

*Certified True Copy*

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

173 2 1 2007

**Re:** v. **Public Schools**

**Child & Parent(s):**  
 , child of majority age  
 , parent(s)

**Administrative Hearing Officer:**  
Ternon Galloway Lee, Esquire  
215 McLaws Circle, Suite 3A  
Williamsburg, VA 23185  
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**Child's Attorney/Advocate:**

**Public School Attorney:**

**Superintendent of Public Schools:**

**DECISION**

**I. PROCEDURAL HISTORY**

The Public Schools system (hereinafter "LEA") received on December 13, 2006, a due process request made December 12, 2006 by (hereinafter "child"). The hearing officer held an initial pre-hearing conference on December 20, 2006, to address various matters pertaining to the due process request. Immediately thereafter, she issued a scheduling order. By order dated December 22, 2006, the hearing officer denied the LEA's motion to dismiss the child's case for lack of sufficient pleading. The parties subsequently engaged in a resolution session without success. The hearing officer held a subsequent pre-hearing conference on January 16, 2007, to further clarify the issues and hear arguments on (i) a pre-hearing motion to dismiss the proceeding submitted by the LEA and (ii) a pre-hearing motion for a

continuance submitted on behalf of the child. Rendering the LEA's motion moot and denying the child's motion for a continuance because argument failed to show how a continuance would be in the best interest of the child, the hearing officer disposed of both motions. The hearing officer also determined the issues before her are as follows:

1. Is [redacted] receiving a Free Appropriate Public Education (hereinafter "FAPE")?
2. If [redacted] placement is inappropriate, what other placement - private school or other placement - is appropriate?

A due process hearing was held on February 5, 2007, wherein the hearing officer took testimony as evidence and admitted hearing officer exhibits (hereinafter "H.O. Exh.") one (1) through twenty-two (22), child exhibits (hereinafter "C Exh.") 1 through nine (9) and the LEA exhibits 1 through fifty-nine (59).

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. Is [redacted] receiving a free appropriate public education (FAPE) in his current placement?
2. If [redacted] placement is inappropriate, what other placement - private school or other placement - is appropriate?

### III. STATEMENT OF FACTS

1. Born February 22, 1988, (hereinafter or “child”) is nineteen (19) years of age. LEA Exh. 1 (reporting child’s birth date.)
2. mother is “hereinafter “Ms. ” or parent). Tr. 87.
3. LEA Exhibit 38 which purports to be copy of a power of attorney appointing the parent as agent and authorizing her to proceed on the child’s behalf in the due process matter before the hearing officer does not show when the notary public’s commission expires. LEA Exh. 38.
4. LEA Exhibit 38 is not a valid power of attorney. The parent, however, is an advocate for the child. LEA Exh. 38, Tr. 17.
5. The LEA had previously determined the child eligible for disability under the category of mentally retarded. Prior to being eligible under that category, the child was eligible under the categories of developmentally delayed and speech impaired. At the parent’s request sometime in 2005, the LEA reevaluated , held an eligibility meeting and determined on January 6, 2006, that continued to qualify for special education and related services but under the category of speech/language impairment only. TR. 103. LEA Exhs. 2, 7.
6. Child has received homebound instruction since the 2003-2004 school year. LEA Exh. 19.
7. Child has been zoned to attend High School (hereinafter “ HS”) since the 2004-2005 school year; however due to his receipt of homebound services since 2003, the child has never attended HS. Tr. 67, 95.
8. HS offers a speech and language program. Tr. 48 - 49.



9. \_\_\_\_\_, (hereinafter “ \_\_\_\_\_”) has provided homebound instruction in the areas of math and science since on or about February 2006. Tr. 42, LEA Exh. 58 at 38.

10. The child or parent has cancelled many of the homebound sessions with \_\_\_\_\_ LEA Exh. 58 at 44.

11. The child and/or parent cancelled many homebound sessions with \_\_\_\_\_ and other instructors contending illness. Tr 46, LEA Exh. 58 at 41-42, 44. For about three (3) weeks, sessions were cancelled at \_\_\_\_\_ residence due to a bug infestation at the child’s home. During that time, the child rejected community based homebound instruction offered by LEA. Tr. 45, LEA Exhs. 52, 53.

12. A job conflict precluded \_\_\_\_\_ from providing some scheduled homebound sessions in September 2006. The child/parent declined \_\_\_\_\_ offer to make up those sessions. LEA Exh. 58 at 42-43.

13. The child’s psychologist recommended transitioning instruction out of the home to a community setting. Tr. At 80. During the months of November and December 2005 and January 2006, the LEA offered homebound instruction in the community. \_\_\_\_\_ missed many of the sessions and by February 2006, community based homebound instruction had ceased. Tr. 170-71.

14. Child/parent rejected additional community base homebound instruction offered to be provided at the HS science lab after school hours by \_\_\_\_\_. Tr. 44.

15. Between December 2005 and December 2006, the child or parent cancelled 229.25 hours or over 60% of the 377.5 hours of homebound instruction offered by the LEA. Tr. 162, LEA Exh. 57)

16. [redacted] has failed to complete a substantial amount of his homework. Tr. 50, LEA Exh. 58 at 28, LEA Exhs. 40-44.

17. [redacted] has gotten far behind in his school work. During 3<sup>rd</sup> nine weeks of the 2006-07 school year, he is only working on work from the 1<sup>st</sup> nine week. Tr. 50.

18. The parent's actions and home environment at [redacted] residence have created an atmosphere not conducive to effective instruction in the home. LEA Exh 58 at 87-90; Tr. 99-102.

19. Child's initial IEP, to be implemented at HS, gave him the option of obtaining a modified diploma or a standard diploma; however the child and parent insisted on deleting the modified diploma option. Tr. 74-75, 96-97, 181; LEA Exh. 21 at page noted 5 of 12; LEA Exh. 22 at page noted 5 of 12.

20. Selecting a standard diploma option only on the IEP, placed [redacted] on an academic coursework track. Selecting a standard or modified diploma option on the IEP would have provided [redacted] with the greatest flexibility in meeting graduation coursework requirements. Tr. 29-30, 97.

21. The child has never been found eligible for special education under the category of learning disabled (hereinafter "LD"). Tr. 189-92.

22. [redacted] asserts he has been accepted at [redacted] Academy in [redacted], Virginia. C Exh. 2.

#### **IV. APPLICABLE LAW AND ANALYSIS**

The child presents, among other evidence, failing report card grades during the 2005-2006 school year and has brought this due process matter before the hearing officer contending inappropriate placement. C Exh. 9; LEA Exh. 25.

As the moving party, the child bears the burden of showing ineffective placement.

Schaffer v Weast, 44 IDELR 150 (U.S. 2005).

To provide the hearing officer with relevant background information, she begins her deliberation by considering the child's 2003-2004 (hereinafter "2003-04") and 2004-2005 (hereinafter "2004-05") IEP placements. The LEA identified [redacted] in need of special education and related services during the 2003-04 school year under the category of mental retardation. [redacted] has never been found eligible for special education under the disability category of learning disabled; however, his IEP for the 2003-04 school year called for placement in learning disabled (herein after "LD") classes for his core subjects - English, Math, Science and Social Studies- because the parent refused to sign an IEP that placed him otherwise. Tr. 175, LEA Exh. 14 at 1 (noting IEP revision date of 2/06/02).

[redacted] struggled academically in the LD classes. During the first marking period of the 2003-04 school year, his grades in core subjects consisted of 3Fs and 1D. LEA Exh. 16 at 1 of 13; LEA Exh. 19 at 2 of 13; and LEA Exh. 19 at 2 of 13.

At some point, the LEA received an application from the parent to place [redacted] in homebound instruction for the remainder of the 2003-04 school year. The evidence shows that the parent supported her petition with medical documentation from the child's psychologist, Dr. [redacted], who diagnosed [redacted] with anxiety and depression and recommended he receive homebound instruction. Tr. 185, LEA Exh. 17, LEA Exh. 19 at page noted 6 of 13.

The homebound placement was granted for the remainder of the 2003-04 school year and evidence shows [redacted] grades for the second and third marking periods of that school year improved as noted below.



**2003-2004 school year**

Subject	2 <sup>nd</sup> Marking Period	3 <sup>rd</sup> Marking Period
Math	C	B
Language Arts	D	C
History	C	B
Science	C	B

LEA Exh. 19 at page 2, 4 of 13.

For the subsequent, 2004-05 school year, the LEA classified [redacted] as a ninth grader and zoned him to attend [redacted] High School (hereinafter " HS"). Resulting from an IEP meeting held May 12, 2004, [redacted] IEP team determined that his placement for the 2004-05 school year would be at HS in a double blocked self-contained math class, a double blocked self-contained language arts class, a single blocked self contained science class, a single blocked self contained social studies class, a PE elective in a general education class, and another elective in a general education class. LEA Exh. 19 at page noted 6 of 13, Tr. 185. This IEP placement remained the same for the 2005-2006 (hereinafter "2005-06") school year until a reevaluation of [redacted], at his parent's request, identified an eligibility change for the child. Tr. 188-89.

In January 2006, subsequent to the reevaluation, the eligibility committee found [redacted] no longer eligible for special education under the category of mental retardation, but under the category of speech and language impairment. Tr. 188-89, LEA Exhs. 1,2. The IEP team then met and revised [redacted] IEP effective February 2, 2006, to address his educational needs under his newly determined category of disability. [redacted] revised February 2, 2006 IEP called for placement in a self-contained, single-blocked English

class, speech consultation between teachers and the speech pathologist monthly, and remedial homebound instruction. would receive all other instruction in regular education classes at HS. LEA Exh. 22 at page noted by 6 of 12; Tr. 192. The English self-contained, single block class would support the auditory difficulty where the language impairment is evident. Tr. 192-93.

As noted above, IEPs for school years 2004-05 and 2005-06 called for him to attend HS; however, he never physically attended the school because of ongoing applications by the parent/child, with medical documentation, for homebound placement and receipt of those services. Tr. 185-87, LEA Exh 20, LEA Exh. 58 at 61, 77-78, 83, 85. Consequently, for school years 2004-05 and 2005-06, and the existing portion of the current 2006-2007 (hereinafter "2006-07") school year, the LEA has provided or offered homebound instruction. C Exh. 8, H.O. Exh. 1, 5, LEA Exh. 57.

The child comes before the hearing officer and argues his (i) physical placement in classes at HS and (ii) homebound placement are inappropriate and the LEA should provide a private school placement. Specifically, he has requested placement at Academy in , Virginia.

First, the hearing officer addresses contention that placement in self-contained and general education classes at HS is inappropriate.

The evidence shows that has not given the HS setting a try. As previously mentioned, the child has never attended HS during regular school hours as called for by his non-medical IEP placement. Further, homebound teacher tried to hold math instruction after school hours in HS's math lab, the child would not attend. Tr. 44. Moreover, a bug infestation problem at the child's home temporarily precluded instruction



in the home. When the LEA offered to provide service elsewhere, to include HS, the child declined the offer. LEA Exhs. 52, 53, 54.

The hearing officer therefore finds the evidence does not substantiate contention that placement at HS in self-contained and regular education classes is inappropriate. In making this finding, the hearing officer is mindful of failure in 3 out of 4 core subjects during the first marking period of the 2003-04 school year, last physical attendance at a school within the jurisdiction of the LEA. The hearing officer has also considered that during this last non-homebound placement, received at his parent's insistence, instruction in a special education class not designed to meet the needs of his then disability category.

Moreover, in finding no substantiation of the allegation claiming ineffective placement in special education and regular classes at HS, the hearing officer is mindful of the reported medical documentation to support homebound placement. The hearing officer notes the child had the opportunity to subpoena his psychologist and the recommender of the homebound placement and have him testify regarding appropriate placement; however, declined to present his psychologist as a witness at the hearing. Without more, the hearing officer finds the report insufficient to demonstrate homebound or private placement would be more appropriate for the child. See 41 IDELR 74 (February 17, 2004). The hearing officer also notes that no evidence exists in the record showing homebound instruction has been granted beyond February 5, 2007, and that most current IEP dated September 26, 2006, indicates that the child's current IEP places him in a self contained class at HS for English, regular education classes for other subjects, and homebound 4 hours weekly for compensatory homebound services. LEA Exh. 25.

Second, the hearing officer addresses contention that his homebound placement has also been ineffective. highlights his numerous incompletes and/or failing grades to support his argument that even homebound placement is ineffective. C Exh. 9.

The evidence shows unsatisfactory attendance by the child. LEA Exh. 40, 57. or the parent cancelled over 60% of homebound sessions offered by the LEA. LEA Exh. 57. During a thirteen (13) month period from December 2005 through December 2006 the LEA considered well over half of those cancellation unexcused. On several occasions, parent/child cancelled sessions without advance notice to LEA and at times instructors would show for scheduled sessions only to be turned away. LEA Exhs. 46,47, 48. Tr. 152. When an effort was made by the LEA to provide some homebound instruction at the library, attendance remained poor. LEA Exh. 20 at page noted 5 of 12 (where IEP indicates some homebound instruction should be in the community). Evidence further showed that the instructor often found herself waiting at the library for to either show up late or not at all. Discouraged, that homebound instructor quit. Tr. 209.

Not only has attendance been unsatisfactory but his completion of home work assignments has been also. LEA Exhs. 42, 44, 49. By way of example, math teacher testified he completed only 10 percent of homework assignments even after she had gone over portions of exercises and determined he was able to complete the rest of them independently. Further, evidence indicates that often she spent time going over work that had been done during an earlier session because had not completed homework assignments and therefore had forgotten previously taught material. LEA Exh. 58 at 28,



30. Additionally, \_\_\_\_\_, himself, has admitted only completing half of his assigned homework. Tr. 73.

In her deliberation concerning the appropriateness of \_\_\_\_\_ homebound placement, the hearing officer also notes that during the 2<sup>nd</sup> and 3<sup>rd</sup> marking periods of \_\_\_\_\_ homebound placement in school year 2003-04, \_\_\_\_\_ grades were mostly Cs and Bs and the evidence presented does not show completion of assignments and attendance were inadequate. Considering this point and above discussions, the hearing officer finds that the child's unsatisfactory attendance and poor completion of homework discussed previously herein have greatly contributed to his course failures and/or incompletes.

A finding of inappropriateness would be erroneous where parent/child fails to comply with the homebound instruction program. See 46 IDELR 229 (August 28, 2006) (where student with an undisclosed psychological disability refused to comply with the homebound instruction program offered by the LEA and parent therefore could not show LEA denied the child a FAPE). In the case before the hearing officer, evidence shows the parent and or child obstructed the LEA's ability to provide services by canceling over 60% of the instructional sessions, creating an environment not conducive to the provision of instruction, and failing to complete at least half of the homework assignments. LEA Exhs. 45 - 49, 57, 58.

The child contends further that another reason homebound placement is inappropriate is because he is not getting "the right amount of hours." He argues either the LEA has failed to appropriately staff hours required by the IEP and/or ten (10) hours a week of homebound instruction is insufficient.

By order entered February 16, 2006, the hearing officer found the LEA denied the



child a FAPE during a portion of the 2005-06 school year because it failed to provide certain homebound hours of instruction in conformity with 2005-06 medical homebound IEP. The hearing officer then ordered, among other things, the LEA to make up those homebound hours. H.O. Exh. 1. Subsequent to the order, the child requested a due process hearing contending the LEA failed to comply with the hearing officer's February 16, 2006 order. By order dated November 27, 2006, the hearing officer found no merit to the child's claim. H.O. Exh. 5. The hearing officer now finds no evidence presently before her to persuade her otherwise. She, therefore, finds the child's argument alleging the LEA has not provided instruction pursuant to the homebound IEP without merit.

The hearing officer in her deliberations has also considered the child's contention that 10 hours of weekly homebound instruction is inadequate.

The child attempts to support this argument by the testimony of his homebound math instructor, . When asked the instructor on direct examination if he were failing based on the hours, expressed that she was unable to answer the question. Alluding to the many sessions of instruction missed by the child, she noted that she was unable to answer the question because the time assigned for homebound instruction had not been utilized. Tr. 37. The hearing officer finds unsubstantiated the child's claim of inadequate hours.

Contrarily, the hearing officer finds the LEA's evidence on the matter persuasive. is director of alternative and adult education and she has specialized knowledge in the area of homebound instruction, to include the hours of homebound instruction deemed appropriate. Tr. 148, 156. According to , the LEA only

provides homebound instruction for core subjects. She testified that the LEA provides a maximum of ten (10) hours a week of homebound instruction; that is, 2 hours of instruction for each school day within a week. For instance, if a school week has 5 school days, the LEA allots 10 hours of homebound instruction for that week. If a school week has 4 school days, the LEA allots 8 hours of homebound instruction for that week, and so on. According to \_\_\_\_\_, the LEA deems 2 hours per school day or a maximum of 10 hours of homebound instruction a week sufficient. This is so, according to \_\_\_\_\_, because of the one on one teacher ratio in a homebound setting where more instruction with one child can presumably be covered compared to the amount of instruction the classroom teacher covers with 20 - 25 students in a class where only a total of 15 instructional hours are provided for all core subjects.

The hearing officer has noted that some of \_\_\_\_\_ homebound teachers expressed that while they are providing him instruction, he puts forth the effort to learn. Additional evidence shows, however, \_\_\_\_\_ endeavors to learn cease when the homebound instructor departs. Moreover, \_\_\_\_\_ and his parent have taken a course of actions that appear to sabotage his stated desire to graduate and become a functioning and independent living adult. Those actions include, but are not necessarily limited to \_\_\_\_\_ obstructing homebound instruction, insisting on eliminating the option for a modified diploma, refusing community based instruction, rejecting offered services, not completing homework, and canceling over 60% of the homebound instruction offered while complaining that the LEA has failed to provide sufficient hours of homebound instruction.

After contending the LEA's placement is ineffective, \_\_\_\_\_ next asserts he should be placed in a private school. The IDEA's least restrictive environment mandate makes it



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After contending the LEA's placement is ineffective, \_\_\_\_\_ next asserts he should be placed in a private school. The IDEA's least restrictive environment mandate makes it



clear that a private school or facility placement should be made only when a student's disability is of such nature and severity that the student cannot be satisfactorily educated in any public school setting. 34 CFR 300. 114(2)(ii).

The hearing officer finds that the actions of [redacted] and of his parent resulting in failing grades and incompletes do not somehow satisfy his burden of showing his placement either homebound or at [redacted] HS in self-contained and regular educational classes is inappropriate and that a private school placement is warranted.

**V. DECISION AND ORDER**

The hearing officer finds the child has not met his burden and shown that any of the placements, homebound and or placement in the public school setting, are inappropriate.

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 because the child has not met his burden in showing that his placement is inappropriate.

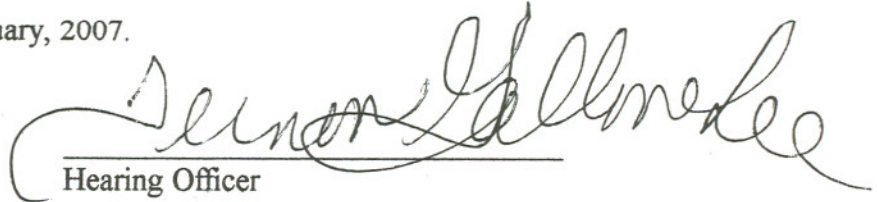
**VI. PREVAILING PARTY**

The hearing officer finds the LEA is the prevailing party in this matter as the hearing officer has found the child has not met his burden and shown that the current placement is inappropriate.

**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 26 day of February, 2007.

  
Hearing Officer

, Child  
, Advocate  
, Attorney for LEA  
, Coordinator for Special Education  
Virginia Department of Education

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