**COMMONWEALTH OF MASSACHUSETTS**

**SPECIAL EDUCATION APPEALS**

# **In Re: Amherst-Pelham Regional School District BSEA #11-9418**

## 

## **DECISION**

This decision is issued pursuant to the Individuals with Disabilities Education Act (“IDEA”), 20 USC Sec. 1400 et seq., 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 June 21, 2011, Parents filed a hearing request with the Bureau of Special Education Appeals (BSEA) alleging that the Amherst-Pelham Regional School District (Amherst or School) has failed to offer the Student, who is a child with a language-based learning disability, a free, appropriate public education (FAPE). Parents allege that the Student requires a fully-integrated program that provides language based instruction in all settings, and contend that Amherst’s proffered placement is not such a program. Parents have requested the BSEA to order Amherst to reimburse them for the costs of Student’s unilateral placement at the White Oak School, an approved private day school in Westfield, MA.

Amherst responds that at all relevant times it has made an appropriate IEP available to Student, and has offered a public school placement that is appropriate and can fully implement Student’s IEP. Amherst contends that the White Oak School is too restrictive for Student, who can be educated within a public middle school. Amherst denies allegations of procedural violations.

The parties requested and were granted several postponements of the hearing date for good cause. A hearing took place on February 6 and 8, 2012, at the offices of Catuogno Court Reporting Services in Worcester, MA. Both parties were represented by counsel. Each party 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- 14, School’s exhibits S-A through S-V, tape recorded testimony and argument, and the written transcript created by the certified court reporter. At the parties’ request, the conclusion of the hearing was postponed to March 7, 2012 for submission of written closing arguments and the record closed on that day.

Those present for all or part of the proceeding were:

Parent

Betsy Dinger Assistant Principal, Amherst Regional Middle School (ARMS)

David Slovin Student Services Administrator, Amherst-Pelham RSD (Amherst)

JoAnn Smith Interim director of Student Services, Amherst

Sarah Wilson Speech/Language Therapist, ARMS

Tracy Westover Special Education Teacher, ARMS

Susan Shellenberger Special Education Teacher, ARMS

Maura Stampa Special Education Teacher, ARMS

Dorry Gardner Special Educaton Teacher, ARMS

Derek Beaulieu, Esq. Counsel for Parents

Fernand Du Pere, Esq. Counsel for School

Sara Berman BSEA Hearing Officer

Brenda Ginisi Court Reporter

### ISSUES PRESENTED

1. Whether the IEP and placement that the School proposed for the period from November 22, 2010 to November 21, 2011 were appropriate for the Student;
2. If not, whether Parents are entitled to reimbursement for their unilateral placement of the Student at the White Oak School;[[1]](#footnote-1).
3. Whether the School committed procedural violations that denied Student a Free, Appropriate Public Education such that the School owes the Student compensatory services.

#### POSITION OF PARENT

Student has severe dyslexia as well as ADHD, and his reading, writing, and other academic skills are very low in relation to his grade and cognitive ability. To make effective progress, Student requires a substantially-separate program where language-based methodologies are used, in an integrated fashion, in all subjects, and in which Student would be educated in small classes with peers having similar cognitive and learning profiles.

Amherst does not dispute this conclusion, and, in fact, its most recent IEP calls for such a placement within the public school setting. Amherst is incapable of fully implementing this IEP, however, because the language-based program called for in the IEP does not exist as a coherent entity at the middle school which Student would attend. Rather, Amherst’s proposed program is a combination of pull-out and mainstream or inclusion classes that is neither appropriate nor in conformity with his IEP. For example, Amherst’s program does not have an established language-based social studies class. Amherst has proposed to create substantially separate classes if needed, but Student might be the only enrollee. This setting would not be appropriate for Student. Further, the School’s program is located within the public middle school building. As a result of his disabilities, Student would have difficulty negotiating this setting, and might experience bullying and stigma.

Finally, Amherst impermissibly delayed identifying and evaluating the Student, and failed to offer him an appropriate IEP and placement in a timely manner. The Parents, therefore, acted reasonably when they placed the Student at the private White Oak School, which has provided the integrated language-based programming that Student needs. Student has made academic and social-emotional progress at White Oak, which is an appropriate placement for him.

POSITION OF SCHOOL

The Student in this case never has been educated within the Amherst Public Schools. Rather, he attended a non-special education private school at parental expense through fifth grade and part of sixth grade, until his Parents unilaterally transferred him to White Oak in approximately November 2009. While there is no dispute that Student has a language-based learning disability and ADHD, the record does not support a conclusion that Student could not or cannot be educated successfully within the public school setting pursuant to his IEP. Amherst has language-based classes in English Language Arts, Math, and Reading that can meet Student’s needs, can provide any necessary related services. Further, the Amherst program is flexible and can be tailored to meet Student’s individual needs. For example, if Student needs a daily 1:1 tutorial in reading, Amherst can provide it. If he needs a separate classroom for science and/or social studies, Amherst can create the requisite classrooms, but is not required to have such classes in existence if Student is not enrolled in the District. Finally, Amherst has not committed any procedural violations that deprived the Student of a FAPE.

**FINDINGS OF FACT**

1. Student is a fourteen year old eighth-grader who lives within the Amherst-Pelham Regional School District. Since approximately November 2009, Student has attended the White Oak School in Westfield MA at parental expense. Student’s eligibility for special education and related services is not in dispute. Student is described as a bright, personable, creative, athletic, and hard-working child with many interests. (Parent, S-A, S-E)
2. Student has solidly average intellectual ability, but has a significant language-based learning disability, classified as dyslexia, as well as ADHD-combined type. Student’s reading, writing and math skills are well below the levels expected in light of his age and cognitive ability. His organizational skills and executive functioning are weak, and his impulsive behavior causes minor conflicts with peers, who sometimes get annoyed with him. (S-E)
3. From kindergarten through the first months of sixth grade, Student attended a private, non-special education school. This school taught pre-reading skills in grades K through 2, but did not introduce formal reading instruction to any students until third grade. (Parent, S-A, S-M) From the outset, Student had problems with attention, memory, and phonemic awareness, as well as some problems with peer interactions. (S-A, S-M) When he started reading instruction in third grade, he did not acquire skills as quickly as his peers, and soon began falling behind. (Parent, S-A, S-M)
4. Concerned about his progress, in November 2006 Parents obtained a neuropsychological evaluation from Heather Hornik, Ph.D. Dr. Hornik administered a battery of standardized tests to Student and had Parents and teachers complete rating scales. Based on the results of these assessments, Dr. Hornik concluded that Student had average cognitive ability, but also had a language processing disorder that affected both phonological and visual processing. As a result, Student’s reading, written language and math skills were below grade level. (S-A)
5. Dr. Hornik also concluded that Student met the criteria for ADHD Combined Type, characterized by hyperactivity and difficulties with focus, distractibility, impulsivity, working memory, and organization. (S-A)
6. Dr. Hornik’s report made numerous recommendations, including “explicit, intensive teaching of phonological and phonic aspects of word decoding from a reading specialist” using a program such as LiPs, Wilson Reading, or PhonoGraphix, as well as intensive work on reading fluency, speech/language therapy to work on language structure, explicit instruction in writing, assistive technology, and a modified approach in math to accommodate his reading weaknesses. (S-A)
7. In approximately August of 2007, after receiving Dr. Hornik’s report, Parents contacted Amherst and requested a referral for tutoring. (Parent, Smith) JoAnn Smith, now the Interim Director of Student Services, referred Parents to a teacher whom Parents then retained and paid privately. This teacher provided reading tutoring to Student before and after school, two to three days per week, until he left the private school. (Parent)

1. Student experienced social difficulties and bullying at his private school which escalated with the increasing skill gap between him and his peers, and his self-confidence dropped. In approximately November 2009, at the start of Student’s sixth grade year, Student was injured in a serious bullying incident. Parents removed Student from the private school. Shortly thereafter, still in November 2009, Parents unilaterally placed Student at the White Oak School in Westfield. (Parent)
2. Student’s emotional state improved almost immediately after this placement. According to Parent, Student felt as though he fit in with his peers, became more confident, and seemed to be making academic progress. (Parent)
3. At the time they placed Student in White Oak, the Parents’ only contact with Amherst had been the 2007 inquiry regarding tutoring. Parents had not enrolled Student in the Amherst public schools, had not requested an evaluation or special education services, and did not ask Amherst to fund White Oak. (Parent, Smith)
4. On the other hand, when Parent first contacted Amherst in 2007 and informed Ms. Smith that they had a child who had been diagnosed with learning disabilities, neither Ms. Smith nor any other employee from the School informed Parents about special education services that might be available from the District, referred Student for an evaluation, or advised Parents on how to make a referral. (Parent)
5. There was no contact between Parents and the School between 2007 and May 2010, about six months after Student enrolled in White Oak. In May 2010, Parents sent an e-mail to JoAnn Smith requesting an evaluation for Student, stating that they had transferred Student from his original private school to White Oak and further stating that Student “has severe dyslexia and requires the atmosphere of a special education program.” (P-14, Parent)
6. The Parents and Ms. Smith continued to exchange e-mails regarding logistics during May and June 2010. Parents made several requests for consent forms. Parents provided the School with a signed consent form on or about June 14, 2010. Meanwhile, Parents had scheduled a private evaluation for Student and so informed Amherst. The parties ultimately determined that school-based testing would be deferred to the start of the 2010-2011 school year after Amherst had had a chance to review the private evaluation results. (Parent, Smith, P-14)
7. The private neuropsychological and educational evaluation was conducted by Amy K. Morgan Ph.D. and Gretchen Timmel, M.Ed. in July 2010. Student was twelve years old at this time. (P-4)
8. The neuropsychological evaluation consisted of tests of cognitive abilities, executive functioning, language processing, visual-perceptual and fine motor skills, as well as emotional functioning. In summary, Student had average cognitive ability, with relative strengths in vocabulary, non-verbal reasoning, and processing speed and relative weaknesses in working memory, fund of knowledge, and shifting attentional set. While he had strong reasoning skills and higher order conceptual ability, he had weaknesses in executive functioning (memory, sequencing, organization, planning, and shifting set) that impeded his access to these skills. (P-4)
9. Student had generally strong language skills, but his weaker memory and organizational skills made it difficult for him to access them. Student was able to benefit from cues and context. Student had weaknesses in visual spatial judgment and visual motor integration, which, according to the evaluator, is common in individuals with dyslexia. (P-4)
10. Student’s emotional/behavioral status was assessed with the BASC-2, completed by Parents as well as Student’s teacher from White Oak. The results, together with reports of Parents and teacher, indicated that Student generally presented as positive, upbeat, curious and creative; however, he also had problems with hyperactivity (e.g., staying in his seat), distractibility, and focus, was often disruptive in class or teased others, sometimes overreacted to situations, and was impulsive. He often was not aware that his behavior annoyed others. (P-4)
11. Academic testing using the WIAT indicated that many of Student’s skills were well below grade level, as follows: (S-E)

* Reading Comprehension: 2d %ile, G.E.—1.6
* Math Problem Solving: 16th%ile, G.E.—4.9
* Word Reading: 1st %ile, G.E.—2.0
* Essay Composition: 8th %ile, G.E.—3.3
* Pseudoword Decoding: 4th %ile, G.E.—1.9
* Numerical Operations: 5th %ile, G.E.—3.1

1. Dr. Morgan’s and Ms. Timmell’s conclusions were consistent with those of Dr. Hornik in 2006. In sum, Morgan and Timmell stated that Student “presented with a significant dyslexia characterized by lack of automaticity and accuracy in sound symbol correspondence, vowel substitutions, letter order interchanges, difficulties with the understanding of sentence structure and grammar and single word encoding. [Student’s] lack of functional literacy is putting him at significant risk for access to grade level curriculum.”[[2]](#footnote-2) They stated that Student’s literacy deficits caused reduction in his math skills. (P-4) Dr. Morgan and Ms. Timmell further concluded, as had Dr. Hornik, that Student had ADHD-Combined Type which affected attention and executive functions such as planning, organizing and anticipating the impact of his actions. (P-4)
2. Morgan and Timmell recommended Student’s continued placement at White Oak, which they stated was “critical to his continued development,” because his dyslexia was “somewhat resistant to intervention [based on his having had prior tutorials].” They stated that to acquire functional literacy, Student needed “intensive integrative services” in a “learning environment that simultaneously teaches systematic, multisensory decoding and encoding, in conjunction with concept building and curriculum formation…multisensory teaching across curriculum with a ‘universal’ design of implementation of multisensory decoding, encoding, and other written language tools…[and] no fewer than four to five 1-hour [Orton-Gillingham or Wilson] tutorials.
3. The evaluators further recommended services to address math, writing, and executive functioning, accommodations for his ADHD, and continued placement in a classroom of peers. (P-4)
4. Finally, Morgan and Timmell stated that while they believed White Oak best met Student’s needs, if Student were to be educated somewhere other than White Oak, he would require a “substantially separate language-based classroom under the leadership of a Special Education Teacher certified in one of the multisensory reading methodologies;” placement with similar peers, intensive 1:1 reading tutorial, and specialized math and writing instruction. They felt mainstreaming should be limited, with the possible exception of science, with support of an aide, accommodations, and modifications. (P-4)
5. The Morgan and Timmell evaluation report was completed in July 2010, and Parents sent it to the School shortly thereafter.
6. In September 2010, Student received a speech and language evaluation from Amherst’s speech-language pathologist, Sarah Wilson. Ms. Wilson reviewed the Morgan and Timmel evaluation, as well as the “IEP”[[3]](#footnote-3) issued by White Oak, observed Student in his White Oak classroom, and conducted a formal assessment (the CELF-IV). (S-F, Wilson)
7. On the CELF-IV, Student earned “average” scores on all subtests. When Ms. Wilson observed Student in his Oral Expression class, she noted that Student actively participated for most of the class, although he sometimes got distracted, and became restless at the end of the class. Ms. Wilson’s report recommended accommodations such as preferential seating, repetition of directions, check ins to assure comprehension, monitoring responses for accuracy, and written or visual supports for orally presented information. (S-F)
8. Student’s teachers at White Oak completed educational assessments. The report of the math teacher stated that Student needed 1:1 assistance, modeling, cues and ongoing practice and review for number identification skills. He needed continuous cues to maintain focus. Student sometimes talked out in class, or got up and walked around looking at others’ work. He needed to work on peer interaction skills (he was sometimes controlling and boastful). Student understood math concepts and was working on the four operations with two and three digit numbers. (S-H)
9. The social studies teacher reported that Student was studying ancient civilizations in a class of 7 students. He needed reminders to remain focused, and needed work to be presented in small chunks. All content material was read aloud because of Student’s low reading level. (S-H)
10. The language arts teacher reported that Student could use teacher-generated written models and class discussion, prompting, cues and review to write answers to questions in complete sentences, to identify and give examples of the parts of speech, write a paragraph, and edit his written work. As was the case in math and social studies, Student needed much cuing to stay focused and interact appropriately with peers. (S-I)
11. The Amherst TEAM met on November 22, 2010 to consider the reports of the outside evaluators, Amherst’s speech-language pathologist, and the White Oak staff members. The TEAM found Student eligible for special education on the basis of specific learning disabilities (in reading and math skills), as well as ADHD, and issued an IEP for November 2010 – November 2011 that essentially adopted and incorporated the evaluation results of Morgan and Timmell. (S-G)
12. The IEP provided numerous accommodations, as well as goals in organization and study skills, reading, mathematics, and social skills. With the exception of 1x 15 minutes/cycle of consultation by the special education team in Grid A, the service delivery grid provided for all academic classes and services in Grid C, including 4x45 minutes per cycle in science, social studies, English, ELA skills, reading tutorial, and mathematics; 2x45 minutes/cycle of mathematics skills, 1x34 minutes/cycle each of organization/study skills and ELA skills, and 1x30 minutes/cycle of social skills instruction. Services in English, reading tutorial and mathematics were to be delivered by a special education teacher, while the remaining services—except for Social Skills, which was to be provided by the student assistance counselor, were to be provided by a special education teacher of paraprofessional. (S-G)
13. The IEP placement page designated a substantially separate classroom. (P-2)
14. The IEP was sent to Parents in December 2010. While Parents intended to reject the IEP and placement, they did not do so in writing; rather, they did not respond to the IEP during the weeks after it was issued. On January 31, 2011, Amherst forwarded the unsigned IEP, which it construed to be rejected, to the BSEA. (S-T)
15. During that period, Parents, who had hired an advocate, were attempting to locate counsel and also to find out more information about Amherst’s program. Parents wanted to know if Amherst’s program would provide Student with the same services as he was getting at White Oak. Parent had one or more conversations with Mr. David Slovin, the Student Services Administrator for the District, in which they asked him to describe the program that had been offered. Mr. Slovin said he would investigate and get back to Parents, but Parents did not hear from him. (Parent)
16. During February and March 2011, the School made attempts to schedule a TEAM meeting to discuss the unsigned/rejected IEP. Parents cancelled the February meeting. On or about March 6, 2011, Parents hired their current counsel who wrote to the School in an effort to schedule the TEAM meeting. Parents and counsel had numerous conversations during the ensuing months, in an attempt to obtain an observation of the Amherst program by Timmel and/or Morgan, or by another educational advocate/consultant hired by Parents, Stephanie Zolotor. (Parent, Smith) Ultimately, in on May 11 and 18, 2011, Ms. Zolotor visited White Oak and the Amherst program. Ms. Zolotor did not testify at hearing and the record contains no information about her qualifications. She did write a brief, undated report, which will be discussed further, below. (P-13)
17. The parties attempted to schedule additional observations but were unsuccessful. Ultimately, there were no further Team meetings or observations prior to the hearing in this matter. In November 2011, the proposed IEP expired, and Amherst has neither scheduled a TEAM meeting nor proposed a successor IEP. Meanwhile, the Student has remained at White Oak at parental expense. He is now an eighth-grader.
18. The Parents seek reimbursement for Student’s placement at White Oak, from the date of his placement through the 2011-2012 school year.
19. There is no dispute that White Oak is a Chapter 766-approved private day school for students with language-based learning disabilities (including dyslexia) and at least average intellectual abilities.
20. White Oak has a curriculum based on the Massachusetts Frameworks, modified to meet the needs of its student population.
21. In February 2010, about three months after Student enrolled, White Oak developed its own “IEP” covering February 2010 to February 2011, based on teacher observations and the 2006 testing by Heather Hornik. In brief, the White Oak document called for placement in “small, language-based classes of no more than eight students who share similar learning profiles and where instruction is delivered in a multi-sensory format.” The plan further specified that Student needed 5x50 minutes/week of 1:1 reading instruction with a certified teacher to work on “phonetic/linguistic patterns of the language,” as well as accommodations, strategies, and access to assistive technology (such as a word processer). (P-2)
22. The IEP further provided for “remedial instruction for language-based skills to be provided concurrently with Curriculum Frameworks-based contextual instruction.” The plan provided tutorial goals in decoding, oral reading, reading comprehension, spelling, and homework/independent work skills. There were language arts classroom goals in writing, comprehension, vocabulary, editing, and homework. Similarly, there were math goals in number identification, sequencing, computation, and homework; science and social studies goals in note-taking, research, writing, and class discussion and homework, and oral expression goals in decoding, vocabulary, sequencing, auditory memory, comprehension, and homework. The goals were tied to Student’s Current Performance Levels and particular strands of the applicable Massachusetts Frameworks. (P-3)
23. White Oak assessed Student’s progress in reading and math using the Stanford Achievement Tests and in reading using the Slosson Oral Reading Test and GORT-4, in December 2009, May 2010, September 2010, May 2011 and September 2011. Between the December 2009 and September 2011 test sessions, Student showed approximate[[4]](#footnote-4) gains as follows:

* Stanford Total Reading: 1.4/1.9[[5]](#footnote-5) G.E. to 2.9 G.E.
* Stanford Total math 2.2/5.8 G.E. to 5.0
* Slosson Oral Reading; 2.1 G.E. to 4.3 G.E.
* GORT-4: Comprehension—4.0 G.E. to 6.7 G.E.; Fluency—1.7 G.E. to 3.7 G.E.

1. White Oak also issued detailed quarterly progress reports based on the White Oak IEP goals. The reports indicated generally that Student was progressing in all goal areas, but continued to need ongoing instruction and support. (P-9, P-10)
2. The School has proposed to place Student at the Language Learning Disability (LLD) program at Amherst Regional Middle School (ARMS). The LLD program is designed for seventh and eighth grade students with at least average thinking and reasoning abilities, with scores on reading and/or written language tests that are significantly below their ability level, such that they have a primary diagnosis of a language-based learning disability.[[6]](#footnote-6) (P-8, Shellenbarger)
3. The student population at ARMS is divided into two to three administrative teams at each grade level. Each team has an assigned special education liaison who oversees IEP implementation for students in that team. The students in the LLD program are assigned to a single grade-level team. (Dinger)
4. In general, the LLD program is not a single, self-contained classroom or cluster of classrooms in which all students enrolled in the program spend their entire school day. Rather, the services received by a student enrolled in the LLD program would be driven by his or her IEP, and not every student participates in every service offered within the LLD program. (P-8, Dinger, Shellenberger)
5. There are, however, services in which all LLD students do participate. These are substantially separate classes in English independent study, and ELA skills. Most students also participate in a 1:1 or 2:1 reading tutorial. (P-8, Dinger)
6. Also depending on their IEPs, LLD program students may receive instruction in organizational skills, speech/language consultation or direct services, math skills, math independent study and inclusion support in regular education classes. (P-8, Dinger)
7. For math, science, and social studies, students may be enrolled in mainstream, inclusion (mainstream with in-class support), or substantially-separate classes. The substantially-separate math class is designed for students who have difficulty understanding math concepts at grade level. Inclusion math is targeted to students who have a stronger understanding of math concepts but need help reading and/or understanding math language (e.g., word problems). (Dinger, Shellenberger)
8. Teachers in the LLD program communicate with each other in a variety of ways, including a monthly meeting, called the “common assessments group,” which monitors student progress by examining data from assessments performed in class. (Shellenberger)
9. In addition, teachers communicate informally, via conversations and emails. (Shellenberger)
10. The English independent study (or “pull-out English’) class in which Student would be enrolled is taught by Ms. Shellenberger, who is a certified, Master’s-level special education teacher with eleven years of experience teaching students with a variety of disabilities. In this class, students use a sequential, multisensory program to study phonetics, phonemic awareness, vocabulary, morphology, reading comprehension, and fluency, as well as writing, listening and speaking. In addition, students are instructed in literature and are taught strategies for comprehension of what they read. (Shellenberger)
11. Ms. Shellenberger also teaches the ELA sklls class in which Student would participate. This class is used to reinforce the skills taught in pull-out English, as well as to close skill gaps that might become apparent during the main English class. (Shellenberger)
12. Student also would participate in a substantially separate math class, reinforced by a math skills class. School witnesses referred to the ELA sklls and math skills classes as “double dipping;” that is, areas of weakness or skill gaps that are spotted in the English and math classes are targeted for remediation in the skills classes. (Shellenberger)
13. Student’s reading tutorial would be taught by Ms. Tracey Westover, and would consist of four class periods per week of 1:1 instruction in decoding, encoding and fluency. The tutor uses a variety of methodologies including Wilson Reading and elements of some Lindamood-Bell programs. The tutor consults regularly with subject matter teachers, but does not specifically carry over content in, for example English, to the tutorial, because she is working on different skills. (Westover)
14. Student’s organizational skills class would be taught by Ms. Maura Stampa. In this class, students work on executive functioning and organizational skills. Additionally, students may get help from the teacher in reading and understanding the material taught in math, science or social studies. (Stampa)
15. As of the hearing date, there was not a substantially-separate language classroom for science or social studies; the then-current LLD students all were in inclusion classes for these subjects. (Stampa) The School would be able to assemble separate classes in science and social studies for Student if he were to enroll at ARMS, but it is not clear that he would be grouped solely with students from the LLD program, as opposed to other students with disabilities enrolled in the middle school. (Dinger, Stampa)
16. All of the teachers who testified stated that based Student’s evaluation and progress reports, he appeared to be very similar in profile to students in the LLD program, and could be served there. Student’s profile and skill level would not be identical to those of his classmates in every instance, but all students with whom he would be grouped would have at least average intelligence and specific learning disabilities affecting reading and written language. (Dinger, Shellenberger, Westover, Stampa)
17. On the other hand, the report of Ms. Zolotor, the Parents’ consultant, stated that Student would not be able to manage the distractions and of a large middle school, and that for this reason, Amherst’s program would not be appropriate. As stated previously, Ms. Zolotor did not testify at the hearing.
18. The School’s program is designed to be flexible, so that as students make progress in various areas, they can move into less restrictive settings within the building (e.g., from pull-out to inclusion math.) If Student were to enter the LLD program at ARMS, Amherst would likely conduct assessments and observations, and convene a meeting to determine an appropriate configuration of services. (Shellenberger)

**FINDINGS AND CONCLUSIONS**

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 his unique needs and potential, and is 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); North Reading School Committee v. BSEA, 480 F. Supp. 2d 489 (D. Mass. 2007); citing Lenn v. Portland School Committee, 998 F.2d 1083 (1st Cir. 1993).

While Student is not entitled to an educational program that maximizes his potential, he is entitled to one which is capable of providing “meaningful” educational benefit, in light of his potential. See Bd.of Education of the Hendrick Hudson Central School District v. Rowley, 458 US 176, 201 (1982), Town of Burlington v. Dept. of Education, 736 F.2d 773, 789 (1st Cir. 1984). That is, a school must consider a child’s potential in determining whether an IEP is calculated to provide that child with FAPE. Rowley, supra, at 202, Lessard v. Wilton Lyndeborough Cooperative School District, 518 F3d 18, 29 (1st Cir. 2008).

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

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 to change the status quo. In the instant case, as the moving party challenging the IEP that Amherst had proposed, and seeking public funding of the unilateral placement at the White Oak school, Parents bear this burden. That is, in order to prevail, Parents first must prove, by a preponderance of the evidence, that for the period for which they seek reimbursement, Amherst’s IEP and services were not appropriate, i.e., were not reasonably calculated to provide Student with FAPE. Schaffer v. Weast, 546 U.S. 49, 44 IDELR 150 (2005).

If Parents meet this burden, they must then prove that White Oak was appropriate for Student. The Parents are not held to the same appropriateness standard as the school district, however, and need only demonstrate that the White Oak program was or is responsive to Student’s special needs, so that he 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).

The parties here agree that Student is a child with at least average intelligence whose ability to make effective educational progress is compromised by a language-based learning disability and ADHD. There is no dispute that these disabilities interfere with Student’s ability to read and write. They also cause some difficulties with attention, and organization. Student’s ADHD sometimes causes impulsive or mildly disruptive behavior that annoys his peers.

Further, the parties do not dispute the findings of the independent evaluators retained by the Parents, namely, that Student needs a multi-sensory, well-integrated highly-structured, language-based program that includes a structured, sequential daily reading tutorial, with small classes of similarly-situated peers. In fact, Amherst relied on and largely incorporated the findings of the independent evaluators into its IEP.[[7]](#footnote-7) Finally, the parties have not stated a disagreement with the goals and objectives of the IEP.

The parties’ substantive dispute is over whether Amherst’s placement can provide the Student with the language-based programming that the evaluators state that he needs. The Parents argue that the only evaluations in the record call for a coherent, fully-integrated program with “universal design” that carries out language-based strategies across all settings, and that Amherst’s program does not fit this description. In particular, Parents have focused on the absence of substantially-separate language-based classes in science and social studies, notwithstanding the School’s assurance that it could develop such classes if Student were to enroll in Amherst.

The School itself has acknowledged that its proposed placement is not, in fact, a self-contained language-based program as this term is commonly understood, but, rather, is a coordinated array of services for students with language-based disabilities. Participation in the program is not “all or nothing;” many students receive pull-out services in only some subjects (such as English skills and English independent study) while participating in general or inclusion classrooms for others (such as math, science or social studies). (Smith, Shellenberger, Stampa) The School’s position is that even if its program is not self-contained, it can implement Student’s IEP and provide him with FAPE.

Based on the evidence, I find that the Parents have not met their burden of proving that the School’s program was inappropriate during the period covered by the IEP. On the contrary, the evidence on the record clearly demonstrated that the proposed placement would have provided Student with intensive, multi-sensory, substantially separate instruction in all core academic subjects (and had the capacity to provide such instruction in social studies and science), as well as the almost daily individual reading tutorial recommended by the outside evaluators and instruction in organization and study skills. While Amherst’s LLD program does not purport to be a fully self-contained language-based model with as recommended by the evaluators, the record shows that the program is well-coordinated, with regular consultations among staff to review common assessments and share data regarding student progress, and clearly had the capacity to address Student’s needs. Because the IEP for November 22, 2010 through November 21, 2011 was appropriate, Parents are not entitled to be reimbursed for that period.

**Claim of Procedural Violations**

A hearing officer may order compensatory relief to make a student whole in situations where procedural violations by the school district have deprived the student of FAPE. On the other hand, procedural violations that are technical or de minimis are not compensable. Compensatory relief generally is equitable in nature, and the hearing officer may exercise discretion in order to fashion such relief. See CG ex rel AS v. Five Towns Community School District, 513 F.3d 279, 290 (1st Cir. 2008); Lenn v. Portland School Committee, 998 F.2d 1083 (1st Cir. 1993).

Here, the Parents allege that the School committed procedural violations that deprived the Student of FAPE. Specifically, the Parents allege that the School (1) violated its “child find” responsibilities because it failed to follow requisite procedures when it learned that Student was a child with disabilities living within the District; and (2) once Student had been referred for special education, impermissibly delayed the evaluation process. Parents state that as a result, Student was deprived of a FAPE. I will examine each of these issues in turn.

**Child Find**

Both the IDEA and Massachusetts law impose a “child find” responsibility on school districts. The relevant provision of the IDEA and corresponding regulation requires states to develop a plan to ensure that “all children with disabilities residing in the State, including….children with disabilities attending private schools…who are in need of special education and related services, are identified, located and evaluated…” 20 USC Sec. 1412(a)(3)(A); 34 CFR 300.111(a). The Massachusetts statute requires “the school committee of every city, town, or school district [to] identify the school-aged children residing therein who have a disability…diagnose and evaluate the needs of such children, propose a special education program to meet those needs,[and] provide or arrange for the provision of such special education program…GL c. 71B, Sec. 3.

Parental notification of a school district representative that his or her child has or may have a disability triggers the child find requirements, as long as the child is a resident of the district, regardless of whether or not the child is formally enrolled in the district’s school system. See, e.g. W.B. v. Matula, 57 F.3d 484, 501 (3d Cir. 1995); Robertson County School System v. Patrick King, Jr., et al, 99 F.3d 1139 (6th Cir. 1996). Moreover, courts have held districts to have “child find” responsibilities even if a disability has not been formally diagnosed, if the “district had reason to suspect that student has a disability and that special education services may be needed to address that disability…” C.G. v. Five Town Community School District, (D. ME 2007), aff’d., 513 F.3d. 279 (1st Cir. 2008) This is the case even if the student is “progressing from grade to grade in an acceptable manner.” Murphy v. Town of Wallingford, 56 IDELR 153 (D. CT 2011) Districts must identify and evaluate potentially eligible students within a reasonable time of being “on notice of behavior that is likely to indicate a disability.” W.B. v. Matula, supra, regardless of whether or not the parent or anyone else has actually requested special education. Board of Education of Fayette County, KY. V. LM (478 F.3d. 307 (6th Cir. 2007).

Here, the record shows that the Parents informed Amherst that they had a child with a disability in August of 2007, when they spoke to JoAnn Smith to request a tutor, and informed her that Dr. Heather Hornik had evaluated the Student and diagnosed him with dyslexia. This inquiry triggered Amherst’s “child find” obligation, even though the Student was enrolled in a private school,[[8]](#footnote-8) and even though the Parents had not specifically requested special education services from the district. Within a reasonable time after speaking with Parents, Amherst should have referred Student for evaluation or at the very least, informed the Parents of their right to make a referral. Amherst did not do so. Instead, Amherst provided Parents with the name of a potential private tutor, whom the Parents then hired and paid. Amherst did not begin the special education process until the Parents made a written request for evaluation in May 2010, nearly three years after the Parents initially notified Amherst of Student’s status. Ultimately, in November 2010, Amherst determined that Student was eligible for special education and issued an IEP.

Based on the foregoing chronology and applicable law, I find that Amherst failed to comply with federal and state child find obligations when it took no action upon learning that Student, who lived within the district, had been diagnosed with a disability. That Student was enrolled in private school, and that Parents did not explicitly mention special education or request an evaluation or services is immaterial. The School had a duty to affirmatively inform Parents of their rights and to refer Student for evaluation, and did not do so until nearly three years later, in May 2010, in response to an explicit request by the Parents.

I further find that this violation of the School’s child find obligations was substantial. Had Student been referred and evaluated at the time of Parents’ initial inquiry in August 2007, it is likely that he would have been found eligible for special education and offered an IEP by the first part of the 2007-2008 school year, rather than in November of 2010. Clearly, the School’s inaction potentially denied Student educational benefit, such that he is entitled to some form of compensatory relief. Murphy v. Timberlane, 22 F.3d 1186 1196(1st Cir. 1994); Pihl v. Mass. Dept. of Ed., 9 F.3d 184, 189 (1st Cir. 1993); ME School Admin. District. No. 53 v. R., 321 F. 3d 9, 18 (1st Cir. 2003).

In determining the nature and amount of this relief, several factors must be considered. First, the BSEA can grant relief only corresponding to the time period that falls within the two-year statute of limitations. 20 USC Sec 1415(f)(C) In this case, that period extends back only to June 21, 2009, which is two years before the hearing request was filed, on June 21, 2011. Second, it must be determined how the violation impacted the Student’s receipt of FAPE. Here, between June 2009 and May 2010, the School knew only that the Student had disabilities and lived within the District. The School had no notice of Student’s unilateral White Oak placement until May, 2010; therefore, even though the School had not offered any IEP covering November 2009 to May 2010, it would not be reasonable or equitable to order reimbursement of the Parents for the costs of White Oak during that time. Even though the School had notice of the White Oak placement by May 2010, it began to comply with the requirements of the IDEA and Chapter 766. Moreover, the length of time that elapsed between the Parents’ notification of the School of Student’s attendance at White Oak and the issuance of the IEP was not excessive, and delays were at least partially caused by the Parents’ preference to await the results of their private testing, as well as the Parents’ postponement of the initial Team meeting.

On the other hand, if Student had been timely evaluated in the first place, it is reasonable to assume that he would have received some services from June 2009 forward. While there are too many confounding factors to determine precisely what Student would be entitled to in order to make him whole for the period from June 2009 November 2010, a reasonable offer of compensatory services might include additional or supplemental services (including after-school or summer services, if appropriate) in Student’s identified areas of need. The specifics of these services should be determined by the Team, taking into consideration Student’s current needs and schedule.

In addition to any compensatory services determined appropriate by the Team, the School is required to reimburse the Parents for the tutoring expenses they incurred from June 2009 forward. When the Parents requested information about a tutor, the School simply passed along the name of a person for the Parents to hire at their own expense, instead of informing them of their rights to a referral and evaluation. While it is not clear exactly what services the School would have ended up offering, or Parents would have accepted, if it had fulfilled its child find obligations to Student, whatever services it might have offered would have been free of charge.

**Alleged Delays in Evaluation and Team Process**

Parents allege that the School unduly delayed the evaluation and Team meeting process, noting that Parents requested an evaluation in May 2010 and an IEP was not finally issued until November 2010, some six months later. In general, state regulations require that no more than 45 school working days after receipt of parental consent to conduct evaluations, a school district must perform the assessments, convene the Team, and issue either an IEP or finding of ineligibility for special education. 603 CMR 28. Within that time period, the School must forward Parents an evaluation consent form within five school working days from receipt of an evaluation referral, and must conduct the evaluations within thirty school working days of receipt of parental consent.

Here, the record indicates that the Parents and Ms. Smith exchanged emails and documents as follows: (S-N, O, P, Q, R)

5/17/10 Parents to Smith, request evaluation

5/18/10 Smith to Parents, request address and grade level information

5/21/10 Parents to Smith, providing information requested, requesting evaluation prior to the end of the school year (June 17, 2010)

5/29/10 Parents to Smith, inquiring about status of referral

6/1/10 Parents to Smith, requesting consent form.

6/1/10 Smith to Parents, informing them that evaluation would be over summer if Student did not already have an IEP.

6/3/10 Parents to Smith, requesting consent form for Speech/language evaluation, informing Smith of private [Timmell] evaluation, offer to send results when received and to inform School evaluators of instruments used.

6/4/10 School sent evaluation proposal and consent form to Parents

6/7/10 Parents signed consent for evaluation to School (speech/language, psychological, observation, home assessments)

6 /13/10 Parents to School, email with list of tests conducted by Morgan and Timmell.

6/14/10 Smith to Parents, discussion of whether to conduct school-based evaluations or rely on Morgan and Timmel report when completed.

10/12/10 Meeting Invitation for meeting scheduled for 10/14/10.

10/13/10 Email Parents to School; need another date, notice is too short for advocate and others to attend.

10/14/10 School to Parents, offer of 10/18/10 and 11/5/10 for Team meeting.

11/9/10 Team meeting held.

11/22/10 Proposed IEP issued.

Approximately 41 school working days had elapsed from the time that the Parent signed the evaluation consent form and the date that the School issued the proposed IEP. The School sent the consent forms to Parents approximately 13 school working days after the Parents’ request for evaluation, representing a delay of 8 school days. I find that this is a de minimis procedural violation; notwithstanding the delay in supplying the consent form, the School initially offered an IEP meeting in mid-October 2010, which the Parents had to postpone. Moreover, the Parents have made no showing of educational harm from this brief delay in the process (as opposed to harm from failing to identify and evaluate the Student in the first instance), and are not entitled to compensatory relief over and above whatever relief might be available as a result of the “child find” violations. .

**CONCLUSION AND ORDER**

Based on the foregoing, I find that the IEP and services proposed for November 2010 to November 2011 were appropriate; therefore, the School is not required to reimburse Parents for Student’s tuition at White Oak during that period. On the other hand, I find that the School committed procedural violations that deprived the Student of FAPE when it failed to fulfill “child find” obligations with respect to Student as discussed above.

Within 30 days of the date of this decision the School shall do the following:

* + 1. Upon receipt of verification from the Parents, reimburse the Parents for all out-of-pocket expenses associated with private tutoring from June 21, 2009 to the time at which tutoring was terminated.
    2. Convene a Team meeting to develop a plan of compensatory services to compensate Student for the denial of FAPE from June 21, 2009 to November 22, 2010.

By the Hearing Officer:

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Sara Berman April 13, 2012

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1. Originally, Parents sought an order for Amherst to fund White Oak for the 2011-2012 school year. Between the time the hearing was requested in June 2011 and the time the hearing actually went forward (in February 2012) the only IEP at issue had expired, and Amherst had not proposed a successor IEP. Neither party raised this issue at the hearing. Although Parents have sought a finding regarding the entire 2011-2012 school year, my jurisdiction extends only for the life of the existing IEP, that is, to and including November 22, 2011. [↑](#footnote-ref-1)
2. The report did not address the fact that not only had Student not received special education services prior to October 2009, he had not received any formal reading instruction until third grade. [↑](#footnote-ref-2)
3. White Oak develops written educational plans that follow the DESE IEP format for all of its students, including those who are placed privately. [↑](#footnote-ref-3)
4. Comparisons are rough; different levels of the Stanford test were administered at different times, with the earlier tests at the “primary” level and the later tests at the “intermediate” level. [↑](#footnote-ref-4)
5. Timed/untimed. [↑](#footnote-ref-5)
6. The Parents submitted a document (P-7), provided by Amherst in response to a discovery request, which contained the foregoing description of a program. However, the reading tutorial instructor, Tracy Westover, testified that there is no program at ARMS with that designation; rather, as stated infra, there is a menu of classes and services for students with language learning disabilities. Students participate in different combinations and permutations of services and classes, depending on their IEPs and skill levels. (Westover) [↑](#footnote-ref-6)
7. Other than the speech-language assessment, Amherst conducted no evaluations of its own during the period at issue. [↑](#footnote-ref-7)
8. Pursuant to 34 CFR 300.131, the town of Hadley, where the private school was located also had an obligation to locate and identify children with disabilities attending private schools within its borders. Hadley is not a party here, however. [↑](#footnote-ref-8)