STATE OF NEW HAMPSHIRE

DEPARTMENT OF EDUCATION

In Re: IDPH-FY-07-02-049 / Kensington School District

DECISION

I. INTRODUCTION.

A Prehearing Conference was held on March 21, 2007 and a Prehearing Order issued that day. A copy of the Prehearing Order is incorporated herein. The issues to be determined at the Due Process Hearing which was held on April 9, 2007 and April 10, 2007 were IEP and placement. The District presented first by agreement of the parties.

II. PROCEDURAL VIOLATIONS.

The Parents made certain allegations of procedural violations. The District objected arguing that the procedural violations should have been enumerated in the initial request for the due process hearing. The objection was overruled. The procedural violations will be addressed in the body of the Decision.

III. DISCUSSION.

Jeanne Calias testified as the first district witness. Her Affidavit appears at SD Book 8001. Ms. Calias has worked with the Student (D.O.B., 02/25/97) since the Student was in kindergarten. She began implementing the current IEP after the previous hearing officer ruled in January, 2006 upholding the IEP for November, 2005 to November, 2006. She worked with the Student one half hour per week in class and one hour per week one-on-one. She worked on IEP goals and objectives, including, the speech language goals and writing goals. She also wrote the quarterly progress reports. In December, 2006 a new IEP was offered and Ms. Calias began to implement it after the Christmas vacation. Her time working with the Student remains the same with the new IEP. In her opinion, the Student has made excellent progress in all areas since the December, 2005 due process hearing occurred. Her Affidavit at SD 8005 references the LAC-III test results indicating that the Student was within the average range for phoenemic awareness and that between August, 2005 and October, 2006 the Student had risen from the thirteenth percentile to the thirty-ninth percentile. She also pointed out that the Landmark School LAC-III results (P136) from February, 2007 placed the Student in the sixty-first percentile. As such, she opined that the Student was making progress as evidenced by the LAC-III scoring. She also reviewed other testing including the SCAT which is an articulation probe that was administered by her several times over the school year, the scores at SD8011 and in Ms. Calias' opinion they showed progress between January and September, 2006. She was aware that the Parents were looking for a separate goal for articulation and felt that it was not necessary as the Student has mastered the articulation goals. Ms. Calais also reviewed other performances by the Student including the number of written words per minutes, which went from four (per minute) in March, 2006 to fourteen in January, 2007, the three minute writing sample which increased from thirty-three words to forty-four words between April, 2006 and January, 2007, and the spelling performance which also increased substantially between November, 2005 and January, 2007. Ms. Calais felt that the Student's writing has improved since January, 2006. With respect to social language in the IEP it was Ms. Calais' understanding the Parents wanted it included as a goal and she felt again that it was not necessary. In her opinion the IEP was appropriate and provided the least restrictive environment in order to provide FAPE to the Student. On cross-examination in review of the proposed IEP at SD 7206, Ms. Calais was asked why it was necessary to adjust the language level for the Student when speaking to the Student. Her response was that because the Student has a speech language impairment. The Parent argued in cross-examination that many of the assessments referenced in direct-examination were informal, however, the IEP provided for informal testing and Ms. Calais indicated that she did some formal testing and referenced her Affidavit from the last hearing (SD 2019 including the SELF). Ms. Calais felt that more standardized assessments were unnecessary because of all the measuring sticks that she used in working with the Student. She understood that the Parents distrusted/disbelieved the District's position regarding the Student's progress. In reviewing the three minute writing sample (P14) Ms. Calais was at best guessing at the words spelled by the Student, as they were not clearly spelled. In reviewing a spelling list at SD 8018 Ms. Calais agreed that the Student misspelled approximately one third of the words and that a lot of those

words were one or two letter words. Although there was redirect and re-cross-examination of Ms. Calais it yielded nothing beneficial to issuing a ruling in this case.

Whitney Schwartz testified as the second district witness. She is a special education teacher for the Student and has been since April, 2006. Her Affidavit is at SD 8018 and her Resume at SD 8116. Since April, 2006 the Student has been in the resource room eleven hours per week and that schedule continues. In addition, Ms. Schwartz began at some point to remain with the Student in the content area classes in the afternoon. She works with the Student daily one-on-one for one hour working on reading and with the Student at least one hour each afternoon working on reading and content areas and studying for tests. The class size is approximately sixteen to eighteen. Ms. Schwartz also works with the Student approximately one hour per week in math during the fourth grade curriculum. She uses the LIPS program, and it was her opinion that the Student has progressed past the LIPS program for reading fluency. In her opinion the Student has absolutely made meaningful progress between April, 2006 and April 2007. SD 8111 references a DRA test that Ms. Schwartz administered and which in her opinion showed progress. In addition, the reading fluency test showed progress (results at SD 8119 and 8120). The Student has strong reading comprehensive skills and listening comprehension skills. The Student appears to comprehend what the Student is reading in the core subjects. In the fall, 2006 the Student was not performing as consistently as the Student had previously and the Student indicated to Ms. Schwartz that the Student had been going to the Landmark School. Since early February Ms. Schwartz indicated that things are back to normal in terms of the Student's concentration and performance in school. The Student took the NECAP statewide testing in October, 2006 and the results are at SD 8405 which show partial proficiency in math and substantially below proficient in reading. She agreed that writing is weaker than reading but in her opinion the Student was making progress in writing. Ms. Schwartz was on the IEP team and believes the IEP is appropriate and will allow the Student to read and write across the curriculum. Placement at the local elementary school is appropriate in her opinion. The Student is happy at the school, has friends and is able to access the curriculum. Ms. Schwartz intended on visiting the Landmark School but was unable to due to a storm. She spoke to Karl at the Landmark School and discussed the tutorial which appeared to be similar to what the District is implementing at this time. With respect to Dr. Gear's letters (P1 and P2), Ms. Schwartz testified that Dr. Gear never contacted her and never requested that she complete a rating scale. She disagreed that the Student suffers from depression, and disagreed that the Student has behavioral issues.

On cross-examination Ms. Schwartz disagreed that during the period in which the Student was not performing to the Student's usually standards, that this was because of anxiety or depression. She acknowledged that the Student is not reading fluently at the fourth grade level. Ms. Schwartz indicated that she pre-teaches vocabulary words and math to the Student and acknowledged that the Student reads comfortably at the mid-second grade level, and was reading comfortably at the mid-first grade level in April, 2006 (approximately one year ago). Ms. Schwartz indicated that given the Student's profile (learning disability, ADHD, an speech language impairment) she looks at reading fluency and sees great growth over the period in question. The Student's father in cross-examination articulated his belief of meaningful gains. Ms. Schwartz felt that the IEP is appropriate for the Student to make progress in the curriculum and no additional goals are necessary.

Deb Hiney was scheduled as the next witness. The parties agreed that in lieu of her testimony her Affidavit would be submitted without cross-examination. That appears at SD 8029.

Dr. Joshua Gear testified on behalf of the family. He is a child adolescent and adult psychiatrist who is board certified, and has been practicing in Portsmouth since 1996. He indicated that with respect to the Student's "off days/months" that this was attributable to the Student clearly struggling academically due to the Student's learning disabilities. Dr. Gear indicated that academic, social and emotional performances are all tied and intermingled together such that if the Student is struggling academically his social and emotional development will be stilted. Dr. Gear also felt that being pulled out of class daily would create a stigma. With respect to the Student suffering migraine headaches, it was Dr. Gear's opinion that medication was not causing the headaches, but that they were probably caused by stress. In addition timed tests such as those in spelling and sentence formation could create more anxiety for the Student. He felt that teasing of a disabled child could have a devastating effect, and that this Student has been stigmatized by being pulled out of class causing devastating self esteem issues. Dr. Gear has treated several students who have attended Landmark School, and he then generalized about "schools teaching kids like the Student." In his opinion the Landmark's staff is very effective in treating

learning disabled students, and that such students can make gains in the short term both academically and emotionally. In his opinion the school district has tried mightily to address the Student's needs, however, Landmark is the necessary placement.

On cross-examination, Dr. Gear agreed that he has never visited the Landmark School and that he spoke to representatives of the school in the fall of 2006 for approximately five minutes. He could not identify who he spoke with, and he was not calling about this student but another student. With respect to the training of Landmark teachers, Dr. Gear relied on brochures, letters and the website. He was unaware of the high turnover rate of teachers at Landmark (SD8820). With respect to the local school, Dr. Gear never visited, never spoke to anyone at the school about the Student, nor did he ever seek information about the Student. He did write the two letter that are at P1 and P2. Although the Parents completed a checklist at his request, no teachers were asked to complete a similar checklist with respect to the Student. In addition, neither of Dr. Gear's letters recommends Landmark as a placement, nor identifies a specific intervention necessary. However, Dr. Gear maintained his position that learning disabilities were not being effectively addressed in the current IEP and placement, and that if more effective intervention is not undertaken there is a very high potential a social and emotional disaster. After a review of Dr. Gear's file, counsel for the District continued cross-examination and Dr. Gear agreed that he has reviewed no documentation from the school district since June, 2006, has seen no report cards, no IEP reports, has not reviewed any of the testing results from Ms. Calais and Ms. Schwartz, has not reviewed Ms. Hiney's report or testing, nor has he reviewed the Landmark reports. Essentially, it appears that Dr. Gear's information regarding the Student comes almost exclusively from reports from the Parents. With respect to allegations of the Student misbehaving at school, Dr. Gear did not verify any of these allegations with the school, and he could not recall anything specific. He did acknowledge that there were no discipline issues that he was aware of.

It is apparent to the Hearing Officer that while Dr. Gear may have the best intentions for the Student there is no substantive basis for his letters and recommendations, particularly with respect to the issue of placement at Landmark School.

Patricia Dowey testified on behalf of the District. She is the Special Education Administrator at S.A.U. 16. On December 12, 2006, the school district first received Dr. Gear's letter of October, 2006. There had been meetings on October 31, 2006 and November 28, 2006, yet the letter had not been disclosed. When the District received Dr. Gear's letter the District requested a release from the Parents to communicate with Dr. Gear and the Parents refused. Dr. Gear's second letter was not provided to the District until the Exhibits were exchanged for this hearing. The Parents sought a release to obtain records from Dr. Oxnard, the Student's primary care physician and the Parents refused until the discovery phase of this case. Ms. Dowey indicated that the Landmark School is not on the list of approved out-of-state special education schools. With respect to the list of procedural violations, Ms. Dowey denied PV No. 1 that the District failed to implement the court ordered IEP until April, 2006. With respect to PV No. 2 (allegation that the District changed the court ordered IEP without permission of the court or Parents), Ms. Dowey indicated that she had no idea what the Parents were referring to, and further indicated that the Parents agreed to extend the old IEP through the Christmas vacation. A proposed IEP was sent to the Parents on December 12, 2006, and there was no response. With respect to PV No. 3 referencing the three year evaluation, Ms. Dowey denied that there was any procedural violation with respect to not doing the three year evaluation early. PV No. 4 alleges that the Parents were not allowed to participate in development of IEP, and Ms. Dowey denied that and indicate that there were extensive meetings beginning in July, 2006 at which the Parents did participate, and that the Parents choose not to attend a meeting on October 31, 2006. With respect to PV No. 5 (that the IEP is inadequate), Ms. Dowey denies inadequacy. With respect to PV No. 6 (holding a meeting without the Parents after the Parents canceled), Ms. Dowey indicated that she offered to extend the prior IEP and the Parents agreed. With respect to PV No. 7 (allegation that Ms. Dowey stated at a meeting with the superintendent that "there was no way that our IEP team was going to agree to an out of district placement for the Student"), Ms. Dowey indicted that she was present at the meeting and said that the team would not consider an out of district placement if the Student was making progress in district. She felt that the Landmark School was too restrictive, too far away, had only disabled students and as such was more restrictive than necessary under the federal statute and regulations.

On cross-examination there was extensive and lengthy discussion regarding the three year evaluation. However, the Hearing Officer finds and rules that there was no procedural violation in not

agreeing to move the three year evaluation up. The Hearing Officer further rules that the Parents have failed to establish that any of the seven alleged procedural violations occurred.

The Parents called Paul Flynn, Associate Superintendent of School for S.A.U. 16. He recalled a meeting at the superintendent's office on July 24, 2006. He indicated that the District was willing to go to Mediation, and he did not recall Ms. Dowey talking about using Mediation to allow the Student to attend Landmark. He acknowledged receiving documentation from the Parent indicating that the Student had been accepted to Landmark. As to why Ms. Schwartz took over the Student's case in the spring of 2006, Mr. Flynn indicated that it was not his decision to make. There was further discussion regarding a letter of settlement from Attorney Zelin, however, the Hearing Officer finds and rules that the discussion is not pertinent to a decision in this case.

Susan Fife also testified at the request of the Parents. She was a Student Special Education teacher until April, 2006. There was a volunteer who read to the class during that period. Between January and April, 2006, a majority of the time spent with the Student was one-on-one. With respect to P30, the results of the GORT testing, this witness agreed that the results were accurate and were a reflection of the Student's rate fluency and accuracy. The matter was submitted at the conclusion of Ms. Fife's testimony. Neither Parent testified.

IV. REQUEST FOR FINDINGS OF FACT AND RULINGS OF LAW.

The Parents submitted a Request for Findings of Fact containing 123 separate paragraphs. Requests Nos. 1 through No. 52 all predate even the prior due process hearing. As such, those requests are neither granted nor denied. They are denied to the extent that they are inconsistent with the decision below and granted to the extent that they are consistent. Essentially, they are of historical value only. Request for Findings of Fact Nos., 53, 54, 63, 70, 72, 74, 75, 77, 80, 81, 82, 87, 88, 90, 91, 93, 94, 97, 98, 99100, 101, 109, 110, 112, 113, 114, 115, 119, 121, and 123 are granted. Request for Findings of Fact Nos., 55, 56, 57, 58, 59, 60, 61, 62, 64, 65, 66, 67, 68, 69, 71, 73, 78, 79, 83, 84, 85, 86, 89, 92, 95, 102, 103, 104, 105107, 108, 111, 116, 117, 118, 120, and 122 are denied to the extent that they are inconsistent with the decision below and granted to the extent that they are consistent. The Hearings Officer points to many multi sentence requests and neither grants nor denies these requests because portions are clearly such that they should be granted, and others denied, Request for Findings of Fact Nos., 76, 96, and 106 are denied.

The School District submitted a mixed submission of Request for Findings of Facts and Rulings of Law. They are ruled upon as follows. Request Nos. 12, 21 and 22 are neither granted nor denied to the extend that they are inconsistent with the decision below, they are deemed to be denied to the extent that they are consistent, they are deemed to be granted. All other requests are granted.

V. RULING ON PROCEDURAL VIOLATIONS.

The Parents have failed to establish that the District committed any procedural violations, particularly the seven that are enumerated in the list of procedural violations submitted by the Parents.

VI. DECISION.

The Hearing Officer is persuaded by the testimony and Affidavits of the School District witnesses, that the District has offered an appropriate IEP designed to provide FAPE to the Student and that the in district placement is the least restrictive environment for the Student which would allow the Student to make reasonable progress. The Hearing Officer is further persuaded that the School District complied with the procedural requirement of IDEIA and that the IEP developed was reasonably calculated to enable the child to receive some educational benefit. Board of Education v. Rowely, 458 U.S. 176 (1982). It is established law that the IDEIA sets modest goals which emphasize an appropriate rather than an ideal education which requires an adequate rather than an optimal IEP. Lenn v. v. Portland School Committee, 998 F.2d. 1083 (1st Cir. 1993). The Parents' case relies primarily on the two letters and the testimony of Dr. Joshua Gear. However, the Hearing Officer finds that there is no substantive basis for Dr. Gear's opinion that the Landmark School is the appropriate placement (see, discussion regarding Dr. Gear's testimony and comments therein). In addition, while the Hearing Officer is persuaded that Dr. Gear is concerned for the best interest of the Student, the IDEIA, as referenced above, sets a much more modest framework. It is also noteworthy that neither parent choose to testify in support of their position relative to the appropriateness of the IEP or the in district placement. There is ample support in the testimony and Affidavits of the district witnesses that worked with the Student and conducted both formal and informal testing that the Student has made adequate progress and that the IEP would provide the Student with FAPE. The Parents called no one from Landmark School to testify about

its program or the appropriateness of the program for the Student. In addition, Dr. Gear's interactions with representatives of the Landmark School consistent of approximately a five minute telephone conversation relative to another student. There is no disagreement that the Landmark School is considerably more restrictive in the continuum of placements than the local school. The Parents have established no basis to support a finding that the local school was inappropriate or that the Landmark School is appropriate. For all of the above reasons the Hearing Officer rules and finds that the IEP proposed by the District and challenged by the Parents is appropriate and will provide the Student with FAPE in the least restrictive environment. The District is the prevailing party.

VII. APPEAL RIGHTS.

If either party is aggrieved by the Decision of the Hearing Officer set forth above, either party may appeal this Decision to a Court of appropriate jurisdiction. The Parent has the right to obtain a transcription of the proceedings from the Department of Education. The District shall notify the Commission of Education when either the District or the Parent seeks judicial review of the Decision.

VIII. STATEMENT OF COMPLIANCE WITH ED-1128.22 (B).

If neither party appeals this decision to a Court then the District shall within ninety (90) days provide to the Office of Legislation and Hearing (Department of Education) and the Hearing Officer a written report describing the implementation of this Decision and provide a copy to the Parents. If the Parents do not concur with the District's report, the Parents shall submit their own report through the Commission of Education.

SO ORDERED.

Dated: 5/7/07
John P. LeBrun, Hearing Officer