00-111

VIRGINIA:

SPECIAL EDUCATION DUE PROCESS HEARING

, et als. Complainants

v.

PUBLIC SCHOOLS Respondent.

DECISION OF THE HEARING OFFICER
AT THE STATE LEVEL REVIEW

I. Introduction

The hearing officer ("SHO") was appointed to this state level administrative review proceeding on . The initial administrative due process proceeding before the local level hearing officer ("LHO") was filed in and, accordingly, is governed not by the current Regulations Governing Special Education Programs for Children with Disabilities in Virginia (the "Virginia Regulations") but by the Virginia Regulations effective January 1994, which governed the operation of the special education programs in Virginia in .

In its requested review, the LEA, by counsel, assigned error to (i) the LHO's rulings that the LEA did not adequately implement the student's IEP and did not provide a free appropriate education ("FAPE") to the student even though the student had graduated from high school with a regular diploma; (ii) the LHO's finding that he had authority to change specific grades on the student's report card and his changing of certain grades; and (iii) the evidentiary basis for the LHO's rulings.

On , the parent filed a cross appeal, in this state level review proceeding and essentially requests (i) reversal of the LHO's decision that the student failed to prove that the LEA did not comply with the student's IEP during junior year at high school; and (ii) that 's English 12 grade be changed to a "C" from the LEA's "D" and from the LHO's award of a "D+".

The state level review requires the SHO to make an independent decision upon completion of the review in accordance with the provisions of the Virginia Regulations and applicable law. However, as the LEA concedes, the SHO must give "due weight" to the underlying administrative proceedings before the LHO. See Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176 at 206, 102 S.Ct. 3034 (1982); Doyle v. Arlington County Sch. Bd., 953 F.2d 100, 103 (4th Cir. 1992).

As the Court pointed out in Arlington County Sch. Bd. v. Smith, 230 F.Supp. 2d 704, 712 (E.D. Va. 2002), the Doyle decision is instructive on the meaning of according due weight to the administrative hearing. The SHO must examine the methods the hearing officer employed to reach his decision. See Doyle, at 105. When the hearing officer's findings of fact are "regularly made and entitled to prima facie correctness, the [SHO], if [he] is not going to follow them is required to explain why he does not." Id. However, when the LHO has "departed from the fact-finding norm to such an extent . . . the facts so found as a result of that departure are entitled to no weight." Id.

> The Fourth Circuit has also warned that the reviewing court is not to "substitute [its] own notions of sound educational policy for those of local school authorities," nor should the reviewing court "disturb an IEP simply because [it] disagrees with its content." *MM*, 303 F.3d at 531-32 (quoting *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 999 (4th Cir. 1997) and *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990)). Indeed, once a "procedurally proper IEP has been formulated, a reviewing court should be reluctant...to second-guess the judgment of education professionals." *Tice*, 908 F.2d at 1207. Instead, the court should "defer to educators' decisions as long as an IEP provided the child the basic floor of opportunity that access to special education and related services provides." *Id.*

Arlington County Sch. Bd. v. Smith, *supra*, at 712-713.

Of course, if the LHO has erred in his decisions as a matter of law, the reviewing person can reverse his decision without any constraints.

II. Findings of Fact

1. was born on

2. In , graduated from High School in , after earning all of the necessary credits and completing all of the requirements for a regular high school diploma in Virginia. graduated from High School with a regular diploma.

3. During his senior year ( ) at High School, was eligible for special education and related services as a student with a learning disability.

4. was clinically diagnosed with Attention Deficit Disorder ("ADD") and area of disability in IEP is classified as "other health impaired" [LEA 22 at 1].[1]

5. Throughout high school, participated in the general curriculum in regular education classes, advancing from grade to grade without much difficulty [LEA 51].

6. succeeded in passing all seven of the "Literacy Passport" and "Standards of Learning" ("SOLs") examinations and met all of the core requirements for graduation. passed several examinations at an advanced level [LEA 48, 60].

7. passed the SOLs and SATs, performing well by any standard without oral examinations or any other accommodations [C 6, at 8-12; see also I Tr. 36, 139 and 142].

8. An individualized education plan ("IEP") dated , was adopted for 's senior year at High School [LEA 22].

9. , who was at the time, signed the IEP on own behalf.

10. In this IEP, agreed that among the accommodations which could be utilized were "shortened assignments (when possible)", "extended time for tests and quizzes also (when possible)", "oral examinations (when possible)" and "access to keyboard/word processor (when possible)" [LEA 22, at 4].

11. also agreed in this IEP that would take the initiative and speak up when needed accommodations:

> will let teachers know accommodations in IEP and advocate more for self. will report to monitor teacher when accommodations are not being utilized in the classroom.

[LEA 22, at 2; see also LEA 22 at 3 and 8; and I Tr. 136 and 196].

12. Because participated in the general education curriculum in mainstream classes, certain core elements could not be waived or eliminated.

13. In U.S. and Virginia Government, received a "B+" for senior year. In Wind Ensemble, received an "A" [LEA 51].

14. In U.S. and Virginia Government, received few accommodations [I Tr. 71-72].

---

[1] References to exhibit numbers are designated either " " for or "LEA" for Public Schools. References to the transcript of the hearing are designated "___ Tr." with the volume number of the 3-volume transcript preceding the "Tr." and page number following it.

15. Extraneous factors diverted and distracted from academic pursuits in senior year.

16. missed at least 20 full days and parts of many other days of academic instruction during senior school year [LEA 70, last page].

17. had a friend, with whom would sometimes be seen cutting class, or checking self out [LEA 78].

18. Contrary to what had agreed in IEP, generally did not advocate for self concerning accommodations.

19. , contacted High School to express concerns about the accommodations being provided to under the IEP.

20. In response to 's concerns, the IEP team assembled on

21. At this meeting, an IEP Addendum was executed [LEA 23].

22. Again, signed the IEP Addendum on behalf of self [LEA 23 at 1].

23. At this meeting of the IEP team, 's IEP accommodations were reviewed and expressed dissatisfaction with the lack of accommodations being made by English teachers [LEA 23 at 2].

24. and presented a two-page document summarizing standard class policies and numerous English 12 class accommodations provided to [LEA 23].

25. The possibility of changing English teachers was discussed but not decided upon at the IEP team meeting [LEA 23].

26. Each of 's teachers in senior year exercised their professional judgment to provide accommodations to in accordance with IEP [I Tr. 136, 196, 252-255, 294-295; II Tr. 47].

27. Despite the universal and well-deserved accolades afforded to for efforts on behalf of , still only received a "D" for the second half of English 12 class.

28. As noted above, received a "B+" for class in U.S. and Virginia Government even though few accommodations were afforded in this class [C 87; see also I Tr. 65-67, 71-72].

29. Even though has complaints with 's implementation of the IEP, does not ask for any modification of grade in this government class because is satisfied with the "B+" [I Tr. 65-67; LHO Dec. at 18].

30. The LEA made a concerted and collaborative effort to address the concerns of 's father relating to 's education in senior year.

31. For example, in response to 's request, 's English 12 teacher was changed to during the second semester.

32. Two additional IEP meetings were convened to address and to attempt to resolve issues pertaining to 's outstanding assignments [LEA 24-26].

33. , the principal at High School, also personally intervened in an effort to broker a resolution of the issues concerning 's accommodations and grades.

34. met with and then with 's teachers to discuss the accommodations. then provided a proposal to about further possible accommodations beyond what believed was called for by the IEP. did not respond to this proposal [II Tr. 164-166, 170-172].

35. The requirements of notice to the parents concerning this proceeding were satisfied.

36. During senior year at High School, had a disability and needed special education and related services.

37. During 's senior year at High School, the LEA supplied FAPE.

38. The state review level hearing officer affirms and adopts the findings of fact of the local level hearing officer concerning 's junior year ( ) at High School.

39. During the three day due process hearing in this proceeding, "junior" year was only mentioned five times by witnesses other than and, in each of these instances, the implementation of 's junior year IEP was not addressed [II Tr. At 138, 191, 197 and 200].

III. Conclusions of Law and Decision

, by counsel, in cross-appeal raises two main issues: (i) whether the LHO erred in finding that failed to prove claim that the LEA did not comply with 's IEP during junior year at High School; and (ii) whether the LHO erred in changing 's English 12 grade from a "D" to a "D+" rather than a "C". See also SHO's Scheduling Order dated . argues that the LHO erred as a matter of law in both cases, arguing that the LHO wrongly assigned the burden of proof on this issue to the parent and providing mainly conclusory statements in support of contentions. The hearing officer affirms and adopts the decision of the LHO concerning 's junior year and declines to change 's English 12 grade to a "C" or even a "D+" for the reasons given below. Accordingly, 's cross-appeal of the LHO's decision is hereby denied.

The parties do not dispute that had a disability, that needed special education and related services and that was entitled to a free and appropriate public education pursuant to the Individuals with Disabilities Education Act ("IDEA") 20 U.S.C. §§ 1400 et seq., and Va. Code Ann. § 22.1-213-221 (1950), and the regulations promulgated thereunder. also concedes that the IEP which agreed to and signed on own behalf for senior year was appropriate.

, however, contends that IEP was not properly implemented during senior year, specifically contending that accommodations were not provided as required by the IEP. further contends that the LEA's failures to properly implement the IEP denied FAPE during senior year.

The law does not require that receive the optimal education available, nor even that the education provided allow to realize full potential commensurate with the opportunity provided to other children. Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, at 198, 102 S.Ct. 3034 (1982); Bales v. Clark, 523 F.Supp. 1366 (E.D.Va. 1981).

The usual Rowley analysis provides that 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 '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 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).

A small violation of IDEA's procedural requirements does not, without evidence of an actual loss of educational opportunity, constitute a failure to provide with a free appropriate public education. Rowley, *supra*; Hall v. Vance County Board of Education, 774 F.2d 629 (4th Cir. 1985); Tice, *supra*; Doe v. Alabama Department of Education, 915 F.2d 615 (11th Cir. 1990); W.G. v. Board of Trustees of Target Range School District, 960 F.2d 1479 (9th

Cir. 1992); Evans v. School District No. 17 of Douglas County, 841 F.2d 824 (8th Cir. 1988). Technical violations of IDEA procedures that do not deny the student FAPE are considered de minimis. See, e.g., Fairfax County Sch. Bd. v. Doe, Civil Action No. 96-1803-A (April 24, 1997); see also Roland v. Concord School Committee, 910 F.2d 983, 994 (1st Cir. 1990), cert. denied 499 U.S. 912 (1991); Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 982 (4th Cir. 1990); Spielberg v. Henrico County Sch. Bd., 853 F.2d 256, 259 (4th Cir. 1988); Hall v. Vance County Bd. of Educ., 774 F.2d 629, 633-635 (4th Cir. 1985); and Board of Educ. v. Brett Y, 155 F.3d 557 (4th Cir. 1998).

Concerning the issues before the hearing officer in this proceeding, there is no contention of and, indeed, no evidence of, serious procedural flaws in this proceeding that rise to the level necessary to constitute a denial of FAPE to . The IEP at issue in this proceeding was developed in compliance with the procedures set forth in IDEA and under Virginia law and any technical procedural violations do not rise to the level necessary to constitute a failure to provide with FAPE. Similarly, there is no contention that and, indeed, no evidence that 's IEP was not reasonably calculated to enable to receive educational benefit as mandated by IDEA.

The IEP was designed, amongst other things, to satisfy 's goal to graduate and to prepare for life after school [LEA 22]. The 1997 IDEA Reauthorization was signed into law on June 4, 1997. The U.S. Department of Education has provided its own summary of the main themes of the statutory changes concerning IEPs effected by the 1997 Reauthorization:

> The IEP requirements of the 1997 IDEA Reauthorization "emphasize the importance of three core concepts: (1) the involvement and progress of each child with a disability in the general curriculum including addressing the unique needs that arise out of the child's disability; (2) [involvement by parents, students, and teachers in making decisions]; and (3) the preparation of students with disabilities for employment and other post-school activities."

34 C.F.R. Part 300, Appendix A, Introduction (Emphasis supplied).

was when signed and agreed to IEP. The IEP contemplated, indeed mandated, instilling an element of personal initiative and accountability in . This approach for 's unique needs and situation was not only appropriate but prudent given the 1997 IDEA Reauthorization's heightened emphasis on preparing students for life after school and its strengthened provisions on accountability.

Everyone on the IEP team, including , and other persons, believed that instilling in a sense of personal responsibility and accountability was important for 's education in senior year. [See, for example, I Tr. 136, 247-248; II Tr. 8-9, 44-45, 234-235; III Tr. 48; LEA 22 at 2, 3 and 8.]

In Rowley, *supra*, the Court cautioned judges against imposing their view of preferable education methods upon school districts. Noting that courts lack the wisdom and experience necessary to resolve persistent and difficult questions of educational policy, the Court limited the permissible inquiry to determining whether the specified requirements of the Act were being met. Id. at 206, 102 S.Ct. at 3051.

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").

In a recent decision, the Court cautioned hearing officers not to 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).

Ten potential accommodations are specifically described in part 8 of 's IEP [LEA 22 at 4]. Four of these accommodations are followed by the qualifier "when possible" [LEA 22 at 4]. In Part 9 of 's IEP, the box opposite "General Education curriculum with modifications and accommodations as appropriate" is checked [LEA 22 at 4]. Clearly, the IEP contemplated that 's teachers would exercise their professional judgment to

determine appropriate accommodations for and this is precisely the kind of judgment and discretion vested in teachers which deserves deference.

In this proceeding, is alleging that the accommodations identified in IEP have not been implemented in regular education classes, thus denying FAPE. However, the record is clear that numerous accommodations, including several not specified on IEP, were provided or offered to . 's complaint reduced to its root cause is really that all ten of the specific accommodations were not used by all of teachers (with the exception of) at times which would have wanted and even though might not have communicated desire. This position is untenable. The IEP mandated that the teachers let develop the ability and confidence to speak up if believed needed a specific accommodation for a particular class or assignment [LEA 22 at 2, 3 and 8]. The teachers were aware of the accommodations in the IEP and even though did not advocate particularly well for self, the record is clear that each teacher provided or elected not to provide accommodations for , where appropriate, and within the permissible bounds of their professional judgment.

The hearing officer agrees with that 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.)

However, the issue is precisely whether the IEP has been implemented. The analysis concerning whether the IEP has been implemented does not require the reviewing officer to count the "trees" of individual accommodations to determine whether any have been missed, but to examine the "forest" and decide if there has been the legally required quantum of educational benefit.

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 IDELR 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).

After all, IDEA's main goal is to provide disabled students with an appropriate education, not merely an appropriate IEP. Ridgewood Bd. of Educ. v. Stokley, 172 F.3d 238 (3d. Cir. 1999).

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).

Concerning the content of IEPs, special education and related services are those that will be provided for a child (i) to advance appropriately toward attaining the annual goals; (ii) to be involved and progress in the general curriculum; and (iii) to be educated and participate with other children with disabilities and nondisabled children in the general curriculum. 34 C.F.R. § 300.347.

Inevitably any analysis of the standard of FAPE must begin with Rowley. The Rowley Court held that by passing the Act, Congress sought primarily to provide disabled children meaningful access to public education. Implicit in the legislative intent of providing access to FAPE is the requirement that the IEP confer "some educational benefit" upon the child for whom it is designed. Rowley, at 200.

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).

Because each child's potential must be taken into account to assess educational benefit, graduation in and of itself does not mean that FAPE was provided. This is precisely the type of bright-line test that the Rowley Court rejected. Nevertheless, Rowley recognized that "the achievement of passing marks and advancement from grade to grade will be one important factor

in determining educational benefit." 458 U.S. at 207 n.28; see also Houston Independent Sch. Dist. v. Bobby R., 31 F.3d 341, 349-350 (5th Cir.), cert. denied, 531 U.S. 817 (2000) (holding that consideration of grade advancement, test scores and progress in mastering subject areas was appropriate to determining educational benefit).

The record in this proceeding establishes that advanced from grade to grade, mastering significant general curriculum educational materials while in mainstream classrooms, and graduated High School with a regular education diploma in June . also succeeded on Literary Passport, SOLs and SAT examinations. Indeed, the LHO specifically found that " did receive educational benefit from senior year [LHO Dec. at 19]." Clearly, the record shows that received the necessary quantum of educational benefit from education during senior year at High School.

Some discussion of which party bears the burden of proof concerning this proceeding is necessary because this issue is contested by the parties.

Once a child is found eligible to receive special education and related services, as was, the LEA must provide FAPE to the child. Nevertheless, the SHO decides that the parents or child challenging the LEA's provision of FAPE to a student under an IEP, which all parties agree was developed in compliance with IDEA's procedural and substantive requirements, must prove their case upon a preponderance of the evidence. Accordingly, must prove upon a preponderance of the evidence that the LEA's alleged failures to implement the IEP denied a FAPE. Bales v. Clarke, 523 F.Supp. 1366, 1370 (E.D. Va. 1981); Alexander K v. Virginia Bd. of Educ., 30 IDELR 967 (E.D. Va. 1999); In re Fairfax County Public Schools, 20 IDELR 585, at 586-587 (SEA Va. 1991).

Allocating the burden of proof to the child or parents who are challenging an IEP or the implementation of an IEP, which all parties agree was developed in accordance with IDEA's procedural and substantive requirements, is consistent with the deference both IDEA and the courts exhibit for the considered decisions of local educators concerning educational matters, which are within their professional experience and expertise. Hartmann v. Loudoun County, at 1000-1001; Houston Independent Sch. Dist. V. Bobby R.; Tatro v. Texas, 703 F.2d 823, 830 (5th Cir. 1983), aff'd, 468 U.S. 883 (1984); Dong v. Bd. of Educ., 31 IDELR 157 (6th Cir. 1999).

For the reasons given herein, has failed to meet burden. Additionally, even if the burden was on the LEA to prove upon a preponderance of the evidence that it had provided with FAPE during senior year, the LEA has satisfied such burden in this proceeding.

The LEA has appealed the LHO's decisions that the LEA failed to implement the IEP and thus denied FAPE. The SHO decides that the LEA implemented 's IEP as designed and as required by applicable law. The SHO further decides that even if it could conceivably be decided that the LEA did not implement all accommodations as required by the IEP, such failures could not in any way be decided to constitute a failure by the LEA to implement the substantial or significant portions of 's IEP or to deny FAPE.

The LEA has also asked for review of the remedy provided by the LHO. Even if the LEA were found to have denied FAPE, this conclusion requires the LHO to determine what relief is appropriate. 20 U.S.C. § 1415(e)(2).

"Each LEA or parent of a child determined to have a disability, shall have the right to initiate a hearing when a disagreement occurs on matters relating to . . . the provision of a free appropriate public education for the child." Virginia Regulations § 3.4(A)(2). Clearly, the parent had a right to challenge the LEA's provision of FAPE to .

Under IDEA and its regulations, each party has the right to findings of fact and a decision. 34 C.F.R. 300.509(a)(5). Whether directly or after SEA review of that decision, each party has the right to bring a civil action in a state or federal court, which has the authority to "grant the relief that the court determines to be appropriate" [34 C.F.R. 300.512(b)(3). Emphasis supplied.] In Burlington Sch. Committee v. Dept. of Educ. of Massachusetts, 471 U.S. 359, 105 S.Ct. 1996 (1985), the Court held that under IDEA a court has broad authority to fashion appropriate relief to realize the purposes of IDEA, considering all equitable factors.

Since Burlington, OSEP and certain courts have stated that a hearing officer or state review officer has the same broad authority as a court to grant any such appropriate relief under IDEA. The reasoning is that for exhaustion of the administrative remedy to be meaningful, the party must be able to gain from it any "appropriate relief" which it could obtain once it gets to court. See for example, Letter to Kohn, 17 EHLR 522 (OSEP 1990), and Cocares v. Portsmith Sch. Dist., 18 IDELR ¶461, 462-463 (USDC NH 1991).

However, other courts appear to have cast doubt on the issue whether hearing officers or state review officers have at their disposal the full range of judicial remedies. For example, under the so-called Honig injunction, it is to the courts and not hearing officers that school officials must go to seek to obtain injunctive relief to remove a student with a disability from school or to change the student's current educational placement if the school district believes that maintaining the student in the current educational placement is substantially likely to result in injury to the student or others. Honig v. Doe, 108 S.Ct. 592, 606 (1988). See also, Roher v. District of Columbia, Cir. A. Nos. 89-2425, 89-2503, 1989 W.L. 330800, at *4 n. 7 (D.D.C. 1989) which can also be read to support the position that an administrative hearing officer has no power to issue an injunction, which that note suggests is solely a judicial remedy.

The remedy the parent is requesting in this proceeding, changing 's grades, is in the nature of a mandatory injunction, which seeks to alter the status quo. However, while the issue of whether a Hearing Officer can ever issue an injunction may be subject to question, it is not necessary for purposes of this proceeding to decide this broader issue.

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 education records, including grades, 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 when turned 18 the FERPA rights to access records and prevent non-consensual disclosure to third parties transferred to See also 34 C.F.R. § 300.574.

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 20-70-80(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 believes is inaccurate or misleading to be included with the student's file. 8 VAC 20-70-80(G)(8). The parent has not pursued this avenue of relief.

Grading student work is precisely the type of academic pursuit where educators have considerable expertise and experience typically lacking in non-academic reviewing persons and, accordingly, the educators' decisions are due deference by reviewing persons. Educators exercising their considered professional judgments to grade student work 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).

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)(1)(E). These statutory provisions are mirrored by the relevant provisions of the U.S. Code of Federal Regulations (34 C.F.R. §§ 300.506(a) and 300.504(a)(1) and (a)(2)) and by the Virginia Regulations (§ 3.4(A)(2)).

has the right to challenge the LEA's provision of FAPE to but the hearing officer lacks subject matter jurisdiction to change 's grades. Applicable law establishes a different procedure and a different, detailed legislative framework which must be followed concerning challenges to the student's grades. 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).

Concessions made by the complainants during cross-examination and the discussions between the LHO and the parties concerning the requested change in grades show the speculative nature of the relief afforded by the LHO and demonstrate why an administrative due process hearing under IDEA is not the appropriate forum to bring and decide a dispute concerning 's grades. See, e.g., II Tr. 380-387 and 390-398; III Tr. 45, 62-65; III Tr. 88-105.

Short of bringing a formal FERPA proceeding, High School has also established its own specific procedures for challenging grades at the high school, which include an appeal to the principal and ultimately a final decision by the LEA superintendent. I Tr. 199.

The LHO in deciding that did have the authority to change a student's grades, cited no case to support position [LHO Dec. at 18].

Concerning the review requested by the LEA, the LHO's decision was erroneous for several reasons. The LHO's findings lack support in the record, failed to defer to the considered judgment of the educational experts concerning the implementation of the numerous accommodations in 's IEP and erred in making decision as a matter of law.

As discussed above, the LHO erred as a matter of law in finding that had the authority to change 's grades. Furthermore, there was absolutely no evidentiary foundation in the record on which the LHO could possibly have based decision to grant a certain grade rather than another.

The LHO specifically found that " did receive educational benefit from senior year [LHO Dec. at 19]". The LHO also specifically found that "it would not be equitable or appropriate to require the furnishing of any compensatory educational services" in this proceeding [LHO Dec. at 19]. The central question in due process hearings is whether the student received an appropriate education. Rowley; Ridgewood Bd. of Educ. v. Stokley, 172 F.3d 238 (3d Cir. 1989). If a child is provided FAPE notwithstanding a technical violation of IDEA, the LEA has fulfilled its legal obligations. MM v. School District of Greenville County, 303 F.3d 523, 534 (4th Cir. 2002) (citing Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 982 (4th Cir. 1990) (citation omitted)). The LHO stated, during the hearing, "[t]o me, the question is not one of educational benefit; it is one of whether there has been either, under one view, strict compliance; or another view substantial compliance with the IEP... I don't think you can simply argue that got great benefit; that's not the point." (LHO, I Tr. 43-44).

The LHO missed the forest for the trees and erred as a matter of law. The LHO considered the perceived failure of teachers to provide all of the numerous accommodations in 's IEP as a per se denial of FAPE. However, 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., *supra*; Gillette v. Fairland Bd. of Educ., *supra*.

> 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 this error of law, the LHO erroneously adjusted 's grades for perceived technical violations of IDEA that did not deny FAPE during senior year at High School.

The LHO's findings are also entitled to less deference because failed to defer to the considered judgment of the educational experts concerning the implementation of 's IEP, and this despite the fact that 's IEP on its face required the teachers to utilize their discretion as to when it would be appropriate to accommodate [LEA 22]; Arlington County Sch. Bd. v. Smith, *supra*; Faulders v. Henrico County Sch. Bd., 190 F.Supp. 2d 849 (E.D. Va. 2002).

The LHO decided that " 's teachers were required to make the IEP accommodations when possible and when there was no impact upon core requirements [LHO Dec. at 5]". However, having decided this, the LHO inconsistently holds the teachers erred by not providing with each of the numerous accommodations in IEP. See, for example, the LHO's finding that " . . . provided substantially all of the accommodations required by 's IEP except for shortening 's assignments [LHO Dec. at 13]" and the LHO's finding that ' 's senior year teachers (except for) improperly substituted their own judgment as to whether or not needed the accommodations specified in IEP [LHO Dec. at 9]."

The LHO describes in great detail numerous accommodations provided by to in 's TV Production class [LHO Dec. at 13-14], but then still inexplicably proceeds to change 's grade from a "C" to a "B" [LHO Dec. 18].

attaches great significance to the fact that the longest statement concerning IEP mandated self-advocacy appears in IEP in a paragraph entitled "Parent Concerns" seeking thereby somehow to negate the self-advocacy component of IEP. This argument is a red herring. Firstly, the IEP mandates personal accountability and self-advocacy throughout. See, e.g., "[ ] will seek assistance as necessary [LEA 22 at 3]"; and "[ ] will make a more concerted effort to speak to teachers immediately when I feel like I'm becoming overwhelmed and falling behind [LEA 22 at 8]". Additionally, as discussed above, the record is clear that all the members of 's IEP team, including , considered self-advocacy and personal accountability to be an important component of 's IEP.

Each of 's teachers was aware of the components of 's IEP, including the need to instill in or in "IEP-speak" to implement its mandated components of self-advocacy and personal accountability for .

Even evidence relied upon by the LHO and to support their positions shows that each of 's teachers implemented certain of the accommodations afforded to by IEP. See, e.g., C 96. Certainly, each teacher implemented the accommodations differently and in varying degrees, but well within the permissible bounds of their professional judgment as to what was academically appropriate for their particular courses and for , taking into account both the IEP's requirement that be given the latitude to advocate for self and the considered discretion vested in the educators by the IEP and by law. The services required by 's IEP were provided in a coordinated and collaborative manner by the key educators.

The differences amongst the teachers in implementing 's IEP accommodations do not show neglect or indifference but rather the flexibility vested in the educators in implementing 's IEP accommodations, after taking all its components into consideration. This flexibility is the type of flexibility IDEA, Rowley and its progeny contemplate that educators need in order to go about the business of exercising their professional judgment, utilizing their unique skills and experience, to run the schools and educate the students.

The Complainant has attacked the credibility of the LEA's witnesses at the due process hearing below and has cast aspersions on the good faith of the LEA's legal counsel in advocating their proposed findings of fact and conclusions of law. See, e.g., complainant's opening brief at 15 and complainant's reply brief at 24. Suffice it to say that the SHO finds no basis for such attacks. It should also be noted that the LHO in decision made few findings of credibility, if any, whether explicit or implicit.

For the reasons provided above, the SHO upholds the LHO's decision in part and reverses the LHO's decision in part. The SHO upholds the decision of the LHO that failed to meet burden of proving upon a preponderance of the evidence that the LEA did not comply with 's IEP during junior year at High School (the school year). Reversing the LHO, the SHO decides that failed to meet burden of proving upon a preponderance of the evidence that the LEA failed to implement 's IEP during senior year at High School (the school year), thus denying FAPE. Further, the SHO affirmatively decides that the LEA provided FAPE during senior year at High School in accordance with the requirements of IDEA. Again, reversing the LHO, the SHO decides that the LHO lacked subject matter jurisdiction to change 's grades and that, in any event, there was no evidentiary basis in the record upon which the LHO could have founded decision to change the grades.

The decision made by the reviewing official is final and binding on all parties, unless any party aggrieved by the findings and decisions of the administrative review brings civil action in any state court of competent jurisdiction within one year or in federal district court. Virginia Regulations, § 11(b).

ENTER: / /

_____

, Hearing Officer

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