**#20-026**

**COMMONWEALTH OF VIRGINIA**

**VIRGINIA DEPARTMENT OF EDUCATION**

**DIVISION OF SPECIAL EDUCATION & STUDENT SERVICES**

**OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES**

**Re: Child, by and through xxx parent, Parent v. LEA (Case No. 20-026)**

**Child & Parent(s)/Guardian: Administrative Hearing Officer:**

Child Ternon Galloway Lee, Esquire

Parent(s) 215 McLaws Circle, Suite 3A

Williamsburg, VA 23185

**Child’s Advocate(s):** (757) 253-1570

Advocate for Child (Parent) (757) 253-2534

**LEA’s Attorney**

Attorneys for LEA

**Superintendent of LEA:**

School Superintendent

# DECISION

# I. PROCEDURAL HISTORY[[1]](#footnote-1)

On October 23, 2019, Parent filed a due process complaint (DPC) requesting a due process hearing. The Hearing Officer held the first prehearing conference (PHC) in this matter on November 1, 2019. Pursuant to discussions during the PHC, the HO initially scheduled the hearing by agreement of the parties for December 5 and 6, 2019. *See* Initial Scheduling Order entered on November 1, 2019 (HO Exh. 8). During a subsequent PHC held the day before the hearing was scheduled to begin, the parent reported, with supporting documentation, that she and the child were ill. Hence, the parent requested a continuance and an extension of the 45-day timeline. After hearing from both parties on the parent’s request, the Hearing Officer determined it was in the best interest of the child to grant the parent’s request. Accordingly, during the PHC, the Hearing Officer *ore tenus* continued the hearing and extended the 45-day timeline pursuant to IDEA regulation 34 C.F.R. § 300.515 and 8 VAC 20-81-210(Q). The Hearing Officer confirmed the same in an order issued on December 5, 2019. (HO Exh. 37). Thereafter, by order entered December 17, 2019, the Hearing Officer rescheduled the hearing for January 22, 23, 30, and 31, 2020, and extended 45-day timeline to 35 days following the last day of the hearing. Although scheduled for a four-day hearing, the hearing concluded on the third day. Hence, the Hearing Officer determined hear decision was due by March 5, 2020. *See* Order issued December 17, 2019 (HO Exh. 41).

On January 7 and 15, 2020, the Hearing Officer held the seventh and eighth PHCs to address, among other matters, certain objections to witnesses and documents. *See* Orders issued on January 9 and 20, 2020, which sets forth the Hearing Officer’s rulings. (HO Exhs. 48 and 55).

The Hearing Officer held the hearing on January 22, 23, and 30, 2020. The Hearing Officer notes that she provided the parties with ample opportunity to present her/its case. Even though the hearing had been scheduled to conclude on January 31, 2020, by January 30, 2020, the parties stated that they had concluded the presentation of their respective cases. Moreover, both indicated they were prepared to present their closing arguments on the third day and they did so. The Hearing Officer then determined the due date for her decision is March 5, 2020; that is, 35 days after the conclusion of the hearing.

Prior to commencing the taking of evidence, the Hearing Officer addressed matters of concerns by the parties.

First, Counsel for the school had objected to the parent’s proposed order of presenting her witnesses that were school employees. Counsel complained that the parent’s proposed order was submitted untimely and prejudicial to the school. After giving both parties an opportunity to comment on the objection, the Hearing Officer confirmed her previous ruling in an order issued on January 20, 2020. In that order, the Hearing Officer overruled the school’s objection.

Next, the parent objected to Special Education Director sitting in the room during the hearing before being called as a witness. Because the Special Education Director was the school’s representative, the Hearing Officer overruled the parent’s objection.

In addition, the parent expressed concerns that the school division had not made the child’s math teacher during the first part of the school year available as a witness for the parent/child. Counsel for the school represented that this teacher was no longer employed by the school division. And therefore, the division was not able to compel this teacher to be present as a witness for the hearing.

During the course of the hearing, the Hearing Officer admitted Parent’s Exhibits 1 through 13; Exhibits 17 through 31; and Exhibits 33, 33a, 34, and 34a.[[2]](#footnote-2) Moreover, regarding Parent’s Exhibit 7, the Hearing Officer admitted the hard copy only. In addition, the Hearing Officer admitted School’s Exhibits 1 through 33. Further, the Hearing Officer admitted her exhibits 1 through 59 which contained the administrative record, mainly orders and correspondence between the parties and the Hearing Officer. Neither party objected to the Hearing Officer’s exhibits.

# MATTER(S) ARISING DURING THE HEARING PROCESS

During the course of the proceedings, the parent requested to not be emailed. She confirmed her mailing address multiple times during the course of the proceedings. The Hearing Officer finds that all mailings sent to the parent by LEA counsel were received by the parent. Further, the Hearing Officer finds that all orders, correspondence, exhibits, etc., sent to the parent by the Hearing Officer were received by the parent by regular mail. The Hearing Officer does note that on November 26, 2019, the Hearing Officer mailed to the parent by regular mail Hearing Officer Exhibits 15 through 21. In addition, the Hearing Officer mailed a duplicative copy by certified mail return receipt. The regular mailing was received by the parent. However, the certified mail was tendered but never picked up by the parent.

The Hearing Officer issues her decision in this matter below.

# II. ISSUES

# Issue

1. Has the LEA failed to properly implement the child’s IEP during the 2019-2020 school and therefore denied the child a FAPE by:

(i) not providing for the child’s aide(s) during all times they are specified to be provided for in the child’s current IEP;

(ii) not providing designated occupational and speech therapy services as specified in the child’s current IEP;

(iii) not providing the child with certain equipment designated for in the child’s IEP. The specific equipment not provided by the LEA being a small chest prompt, rifton toilet/chair, activity chair, and stander; and

(iv) failing to assure that the child’s teachers are familiar with the child’s IEP so that they can fulfill it.

# III. BURDEN OF PROOF

The United States Supreme Court held in *Shaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed.2d 387 (2005), that the party seeking relief bears the burden of proof. Therefore, in this case the parent bears the burden of proof as she is challenging the LEA’s actions and seeking relief.

# IV. STATEMENT OF FACTS

1. Child’s IEP noted that on March 20, 2018, the child’s elementary eligibility team had determined that xx remained eligible for special education and related services under the primary category of Multiple Disabilities and the secondary category of Speech and Language Impairment. As reported in the IEP, the primary disability category was based on the team determining the child was other health impaired and had an orthopedic impairment, as well as, an impairment in speech and language. (P Exh. 3, p. 12; S Exh. 3, p. 12).

2. Regarding the other health impaired category, the IEP’s Present Levels of Academic Achievement and Functional Performance (PLOP) noted that the eligibility team had determined the child was eligible under this category due to xxx diagnosis of xxxxxxxxxxxx xxxxxxxxxxx which resulted from the child not breathing for seven minutes after birth. In addition, the PLOP noted that this disability caused the child to be fatigued often and influenced xxx transitioning, mobility, positioning, feeding, toileting, vision and communication skills. Hence, the PLOP also stated that the child needed assistance with positioning, mobility, manual tasks, feeding, daily living tasks, and moving throughout the school day. (P Exh. 3, p. 12; S Exh. 3, p. 12).

3. In addition, the PLOP notes that the child’s xxxxxxxxxxx xxxxxxxxxx also qualifies xxx as having an orthopedic impairment and this impairment requires accommodations for the child including special seating equipment to help xxx with posture and equipment to help xxx be mobile at school. (P Exh. 3, p. 12; S Exh. 3, p. 12).

4. Further, the PLOP section of the child’s IEP noted that in accessing xxx education, the child benefits from assistive technology. Examples of assistive technology mentioned included but were not necessarily limited to read aloud that accessed one line at a time and highlighted a word as it was read; math aids including talking calculator and visual aids; and digital text books. (P Exh. 3, pp. 15-18; S Exh. 3, pp. 15-18).

5. The PLOP section of the IEP also noted that the child needed supplemental homebound services to support the child’s development especially in reading and math which would also enhance xxx knowledge of history and science. Further, homebound services were noted as being needed to allow the child to make up missed assignments in addition to regular school disability related placement. (P Exh. 3, p. 16; S Exh. 3, p. 16).

6.. Among other provisions, this IEP contains over 40 accommodations or modifications. (P Exh. 3 at 46-50; S Exh. 1 at 46-50).

7. The parent consented to the child’s current IEP on July 2, 2020. (P Exh. 3 at 59; S Exh. 1 at 59).

8. The Hearing Officer notes that the evidence shows that all the child’s teachers were made aware of the child’s IEP before the beginning of school during an August 29, 2019 meeting. Those present included, among others: all Child’s first semester teachers, the parent, the principal, and the homebound instructor. Teachers were made aware that the child would regularly be absent from class due to xxx health condition and xxx attending outside therapy sessions and that supplemental homebound services were an accommodation. (S Exh. 2; P Exh. 3, pp. 16, 47; S Exh. 1, pp. 16,47).

9. On October 23, 2019, the parent filed a due process complaint contending that the LEA had failed to implement certain accommodations or modifications pursuant to the IEP. Below, the Hearing Officer lists the accommodations listed in the IEP to which the parent contends the LEA failed to implement from the beginning of the 2019-20 school year, September 3, 2019, to October 22, 2019. This time period consists of the first seven (7) weeks of the 2019-20 school year.

Essentially, the parent complains that the LEA failed to supply instructional aides, technology or assistive technology, certain equipment (stander and gait trainer), and therapy. She also complains that the child’s teachers were unfamiliar with Child’s IEP and therefore did not follow it.

10. Specific accommodations the parent contends the LEA failed to implement are listed below:

(i). Access to a portable interactive/touch screen device/tablet with charger for short written output (Less than 5 words at a time) & to record journal writing and short essay answers during instruction at the child’s school. The IEP indicated that this accommodation was to be provided in the child’s general and special education settings.

(ii). Access to a student-dedicated laptop with charger needed to access digital text books and audio books when using textbooks in class or reading books. The IEP stated that this accommodation was to be provided in the child’s general and special education settings.

(iii). Access to digital text books and materials (pdf, WORD); audio books, word prediction; and software to support all instruction during instruction. The IEP indicated that this accommodation was to be provided in the child’s general and special education settings.

(iv). Access to read aloud software that reads and highlights one word at a time and paces as needed to read grade level material. The IEP indicated that this accommodation was to be provided in the child’s general and special education settings.

(v). Adaptive writing utensil during instruction. The IEP stated that this accommodation was to be provided in the child’s general and special education settings.

(S Exh. 1 at 46; P Exh. 3 at 46).

(vi). Audio recording/photographs per teacher discretion of instructional delivery at the teacher’s discretion to record lessons daily. The IEP stated that this accommodation was to be provided in the child’s general and special education settings.

(vii). Brush teeth as recommended by the dentist after snacks, meals and supplements due to xxx lack of tongue lateralization and tongue tip elevation. The IEP stated that this accommodation was to be provided in the child’s general and special education settings.

(viii). Homebound instruction for 10 hours a week in a homebound setting. The schedule was to be determined by the parent and homebound instructor.

(S Exh. 1 at 47; P Exh. 3 at 47).

(ix). “[I]nstructional assistant from arrival to departure to provide additional support in areas to include: learning strategies, mobility, feeding, personal care and communicate with related service providers and obtain lessons/instructions in students absence.” The IEP states that the setting for this accommodation is the child’s general and educational setting. Further, the IEP notes that the frequency of this accommodation was/is “[f]rom arrival to departure of student and when the student is absent.”

(x). Length of assignments shortened at least 50% and greater if effort is shown during instruction in the general and special educational settings.

(xi). Personal bag with [Student’s] supplies, with meals provided by [the parent], to travel with the child throughout the school environment.

(xii). Positioning and mobility supports (i.e. adaptive seating, supportive gait trainer, stander)

(S Exh. 1 at 48; P Exh. 3 at 48).

(xiii). Provide computer-based learning games and tutorials to assist and engage [Student] in more difficult learning tasks during activities when the child cannot access the instructional activity. The IEP stated that this accommodation was to be provided in the child’s general and special education settings.

(xiv). reader marker during instruction and assessments in the child’s general and special education settings.

(xv). SOL or Audio Calculator during math instruction and assessments in the child’s special education setting.

(xvi). SOL Regulated Math Aids but not limited to: number lines, arithmetic tools such as addition and multiplication charts, blank clock faces, hundreds chart, number alignment aids, base ten blocks, colored shapes, graph paper, fraction bars and circles during math instruction and assessments in the child’s special education setting.

(S Exh. 1 at 49; P Exh. 3 at 49).

(xvii). Use of stroller [for mobility] during emergency evacuations in general and special education settings.

(xviii). visual aids during instruction in the general and special education settings.

(S Exh. 1 at 50; P Exh. 3 at 50).

# TEACHERS’ IMPLEMENTATION OF IEP

As referenced immediately above, one of the parent’s complaint is that Child’s teachers were not familiar with Child’s IEP and therefore failed to follow it.

# Art Teacher

11. The child took art as an elective class during the first semester of the 2019-20 school year. (P Exh. 26). Art Teacher was familiar with child’s IEP and xxx accommodations. (S Exh. 2; Tr. III., 11-17).

12. The evidence shows that the child regularly used assistive technology in the class which included an adaptive board. (Tr. III., p. 58/4-8). The evidence does not demonstrate that the child needed an adaptive writing utensil in art class since a paint brush was used for the sole or major assignment for at least the first 4/4.5 weeks of school. Moreover, the evidence does not show that the child required computer-based learning games and tutorials to access the instruction in art class during the beginning weeks of school. (Tr. III., pp. 50-52).

13. In addition, the evidence reveals that this major assignment for a minimum of the first 4/4.5 weeks of school in art class was that each student was expected to, using a paint brush, work in xxx sketch book. The teacher’s assessment for each student at the time she issued interim reports was solely based on what that student did in the sketch book.

14. The end of the first 4/4.5 weeks of school constituted the first nine weeks’ interim period.

However, the child had completed no work on this assignment by the end of this period. xx had been absent from class to a large extent. In fact, during the first 4.5 weeks of school, Art Teacher only saw the child four times. (Tr. III., p. 47/10-14). Moreover, when the child did attend class, xx was often 20 minutes late and the other students would have already moved on from working on their sketch books. (Tr. III., p. 64).

15. Teachers issued their first interim grades or assessments on or about October 3, 2019. Child’s interim assessment in art class indicated that xx needed improvement. Further, Art Teacher made a comment on the interim stating “ABSENCE AND/OR TARDINESS ADVERSELY AFFECTS WORK.” (P Exh. 25).

The interim report card assessed child’s progress from September 3, 2019, to October 3, 2019. (P Exh. 25). During this period, the child had completed no assignments as xx had extensive absences from class. The major assignment for the class during that period was working in the Sketch Book. Because the child had missed substantial time from class during the first weeks of school and because the assignment was not provided to xxx homebound instructor for Child to work on, xx had done no work on it. Even so, for the interim report, Art Teacher give the child a 60% grade score or “D”[[3]](#footnote-3) even though xx had completed no work in her class. (Tr. III, p. 39/21-25 and p. 40/1-17; Tr. III.,pp. 64-65).

16. Art Teacher sent no assignments home for the child to complete during at least the first 4/4.5 weeks of school. By her testimony, Art Teacher stated that she did not send home work for the child to complete because she was under the impression that homebound instruction was for reading, math, history, and science subjects. (Tr. III., pp. 20-21 and 40-41).

17. At the same time the child was enrolled in art class, xx was also enrolled in an elective dance class. (P Exh. 26). Dance Teacher did send assignments home for the child to complete that xx had missed due to absences. (Tr. II, p. 143).

18. As earlier referenced, all of the child’s first semester teachers were apprised of the child’s IEP prior to school’s beginning during a meeting on August 29, 2019. During that meeting they were all reminded that the child’s accommodations included homebound services. (S Exh. 2).

19. The first interim period ended on or about October 3, 2019, after about 4.5 weeks of school. During the interim period, the child had excessive absences. As noted above, one of the child’s accommodations provided for in xxx IEP is homebound instruction. The provision for this accommodation in the IEP did not limit it to certain classes. Also, during a meeting on August 29, 2019, with the parent and the child’s teachers, to include Art Teacher, the discussions included homebound instruction. Notes from that meeting do not indicate that only certain classroom teachers were required to provide assignments for homebound instruction. (S Exh. 1, p. 47; P Exh. 3, p. 47; Tr. III, p. 48/9-12; P Exh. 25).

20. By her testimony, Art Teacher also believed that she was not required to provide computer-based assignments. (Tr. III, p. 32). Moreover, she provided no adaptive writing utensil for the child in her class. (Tr. III, p. 31/12-22).

# Science Teacher

21. Science Teacher was familiar with the child’s IEP. (S Exh. 2)

22. Child had access to an iPad in science class that the LEA had provided to xxx. When the child did not have this iPad with xxx, Science Teacher permitted xxx to use her iPad. (Tr. III, pp. 92-93). Moreover, Science Teacher provided the child with digital assignments. For example, Science Teacher would take a picture of written assignments and place them on the child’s iPad. Child was able to read the assignments from xxx iPad. Science Teacher also sent home assignments that were digital. (Tr. III, p. 82). Child’s science teacher did not use a digital text book in class because she did not teach from a text book in class. (Tr. III, p. 80/21-25). Even though Science Teacher did not use a text book in class, she did provide a non-digital one to the child’s case manager. (Tr. III, p. 80/21-25). (Tr. III, p. 81/23-25).

23. Science Teacher also used software to support her instruction. (Tr. III, p. 79/14-18 and p. 81/1-2). Additionally, computers she used with the child had audio capacity. Further, the teacher provided the child with audio instruction. (Tr. III, p. 81/3-10).

24. In science class, Child also had use of a portable, interactive touch screen. (Tr. III, p. 92/15-25 and p. 93/1-7). Moreover, the child had use of a reader marker. (Tr. III, p. 88/5-7).

245 What’s more, Science Teacher had training in Snap and Read. This technology highlighted each word and read it for the child. Child had access to read aloud as needed. (Tr. III, p. 83/17-22 and p. 98).

25. Science Teacher did provide homebound assignments for the child to complete, including science experiment assignments. Most were in a digital format. Pursuant to one of the child’s IEP accommodations, these assignments were shortened. Regarding the science experiment assignments, the materials to be used to conduct the experiments were not provided for the home bound instruction. Science Teacher testified that some materials used for experiments are considered hazardous. She is not allowed to send those hazardous materials home. (Tr. III, p. 82/10-18 and p. 113).

26. Additional assistive technology used by Science Teacher included visual aids in class instruction. Further, Science Teacher sent visual aids home for the child to use such as videos. (Tr. III, pp. 112-113).

27. Although the child did not use an adaptive writing utensil in Science class, xx had access to substantial technology and instruction. (Tr. III, p. 98/18-25 and p. 99/1-2).

28. Child was passing at the time interims were issued. (P Exh. 25). Moreover, on assignments completed during the first four to five weeks of school, xx made grades in the “A/B” range. (P Exh. 28/17). On Child’s report card for the first nine week marking period, xx received an “A.” The first seven weeks of this marking period included the period September 3, 2019- October 22, 2019.

29. Science Teacher substantially complied with the applicable IEP accommodations.

# Collaborative Teacher English Class

30. Special Education Teacher I (SE Teacher I) was a collaborative teacher in Child’s English and science classes. SE Teacher I has been a schoolteacher for 38 years. (Tr. II, pp. 224/2-12 and 242/10).

31. In English class Child received some written assignments, but most of the assignments were in an alternative form. (Tr. II, p. 227).

32. In English class the child had access to read- aloud software that reads passages, highlights words, and paces. However, this accommodation was not used during the first weeks of school because the class was reading a novel – *The Lighting Thief.*  Child’s teacher determined the read aloud accommodation was not needed due to either the teachers or a tape reading the novel aloud as it was projected on the board or wall. One of the teachers would read the novel aloud for the class, or alternatively, it was read aloud by a tape. Because of this method being used, Child’s teachers determined the read aloud accommodation was not necessary. During the reading, a teacher would check with the child to make sure the child could see the projection. (Tr. II, pp. 235-236 and p. 244).

33. Child’s teacher graded xxx on assignments xx completed on the novel. (Tr. II, p. 245/6-21). Particularly, the child scored “100” or made an “A” on Comprehension Question One on the novel. On Comprehension Question Two, the child scored “90%” which is still in the “A” range. On assignments “Independent Reading Participation 3 and 4” xx received an “A” on each assignment. Further, on the “Mid Unit Assessment,” Child received a score of 90 or an “A.” (P Exh. 28, p. 14).

34. Although the child has tracking issues of which xxx English teachers were aware, they determined the manner in which the novel was presented was sufficient. This is so because the teachers determined the Child was receiving the material, following along, and answering the questions regarding the novel. Moreover, Child answered more questions than any other student in the class on the novel. (Tr. II, p. 252; and p. 256/1-14).

35. When the child missed assignments due to xxx being absent, English assignments were provided to the homebound instructor for the child to complete. (Tr. II, p. 227/19-22 and p. 228/1-2).

36. SE Teacher I did not use a reading marker[[4]](#footnote-4) with the child because she had been informed the child preferred to not use one. (Tr./ II., pp. 240-241 and p. 246).

37. Although Child’s English teacher sent assignments home that were not digitalized, SE Teacher I believed the child was accessing the curriculum. (Tr. II, p. 259/5-8).

38. Child was not a behavior problem in English class. SE Teacher I described xxx as “bright, a conversationalist, and a responder to questions.” (Tr. II, p. 242/20-22).

39. On xxx English interim report, SE Teacher I assessed the child as passing. On xxx first marking period report card, xx received an “A.” Comments on the report card commended the child for class participation, effort, and interest. (P Exhs. 25 and 28, p. 4).

40. SE Teacher I was familiar with the child’s IEP. (S Exh. 2). She substantially complied with the appropriate accommodations.

# Dance Class

41.Dance Teacher described Child as “a wonderful student with a positive attitude who is always prepared for class.” (Tr. II, p. 136/18-21).

42. Dance Teacher also described the child’s attendance as “pretty good.” Of note the child’s report card for the first nine weeks of school state that xx had nine absences in dance class for the first nine weeks. This was fewer absences than any other class for the marking period. Dance teacher also assessed the child as successful in her class. (Tr. II, p. 137/17 and p. 142; P Exh 28, p. 4).

43. Dance Teacher did provide Child accommodations. When xx was absent from class and missed assignments, she sent them to xxx homebound instructor. (Tr. II, p. 143).

44. Child received an “A” in dance class for the first nine weeks. (P Exh. 28, p. 4). xxx interim report reflected that xx was passing in the class as of October 3, 2019. Also, a note regarding child’s progress in dance class reads “Commended for effort, interest, and class participation.” (P Exh. 25).

# Homebound Teacher

45. Homebound Teacher attended the August 29, 2019 meeting where all of the child’s first semester teachers for the 2019-20 school year were present. Homebound Teacher explained that she would be providing homebound instruction for the child. (Tr. II., pp. 295-297 and 298/1-9).

46. Homebound Teacher received assignments from all the child’s teachers except Art Teacher. (Tr. II., p. 295/5-13 and p. 301/1-16). She generally provided homebound services for the child after xxx school day was over. Moreover, on days the child had therapy appointments, which the evidence indicates was weekly, she provided those services after school and after those appointments. (Tr. II., p. 335).

47. Homebound Teacher worked on English assignments pertaining to *The Lighting Thief*. English Teacher did provide a written copy of the book. While working on reading assignments for English, the child did become tired. (Tr. II., pp. 281-282).

48. Homebound Teacher communicated with the child’s teachers by the “Teachers Communication Log” (communication log) or during regular conference calls that the homebound teacher and other teachers participated in each week. Often the telephone conference with the child’s classroom teachers was held on Fridays. (Tr. II, p. 302; P Exh. 6). The communication log would inform the teachers of what assignment was worked on during the homebound session, how the child performed, and any materials that may have been needed. (Tr. II., p. 302/1-8).

49. The communication logs do not reflect that Homebound Teacher inquired about technology or assistive technology to assist the child in completing assignments in English, History, and Science. (Tr. II, pp. 318-322; S Exh. 28, p. 7 and P Exh. 6, pp. 20 and 26 (Homebound Teacher’s notes to teacher(s) for September 9, 18 and 24, 2019)).

50. Homebound Teacher testified that at the very beginning on the school year, she did not have technology for Child or that Child’s teachers had not been provided with certain technology. Particularly, she testified that the following was not provided at the beginning of the school year: digital textbooks, assignments uploaded electronically, access to a portable interactive screen device, adaptive writing utensil, an audio calculator, a dedicated lap top with audio books. (Tr. II, pp. 268, 272 thru 276, 281 and 291).

51. Homebound teacher testified that she made up for the lack of access to technology during the beginning of the school year by scaffolding assignments, providing background information for the assignments, making drawings or visual illustrations, and using her telephone. (Tr. II., p. 294).

The teachers sent modified/shortened assignments to Homebound Teacher for the child to complete. The modified assignments were consistent with an accommodation in the child’s IEP. (P Exh. 3).

52. Regarding the assertion that the child was not supplied with technology, notes pertaining to the child’s school therapy (therapy notes) on therapy summary for the child indicate that by September 12, 2019, a ThinkPad had been provided to the teacher for Child. However, the program was not working as of that date. (S Exh. 27, p. 8; Tr. II., p. 306-307).

53. In addition, the therapy notes indicated that by September 17, 2019, the child had access to an adaptive calculator and that using it, Child was able to complete 15 math problems. (S Exh. 27, p. 9; Tr. II, pp. 307-308).

54. Further, the therapy notes dated September 30, 2019 indicate that the child had access to Snap and Read, text to read, and read aloud technology. Moreover, xx had been provided a ThinkPad and all pdf English materials had been downloaded on the ThinkPad. (S Exh. 27, p. 10).

55. At the very beginning of the 2019-20 school year, Child may not have had access to the technology referenced immediately above. However, prior to October 22, 2019, xx had access to technology, to include, but not necessarily limited to, an iPad, Think Pad with audio stories, adaptive calculator, read aloud software, text to read. (P Exh. 6, p. 45; S Exh. 27, pp. 8-10; Tr. II, pp. 305-317 and pp. 355 and 363).

56. As referenced, the school division started the 2019-20 school year for students on September 3, 2019. (Tr. I, p. 210/18-23). Child made educational progress using homebound services. (Tr. II., p. 324 and p. 343/9-16). xxx interim reports, encompassing school year dates September 3, 2019, to October 3, 2019, indicated (with the exception of art class where the teacher indicated the child needed improvement) that child was passing all xxx classes. (P Exh. 25).

57. Homebound Teacher has taught in a special education classroom. However, she has not provided special education in a classroom since 2000). Homebound Teacher qualified as an expert in special education. (Tr. II., pp. 266-267).

# IMPLEMENTATION OF THERAPIES

# Speech pathologist

58. In addition to providing homebound services, the Child’s IEP provided for (i) speech and language services 60 minutes a week in the special education setting and (ii) occupational services 60 minutes a week in the general education setting. (P Exh. 3, pp. 54 and 55; S Exh. 1, pp. 54 and 55).

59. Parent asserts that the LEA failed to provide all the speech and language services it was required to provide.

60. Regarding Speech/Language Services, the evidence establishes that the speech pathologist provided those services outside of the general education setting for 60 minutes a week from the beginning of the school year. (Tr. II, pp. 44, 47-49, and p. 54). By being pulled out for this service, Child missed some time from art once a week and some time from dance once a week. (Tr. II., p. 50/10-13).

61. Speech Pathologist is familiar with the child’s IEP, to include the accommodation that the child’s teacher/LEA staff should confer with the speech pathologist if staff finds the child’s speech is difficult to understand. (Tr. II, pp. 51-52; P Exh. 3, p. 47). Speech Pathologist sent emails to child’s teachers reminding them that they could confer with her regarding the child. No teacher has indicated a need to confer with the speech pathologist about the child’s speech. (Tr. II., pp. 52 and 55).

62. Child’s schedule to receive speech pathology was designed to accommodate transitioning the student at non-crowded times. This accommodation was consistent with xxx IEP. (P Exh. 3, p. 47; Tr. II. P. 57).

63. Speech Pathologist describes the child as pleasant, hard-working, and motivated. She also noted that the child “puts a smile on everyone’s face.” (Tr. II, p. 51/1-6).

64. The Hearing Officer finds that the evidence fails to establish that the LEA did not provide the speech and language services designated in the child’s IEP.

# Occupational Therapist

65. Parent asserts also that the LEA failed to provide all the occupational services it was required to supply.

66. Occupational Therapist (OT) has worked as an occupational therapist for over 25 years. (Tr. I., p. 283/8-18). She provides the child with direct occupational therapy services two times a week in the school setting in xxx math and science classes. Each session is 30 minutes. (Tr. I, p. 268/17-22; Tr. I., p. 271**).** By her testimony, OT works with the child on “adaptation, modification, and accessibility.”(Tr. I., p. 273/15-20, pp. 289-290).

67. In the provision of her services, OT supplied the child with an adaptive writing utensil, a blue ball writing utensil. It was placed in the child’s bag. OT observed that when the child did use this utensil, xx had a difficult time working with it. This utensil was eventually lost. As a substitute, the child started using a marker with assistance. (Tr. I., p. 269 -270).

By her testimony, OT has determined that the child is able to access xxx education in math and science classes. (Tr. I., pp. 286-287).

68. Child’s two aides assist xxx moving throughout the school and help xxx in the cafeteria. Regarding feeding xxxself, OT has trained the child’s two aides in using the adaptive equipment for the child’s feeding. That equipment consists of a suction bowl and a light weight spoon. (Tr. I., p. 271-272 and p. 287).

69. Among other short-term objectives that are a part of the child’s IEP, five which are related to occupational therapy are set forth below. Parent asserts the OT failed to work on these objectives.

By 05/01/2020 [Child] will feed xxxself [using fork, spoon, and fingers (when appropriate with finger foods)] for up to 8 minutes with no more than 25% assistance from an adult during those 8 minutes for 3/5 days week.

By 05/01/2020 [Child] will independently feed xxxself using a spoon (yogurt, cereal) with 75% accuracy for 3/5 days week.

By 05/01/2020 [Child] will independently pull up xxx pants when laying on the changing table when given 2 opportunities daily.

By 05/01/2020 [Child] will consistently void in the toilet using xxx adaptive toilet seat twice daily 5 days a week.

By 05/01/2020 [Child] will help with transfers and daily activities by standing and bearing most of xxx weight for at least 10 seconds 2 to 3 times a day for 5 consecutive days at school with adult support for balance.

(P Exh. 3, pp. 21, 23, and 37; S Exh. 1, pp. 21, 23, and 37).

70. Regarding the first two objectives listed above, OT has determined that the child has met these feeding objectives. Specifically, OT has observed the child feeding xxxself independently with the suction bowl after it was set up. Further she stated that the child is able to scoop with a spoon and bring it to xxx mouth to eat. (Tr. I., pp. 278-280).

71. While the Occupational Therapist had not spent time with the child on the remaining three short term objectives as of October 22, 2019, the child’s IEP indicates that the expectation is xx will achieve the goals by May 1, 2020; that is, over six months from October 22, 2019. (Tr. I., pp. 281-282). (P Exh. 3, p. 21; S Exh. 1, pp. 21, 23, and 37).

72. Because OT had not worked on these three benchmarks/objectives as of October 22, 2019, this inaction does not constitute a “failure - to - implement” provisions of the IEP. This is the case, because pursuant to the IEP the expectation is that the objectives will be met at a distant date in the future. This provides OT with adequate time to address the goals in the upcoming weeks and months of the school year. (P Exh. 3, pp. 21, 23, and 37; S Exh. 1, pp. 21, 23, and 37).

# INSTRUCTIONAL AIDES

73. As written and referenced above, the child’s IEP states that one of xxx accommodations is an “instructional assistant” from arrival to school to departure from it to provide additional support in areas to include: learning strategies, mobility, feeding, personal care and communicate with related service providers and obtain lessons/instructions in students absence.” Parent consented to the IEP which included this provision. (P Exh. 3, pp. 48, 59; S Exh. 1, p. 48, 59).

74. Regardless of the IEP providing for a single instructional assistant, the LEA had otherwise determined the child needed two aides and provided such in practice. The aides provided assistance in instruction, not behavior. (Tr. II, pp. 162-163/14-20); (Tr. II, p.186/3-8 and p. 187/1-8).

75. The Hearing Officer has determined the aides provided instructional assistance after considering testimony from Special Education Director, ICC, and the child’s teachers who confirmed the aides provided instructional assistance in the class. (Tr. II., pp. 186-187; Tr. III., p. 159). *See also* Tr. III., p. 12/1-9; pp. 44, 51 (Art Teacher indicating the aides were present in Art class and providing instructional assistant; Tr. III, p. 81/1-10 indicating that aides sit with the child in science class providing instructional assistance).

Other evidence, a document supplied to the parent from the LEA titled “School Based Behavior Aide Support Protocol,” and material printed from the internet regarding xxx fail to prove the child’s aides were there for behavior support. Although these documents reference behavior aides or use the term “behavior aide,” other evidence of record clearly shows the aides’ provided help for the child in instruction. (Tr. II., pp. 186-187; Tr. III., pp. 158-159;P Exhs. 29, 31, 34).

76. LEA had agreed with the parent to attempt to hire an instructional assistant for the child. However, the LEA was unable to do so due to shortages in the labor force of instructional assistants and the low salary offered by the LEA for the instructional assistant position. Accordingly, the LEA contracted with xxx for the two instructional aides. The IEP does not require that the aides be hired by the LEA. (Tr. II., pp. 190-191).

77. On the first day of the 2019-20 school year, the principal of xMS held a meeting. Those in attendance included, among others, all of the child’s first semester teachers for the school year, the parent, the child/student, as well as xxx school therapists and the child’s then two instructional aides. The purpose of this meeting was to determine the child’s arrival and departure times each day. During this meeting, it was understood that the child would arrive at school at 9:30 a.m. on Tuesdays and Thursdays. On Wednesdays and Fridays, it was determined that the child would arrive the same time other students arrive which was between 8:10 a.m. and 8:30 a.m. Monday’s arrival and departure times were not addressed during the meeting. (Tr. I, pp. 211-212; S Exh. 4; Tr. II., p. 77).

78. Even though the child’s schedule was discussed during the meeting, on several occasions during the first weeks of school, either one or both aides were not present to receive the child upon the child’s arrival. Or the child arrived at one location at the school and the aides were at another location on the school premises. (Tr. I. p 170/1-5 and p. 172/6-10); Tr. II., p. 152/3-10; S Exh. 5).

79. On some of the occasions when the aides were not present upon the child’s arrival, the parent had provided to the LEA the child’s schedule indicating xxx arrival time; however, the parent would arrive with the child at a different time; when the aides were not present. Under the LEA’s contract with xxx – the company providing the aides - the aides were required to be at school during the times the child was present. The parent’s providing a schedule indicating she would arrive with the child at one time, but arriving at another time was a contributing factor in the aides not being at school when the child arrived. (Tr. I., p. 208/11-21 and p. 219).

80. On other occasions either one or both aides were on school grounds in their cars, but not in the school building, when the parent arrived with the child. (Tr. I., p. 220/18-25 and p. 225; S Exh. 11).

81. School documentation shows that on Wednesday, September 4, 2019, the aides were not at school upon the child’s arrival. (S Exh. 5).

82. Also, School documentation shows that on Wednesday, September 18, 2019, an aide was present upon the child’s arrival. However, the aide was parked in the school’s parking area waiting for the parent to arrive with the child. The aide did not see the parent when she arrived with the child; accordingly, she had not entered the building to receive the child. (S Exh. 11).

Regarding the aide’s arrival on September 18, 2019, school documentation shows that after the aide was in the school building, the parent came back inside the school/office and started a “conflict” with the aide about her duty hours. (S Exh. 11).

83. In addition to the incident with the parent disagreeing with the aide on September 18, 2019, Principal had observed the parent displaying hostility toward the aides. And on September 23, 2019, the parent and aides showed frustration with each other. By the school’s documentation, by the third week of school, both aides reported they were leaving. One quit citing a hostile working environment. Not soon thereafter the other aide was replaced. In fact, xxx replaced the original two female aides with two male assistants. (Tr. I., pp. 225-229; S Exh. 13). The evidence does not show that the replacement aides failed to be present from the child’s arrival to departure. (Tr. I., p. 229).

84. Further, documentation by the school indicates that on Tuesday, October 1, 2019, the aides were present, but in their cars, waiting for the parent to arrive with the child. (S Exh. 19)

85. The Hearing Officer finds that the evidence is insufficient to show the aides failed to be in place upon child’s arrival on numerous occasions. And as noted above, even some of the times the aides were not present can be contributed to the parent arriving at school with the child at a different time than the parent had previously provided as xxx arrival time.

86. The Hearing Officer finds that considering the totality of the evidence related to the aides, the evidence fails to show that during the majority of the time during the first weeks of school, the aides or aide was not present. Accordingly, the evidence does not show the LEA significantly deviated from providing instructional aides from the child’s arrival to departure. Moreover, the Hearing Officer finds no harm to the child from any deprivation identified.

87. Generally, if the child arrived and the aides were not present either a teacher or other staff person took the child to class. Aides were also with the child at the end of the school day. (Tr. I., p. 65). Further, the aides were with the child throughout the day, helping xxx maneuver throughout the school. (Tr. I., p. 272/21-23) *See also* statements by Art Teacher indicating the aides were with the child in xxx Art class at Tr. III, p. 11/22-25 and Science Teacher indicating aides in that class also at Tr. III., 81/1-10; *see also,* S Exh. 27, p. 9 (aides with the child in math class on September 17, 2019)).

88. The Hearing Officer finds that the evidence is insufficient to show that the child was deprived of an education because of an aide’s whereabouts.

# EQUIPMENT (STANDER AND SCROLLER)

89. All of the child’s equipment or assistive technology provided for in xxxIEP had been ordered before the beginning of the school year and was expected to timely arrive and be ready for use by the child at the beginning of the school year, with the exception of two large items. (Tr. II, pp. 167/1-6 and 168).

90. Regarding the two large items whose arrival was expected to be delayed, they were other than the stander and stroller. When the LEA ordered these large items, the LEA had been informed that the delay was because these pieces were being built to specifications. Further, the company building the equipment was located in California. The director of special education’s staff contacted the company and offered on behalf of the LEA to pay a fee to have the order expedited. The LEA was informed a “rush order” was unavailable because of the specific nature of the items. (Tr. II, p.189/ 3-11 and p. 196/ 7-14).

91. Even so, the LEA was able to accommodate the child because the LEA had loaner equipment available or the child could use xxx equipment from elementary school until the two large items arrived. (Tr. II, p.188/14-20).

# Scroller

92. Even though ordering of all the equipment was done prior to school beginning, all of the of the child’s other equipment that was expected to arrive for the child’s use by the first day of school did not timely arrive. For instance, the LEA had not received the scroller and stander by September 3, 2019. (Tr. II, p. 83/20-22).

93. The scroller accommodation in the IEP stated that one was to be available for use “during emergency evacuations.” The accommodation did not require a new stroller be provided for the child. Further, even though the accommodation referenced the scroller being used during emergency evacuations, the IEP as written contains no emergency evacuation plan. (S Exh. 1 at 50; P Exh. 3 at 50; Tr. II., p. 191).

94. Even though the scroller ordered by the special education director’s office had not arrived by the beginning of school, there was a scroller already at the school that could be used for the child in an emergency. In fact, PT informed the school staff of its availability during a meeting on the first day of school. (Tr. II., p. 99/11-20 and pp. 111-112).

# Gait Trainer, Chest Prompt, and Stander

95. Another accommodation provided for in the IEP is “positioning and mobility supports (i.e. adaptive seating, supportive gait trainer, stander).” (S Exh. 1 at 48; P Exh. 3 at 48).

96. The LEA provided the Child with a gait trainer and chest prompt at the beginning of the school year. Although the chest prompt is not mentioned in the IEP, this item is necessary for the child to use the gait trainer. PT had measured the child’s chest for purposes of determining the correct size for the chest prompt. The measurement was determined to be 27 inches. With the chest prompt provided by the LEA, Child was able to stay in an upright position using the chest prompt and gait trainer. The LEA’s physical therapist (PT) determined the chest prompt was a proper fit. (Tr. II, p. 84/9-22; p. 85/1). Parent disagreed indicating the item should have been smaller. (Tr. II, p. 88). For instance, parent raised the topic that at some point during the beginning of the school year, the child’s feet dragged while xx was using the chest prompt and gait trainer. PT testified that without the assistance of the PT, presumably done by an aide, the child’s equipment had been mistakenly loosened at the time the feet dragging incident occurred. (Tr. II., p. 92/1-12).

97. Regarding the stander, as mentioned above, it was one of the pieces of equipment that the LEA had ordered prior to the beginning of the school, but it had not arrived by the first day of school. Hence, at the very beginning of the school year, the stander was unavailable for the child’s use. (Tr. II, p. 106/3).

For reasons noted here, PT opined that not having the stander did not deprive xxx of any education. (Tr. II., p. 113/6-20).

Even though some equipment, including the stander, had not arrived by the beginning of the school year, PT was able to work on the goals and benchmarks/objectives with the child as they pertained to physical therapy. On such benchmark or objective involved weight bearing. As written in the IEP it appears below:

[b]y 05/01/2020, given appropriate equipment, [the child] will stand to bear weight on both legs during appropriate activities for a minimum of 10 minutes, up to 40 minutes, at least two times a week for 4 consecutive weeks

(P Exh. 3, p. 37; S Exh. 1, p. 37).

98. PT provided physical therapy services twice a week for a total of 60 minutes in the child’s dance class. In this class, PT walked with the child. Also, Child did have access to ankle foot orthoses (AFOs) or leg braces in the class and in fact usually entered the class with them on. However, PT usually removed them for dance class as she had determined the child was able to work on xxx physical therapy goals and benchmarks without the assistance of the AFOs when she was working with xxx in dance class. Her testimony also indicated that xxx stander was not needed at that time in dance class. (Tr. II, p. 107/13-18; Tr. II, p. 114; Tr. II, p. 120/1-15; P Exh. 3, p. 12; S Exh. 1, p. 12).

99. PT testified that in her opinion, the child was not deprived of physical therapy or an education because certain equipment was not immediately available at the beginning of the school year. (Tr. II., pp. 104/18-20; and pp. 116-117).

100. The Instructional Compliance Officer also testified that child did not need the stander during the relevant time period. Further, the transcript of the resolution meeting corroborates that PT had determined that during that time the stander was not needed. Hence, the Hearing Officer finds that the LEA did not deprive the child of an education because some equipment was not yet available. (Tr. III., p. 190; P Exh. 29, p.64/22-24).

101. Moreover, even without the stander, the child was able to move throughout the school building using the gait trainer and chest prompt. (Tr. II., pp. 74 and 107-109).

102. Further, Special Education Director was qualified as an expert in Special Education. She has 18 years of experience in the field of Special Education and has worked with students in all categories of disabilities. She opined that the lack of any equipment did not deprive the child of an education. (Tr. II., pp. 171-172; 174-180; and 189/12-14).

# E. ADDITIONAL STATEMENTS OF FACTS

103. Non-collaborative behavior by the parent had also occurred on the first day of school. Principal testified credibly that she had initially invited the parent to remain in the school the entire first week. The agreement was that the parent was to remain primarily in the office in the event there was a question about the child transitioning throughout the school day. Principal rescinded the invitation after day one of school due to the parent’s behavior. Specifically, Parent was observed in various locations of the school including classrooms, clinic, and hallway. She was stopping staff and engaging in conversations in the hallway. Her behavior was disruptive and to such a degree that school security and administrators were summoned. (P. Exh. 7; Tr. I., p. 150/11-18; Tr. I., pp. 214-215).

104. The Hearing Officer finds the Principal’s enforcement of the **visitation policy** did not preclude the child from attending school or in effect “kick the parent or child out of the building.”

105. Principal qualified as an expert in secondary education based on her extensive experience as an administrator and education. (Tr. I., pp. 199-201).

106. The Hearing Officer finds that the evidence is insufficient to establish that the IAs failure to **brush the child’s teeth** sometimes was substantial. (S Exh. 30; Tr. I pp. 186-187)

107. *Prima facie* Parent consented to the IEP as it was written. However, parent contends the IEP she signed has several **typographical errors.** For instance, she claims, the IEP should have provided for two instructional assistants, not one. (Tr. II, p. 15/7-12 and pp. 72-74).

108. The evidence fails to support the claim that the Principal’s letter regarding a field trip in October, 2019, instructed staff to not comply with the child’s IEP.

# V. LEGAL ANALYSIS

The Individuals with Disabilities Education Improvement Act (IDEA/Act), 20 U.S.C. § 1400 *et, seq,* requires a state, as a condition of acceptance of federal financial assistance, to ensure a “free appropriate public education” (FAPE) to all children with disabilities. 20 U.S.C. § 1400 (d) and § 1412(a)(1). The Commonwealth of Virginia has elected to participate in this program and has required its public schools, including the LEA here, to provide FAPE to all children with disabilities residing in its jurisdiction. Va. Code Ann. § 22.1-214-215.

The Act imposes extensive substantive and procedural requirements on states to ensure that children receive a FAPE. 20 U.S.C. § 1415. *See also Board of Education v. Rowley*, 458 U.S. 176 (1982) and *Endrew v. Douglas County – School District RE-1,* 580 U.S. \_\_\_\_\_\_\_\_ (2017) 137 S. Ct. 988.

One requirement of the IDEA is that the LEA must not only develop an IEP for the child, but it must also implement the plan. 20 U.S.C. §1412(a)(4); See *also* 34 C.F.R. § 300.112 and 8 VAC 81-110A

A tribunal reviewing the failure-to-implement claims under IDEA must determine if the aspects of the IEP that were not followed were material; that is, substantial or significant. *See Sumter County Sch. Dist. 17 v. HeffernanI, 56 IDELR 186 (4th Cir. 2011); Catalan v. District of Columbia,* 478 F. Supp. 2d 75 (D.D.C. 2007) (quoting *Houston Indep. Sch. Dist. v. Bobby R*., 31 IDELR 185 (5th Cir. 2000), *cert. denied*, 111 LRP 30885.

In the case before this Hearing Officer, the parent argues that the LEA did not provide the child a FAPE because it failed in several ways to implement the child’s IEP.

# A. DID THE TEACHERS FAIL TO IMPLEMENT THE IEP?

Now, the Hearing Officer considers the parent’s assertion that the teacher’s failed to implement the IEP. Mainly the parent argues that the teachers did not provide the child with assistive technology and or homebound instruction.

First the Hearing Officer focuses on Dance Teacher. The evidence is devoid of any instance of Dance Teacher failing to provide appropriate assistive technology or implement any other provision of the IEP.

Of specific note, the evidence shows that this teacher sent any assignments missed by the child to xxx homebound instructor. Dance Teacher credibly testified to such. In addition, Homebound Teacher acknowledged receiving assignments from Dance Teacher. Dance Teacher also testified that the child held a positive attitude, was always prepared, and successful in dance class. Her assessment of the child is corroborated by xxx interim report indicating xx was passing and xxx report card. The latter reflected the child received an “A” for the first nine weeks of school. No evidence exists indicating this grade was unearned by the child.

Accordingly, the Hearing Officer finds Dance Teacher was familiar with the child’s IEP and she implemented it. Even if, Dance Teacher did not fulfill it to perfection (which the Hearing Officer finds is not the case), any deviation was insignificant as shown by the child’s ability to participate in class and xxx interim and report card assessment.

Turning now to Science Teacher, the Hearing Officer finds no substantial deviation from the child’s IEP for reasons noted here.

This teacher’s testimony revealed that in science class, the child had access to significant technology. For example, xx utilized an iPad in her class. In fact, the teacher noted that when the child did not have with xxx the iPad the school had issued to xxx, she allowed xxx to use her iPad. During her examination, Science Teacher also stated that the child had access to digital assignments in class and ones sent home by her for xxx to complete. Visual aids and audio instruction were provided. Moreover, according to Science Teacher, the child had use of a computer with audio software. Additionally, xx had use of a portable interactive touch screen and a reader marker. The teacher’s testimony indicated that she did not use a textbook in her class. Accordingly, she did not provide a digital textbook. Science Teacher also testified that she had received training in Snap and Read and that this training facilitated her giving the child access to read aloud technology, as needed.

Of note, the evidence demonstrates that Child’s report card for the first nine weeks of school indicated that xx had been absent from science class 10 times. Science Teacher testified that she shortened assignments xx missed and provided them to xxx homebound instructor for the child to complete.

Child’s interim report for the period September 3, 2019, to October 3, 2019, indicated that the child was passing science class. And xxx report card for the first nine weeks of school reflected xx received an “A” in the class for that marking period which included the first seven weeks of the school year – the relevant time period for this due process matter. There is no evidence that xxx assessments/grades were inflated.

The Hearing Officer observed Science Teacher’s demeanor as she testified. Moreover, her testimony was supported by other evidence of record. The Hearing Officer finds Science Teacher credible and assigns great weight to evidence derived from her testimony.

The Hearing Officer has determined that substantial assistive technology and other applicable accommodations were implemented by the Science Teacher. Further, the child’s

Non-use of an adaptive writing pencil in the class was insubstantial as child had access to the curriculum. Science Teacher did not materially deviate from the IEP.

Similar to her finding that Science Teacher substantially implemented the IEP, the Hearing Officer’s concludes the same regarding the English Teacher (SE Teacher I). Reasons are provided below.

English Teacher/SE Teacher I testified credibly during the hearing. The evidence showed that she team taught with another instructor.

Specifically, English Teacher’s testimony indicated that the child had access to read aloud software in her class. But as indicated in the IEP, this accommodation is utilized, as needed. Accordingly, the teacher determines when the child is in need of this particular assistive technology. To this point, the evidence shows that during the beginning weeks of school the teacher noted that the primary assignment for the class was reading a novel. The teachers projected it on a wall or board and read the text aloud to the students. Or alternatively, as the novel was projected, it was read aloud by a taped recording. The teachers would check to make sure the child was following along. In the words of English Teacher, “the child was getting the material.” For example, when the teachers assessed the students, the child was able to answer more questions than any other student in the class about the novel. Accordingly, the teachers in their discretion determined that the child was not in need of read aloud software for the novel. The teachers found this to be the case even though the child may experience tracking problems when reading.

The teachers exercised their judgment here as permitted by the IEP. Hearing Officer gives deference to the teachers’ determination here and will not attempt to second guess whether the read aloud software should have been used with the child. *See*. *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) (indicating that 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).

In addition to reading the novel aloud and projecting it on the board for the students to see, if the child missed assignments, SE Teacher I sent them (albeit in a shortened format) to the child’s homebound instructor.

On xxx interim report, English Teacher noted that child was passing. Moreover, on the child’s report card, xx received an “A.” Notably, this was the case even though the child was absent from class on 27 occasions during the marking period and had one tardy.

The Hearing Officer is cognizant of English Teacher’s admission that the child did not use a reading marker in the class. English Teacher sufficiently explained such was the case because she had been informed that the child preferred not to use one.

The Hearing Officer has determined that any deviations from the accommodations applicable to child’s English class during the relevant time were not material. Such deviations including sending some written assignments rather than digital homebound work and the child not utilizing a reading marker in class were insignificant and did not deny the child access to instruction.

Hearing Officer now focuses on evidence derived from Homebound Teacher’s testimony. Parent offered this witness to support her claim that the teachers failed to implement the IEP.

Homebound teacher testified that at the very beginning of the school year, she did not have certain technology to use while providing homebound instruction. For instance, she mentioned that she did not have digital textbooks assignments uploaded electronically, access to a portable interactive screen device, adaptive writing utensil, an audio calculator, a dedicated laptop w/audio books.

The Hearing Officer declines to give substantial weight to this testimony. Such is the case because despite Homebound Instructor’s testimony, the evidence does show that prior to October 22, 2019, the LEA was providing Snap and Read, text to read, and read aloud technology for the child. What is more, the child had been provided a ThinkPad and pdf materials had been downloaded on the ThinkPad. Further the child had access to an iPad. Child also had an adaptive calculator. The evidence is not sufficient to show this calculator failed to conform with the audio calculator referenced in the child’s IEP. Furthermore, the evidence shows that xx had been provided with an adaptive writing utensil which was in xxx bag; however, that utensil was lost and another utensil substituted.

In addition, although Homebound Teacher stated that she verbally informed the teachers of the need for assistive technology, communication log notes from Homebound Teacher during the relevant time period fail to substantiate this claim.

Based on other evidence of record resulting from the teachers’ testimonies and supporting documentation, the Hearing Officer does not find teachers substantially failed to provide assistive technology. Further, Homebound Teacher testified that despite her not having the technology she complained of lacking, she was able to provide instruction to the child and xx successfully completed assignments sent home by the teachers.

Excluding the child’s art teacher, Homebound Teacher’s testimony fails to persuade the Hearing Officer that the teachers materially failed to implement the child’s IEP.

The Hearing Officer now focuses on Art Teacher.

The child took art as an elective class during the first semester of the 2019-20 school year. The evidence shows that the child regularly used assistive technology in the class which included an adaptive board. In addition, the evidence reveals that the major assignment for the first 4/4.5 weeks of school in art class was each student was expected to, using a paint brush, work in xxx sketch book. The teacher’s assessment for each student at interim was solely based on what that student did in the sketch book. The end of the first 4/4.5 weeks of school constituted the first nine weeks’ interim period.

However, the child had completed no work on this assignment by the interim. xx had been absent from class to a large extent. In fact, Art Teacher testified that during the first 4.5 weeks of school, she only saw the child four times.  Moreover, she stated that when xx did attend class, xx was often 20 minutes late and the other students would have already moved on from working on their sketch books.

Teachers issued their interim grades or assessments on or about October 3, 2019. Child’s interim assessment in art class indicated that xx needed improvement. Further, Art Teacher made a comment on the interim stating “ABSENCE AND/OR TARDINESS ADVERSELY AFFECTS WORK.” For the interim report, Art Teacher had given the child a 60% grade score or “D” even though xx had completed no work in her class.

Although the child was often not present in the class or late, Art Teacher sent no assignment home for hm to complete during the first 4/4.5 weeks of school. During her testimony, Art Teacher stated that she did not send home work for the child to complete because she believed that homebound instruction was for reading, math, history, and science subjects.

The Hearing Officer finds Art Teacher’s explanation unpersuasive. First, theIEP speaks for itself and clearly provides that the child is entitled to homebound services to make up missed work due to xxx absences. Further at the same time the child was enrolled in art class, xx was also enrolled in an elective dance class. The evidence shows Dance Teacher did send assignments home for the child to complete**.**  All of the child’s first semester teachers were apprised of the child’s IEP prior to school’s beginning during a meeting on August 29, 2019. During that meeting they were all reminded that the child accommodations included homebound services.

The evidence clearly shows Art Teacher failed to send home missed assignments for the entire first interim period. This failure was significant as the child had completed no work for 4/4.5 weeks into the first marking period. The teacher afforded xxx no access to the sketch book assignment. In addition, in effect, but for Art Teacher inflating xxx grade to the lowest “D” possible, the child’s grade was an “F” in art class by the end of the first 4.5 weeks of school. The Hearing Officer finds it is reasonable to infer that art projects such as “a sketch book” hone skills and are an important educational component.

Art Teacher’s failure to send the sketch book assignment to the homebound instructor materially deviated from the IEP.

# B. WERE THE AIDES PRESENT

The parent also argues that in several ways, the LEA failed to provide instructional aides (IAs) as required by the IEP.

Parent claims two aides were not at school when she arrived with the child. Of note, the relevant IEP accommodation references the LEA providing the child with “instructional assistant.”[[5]](#footnote-5) Accordingly, the LEA contends that it is obligated to provide only one instructional assistant (IA). That said, the evidence did establish by credible testimony of PT that the child’s IEP team recognized xx needed two IAs and made provisions for such. Even so, the evidence illustrates that there were times when the parent arrived at school with the child and either one or both aides were not present.

The evidence shows that the parent contributed in part to this occurring. An instance of this was shown by Principal’s testimony which the Hearing Officer found to be credible. Principal testified that at the beginning of the school year, the parent provided the school with a schedule indicating the child’s arrival times. Yet at times the parent would bring the child to school at a time different from the one indicated on the schedule. And since the IAs were contracted to be present when the child arrived, the altered arrival time that the parent arrived with the child did not coincide with the IAs’ arrival. Consequently, the situation occurred where the IAs had not gotten to the school when the parent arrived with the child. Even so, when this did happen, the evidence shows that generally other school staff took the child to class.

The evidence also demonstrates that there were times when either one or both aides arrived at school and were waiting in the parking lot for the child to get there. Because they were not physically at the identical location as the parent upon her arrival with the child, parent entered the building annoyed and inquiring about the aides’ whereabouts. In fact, the evidence shows that on one such occasion, the parent argued with one of these aides once the aide entered the school building. Further, the evidence shows the parties (aides and parent) grew frustrated with one another. Subsequently, one of the original two aides quit the job citing a hostile work environment. The other left shortly thereafter. Sometime after September 18, 2020, the original two IAs who were females were replaced with two male IAs. The evidence does not establish that the replacement aides (i) failed to report as scheduled and (ii) failed to remain with the child throughout the school day.

As to the parent’s claim that the aides failed to remain with the child throughout xxx entire day at school, the parent called several witnesses. None supported her claim. To this point, OT testified that the child’s aides assist xxx moving throughout the school and help xxx in the cafeteria. This testimony was not contradicted and the hearing officer found it credible. Further, Child’s art and science teachers referenced the aides being in their classes and assisting the child with instruction. Additionally, documentation submitted as evidence illustrated that the aides assists the child in math class.

To the point regarding the type of assistance the aides provided, Parent contends that the IEP requires instructional aides, but the LEA provided behavior assistants. Multiple school witnesses testified that the aides were instructional in nature. As an illustration, Special Education Director who was responsible for contracting with xxx for the services testified credibly that the LEA contracted with xxx for instructional assistants for the child and that the child’s aides perform instructional tasks. ICC corroborated Special Education Director’s testimony regarding the aides being instructional in nature. Further, as noted above, child’s teachers referenced the aides assisting xxx in class with instruction. Accordingly, the parent failed to meet her burden on this accusation.

Having made this decision, the Hearing Officer is cognizant of documents presented by the parent containing literature that was obtained from the internet about xxx and the document prepared by the school titled “Behavior Aide Protocol.” Both documents referenced behavior aides. The Hearing Officer notes there was no assurances of who authored the xxx literature that was apparently retrieved from the internet. And further, ICC testified that the aides were instructional ones even though the LEA’s document called them behavior aides. After considering all evidence, both exhibits and testimony, the Hearing Officer finds the assistants assigned to the child were for instruction and not behavior.

In sum, the parent is unable to meet her burden and show the LEA substantially deviated from the provision of the IEP requiring “instructional assistant.”

# C. DID THE LEA FAIL TO PROVIDE EQUIPMENT

The parent also contends that the LEA failed to provide certain equipment – a stroller, gait trainer, chest prompt, and stander.

The evidence establishes through the credible testimony of Director of Special Education that prior to the beginning of the 2019-20 school year, the LEA ordered the child’s equipment or assistive technology provided for in xxx IEP. All equipment was expected to have timely arrived by the beginning of the school year with the exception of two large items of equipment. Regarding those two pieces, Special Education Director requested that they be expeditiously sent. She offered to pay an extra fee for a rush order. However, Special Education Director was informed that because the equipment was being made to specifications for the child and by a California Company an expedited order was unavailable.

Now turning specifically to the scroller and the related IEP provision, a close reading of the plan’s accommodation provision for the scroller indicates that the LEA was not obligated to provide a new one. That being said, as referenced above, the LEA had ordered a new scroller for the child. Even though it had not arrived by school’s beginning, there was already a used scroller available at the school which was available for use on behalf of the child in the event of an emergency.

The Hearing Officer now moves on to the other equipment referenced above (gait trainer, chest prompt, and stander). The IEP indicates that the purpose of this equipment is to provide positioning and mobility support. The evidence shows that since the beginning of the school year, the LEA has supplied a gait trainer and chest prompt. The evidence of record refutes Parent’s claims that the gait trainer is faulty and the chest prompt is too large. PT testified credibly that the chest prompt did fit the child and xx stayed in an upright position. She acknowledged that at some point during the beginning of the school year, the chest prompt/gait trainer had been incorrectly loosened possibly by an aide, but indicated that was corrected and the equipment is proper for the child. In addition to the child having access to the chest prompt and the gait training, PT testified that the child also uses AFOs or leg braces, as appropriate, in the school setting. As the evidence showed the stander had not arrived at the beginning of the school year, PT testified that the child was able to be supported and move around the school without the stander. In fact, she testified that she walked with xxx to dance class and she was able to provide xxx therapy and work on xxx goal(s), including weight bearing.

The Hearing Officer finds PT’s testimony credible. In making this decision, the Hearing Officer notes that PT had an opportunity to observe the child on a regular basis in the school setting. She provided services in a class room setting. Moreover, the Hearing Officer had an opportunity to observe the demeanor of this witness.

Schools are not held to a standard of perfection. *See*  L.J. v. Sch Board of Broward County, Florida, 74 IDELR 185 (June 26, 2019). Because the LEA was not able to provide the child with the stander and a new scroller at the very beginning of school, the equipment provided was sufficient as child was able to be supported and mobile and access the curriculum as evidenced by xxx good grades, testimony of xxx teachers, and other LEA staff. In addition, options were available or employed such as use of the old scroller that was already housed at the school and assessable for an emergency, use of loaner equipment, or use of the child’s equipment from elementary school. Further, the parent’s disagreement with the LEA over the gait trainer and the chest prompt (parent contends the chest prompt should be a smaller size) provided by the LEA does not constitute a “failure-to-implement” the IEP provision referenced here. Moreover, school staff forgetting to carry the child out of the building during one fire drill at the beginning of the school year is not tantamount to a material deviation from the IEP. Of note, upon being informed of this omission on the day it occurred, immediately PT took corrective action by reminding staff of the importance of making sure the child was taken out of the building during such drills.

Hence, after consideration of all the evidence, whether specifically mentioned or not, the Hearing Officer has determined there has been no material breach by the LEA regarding the provision of equipment to provide positioning and mobility support.

# D. DID THE LEA PROVIDE THERAPY SERVICES

The parent also contends that the LEA failed to provide the speech and occupational therapies required by the IEP.

Regarding the speech and language services, the evidence showed speech pathologist provided the services set forth in the IEP; that is, 60 minutes of therapy a week in the special educational setting. The evidence established she was familiar with the child’s IEP, to include the accommodation providing that teachers/staff could confer with the speech pathologist if staff determined that he/she had difficulty understanding the child’s speech. In fact, Speech Pathologist reminded all the child’s teachers by email of this accommodation. None indicated a need to confer with the speech pathologist. This evidence was not contradicted. Thus, the Hearing Officer finds no deviation from the IEP by the speech pathologist.

# Occupational Therapy

The Hearing Officer now turns to the occupational therapist’s provision of services. As required by the IEP, the evidence showed by OT’s testimony that she provided the child with 60 minutes of OT services a week in xxx math and science classes which were held in the general educational setting. Services were divided into two 30-minute sessions per week. OT also testified that she furnished the child with an adaptive writing utensil. xx did use it for a while, but OT observed that xx had a difficult time working with the utensil. It was placed in xxx bag and then it was lost. OT testified that now the child uses a marker with assistance. She noted that xx is able to access xxx education in math and science class. The evidence shows that OT has been practicing in the OT profession for over 25 years. Further, the Hearing Officer had an opportunity to observe her demeanor. The Hearing Officer found her testimony credible.

In arguing that OT failed to implement certain provisions of the IEP, the parent also contends that OT did not work on certain goals or benchmarks or complained that the child had not achieved certain goals pertaining to feeding, toileting, dressing, and transferring xxxself. The evidence shows that the child had met xxx feeding goals. For example, OT provided adaptive equipment for xxx feeding. This equipment includes a suction bowl and a light weight spoon. She trained xxx aides regarding how this equipment is to be used. In addition, she observed the child feeding xxxself independently using the suction bowl after it was set up. What’s more, OT determined that the child is able to scoop with a spoon and bring food to xxx mouth. Parent offered no persuasive testimony to the contrary and as noted previously, the Hearing Officer found OT’s testimony credible.

With regard to the other goals the parent complained were not being addressed by OT, the Hearing Officer notes that the IEP indicates that the child will master them by May 1, 2020. Although the OT had not yet worked on those benchmarks, the Hearing Officer does not find a deviation from the IEP because as of October 22, 2019 (considering the relevant time period for the matter before this hearing officer is September 3, 2019, to October 22, 2019), the OT had over 6 months to address those remaining goals.

# VI. DECISION AND ORDER

The Hearing Officer identifies the parent’s efforts to obtain a FAPE for this significantly challenged child. Also, the Hearing Officer recognizes the school’s witnesses demonstrated sincere efforts to meet the challenges of providing FAPE to this child. Both parties can be credited with the progress the child has made in instruction and functioning.

Having carefully considered the evidence whether specifically mentioned or not, for reasons stated above, the Hearing Officer finds the following with respect to the issue

“Has the LEA failed to implement the child’s IEP during the 2019-2020 school and therefore denied the child a FAPE from September 3, 2019 to October 22, 2019”

1. The parent has failed to meet her burden and show a material deviation from the IEP regarding providing the child with instructional assistant from xxx arrival to departure;
2. The parent has failed to meet her burden and show a deviation from the IEP or substantial deviation from the IEP regarding the provision of therapies to the child;
3. The parent has failed to meet her burden and show a material deviation from the IEP regarding certain equipment designated in the IEP;
4. With respect to the child’s teachers, except Art Teacher, the parent failed to meet her burden and show the they were unaware of the child’s IEP and/or failed to implement it;
5. The parent has met her burden and shown that the child’s Art Teacher substantially deviated from the IEP’s accommodation which required teachers to provide

assignments for homebound instruction when the child is absent from class.

Accordingly, regarding this substantial deviation from the IEP, the LEA denied the child a FAPE.

Further, the Hearing Officer finds that with regard to the issue before her that the requirements of notice to the parent has been satisfied. The Hearing Officer also finds that the school previously determined that Child was one with a disability as defined by applicable law 34 C.F.R. Section 300.8 and that Child was in need of special education and related services.

Accordingly, the Hearing Officer orders the following compensatory education:

The LEA is directed to provide six (6) hours of Art to be provided in appropriate increments over the next 12 weeks of the 2019-20 school year to address art assignment(s) not being given to the child during the first seven (7) weeks of school. This compensatory education may be provided in the classroom or in a homebound setting.

# VII. PREVAILING PARTY

The Hearing Officer has the authority to determine the prevailing party on the issues.

Parent is the prevailing party in part as to the homebound not being given in art class. The LEA is the prevailing party on the issue as it relates to all other matters addressed by the Hearing Officer.

# VIII. 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 180 calendar days of the date of this decision.

ENTERED THIS 5 th day of March, 2020.

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Ternon Galloway Lee, Hearing Officer

Cc: Parent and Advocate for Child (mailed on March 5, 2020, as email unavailable)

Counsel for LEA (emailed)

Special Education Director (emailed)

VDOE Coordinator (emailed)

1. Throughout the decision, the Hearing Officer will use the following abbreviations:

   Transcript - Tr.

   Parents’ Exhibit P Exh.

   Local Educational Agency (LEA)Exhibit - S Exh.

   Hearing Officer Exhibit - HO Exh.

   [↑](#footnote-ref-1)
2. Prior to the hearing, the Hearing Officer had determined that the parent’s proposed exhibits 14 through 16 did not pertain to the issue to be resolved by this Hearing Officer. Accordingly, she granted the school’s objection to exclude those exhibits. [↑](#footnote-ref-2)
3. The evidence shows that the LEA uses a 10-point grading scale. On that scale, scores in the 60 to 69 range constitute a grade of “D,” scores in the 70 to 79 range constitute a “C” grade, and so on. (P Exh. 25). [↑](#footnote-ref-3)
4. The term “reading marker” was not further defined by the parties. [↑](#footnote-ref-4)
5. Parent argues the reference to a singular instructional assistant is a typographical error. The issue before the Hearing Officer is whether the IEP as written was implemented by the LEA. Hence, the Hearing Officer makes no finding on whether the IEP should be interpreted to provide two IAs. [↑](#footnote-ref-5)