

**State of New Hampshire
Department of Education**

IDPH-FY-06-09-016 / Kensington School District

DECISION OF THE HEARING OFFICER

I. Background

A due process hearing was held in this matter on December 2, 2005 and December 5, 2005 . At the hearing, the Petitioners, ..., the parents of the student, were represented by Attorney Sheila Zakre. The Kensington School District was represented by Attorney Gerald M. Zelin.

Both parents testified in support of their Complaint. In addition, the Parents presented the testimony of two expert witnesses, Elaine Holden, PhD and Linda Hanrahan, PhD. The School District presented the testimony of four witnesses, Barbara Switzer, Cindy Culver, Pat Dowey and Deb Hiney. The School District also submitted affidavits from these four individuals as well as the affidavits of Jeanne Calias, Susan Fife, Wendy Lawler and Carrie McDonough. Both parties also submitted a voluminous number of documentary exhibits the most salient of which were referred to during the live witness testimony.

On December 14, 2005 the Hearing Officer received the parties agreed-upon post-hearing submissions. A review of all timely submitted evidence and legal authority mandates that judgment be issued in favor of the School District . The basis of this decision is set forth in the following findings of fact and rulings of law.

II. Findings of Fact

At issue in this matter are student's 2005-2006 IEP and placement. The School District has proposed an IEP effective November 2005 with placement at Kensington Elementary School . The Parents are unwilling to sign the proposed November 2005 IEP and are requesting placement at the Landmark School with interim services being provided at the Reading Foundation. Currently, the School District continues to implement the November 2004 IEP and Student's stay put placement is Kensington Elementary where Student is now in the third grade.

.... IQ testing results indicate that Student is of average intelligence. However, Student's reading skills are significantly below ... grade level and Student, in short, is a struggling reader. In 2001, Student was identified at the age of 4 by the Kensington School District as a child in need of special education and coded developmentally delayed and speech/ language disabled. The initial IEP commenced on July 10, 2001 with services starting with Student's attendance at extended school year programming from July 10, 2001 to August 9, 2001 and continuing into preschool at the Rye Country Day School with additional special education programming beginning there in September 2001. Student's 2002-2003 IEP began on February 5, 2002 at which time ADHD was added to the IEP as an area of disability. Student's 2002-2003 IEP included extended school year programming during July and August of 2002 of one hour of speech/language therapy per week and continued into kindergarten where Student attended a mainstream kindergarten class for 2 ½ hours per day and received two-hours per week of special education services. This program was comprised of 1 hour of speech/language therapy out-of-classroom and 1 hour of special education in class or group.

Student's 2003-2004 IEP took effect on April 17, 2003 at which time Student began receiving 4 hours per week of programming. During the summer of 2003, Student attended an extended school year program of 3 hours per day 3 days per week. Due to a conflict with a family vacation, Student attended 2 out of 4 weeks of the ESY program. Beginning in September 2003, Student was placed in the mainstream first grade classroom at Kensington Elementary School and received one hour per week of speech and language therapy and 3 hours per week of special education in the resource room.

At a May 27, 2004 team meeting it was noted that Student had not met the IEP goals and that continued work on these goals was needed. The team also noted that "Student has an extremely difficult time manipulating sounds to form a word" and "... phonemic awareness is very weak". At the May 27th meeting the team agreed to extend the IEP until the completion of Student's triennial evaluation, which was scheduled for September 2004. It was also agreed that Student would attend an Extended School Year program from June 29, 2004 through July 27, 2004 .

Student's first grade report card from June 2004 indicates that Student "had a good first grade year", "is a hard worker who enjoys actively taking part in class discussion and activities" and "in reading this quarter...has made strides with letter/sound and sight word recognition". Student's first grade teacher, Ms. Mosher also noted that she "highly recommended that Student continue to work on these skills this summer". Ultimately, Student did not attend the ESY program but ... parents did arrange for eight private speech and language tutoring sessions for Student and ... younger sister. This tutoring was provided by Jeanne Calais, Student's speech and language pathologist at Kensington Elementary School .

In a letter dated September 6, 2004, Student's Parents wrote to Susan Fife, Student's case manager at Kensington Elementary to advise her that they would be "requesting some specific changes" at the upcoming team meeting. More specifically, the Parents advised that "over the summer we engaged Jeanne Calais's services in working with Student...in the LIPS program and were very impressed with the gains...made". The letter concluded with a request for one hour per day of individual tutoring in LIPS stating "we would prefer utilizing the services of Jeanne Calais, but would be happy to take anyone else that has the same credentials." At the September 16, 2004 team meeting, Jeanne Calais confirmed Student's progress reporting that Student's reading test scores had risen from June 2004 to September 2004. It was agreed by the team that Student would receive one hour of speech therapy per week and five 45-minute periods per week in the resource room with a group of six children or less.

In October 2004 the School District conducted its triennial evaluation of Student. The team reviewed the results of a battery of tests administered by Susan Fife, Jeanne Calais and School Psychologist Frank Spencer and concluded that Student's "reading and writing scores [were] significantly below what would be expected given ... ability" More specifically, the tests indicated that "Student exhibits disorders in the areas of receptive language, language content and language structure" and "weaknesses in ... overall phonological awareness skills". Ms. Calais also noted that Student's strengths included expressive vocabulary and word association, "skills that are very important in learning and retaining classroom vocabulary". Ms. Calais and ultimately the team recommended that Student continue to receive speech/language therapy "to enhance ... receptive language, social language, language content and structure [and] articulation/voice as well as improving overall phonological awareness".

In November 2004 a new IEP was agreed to for the period from November 9, 2004 through November 9, 2005 , covering Student from second grade into third grade. This IEP continued

accommodated placement in the mainstream grade level classroom (Student's second grade class consisted of 14 students, 3 of whom were receiving special education services) and provided for 4 hours per week in the resource room, 1 hour per week of speech/language therapy and 30 minutes per week of staff consultation. This IEP also included a third code, "specific learning disability". For purposes of tracking Student's reading progress, the team agreed to administer the DRA and Woodcock Johnson tests at year-end.

In March 2005, the Parents obtained an independent evaluation by Dr. Linda Hanrahan, a speech/language pathologist. The "reason for referral" was a parental "concern that Student may not be receiving enough support services and direct special educational programming in order to be successful in his academics". Dr. Hanrahan affirmed the validity and reliability of the school district's October test results noting that the Student's performance on the Test of Word Knowledge that she administered was "consistent with previous testing" of the School District. Dr. Hanrahan concluded that Student was a "severely language impaired individual" and recommended that Student receive "a daily, individual tutorial that is designed to remediate deficiencies in basic skills such as phonemic awareness, word structure, grammatical expression, reading and spelling". Dr. Hanrahan specified that "it is important that Student's tutor use a multisensory structured language approach" and concluded that Student should also receive direct speech and language therapy services for a period of approximately 90 minutes per week.

Dr. Hanrahan conceded in her trial testimony that her March 2005 recommendation of special education services did not differ substantially from the services being provided by the School District in the 2004-2005 IEP. She also opined, however, that if the student does not make progress under the School District 's program then a change would be indicated. In May 2005, after reviewing Dr. Hanrahan's report the team concluded that Student qualified for the Extended School Year program and that placement should continue at Kensington Elementary School in the fall of 2005. A four-week summer program was offered by the School District but due to conflicts with summer camp and a family vacation Student only attended the ESY program for 2 days during the summer of 2005. In June 2005, the team specifically rejected the Parents request for placement at the Landmark School citing Student's continued progress at Kensington Elementary. At that same meeting, Dr. Spencer noted that Student was "on the verge of a major gain" and that was one reason why the option of maintaining his skills via the summer program was recommended.

The preponderance of the evidence submitted by the parties indicates that Student has, in fact, made significant progress in his speech and language skills and in reading during his second and third grade years. Wendy Lawler, Student's second-grade teacher stated via affidavit that Student's knowledge of the alphabet, reading and writing skills all improved during the second grade and that Student was successfully implementing a word decoding strategy ... had been taught. She also observed that Student was reading better this fall in third grade than ... was this past June in second grade. Jeanne Calais, Student's speech and language pathologist at Kensington Elementary School since kindergarten, presented in her affidavit more objective evidence of significant progress. From July 2004 through May 2005 Student increased ... word recognition skills in one particular "word packet" from zero words recognized to being able to "accurately and quickly read aloud 94 out of 117 words". When the word packet was expanded in June 2005, Student was able to read correctly 148 out of 175 words and, subsequently, 160 out of 200 words. Ms. Calais also reports that she continues to work regularly with Student on "articulation, some components of the LIPS program (such as vowel circle), sentence formulation [and] spelling".

Ms Calais opines that Student has made substantial progress from kindergarten until the present in all areas that she has worked with him. More specifically, Ms. Calais states that, Student has improved significantly in each of the following areas: articulation, grammar, knowledge of concepts and the words attached to those concepts, paying attention, speaking too loudly in class, social language and impulsivity. Ms. Calais reports that Student “has now mastered many objectives in the November 204 IEP that he had not mastered by June 2005”. In addition, Ms. Calais indicates that her testing of Student supports her conclusion of substantial progress, citing, for one example, significant

gains in the results of Student's Phonological Awareness Testing. The results of tests conducted by other team members, such as the DRA and the Woodcock Johnson, also indicate significant progress.

Susan Fife, Student's special education resource room teacher, testified via affidavit that Student progressed from “non-reader” status in September 2004 to “reading basic primary phonics books” by June 2005. Both Ms. Calais and Ms. Fife attribute any early-third grade setbacks in Student's progress to regression from the failure to receive the recommended Extended School Year services during the summer of 2005.

As for the current school year, Deb Hiney the school district's literacy consultant has tested Student's reading ability and, in a report dated November 22, 2005 , found that from September 2005 to November 2005 Student's reading rate increased from 21 to 26 words per minute with 80% accuracy. Ms. Hiney opined that this Rate of Improvement was within the range of expected gains for a struggling reader like Student whose baseline test results were below the 25th percentile.

On October 25, 2005 the team met to review Student's November 2004 IEP, which was due to expire on November 9, 2005 . The team then offered a new IEP effective November 2005 that would increase Student's resource room time for reading and writing instruction to 11 hours per week, authorize an additional 30 minutes per week of speech and language therapy with Jeanne Calais and provide for periodic consultation with School District literacy-consultant Deb Hiney. It is the opinion of the School District team that the proposed November 2005 IEP is appropriate and, if implemented, would be the least restrictive alternative likely to lead to additional significant progress for Student. Further, the School District has made an offer of judgment in which the IEP has been expanded to include one additional hour per day of one-on-one reading instruction in the resource room.

The Hearing Officer accepts as credible the foregoing expert opinion evidence submitted by the School District , opinions which are primarily being given by experienced professional educators who have worked with Student regularly over a significant amount of time. The testimony and report of Elaine Holden, to the extent it differs with the School District 's assessment of Student and its proposed IEP, is not credited by the Hearing Officer. Although she is an amply qualified Reading Consultant, Dr. Holden's report and testimony were based primarily upon testing and observation of Student conducted on August 16 and August 18, 2005 . Due to the strong likelihood that Student had regressed in his reading ability over the summer, Dr. Holden's August 2005 testing results are not likely to be indicative of Student's actual reading skills. To the extent that Dr. Holden bases the opinions she testified to on a classroom observation of Student conducted in November 2005, those opinions are not admissible for failure to comply with the five-day prehearing disclosure rule. Moreover, even if the opinions were considered admissible, due to the brevity and atypical nature of the observation, it would not be a sufficient basis to override the opinions of the School District 's professional educators.

In addition, due to its informal nature and non-professional protocol and setting, the Hearing Officer did not find the November “home video” of Student reading aloud to be a reliable basis for determining Student's actual reading level. Accordingly, the Hearing Officer does not credit any opinions of Dr. Holden relative to the alleged significance of that video.

The School District 's Requests for Findings of Fact are ruled upon consistent with the above factual findings. Accordingly, Requests # 's 1 – 50, 52 – 65, 66 (second and third sentences only), and 67-86 are GRANTED. Requests #'s 51 and the first sentence of #66 are denied.

III. Rulings of Law

In light of the foregoing factual findings, the legally mandated outcome of this hearing is clear. The Parents in this case, having sought relief via the administrative hearing process, carry the burden of persuasion under the IDEA. *Schaffer v. Weast*, ___ U.S. ___ (November 14, 2005). As a result, the Parents must show by a preponderance of the evidence that the November 2005 IEP and placement proposed by the School District are not “reasonably calculated to enable the child to receive educational benefits”. See *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982). The parties differ, however, as to whether or not this standard for a free and appropriate education under the IDEA requires that the educational benefit conferred be “meaningful”. Contrary to the assertion of the Parents, the School District maintains that the proposed IEP and placement is not required to confer “meaningful” educational benefits “to the extent that ‘meaningful’ means anything more than ‘some’”. *J.S.K. v. Hendry County School Board*, 941 F. d 1563, 1572 (11 th Cir. 1991).

Regardless of which of these two standards is applied, it is likely from the significant progress made by Student since beginning the second grade, that the School District's proposed November 2005 IEP and placement is reasonably calculated to confer not only “some” educational benefit but a meaningful educational benefit as well. Given the central importance of reading to Student's education, if Student does not continue to progress as expected in grade three, an alternative placement may possibly become appropriate for grade four. However, under the current facts of Student's case, a administratively ordered placement outside of Kensington Elementary School would be premature. In addition, as continued placement at Kensington Elementary School is less restrictive than the Parents proposed alternative placement, the School District 's proposed placement is appropriate on that basis as well. See NHCAR Ed 115.04(b), *see also, Roland M. v. Concord School Committee*, 910 F. 2d 983 (1 ST Cir. 1990)..

The School District 's Requests for Rulings of Law are ruled upon consistent with the foregoing legal rulings. Accordingly, Requests #'s 1, 4-11 and 15 – 22 are GRANTED. Request #'s 2, 3 and 12-14 are denied due to mootness.

IV. Order

For the reasons set forth above, the Parents request for relief is denied and the School District 's proposed November 2005 IEP and placement shall be implemented in accordance with this Decision.

V. Appeal

In accordance with RSA 186-C, this Decision may be appealed to a court of competent jurisdiction pursuant to 20 U.S.C. Section 1415(e) within 120 days from receipt of the final decision. RSA 186-C:IV.

Date: January 4, 2006

Peter T. Foley, Hearing Officer