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Dispute Resolution & Administrative Services

COMMONWEALTH OF VIRGINIA
VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION & STUDENT SERVICES
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES

CASE CLOSURE AND FINAL REPORT

Public Schools School Division	Name of Parent(s)
Division Superintendent	Name of Child
Counsel Representing LEA	None Advocate/Counsel for Parent/Child
Ternon Galloway Lee Hearing Officer	Child Party Initiating Hearing

Hearing Officer's Determination of Issue(s):

The hearing officer finds the LEA prevailed in this matter as the hearing officer found no noncompliance on the part of the LEA.

Hearing Officer's Order and Outcome of Hearing:

The hearing officer found in favor of the LEA and ordered no relief for the child.

This certifies that to the best of my knowledge I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing.

Ternon Galloway Lee
Hearing Officer
December 21, 2006

cc: Parent (via mail, fax not available)
, Attorney for LEA (mail)
, Coordinator for Special Education (via mail)
Virginia Department of Education (original via mail)

Certified true copy

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v. **Public Schools**

Child & Parent(s):
child
parent(s)

Administrative Hearing Officer:
Ternon Galloway Lee, Esquire
215 McLaws Circle, Suite 3A
Williamsburg, VA 23185
(757) 253-1570
(757) 253-2534 facsimile

Child's Attorney/Advocate:
None

Public School Attorney:
, Esq.

Superintendent of **Public Schools:**

DECISION

I. PROCEDURAL HISTORY

On September 12, 2006, (hereinafter " " or "child") and (hereinafter "Ms. " or "parent") requested a due process hearing asserting the Public School Division (hereinafter "LEA") did not provide the hours of homebound instruction and tutoring ordered by the Hearing Officer's Amended Order dated February 15, 2006. LEA Exhibit (hereinafter "Exh.") 17. The hearing officer was appointed to this administrative proceeding on September 19, 2006. Hearing Officer (hereinafter "H.O") Exh. 5. The hearing officer held an initial pre-hearing conference on September 26, 2006, wherein the issue was determined to be the following:

1. Did the LEA provide the hours of homebound instruction and Tutoring Ordered by the Hearing Officer in her Amended Order Dated February15, 2006.

Mindful that the hearing officer must make certain findings pursuant to 8 VAC 20-80-76 J17, the hearing officer also determined relevant issues two (2) through four (4) as set forth below:

2. Was the child denied a free appropriate public education (FAPE)?

3. Were the requirements of notice to the parent(s) satisfied?

4. Does the child have a disability?

5. Is the child in need of special education related services?

Neither party waived the resolution session required by IDEA 2004. Accordingly, the hearing officer found the decision would be rendered within the applicable time after the resolution period ended.

Consistent with the agreement of the parties during the initial pre-hearing conference, the hearing officer scheduled the hearing for October 26, 2006. Based on discussions during the pre-hearing conference and findings made, the hearing officer issued a scheduling order entered September 29, 2006. H.O. Exh. 7.

A second pre-hearing conference was held on October 24, 2006, at which time the parties agreed to change the start time of the due process hearing to 2:00 p.m. on October 26, 2006, and the parties confirmed they held a resolution session on September 27, 2006. H.O. Exh. 9.

A due process hearing was held on October 26, 2006, and transcribed wherein the hearing officer took testimony as evidence and admitted H.O Exhs. 1 through 10, LEA Exhs. 1 through 43; and Parent's (hereinafter "P" Exhs. 1a, 1b, 1c, 2a, 2b, 3a, 3b, 4, 5a, and 5b). Because the hearing officer has determined herein that the power of attorney

purporting to appoint the parent as the agent for the child is invalid, the exhibits submitted by the parent are deemed admitted as the child's exhibits.

The IDEA 2004 was signed into law on December 3, 2004. With the exception of some elements of the definition of "highly qualified teacher," which took effect on December 3, 2004, the provisions of IDEA 2004 became effective July 1, 2005 (the "Effective Date"). Newly implemented federal regulations became effective October 13, 2006. Any state special education regulation not impacted by the Act remains in effect until newly revised state special education regulations are implemented

Below, the hearing officer sets forth her decision.

II. ISSUES

1. Did the LEA provide the hours of homebound instruction and tutoring ordered by Hearing Officer's Amended Order dated February 15, 2006?

2. Was the child denied a free appropriate public education (FAPE)?

3. Were the requirements of notice to the parent(s) satisfied?

4. Does the child have a disability?

5. Is the child in need of special education related services?

III. STATEMENT OF FACTS

1. Born February 22, 1988, (hereinafter " " or "child") is eighteen (18) years and nine (9) months of age. Child's (hereinafter "P") Exh. 1a, 1b, 1c.

2. The LEA had previously determined eligible for disability. The LEA held an eligibility meeting on January 6, 2006, and determined continued to qualify for special education and related services but under the category of speech/language impairment. LEA Exhs. 1, 2.

3. ' mother is (hereinafter "Ms. " or "parent"). Tr. 5.

4. LEA Exhibit 35 which purports to be a copy of a power of attorney appointing the parent as 's agent and authorizing her to proceed on the child's behalf in the due process matter before the hearing officer does not contain the signature of the child nor does it exhibit when the notary public's commission expires. LEA Exh. 35.

5. LEA Exhibit 35 is not a valid power of attorney appointing the parent to act on behalf of the child in the matter before the hearing officer. LEA Exh. 35.

6. did not participate in pre-hearing conferences held on September 26, 2006, and October 24, 2006. H.O. Exh. 7, 9.

7. did not object to his mother participating in the pre-hearing conferences instead of himself. Nor did he object to corresponding and other mailings regarding the case being mailed to his address but addressed to his mother.

8. waived his right to participate in any pre-hearing conferences and to mailings being addressed specifically to him.

9. received all mailings sent to his address by the LEA and the hearing officer regarding the matter before the hearing officer.

10. From February 2006 to September 2006, the LEA offered 227 hours of homebound instruction. LEA Exh. 39.

11. Between February 2006 and September 2006, the child or his parent cancelled 131.5 hours of homebound instruction offered by the LEA and the LEA considered 22 of those cancelled hours of instruction excused. LEA Exh. 39.

12. The parent or child cancelled many of the instructional hours without

justification and/or without giving reasonable notice to the LEA. LEA Exh. 39; Tr. 21-22, 62-63.

13. Of the 71.75 hours of instruction the LEA stipulated it owed to the child at the end of September, 55.75 hours were due to cancellations by the instructors due to matters such as family situations, illnesses, and a job conflict. Tr. 40, 77.

14. (hereinafter " "), the child's math and science homebound instruction offered to make up hours of instruction on weekends and evenings due to her not being able to schedule instructional sessions during most of September 2006. Tr. 40.

15. Parent created an atmosphere not conducive to effective instruction in the home. LEA Exh. 41, Tr. 87 -90.

IV. APPLICABLE LAW AND ANALYSIS

A. Did the LEA comply with the Hearing Officer's Amended Order

By order dated February 15, 2006 the Hearing Officer ordered the LEA to immediately begin making up hours not provided to the child in conformity with the 2005 - 2006 IEP and to makeup those hours by the end of summer 2006. Moreover, the order required a gradual transitioning of the homebound services into the community and the provision of an additional two (2) hours of tutoring each week to begin 2 weeks after entry of the order. H.O. Exh. 2.

The LEA stipulated it owes the child 71.75 hours of homebound instructional services as of the end of September 2006. LEA Exh. 39. The child did not object to the stipulation or offer evidence as to the specific number of hours it contends the LEA owes in homebound service pursuant to the hearing officer's order. Accordingly, the hearing

officer finds the LEA, as of October 1, 2006, had not provided 71.25 hours of homebound instruction and that at least some of those hours are instructional and or compensatory hours due to for the 2005-2006 school year.

Having recognized the LEA's stipulation, the hearing officer next examines reasons for the delay in providing the services to determine if the LEA complied with the February 15, 2006 order.

The LEA contends it has had enormous difficulty staffing 's case. After reviewing the record, the hearing officer finds the evidence substantiates the LEA's position. Since the 2004-2005 school year, has been assigned to High School (hereinafter " HS") and identified as a special education student. For these 3 school years, however, he has not physically attended the school but has received homebound instruction. Tr. 83, 85. Typically, a similarly situated student would receive home based instruction from a special education teacher(s) assigned to HS. As was the norm, upon 's initial home based placement, HS special education teachers accepted assignments to provide with his instruction. After a few months, the two teachers quit. Tr. 86.

The evidence shows actions of the parent have led to teachers quitting. For example, one of the HS special education teachers initially assigned to provide with homebound instruction inadvertently left, at 's house, her homebound journal - notebook that LEA requires homebound instructors to maintain with annotations concerning the homebound sessions. When the teacher discovered after leaving the session that she did not have her journal, she contacted Ms. and inquired of Ms. if she had left it at the child's home. Ms. responded by informing the teacher

she had not left the journal. At the teacher's next instructional session with , she discovered Ms. did have her journal and that without her permission Ms. had read the journal and copied pages from it. Ms. then proceeded to berate the teacher over recordings in the journal. Tr. 87-88. Because the teacher believed the incident created an atmosphere the teacher considered ineffective for homebound instruction, she quit. Tr. 88.

The other special education instructor from HS who initially provided instruction to also quit due to Ms. ' scrutiny of him. During instructional sessions, Ms. would remain in close proximity of and the teacher, interrupt sessions and proceed to instruct the teacher on how should be taught. Tr. 88.

Since the initial two HS special education teachers quit, 's special education case manager has been unable to staff his case with special education teachers from HS. Tr. 88. In its attempts to continue to staff 's case, the LEA has experienced unprecedented turnover as evidenced by the fact that from February 2006 to October 2006, has been assigned five (5) teachers. Tr. 65, 69, and 79.

A teacher quitting after only one instructional setting underscores the LEA's staffing difficulties with s case. 's former homebound geography teacher, (hereinafter " "), for example, met with Ms. and on October 6, 2006, and the parties mutually agreed he would provide instruction on Tuesdays from 6:00 p.m. to 8:00 p.m. and on Fridays from 4:00 p.m. to 6:00 p.m. On Tuesday, October 10, 2006, he arrived for his scheduled session at 6:00 p.m., and Ms. would not allow him entrance in the home. She informed him, was meeting with another instructor and he would have to pick another time. Apparently,

returned for a session on Friday, October 13, 2006. He then took 's book home to review and found roaches in it. That same day, wrote a letter resigning from his homebound assignment. He expressed being discouraged by Ms. ' initial cancellation of the agreed upon session and the home environment which he described as prohibiting effective instruction. LEA Exh. 41. While the parent contends she and got the session times mixed up, the Hearing Officer finds the teacher's description of the incident consistent with other observed actions of the parent some of which are noted herein. See also e.g. LEA Exh. 6 (noting the LEA and parent had mutually scheduled an eligibility meeting and 5 days later the parent called to cancel it).

Accordingly, the hearing officer finds the aforementioned actions of the parent/child have obstructed the ability of the LEA to provide homebound instruction.

The hearing officer next explores cancellations of instructional sessions in deliberating whether the LEA has complied with the relevant order.

In July 2006, the LEA staffed (hereinafter " ") to provide English instruction to . She provided with 2 sessions of 2 to 2.5 hours of instruction a week. Tr. 22-23. In August 2006, due to a personal family situation cancelled 6 hours or 3 sessions of instruction. The evidence does not show offered to make up the missed sessions. The LEA also staffed (hereinafter " ") to provide math and science instruction to . Her assignment began February 2006. Initially, she taught 3 sessions a week for 2 hours each. Tr. 37, 44.

has continued to provide instruction during the 2006-2007 school year; however, during most of September 2006, she was unable to meet with as previously scheduled during the 2005-2006 school year due to a scheduling conflict with

her job. The evidence does show that did offer to make up sessions in the evening from 7:00 p.m. to 9:00 p.m. and during the weekend; however, the parent was not amenable to instruction during those times. Tr. 40.

The hearing officer further notes that of the 71.75 homebound hours the LEA contends it owes the child, 37.75 of those hours were due to cancellations by the homebound teachers due to such matters as previously discussed herein; 16 hours were due to the LEA not being able to staff those hours; and 18 hours were due to cancellation by the math and science teacher of which make up hours for those 18 hours were offered.[1] Accordingly, the hearing officer finds that the LEA offered hours of service for all but 55.75 hours of instruction owed; that is, 71.75 (hours the LEA stipulates it owes) minus 18 (hours of which makeup hours were offered but rejected by the parent/child).

The child/parent cancelled 131.5 hours of the 227 hours of homebound instruction offered by the LEA from February 2006 to September 2006. LEA Exh. 39. The LEA's 55.75 cancelled or un-staffed hours account for significantly fewer hours cancelled by the child/parent.

The hearing officer further notes that many of the hours cancelled by the child were without advance notice to the LEA or instructor. For example, on one occasion, showed up for a scheduled session, knocked on the child's door and waited for 30 minutes. No one answered and missed an instructional session. On another occasion arrived for a session and met with Ms. for 15 minutes before being

[1] The hearing officer has determined that 18 hours of make up time was offered because the math and science teacher previously was scheduled to provide 6 hours of instruction a week. Since the teacher's job prohibited her from continuing that schedule until the latter part of September 2006, the hearing officer has assumed the teacher was unable to provide sessions for the first 3 weeks of September.

told was ill. Tr. 21-22. Again, missed an instructional session. Moreover, LEA Exhibit. 39 shows that of the hours cancelled by the child, the LEA deemed over 80% of them as unexcused; that is, there was no prearranged absence or prior notice of an illness, etc. LEA Exh. 39, Tr. 62-63. The evidence shows that unannounced cancellations by the child continue. As previously mentioned, the parent/child cancelled without notice the initial instructional session with on October 10, 2006 and the cancellation contributed to the teacher's resignation. LEA Exh. 41.

Considering all cancellations and un-staffed hours, and offers by the LEA to makeup some cancelled hours, the hearing officer finds that as of September 30, 2006, the LEA had offered over 84% of all hours of homebound instruction, to include compensatory instructional sessions owed to . That is, of the 354.75 hours owed from December 2005 to September 2006, the LEA had offered to provide all but 55.75 hours of instruction.

In making the above immediate finding, the Hearing Officer has considered that the LEA did provide a total of 48 hours of non instructional hours of homebound services during the months of July and August 2006. LEA Exh. 39. The evidence presented by does not clarify what, if any tutoring instructional hours the LEA failed to provide. Since the child has the burden of proof, the hearing officer can not find that he has met his burden of showing that the tutoring ordered by the hearing officer was not provided.

B. Was there a denial of FAPE

A local education agency's failure to provide all of the services, modifications, and accommodations described in an IEP does not constitute a per se denial of free appropriate education (hereinafter "FAPE"). As long as the LEA implemented substantial

or significant provisions of the IEP and the child receives educational benefit, FAPE is provided. Houston Independent School District v Bobby R., 200 F. 3d 341, 31 IELR 185 (5TH Cir. 2000); Gillette v Fairland Bd. Of Education, 725 F. Supp. 343 (S.D. Ohio 1989), rev'd on other grounds, 932 F. 2d 551 (6TH Cir. 1991).

In the context of IEP implementation, the correct legal standard for determining whether FAPE has been provided involves an analysis concerning whether the LEA has implemented substantial or significant provisions of the IEP and whether the LEA has provided the necessary quantum of "some educational benefit" required by Rowley in Hendrick Hudson Dist. Bd. Of Ed. Of Rowley, 458 U.S. 176 S. Ct. 3034 (1982). Houston Indep. Sch. Dist. v. Bobby R, 200 F. 3d 341, 31 IDELR 185 (5TH Cir. 2000); Gillette v. Fairland Bd. Of Educ., 725 F. Supp. 343 (S.D. Ohio 1989), rev'd on other grounds, 932 F.2d 551 (6TH Cir. 1991).

The approach taken in Gillette seems reasonable, particularly in light of Rowley's flexible approach. Therefore, we conclude that to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit. Houston Indep. Sch. Dist. v. Bobby R., *supra.*

In the case before the hearing officer, the child contends the LEA failed to implement the 2005- 2006 IEP because it failed to comply with the February 15, 2006 hearing officer order requiring the LEA to (i) make up every hour of homebound

instruction it failed to provide in conformity with the IEP and (ii) provide compensatory tutoring hours.

The relevant IEPs considered as a whole in pertinent part required 10 hours a week of homebound services and 2 hours of compensatory homebound services. LEA Exhs. 14, 15, 16; HO Exh. 2. As previously discussed, the LEA had not offered or provided 55.5 of those hours or 16 % of the homebound services as of the end of September, 2006. I find therefore that the LEA has implemented substantial or significant provisions of the IEP with respect to the homebound services.

In her deliberations, the hearing officer also considers that during the 2005 - 2006 school year the child has either failed all subjects during the 2005-2006 school year or received incompletes in all subjects. LEA Exhs. 25 - 33; P Exh. 3b.. However, the hearing officer notes the evidence shows that, did not complete his homework assignments even after understanding how to complete them. LEA Exh. 31. , for example testified that she had provided homebound instruction since July 2006 and often gave homework assignments. As of October 13, 2006, had turned in only one assignment to his English instructor. LEA Exh. 37, Tr. 21. Similarly, 's math and science homebound instructor testified that she often gave homework assignments and would go over a sampling of the homework with to make sure he understood it. She then testified that upon her return for the next session, would not have the homework done. Tr. 28. Moreover, as previously mentioned the hearing officer notes that of all homebound sessions offered from February to September 2006, has cancelled over 50% of them. LEA Exh. 39. Considering these factors, the hearing officer finds that had taken advantage of all the homebound instruction offered and

completed homework assignments, he would have received the requisite educational benefit as required by Rowley.

The hearing officer does note also that the due process request and defined issues do not address the hearing officer's order with respect to the gradual transition of homebound services into the community and that the child has presented no evidence to show that the LEA has failed to transition the child's home based instruction gradually into the community. The hearing officer therefore finds the issue of compliance with the order with respect to the transition of services into the community is not before her.

V. DECISION AND ORDER

In this unusual case parental obstruction and enormous cancellation of instruction by the child/parent is a major factor to consider regarding the noncompliance issue. The refusal of a child/parent to cooperate in the provision of services can constitute a refusal to consent to receive special education and related services. See 106 LRP 63397 (where LEA was relieved of its duty to provide FAPE due to failure of parents to cooperate).

The hearing officer finds the obstruction and cancellations on the part of the parent greatly contributed to any delay in providing homebound services. The hearing officer therefore concludes in this fact specific and unusual case that the school has met the spirit of her February 15, 2005 order.

The hearing officer notes the child is of majority age under the IDEA and may now pursue his rights independent of parent.

The hearing officer has examined the entire record and exhibits timely submitted and finds the LEA is providing a FAPE and all requirements of notice to the parent have been satisfied. Further the hearing officer finds that the child has been identified as having

a speech language impairment and is a child with a disability as defined by applicable law 34 C.F.R. Section 300.7 and is in need of and receiving special education and related services.

The hearing officer has found in favor of the LEA and orders no relief for the child.

The LEA contended during the October 24, 2006 pre-hearing conference that the Hearing Officer should not consider the child's exhibit 5B because the child's submission was untimely. The hearing officer has no need to consider the exhibit as it proposed a remedy in the event the child prevailed.

VI. PREVAILING PARTY

The hearing officer finds the LEA is the prevailing party in this matter as the hearing officer has found no noncompliance on the part of the LEA.

VII. APPEAL INFORMATION

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 one year of the date of this decision.

Entered into this 27th day of November, 2006.

Ternon Galloway Lee
Hearing Officer

cc: , Child
Attorney for LEA
, Coordinator for Special Education
Virginia Department of Education