IDEA. Finally ██████ asserts that greater weight should be accorded its expert witnesses than those of ██████.

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\* 20 U.S.C. 1412(a)(5)(a); 34 C.F.R. 300.550(b); 8 VAC 20-80-10

In reply, [REDACTED] asserts that its witnesses should be accorded more weight than those of [REDACTED], as they had more experience with [REDACTED] and more knowledge of [REDACTED] disability. *Au contraire* the *de minimus* contentions of [REDACTED], [REDACTED] maintains that the procedural violations of [REDACTED] caused [REDACTED] to be denied a FAPE. It is contended that the [REDACTED] is not able to meet the educational requirements of [REDACTED], nor is it appropriate for [REDACTED].

In its reply, [REDACTED] avers that it developed a valid and appropriate for [REDACTED] in [REDACTED], and again in [REDACTED] that the IEP team is not obligated to draft specific academic goals in an IEP, that the settlement discussions advanced by [REDACTED] were appropriate, and that it has complied fully with the procedural requirements of IDEA.

#### Discussion and Conclusions

The starting point for discussion is the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.* The objectives of that Act are "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. 1400(d)(1)(A).

A "free appropriate public education" is defined by the Act as "special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State

educational agency; (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and, (D) are provided in conformity with the individualized education program required under section 614(d)." 20 U.S.C. 1401(8).

There are three primary issues for discussion and decision in this proceeding: (1) Who has the burden of proof; (2) Was the IEP proposed for [redacted] valid; and, (3) Would placement at [redacted] meet the FAPE requirements insofar as [redacted] is concerned. Each of these issues shall be considered seriatim.

**Burden of Proof** - There are actually several burden of proof questions to be resolved herein. As [redacted] has raised questions concerning the appropriateness of the IEP, and whether proposed placement meets the FAPE requirements, it is [redacted] burden to establish that the IEP is not appropriate and that [redacted] would not receive FAPE if placed in [redacted]. Spielberg v. Henrico County Public Schools, 853 F.2d 256, 258 (C.A. 4, 1988); Bales v. Clark, 523 F. Supp 1366, 1370 (E.D.Va, 1981).

On the other hand, the burden is upon [redacted] to prove substantial procedural compliance with the law and appropriate regulations. Spielberg, supra.

**Validity of the IEP** - In order to determine whether the IEP proposed for [redacted] was valid, it must be noted that there were several IEP meetings and IEPs involved. The initial IEP meeting took place on [redacted], and the goals and objectives and placement of that IEP were agreed upon by all of the parties (Ex. 5, SP 16). A second IEP meeting was held on [redacted] and,

although goals and objectives were specifically set forth in the IEP, placement was not specified - other than "separate public day program" - and the parents did not sign off on that IEP. A third IEP meeting was held on \_\_\_\_\_ and, although goals and objectives and placement were specified, the parents did not sign off on that agreement. This was the meeting that \_\_\_\_\_ left early. The testimony of the witnesses who attended that meeting indicates that most of the substantive questions had been resolved prior to \_\_\_\_\_'s departure (Tr. 175 - 176, 25, 76, 92 - 93). The one question which was not resolved - placement - leads me to believe that it would not have been resolved had \_\_\_\_\_ remained at the meeting, thus I find \_\_\_\_\_ limited absence to be of minor importance, and certainly not enough to establish a procedural error on the part of \_\_\_\_\_ which would prove to be fatally defective to the IEP.

Another meeting took place on \_\_\_\_\_. However I am not persuaded that this was ever intended to be an IEP meeting. For all of the other IEP meetings a specific "Parental Notification and Invitation" form was sent by \_\_\_\_\_, which specifically indicated that an IEP meeting was being held and who would attend (Exs. 5, 11, 12, 15, 20, SB 16, 41, 43, 51). No such form was involved in the \_\_\_\_\_ meeting. Significantly, the \_\_\_\_\_ meeting was only attended by \_\_\_\_\_ and \_\_\_\_\_. \_\_\_\_\_ testified that this was not an IEP meeting (Tr. 82, 83), and \_\_\_\_\_ did not offer \_\_\_\_\_ opinion on the matter - although \_\_\_\_\_ did testify that \_\_\_\_\_ thought that the document prepared by \_\_\_\_\_ during the course of that meeting was an addendum to



the IEP (Tr. 95), a logical presumption, given that it was presented on an IEP form (Ex. 15, SB 45).

The final IEP meeting occurred on . . . . . Everyone agreed on the goals and objectives and placement expressed in this IEP, as it was designed only to cover the remainder of the [REDACTED] - [REDACTED] school year for [REDACTED] (Ex. 20, SB 51).

There appear to be no alleged procedural or substantive problems involving the initial IEP meeting and program. Indeed, that IEP was agreed to by all of the parties.

The [REDACTED] IEP meeting produced a program which was not agreed to by the parents. The [REDACTED] IEP meeting produced a program with which the parents partially agreed, the only sticking point being the placement issue. This being the case, I find that [REDACTED]'s argument that the IEP was invalid because it lacked [REDACTED] goals and objectives, and because of [REDACTED]'s early departure from the [REDACTED] meeting, to be unconvincing. If there were any procedural irregularities involved in the [REDACTED], [REDACTED], and [REDACTED] meetings and programs they were too minor to be of any import here; as the [REDACTED] meeting was not properly convened as an IEP meeting, any irregularities therein cannot be held to be detrimental to the IEP program or process. Thus I conclude that any procedural irregularities were not sufficient to render the IEP invalid, nor did they deprive [REDACTED] of FAPE. Fairfax County School Board v. John Doe and Jane Doe, Civil Action No. 96-1803-A, U.S.D.C., E. D. of Va., Alexandria Division, dated April 24, 1997.

Placement at . . . . . and Compliance with FAPE -

It must initially be remembered that FAPE only guarantees an "appropriate" free, public education, not necessarily the best public education that the school system can purchase. Lewis v. School Board, 808 F. Supp 523 (E.D. Va., 1992)

It is argued that the proposed IEP involving placement at [REDACTED] does not take into account the special and unique needs of [REDACTED], i.e., that [REDACTED] cannot learn in a stressful environment, that [REDACTED] requires an academically challenging environment, and that [REDACTED] personnel did not understand the nature of [REDACTED] disability. It appears, however, that [REDACTED] was cognizant of [REDACTED]'s academic strengths and weaknesses. Witness [REDACTED], [REDACTED]'s case manager for two years and [REDACTED] learning laboratory instructor during the Spring of [REDACTED], testified concerning [REDACTED] knowledge of [REDACTED] skills and accomplishments (Tr. 9, 20, 37 -38). [REDACTED]'s IEPs - both agreed upon and proposed - contain detailed descriptions of [REDACTED]'s educational performance, and the steps to be taken to meet [REDACTED] short and long term goals and objectives (Exs. 5, 11, 12, 15, 20, SB 16, 41, 43, and 51). [REDACTED] consulted with those familiar with [REDACTED]'s academic skills and weaknesses and testified that an academic program could be tailored to meet [REDACTED] needs (Tr. 234 -235, 245). Likewise, [REDACTED] personnel appeared to be aware of the nature of bipolar disorder and its treatment. [REDACTED] testified that [REDACTED] had students who suffered from a bipolar disability (Tr. 255 - 256), and [REDACTED] testified that [REDACTED] niece suffered from it (Tr. 86), so it is probably safe to assume that [REDACTED] has more than a passing familiarity with it.

It is also contended that [REDACTED] is designed for students with behavioral problems and that [REDACTED]'s testimony concerning this facility are not credible as [REDACTED] has been so intimately involved in [REDACTED] establishment and operation. [REDACTED] specifically testified that [REDACTED] does not accept socially maladjusted students (Tr. 255), and, given relationship with the [REDACTED] program, [REDACTED] obviously knows the situation there. I find that [REDACTED] relationship with [REDACTED] actually makes [REDACTED] a more credible witness concerning that facility's program than someone who obtains information concerning the program from an internet web page.

[REDACTED] submitted fourteen specific recommendations concerning [REDACTED]'s future educational requirements (Ex. 21, Tr. 40).

[REDACTED] testified how the [REDACTED] program would fulfill the majority of these requirements (Tr. 271 -273). Under these circumstances, I believe that the requirements of FAPE could be fulfilled by placement at [REDACTED].

One other factor requires comment. The importance of medication in treating a bipolar disorder is recognized by all of the parties. For the past several years it has been a struggle to adjust [REDACTED]'s medication to obtain the optimal benefit. However, since [REDACTED] release from [REDACTED] new medication schedule and dosage seems to have resulted in a marked improvement in ability to deal with [REDACTED] disability. Assuming this medical improvement continues, [REDACTED] should be better able to cope with disorder, and this should improve [REDACTED] academic skills and interest (Tr. 93, 129, 134, 203, 15, 48 ; Exs. SB 3, 11, 21, 23, 26, 38).