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Dispute Resolution &
Administrative Services

DECISION OF THE HEARING OFFICER

I. Introduction

On February 7, 2006, the local educational agency (the "School District" or the "LEA") received the parents' Request for Due Process Hearing dated February 7, 2006 (the "Request"). The hearing officer was appointed to this administrative due process proceeding on February 13, 2006.

On February 17, 2006, the LEA filed with the hearing officer its Motion to Dismiss and Memorandum in Support dated February 17, 2006 (the "Motion to Dismiss"). The parents filed with the hearing officer on February 20, 2006 their response dated February 18, 2006 (the "Response") to the Motion to Dismiss. By decision entered March 3, 2006, the hearing officer decided that any attempts by the parents to change their child's diploma status to a Standard High School Diploma from the LEA or to compel the LEA to accept the credits which their child earned from the American School (1) are not issues in this proceeding and, in any event, (2) are barred by the doctrines of collateral estoppel and/or *res judicata*. HO 2[1]. The hearing officer decides that under the facts and circumstances of this proceeding, he lacks subject matter jurisdiction (1) to compel the LEA to change its policy requiring pre-approval of courses at the American School in order to obtain credits at the LEA (8 VAC 20-80-76); and (2) to change the LEA's graduation requirements. 8 VAC 20-80-76. HO 2.

The hearing officer also decided in the pre-hearing context that the applicable statute of limitations bars the parents from raising any of the alleged actions or omissions of the LEA in their Request that arose before February 7, 2004. HO 2. Concerning the relief requested by the parents in the Response, the hearing officer explained to the parents at a pre-hearing meeting that he lacks subject matter jurisdiction to do certain things requested by the parents, such as to change the law to extend the age of eligibility to which the child can receive special education and related services, as requested by the parents. Parents' Response, page 5. However, the hearing officer decided that if the hearing officer were to find for the parents and if the hearing officer finds that an award of compensatory education is warranted, compensatory education could conceivably be awarded past the child's twenty-second birthday next year.

In the pre-hearing context, the hearing officer also decided that the child has the right to challenge the LEA's provision of FAPE to him but the hearing officer lacks subject matter jurisdiction to amend the child's educational record. Applicable law establishes a different procedure and a different, detailed legislative framework which must be followed concerning

1 References to the hearing officer's six (6) exhibits will be designated HO followed by the exhibit number. References to the parents' 45 exhibits will be designated P followed by the exhibit number. Similarly, references to the School Board's 113 exhibits will be designated SB followed by the exhibit number. The transcript of the first three (3) days of the hearing will be cited "TR" followed by the day of hearing and/or page number, as appropriate. The transcript of the fourth day of the hearing was not yet available to the hearing officer at the time of his decision.

challenges to the student's educational record. See Hillsborough Bd. of Educ., 102 LRP 11752 (SEA N.J. 2000); Hacienda La Puente Unified Sch. Dist., 27 IDELR 885 (SEA Cal. 1997); Houston Indep. Sch. Dist., 26 IDELR 817 (SEA Tex. 1997); School Administrative District #1, 25 IDELR 1256 (SEA Maine 1997); Bd. of Educ. of the Ellenville Centr. Sch. Dist., 21 IDELR 235 (SEA NY 1994); Hamilton County Schools, 23 IDELR 772 (SEA Tenn. 1996); Fairfax County Public Schools, 38 IDELR 274 (SEA VA 2003).

The subject matter of disputes which can be heard by an administrative due process hearing officer in a due process hearing are delineated in 20 U.S.C. § 1415(b)(6)(A). These statutory provisions are mirrored by the relevant provisions of the Virginia Regulations. 8 VAC 20-80-76(B)(1).

The Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(g), establishes a procedure which allows parents or a child who has turned 18 to make amendments to educational records that they believe are inaccurate, misleading, or in violation of their privacy rights. 34 C.F.R. §§ 99.20, 300.567 and 99.3.

When a student turns 18, the rights afforded to parents under FERPA transfer to the student. 20 U.S.C. § 1232(d), 34 C.F.R. 99.5(a). At that point, the student is referred to as an "eligible student" in the regulations. This means that when the student in this proceeding turned 18 the FERPA rights to access records, etc. transferred to the student. See also 34 C.F.R. § 300.574. In this proceeding, the child has confirmed that his parents hold a valid educational power of attorney allowing them to act concerning this proceeding and his educational matters.

The Virginia Regulations also provide that parents who believe that a student's educational record is "inaccurate or misleading" must challenge that record through FERPA's procedures. See 8 VAC 20-80-70(G)(6-9). This regulation allows for an informal hearing before a school administrator, but does not provide for a due process hearing or an appeal to court. In fact, the final result of this procedure, if the LEA decides not to amend the record is to allow the parent to submit an explanation of the information he believes is inaccurate or misleading to be included with the student's file. 8 VAC 20-80-70(G)(8).

The parties agreed that the remaining issues for the hearing were those specified by the hearing officer in his Scheduling Order entered March 3, 2006 (HO 3) and repeated in his First Amended Scheduling Order entered March 20, 2006 (HO 5), namely:

1. A prior hearing officer has decided that the child's 2004-05 school year IEP was reasonably calculated to provide the child with FAPE. This decision is not subject to collateral attack in this proceeding because the decision was not appealed by the parents and any such challenge is barred by the doctrines of *res judicata* and/or *collateral estoppel*. However, the parents contend that the LEA failed to implement this 2004-05 school year IEP, including failing to provide homebound services required by such IEP, and that such failure resulted in a denial of FAPE to the child. This issue will be heard at the hearing.

2. The parents contend that at the August 11, 2005 IEP team meeting the LEA refused to recognize the child's true level of educational performance instead insisting on showing his present level of educational performance at a standard way below that at which he functioned. The parents contend that such action or inaction on the part of the LEA constituted a denial of FAPE to the child.

3. The parents contend that the LEA has failed or refused to provide appropriate transition services to the child and inappropriately declined an offer from a representative of the Virginia Department of Rehabilitative Services to provide services to the child at no cost to the LEA. The parents contend that such action or inaction on the part of the LEA constituted a denial of FAPE to the child. Concerning these transition services, the parties agree that the applicable statute of limitations bars the parents from asserting any alleged act or omission of the LEA that arose before February 7, 2004. Additionally, the doctrines of *res judicata* and collateral estoppel may bar certain claims relating to the content of transition services for the 2004-2005 School Year IEP.

HO 3 and HO 5.

The parties duly attended the resolution session mandated by the *Individuals with Disabilities Education Improvement Act of 2004* (the "IDEA 2004") on February 21, 2006. HO 3. Accordingly, the hearing was held on March 29-31, 2006 and May 11, 2006. The hearing officer did not admit into evidence parents' exhibits C 1 through C-4 and the hearing officer did not admit the LEA's exhibits numbered 59 and 67. The hearing officer admitted into evidence at the hearing all of the parents' remaining 45 exhibits and all of the LEA's remaining 113 exhibits. At the hearing, the LEA delivered to the hearing officer its "Points of Legal Authority" and subsequently on May 16, 2006, the parents also timely submitted to the hearing officer their "Complainants' Brief" (each a "Brief" and collectively, the "Briefs").

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 renders his decision based on the sworn testimony of the various witnesses, the numerous exhibits admitted into evidence and the argument of the parties.

II. Findings of Fact

1. The Parents are the parents of the student. The parents hold an educational power of attorney from the student, who is now 21, allowing them to act on his behalf in this proceeding.

2. The requirements of notice to the parents were satisfied, the child has a disability and needs special education and related services. The child is eligible to receive special education and related services until he turns 22 next year.

3. The child was born on and his primary disability is identified by the School District as autism with a secondary disability of specific learning disability. SB 90.

4. The IEP for the child's 2004-05 school year was appropriate and the LEA offered the child an appropriate education during the 2004-05 school year. SB 16.

5. A different hearing officer, in his decision of February 8, 2005, ordered that the IEP offered by the LEA in September 2004 be implemented. SB 16.

6. At the parents' request, the LEA convened an IEP Team meeting on March 16, 2005, to consider a recommendation from Dr. , the student's licensed clinical psychologist, that the September 2, 2004 IEP be implemented on a homebound instruction basis.

7. The IEP Team agreed to modify the September 2, 2004 IEP to permit homebound instruction and the parents signed their consent to the implementation of the September 2, 2004 IEP, as amended by the Addendum of March 16, 2005. SB 2 and SB 30.

8. The students' September 2, 2004 IEP, as amended by the Addendum of March 16, 2005, provided that the student receive, in a homebound setting, Geometry Concepts for eight (8) hours per week for eighteen (18) weeks and Special Instruction to address IEP goals for 3-4 hours per week. SB 2 and SB 30.

9. Homebound instruction was scheduled to begin on April 4, 2005 for Geometry Concepts and IEP goals but such instruction did not begin until April 18, 2005. SB 32.

10. Accordingly, the LEA did fail to implement the 2004-05 school year IEP in the respect that special education instruction and services agreed upon in the September 2, 2004 IEP, as amended by the Addendum of March 16, 2005 were not timely delivered on April 4, 2005 (the "Exception").

11. However, the Exception has not resulted in any loss of educational opportunity to the student because the parties agreed to corrective measures including compensatory services to the student to remedy the LEA's failure in this regard. See, for example, SB 97, 99 and 100.

12. The LEA made a good faith, collaborative, coordinated, reasonable effort to implement the IEP for the student's 2004-05 school year.

13. During his 2004-05 school year, the child made educational progress, received educational benefit and did not suffer any loss of educational opportunity due to any action or inaction on the part of the LEA.

14. In his current school year (2005-06), the child is again being offered by the LEA special education and related services, but, as is their right, the parents and the student have chosen not to accept the LEA's offer of special education and related services. SB 90 and SB 92.

15. The student is 21 and the LEA cannot compel his receipt of educational services offered by the LEA.

16. During his 2005-06 school year, the student did not suffer any loss of educational opportunity due to any action or inaction on the part of the LEA.

17. The testimony of Ms. , Ms. and Mr. , all LEA educational professionals, was both credible and consistent on the major issues before the hearing officer and is entitled to deference from the hearing officer. The demeanor of such experts at the hearing was candid and forthright.

18. Certain actions or inactions consciously taken by the parents have thwarted or delayed the delivery of special education and related services which the LEA has sought to provide to the student.

19. LEA personnel acted appropriately in exercising their considered professional judgment, well within the bounds of their professional educational discretion, in establishing the student's present level of educational performance at the August 11, 2005 IEP team meeting.

20. The LEA has provided or offered to provide appropriate transition services to the student. SB 110 and 111; Tr. 653.

21. Any procedural violations were technical and did not actually interfere with the provision of a FAPE to the child.

22. The student did not appear at the hearing.

III. Conclusions of Law and Decision

The parties do not dispute that the child has a disability, that the child needs special education and related services and that the child is entitled to a free appropriate public education pursuant to the IDEA 2004 and the Individuals with Disabilities Education Act of 1997 20 U.S.C. §§ 1400 et seq ("IDEA 1997") and Va. Code Ann. § 22.1-213-221 (1950), and the regulations promulgated

thereunder. In this administrative due process proceeding initiated by the parents, the burden of proof is on the parents. Schaffer, ex rel. Schaffer v. Weast, 126 S.Ct. 528 (2005).

The new law retains the previous definition of a "free appropriate public education." IDEA 2004 Section 612(a)(1)(A). Accordingly, any analysis of the standard of FAPE must begin with Rowley. Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982). The Rowley Court held that by passing the Act, Congress sought primarily to provide disabled children meaningful access to public education. The Rowley analysis provides that the disabled child is deprived of a free appropriate public education under either of two sets of circumstances: first, if the LEA has violated IDEA's procedural requirements to such an extent that the violations are serious and detrimentally impact upon the disabled child's right to a free appropriate public education or, second, if the IEP that was developed by the LEA is not reasonably calculated to enable the disabled child to receive educational benefit. Rowley, *supra*, 206-7 (1982); Tice v. Botetourt County School Board, 908 F.2d 1200 (4th Cir. 1990); Hudson v. Wilson, 828 F.2d 1059 (4th Cir. 1987); Gerstmyer v. Howard County Public Schools, 20 IDELR 1327 (1994).

The parents have not developed probative evidence of any serious procedural violations in this proceeding.

Concerning the student's IEP for his 2004-05 school year, the parents ultimately consented to implementation of the September 2, 2004 IEP, as amended by the Addendum of March 16, 2005. However, the parents contend that their child's IEP for the 2004-05 school year was not properly implemented during such school year. The parents further contend that the LEA's failures to properly implement the 2004-05 IEP denied the child FAPE and seek reimbursement for "the cost of providing Homebound Instruction to [the student] during the 2004-05 school year." Parents' Brief 12.

Once the LEA structures an IEP which is reasonably calculated to provide FAPE, it cannot simply negate its requirements by somehow assuming that a child was not injured by its failure to implement the IEP. The LEA must provide the special education and related services necessary to implement the IEP. The development and implementation of the IEP are the cornerstones of IDEA. Honig v. Doe, 484 U.S. at 311 (1988).

34 C.F.R. § 300.350 addresses accountability for progress under an IEP. It provides:

> (a) *Provision of services.* Subject to paragraph (b) of this section, each public agency must: (1) Provide special education and related services to a child with a disability in accordance with the child's IEP; and (2) Make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP.
>
> (b) *Accountability.* Part B of the Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and benchmarks or

> objectives. However, the Act does not prohibit a State or public agency from establishing its own accountability systems regarding teacher, school or agency performance.
>
> (c) *Construction-parent rights*. Nothing in this section limits a parent's right to ask for revisions of the child's IEP or to invoke due process procedures if the parent feels that the efforts required in paragraph (a) of this section are not being made.

(Emphasis supplied.)

The issue is precisely whether the applicable IEP has been implemented. 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. 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*.

The parents' main challenges to the LEA's implementation in school year 2004-05 of the 2004-05 IEP focus on the delivery of homebound services to the student, as prescribed by Dr.

While the LEA had received a letter dated May 19, 2004 from Dr. concerning "[the child's] desire . . . to continue home based instruction" for the 2004-05 school year (SB 2, page 14), the first Medical Referral for Homebound Instruction concerning the student was received by the LEA on October 5, 2004. SB 5. The referral was made by Dr. on August 28, 2004 but was only faxed to the LEA by the parents' attorney, Ms. , over one month later.

The LEA approved the homebound instruction for the student and, working through Ms. as the parents' attorney, scheduled an IEP Team meeting to address homebound services on November 19, 2005.

Numerous LEA personnel came to the scheduled meeting including Mr. , Ms. , Dr. , Ms. (the transition specialist) and Mr. . Tr. 173. Tr. 176; SB 15. Ms. and the father attended for the student but instead of a meeting for the purpose of discussing homebound services for the student, as the LEA had been led to expect by representations of Ms. , Ms. first proceeded to read a letter from the student. SB 14. After reading the letter, Ms. stated that essentially the only item on the agenda for the meeting was the student's demand for a standard diploma.

The LEA personnel responded that the LEA had already denied that demand and the LEA sought to address the homebound services. The LEA was not provided the opportunity. Tr. 176; SB 15. Ms. again insisted that the standard diploma issue was, as Ms. put it, "the only item on the table and that [the LEA] needed to agree to it or else [the LEA] would see her in due process." Tr 174.

The meeting quickly concluded with Ms. and the father walking out. A due process proceeding ensued which culminated in a decision dated February 8, 2005 by a different hearing officer deciding all issues, including that of the standard diploma, in favor of the LEA. SB 16.

At the hearing in this proceeding, the parents argued that they should not be held accountable for what they assert was their attorney's unilateral action. Of course, the father also walked out of the meeting but he seeks to excuse this by arguing that he always follows his attorney's lead. The record is replete with actions by the parents which have hindered, frustrated or complicated the LEA's good faith efforts to meet their legal obligations to the student under applicable law. The arguments raised by the parents to excuse or justify their actions on behalf of the student which thwarted good faith efforts by the LEA to implement the 2004-05 school year IEP are meritless. The obligation to participate in good faith in the educational process for the benefit of the student is not a one-way street; of necessity, the parents and student must shoulder some of the responsibility.

The determination of the IEP's reasonableness at the time of its creation is limited to the information known to the IEP team when it wrote the IEP. See Adams v. State of Oregon, 195 F.3d 1141, 1150 (9th Cir. 1999) (IEP "was reasonably developed based on information available to the [multidisciplinary team] including information from the parents").

Rowley and subsequent court decisions have also been careful to recognize the importance of leaving the business of running schools to the considered judgment of local educators.

In Hartmann v. Loudoun County, the court stated:

> Although section 1415(e)(2) provides district courts with authority to grant 'appropriate' relief based on a preponderance of the evidence,

> 20 U.S.C. 1415(e)(2), that section 'is by no means an invitation to courts to substitute their own notions of sound educational policy for those of the school authorities which they review.' (citations omitted)... [t]hese principles reflect the IDEA's recognition that federal courts cannot run local schools. Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment.

118 F.3d 996, 1000-1001 (4th Cir. 1997).

See also Springer v. Fairfax County, 134 F.3d 659, 663 (4th Cir. 1998) (holding that "[a]bsent some statutory infraction, the task of education belongs to the educators who have been charged by society with that critical task"); Barnett v. Fairfax County School Board, 927 F.2d 146, 151-52 (4th Cir.), cert. denied, 502 U.S. 859 (1991) (recognizing Congressional intent to leave education decisions to local school officials and recognizing the importance of giving school officials flexibility in designing educational programs for students); and Tice v. Botetourt County, supra, at 1207 (once a "procedurally proper IEP has been formulated, a reviewing court should be reluctant . . . to second-guess the judgment of education professionals" – rather, the court should "defer to educators' decisions as long as an IEP provided the basic floor of opportunity that access to special education and related services provides").

Accordingly, hearing officers must not succumb to the temptation to substitute their judgment for that of local school authorities in IEP matters. Arlington County Sch. Bd. v. Smith, 230 F.Supp. 2d 704, 715 (E.D. Va. 2002).

IDEA defines FAPE as special education and related services that (i) have been provided at public expense and under public supervision and direction; (ii) meet the standards of the state educational agency; (iii) include an appropriate preschool, elementary or secondary school education in the state involved; and (iv) are provided in conformity with an IEP. 20 U.S.C. § 1401(8).

In determining the quantum of educational benefit necessary to satisfy IDEA, the Rowley Court explicitly rejected a bright-line, single standard test. Instead, educational benefit "must be gauged in relation to the child's potential". Rowley at 185 and 202; see also, Hall v. Vance County Bd. of Educ., 774 F.2d 629, 635 (4th Cir. 1985).

Educators exercising their considered professional judgments to implement a procedurally correct IEP should be afforded significant academic autonomy and should not be easily second-guessed by reviewing persons. 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). In short, where the LEA has developed an IEP in compliance with applicable legal procedures, the hearing officer is required to defer to the considered educational judgment of the LEA's representatives concerning its implementation. MM v. School District of Greenville County, 307 F.3d 523 (4th Cir. 2002).

The parents' stated purpose for the August 11, 2005 IEP Team meeting was to withdraw the student from the LEA's special education program. The mother referred to this IEP as an exit IEP. Tr. 209. SB 91. The parents took the position that the student had achieved a standard diploma from the American School and would exit the LEA system. Tr. 270. The student is not subject to compulsory attendance although he remains eligible for special education and related services from the LEA. Tr. 269-70.

Until approximately July 2002 when the student attended a conference at Christopher Newport University, the parents and the child had expressed to the LEA their desire for a transition-based IEP. From July 2002, the parents and the student moved away from this objective instead aiming for a regular diploma and a college education. LEA officials continue to believe that a vocationally-driven IEP is most appropriate for the student but agreed that the student could pursue a modified standard diploma because of his and his parents' expressed strong desire. Tr. 36. The IEP Team is required to consider the student's wishes concerning transition services.

On September 17, 2005 the student visited Marshall University in West Virginia. PB-10. It was after visiting Marshall and experiencing difficulties in enrolling in its Autism program that the parents first began to complain about the student's present level of performance described in the August 11, 2005 IEP. After all, both parents consented to the implementation of the August 11, 2005 IEP. SB 90 and 31; Tr. 365. Dr. testified that she had no firsthand knowledge concerning what the LEA agreed to put in the student's present level of educational performance in his IEP. Tr. 23-24. Dr. testified that he had not done any educational performance testing at the time the student was attending the American School. Tr. 34. The last time Dr. did a psychological evaluation for the student was in April 2003. Tr. 42; SB 113. The evaluation was used by the parties in formulating the student's present level of educational performance for both the 2004-05 school year IEP and the August 11, 2005 IEP. Tr. 43.

The transition services provided or offered to the student by the LEA have been appropriate. See, for example, SB 110 and 111; Tr. 635-670. The record also clearly shows that the Virginia Department of Rehabilitative Services ("DRS") has continued, pursuant to the Developmental Disabilities Waiver, to provide transition services including job coaching to the student despite any flawed perception by the parents that the LEA acted inappropriately. Tr. 554. The record also reveals that if there has been any obstruction concerning linkages by the LEA with local service providers such as DRS, the obstruction has been generated by the parents. Tr. 139, 142, 143, 146, 166, 201, 364, 669 and SB 3.

The parents bear the burden to establish by a preponderance of the evidence that the LEA has failed to provide their child with FAPE concerning the issues they raised in this proceeding and they have not sustained this burden.

The LEA is reminded of its obligations concerning 8 VAC 20-80-76(I)(16) to develop and submit an implementation plan to the parties, the hearing officer, and the SEA within 45 days of the rendering of this decision.

Right of Appeal. 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.

ENTER: 5 / 22 / 06

John V. Robinson, Hearing Officer

cc: Persons on the Attached Distribution List (by U.S. Mail, facsimile and/or e-mail, where possible)