

**COMMONWEALTH OF MASSACHUSETTS
SPECIAL EDUCATION APPEALS**

In Re: Pentucket Regional School District

BSEA #08-5616

DECISION

This decision is issued pursuant to the Individuals with Disabilities Education Act (“IDEA”), 20 USC Sec. 1400 et seq., as amended by P.L. 108-446¹; Section 504 of the Rehabilitation Act of 1973 (29 USC Sec. 794); the Massachusetts special education statute or “Chapter 766,” (MGL c. 71B) and the Massachusetts Administrative Procedures Act (MGL c. 30A), as well as the regulations promulgated under these statutes.

On March 26, 2008, Parents filed a hearing request with the Bureau of Special Education Appeals (BSEA) alleging that two IEPs and placements proposed by the Pentucket Regional School District (Pentucket or School), one covering the period from May 2007 to May 2008, (IEP #1), and a second IEP and placement, covering February 2008 through February 2009 (IEP #2), which superseded IEP #1, were not reasonably calculated to provide Student with a free, appropriate public education in light of her significant dyslexia and executive functioning difficulties. Parents claim that the Landmark School (Landmark), where they unilaterally placed Student in June 2007, was and continues to be an appropriate placement for Student.

Parents seek the following relief: (1) reimbursement for tuition, transportation and costs associated with Student’s placement at Landmark from her initial placement in June 2007 through the date of this decision; (2) prospective funding of all costs of Student’s placement at Landmark through February 2009, when Pentucket’s most recently proposed IEP (IEP #2) will expire.

A hearing was held on September 11, 12, 17 and 18, 2008 at the office of the BSEA in Malden, MA. Each party was represented by counsel and had an opportunity to examine and cross-examine witnesses and submit documents into the record. The record consists of Parents’ exhibits P-1 through P-36, School’s exhibits S-1 through S-110, tape recorded testimony and the transcript produced by the court reporters. Counsel submitted written closing arguments on October 6, 2008, and the record closed on that day.

Those present for all or part of the proceeding were:

Student’s Mother
Student’s Father
Lisa Shaw, Ph.D.

Private Neuropsychologist

¹ Individuals with Disabilities Education Improvement Act of 2004, or “IDEA-2004”

Jody Gray	Educational Evaluator
Karl Pulkkinen	Landmark School
Chris Woodin	Mathematics Dept. Head, Landmark School
Julie Anne Dejoy	Case Manager, Landmark School
Elaine Lord	Educational Advocate for Parents
Joann Frankhouser	Neuropsychologist, Pentucket R.S.D.
Hilary Gordon	Special Education Teacher, Pentucket R.S.D.
Amy Lopata	Teacher, Pentucket R.S.D.
Lindsay Kasmarcik	Teacher, Pentucket R.S.D.
Patricia Ingalls	Special Education Teacher, Pentucket R.S.D.
Deborah Bartniski	Special Education Coordinator, Pentucket R.S.D.
Lauren Fain	Special Education Director, Pentucket R.S.D.
Sean Goguen, Esq.	Attorney for Parents
Amy Rogers, Esq.	Attorney for Pentucket R.S.D.
Sara Berman, Esq.	BSEA Hearing Officer
Laurie Jordan	Certified Court Reporter
Darlene Coppola	Certified Court Reporter

ISSUES PRESENTED

1. Whether the IEP and placement that Pentucket offered in May 2007 for the 2007 - 2008 school year were reasonably calculated to provide Student with a free, appropriate public education (FAPE).
2. If not, whether the placement chosen by Parents at the Landmark School was appropriate, such that Parents are entitled to reimbursement for the period from June 2007 until issuance of IEP #2 in February 2008.
3. Whether the substitute IEP and placement that Pentucket offered in February 2008 (IEP #2) for the period from February 2008 to February 2009 were reasonably calculated to provide Student with FAPE.
4. If not, whether the Landmark School placement was and is appropriate from February 2008 to February 2009 such that Parents are entitled to both reimbursement and prospective funding for that placement.

POSITION OF PARENTS

Student is an intelligent child with a longstanding diagnosis of dyslexia, combined with significant difficulties with executive functioning and attention. To make effective progress, Student needs a specialized program designed for children with profiles similar to hers, where strategies to remediate her dyslexia and other difficulties are implemented in an integrated, consistent manner throughout the school day.

Student did not make effective progress in reading and writing while attending Pentucket, despite increasing amounts of special education assistance over the years, culminating in a third grade placement (2006-2007) where she received all reading and

writing instruction in a substantially-separate, language-based classroom with a highly experienced teacher. Pentucket claimed that Student had made effective progress in that third grade placement, but could not produce standardized testing to prove or quantify that progress. On the contrary, standardized tests administered by Parents' private evaluator showed that Student had not progressed satisfactorily. Still, Pentucket issued an IEP for fourth grade (IEP #1) for a "mainstream" placement with some pull-out services. Based on this inappropriate proposed IEP and placement for fourth grade, Parents were justified in unilaterally placing Student at the Landmark School in June 2007.

IEP #2, issued in February 2008 after Parents gave Pentucket additional evaluation reports, was and is inappropriate as well. This IEP called for placing Student back as the sole fourth grader in the same substantially separate classroom she had attended in third grade—without making effective progress—for the remainder 2007-2008, and then moving her to a different substantially separate classroom for the beginning of fifth grade. Both proposed placements were and are inappropriate. Parents were again justified in rejecting that proposed IEP and continuing Student's Landmark placement.

In contrast to the programs provided and offered by Pentucket, the Landmark School is specifically designed for children with Student's profile, and provides Student with the integrated approach to her dyslexia and related issues that will enable her to make effective progress. Student has done well at Landmark, and has regained enthusiasm for learning that she had been losing while at Pentucket.

POSITION OF SCHOOL

Both of Pentucket's IEPs were reasonably calculated to provide Student with a FAPE, and Parents are not entitled to reimbursement or prospective funding for Student's unilateral placement at Landmark. First, Student made effective, meaningful progress during her third grade year at Pentucket, so much so that for fourth grade, the TEAM correctly determined that she was ready to move on into a co-taught, regular education inclusion classroom with additional pull-out supports. The psychological and educational evaluations on which Parents relied at hearing to justify their position to the contrary were not available to Pentucket at the time of the TEAM meeting that developed IEP #1, which was completely appropriate given the information available to the TEAM at the time it was written. The School is not responsible for funding a unilateral placement on the basis of information it receives several months later.

Moreover, after receiving additional evaluations in February 2008 the School offered an amended IEP calling for a return to a substantially separate classroom for the remainder of third grade and the first half of fourth grade (although IEP #1 also remained an appropriate option). The School never was able to implement this IEP, however, because Parents already had placed Student at Landmark.

Even if IEP's #1 and #2 were inappropriate, however, the School should not be required to fund the Landmark placement, either retroactively (by reimbursing Parents) or prospectively. First, by approximately March or April of 2007, even before issuance of IEP #1, Parents already had decided to place Student at Landmark, but had withheld that information from the School, and also had withheld the results of outside evaluations and had essentially withdrawn from the TEAM process. This absence of good faith collaboration and information-sharing undermines Parents' reimbursement claim. Further, Landmark is not an appropriate placement for Student. Not only has she failed to make progress there, she actually has lost ground as demonstrated by standardized testing.

FINDINGS OF FACT

1. Student is an eleven-year-old girl who lives with her family within the Pentucket R.S.D. Student is an intelligent, creative, polite, very likeable child who gets along well with adults and children. Student has friends and enjoys many interests and activities. She is especially interested in animals. Student is hardworking and persistent with any activity with which she is involved, including schoolwork, even if it is difficult for her. (Father, Gordon, Gray, Shaw, Dejoy)
2. Student's verbal and non-verbal reasoning ability is at least solidly average, and her listening comprehension is excellent. Student has a reading disability, however, diagnosed as dyslexia, that seriously impairs her reading and writing. Additionally, Student has substantial difficulty with executive functioning as well as attention, which, combined with her dyslexia, further interfere with her ability to access the general curriculum. There is no dispute that Student needs specialized instruction and various accommodations to make educational progress commensurate with her age and cognitive ability. (Father, Gordon, Gray, Shaw)
3. Student started receiving special education services from Pentucket in first grade (2004-2005). Her IEP for that year identified strengths in expressive language and verbal comprehension skills (both described as "superior") as well as in verbal reasoning, word knowledge, perceptual processing, and constructional abilities. Student's identified needs were in the areas of "auditory memory, active working memory, cognitive fluency, and retrieval skills," as well as in phonemic awareness and reading decoding. Student's language issues also affected some of her math skills. Additionally, Student had difficulty focusing, sustaining attention, and concentration throughout the school day. The first grade IEP called for 30 minutes per day, each, of pullout services in reading and math, along with numerous accommodations. (P-11) Although the IEP also offered an extended school year program, Parents opted to have Student privately tutored at the Commonwealth Learning Center during the summer after first grade. (Father)
4. Student's second grade IEP continued the 30 minutes per day of pullout services for reading/language arts, but provided for math support in the regular classroom. (P-

- 10) In mid-year, Pentucket added LiPS instruction to address weaknesses in phonemic processing. (P-10)
5. Student's second grade IEP noted that according to informal measures, Student had made progress with reading but still needed to work on phonemic awareness, decoding, and sight word vocabulary. Additionally, the IEP stated that attentional issues sometimes affected her learning. Student needed help from a scribe and graphic organizers for writing. (P-10)
 6. Like the first grade IEP, the second grade IEP offered a summer program, but once again Parents obtained services privately, this time at the Bedford Learning Clinic, which they felt offered more intensive services than Commonwealth Learning Center. (Father)
 7. Parents observed that Student's progress seemed slow during second grade. They also were concerned that beginning in that grade, Student was coming home from school exhausted, and was visibly struggling with homework. Parents raised these concerns with the School during Student's second grade year. (Father)
 8. In January 2006, when Student was in second grade, Parents had her evaluated by Joan Axelrod, M.Ed. and Jed Lehrich, Ph.D., a licensed psychologist. After administering a battery of standardized tests, Ms. Axelrod and Dr. Lehrich concluded that Student had excellent verbal and non-verbal reasoning ability, but relative weaknesses in working memory, processing speed, and retrieval. (P-3)
 9. Student's most significant weaknesses were in the areas of phonological processing and rapid naming, resulting in a so-called "double deficit." (P-3) On the C-TOPP Elision subtest, which is one measure of phonological processing, she scored in the 16th percentile for her age. On the RAN/RAS test of rapid naming, she scored in the 5th percentile. (P-3)
 10. The Axelrod-Lehrich report also noted evidence of attentional difficulties that, along with the "double deficit" referred to above, interfered with Student's difficulties, which included slow and laborious reading. (P-3)
 11. Ms. Axelrod and Dr. Lehrich concluded that despite Student's many abilities,

[S]he has very significant deficits in phonological processing skills and in the rate/accuracy with which she can retrieve the names for symbols. This "double deficit" has contributed to a serious reading disability (dyslexia), so that although she has...had substantial intervention in phonemic awareness and decoding skills since kindergarten, she is still struggling at the earliest stages of reading. Her other abilities...[support a prediction]...that she will, eventually, learn to read, but the severity of her

disability should not be minimized and she will likely need extensive and highly individualized intervention to insure that she makes progress. In addition to educational help it is possible that she may need treatment for attentional deficits to insure that attentional factors are not inhibiting her reading acquisition. (P-3)

12. Ms. Axelrod and Dr. Lehrich recommended daily, individual reading tutorials of 60 to 90 minutes, consisting of work on phonological awareness and decoding as well as practice for automaticity and fluency, stating that research suggests that such tutorials are necessary for a child with disabilities as severe as Student's to make substantial progress. Additional, more specific recommendations included
 - continuation in a systematic, phonetically based program to present sound-symbol correspondence such as LiPS (which Pentucket had already begun providing);
 - timed practice reading of phonetically controlled and nonsense words to improve quick and automatic recognition of letter sequences;
 - slow introduction of sight words and practice reading them alone and in phrases;
 - daily practice reading of continuous, controlled text
 - practice writing words and dictated sentences which follow the phonetic patterns and sight words she is learning;
 - possible use of Lexia software;
 - administration of the DIBELS three times yearly;
 - summer tutorials;
 - numerous accommodations, including extended time on tasks, alternative access (e.g., tapes) to literature. (P-3)
13. Finally, Ms. Axelrod and Dr. Lehrich recommended further evaluation to determine the presence of an attention deficit disorder and whether medication would be beneficial. (P-3)
14. In April 2006, pursuant to this recommendation, Parents had Student examined by Frank Duffy, M.D. at the Boston Children's Hospital Epilepsy program to determine whether Student had an attentional disorder. Dr. Duffy concluded that Student possibly had reactive attentional problems stemming from her dyslexia, possibly against a background of mild attention deficit disorder of the inattentive type. He also conducted a BEAM study (a type of EEG) and concluded that the results showed abnormalities typical for children with reading disabilities. (P-5)
15. Dr. Duffy recommended changes in Student's educational programming rather than medication at that time, suggesting that Parents should consider the Landmark School summer program and possibly the full-year program. (P-5, Father)
16. On June 2, 2006 after considering the Axelrod/Lehrich report as well as Pentucket's own assessments, the Pentucket TEAM issued an IEP for third grade (2006-2007). This IEP noted that Student's progress in reading was very slow, and that she scored

below average on the WIAT in word reading, pseudo-word decoding, sight word efficiency, and reading comprehension, and also scored below average on the CTOPP in phonological processing. Student's writing was slow and frustrating because of her difficulties with spelling. Student could read independently at about a first grade level (at the end of second grade), and could read 65% of 200 sight words from a second grade level list. She did better in math, but this subject also was affected by her reading problems. (S-9)

17. The third grade IEP issued in June 2006 provided for Student to receive her language arts instruction in Pentucket's Primary Language-Based Classroom, (hereafter, PLBC) which, according to the IEP

is a district 1-3 grade program for students who demonstrate the need for intense direct instruction in the areas of reading, writing and math. This program is designed to provide specialized, direct instruction for students with learning disabilities. Using small group instruction, the students are provided language based instructional practices in order to accelerate their acquisition of reading, writing, and math skills...with the goal of integrating back into the general education classroom. (S-9)

18. The IEP further specified that Student would receive reading instruction using a "structured, systematic, and specialized rule-based reading program," with explicit instruction in phonemic awareness, phonics, and decoding rules, as well as in reading comprehension and fluency strategies and writing skills." (S-9)
19. The service grid on the third-grade IEP called for the following: Grid A--15 minutes per week of consultation between regular and special education teachers; Grid B-- 5 x 30 minutes of academic support in math by regular and special education staff; Grid C—the PLBC), 5 x 140 minutes of academic instruction in English Language Arts (ELA). Accommodation included multi-sensory presentation of reading materials and directions as needed, reading material at Student's independent reading level for in-class reading; support for reading directions and in-class content area material; books on tape or text reader program for grade level reading comprehension, tests read aloud to Student, scribe for written work when necessary, peer tutor for reading components in math, visual representation for vocabulary and oral presentation in math, social studies and science. (S-9)
20. After discussing the PLBC with the teacher, Ms. Hilary Gordon, Parents were enthusiastic and hopeful about this program, as was Student when Parents described it to her. (Father) After considering both Dr. Duffy's recommendations for Landmark and the PLBC, Parents opted to keep Student within the public school, and accepted the IEP for 2006-2007 in full. (Father, S-9) Pursuant to the IEP, Student spent mornings in the PLBC for English Language Arts (ELA) and writing. In the

afternoons, Student transitioned to a regular third grade class, for math, social studies, and science. Student's third grade teacher was Ms. Amy Lopata. (S-9, Gordon, Lopata)

21. The lead teacher for the PLBC is Ms. Hilary Gordon, who has held this position since the program's creation in 2002. Ms. Gordon is a certified special education teacher as well as a certified and licensed speech/language pathologist. Ms. Gordon has training and experience with various methodologies for instructing students with reading disabilities, including LiPS, Visualizing and Verbalizing, Seeing Stars, Project Read Phonology, and Wilson Reading. She has worked for the Pentucket RSD for fourteen years, the first eight as a speech/language pathologist, and the past six as the teacher in the PLBC. During Student's third grade year, Ms. Gordon was assisted by a second teacher, who was working on her master's degree in special education and who had LiPS training. (Gordon)
22. Student was one of approximately eight students in the PLBC² and one of two third graders. The other students were in first and second grade. All of the students had language-based learning disabilities, communication disorders and/or ADHD. None had emotional or behavioral disabilities. All but one student, who had borderline to low-average functioning, had at least average cognitive ability. (Gordon)
23. Ms. Gordon identified Student's primary area of need as the ability to integrate and apply reading-related skills that she had learned in isolation to read connected text. Ms. Gordon felt that Student needed extensive practice to make progress in this area. To address this need, Ms. Gordon used specialized reading and writing programs, including LiPS, Wilson Reading, and various writing programs including a Wilson program and Writer's Workshop. Ms. Gordon also noted Student's executive functioning and attentional problems, and addressed them by, for example, having her use a timer for certain tasks. (Gordon)
24. On a typical day, Student would spend the morning language arts block in the PLBC, where she participated in morning meeting, Reader's Workshop, word study, and work on writing skills. As stated above, after the lunch break, Student would transition into Ms. Lopata's third grade classroom for math, science and social studies. (Gordon)
25. In Ms. Lopata's room, Student was one of 25 students, three of whom (including Student) were on IEPs. One other student came from the PLBC, and the third had multiple disabilities and was accompanied by a dedicated aide. Approximately one month into the school year, Ms. Lopata and Ms. Gordon determined that Student needed additional support in the mainstream math class, and had the PLBC co-teacher accompany Student in Ms. Lopata's class for math to provide support and implement accommodations. (Lopata)

² The number of students in the room at any given time varied, as most or all of the students also spent time in the mainstream. (Gordon)

26. The regular education social studies and science programs emphasized experiential, hands-on instruction via field trips, guest speakers, science experiments, etc. There were few reading assignments in science. Social Studies involved somewhat more reading. At the beginning of the school year, Ms. Gordon scanned this reading material into a Kurzweil Reader to provide Student with access to the text. Towards the end of the school year, Ms. Lopata gave Student the choice of whether or not to use Kurzweil. The record does not indicate whether Student chose to use the Kurzweil Reader versus reading independently. (Lopata) Student had a few writing assignments for social studies, which she completed with Ms. Gordon's help in the PLBC. (Lopata, Gordon)
27. Ms. Gordon and Ms. Lopata met formally every Friday and informally throughout the week in an effort to coordinate Student's services and ensure that accommodations were provided. (Gordon, Lopata)
28. Ms. Gordon and Mother had frequent and regular contact during Student's third grade year, via meetings held every two weeks as well as frequent e-mail exchanges. (P-18) Most of the meetings and communications concerned assignments, coordination of classwork and homework, and other day-to-day concerns. Between September 2006 and January 2007, both Mother and Ms. Gordon stated (in e-mails to each other) that Student was increasingly confident with reading. (P-18)
29. In an e-mail dated February 6, 2007, Ms. Gordon stated that she "did go back through [Student's] reports and noticed that attention was noted as an issue in first grade as well as in Joan Axelrod's testing. I have noticed difficulties in aspects of mental energy control all year. I believe if we can get this piece of the puzzle in place, [Student's] progress will be even more dramatic! I did not have a chance to talk with [Student] about some of the strategies we discussed for monitoring her 'mind trips.' I will make a point of doing this tomorrow."³ (P-18)
30. In general, Ms. Gordon felt that Student made excellent progress in her third grade program. In the first trimester progress report for ELA, dated November 2006, Ms. Gordon cited improvement in Student's sight word vocabulary, automatic knowledge of consonants and digraphs, and retrieval of vowel sounds. She was making "good progress" on the third grade DIBELS fluency monitors. She was reading independently at a Fountas and Pinnel reading level I. According to Ms. Gordon, Student had made "many gains" in written language skills including spelling at the single word level, and writing fluency. (P-14)
31. In the second report, dated March 2007, Ms. Gordon that Student had met IEP Goal I for ELA. She was reading independently at a mid-second grade level, had an instructional level that was somewhat higher, showed solid comprehension, and had an improving sight word vocabulary. (She could now independently read 245 words from the Fry Word List, up from 142 words in November 2006). In writing, she

³ Ms. Gordon spoke to students in the PLBC about attentional problems, which she sometimes referred to as "mind trips," and discussed with them strategies for maintaining focus. (Gordon)

reportedly was making “steady progress,” with improved spelling, the ability to organize and write a single paragraph, and the ability to recognize spelling errors. (P-14)

32. By June 2007, Ms. Gordon felt that Student had made “dramatic progress” since the beginning of the school year, according to observation and criterion-referenced tests. (Gordon) According to one such test, the DRA, Student’s independent reading level had improved from a beginning first grade (pre-primer/primer) level with only 95 sight words and inconsistent application of phonics skills, to a beginning third grade level, representing a growth of two years in one academic year. Her comprehension was 95 – 98% accurate at her independent reading level. Her sight word vocabulary from the Fry list improved from 95 to 420 words. Student’s performance on the GORT (a standardized test) also had improved, with scores in the 2.4 – 3.7 grade equivalency range. (Gordon, P-14))
33. In writing, Student had achieved her IEP goals as written in her IEP, but still needed much support. For example, she was able to use a graphic organizer to organize a paragraph. Ms. Gordon testified that Student began to internalize some phonics rules and apply them to spelling, but she needed much assistance to write a 2 to 3 paragraph composition using a graphic organizer. (Gordon, P-14) She needed prompting to begin and maintain effort during any writing task. Writing fluency remained an area of need. (P-14)
34. Ms. Lopata felt that Student also made effective progress in the general classroom, increasing her participation throughout the year. By the end of the school year she was volunteering to read aloud on occasion. She was an effective self-advocate, asking for help when she needed it. Ms. Lopata felt that with Student’s excellent comprehension and cognitive skills, as well as accommodations and support, she was able to access the general curriculum. (Lopata)
35. Meanwhile, throughout third grade, Parents continued to have concerns about Student’s progress, particularly with her ability to carry over strategies learned in class to homework. On Student’s June 2007 report card, Mother wrote “although [Student’s] reading seemed to have improved at school, she still continues to struggle with these skills at home when doing homework.” (P-14) In their answers to the school’s interrogatories, Parents stated that Student struggled with homework; that Parents had to read most homework assignments to Student so that she would understand them, that she needed many breaks, and often found homework to be exhausting. (S-109) Because of these concerns, Parents obtained, privately, additional neuropsychological and educational evaluations. (Father, Gray)
36. An educational consultant, Jody Gray, Ed.M., conducted two educational evaluations of Student, in January and June 2007. As will be discussed further below, Ms. Gray did not complete and provide the Parents with the reports of either evaluation until approximately November 2007, and Parents did not provide copies of the reports to Pentucket until approximately January 2008. (Gray)

37. For the initial evaluation of January 2007, Ms. Gray performed a comprehensive review of prior assessments, IEPs, and school progress reports and administered a battery of approximately 14 tests, most of which were standardized. (P-2) A summary of results follows:

- CTOPP composite scores: Phonological awareness and memory—average (47th %ile). Rapid naming—poor (5th %ile).
- Lindamood Auditory Conceptualization Test-3 (LAC-3): Average (50th %ile) overall, but difficulty in changing sounds within complex syllables.
- RAN/RAS (tests rapid automatic naming)—Poor (5th %ile)
- Wilson Assessment of Encoding and Decoding—sound-symbol relationship subtests—sound/symbol recognition and production excellent for consonants (96%), weaker for digraphs and trigraphs (67%), and weakest for vowels.
- Slosson Oral Reading Test (SORT)—(reading from word list from primer to 6th grade level)—poor (5th %ile). Could read many words on primer and first grade list, half the words on second grade list, 3 words on third grade list.
- Test of Word Reading Efficiency (TOWRE), total word reading efficiency—Poor (5th %ile).
- Test of Written Spelling-IV—Poor (5th %ile). While Student has made gains with phonological awareness, “her decoding and encoding skills have yet to benefit from such gains and suggest difficulty in synthesizing taught skills.” (P-2)
- Gray’s Oral Reading Test IV (GORT-IV)—Poor (4th %ile)
- Gray Silent Reading Test, Form A—(tests silent reading comprehension)—very poor (below 1st %ile)
- Test of Reading Comprehension-3--Below average (16th %ile)
- WIAT-II, Listening Comprehension Test—Superior (92^d %ile)
- Test of Written Language—Below average (13th %ile)
- Peabody Picture Vocabulary Test (PPVT)—Average (61st %ile)
- Expressive Vocabulary Test (EVT)—Average (66th %ile)
- Test of Mathematical Ability (TOMA)—Poor (2^d %ile) (May not be accurate score; Student’s eyes were tearing).

38. Ms. Gray’s testing confirmed Student’s diagnosis of dyslexia, as well as weakness in executive functioning. Ms. Gray reported that the pattern of test results also showed that although Student had average phonemic processing scores, she was not able to apply those skills to decoding single words. (P-2A; Gray)

39. After reviewing Student’s records and her own test results, Ms. Gray concluded that Student had made some gains since previous testing in “underpinning literacy skills which was very important such as phonological awareness and phonological memory [which] actually came out quite solid.” However, Student still had difficulty with decoding at the single-word level, with just very simple, two to three letter words, as well as with sight words, leading Ms. Gray to conclude that Student “had yet to see the gains of the transfer of those skills to her single word reading.” (Gray)

40. Ms. Gray found that the same problem occurred with spelling and with sight word recognition. Student was only able to spell one-syllable words and had difficulty spelling words independently. Ms. Gray testified that “given her level of phonemic awareness and her past training and all her reading intervention that she really should be able to do [it] consistently by now.” As for sight words, Ms. Gray stated that while the School reported that Student had increased her sight word vocabulary, she was not able to independently use that skill in the test situation, and was not able to read words such as “what,” “come,” “little,” and “free,” which she had been able to read previously. (Gray)
41. In general, Ms. Gray was concerned that Student’s inability to apply taught skills consistently “raised the question as to whether or not she was also having additional difficulties in executive functioning, because that can exacerbate a skill deficit.” (Gray)
42. Ms. Gray made numerous specific recommendations for remediation in decoding, comprehension, reading fluency, spelling, and writing.⁴ Ms. Gray concluded that “given the breadth and intensity of the remedial language based services which [Student] clearly still requires, it is strongly recommended that she remain in a small integrated language based program consisting of students who have similar...profiles. Further, content area instruction such as science and social studies should also occur within a language based setting, as [Student’s] impaired literacy skills would prevent her from accessing the curriculum in a manner which is commensurate with her cognitive abilities.” (P-2A). Ms. Gray felt that such placement was necessary because Student “has yet to attain literacy skills which are in concert with her intellectual potential despite significant remedial interventions since Kindergarten.” (P-2A)
43. In February 2007, Parents took Student to Dr. Duffy for a follow-up visit regarding Student’s attentional issues. Dr. Duffy concluded that he did not think that Student had ADHD. Rather, he felt that her attentional difficulties were a byproduct of her dyslexia. Dr. Duffy also reported that in his opinion, Student was not in an appropriately specialized or intensive educational program. (P-5)
44. Dr. Duffy questioned Father as to why Parents had not placed Student in Landmark for third grade, as he had suggested at the previous visit, and told Father he was “adamant” that the Parents should to place her there. Father understood Dr. Duffy to state that unless Student got an education program that would “get down inside of [Student’s] structure, inside of her foundation and teach her the tools and the strategies to work with her disability,” she would suffer “some very, very serious long term effects...” (Father) Dr. Duffy further told Parents that if they did not get Student into Landmark or a similar program, Student risked losing her self-confidence as well as her good comprehension skills. (Father) There is no evidence

⁴ Ms Gray recommended a re-assessment in math, since Student’s eyes were bothering her when Ms. Gray tested her in that subject.

in the record that Dr. Duffy had any first-hand knowledge of Student's then-current educational program.

45. Dr. Duffy advised Parents to begin immediately to enroll Student in the Landmark summer program for summer 2007. Dr. Duffy also advised Parents to start the application process for the 2007-2008 school year; otherwise, they would not be able to get a place. Worried by Dr. Duffy's statements, Parents began the application process for Landmark in March 2007. (Father) In April 2007, Landmark accepted Student for the 2007 summer program, and, a few days later, for the 2007-2008 academic year. Shortly thereafter, Parents paid Landmark a \$7500 deposit to secure her place in the school year program. When Parents asked whether the deposit was refundable if Parents chose not to send Student to Landmark, Landmark responded that it was not, but that Landmark would consider applying the deposit to the tuition for the summer of 2008. (Father)
46. Parents decided to enroll Student in the Landmark summer program, but to defer any decision regarding the 2007-2008 school year until they had received Pentucket's proposal for fourth grade. (Father)
47. In April 2007, Parents had Student evaluated by a neuropsychologist, Dr. Lisa Shaw, for an updated assessment of her overall cognitive functioning and identification of "any neurobehavioral contributors to her pattern of reading and spelling and written language difficulties." (Shaw, P-1) Dr. Shaw forwarded her report to Parents in August 2007. (Shaw, S-89)
48. Dr. Shaw reviewed records and conducted a battery of standardized tests. Since Jody Gray had not written a report from her January 2007 evaluation, the only information Dr. Shaw had from that evaluation was from telephone discussion with Ms. Gray about some observations and preliminary test scores. (Shaw)
49. Like prior evaluators, Dr. Shaw concluded that Student had dyslexia, characterized by difficulties with phonological processing and rapid naming. She further concluded that Student had a co-existing attention deficit disorder of the inattentive type, i.e., without hyperactivity, ("ADDI"), as well as significant weaknesses with executive functioning. (Shaw, P-1) Dr. Shaw concluded that probably because of her attentional problems, Student had not internalized various language strategies that she had been taught in her reading and language arts instruction; therefore, she needed a "more specialized and intensive form of education," in a "small, self-contained, fully-integrated language-based classroom setting with age and intellectual peers" (P-1). According to Dr. Shaw, Student needed a setting in which skills and strategies for literacy skills would be reviewed and reinforced across the curriculum until Student had learned to use them independently. (Shaw, P-1)
50. Dr. Shaw further recommended accommodations and interventions for Student's attentional disorder, such as monitoring her attention and cuing her to focus and concentrate, teaching her how to plan and organize assignments, repeating

instructions, and the like. (P-1). Finally, Dr. Shaw recommended that the Parents consult a physician about a possible medication trial for the attentional issues.⁵ (P-1)

51. On May 10, 2007, the Pentucket TEAM convened to develop an IEP for Student for fourth grade (2007 – 2008). The resulting IEP called for placement in a regular education fourth grade classroom, with in-class and pull-out support and specialized instruction in reading. Specifically, the service delivery grid specified the following: Grid A: 10 minutes per week of consultation between regular and special education staff. Grid B: 45 minutes/day x 5 days/week of ELA instruction by special education teacher in the general classroom. Grid C: 40 minutes/day x 5 days/week x 4 weeks/month of pullout ELA instruction (for writing). (S-15)
52. In the category “Methodology /Delivery of Instruction,” the IEP stated that during Student’s scheduled ELA block, Student would be “provided with an alternative setting in a small instructional reading group to receive instruction in a specialized, rules-based, sequential reading program. Phonemic awareness and decoding/encoding strategies will be explicitly taught and reinforced. Writing skills will be explicitly instructed linking the specialized reading instruction to spelling skills.” (S-15).
53. The School’s “Notice of Proposed Action by School District” stated the basis for the TEAM’s recommendation as its determination that Student had made significant progress in her third grade placement and that she could now learn best in a general classroom with additional support in an alternative setting to receive continued rules-based, sequential instruction in reading. The Notice further stated that the TEAM had considered offering “continued placement in an intermediate language program” but had rejected that option based on Student’s current level of performance, which indicated that the general classroom was the least restrictive appropriate environment for Student. (S-1)
54. Neither the School nor Parents had reports from the evaluations of Jody Gray or Dr. Shaw at the May 10 TEAM meeting. Ms. Gordon testified that the School learned that Ms. Gray had conducted an evaluation during the course of the meeting. Ms. Lord and/or Mother told the TEAM that Ms. Gray’s report contradicted the School’s report of Student’s progress. (Gordon) Ms. Gordon stated that the testing did not reflect the progress she had seen in the classroom, and suggested follow-up testing at the end of the school year. (S-16, 109)
55. At the same TEAM meeting, Ms. Gordon commented that Student had been saying she would be attending Landmark School, and asked Mother whether this was the case. Mother stated: “yes, for the summer.” (Gordon)

⁵ Parents also had Student evaluated by an audiologist, Ms. Geri Shubow, to assess whether she had a central auditory processing disorder. Ms. Shubow concluded that Student had some mild difficulties in this area.

56. Parents were taken aback by the School's placement recommendations, because they felt Student was not ready for a reduction in the intensity of her services. (Father)
57. It is unclear from the record what the Parents had expected the School to recommend or what they knew of available services within Pentucket. The Notice of Proposed Action by School District indicated that the TEAM had rejected "continued placement in an intermediate language program." (S-14) The documentary record is silent, however, on whether or when anyone from Pentucket discussed an intermediate level program with the Parents prior to or during the May 10 TEAM meeting.
58. In a progress meeting in November 2006, in response to an inquiry from Parents' advocate, Ms. Gordon stated that her classroom did not extend beyond third grade, and this was an administrative decision. (Gordon) Ms. Gordon testified that she had "mentioned" an intermediate program for Student in meetings with Parents during third grade, but that "[e]very time I mentioned it, I didn't get a response from the parents. So I had assumed that that indicated to me that they weren't interested in it. They just didn't respond." (Gordon). The documentary record does not appear to memorialize these conversations.
59. Ms. Gordon further testified that she "assumed" that she had mentioned such a meeting during the quarterly progress meeting held in March 2007; however, notes from that meeting do not refer to any statements about an intermediate program. (Gordon, S-11) Further, in answering Parents' interrogatory regarding Pentucket's proposed services for February 2008 through February 2009 (IEP #2), Ms. Gordon did not mention an intermediate language-based classroom or any classroom other than hers.⁶ In response to questioning, Ms. Gordon testified that her intent under IEP #2 was to have Student remain in her class as the sole fourth grader from February through June 2008, then move to an intermediate program for fifth grade. She further testified that her failure to mention such a move was a "mistake" in answering the interrogatory. (Gordon)
60. In a letter dated June 18, 2007, Parents' advocate informed Pentucket that Parents' had rejected the proposed IEP for fourth grade and had decided to unilaterally place Student at the Landmark School for summer 2007 (beginning on June 28, 2007) and for the 2007-2008 school year, based on "Pentucket's inability to fully address [Student's] academic struggle and its negative impact on her self esteem..." The letter further requested full funding from Pentucket for the Landmark placement, including tuition, transportation, and additional related costs. (S-68)
61. Pentucket's Director of Special Education, Lauren Fain, responded in a letter dated June 25, 2007 stating that "the District is declining [Parents'] request," on the grounds that Pentucket's proposed IEP and placement would provide Student with FAPE, in light of Student's "significant progress" to date. (S-69)

⁶ As will be discussed below, IEP #2 called for nearly full-time placement in a separate language based classroom for the second half of fourth grade and the first half of fifth grade.

62. Notwithstanding Ms. Fain's letter, Parents placed Student in the Landmark summer program as they had planned, on or about June 28, 2007. (Father)
63. On July 25, 2007, Jody Gray conducted a follow-up evaluation of Student, which included review of Dr. Shaw's evaluation and of School progress reports and testing during third grade as well as administration of standardized tests. (Different versions of tests previously given were used to ensure validity.) (Gray, P-2B) Results were as follows:
- CTOPP: Alternate Phonological Awareness—average (58th %ile); Alternate Rapid Naming—very poor (less than 1st %ile)
 - TOWRE: Sight Word Efficiency—Below average (12th %ile); Phonemic Decoding Efficiency—Below Average (9th %ile); Total Word Reading Efficiency—Poor (6th %ile)
 - Test of Written Spelling-IV: Form B—Poor (5th %ile)
 - GORT-IV Form B: Total Oral Reading Quotient—poor (2d %ile)
 - Test of Silent Contextual Reading Fluency—Poor (3d %ile)
 - WIAT-II, Written Expression—Borderline/Poor (8th %ile); Numerical Operations—low average (16th % ile).
64. Ms. Gray found that Student's scores had not changed significantly between January and June 2007. (P-2B, Gray) Ms. Gray's report concluded that Student was "still struggling to attain basic literacy skills despite specialized academic interventions since Kindergarten." (P-2B)
65. On August 16, 2007 Ms. Lord wrote a second letter in which she stated that Jody Gray's (January 2007) testing results were "discussed at [Student's] last TEAM meeting" (in May 2007) and that these results indicated that Student would not make effective progress within Pentucket's proposed program. (S-70)
66. As stated above, Student began attending the Landmark School during summer 2007, and entered the academic year program in September. Landmark placed her in its elementary program, in a class that corresponded with fourth grade. (Pulkinnen) Student has remained in Landmark from that time to date. (Father, Pulkinnen)
67. Meanwhile, the TEAM re-convened in February 2008 to consider the April 2007 report of Dr. Shaw, the January and July, 2007 reports of Jody Gray, and an updated report from Ms. Shubow. The resulting IEP (IEP #2) called for placing Student in a language-based classroom for all academic subjects except for hands-on science activities. For the remainder of fourth grade, Student would return to Ms. Gordon's PLBC. Beginning in the fall of 2008, Student would be placed in Pentucket's Intermediate Language Based Classroom (ILBC), also for all academic subjects except hands-on science activities.
68. Parents rejected IEP #2, and Student remained at Landmark.

69. In April 2008, Pentucket conducted Student's three-year re-evaluation consisting of psychoeducational, speech/language, and educational assessments, as well as a classroom observation at Landmark.
70. The psychoeducational assessment, conducted by Kathleen Parker, consisted of selected subtests from the Woodcock Johnson III Cognitive Battery and a record review. On the Woodcock Executive Processes Cluster, Student scored in the low average range in "Concept Formation" and "Pair Cancellation," and in the average range for "Planning." On the Cognitive Fluency Cluster, she scored as follows: "Retrieval Fluency" – low average, "Rapid Picture Naming"—borderline, "Decision Speed"—average. These test results, coupled with records of prior testing including Dr. Shaw's, reflected previously documented difficulties with "executive functioning difficulty or information processing resulting in an occasional impulsive response style, distractibility, organizational difficulties and cognitive inflexibility." (S-1) Ms. Parker recommended various classroom strategies and accommodations (e.g., checklists, use of visual and graphic organizers, graphic representations of tasks, multiple choice formats for tests, word banks), as well as opportunities to practice reading to improve fluency. (S-1)
71. The speech/language assessment, conducted by Danielle Oliva, revealed generally average receptive and expressive language skills. (S-2)
72. Ms. Gordon, Student's former third grade teacher, conducted the special educational evaluation consisting of review of records and standardized tests (or subtests) as follows:
- CTOPP Phonological Awareness—poor (5th %ile), Phonological Memory—below average (12th %ile), Rapid Naming—poor (1st %ile)
 - TOWRE Form A—poor (3^d %ile)
 - GORT-4—Below Average (12th %ile) (rate and fluency were poor, comprehension was average, and accuracy was below average).
 - TORC-3—Poor overall comprehension for silent reading (7th %ile)⁷
 - TOWL-3, contrived writing subtests—below average (16th %ile)
 - WIAT II, math subtests—below average (9th %ile)
73. The educational testing showed a decrease in phonological awareness and memory from the "average" range, when Student was tested by Jody Gray in January and July 2007, to the poor and below average range, respectively, in April 2008. (Gordon, S-3) The GORT reflected improvement from the "poor" range in 2007 to "below average," which reflected improved comprehension with continued difficulties with accuracy and rate. (S-3)
74. Ms. Gordon concluded that Student's reading disability continued to impact her performance. She recommended instruction in a specialized, rules-based reading

⁷ It is unclear why Student scored so low on this test, as all of the subtest scores were in the Below Average or low average range, and none was in the "poor" category.

program, explicit teaching of phonemic awareness and decoding/encoding strategist, as well as in writing, incorporation of multi-sensory materials into math, and various accommodations including repetition of directions, breakdown of multi-step instructions, extra time for processing, and graphic organizers, sentence and paragraph frames for writing. (Gordon)

75. Ms. Gordon and Ms. Parker conducted the classroom observation at Landmark. They observed Student in her math and ELA classes. Their report concluded that Student was able to follow the classes, benefited from various accommodations, independently complete her work, and that she received appropriate supports in her small group settings. (S-4) Ms. Gordon testified that Student did not appear to be challenged by the Landmark curriculum, and appeared to be revisiting material that she already had mastered. (Gordon)
76. Student told her parents and others that she was concerned about the three-year evaluation because she did not want to return to her former public school. (Father, DeJoy, Gordon).
77. Student completed fourth grade at the Landmark School, participated in the Landmark summer program for summer 2008, and continues to attend as a fifth grader. (Father, Pulkinnen)

Parents' Proposed Program

78. The Landmark School is a Chapter 766-approved private school with several campuses. Student attends the elementary program of the Landmark School in Manchester. Landmark specializes in serving elementary, middle, and high school students who have specific language-based learning disabilities together with average or above average intellectual functioning. Landmark does not serve students with primary diagnoses of emotional or behavioral disorders. (Pulkinnen)
79. The Landmark curriculum is aligned with the Massachusetts Curriculum Frameworks. Students who are publicly funded take the MCAS examinations. (Pulkinnen)
80. Like other students at Landmark, Student receives both daily individual tutorials and whole-group instruction. Groupings are homogeneous, and are created on the basis of reading, comprehension, writing, and spelling skills. Groupings can be readjusted if needed. (Pulkinnen) Landmark assigns each student a case manager, who oversees and coordinates the child's program, as well as a tutor. The case manager works closely with the tutor, and somewhat less so with the classroom teachers, who primarily are supervised by department heads. (Dejoy)
81. Student's Landmark case manager for fourth grade was Ms. Julie Anne Dejoy. Ms. Dejoy knew Student well. She worked closely with Student's 1:1 tutor, observed some classes, and maintained regular contact with teachers. (Dejoy)

82. Ms. Dejoy testified that as a result of Student's combination of disabilities, Student was one of the more impaired students at Landmark. She was "a very disorganized student" as a result of her executive functioning problems. Student spent much of fourth grade "learning how to be a student," i.e., learning strategies for remembering to bring her homework or gym shirt from home, to get her materials from place to place, and to get started on her work without wandering around the classroom. Student's executive functioning problems affected homework because Student was unable to plan, prioritize and organize assignments. Landmark explicitly taught those skills. (Dejoy) Ms. Dejoy testified that Student was more disorganized than the typical Landmark student. (Dejoy)
83. Additionally, Ms. Dejoy further testified that Student had difficulties in both oral and written expression, and "very poor phonemic awareness." (Dejoy) Student's oral reading was labored, word-by-word and sound-by-sound. Landmark decided to address this issue with the LiPS program. (Dejoy)
84. Student also had difficulty with attention at the beginning of the fourth grade, but it improved over the course of the year. (Dejoy)
85. In general, Ms. Dejoy felt that it was Landmark's job to "rewire" Student's reading, writing and speaking and there were so many "holes" in Student's skills in reading, writing and speaking, that Student had to review or relearn skills that had been taught in the past. (Dejoy)
86. Ms. Dejoy testified that during her fourth grade year, Student made progress in reading and writing, was more focused, organized, and less fatigued by school. Homework was taking less time because Student was using a timer and becoming aware of how she got distracted and off task while doing homework. Ms. Dejoy attributed this progress to Landmark's use of a consistent approach across the curriculum, which supported Student's organization and executive functioning. (Dejoy) Mr. Christopher Woodin, who heads the math department in Student's Landmark placement and also taught Student math during the last three months of fourth grade, testified that Student had made progress in math, and, in particular, was less distractible and more organized in her approach to math problems. (Woodin)
87. Student has enjoyed being at Landmark. In particular, Student feels that she benefits from the fact that "everything is the same," i.e., that all teachers use similar approaches to analyzing and completing work. Parents observed that Student was able to do her homework independently. (Father)
88. According to Landmark's progress report completed in June 2008, Student's major gain has been in her comfort level and confidence in her work. Student had not internalized many of the skills listed as goals. Further, Student's scores in some standardized tests administered by Landmark decreased between July and October

2007 and June 2008, including math scores on the Stanford Achievement Test and certain subtests of the WIAT and Woodcock Reading Mastery test. (Woodin, Dejoy)

Program Proposed by the School

IEP #1

89. The program that Pentucket proposed in May 2007, embodied in IEP #1, consisted of a fourth grade classroom co-taught by Ms. Lindsay Kismarcik and Ms. Patricia Ingalls. Both teachers are dually certified in elementary and special education, but Ms. Kismarcik was designated as the regular education teacher, and Ms. Ingalls as the special education teacher responsible for children on IEPs. Ms. Kismarcik is a reading specialist who is Wilson trained. Ms. Ingalls also is Wilson trained. (Kismarcik)
90. During the 2007-2008 school year, the co-taught class consisted of 22 students, five of whom were on IEPs. Of the five students on IEPs, four had language-based learning disabilities. The fifth student, who had multiple disabilities, had a highly modified curriculum delivered primarily by a 1:1 aide. (Kismarcik)
91. The teaching model for the inclusion class was for the teachers to collaborate and provide differentiated instruction according to the needs and skill levels of the students. Typically, for reading and math, the teachers presented mini-lessons to the whole group. The group lessons were followed by instruction in small groups. The teachers created the groups for each unit on the basis of pre-testing. Groupings were flexible and could be changed to meet student needs. For reading, Student would have received Readers' Workshop as well as small group Wilson instruction. Science and social studies were co-taught. Science involved minimal reading. Somewhat more reading was required for social studies, and modified texts and the Kurzweil Reader were available. (Kismarcik)
92. For writing, Student would have received 1:1 tutorial services from Ms. Mary Hall, the intermediate language-based teacher, who would have provided systematic, sequential and multi-sensory writing instruction, including use of graphic organizers, practice developing sentences and paragraphs, and practice and review with encoding. (Bartiniski)
93. The teachers for the inclusion classroom described it as large enough for several small groups, very quiet, structured and predictable. (Kismarcik, Ingalls)
94. Pentucket staff generally felt that Student was ready for and would benefit from the inclusion model because she had both the cognitive ability as well as the listening and comprehension skills to absorb grade level content. Additionally, Student's ability to self-advocate and her good social skills would allow her to participate fully in the classroom. They felt that the differentiated instruction in the inclusion class would have met Student's needs in reading and math, and that the writing tutorial would

continue the more intensive instruction that she needed in that area. The teachers felt the class could meet Student's language needs and that the accommodations in her IEP easily fit into the structure of the classroom. (Kismarcik, Gordon)

IEP #2

95. As stated above, IEP #2, developed in February 2008, called for Student's placement in a substantially separate language-based class for all academic subjects except for hands-on science activities. Student was to return to Ms. Gordon's PLBC for the remainder of fourth grade (2007-2008).⁸ For fifth grade, Student would move to the Intermediate Language Based Classroom (ILBC), which serves grades four through six. The teacher for the ILBC was Ms. Mary Hall (who would have been Student's writing tutor under IEP #1). Ms. Hall is Wilson certified, Orton-Gillingham trained, and certified in moderate special needs. (Gordon)
96. Pentucket staff felt that Student could make effective progress in either the inclusion setting described in IEP #1, or the substantially separate classroom described in IEP #2. Although they had a preference for IEP #1, they proposed IEP #2 in consideration of Parents' desire for an integrated, language-based program. (Gordon)

FINDINGS AND CONCLUSIONS

Based on the evidence at the hearing, I conclude that IEP #1, issued in May 2007 was not reasonably calculated to provide Student with FAPE. I further conclude that IEP #2, issued in February 2008 was inappropriate from February 2008 until the start of the 2008-2009 school year (fifth grade), but was appropriate from that point forward. I further find that Landmark School was appropriate from the date of entry until the start of the 2008-2009 school year. Since IEP #2 was appropriate beginning in or about September 2008, I need make no further findings regarding whether or not Landmark continued to be an appropriate placement after that date. My reasoning follows.

There is no dispute that Student is a school-aged child with a disability who is eligible for special education and related services pursuant to the IDEA, 20 USC Section 1400, *et seq.*, and the Massachusetts special education statute, G.L. c. 71B ("Chapter 766"). Student is entitled, therefore, to a free appropriate public education (FAPE), that is, to a program and services that are tailored to her unique needs and potential, and are designed to provide 'effective results' and 'demonstrable improvement' in the educational and personal skills identified as special needs." 34 C.F.R. 300.300(3)(ii); Lenn v. Portland School Committee, 998 F.2d 1083 (1st Cir. 1993), citing Roland M. v. Concord School Committee, 910 F.2d 983 (1st Cir. 1990), *cert. denied*, 499 U.S. 912 (1991).

Education must be provided in the least restrictive environment (LRE) consistent with an appropriate program; that is, students should be placed in more restrictive

⁸ For the period in question, Ms. Gordon had only second and third graders in her class; Student would be the only fourth grader. (Gordon)

environments, such as private day or residential schools, only when the nature or severity of the child's disability is such that the child cannot receive FAPE in a less restrictive setting. (Id.) On the other hand, the opportunity to be educated with non-disabled students does not cure a program that otherwise is inappropriate. School Committee of Town of Burlington v. Dept. of Education of Mass., 471 U.S. 359 (1985).

In a due process proceeding to determine whether a school district has offered or provided FAPE to an eligible child, the burden of proof is on the party seeking the status quo. In the instant case, as the moving party challenging the School's IEPs, Parents bear this burden. That is, in order to prevail, they first must prove, by a preponderance of the evidence, that IEPs #1 and/or #2 were not appropriate, i.e., were not reasonably calculated to provide Student with FAPE. To do so, the Parents must provide more evidence that the School's IEPs were inappropriate than the School must provide in defense; if the evidence is equal, the School must prevail. Schaffer v. Weast, 546 U.S. 49, 44 IDELR 150 (2005).

On the other hand, if Parents meet this burden with respect to either or both IEPs, they must then prove that the Landmark School was appropriate for Student.⁹ The Parents are not held to the same appropriateness standard as the school district, however, and need only demonstrate that the Landmark program was or is responsive to Student's special needs, so that she can benefit educationally. Florence County School District Four v. Carter, 510 US 7, 13 (1993), Doe v. West Boylston School Committee, 28 IDELR 1182 (D. Mass., 1998); In Re Gill-Montague RSD, BSEA #01-1222 (Crane, August 2001).¹⁰

In the instant case, the parties agree on Student's profile as a bright, likeable, hard-working child with excellent comprehension and reasoning skills, and with significant deficits in reading, writing, and spelling, complicated with problems with executive functioning and attention. Their dispute is over the appropriateness of IEPs #1 and #2 to meet Student's needs, and the appropriateness of the Landmark placement. A subsidiary dispute is whether IEP #1 was appropriate in light of the School's knowledge of Student's needs at the time it was written, and whether the Parents should be denied reimbursement for Landmark because they acted unreasonably and/or gave inadequate notice prior to making the unilateral placement at Landmark.

Student's Progress in Third Grade (2006-2007)

The Parents do not dispute the appropriateness of the third grade IEP, which they had fully accepted. Student's progress for that year is relevant, however, to the issue of whether the IEP offered for fourth grade was appropriate.

⁹ If parents of an eligible disabled child can prove that the program and services offered by their school district do not provide FAPE, they may be reimbursed for the costs of unilaterally placing their child in a private program, if they also can prove that the privately obtained services are appropriate. Burlington, supra.

¹⁰ Obviously, since there are two IEPs at issue here, Parents have the burden of proving that each IEP was inappropriate, in order to recover reimbursement for the corresponding period at Landmark School.

There is no dispute that Student made educational progress in the PLBC. As Ms. Gordon persuasively testified, Student particularly made progress in her independent reading level as measured by the DRA, in sight word recognition, and in reading fluency. Subsequent testing by Jody Gray indicated that by mid third-grade, Student scored in the “average” range on tests of phonemic awareness. Still, the record shows that Student continued to struggle with applying the discrete skills that she was learning to both reading and writing in particular. Further, homework was still very difficult and time-consuming for Student, and she could not complete it independently. As Ms. Gordon herself recognized, Student’s documented attentional and organizational difficulties interfered with her performance in all areas.

There also is no dispute that Student still needed specialized instruction for both reading and writing, as well as numerous accommodations. Rather, the parties disagree on the appropriate setting for delivering the services needed. On the whole, it appears that Student benefited from her third grade placement, but given the scope and complexity of her disabilities, as well as her need for continued progress in internalizing and generalizing skills, I conclude that she was not ready for a reduction in the intensity of her services for fourth grade.

IEP #1

IEP #1, offered in May 2007, was inappropriate because it reduced the intensity and cohesiveness of services to Student when she was still struggling tremendously to apply the skills she had learned, was not able to do homework independently, and seemed to be just beginning to learn strategies to sustain her attention and organize her work. There is no dispute that Pentucket was aware of these areas of continuing need, even without Ms. Gray’s report and recommendations for an integrated, language-based program for fourth grade. Moreover, the record shows that at the May 10, 2007 TEAM meeting, Parents or their advocate put Pentucket on notice that Ms. Gray had conducted testing which called Student’s progress into question. Indeed, the record shows that Ms. Gordon suggested follow-up testing at the end of the school year. Further, upon hearing about Ms. Gray’s evaluation, Pentucket took no steps to either contact Ms. Gray for further discussion or to conduct further assessments of its own. This inaction in the face of information that seemingly contradicted its own conclusions undermines Pentucket’s claim that it lacked information about Student’s need for a language-based program for fourth grade.

Finally, notwithstanding Ms. Gordon’s testimony to the contrary, the record supports the conclusion that Pentucket provided Parents with little or no information about its own, intermediate language-based classroom. Although the Notice of Proposed Action accompanying IEP #1 indicates that the TEAM considered and rejected that option for fourth grade there is no documentation of such consideration at the May TEAM meeting or of discussion of that program with the Parents at any other time.

Given the inappropriateness of IEP #1, especially coupled with an absence of information to Parents about other in-district options for Student, Parents were justified in

placing Student at Landmark for the beginning of fourth grade. (The Parents have presented no evidence regarding the appropriateness or lack thereof of Pentucket's summer program for 2007; therefore, they are not entitled to reimbursement for that period).¹¹

IEP #2

IEP #2 was inappropriate for the period from February 2008 until the beginning of Student's fifth grade year in September 2008, but was appropriate from September 2008 forward, until its expiration in February 2009. In light of Student's difficulties with organization and executive function, it would not be appropriate to have her change schools for the second portion of fourth grade. Further, while perhaps not in violation of the applicable regulations regarding permissible age spans in classrooms, it would be inappropriate to require a Student to be the only fourth grader in a room of second and third graders. That Landmark has ungraded classrooms is irrelevant; Pentucket does classify children by grade.

On the other hand, the proposed IEP for fifth grade, which provides all academics but science labs within a substantially separate language-based classroom taught by a Wilson-certified, Orton-Gillingham trained teacher, incorporates the recommendations of the various independent evaluators, and should provide Student with the intensive, specialized services that she continues to need.

In reaching this conclusion, I note that the record shows that Student did not make dramatic progress at Landmark. Rather, according to both Landmark and Pentucket's testing, she appears to actually have lost ground in some areas. While the record does not definitively establish why the Student appears to have lost skills, or whether the diminution in some test scores (other than tests of phonemic awareness) is statistically or otherwise significant, it does establish that Student appears not to have increased her rate of progress, or closed the gap between her skill level and that of her typical peers in a way that has been objectively measured, at least in the areas tested. This does not indicate that Landmark was inappropriate for Student per se, but, rather, that it seems to have resulted in no more measurable progress for Student than Pentucket's program did during third grade, and no more progress than would the appropriate portions of IEP #2.

Appropriateness of the Landmark Program for Fourth Grade

Having found that the program and services offered by Pentucket for fourth grade as embodied in IEP #1 and the portion of IEP #2 from February 2008 until the start of the 2008-2009 school year (fifth grade) were inappropriate, I now must determine whether the placement chosen by the Parents was appropriate. The record shows that the

¹¹ Contrary to the School's assertions, Parents gave adequate notice to Pentucket of their intent to unilaterally place Student at Landmark. The relevant statute does not require parents to provide more than advance written notice of their intent to make such a placement. Moreover, Student had been enrolled in Pentucket since Kindergarten and had been a special education student continuously since first grade; Greenland and similar cases are, therefore, inapposite.

Landmark School has provided Student with FAPE during the relevant period, and hence was an appropriate setting for Student during 2007-2008. Landmark is an established, Chapter 766-approved private school for students who, like Student have language disorders including dyslexia, in the context of average or above average cognitive ability. Course content is aligned with the Massachusetts curriculum frameworks. Student received specialized tutorial and group instruction in her areas of need. She seemed to benefit from a uniform approach to instruction across the curriculum. The School's own observers concluded that Student seemed to be functioning well within her Landmark classroom. There is no evidence that Parents had any reason to doubt Student's progress at Landmark until her re-evaluation in April 2008, and, even then, the Parents were not unreasonable in choosing not to disrupt Student's placement in the spring of her fourth grade year.

For these reasons, Parents, therefore, are entitled to reimbursement for tuition at Landmark School as well as transportation and other associated costs from the start of the 2007-2008 academic year until the start of the 2008-2009 academic year. Parents are not entitled to reimbursement for such costs from the start of the 2008-2009 academic year forward, however, because Pentucket made an appropriate program available at that time.

Finally, I note that the parties agree that Student's progress has been less than might be expected, especially in light of her intelligence, hard work and motivation, and the intensive services she has received from skilled professionals over the years. The record contains ample evidence that Student's attentional and organizational difficulties are pervasive, and interfere with her learning and her functioning as a student. It would be advisable for the TEAM to revisit this issue and consider whether Student needs additional evaluation, strategies, or accommodations in this area.

ORDER

Based on the foregoing, the Pentucket Regional School District shall do the following:

1. Upon receipt of appropriate documentation verifying expenditures, reimburse Parents for tuition payments made to the Landmark School from the date of Student's enrollment in the academic program for the 2007-2008 school year until the start of the 2008-2009 school year;
2. Reimburse Parents for transportation that they provided to Student to and from Landmark School during the period referred to above according to the requirements of 603 CMR §28:07(6), as well as for any other incidental costs associated with the Landmark placement during that period.

By the Hearing Officer,

Sara Berman

Dated: November 14, 2008