

FEB 16 2006

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

Dispute Resolution &
 Administrative Services

CASE CLOSURE AND FINAL REPORT

 School Division

 Name of Parent(s)

 Division Superintendent

 Name of Child

 Counsel Representing LEA

Sheila Marble

 Advocate/Counsel for Parent/Child

Ternon Galloway Lee
 Hearing Officer

 Party Initiating Hearing

Hearing Officer's Determination of Issue(s):

The hearing officer finds the LEA prevailed on the sub-issue of whether the child was denied a FAPE during the 2004-2005 school year and whether compensatory services should be ordered for the non-provision of homebound instructional hours for that school year. Moreover, the LEA prevails on the sub-issue of whether homebound services and/or compensatory services should be ordered beyond Summer, 2006.

The hearing officer finds the parent prevailed on the sub-issue of whether the child was denied a FAPE during the 2005-2006 school year. The parent also prevailed on the issue of whether compensatory services should be ordered to make up for the non-provision of hours of homebound instruction during the 2005-2006 school year. The hearing officer's order ends the homebound instruction by the end of Summer 2006, and ends the tutoring the week before the commencement of school year 2006-2007.

Hearing Officer's Order and Outcome of Hearing:

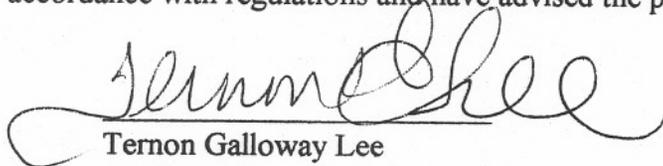
By amended order entered February 15, 2006, previously the decision was issued February 13, 2006, the hearing officer found all requirements of notice to the parent was satisfied that the school reported the child had been diagnosed with adjustment w/anxiety and depression and that the child was a child with a disability as defined by applicable law 34 C.F.R. Section 300.7 and was eligible for special education and related services. Moreover, the hearing officer found the LEA failed to provide the child with a FAPE during the 2005-2006 school year.

Accordingly, the hearing officer ordered the following:

1. By the end of Summer 2006, the LEA must make up every hour of homebound instruction not provided in conformity with the 2005-2006 IEP. The LEA was ordered to immediately commence this compensatory service. In conformity with the IEP, the LEA was ordered to gradually transition these homebound services into the community.
2. The LEA was ordered to provide an additional 2 hours of tutoring each week, commencing no later than 14 days after entry of the amended order and ending the week before the beginning of the 2006-2007 school year.

The hearing officer did not order a homebound placement beyond Summer 2006.

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



Ternon Galloway Lee
Hearing Officer
February 15, 2006

cc: Parent (via mail, fax not available)
, Attorney for LEA (via fax and mail)
Shelia Marble, Advocate (via fax and mail)
Lois Manes, Attorney for parent for purposes of negotiations (via fax and mail)
Coordinator for Special Education (via mail)
Virginia Department of Education (original via mail)

VIRGINIA STATE EDUCATIONAL AGENCY

v. Public School Division

Parent/Child:

Counsel for Public School Division, Esq.

Hearing Officer: Ternon Galloway Lee, Esq.

AMENDED DECISION

I. PROCEDURAL HISTORY

On November 28, 2005, (hereinafter "parent") requested a due process hearing asserting the Public School Division (hereinafter "LEA") did not provide homebound services as required in (hereinafter "child") IEP and the LEA failed to report the child's correct grades and give progress reports. Hearing Officer's Exh. (hereinafter "H.O. Exh.") 1. The hearing officer was appointed to this administrative process hearing on December 5, 2005. H.O. Exh. 1. The hearing officer held an initial pre-hearing conference on December 8, 2005, wherein the issue was determined to be (i) did the LEA provide appropriate homebound services during the 2004-2005 school year, and (ii) should the LEA provide homebound services beyond Summer 2006. The parent also requested as a resolution to the issue that the LEA fund any college cost the child may incur to receive a college education. The hearing officer

found no authority to grant the parent's request for college cost. H.O. Exh. 1.

The hearing officer found she did not have sufficient information to determine if there was a hearable issue relating to grades and ordered the parent to provide clarifying information by 5:00 p.m. on December 16, 2005. H.O. Exh. 4.

Over the objection of the LEA, the parent also raised for the first time during the initial pre-hearing conference whether the child was appropriately categorized as a Mentally Retarded (hereinafter "MR") special education student and whether the IEP's notation that the child would receive either a standard or modified diploma was appropriate. The hearing officer found the parent's due process request did not notify the LEA of the category of disability and diploma issues. Accordingly, the hearing officer ruled that pursuant to Section 615(f)(3)(B) of IDEA 2004, she would not hear those issues. H.O. Exh. 4.

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

Consistent with the agreement of the parties during the initial pre-hearing conference, the hearing officer scheduled the hearing for January 11, 12, 2006. Based on discussions during the pre-hearing conference and findings made, the hearing officer issued a scheduling order dated December 12, 2005. H.O. Exh. 4.

At the request of the LEA, on December 21, 2005, the hearing officer held a second pre-hearing conference to, among other things, further clarify the issues. H.O. Exh. 7. The issues were further clarified and found to be:

- (i) Did the LEA provide the hours of homebound services specified in the

individual educational program (hereinafter "IEP") and, assuming the non-provision of these services, was the student denied a free appropriate public education (hereinafter "FAPE"), and

(ii) Should the LEA provide (1) homebound services beyond Summer 2006, and (2) compensatory services. H.O. Exh. 8.

The hearing officer also found the parent timely received her December 12, 2005 order instructing the parent to provide further information about her proposed grade issue, but the parent failed to respond. The hearing officer found the parent was implicitly requesting the hearing officer change the child's grade and that the hearing officer lacked subject matter jurisdiction to change the child's grades. H.O. Exh. 8. The hearing officer issued an order dated December 24, 2005, memorializing her findings and ruling(s) made during the second pre-hearing conference. H.O. Exh. 8.

The hearing officer held a third pre-hearing conference call on January 9, 2006, to address a request made by the parent for telephonic witness testimony, as well as other matters. After proper notice, the parent declined to participate, but the parent's advocate and attorney who represented the parent in negotiations were present. The LEA objected to telephonic communication during the third pre-hearing conference and the hearing officer denied the parent's request and entered an order dated January 9, 2006, to that effect. H.O. Exhs. 10, 11, 12, and 13.

A due process hearing was held on January 11, 2006, and transcribed. Subsequent to the hearing, the parties received a transcript of the hearing. By voicemail message and, on information and belief, by telephone conversation with the court reporter, the parent contended that the reporter had not accurately transcribed line 16 on page 17 of the

transcript and line 12 on page 57 of the transcript. After making inquiry with the court reporter, the hearing officer finds the court reporter accurately transcribed the hearing.

During the hearing, the hearing officer admitted hearing officer exhibits 1 - 23; LEA exhibits 1-5, 12; and Parent's exhibits 1-3.

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"). Concerning this administrative due process proceeding, where the events occur before the Effective Date, IDEA 1997 and the implementing regulations apply. Obviously, concerning events occurring on or after the Effective Date, the IDEA 2004 applies. In this event, any federal and state special education regulation not impacted by the Act remains in effect until newly revised federal and/or state special education regulations are implemented.

The hearing officer issued her decision on February 13, 2006. On February 14, 2006, the LEA by motion brought it to the attention of the hearing officer that a fact was misstated in the February 13, 2006 decision. The hearing officer inquired of the parent whether she objected to the motion and determined the parent had no objection to motion.

After considering the LEA's motion and giving the parties an opportunity to argue it, the hearing officer finds the parent does not object to the motion, a factual misstatement has occurred and granting the LEA's motion will not substantively change the hearing officer's decision. Accordingly, the hearing officer grants the LEA's motion to correct the factual error and hereby issues her amended decision reflecting that the IEP for 2005-2006 school year mandated ten (10) hours of homebound instruction each week of school, not

twenty (20).

Below, the hearing officer sets forth her amended decision.

II. ISSUES

A. Did the LEA provide the hours of homebound services specified in the IEP and, assuming the non-provision of these services, was the student denied a FAPE, and

B. Should the LEA provide (1) homebound services beyond Summer 2006, and (2) compensatory services.

III. STATEMENT OF FACTS

1. _____ (hereinafter "child") is a 16 year old child with a disability and receives special education and related services. LEA Exhs. 1,2.

2. Reportedly, he is diagnosed with adjustment with anxiety and depression. LEA's Exh. 1, p. 1.

3. _____ (hereinafter "parent") is the parent of the child.

4. The child has a good work ethic and is diligent about his work and puts forth his best effort. Tr. 22, 26, LEA Exh. 2 at 2.

5. The child requires extra help when completing assignments. LEA Exh. 1, p. 1.

6. The child is weak in the areas of expressive and written language, math computation, spelling, short and long term memory, organization, attention span, and working independently. LEA Exh. 1, p. 1; LEA Exh. 2.

7. The child's IEP for school year 2004-2005 initially placed him in a self-contained class. LEA Exh. 1 at 1a.

8. During the first quarter of the 2003-2004 school year, the child participated in a self-contained setting with students served in a specific Learning Disability class. His

grades for the first quarter were as follows:

<u>Subject</u>	<u>1st Quarter</u>
Math	F
Lang. Arts	F
History	D
Science	F

LEA Exh. 1, p. 1a

9. During the second and third quarters of the child's 2003-2004 school year, the child's placement became homebound. The child received the following grades during the second and third quarters of the 2003-2004 school year:

2003-2004 Report Card Grades		
<u>Subject</u>	<u>2nd</u>	<u>3rd</u>
Math	C	B
Lang. Arts	D	C
History	C	B
Science	C	B

LEA Exh. 1

10. During the 2003-2004 school year, the child's placement was changed to homebound at the request of the child's mother for medical reasons and with medical documentation. Subsequently, the parent made similar requests and homebound placement was granted during the 2004-2005 school year on or about February 16, 2005, when the IEP was modified and during the 2005-2006 school year. Tr. 58, 62, 77-78, LEA Exh. 1 at 1m, 1v; Parent's (hereinafter "P") Exh. 1; LEA Exh. 2

11. The LEA provided the child with six (6) homebound teachers during the 2004-2005 school year. Tr. 59-60.

12. The child received no progress reports from the LEA during the 2004-2005 school year for that school year. Tr. 52-53.

13. During the first semester of the 2005-2006 school, the LEA provided the

child with progress reports for the 2004-2005 school year. Tr. 52-53.

14. The child was to receive 348 hours of homebound instruction during the 2004-2005 school year, but received only 304.5 hours. LEA Exh.s 3,5.

15. During Summer 2005, the LEA provided the child with 16.5 compensatory hours of homebound service hours. The LEA did not provide the child with 26.25 hours of homebound services for the 2004-2005 school year. LEA Exhs. 3,5.

16. While on homebound status during the 2004-2005 school year, the child was given, among other assignments, 149 English 9 assignments to complete. Of the assignments given, the child completed 50. Because the child had not completed many of the assignments, he could not receive a passing grade for English 9. LEA Exh. 12.

17. The child's subject grades for the 2004-2005 school year were as follows:

SS W GEOG 2 A	09	F	.00
SC EARTH SC 2 A	09	D	.50
HP PE 9	09	F	.00
EN ENGL 9 2B	09	F	.00
MA ALG PART 2(SEM B)	09	F	.00
SS W GEOG 2 B	09	F	.00
SC EARTH SC 2 B	09	B	.50
HP HEALTH 9	09	F	.00
Yearly Total			1.00

LEA Exh. 12.

18. The child's IEP for the 2005-2006 school year mandated the child receive home based instruction as follows: 10 hours a week at home for 2nd semester English 9, Algebra 1, Biology and Health until November 13, 2005. Starting November 14, 2005, the child would receive a total of 10 hours of homebound services a week of which 2.5 hours of English would be provided in a community setting and 7.5 hours of homebound services would be provided in the home setting. LEA Exh. 2 at 2d.

19. As of December 19, 2005, the LEA owed the child 120 hours of homebound services for the 2005-2006 school year; however, the child had only received 41.25 hours of those services. LEA Exhs. 3, 4.

20. The parties had the opportunity to have witnesses present to testify on their behalf at the due process hearing. H.O. Exhs. 4, 8, 10, 11.

21. Neither party requested witness subpoenas.

22. Witnesses present at the hearing who testified on behalf of the parent were _____ and _____. Tr. 22,26,40.

23. Witnesses present who testified on behalf of the LEA were _____
Tr. 72.

24. The parent received all the LEA's proposed exhibits at least 5 business days before the hearing. H.O. Exh. 18.

25. The LEA received from the parent, on December 28, 2005, four pages titled by the parent "Due Process Hearing Form and Resolution." P. Exh. 3.

26. The four pages received by the LEA from the parent on December 28, 2005, did not amend the November 28, 2005 due process request, received by the LEA on November 28, 2005. P. Exh. 3.

27. The parent received all correspondence, copies of correspondence and copies of orders mailed to her concerning this matter.

28. The hearing was open to the public at the parent's request. H.O. Exh. 4.

29. The parent requested a written decision. H.O. Exh. 4.

IV. APPLICABLE LAW AND ANALYSIS

IDEA defines a free appropriate education (hereinafter "FAPE") as special

education and related services that (i) have been provided at public expense and under public supervision and direction and without charge; (ii) meet the standards of the state educational agency; (iii) include an appropriate preschool, elementary or secondary education in the state involved; and (iv) are provided in conformity with an individual education program. Section 602(9) of IDEA 2004.

A local education agency's failure to provide all of the services, modifications, and accommodations described in an IEP does not constitute a per se denial of FAPE. As long as the LEA implemented substantial or significant provisions of the IEP and the child receives educational benefit, FAPE is provided. Houston Independent School District v. Bobby R., 200 F.3d 341, 31 IELR 185 (5th Cir. 2000); Gillette v. Fairland Bd. Of Education, 725 F.Supp. 343 (S.D. Ohio 1989), rev'd on other grounds, 932 F.2d 551 (6th Cir. 1991).

The evidence of record shows that during the 2004-2005 school year, the child, among other things, was below grade level in comprehension, benefited from one on one instruction, and required extra help when completing assignments. The evidence shows that for the 2004-2005 school year, the LEA granted the parent's request for provision of homebound services due to medical reasons. The LEA also provided the child with 6 homebound teachers who provided individual instruction during the school year and 304 hours, or 87.5%, of the 348 hours of the IEP's required homebound services. During Summer, 2005, the LEA also made up 16 hours of the 43.5 hours of homebound instruction owed for school year 2004-2005. The child did have a good work ethic and for the 2004-2005 school year received a B in Science, and F's in Math, English, and Health. He acquired one course credit and a GPA of 0.44.

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

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

Houston Indep. Sch. Dist. v. Bobby R., *supra*.

Based on the foregoing, the hearing officer finds (i) the LEA implemented substantial or significant provisions of the 2004-2005 IEP by providing the child with 6 homebound teachers and 87.5% of the homebound hours mandated in the IEP and (ii) the child received educational benefit which is evidenced by his passing Science with a B and accumulating one course credit. Accordingly, the hearing officer finds the parent did not meet its burden of showing a denial of FAPE during the 2004-2005 school year.

The IEP developed for the 2005-2006 school year required 10 hours a week of homebound services for Algebra, Health, English, and Biography. What the evidence shows, however, is that as of December 19, 2005, well over half of the homebound

weekly service hours had not been provided to the child. I find the LEA, therefore, has not implemented substantial or significant provisions of the IEP. Considering the child is deficient in comprehension, needs to go over his assignments with someone and has a good work ethic, I further find, the LEA has not provided the necessary quantum of educational benefit required by Rowley.

Accordingly, the hearing officer finds the LEA's failure to provide the homebound services mandated in the child's IEPs for school year 2005-2006 has denied the child a FAPE.

Having found the LEA has denied the child a FAPE during the 2005-2006 school year, the hearing officer must determine what relief is appropriate. The parent has requested compensatory services/education.

The purpose of compensatory services/education is to provide to the student the services that should have been provided in the first instance. 28 IDELR 630 (1988). In the case before the hearing officer, those services involved hours of home base instruction to be provided at home or in the community during the 2004-2005 and 2005-2006 school years.

The parent presented no evidence at the hearing to support the appropriateness or duration of any particular compensatory service/education. As a general matter, compensatory services should be of the same type as the services that should have been provided in the first instance. See E.g. Ashland School District 28 IDELR 630 (SEA OR 1998).

Special Education law also requires a student to be educated in the least restrictive environment (hereinafter "LRE"). 20 USC 141 2(a)(5)(A); Section 612 (a)(5) of IDEA

2004. This means that, to the maximum extent appropriate, children with disabilities must be educated with children without disabilities. 34 CFR 300.550(b). Removal of a child with disabilities from the regular educational environment is to occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactory. 34 CFR 300.550(b)(2).

The child's homebound placement has been allowed due to the parent's request and the child's medical condition. P. Exh. 1. Evidence of record dated August 5, 2005, supporting the parent's request for homebound services based on a medical condition indicates the placement is needed for three months which is certainly not beyond the 2005-2006 school year. Accordingly, the hearing officer finds an order of homebound placement beyond summer 2006 may be in violation of the LRE principle of IDEA.

V. DECISION AND ORDER

The hearing officer finds all requirements of notice to the parent have been satisfied that the school reports the child has been diagnosed with adjustment w/anxiety and depression and that the child is a child with a disability as defined by applicable law 34 C.F.R. Section 300.7 and is eligible for special education and related services. Moreover, the hearing officer finds the LEA failed to provide the child with a FAPE during the 2005-2006 school year for the reasons stated previously herein.

Accordingly, the hearing officer orders the following:

1. By the end of Summer 2006, the LEA must make up every hour of homebound instruction not provided in conformity with the 2005-2006 IEP. The LEA is ordered to immediately commence this compensatory service. In conformity with the IEP, the LEA is to gradually transition

these homebound services into the community.

2. The LEA is to provide an additional 2 hours of tutoring each week, commencing no later than 14 days after entry of this order and ending the week before the beginning of the 2006-2007 school year.

The hearing officer, does not order a homebound placement beyond Summer 2006.

VI. PREVAILING PARTY

The hearing officer finds the LEA prevailed on the sub-issue of whether the child was denied a FAPE during the 2004-2005 school year and whether compensatory services should be ordered for the non-provision of homebound instructional hours for that school year. Moreover, the LEA prevails on the sub-issue of whether homebound services and/or compensatory services should be ordered beyond Summer, 2006.

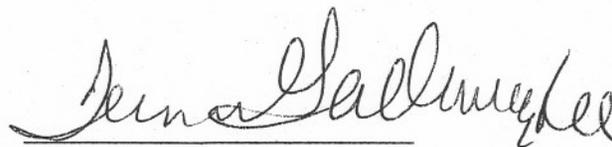
The hearing officer finds the parent prevailed on the sub-issue of whether the child was denied a FAPE during the 2005-2006 school year. The parent also prevailed on the issue of whether compensatory services should be ordered to make up for the non-provision of hours of homebound instruction during the 2005-2006 school year. The hearing officer's order ends the homebound instruction by the end of Summer 2006, and ends the tutoring the week before the commencement of school year 2006-2007.

The hearing officer notes the LEA asserts in its closing argument that it did propose to the parent making up the hours of homebound services missed and tutoring.

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 15th day of February, 2006.



Ternon Galloway Lee
Hearing Officer

cc: . Parent (via mail, fax not available)
 Attorney for LEA (via fax and mail)
Shelia Marble, Advocate (via fax and mail)
Lois Manes, Attorney for parent for purposes of negotiations (via fax and mail)
 , Coordinator for Special Education (via mail)
Virginia Department of Education (via mail)