

Special Education Due Process Hearing Decision
Cape Elizabeth v. Parent

CASE NO: 99.015

REPRESENTING THE SCHOOL: Eric Herlan, Esq.

REPRESENTING THE PARENT: Richard O'Meara, Esq.

HEARING OFFICER: Carol B. Lenna

This hearing was held and the decision written pursuant to Title 20-A, MRSA, 7207 et. seq., and 20 USC 1415 et. seq., and accompanying regulations.

This hearing was requested by the Cape Elizabeth School system on January 21, 1999. The case involves the Student, whose date of birth is xx/xx/xx. She resides with her mother. The Student is eligible for special education services under the category of learning disabilities. The Student is currently attending school at the Landmark School, a private special purpose school for learning disabled students in Massachusetts. The Student's placement at Landmark was the result of a unilateral decision by the mother.

At the request of both parties, the dates for the prehearing conference and the original date for hearing were rescheduled several times. The parties met in a prehearing conference on March 1, 1999 to exchange documents and lists of witnesses, and clarify the issues for hearing. The hearing convened on March 10, 11, 17 and 23. The school entered 312 documents into the record; the parents entered 116. Fourteen witnesses testified. The hearing record was left open until March 30, 1999 for the submission of closing arguments.

Following is the decision in this matter.

I. Preliminary Statement

The case involves a xx-year-old student who is eligible for special education services under the category of learning disabilities. She is currently attending school at the Landmark School, a private residential, special purpose school for learning disabled students in Massachusetts. Her placement at Landmark was the result of a unilateral decision by her mother.

The school requested this hearing. It was the contention of the school that it has in place an individualized education program which is reasonably calculated to provide the student with a free appropriate public education in the least restrictive educational environment, and they are prepared to implement that program should she return to the public school. It is further their contention that the student made reasonable progress in her area of disability in the programs provided to her during the years she attended the school in the district.

It was the contention of the parent that the student showed little progress in areas of academic need during the years from 1995-1998. She argued that this lack of progress had a negative effect on the student's emotional health. The parent further argued that the student's social/emotional needs were not being met, leading her to become significantly depressed. The parent contended that she had little choice but to place the student at the Landmark School. She stated that the student has made dramatic progress during her tenure at Landmark.

II. Issues to be Decided by the Hearing

1. Is the IEP, developed for the student on October 14, 1998, reasonably calculated to provide her with a free appropriate public education in the least restrictive educational environment?
2. Were IEPs developed for the student during her 5th, 6th, and 7th grade years reasonably calculated to provide her with a free appropriate public education in the least restrictive educational environment?
3. Is the parent entitled to reimbursement for the tuition, room, board, transportation, and related costs associated with the student's 1998-99 unilateral placement at the Landmark School?

The parent makes no claim of procedural violations.

III. Findings of Fact

1. The student became a resident of the school district in the fall of 1995, as a 5th grade student. (Testimony: LaBrie, Parent)

2. The student is identified as learning disabled. Scores on standardized intellectual assessment reveal average cognitive ability. Achievement test scores show below average results in basic math skills, basic writing skills and reading decoding and encoding skills. (Exhibits: 311; 44-60; 260-277)
3. The student was initially referred to the PET in May 1991 as a kindergarten student when her parents were residents of a neighboring school district. She was referred for evaluation. Results of testing to assess her cognitive potential were “inconclusive” due to the student’s “distractible behavior and inability to remain focused”. Overall, she scored in the “average”, to “above average”, range on all sub-tests except one. She was found to exhibit considerable weakness in abstract verbal reasoning. Speech and language testing indicated she had “language skills within the average to above average range for her age”. The PET did not conclude that she qualified for services as a disabled student, but determined to meet again in March 1992 to reassess her progress. (Exhibit: 278-296)
4. The PET met again in June 1992 to review the student’s progress and to discuss the results of an independent evaluation obtained by the parent. It was determined that she did meet the eligibility criteria as a student with a learning disability. An IEP was developed for her second grade academic year. The student remained in special education programs in this district through 4th grade. (Exhibit: 255-259; 260-277; 240-249; 131, 132)
5. In September 1994, as the student was entering 4th grade, the parent again obtained an independent evaluation. Results of this evaluation found that the student had “overall cognitive abilities ...strongly in the average range”, but had a “difficult time applying linguistic decoding strategies”, and was a “dysfluent reader”. The evaluation found that the student’s written expression was “creative and focused”, but lacked the mechanics of writing. Her “overall level of skills in mathematics [was] delayed, with skills demonstrated...like those of a mid-grade2/early grade 3 student”. (Exhibit: 173-205)
6. The student entered the Cape Elizabeth Middle School in 5th grade. The PET met on October 11, 1995 to develop an IEP for that school year. That program provided the student with 7.5 to 8.5 hours of special education instruction each week for language arts, math and support of content area subjects. Approximately 76% of her time each week was in regular education. Annual instructional goals focused on improving word identification strategies, writing mechanics, math reasoning and computation skills, and becoming more responsible for content area support strategies. (Exhibit: 126-130)
7. Her 5th grade special education teacher testified that the student did not meet all goals and objectives in her IEP but made progress in all areas. She stated that this progress was determined by teacher assessments and analysis of written work. She testified that the progress notes in the IEP reflect this growth. The student was described as a student engaged in her work who interacted appropriately in the educational setting. (Testimony: Mullin; Exhibit 129-130A)
8. The PET met on October 16,1996 to develop an IEP for the 6th grade school year, 1996-97. Special education instruction was increased an hour a week, up to 9 ½ hours, again for language arts, math and support of content area subject.

Approximately 72% of her time was assigned to regular education. The annual goal and objectives in reading decoding and encoding reflected the use of the Wilson Reading Program. Writing mechanics, math reasoning and fluency in math concepts and computation skills were again included as goals. Special education support to achieve a goal of maintaining achievement in academic subjects of science, social studies and Spanish was again included in the IEP. (Testimony: Mullin, Doan, Rusk; Exhibit: 118-124)

9. The student began the Wilson Reading Program in September 1996. She began at Level I and progressed into Level IV. Pre and Post testing comparisons, using the Woodcock-Johnson Reading Mastery, demonstrate that the student showed progress in “word identification”, “word attack”, “reading vocabulary” and “passage comprehension”. “Broad Reading” showed growth from the 3.1 grade level to the 4.3 grade level. (Exhibit: 106-107; Testimony Mullin)
10. The student’s 6th grade social studies and homeroom teacher testified that the student was successful in his class, and was a solid B student, mastering the same material as non-disabled students. He described her as able to participate and learn well with the support provided. She was able to participate meaningfully in cooperative learning projects. The teacher stated that he was aware that the student was not as socially successful as she wanted to be. He went on to describe her as having good social skills with adults, with a good sense of humor who was a distinctive and flamboyant dresser. He did not view her as depressed or distressed about her school experience. He was aware that the parent had concerns about the student’s social/emotional well-being. He testified that as a result he “kept an eye on her”. He observed the student to lack social confidence with the “popular group”, but that generally she was accepted by her peers. He testified that a letter written by the student expressing sadness about her dyslexia and lack of peer support did not reflect the student he saw each day in school. (Testimony: Doan; Exhibit: P74)
11. The student’s 6th grade special education teacher testified that she provided special education instruction in written language, math, independent reading and regular classroom support, and that the student showed progress in the goals set for her in the 1996-97 IEP. Using the “analytic writing scale” to review the student’s written work, she determined that the student made progress in the mechanics of writing over the year. The teacher met regularly with the student’s regular education teachers to develop appropriate support materials to assist her to succeed in those classes. She testified that the student took tests in her classroom, and that the student demonstrated mastery of the material tested. She testified that the student’s 6th grade reading log was representative of her independent reading level of mid-third to early fourth grade, and an instructional reading level of mid-fourth grade. (Exhibit: 1, 121-124, 144; Testimony: Rusk)
12. The school conducted the student’s triennial testing in October 1997. Tests included the Woodcock-Johnson Tests of Cognitive Abilities and the Woodcock-Johnson Tests of Achievement-Revised.
 - The student attained standard scores (ss) “solidly within the average range” on tests of cognitive ability. Her “strongest scores were in the areas of Comprehension/Knowledge (ss 106), Short-Term Memory (ss 103), and

Auditory Processing (ss 100)". The student's "weakest scores were in the areas of Visual Processing (ss 86) and Processing Speed (ss 79)" suggesting "that it may be difficult for the student to perform when material is presented in a primarily visual fashion", and that she "will require additional time to complete everyday academic tasks".

- Achievement testing indicated significant deficits in the areas of reading, written language and mathematics. Standard scores attained in reading subtests indicate performance in the "low" range in Word Identification (ss 79), and in the "low average" range in Word Attack (ss 88). While her score in the Passage Comprehension subtest was in the "average" range (ss 99), her Broad Reading score still fell in the "low average" range.
- Written language subtests were "clearly the most difficult" for the student. In all subtests of writing mechanics, she scored in the "very low" range. "Despite [the student]'s weaknesses in the basic writing skills, she was able to overcome these weaknesses to write quality sentences on the Writing Samples portion of the test. This subtest is measured on quality of ideas, rather than basic skills."

(Exhibit: 100-105; Testimony: Thatcher)

13. The PET met October 9, 1997, and developed the 7th grade IEP. Special education services were increased to 11.25 hours to provide special education instruction in language arts which included reading and written expression, math and academic subject support. In addition, the program included social work services as a related service for 30 minutes each week. The annual goals were stated in more precise, measurable terms, but most of the objectives did not change. (Exhibit: 89-99)
14. The parent began the application process for Landmark School in the fall of 1997. An initial visit and intake interview at Landmark School occurred on January 20, 1998. The parent received a letter from Landmark accepting the student, dated January 22, 1998. (Exhibit: 72-74, P64, P65, P71, P74)
15. The parent requested the PET meet to discuss the student's program. At that meeting, convened on January 22, 1998, the parent expressed concerns that IEP goals and objectives were very similar from year-to-year and that "she had not seen dramatic growth". She expressed concern that the student's reading deficits would have a negative impact on the student's ability to survive high school. School staff assured her that the student was making progress in her reading program. At the insistence of the parent, a daily 20-minute period of oral reading with an educational technician was added to her program. The parent informed the school at that meeting that she was considering sending the student to Landmark School summer school and 8th grade. (Exhibit: 75-77)
16. The Wilson Reading Program continued as part of the student's 7th grade special education reading program. The reading teacher testified that the student moved from Level IV through Level VI achieving the 95% accuracy rate required by the program. He observed that the student complained about participating in the Wilson program, but did so compliantly. Her mood and affect while in his class was appropriate. She made good eye contact, was polite to him and other students she worked with; he found her to have a "good sense of humor" and

good verbal skills which she used appropriately. He testified that her math program was individually instructed. He observed her “basic computation skills building over the year”. She did not meet the criteria set for most of the math objectives, but based on daily test and quiz scores she did show measurable progress. (Exhibit: 94, 297; Testimony: Ferrick)

17. The student’s 7th grade case manager provided support for her regular education classes, taught the written language portion of the IEP, and supervised the oral reading time done with the educational technician. The teacher testified that the student’s instructional reading levels moved from the mid-fourth to the mid-fifth grade by the end of the year. Content area grades remained high and reflected mastery of the curriculum. Written expression and writing instruction remains difficult for the student, but as the year progressed she showed demonstrable progress in using the techniques taught and becoming more independent in her proofing and editing skills. (The student’s writing portfolio for the year was on a disc, which was destroyed by a computer problem.) She observed the student in academic and non-academic situations ranging from individualized instruction to school dances. The student’s affect and mood were appropriate to the setting. The teacher testified that the student confided in her at times. She was aware that the student struggled with her disability and with her feelings of being different. She did not describe the student as sad or depressed. The student exhibited a good work ethic in all classes. (Exhibit: 1, 91, 96, 97; Testimony: Thatcher)
18. The student’s 7th grade science teacher confirmed that the student mastered the 7th grade science curriculum. Her A’s and B’s in that subject reflect the same content mastery as her non-disabled peers as determined by tests, quizzes, labs and project work. She described the student as attentive, quiet and diligent about doing work. She observed no inappropriate interaction between the student and her peers in the class, in either small or large group activities. Her mood and affect was up and down, but not atypical of the other adolescents in the class. She did not see signs of depression in the student’s daily demeanor. (Exhibit: 1, Testimony: Curry)
19. The middle school social worker began seeing the student in October 1997 for a ½ hour per week. The student came regularly and promptly to the sessions. During the school year she observed the student in a variety of settings across the school day. She did not judge the student to be depressed. It was her opinion that the student exhibited a range of affect, but always within normal limits. She viewed the student as having good self-esteem, with appropriately emerging self advocacy skills. She found the student could talk articulately about her feelings about her learning disability, and how it affected her sense of herself. She does not see the student as having social skill deficits. She voiced her concern that the student’s placement in a residential school for learning disabled students focuses too much on the student’s disability, not her ability. She stated that in her view the student has enormous strengths; she is artistic, creative, and talented. (Exhibit 98; Testimony: Vose)

20. The parent notified the school in writing on August 15, 1998 that she was enrolling the student at Landmark school and was requesting the school support the cost of that placement. The student began attending Landmark in September 1998. (Exhibit: 43; Testimony: Parent)
21. In June 1998 the parent requested, and the school paid for, a comprehensive independent evaluation, which included a neuropsychological assessment. The assessment was conducted by the Sweetser Children's Services Diagnostic Review Team in August and early September. The evaluation summary describes the student's assessment behavior as "cooperative to the process, but showed little enthusiasm and in general was reserved..." "[A]ttention and concentration were fair". "She was pleasant, but it was hard to get her engaged in the tasks."
- Test results found that the student's overall score on an individual test of intelligence (WISC-III) fell within the average range with a standard score of 101. Subtest scores on this assessment ranged from "very superior" to "low average".
 - Results of neuropsychological testing were generally consistent with intellectual test findings. Testing showed "well-developed higher level conceptual abilities, strong psychomotor problem-solving skills, as well as intact visual-spatial processing skills. Her ability to attend and concentrate was...within the expected range." In contrast to her strengths, the student had "visual-motor integration deficits throughout the battery. She had difficulty on constructional tasks and, most notably, demands for visual-motor integration (writing, copying) had a negative impact even in areas of strength." "[M]emory abilities were variable." "[s]he demonstrated the ability to benefit from repetition and review. She was also able to transfer information from short-term to long-term memory." [S]he "demonstrated expressive language difficulties. [The student] had most trouble with written language tasks, including spelling, writing, and math calculations."
 - Results of speech-language functioning determined that the student's scores fell within the average range for comprehending single word vocabulary on the Peabody Picture Vocabulary Test – 3rd Edition. Results of the Expressive Vocabulary Test showed scores within the high average range for single word naming. "Word retrieval was within normal limits". The student performed within the average range in receptive and expressive language on the Clinical Evaluation of Language Fundamentals – 3rd Edition. The test scores revealed that the student's "ability to process language was better than her ability to express herself" with results on the "Formulated Sentences" subtest below average.
 - Educational achievement testing confirmed that "reading is an area of difficulty for [the student]", she "has severe deficits in the area of written language", and that "test results were below expectancy on math calculation...but "in the average range" on a subtest that measured her math reasoning skills. Results of the Woodcock-Johnson Revised Tests of Achievement gave standard scores in the "borderline" range in written

language subtests, and with the exception of “passage comprehension”, “low average” results on reading subtests.

- The student responded to the Millon Adolescent Personality Inventory “in a manner consistent with adolescents who are described as anxious to conform to the expectations of others and who put forth considerable efforts to control emotions and impulses”. Scores on behavior rating scales completed by the parent and the special education teacher showed some moderate elevations of targeted behaviors, but none reached the clinically significant range, except for two scales completed by the parent measuring problems with attention and organized thinking. The psychologist did not conclude that the student exhibited significant attentional deficits. Results of this part of the assessment did not lead the team to conclude that the student showed signs of depression.

(Exhibit: 44-60; Testimony: Strzok)

22. The PET met on September 30, and October 14, 1998, to discuss the results of this evaluation and develop an IEP for the 1998-99 school year. Both the parent and school teaching and administrative staff attended the meetings. One of the evaluators from Sweetser attended the September meeting. The completed IEP increased special education instruction to 12.75 hours per week in the areas of reading, writing and math, with continued support in content area classes. Social work services were increased to 4 hours per month for individual and group-directed service. Speech and language services for 45 minutes per week were added as a supportive service. (Exhibit: 15-26, 28-32; Testimony: LaBrie)
23. Consensus was not reached on the placement recommendation to educate the student in the public school, nor to support the parent’s request to provide reimbursement for the unilateral placement at Landmark School. (Exhibit: 5-9; Testimony: Parent, LaBrie)
24. In February 1999, the parent obtained a reassessment of the student from the Sweetser evaluation clinic. This evaluation included the re-administration of selected standardized tests and a clinical interview. Results of the interview and scores on self-reporting, parent-, and teacher-reporting personality inventories again showed no clinically significant elevations in identified behaviors. Some decrease in previously identified concerns was noted. The evaluator concluded that the student is happier at Landmark, with fewer school-driven concerns voiced by the student. Standard scores on the Woodcock-Johnson achievement subtests showed an increase from scores attained in September 1998. Word Identification was 91, Passage Comprehension was 115, and Word Attack was 97, Writing Samples was 83, Mathematics Calculation was 93. Scores obtained on the Test of Written Language showed no increase in overall scores. (Exhibit: 3-7; Testimony: Strzok, LaBrie)
25. The student’s transcript for 5th, 6th, and 7th grade shows letter grades of A’s and B’s in most subjects. Teachers testified that while modifications were made and special education support was given, that the grades earned in regular education classes reflected the same mastery of content as exhibited by non-disabled students in those classes. (Exhibit 1; Testimony: Doan, Mullin, Rusk, Curry, Thatcher)

26. The student participated in private psychotherapy from March to September 1998. The therapist testified that in her opinion the student suffered from “dysthymia”. She was depressed about her disability and her difficulty with peers. She saw herself as different and this caused her great sadness. She did not feel that the depression reached a level where medication or hospitalization was a consideration. She did not have concerns that the student might harm herself. She did not speak with school personnel nor observe the student in the school setting. (Testimony: Sullivan)
27. The student’s case manager from Landmark testified that the program there was determined by pre-testing done at Landmark in September. The testing determined that the student showed weaknesses in reading, writing and math. The math testing indicated that the student had most of her basic facts with some gaps in the multiplication table, and that math structure and process continue to be a problem. Math objectives are similar to those listed in the public school IEP. Reading testing indicated that the student should be placed in Level 6 of the “Bloomfield” series used by Landmark. The case manager testified that the reading program uses a comprehensive linguistic approach that is comparable linguistically to the Wilson program and that the student’s current objectives at Landmark are similar to the objectives set out in the public school’s IEP. The student, as do all new students entering Landmark, takes US History and science as part of her coursework. The content in these courses is used, primarily, as a vehicle for study and language skills. Pretest data indicated that the student needed a small group writing class that emphasizes the development of oral to written expression. The program uses graphic organizers, teacher-modeling and direct instruction as techniques. The case manager testified that written language continues to be difficult for the student. (Exhibits: P30-P46; Testimony Nadeau)
28. There is little comparative progress data from Landmark. Rating sheets are provided for October 1998 and January 1999. Instructional objectives were developed in October and most were not rated. Those for which comparisons do exist show few increases in performance, and equal numbers of decreases when comparing individual objectives and classroom behaviors. Residential behaviors rated in October and January show slight decreases in behavior performance. (Exhibits: P8-P27, P31-P46)

IV. Conclusions

Are the IEPs for the 1998-99, 1997-98, 1996-97, and 1995-96 school years reasonably calculated to provide the student with a free appropriate public education in the least restrictive educational environment?

This student was described as bright, creative, artistic, sensitive, kind, caring, humorous, bubbly, and flamboyant. She is also described as hard working, self-controlled and anxious to perform. She has a significant learning disability, which

interferes with her ability to perform at her intellectual level. She struggles to decode words, to spell, to do math calculations, and to master the mechanics of writing. Those who work with her in both the public and private school obviously like her enormously.

The parent asserts that the school has been unable to meet the student's educational needs. She states that the student has become despondent about her lack of success, and coupled with an inability to make friends, has become more and more depressed since entering the district. The parent argued that she had no recourse but to enroll the student unilaterally in a private residential school for learning disabled students in a neighboring state to correct this situation. Evidence does not support the parent's position.

The Individuals with Disabilities Education Act (IDEA) requires that local schools provide students identified as disabled with a "free appropriate public education" which is described in the student's "individualized education program" (IEP). [20 USC §1412(a)(1)(A), §1413 (a)(1), §1414(d)(A)] The IDEA further requires that:

[t]o the maximum extent appropriate, children with disabilities...are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 USC § 1412 (a)(5)(A)

Since the inception of IDEA (formerly the Education for Handicapped Children Act) in 1975, schools and parents have struggled with Congress' intent of the term "appropriate". In 1982 the Supreme Court considered this issue and determined that a program is found to be appropriate if the school has "complied with the procedures set forth in the Act", and has in place an individualized educational program developed through the Act's procedures which is "reasonably calculated to enable the child to receive educational benefits". (*Board of Education v. Rowley*, 3 IDELR 553:656, 667 [1982])

There were no claims that the school failed to comply with the "procedures set forth in the Act". Having met the test of procedural compliance, the discussion must then focus on a review of the IEP to determine if the program described in the IEP provides the services and instruction necessary in order for the child to receive educational benefit.

According to the definitions contained in the Act, a "free appropriate public education" consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child "to benefit" from the

instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the Child's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a "free appropriate public education" as defined by the Act.

(Id. at 662)

I find the school has met this test. The 5th grade IEP was designed and written based on valid historical and evaluative data, which came into the district with the student. The IEP was designed by a team of individuals, including the parent, and it addressed the defined needs of the student. The services described in the IEP were provided by qualified, certified staff in the manner and degree described. There is evidence of educational benefit. The student mastered content material in her regular classes. Her teachers testified that she earned mostly A's and B's in those subjects. The student made progress toward meeting the goals and objectives in the IEP.

The 6th grade IEP again was designed and written based on valid historical and evaluative data. The IEP reflects increased services and increased support to address increased work expectations. The district determined that the student was not benefiting from the reading approach described in the 5th grade IEP, and so changed the methodology for 6th grade. The student showed measurable increase in decoding strategies with the new approach. Her "Broad Reading" score on standardized testing increased from a 3.1 to 4.3 grade level. Analysis of her written work showed an increase in her understanding of the mechanics of writing and improvement of her written work. She again earned mostly A's and B's in her regular education subjects.

The 7th grade IEP was written after the completion of the student's triennial evaluation. The IEP again shows an increase in the amount of services. Social work services were added to assist the student with issues related to her increasing frustration with her disability. Although goals were stated in more precise, measurable terms, many of the objectives were repeated verbatim from the previous year. Staff explained, and were convincing, that some recurring objectives reflected review of work mastered, and that others reflected an increase in the work required by the student and an increase in the expectations for performance needed to meet the objective.¹ Mid-year, at the parent's request, oral reading for 20 minutes a day was added to the program.

¹ Parents have a legitimate claim that students are not making progress when IEP objectives do not change from year to year. In this instance, the teachers were able to point to other data, which supports their contention that the student was indeed making progress toward meeting the criteria in the objectives, and that the repeated

The student made demonstrable progress during the 7th grade year. She moved through two more levels of the Wilson reading program. Her math computation skills increased. The student mastered program content and earned A's and B's² in her regular education classes. She was a successful participant in chorus. By the conclusion of 7th grade the student's instructional reading level was at the mid fifth grade.

The IEP proposed for the 8th grade year is designed using data from the test results and recommendations of the comprehensive independent evaluation requested by the parent. One of the evaluators attended the IEP meeting to discuss the results of the evaluation. The parent participated actively in the discussion of the program elements. The completed IEP recommends increased services from the previous year. Specialized instruction and related services to address all areas of identified need are included in the program³. The IEP lists goal statements in clear measurable terms. Objectives are stated in terms to determine progress toward meeting the goal. There is no reason to believe that the student would not have achieved progress in this program as well.

The parent argued that there was not educational benefit - that any progress made was too little, too late. The parent compared test data of February 1999 with test data from October 1997 and August 1998 to argue that, not until the student was enrolled at Landmark, did the student's performance show significant increase. She argued that these comparisons proved the student's ability to make significant progress after only a few short months at Landmark. It is true that a comparison of the standard scores from October to August, and from August to February, show some increases of scores on some subtests. It is not possible to conclude, however, that this is a direct result of Landmark's success, or the public school's failure.

The test data from October 1997 represents the student's performance while actively engaged in her education program, with the evaluator being a teacher familiar to her. The August test data represents the student's performance over two days of testing after being out of school for six weeks. The student is described by the evaluator, someone she has never met, as "show[ing] little enthusiasm" for the tasks, and only "fair" concentration. By comparison, the February test data represents the student's performance after five and ½ months of instruction at Landmark. The student's

objectives in fact conveyed increased expectation. Schools give parents fuel for claims of lack of progress when the language does not change and the only measurement is a number that corresponds to a vague conclusion such as "making progress".

² The parent asserted that the student did well in her regular classes because of the extraordinary efforts of the parent in assisting her to study for tests and complete written projects. There is no way to evaluate this claim. Parent assistance with homework and study is part of public education. However, teachers were clear that the student had learned information and could apply it, not just regurgitate it for tests, and that significant portions of work in these classes was performed in the classes. Further, the students test scores on Broad Knowledge, Science and Social Studies shows average performance. (See Exhibit 311)

³ A direct comparison of the objectives and teaching strategies in the district IEP and the Landmark program show remarkable similarities.

“ability to attend” score rose from “1” in August to “5” in February. In February, the student is described as “upbeat” and “willing to elaborate on topics when asked”.

A direct comparison of these standardized test results shows only that from October 1997 until February 1999 the student has maintained forward progress. The isolated, larger gains from August to February on some subtests does not provide any conclusive information about progress, or lack of progress⁴, any more than any decrease in subtest scores would lead the viewer to conclude, without further data, that the student had lost skills.

Finally, the psychologist who testified for the parent pointed to test results of August 1998 to argue that the student was not “closing the gap” between her cognitive ability and her performance. She maintained that the public school program was not sufficient to assist the student to gain skills at a faster rate. There is no requirement in law that special education must “close the gap” between a student’s cognitive ability and performance. While it may be a goal, and is certainly desirable, to require such a standard would be in direct opposition to the finding of the *Rowley* Court that the law does not “require the State to maximize the potential of each handicapped child...” The *Rowley* Court made clear that “educational benefit” is not synonymous with “maximum” benefit.

Are the parents entitled to reimbursement for the tuition, room, board, transportation, and related costs associated with the student’s 1998-99 unilateral placement at the Landmark School?

Landmark has yet to provide comparative performance data for the student since teaching objectives were developed in October 1998. Reports on student performance completed in January 1999, however, show the student to be performing at essentially the same level, in essentially the same program, as that offered by the public school. In fact, where comparative data is available, there are an equal number of decreases in performance, as increases. In fact, Landmark staff describes the student much as her public school teachers do. They find her an engaged⁵, hard-working, likable, pleasant student; they believe she is making gains. Quite likely, she is.

The parent was adamant that Landmark is the appropriate placement for her daughter because she is happier there. She views her daughter as having friends and a supportive peer group at Landmark which she did not have in the public school. She was described by the parent as intensely sad and depressed. There

⁴ Dr. Strzok generalized that the student was having limited success in the Wilson Reading Program because of her performance on decoding tasks in the August evaluation. The student’s failure to achieve a higher score on isolated subtests, after being out of the program for six weeks, should not lead an evaluator to conclude that a program has been of “limited success” without further information.

⁵ The parent argues that the student did not willingly participate in instruction at the public school. School staff disagrees with this assessment. They do concede that her “buy in” to the Wilson program decreased as the 7th grade wore on and she had mentally made the shift from leaving the public school to going to Landmark, but they insist that she did not “shut down”.

is no reason to disbelieve this to be true, but the student's depression was not such that a psychiatric consult resulted in medication. Her private therapist did not provide a DSM-IV diagnosis of depression. She was never considered in danger of suicide nor was there ever a concern that she required hospitalization. I do not doubt that the student was sad and depressed about her disability, and that it had an impact on her education. But the fact remains that the school did not see that depressed, sad student at school. She was observed to have appropriate peer interactions at school. She related in typical adolescent fashion with peers, both in classroom situations and free-time activity. The student may be happier at Landmark, but there is no legal requirement for the public school to support her placement there.

"The IDEA does not promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. The Act sets more modest goals: it emphasizes an appropriate, rather than an ideal, education: it requires an adequate, rather than an optimal, IEP. Appropriateness and adequacy are terms of moderation. It follows that, although an IEP must afford some educational benefit to the handicapped child, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential. See *Rowley*, 458 U.S. at 198, 102 S. Ct. at 3046-47; *Roland M.*, 910 F.2d at 992." [*Lenn v. Portland School Comm.*, 998 F.2d 1083 (1st Cir. 1993)]

V. Order

The IEP developed for the student for the 1998-99 school year is found appropriate to meet her special education and related needs. The parent's unilateral placement of the student in the Landmark school was not required in order for the student to achieve educational benefit. No order is issued in conjunction with this decision.

Carol B. Lenna
Hearing Officer