**COMMONWEALTH OF MASSACHUSETTS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

# In Re: Amherst-Pelham RSD BSEA #11-9418

## RULING ON MOTION FOR SUMMARY JUDGMENT

### 

On January 18, 2012, the Parents filed a Motion for Summary Judgment in the above-entitled matter. The Amherst-Pelham Regional School District (Amherst-Pelham or School) filed an Opposition to the Parents’ Motion on January 25, 2012. At issue in this Motion is whether the undisputed facts in this matter demonstrate that the School is incapable of implementing the IEP that it proposed for the 2011-2012 school year because the School does not have substantially-separate language-based classrooms capable of delivering Grid C services in Science and Social Studies as required by its own IEP. The Parents assert that there are no genuine issues of material fact, and that they are entitled to relief as a matter of law. The School contends that Parents have not met their burden of showing that there are no genuine issues of material fact.

**ISSUE PRESENTED**

Whether the Student is entitled to the relief sought at hearing as a matter of law where (1) the parties agree that Student, who has a language-based learning disability, requires substantially-separate language-based classrooms for all academic instruction (including science and social studies); (2) the relevant IEP, proposed by the School, specifies that all academics, including science and social studies will be taught in a substantially-separate language-based classroom; (3) as of June 2011, the School did not have in existence a substantially-separate language-based classroom for social studies; (4) as of December 2011, the School lacks substantially-separate classrooms for science and social studies; and (5) the School has asserted that if Student returns to Amherst-Pelham from White Oak, Amherst-Pelham will fully implement his IEP, including by creating a substantially-separate language-based science and social studies classes if such is required by that IEP. [[1]](#footnote-1)

**POSITIONS OF THE PARTIES**

**Position of Parents**

Amherst-Pelham and Parents agree that Student needs to receive all academic instruction, including in science and social studies, in a substantially-separate language-based classroom with similarly-situated peers. The IEP reflects this agreement, and provides for “Grid C” services in all academic subjects. Amherst-Pelham could not and cannot implement this IEP, however, because the language-based (“LLD”) program at the middle school to which Student is assigned does not provide the requisite substantially-separate science and social studies classes for students enrolled in the LLD program. While the School has asserted that it would provide such classes for Student if he were to enroll in the middle school, the school has not done so to date. Because the School cannot implement its proffered IEP, the Parents must prevail as a matter of law.

**Position of School**

The Parents have failed to meet their burden of showing that there are no genuine issues of material fact. Specifically, Parents have not demonstrated that the School could not or would not implement the Student’s IEP if he returned from White Oak, and could not or would not create additional substantially-separate classroom(s) if needed to implement the IEP. Moreover, there is no legal basis for the Parents’ assertion that the School is required to create particular classroom settings for Student when he is not currently enrolled, as long as if and when Student does return to the District, the School is prepared to provide him with FAPE.

#### UNDISPUTED FACTS

The following facts are not in dispute, and are derived from the hearing request, response, and accompanying documents, as well as documents submitted with the Motion for Summary Judgment and Opposition.

1. At all relevant times, Student has been, and is, eligible for special education and related services, pursuant to the IDEA, 20 USC Sec. 1400 et seq., and MGL c. 71B. Amherst-Pelham is the Local Education Agency (LEA) responsible for providing Student with a free, appropriate public education. (FAPE). Student’s assigned school, based on his age, grade and residency, is the Amherst Regional Middle School (hereafter, Middle School).

1. Student has never actually attended a public school operated by Amherst or Amherst-Pelham. Student attended a private, non-special education school at parental expense through the 2008-2009 school year. In or about November 2009, Parents unilaterally placed the Student at the White Oak School, an approved private special education day school for students with language-based learning disabilities. Student has remained at White Oak, at parental expense, since that time. Parents now seek an order from the BSEA directing the School to reimburse the Parents for their past payments to White Oak as well as to fund Student’s placement at White Oak for the 2011-2012 school year.
2. The parties agree that Student has a language-based learning disability, and requires specialized, language-based instruction in all academic subjects, including science and social studies.
3. The relevant IEP, issued by Amherst-Pelham in December 2010, provides for placement in a “substantially separate program” within the Middle School, and further lists all academic classes in Grid C. The “substantially separate program”—hereafter the “LLD” program—is intended for students with language-based learning disabilities. The proposed IEP incorporates the recommendations of Parents’ outside evaluators.
4. During part or all of the 2010-2011 school year, the Middle School did not have a substantially-separate science classroom as part of the LLD program. During 2011-2012, there has been no substantially-separate science or social studies classroom as part of the LLD program.

**DISPUTED FACTS**

1. The parties dispute whether Amherst-Pelham will be able to implement the Student’s IEP if he returns to the district, including by creating appropriate substantially-separate instruction in science and social studies. The Parents assert that among other things, the School does not have and cannot create the class placements in science and social studies within the LLD program as required by the proposed IEP. The School states that it is not required to have programs in place for a student who is not currently enrolled, but that it is fully able to provide appropriate programming consistent with Student’s IEP and would do so in the event that Student returns to the District. [[2]](#footnote-2)

**FINDINGS AND CONCLUSIONS**

The Parents’ Motion for Summary Judgment is DENIED because the Parents have not met the threshold burden of demonstrating that there are no genuine issues of fact.

**Discussion**

Summary judgment is available at the BSEA if “there is no genuine issue of fact relating to all or part of a claim or defense and [the moving party] is entitled to prevail as a matter of law…” 801 CMR 1.01(7)(h). In determining whether to grant summary judgment, BSEA hearing officers are guided by Rule 56 of the Federal and Massachusetts Rules of Civil Procedure, which provide that summary judgment may be granted only if the “pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law.” Id. See also Rulings on Motions for Summary Judgment in: *Zelda v. Bridgewater-Raynham Public Schools and Bristol County Agricultural School*, BSEA No. 06-0356 (Byrne, 2006); *In Re Westwood Public Schools,* BSEA No. 10-1162 (Figueroa, 2010); *In Re: Mike v. Boston Public Schools*, BSEA No. 10-2417 (Oliver, 2010).

A fact is “material” if it “might affect the outcome of the suit under governing law. Anderson v. Liberty Lobby, Inc., 477 US 242, 248 (1986). The moving party has the initial burden of producing evidence that there is no dispute of material fact. Once the moving party has done so, the burden then shifts to the party opposing summary judgment to establish, via affidavits or other documents, specific facts showing that there is a “genuine issue for trial.” Celotex Corp. v. Catrell, 477 U.S. 242, 248-50. (1986) All evidence and inferences must be viewed in the light most favorable to the party opposing the motion for summary judgment, in this case, the School. Anderson v. Liberty Lobby, supra, at 252.

In the instant case, the central issue is whether the program and services offered by Amherst-Pelham can provide the Student with FAPE, or, if not, can be modified in order to provide him with FAPE. The ability of the School to implement the Grid C services in science and/or social studies, as discussed in the Motion for [Partial] Summary Judgment, is subsumed in this larger inquiry. The parties have a factual dispute regarding the science/social studies classrooms, such that partial summary judgment is not appropriate on that issue.[[3]](#footnote-3)

In light of the foregoing, I conclude that Parents have not met their burden of demonstrating that there are no material facts in dispute with respect to the Grid C services. On the contrary, the parties clearly disagree on whether the placement proposed by Amherst-Pelham is capable of implementing the Student’s IEP, as well as, of course, the remaining issues raised in the Hearing Request.

**CONCLUSION AND ORDER**

For the reasons stated above, the Parents’ Motion for Summary Judgment is DENIED, and this matter shall proceed to hearing as scheduled.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Dated: Sara Berman, Hearing Officer

1. The Parents’ hearing request and other submissions contain numerous additional factual allegations, including that the School failed to offer the Student FAPE for 2010-2011 and also committed various procedural violations. Since the Motion for Summary Judgment addresses only the issue of the science and social studies classrooms, however, and not the other issues in dispute, I will construe it as a Motion for Partial Summary Judgment. [↑](#footnote-ref-1)
2. The Parents never responded to the IEP proposed in December 2010, and the School treated their non-response as a rejection. Presumably, this IEP has expired, and neither party has submitted a successor proposed IEP. There is no indication to date that such successor IEP would designate a placement or service grid that materially differs from those contained in the IEP of December 2010. [↑](#footnote-ref-2)
3. Of course, there continue to be disputes of material fact on other issues, including but not limited to the availability and appropriateness of tutorials at the School’s proposed placement, whether or not Middle School classes observed by Parents’ consultant were the only LLD classes that were available from the School, or even were the same classes that Amherst-Pelham had proposed for Student, and whether the School committed procedural violations—such as delays in the IEP process-- for which Parents are entitled to relief. [↑](#footnote-ref-3)