

**COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF ADMINISTRATIVE LAW APPEALS  
SPECIAL EDUCATION APPEALS**

**In Re:** Student v.  
Andover Public Schools

**BSEA #12-0430**

**DECISION**

This decision is issued pursuant to the Individuals with Disabilities Education Act (20 USC 1400 *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 USC 794), the state special education law (MGL ch. 71B), the state Administrative Procedure Act (MGL ch. 30A), and the regulations promulgated under these statutes.

On July 13, 2011, Parent requested a Hearing in the above-referenced matter. Following requests for postponements filed by Parent and the school district, on August 10, 2011, the matter was scheduled for Hearing. The Hearing was held on October 3, 4 and 5, 2011, at the Bureau of Special Education Appeals, 75 Pleasant St., Malden, Massachusetts. Those present for all or part of the proceedings (in person or via telephone conference call) were:

Student's mother	
Jeffrey Sankey	Parent's Attorney
Ann Helmus	Pediatric Neuropsychologist, Neuropsychology & Education Services for Children & Adolescents (NESCA)
Melody O'Neil	Landmark School
William J. Hecht Jr.	Special Education Teacher, Andover High School, Andover Public Schools
Ida Carreiro King, Ph.D.	Educational Consultant, Andover High School
Kim Serapiglia	Special Education Teacher, Andover High School, Andover Public Schools
John Norton	Program Advisor, Andover High School, Andover Public Schools
Lisa Blasi	Special Education Teacher, Andover High School, Andover Public Schools
Linda Burns	Special Education Teacher, Andover High School, Andover Public Schools
Stephanie Hand	Science Special Education Teacher, Andover High School, Andover Public Schools
Karen Parker	Math Special Education Teacher, Andover High School, Andover Public Schools
Stephen Bessette	Learning Specialist, Doherty Middle School, Andover Public Schools

Leila Scanlon	Spanish Teacher, Doherty Middle School, Andover Public Schools
Helen Fitzgerald	Speech and Language Pathologist (grades 9-12), Andover High School, Andover Public Schools
Marion O'Shaughnessy	8 <sup>th</sup> grade Reading Teacher, Doherty Middle School, Andover Public Schools
Amy Burt	Sixth grade Special Educator, Doherty Middle School, Andover Public Schools
Catherine Clark	Program Advisor, Special Education, Doherty Middle School, Andover Public Schools
Amy M. Rogers, Esq.	Attorney for Andover Public Schools
Joyce Laundre	Director of Student Services, Andover Public Schools
Brenda M. Ginisi	Catuogno Court Reporter
Christine M. Lo Schiavo	Catuogno Court Reporter

The official record of the hearing consists of documents submitted by Parent and marked as exhibits PE-1 through PE-37 and PE-39, and those submitted by Andover Public Schools (Andover) marked as exhibits SE-1 through SE-51, recorded oral testimony and written closing arguments. The Parties' Closing Arguments were received on October 24, 2011 and the record closed on that date.

### **HEARING ISSUES:**

1. Whether Andover is responsible to offer Student compensatory services for its failure to provide Student a free and appropriate public education (FAPE) for the period from January 2011 through June 2011, Student's eighth grade?
2. Whether the IEP promulgated by Andover for the period covering September 2011 through January 25, 2012, (9<sup>th</sup> grade) calling for placement of Student at Andover High School was reasonably calculated to offer Student FAPE in the least restrictive environment consistent with state and federal law? If not,
3. Whether Student is entitled to public funding for an out-of-district day placement at the Landmark School?

### **POSITIONS OF THE PARTIES:**

#### **Parent's Position:**

Parent states that Andover's proposed programs for Student for the eight and ninth grades were poorly developed and failed in the delivery of services. According to her, during the eighth grade, Andover did not offer Student the reading services required under the last accepted IEP, and also failed to implement the recommendations of the Team to assess Student's math abilities in a timely fashion, thereby delaying provision of necessary services to Student. Even after the Parties agreed to a plan to compensate Student for the missing sessions, Andover failed to make Student whole. Because of the numerous procedural and substantive issues regarding

implementation of Student's IEP during the eighth grade, Parent argues that Student was denied a FAPE. As a result, Parent asserts that Andover owes Student compensatory services.

Regarding ninth grade, Parent further states that Andover's proposed language-based program is inappropriate because the block scheduling prevents Student from receiving the year-round math and English Language arts she requires, while availing herself of the benefits of mainstreaming, and also because the peer grouping and teaching styles are inappropriate. Parent states that Student's ninth grade program is not adequately designed to address her needs and will likely impede Student's ability to make effective progress. Parent states that Andover has failed to provide Student programming designed to help her build the solid reading, math and communication skills she requires to become a productive and self-sufficient adult at the end of her educational entitlement. According to Parent, Andover's programming determinations are based on the school's scheduling and teacher availability as opposed to being centered on Student's needs and pursuant to her IEP. As a result, Parent argues that Student is entitled to public funding for attendance at Landmark School's day program.

**Andover's Position:**

Andover does not dispute that Student is eligible to receive special education as a result of a language based learning disability that affects her performance across all areas of the curriculum. It also agrees that Student requires a language-based program for ninth grade. However, disputes that in order to receive FAPE Student requires placement at Landmark, and instead argues that Student can be appropriately served in the language based program in Andover High School (AHS).

Regarding eighth grade, Andover asserts that Student made academic, social and emotional progress in her program at the Doherty Middle School and asserts that the Qualitative Reading Inventory demonstrated that Student advanced two full years in reading. Andover disputes Parent's allegations of non-compliance during 8<sup>th</sup> grade stating that it fully complied with federal and state laws and regulations, and states that any alleged non-compliance did not prevent Parent from participating in educational decision-making and did not result in a deprivation of educational benefit to Student.

Andover argues that during the month following Student's placement in Andover, Parent communicated with Landmark stating her intention to enroll Student in the fall of 2011, which evidenced Parent's lack of commitment to a collaborative process with Andover, and as such her requested relief should be denied.

Regarding Parent's position that the proposed peer group for ninth grade and Andover's block schedule are inappropriate, Andover disputes the inappropriateness of the peer group and states that Student's schedule could be modified to accommodate math instruction year-round. It also states that Dr. Helmus, Parent's expert, agreed that AHS' language-based program satisfied her recommendations. As such, Andover argues that Student is not entitled to public funding for placement at Landmark.

## **FINDINGS OF FACT:**

1. Student is a fourteen-year-old resident of Andover, Massachusetts, who has been diagnosed with a language-based learning disability (that affects reading comprehension, written expression and mathematics reasoning and concepts), but who also possesses solid average intelligence (SE-2; Helmus). Parent has described her as very social but sensitive about her disability and struggling to mask her deficits (Parent). She has also been described as a quiet, sweet, hard-working individual (SE-2).
2. Student was first evaluated by Andover in 2009, while she was in the sixth grade, and was subsequently found eligible to receive special education services following a Team meeting on June 25, 2009 (PE-1; SE-5; SE-6). At the time of this evaluation, she was a Student at the Newton Country Day School (NCDS) in Newton, Massachusetts where she made progress in some areas but met with dismal results in others (e.g., F in her first semester of eighth grade science and math, and D in seventh grade social studies and science) (PE-18; PE-19). The evaluations included academic achievement assessments, a psychological evaluation, an Informal reading assessment using the Qualitative Reading Inventory (QRI); and a speech and language evaluation (PE-20; PE-21; PE-22; PE-23; SE-1; SE-2; SE-3; SE-4). Andover drafted an IEP offering Student reading services with a reading specialist three sessions of forty-six minutes each per week, a once per week forty-six minute speech and language session with the speech and language therapist, and twice per week forty-five minutes each assisted study (also known as “Academic Connections class”) with a special education teacher, in addition to numerous accommodations (PE-1; SE-6; SE-45). The IEP placement page called for participation in a full inclusion program for the period from June 25, 2009 to June 25, 2010 (PE-1; SE-6).
3. Following a review of the IEP and further revisions requested by Parent, the IEP was forwarded to Parent on September 15, 2009, and on October 1, 2009 Parent fully accepted this IEP (SE-6). Student remained in private school and the services were never implemented because of scheduling issues (Parent).
4. Student has received private tutoring since the sixth grade (Parent). In 2009/ 2010 Student received private reading and writing tutoring twice per week with Dr. Cahill at private expense (SE-7; Parent). Additionally, she received one-to-one organization and math tutoring once per week for fifty minutes at Landmark at Parent’s expense, and attended a pre-algebra two week summer program at Landmark (PE-3; PE-13; SE-12; SE-45, 35).
5. Marion O’Shaughnessy, Reading Specialist in Andover (SE-41), again administered the QRI to Student on March 15, 2010, finding that although automaticity had improved, and reading fluency was excellent (reading 164 wpm), Student was lagging behind in reading comprehension and word recognition skills. Similarly, Student’s scores in reading accuracy, fluency and comprehension had dropped one standard score from testing completed in 2009 but her rate remained the same on the Gray Oral Reading Test. Student seemed to be focused on making sure that she got the words right rather than on the meaning of the words. Ms. O’Shaughnessy recommended specialized reading instruction to “bolster [Student’s]

word recognition and comprehension skills, providing her with strategies that will not only help her note details, but also question, predict, infer, connect to the text and summarize information” (SE-42).

6. On June 28, 2010, Student’s Team agreed to amend the IEP, extending it through October 31, 2010. In her response to this Amendment, Parent notified Andover that she would arrange for Student to be independently evaluated and would forward the report when it became available (SE-8; SE-9).
7. On October 22, 2010, Parent wrote to Kathryn Clark in Andover, confirming her attendance at a Team meeting scheduled for November 5, 2010. Parent notified Andover that Student had great difficulties in math, was failing most of her classes at NCDS and was showing school anxiety. NCDS was not implementing Student’s accommodations (SE-45, 35).
8. Student’s Team convened again on November 5, 2010. At this time Student was an eighth grader at NCDS (PE-2; PE-12; SE-10; SE-11). NCDS submitted notes describing Student’s progress and difficulties, but none of its teachers attended the meeting (PE-2; SE-14; PE-15). The Student’s Strength and Key Evaluation Summary section of the IEP resulting from this meeting stated

... Student presents with a disability which impacts her ability to process part-to-whole, her acquisition of decoding and phonemic skills, her comprehension, her math as well as planning and organization.

[Student] is an athletic, pleasant hard working student and her teachers report that she has a good work ethic and has demonstrated progress. [Student] has been tutored at the expense of her parents, who have opted not to accept Andover services due to scheduling issues. While [Student] has demonstrated progress, she continues to struggle in class with writing, comprehension and mathematics.

Past testing indicates that [Student] has average verbal, nonverbal and processing speed, with a relative weakness in the area of working memory. While [Student] has strong memory, she demonstrated weakness in part-to-whole thinking. [Student]’s speech/ language abilities vary greatly on formalized testing. [Student] appeared to have a solid understanding of language form and she seemed to know when sentences were not grammatically correct, but she does not appear to have the flexibility or repertoire of structures to formulate alternatives. Significant difficulties were exhibited when processing language in sentences and directions. At the paragraph level, [Student] was able to recall details from meaningful passages, but did not consistently get the “big picture” in order to form a main idea or an inference.

[Student]’s reading has improved, but she continues to demonstrate weak comprehension skills... (PE-2; SE-11).

9. The November 5, 2010 IEP identified English Language Arts (ELA), History, Social Studies, Science, Technology and Mathematics as areas affected by Student's disabilities and set goals in the areas of reading, academic self-confidence, and language. The academic self-confidence goal sought to help Student gain understanding of her strengths and weaknesses, identify and use specific organizational strategies, demonstrate an understanding of questions asked by using active reading strategies, and avail herself of opportunities to receive extra help and implement accommodations, as well as take advantage of bonus opportunities (PE-2; SE-11). To address Student's deficits it offered her participation in a full inclusion program with pull-out services as follows: two sessions per week, forty-five minutes each assisted studies; three reading sessions per week forty-six minutes each with the reading specialist; and once per week speech and language therapy for forty-six minutes (PE-2; SE-11).
10. On or about November 18, 2010, Student visited the proposed eighth grade program at the Doherty Middle School in Andover (SE-45, 39, 43).
11. Out of concern for Student's failing grades and emotional well-being, on December 15, 2010, Parent notified Kathryn Clark, Andover's Program Head for Special Education, that Student would be attending Andover starting in January 2011 (PE-18; SE-45, 44; Parent). Via e-mail dated December 29, 2010 to Parent and the Andover staff, Ms. Clark informed the Andover staff of Student's arrival and her proposed schedule (SE-45, 48).
12. Parent transferred Student to the Doherty Middle School in Andover on January 3, 2011 (SE-15; Parent). According to Ms. Clark, Andover made Parent aware that there would be a conflict in providing Student three times per week reading instruction. Student would be able to take two forty-six minute sessions on Friday morning and the third session could be split into two, thirty minute sessions, and provided on Tuesday and Thursday after school (SE-45, 56; PE-34; PE-35). Ms. Clark and Parent testified that there was a conflict between specialized reading instruction and Spanish because in Andover, reading occurred at the same time as Spanish (SE-45). Ms. O'Shaughnessy, the reading specialist, was available to provide reading during Student's Spanish block.
13. On January 4, 2011, Ms. Clark e-mailed Parent explaining that the Assisted Study class is known as Academic Connections class, and strongly recommended that Student drop her Spanish class and instead take reading with her team at that time. According to Ms. Clark, Parent was correct that there were "inherent problems with trying to create a class that [didn]'t exist" and therefore, Andover would be "offering reading instead of foreign language" (SE-45; Clark, Parent). Parent disagreed with the proposal because she wanted Student to receive credit for a full year of foreign language, believing that she would then only need to take one year of a foreign language in high school, and because completing Spanish would boost Student's self-esteem. As an alternative, Parent suggested that the additional reading session be offered in lieu of assisted study period, but Andover rejected this option (Parent).

14. On January 5, 2011, Parent rejected the proposed services in the November 5, 2011 IEP but consented to placement in the full inclusion program at the Doherty Middle School to which she had transferred Student two days earlier. The attached document detailing the five reasons for her rejection lists among others that the IEP reflected goals and benchmarks developed when Student was in sixth grade while she was now in eighth grade; that the IEP should reflect that the full inclusion model, should include a classroom aide and /or the special education teacher; Parent rejected Andover's proposal that Student be removed from Spanish in order to accommodate her reading services due to Andover's scheduling problems, and also rejected the proposal that some of the reading services be provided after school. Parent requested that reading be provided during the school day as delineated in Student's IEP (SE-11). The Team had recommended continued reading services and work around comprehension and phonetic strategies as well as the possible use of LIPS. At least two service providers in Andover were trained in LIPS and the service could be offered if the Team recommended this type of intervention. According to Andover, the goals and services in the IEP had not changed markedly since sixth grade because Student had not received sufficient services in the areas identified and appeared to continue to need support in said areas (PE-4; SE-12).
15. On or about January 7, 2011, Ms. O'Shaughnessy administered the Reading Level Indicator (RLI) and the QRI to assess Student's reading level and skills. Ms. O'Shaughnessy found that Student had made some progress when working on short pieces of text but had not been able to attain the reading goal established in 2009. She opined that Student lacked confidence to know when she had lost the meaning of a passage she had read and required strategies to understand and correct the situation. She also found that Student displayed weaknesses in her ability to return to the text to look for or expand in response to directed questions. Ms. O'Shaughnessy recommended implementation of strategies such as visualizing, connecting to the text, and work on vocabulary. She found that Student's reading skills were below expectations and still developing, for which she required direct instruction and practice. She also required work on word recognition as well as on improving her reading rate, which appeared to have declined when compared to her performance in previous testing (SE-32).
16. In an attempt to assure that Student receive an appropriate education that addressed her academic and special education needs throughout the day, and in an attempt to consider possible options, Parent also initiated the application process at Landmark to ascertain if the school would be a good match for Student.<sup>1</sup> According to Parent, she had intended on moving Student once from NCDS to a school that could meet her needs. On January 7, 2011, Parent completed an application for admission to Landmark School, seeking Student's admission for the 2011-2012 school year, Student's ninth grade (SE-43). On February 9, 2011, Landmark wrote to Parent confirming Student's acceptance (SE-44; SE-48; Parent).

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<sup>1</sup> Parent was acquainted with Landmark both because another one of her children had attended this school and also in her role as an educational advocate.

17. On January 25, Leela Scanlon, Student's Andover Spanish teacher wrote to Mother expressing concern regarding Student's performance in class. According to Ms. Scanlon, though Student was polite and a pleasure to have in class, she lacked the vocabulary and grammatical foundation other eighth grade students had and was struggling in this class. She recommended that Student audit the class as opposed to take it for credit and then take Spanish 1 in high school (SE-46, 20).
18. Andover reconvened the Team on January 26, 2011. The Key Evaluation summary in the IEP mentions that Student had evidenced progress but continued to struggle with comprehension, ability to process part to whole, math skills, planning and organization. In the QRI, test results showed that Student was at a fifth grade frustration level when reading passages, which was the same level she achieved when previously tested by Andover in 2009. Also, while Student showed improvement with word recognition, comprehension skills were still weak and she did not always get the "big picture" in order to draw inferences or form a main idea (PE-5; SE-15).
19. The January 26, 2011 IEP offered Student participation in a full inclusion eighth grade program at Doherty Middle School. Between January and June 22, 2011 it offered Student in class support from a special education teacher and or the assistant forty-six minutes per day in addition to the following direct services in other areas: assisted studies twice per week for forty-five minutes each session; reading three times per week for forty-six minutes each session and speech and language once per week for forty-six minutes with the speech and language pathologist. Between September 7, 2011 and January 25, 2012 (the expiration date of the IEP), it was proposed that Student receive one daily thirty minute speech and language session, and two and a half sessions of eighty-two minutes, of assisted studies per week with the special education teacher. Reading services and in-class support were dropped from the IEP starting in September 2011. The IEP offered numerous other accommodations (PE-5; SE-15).
20. The Team discussed whether a math benchmark was also indicated for Student determining that informal testing would be appropriate to assess Student's grade level skills. Ms. Clark agreed to look into what would be appropriate and e-mail Parent the content of the informal assessments (PE-12; SE-16). Regarding reading, Ms. O'Shaughnessy's observations and informal reading assessment indicated the need for Student to receive four instead of three reading sessions per week (O'Shaughnessy). The N-1 also reflects that the services reflected in the 2009 IEP would be implemented with the exception of one of the three reading sessions (a 46 minute period) which could not be accommodated because of Parent's preference that Student complete the Spanish course sequence through the end of the year (PE-12; SE-16).
21. On January 26, 2011, Ms. Clark wrote to Parent later in the day suggesting that in order for Student to receive her four reading sessions during the school day, she should replace reading for foreign language. She also raised the possibility that Student attend a different Spanish class with a different teacher, her physical education class would change and she would not be able to take Integrated Arts at all. Ms. Clark also suggested that she was still



looking into informal math assessments as requested by Parent and would forward the information as soon as she gathered it (SE-45, 74). Parent responded via e-mail dated January 31, 2011, noting her concern that Student had become upset at the prospect of changing Spanish teachers. Parent further inquired about details regarding the math evaluation she requested. Later that night, Parent e-mailed again describing her concerns regarding Student's needed services and scheduling issues, indicating that in her opinion the district was responsible to separate them and that "schedules should not prevail over services needed", stating her disagreement with the district's proposal (SE-45, 76). Parent wrote again on February 1, 2011 seeking that her one page "Parent Concerns" be incorporated into Student's IEP verbatim (SE-45, 81).

22. The Parent Concerns document described Parent's views regarding Student's learning profile, Student's difficulties understanding concepts, with reading and writing, organizational issues and math. Regarding reading and math, Parent reported that Student

... had received [one-to-one] tutoring since the [sixth] grade [in reading]. However, she still has significant struggles with reading comprehension and with some decoding. [Student's] most recent reading assessment (January 2011) shows [Student] to be performing on a [fifth-sixth] grade reading level. Her current performance states: "On a fifth grade passage she was still in the Frustration level, answering only 62% of the questions and reading with 83wcpm with 96% accuracy. Many of her miscues affected her comprehension". Despite years of [one-to-one] tutoring and her own personal investment to improve, [Student] continues to perform below grade level. ...struggled with math computation, concepts and work problems. She made good gains during an intensive summer school math program in 2010 but was unable to apply it to classroom material in [the] Fall [of] 2010. Her rote facts and pre-algebra concept skills are weak. Her calculations become chaotic when doing algebra or problems requiring multiple steps. Despite her many years of [one-to-one] math tutoring and a structured summer school program, she continues to have difficulty with independent work completion. [Student] requires a very structured and literal approach to math concepts (PE-6; SE-21).

During the previous years to which Parent referred, and while receiving the one-to-one services, Student was enrolled in regular education private schools (Parent).

23. On February 3, Student visited and was evaluated at Landmark School (PE-29). Pursuant to Landmark Student placed in the thirty-ninth percentile (39%ile) in the Peabody Picture Vocabulary Test-4 which assessed her receptive vocabulary; in the sixteen percentile (16%) in Expressive Vocabulary Test-2; in the thirteenth percentile (13%ile) (a 4.0 grade equivalence) in Lindamood Auditory Conceptualization Test-3. Her academic achievement was measured with the Woodcock Reading Mastery Tests- revised/NU in which she obtained a standard score of 88, placing her in the twenty first percentile (21%ile) (a 5.3 grade equivalence) in Word Identification; a standard score of 88, placing her in the twenty-first percentile (21%ile) (a 6.4 grade equivalence) in Word Attack. On the Gray Oral Reading

Test-4, which assessed contextual oral reading rate, accuracy and fluency, she obtained a standard score of nine (9) for rate of reading, placing her in the thirty-seven percentile (37%) (a 8.2 grade equivalence); a standard score of seven (7) for reading accuracy (16%ile) (a 5.4 grade equivalence); and a standard score of seven (7) for reading fluency, placing her in the sixteenth percentile (16%) (a 6.7 grade equivalence). In the Detroit Test of Learning Aptitude-2 (DTLA-2) Student fell in the below average range for word sequences and in the average range for oral directions (PE-29).

24. Parent e-mailed Ms. Clark again on February 7, 2011, seeking to resolve the outstanding issues regarding scheduling of special education services, seeking a meeting with the Spanish teacher and a draft copy of the IEP. Regarding math, Parent specifically stated

As you know, we discussed a proposed math evaluation request at the January 26, 2011 Team meeting. The math teacher did not have input regarding [Student]'s current performance. It's my understanding from previous years, and from her summer school math teacher, that [Student] continues to struggle with math computation, concepts and most algebra instruction. Her difficulty with math is included in my Parent Concerns. I have not heard back from Dr. Helmus about her suggestions about which math assessment she will be doing. Regardless, I would like for the district to please do a formal math assessment on her. Please send me (e-mail would be preferable) an Evaluation Consent Form with the specific tests you will be performing. I will sign and return the form immediately (SE-45, 89).

This request for the consent form was renewed by Parent via e-mail dated February 9, 2011<sup>2</sup> (PE-33; SE-45, 90).

25. Ms. Clark responded on February 10, 2011, stating that the math assessments Andover would use were informal assessments, namely, the Math Level Indicator and STAR assessment from the Renaissance Learning Math program. She further explained that since these were informal screening tools (not requiring the formalities involved in formal evaluations, i.e., consent, etc.), they could have those administered as soon as possible (SE-45, 92; Clark). In a separate e-mail the same day Ms. Clark stated that the Key Math would require a consent form because it was a formal assessment, so she suggested proceeding with an informal screening first to see if the Key Math was needed (SE-45, 95). The following day, Ms. Clark e-mailed again and explained to Parent that Student's performance in general education classes was assessed frequently and that Andover used a differentiated approach to teach heterogeneous groups. As such, math classes were not leveled. She further stated that she would forward the evaluation consent form so that Andover could proceed with the Key Math evaluation (SE-45, 94).

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<sup>2</sup> "...in the meanwhile could you please e-mail me the Evaluation Consent Form for the Math so we can at least begin the process. Please include the test you will be doing..."(PE-33).

26. On February 11, Parent responded to Ms. Clark's e-mail stating that Andover should proceed with the informal math assessment forthwith, stated that she would also like to move forward with the formal (Key Math) assessment and again requested the consent forms (PE-33; SE-45, 94).
27. The January 26, 2011, IEP was forwarded to Parent on or about February 11, 2011 and Parent rejected this IEP's program and placement on March 14, 2011 (PE-7; PE-5; SE-15).
28. On February 14, 2011, Andover forwarded an N-1 form to Parent with an evaluation consent form to conduct a formal math evaluation (SE-17; Clark).
29. On March 23, 2011, Andover forwarded a revised IEP to Parent which included updated MCAS information/ accommodations, and which reflected the addition of reading, tutoring and speech and language summer services in the Service Delivery Grid (SE-21).
30. On March 16, 2011, Parent e-mailed Ms. Clark stating that she was very concerned that the math evaluations had not yet been initiated and stating that she had not yet received the consent form for the math evaluation. Parent also raised concerns regarding Student's accommodations for the MCAS (SE-45, 99). Ms. Clark responded the following day, March 17, 2011, stating that she was concerned that Parent had not received the consent form which had been sent out on February 15, 2011 and she would send another copy (Id.).
31. On March 25, 2011 Parent e-mailed Ms. Clark again requesting progress reports for each one of Student's classes and noting that

... we have spoken many times about the district doing an informal math assessment in addition to a formal math evaluation. At the January 26<sup>th</sup> Team meeting, the math teacher did not have a clear indication on her current performance level. I would like to hear how she is performing in class and when the informal math assessment is going to be completed. You told me you would be sending an Evaluation Consent Form. I still have not received it with my original request for Math testing being January 26<sup>th</sup> (SE-45, 105).

Ms. Clark responded on March 28, 2011 that she had forwarded another consent form on March 23, 2011 (SE-45, 106).

32. Parent submitted a partial rejection of Student's IEP on March 28, 2011 (PE-9). She accepted only portions of the MCAS accommodations and the proposed increase in reading services, from three times forty-six minutes per week to four times forty-six minutes per week as recommended by Ms. O'Shaughnessy in January 2011, and explained the reasons for the rejected portions (SE-21; PE-9; Parent, O'Shaughnessy).
33. On March 28, 2011, Parent consented to the math evaluation via e-mail, stating that she sought additional information on the instruments to be used. Parent also signed an

Evaluation Consent Form the same date and forwarded the document to Andover. The consent form was received by Andover the next day (PE-26; SE-18; SE-19).

34. On March 29, 2011, Ms. Clark e-mailed Mr. Bessette seeking confirmation that the formal math test to be administered was the Key Math and informing him that Parent had consented to the math evaluation (SE-45, 1).
- 35.
36. Ann Helmus, Ph.D., (PE-25), conducted a neuropsychological evaluation of Student at Parent's request on March 2, 8, 10 and April 7, 2011. As part of her evaluation, she reviewed previous records and evaluations and had Parent complete the developmental questionnaire and the Achenbach Child Behavior Checklist (CBCL). Stephen Bessette, the special education teacher in Andover, completed the Achenbach Teacher Report Form (TRF). Additionally, the following tests were administered to Student: Wechsler Intelligence Scale For Children-Fourth Edition (WISC-IV); Wechsler Individual Achievement Test- Third Edition (WIAT-III); Gary Silent Reading Tests (GSRT); Comprehensive Test of Phonological Processing (CTOPP); Beery-Buktenica Test of Visual-Motor Integration (VMI); Wide Range Assessment of Memory and Learning- 2<sup>nd</sup> Ed. (WRAML-2) selected subtests; Rey Osterrieth Complex Figure Test (ROCFT); Delis-Kaplan Executive Function System (D-KEFS); Achenbach Youth Self-Report (YSR); and Revised Children's Manifest Anxiety Scale-2<sup>nd</sup> Edition (RCMAS 2) (PE-24; SE-23).
37. Dr. Helmus noted that Student was polite, fully invested, hardworking, cooperative and motivated to do well during the evaluation. Her ability to maintain focus and to direct her attention to task were excellent and her behavior regulation age-appropriate. Student's linguistic pragmatic skills were found to be intact, and speech parameters age appropriate. She displayed good self-advocacy skills during the exam to ensure that she understood the task expectations but required repetition of instructions, modeling and demonstration. Once she understood the directions she initiated tasks independently and was able to shift from task to task without difficulty. Student however, experienced difficulties with planning compromising her efficiency especially in timed tasks (PE-24;SE-23).
38. Dr. Helmus diagnosed Student with a Language-Based Learning Disability manifest in both spoken and written language. She stated that from an educational standpoint Student's diagnosis met the following criteria: Communication Disorder, and a Specific Learning Disability in reading, written expression and mathematics. She also presented with weak executive functioning skills. Based on the result of the evaluation, Dr. Helmus opined that Student was not making effective progress and that she was not closing the gap between her and same aged peers despite having received supports privately and recently through Andover. She however noted that "fortunately, [Student's] weaknesses occur in the context of many important strengths" such as her ability to reason with nonverbal information, intelligence and well developed story memory skills (PE-24; SE-23; Helmus).
39. According to Dr. Helmus, Student required a specialized program that served students with language-based learning disabilities with no more than eight to ten students so that Student

could receive individualized attention. The delivery of instruction should be language-based, and multi-sensory, with direct teaching and reinforcement of strategies throughout the day, as well as pre-teaching of concepts and vocabulary. Verbal information should be presented more slowly with frequent opportunities for clarification. Student also required specialized reading and the use of specific strategies such as Lindamood Bell Visualizing Verbalizing or Project Read. Math instruction should be delivered by a special educator using a specialized curriculum designed for students with learning disabilities. Math concepts should be broken down into the simplest terms through step-by-step instruction at a reduced pace. Student also required intervention for written expression, and should be provided with strategies for note-taking. Assistive technology, such as Dragon Naturally Speaking, and books on tapes and additional accommodations such as extended time on tests and provision of a reader were also recommended. Dr. Helmus opined that Student would be at risk of regression without a summer program (PE-24; SE-23).

40. Student's Team reconvened on April 13, 2011 to review the rejected portions of the January 2011 IEP (PE-8; SE-21; SE-22).
41. The IEP states that while Student had demonstrated some progress since entering Andover three months earlier, she still continued to struggle with math, writing and comprehension. Specifically in reading, improvement was noted with word recognition but comprehension remained at the fifth grade Frustration level for comprehension (SE-21).
42. Mr. Bessette reported that Student was performing at grade level across all academic subjects including social studies, science, math and English. Mr. Bessett reported that his greatest concerns for Student were "her academic growth, phonetic skills, comprehension skills and written language". Social skills, work ethic, and athleticism are viewed as areas of strength for Student. According to Parent, Student was reaching clinically significant levels of anxiety as she was nervous, fearful, dependent and worried much. According to her teachers, Student's ability to seek assistance in class was variable and she displayed avoidance behaviors when overwhelmed with classroom tasks and expectations, especially when she was taking in more information than she was able to process at a given time. Dr. Helmus found Mr. Bessette's report that Student was doing well and functioning at grade level difficult to reconcile with her evaluation results, Student's disabilities, and the fact that she was failing almost every subject at NCDS (SE-23).
43. The IEP resulting from the April 2011 Team meeting contained the previous March 23, 2011 forwarding date along with Parent's March 23, 2011 rejection (SE-21). The aforementioned IEP continued to recommend participation in a full inclusion program and proposed the following services through June 2011: Assisted studies twice per week forty-five minutes sessions; four forty-six minutes reading sessions per week; and one forty-six minute language session per week. During the summer of 2011 it proposed one hour speech and language session per week with the special education teacher, and two sixty minutes reading sessions per week for a month. From September 6, 2011 through January 25, 2012 it proposed the following services: tutoring 2.5 sessions 82 minutes per week; one thirty

minute session per week speech and language; and assisted study 2.5 sessions 82 minutes per week (SE-21).

44. A Team meeting note dated April 13, 2011 states that in math Student was demonstrating sixth grade computational skills. During the semester she had struggled with vocabulary retention, on getting assignments in on time and was inconsistent about accessing supports in her desire to “blend in” with typically developing same age peers (SE-51). The note further reflects that the Parties reached an agreement regarding provision of compensatory reading services and also that at minimum, Student would require reading, speech and language, assisted study, tutoring and support in her classes in high school, but a final decision on services would be deferred until Dr. Helmus’ evaluation were completed (SE-50)
45. Via e-mail forwarded on April 15, 2011 to Parent and Ms. O’Shaughnessy, Ms. Clark expressed her hope that Student was available to receive two additional specialized reading sessions on Tuesdays and Wednesdays because the days worked for Ms. O’Shaughnessy (SE-45, 109). Later on April 15, 2011, Kate Clark wrote to Parent stating that due to scheduling conflicts during the school day, Student would be seen after school on Tuesdays and Wednesdays, for eight weeks (2 x 46 minutes per week) through June 17, 2011, to receive compensatory reading services. Services would start as soon as Parent confirmed her consent (SE-47). These services would be offered in addition to the reading services offered during the school day. On April 26, 2011, Parent rejected the amount of compensatory sessions proposed by Andover stating that Student had lost twenty-five sessions and Andover’s proposal compensated her only for sixteen sessions (SE-45, 114). On or about May 16, 2011, the Parties agreed to provide Student the remaining reading sessions during the summer of 2011 (PE-33; SE-45, 123).
46. Parent’s April 26, 2011, e-mail sought further information regarding a previous discussion during the Team meeting. Those were: 1) information regarding the informal math assessment used by the District as well as how Student’s math grade equivalency was reached, and a description of what her strengths and weaknesses were in math; and 2) provision of Student’s scores and test grades in all of her core classes as well as Spanish (PE-33). Regarding the math piece, Mr. Bessette responded on April 28, 2011 that his estimate of Student’s Math levels was fifth to sixth grade in computational skills but Student displayed difficulty applying her skills to new situations. He agreed to provide Parent his assessment and then meet to discuss it in person (PE-33).
47. Amy Burt, M.Ed., special education teacher in Andover, performed an informal math assessment on May 2, 2011. Ms. Burt had previously evaluated Student in 2009 using the WIAT II, finding weaknesses in math reasoning, in addition to pseudo-word decoding, spelling and in word reading. In 2011, she administered the Math-Level Indicator (MLI) and concluded that Student presented gaps in her knowledge of math. She recommended provision of support for: “multi-step problems, algebra problems, and concepts that involve decimals and fractions”. When teaching concepts involving complex tasks, she recommended “breaking down the information into manageable chunks, as well as using whole numbers” to help Student deal with increasingly abstract math problems. Ms. Burt

opined that the use of checklists, templates and a calculator would be beneficial (PE-28; SE-24).

48. The formal math assessment was conducted by Stephen L. Bessette, on May 4, 2011. He administered the Key Math 3 Diagnostic Assessment- Form B to ascertain Student's then-current math functioning level. Student scored in the average range for numeration, data analysis, mental computation estimation, addition and subtraction, multiplication and division and operations. She scored below average in Algebra, Geometry, Measurements, Basic Concepts, Foundations of Problem Solving, and in Applied Problem Solving. In Applications, she scored well below average. According to Mr. Bessette, Student obtained a total standard score of 90, corresponding to a percentile rank of 25%, placing her in the Average range, and indicating that she performed higher than 25% of her same-age peers. Mr. Bessette deferred his recommendations for the Team meeting (PE-27; SE-25).

49. On May 10, 2011, Parent wrote to Ms. Clark requesting to view Student's math tests/grades and seeking information about ninth grade language-based classrooms that she could observe. Parent stated

I spoke to John Norton about observing the LB classes this week. However, when he checked [Student]'s file, he noted that there were not any recommendations for LB classes for [Student] for next year. While he is willing to let me observe, we are not sure what classes we would need to observe. Would you please clarify as Steve had clearly indicated that LB HS classes would benefit [Student]. I need clarity to this [ASAP] so I can schedule observations accordingly (PE-33).

50. A note written by Ms. O'Shaughnessy, reading specialist in Andover, dated May 31, 2011, explained that while Student was reading 118 wcpm with between 80 and 90% accuracy on comprehension on the Read Naturally seventh grade passages when they began working together, she switched Student to level 8 in April 2011 and by May 2011, Student was reading 142 wcpm with 85% accuracy for comprehension. She recommended that Student be placed in a language-based classroom at the high school so that she could continue to receive the specialized level of instruction she required. Additionally, Ms. O'Shaughnessy recommended that Student be provided specialized reading instruction (SE-26).

51. Student's Team convened again on May 31, 2011, to discuss the result of Andover's math evaluation, Dr. Helmus' independent neuropsychological evaluation, Student's classroom performance and her transition into high school. The Team once again found Student eligible to receive special education due to a specific learning disability that impacted her: basic reading skills, reading fluency, mathematics problem solving, written expression and a reading comprehension (PE-14; PE-15; SE-22; SE-29; SE-27; SE-28).

52. The May 31, 2011 Team meeting summary notes reflect that Parent had requested a math evaluation for Student in January 2011 and that in her view, services in that area should have been provided to a greater extent. The notes also report the math test results reported by Mr.

Bessette. They also state` that for high school the Team recommended that Student participate in a language-based program that offered small-group instruction for all core courses: English language arts, math, social studies and science (PE-15).

53. On June 7, 2011, Andover forwarded Parent an IEP amending the April 2011 IEP, rejected by Parent in May 2011. The amendments involved changes to: the service delivery grid; adding goals and objectives for mathematics, writing and academics; changing the student profile section; and changing Student's placement for high school (PE-10; SE-28). Although the Student's placement page calls for participation in full inclusion program at the Doherty Middle School, the Service Delivery Grid describes participation in a substantially separate program for the ninth grade (SE-29). The Parent's Concerns section of the IEP reflects the increase in reading services to four times per week for forty-six minutes each session which results in the elimination of all of Student's electives.
54. The Service Delivery Grid in this IEP lists the same summer services as the IEP promulgated in April 2011 and provides the following direct services under the C section of the grid between September 6, 2011 and January 25, 2011: Reading with a reading specialist two and a half times forty-one minutes per week; Standard English, two and a half times eighty-two minutes per week; tutoring, two and a half times forty-one minutes per week; speech and language two and a half times forty-one minutes per week; Standard Math, two and a half times eighty-two minutes per week; Standard History, two and a half times eighty-two minutes per week; and Standard Science, two and a half times eighty-two minutes per week. Between January 26 and June 22, 2012, Student would receive: Reading with a reading specialist four, forty-six minute sessions per week; speech and language once per week for forty-six minutes; and, assisted study twice per week for forty-five minutes each session. Additionally, Student would receive forty-six minutes five times per week of in class support between January and June 2012. The start and end dates on the Service Delivery Grid in this IEP show that Student would receive English, Math, History, Science and assisted study between September 2011 and January 25, 2012. The grid reflects that in ninth grade Student would receive half the amount of reading and speech and language sessions she received in eighth grade. The IEP also offers numerous in class and MCAS accommodations (PE-10; SE-29).
55. Student's Reading progress report for the period ending on June 17, 2011, the end of her eighth grade, states that Student had made progress and had reached her goal of reading a fifth grade level QRI passage at 159 wcpm with 87% comprehension, and a sixth grade expository piece on the Nile at 138 wcpm with 87% comprehension (SE-30). In language, the progress report states that Student benefitted from Lindamood Bell Visualizing and Verbalizing as the visualization techniques helped her with language expression and with language processing. She also learned metacognitive strategies for understanding vocabulary words (SE-30). The language progress notes further state that Student continued to struggle with formulating main ideas and with summarizing statements. Student was beginning to show self advocacy skills with her special education teacher but not yet in regular education settings. Her academic self-confidence was still at the emergent stage by the end of the school year as she struggled with organizational strategies and preparation for class.



According to Mr. Bessette, Student was not implementing the strategies consistently. He opined that she was very socially preoccupied and this negatively impacted her ability to follow through with the strategies provided to her in Assisted Study and/ or access adult support in the classroom. She required continued work on her academic self-confidence strategies so she could access and implement the strategies automatically thereby becoming more independent (PE-17; SE-30).

56. During the period from January 2011 through June 2011, Student had ten excused absences, was tardy on eight occasions, six of which were excused, and was dismissed early twice (SE-31).

57. On July 7,<sup>3</sup> 2011, Parent rejected the IEP placement and partially rejected the proposed program. Specifically, Parent rejected the block scheduling and the overall teaching style in the proposed language-based program, and she challenged the appropriateness of the proposed peers. Parent also rejected the reduction in reading and speech and language services, the math goal and benchmark because it failed to provide grade level content rendering it immeasurable, and overall, Student required a better suited program. Additionally, Parent noted misstatements in the IEP regarding the dates for requesting the math evaluation prior to March 2011 as alleged by Andover, and failure to consider previous assessments and other sources of information raising Student's difficulties with math, including Student's need to retake math tests which she had failed at Doherty Middle School. Regarding summer services, Parent challenged Andover's failure to provide math instruction to avoid regression and therefore, she also rejected the proposed extended school year services (PE-11; SE-29). According to her, the aforementioned constituted procedural violations. In her July 8, 2011, rejection, received by Andover on July 12, 2011, Parent further stated

...again, this proposal forces [Student] to pay a high price for receiving her special education services. We understand that [Student's] special education services are imperative, but we also see the vital importance of a healthy academic balance that includes core classes, necessary special education services, as well as enrichment programs (PE-11; SE-29).

58. Student's final grades for eighth grade in Andover were: C in Algebra, C+ in Language Arts; B in Social Studies, and B- in Science, Pass in Spanish and in Integrated T.T. 8A, B+ and an A in Integrated Arts 8, and A- in physical education (SE-51).

59. Student started the 2011-2012 school year, her ninth grade, at Andover High School (SE-33; Parent). Andover follows a block schedule in high school and proposed that Student form part of the blue team. As such, the proposed schedule shows that between September and January she would receive Standard World Civilization and Environmental Science, Tutoring, Assisted Studies and Project Challenge Fieldhouse. No Math or English is

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<sup>3</sup> The Heading in this document states July 8, 2011, however, Parent signed and dated it July 7, 2011, (PE-11; SE-29).

provided during the first semester of the 2011-2012 school year. Between the end of January and June 2012, Student's block schedule would accommodate ninth grade English, Standard Math, Standard Biology, Assisted Study and Tutoring (PE-31; SE-33). Andover follows the Massachusetts Frameworks Curriculum standards (PE-31; SE-34; SE-35; SE-36; SE-37). The specialized reading course focuses on improving reading fluency, vocabulary and decoding and encoding skills as well as applying those skills in content areas (SE-38). Additionally, general skills and strategies applicable to freshmen, school orientation and study skills will be provided (SE-39). To promote becoming an independent learner, tutoring will focus on improving basic reading and writing skills, work on self-advocacy skills by developing awareness and comprehension of learning styles, improving organization and study skills (SE-40).

60. The record contains the curriculum vitae, and where appropriate the licensure and DESE certifications for Lisa Blasi; Stephen Bessette (special education teacher); Linda Burns; Kathryn Thayer Clark; Helen Fitzgerald (CCC-SLP), Stephanie Hand; William J. Hecht Jr.; Ilda Carreiro King (Ph.D. in Developmental Psychology); Joyce Fahy-Laundre (Director of Special Education); Sarah Smith Letsky (CCC-SLP at the Doherty School); Sally Mandelbaum (Reading Specialist); John Norton; Marion O'Shaughnessy (Reading Specialist); Karen Parker (high school special education teacher); Kimberly Serepiglia (middle school special education teacher; Ann Marie Wilde (moderate special needs teacher) (SE-41).

#### **CONCLUSIONS OF LAW:**

The Parties do not dispute that Student is an individual with a disability falling within the purview of the Individuals with Disabilities Education Act<sup>4</sup> (IDEA) and the state special education statute<sup>5</sup> due to a language-based learning disability. Student has difficulties conceptualizing part to whole which negatively impacts use of language, reading rate, comprehension of grade level material, and math (PE-10). As such, Student is entitled to a free, appropriate public education (FAPE).<sup>6</sup> The dispute involves whether Andover owes Student compensatory services both for alleged failure to offer necessary reading services and for alleged procedural violations regarding failure to conduct a math evaluation in a timely fashion, thereby preventing Student from receiving necessary math services during the eighth grade. The Parties further dispute the appropriateness of the IEP program and placement offered by Andover for the period from September 2011 through the end of January 2012. In rendering my decision, I rely on the facts recited in the Facts section of this decision and incorporate them by reference to avoid restating them except where necessary.

The IDEA and the Massachusetts special education law, as well as the regulations promulgated under those acts, mandate that school districts offer eligible students a FAPE. A FAPE requires that a student's individualized education program (IEP) be tailored to

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<sup>4</sup> 20 USC 1400 *et seq.*

<sup>5</sup> MGL c. 71B.

<sup>6</sup> MGL c. 71B, ss. 1 (definition of FAPE), 2, 3.

address the student's unique needs<sup>7</sup> in a way reasonably calculated to enable the student to make meaningful<sup>8</sup> and effective<sup>9</sup> educational progress. Additionally, said program and services must be delivered in the least restrictive environment appropriate to meet the student's needs.<sup>10</sup> Under the aforementioned standards, public schools must offer eligible students a special education program and services specifically designed for each student so as to develop that particular individual's educational potential.<sup>11</sup> Educational progress is then measured in relation to the potential of the particular student.<sup>12</sup> School districts are

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<sup>7</sup> E.g., 20 USC 1400(d)(1)(A) (purpose of the federal law is to ensure that children with disabilities have FAPE that "emphasizes special education and related services designed to meet their unique needs . . ."); 20 USC 1401(29) ("special education" defined to mean "specially designed instruction . . . to meet the unique needs of a child with a disability . . ."); *Honig v. DOE*, 484 U.S. 305, 311 (1988) (FAPE must be tailored "to each child's unique needs").

<sup>8</sup> *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 192 (1982) (goal of Congress in passing IDEA was to make access to education "meaningful"); *Deal v. Hamilton County Board of Education*, 104 LRP 59544 (6<sup>th</sup> Cir. 2004); ("IDEA requires an IEP to confer a 'meaningful educational benefit' gauged in relation to the potential of the child at issue"); *G. by R.G. and A.G. v. Fort Bragg Dependent Schs*, 40 IDELR 4 (4<sup>th</sup> Cir. 2003) (issue is whether the IEP was reasonably calculated to provide student meaningful educational benefit); *Weixel v. Board of Education of the City of New York*, 287 F.3d 138 (2<sup>nd</sup> Cir. 2002) (placement must be "reasonably calculated" to ensure that [student] received a meaningful educational benefit"); *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000) (educational benefit must be "meaningful"); *Ridgewood Board of Education v. NE for ME*, 172 F.3d 238 (3<sup>rd</sup> Cir. 1999) (IDEA requires IEP to provide "significant learning" and confer "meaningful benefit").

<sup>9</sup> *Lenn v. Portland School Committee*, 998 F.2d 1083 (1<sup>st</sup> Cir. 1993) (program must be "reasonably calculated to provide 'effective results' and 'demonstrable improvement' in the various 'educational and personal skills identified as special needs'"); *Roland v. Concord School Committee*, 910 F.2d 983 (1<sup>st</sup> Cir. 1990) ("Congress indubitably desired 'effective results' and 'demonstrable improvement' for the Act's beneficiaries"); *Burlington v. Department of Education*, 736 F.2d 773, 788 (1<sup>st</sup> Cir. 1984) ("objective of the federal floor, then, is the achievement of effective results--demonstrable improvement in the educational and personal skills identified as special needs--as a consequence of implementing the proposed IEP"); 603 CMR 28.05(4)(b) (Student's IEP must be "designed to enable the student to progress effectively in the content areas of the general curriculum"); 603 CMR 28.02(18) ("*Progress effectively in the general education program* shall mean to make documented growth in the acquisition of knowledge and skills, including social/emotional development, within the general education program, with or without accommodations, according to chronological age and developmental expectations, the individual educational potential of the child, and the learning standards set forth in the Massachusetts Curriculum Frameworks and the curriculum of the district.").

<sup>10</sup> See generally *In re: Arlington*, 37 IDELR 119, 8 MSER 187, 193-195 (SEA MA 2002) (collecting cases and other authorities).

<sup>11</sup> MGL c. 69, s. 1 ("paramount goal of the commonwealth to provide a public education system of sufficient quality to extend to all children the opportunity to reach their full potential..."); MGL c. 71B, s. 1 ("special education" defined to mean "...educational programs and assignments . . . designed to develop the educational potential of children with disabilities . . ."); 603 CMR 28.01(3) (identifying the purpose of the state special education regulations as "to ensure that eligible Massachusetts students receive special education services designed to develop the student's individual educational potential..."). See also Mass. Department of Education's Administrative Advisory SPED 2002-1: Guidance on the change in special education standard of service from "maximum possible development" to "free appropriate public education" ("FAPE"), effective January 1, 2002, 7 MSER Quarterly Reports 1 (2001) (appearing at [www.doe.mass.edu/sped](http://www.doe.mass.edu/sped)) (Massachusetts Education Reform Act "underscores the Commonwealth's commitment to assist all students to reach their full educational potential").

<sup>12</sup> *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 199, 202 (court declined to set out a bright-line rule for what satisfies a FAPE, noting that children have different abilities and are therefore capable of different achievements; court adopted an approach that takes into account the potential of the disabled student); *Deal v. Hamilton County Board of Education*, 104 LRP 59544 (6<sup>th</sup> Cir. 2004); ("IDEA requires an IEP to confer a 'meaningful educational benefit' gauged in relation to the potential of the child at issue"); *HW and JW v. Highland Park Board of Education*, 104 LRP 40799 (3<sup>rd</sup> Cir. 2004) ("benefit must be gauged in relation to the child's potential"); *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000) (progress should be

responsible to offer students programs and services that will allow them to make meaningful, effective progress.<sup>13</sup>

As the party challenging the adequacy of Student's proposed IEP, Parent carries the burden of persuasion pursuant to *Shaffer v. Weast*, 126 S.Ct. 528 (2005)<sup>14</sup>, and must prove her case by a preponderance of the evidence. Also, pursuant to *Shaffer*, if the evidence is closely balanced, the moving party, that is Parent, will lose. *Id.*

Upon consideration of the evidence, the applicable legal standards and the arguments offered by the Parties in the instant case, I conclude that the IEP offered by Andover as is, is not reasonably calculated to meet Student's needs and amending the IEP so that Student may receive a FAPE would result in an overly restrictive placement for Student at Andover. As such, Parent has met her burden of persuasion pursuant to *Shaffer* and Student is entitled to public funding for an out-of-district day placement at Landmark for the remainder of the IEP period and to compensatory services as explained below. My reasoning follows:

#### **I. Eighth grade IEPs and services:**

The evidence shows that all of the IEPs proposed for eighth grade offered specialized reading instruction, direct speech and language and assisted study. The goals and benchmarks in these IEPs included reading, language and academic self-confidence (SE-15; SE-21; SE-29). The IEPs however, offered no services in math. Since Parent rejected all of the IEPs proposed in eighth grade the IEP accepted on October 1, 2009 defined the services Andover was responsible to provide; those were: Reading three times per week, once per week speech and language and assisted study twice per week, all sessions forty-six minutes each (SE-6). By late January 2011, Ms. O'Shaughnessy recommended, and Parent later accepted, an increase in reading services to four times forty-six minutes per week. Parent also accepted the recommended MCAS accommodations. Her acceptance became effective on March 28, 2011.

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measured with respect to the individual student, not with respect to others); *T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 578 (3d Cir. 2000) (appropriate education assessed in light of "individual needs and potential"); *Ridgewood Board of Education v. NE*, 172 F.3d 238 (3<sup>rd</sup> Cir. 1999) ("quantum of educational benefit necessary to satisfy IDEA . . . requires a court to consider the potential of the particular disabled student"); *Mrs. B. v. Milford Board of Ed.*, 103 F.3d 1114, 1122 (2d Cir. 1997) ("child's academic progress must be viewed in light of the limitations imposed by the child's disability"); *MC v. Central Regional School District*, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996), *cert. denied* 519 US 866 (1996) (child's untapped potential was appropriate basis for residential placement); *Roland v. Concord School Committee*, 910 F.2d 983 (1<sup>st</sup> Cir. 1990) ("academic potential is one factor to be considered"); *Kevin T. v. Elmhurst*, 36 IDELR 153 (N.D. Ill. 2002) ("Court must assess [student's] intellectual potential, given his disability, and then determine the academic progress [student] made under the IEPs designed and implemented by the District").

<sup>13</sup> E.g. *Lt. T.B. ex rel. N.B. v. Warwick Sch. Com.*, 361 F. 3d 80, 83 (1<sup>st</sup> Cir. 2004) ("IDEA does not require a public school to provide what is best for a special needs child, only that it provide an IEP that is 'reasonably calculated' to provide an 'appropriate' education as defined in federal and state law.")

<sup>14</sup> *Shaffer v. Weast*, 126 S.Ct. 528 (2005) places the burden of proof in an administrative hearing on the party seeking relief.

To ascertain whether the IEPs promulgated by Andover between January and June 2011 were appropriate to meet Student's needs one must first consider the information available to the Team at the time the IEPs were promulgated. I note that when the Team met in November 2010, Student was still enrolled at NCDS and had been receiving private tutoring.

The November 2010 and January 2011 Teams were in receipt of the initial 2009 evaluation reports, the March 2010 updated reading assessment by Ms. O'Shaughnessy (which found Student's reading level to have remained at the fourth grade level), NCDS' progress reports, and Parent's and NCDS's input (SE-1; SE-2; SE-3; SE-4; SE-13; PE-4; PE-6; PE-19). The Team concluded that since Student's reading level had remained the same as in the previous evaluation, the goals and objectives in the 2009 IEP (SE-12) remained valid.

According to Andover, at the January 2011 team meeting, Stephen Bessette, special education/ assisted study teacher, provided Parent an explanation as to how special education interfaced with the inclusion program in the middle school. He explained that Inclusion classrooms were staffed by a special education staff and a regular education teacher. He testified that a learning specialist was responsible to implement the eligible students' programs in and out of the classroom and stated that he met with the regular education teacher and the inclusion/ special education staff daily to discuss students and curriculum. In the inclusion program Student would receive her instruction in the regular education classroom from the regular education teacher with support from either him or one of his staff when students moved to the "small student-directed pods." In the small group, Mr. Bessette presented strategies, skills and techniques which students could then apply in the regular education classroom.

Andover argued that given the special education support offered in the inclusion classroom, along with the three times per week reading instruction and direct speech and language services, it was reasonable for the Team to conclude that the proposed IEP would offer Student a FAPE. In this regard Andover is correct that given the information available to the Team in November 2010, the proposed IEP placement, services and supports would have seemed appropriate to address her needs, especially considering that Student was not enrolled in Andover, had not received services there, and none of her teachers from NCDS participated. When Parent rejected this IEP Andover was responsible to implement the last agreed upon IEP, that is, the 2009 IEP.

Student enrolled in Andover on January 3, 2011. By the time the Team convened on January 26, 2011, the Andover staff had begun acquiring direct knowledge of Student, and some of the staff had very strong opinions as to her capabilities (Bessette, Scanlan, Shaughnessy, Clark). At the Team, Parent raised concerns regarding Student's math abilities and requested that Andover conduct formal and informal math evaluations something that was not done until the end of the school year. Andover's Team was also aware of the difficulties Student had in math at NCDS for which she received an F at the end of the first eighth grade semester (PE-18; PE-19). The Team also knew that Student had participated in a math summer program at Landmark during the summer of 2010 (Parent). The information suggested difficulties in math and the January Team recommended that Student's math

abilities be evaluated. No informal or formal math assessments were conducted until May 2011, and as such, the IEPs promulgated through June 2011 did not address math (PE-8).

The January 2011 Team was also aware of Student's significant reading needs, and while it recommended that Student receive three (and later four) reading sessions per week, Andover, failed to fully implement the required reading services until the end of April 2011.

After the May 31, 2011, Team met to discuss Dr. Helmus' evaluation and Andover's formal and informal math assessments, increases in the provision of services appear in Student's IEP (PE-24). Dr. Helmus found Student to present with a language-based learning disability that impacted both spoken and written language skills. Student also presented with specific disabilities in written expression, mathematics, reading and executive functioning (Helmus). Dr. Helmus testified that her comparison of Andover's 2009 reports and her March 2011 evaluation results demonstrated that Student had not made effective progress (Helmus). Andover's math assessments conducted in May 2011, supported Dr. Helmus' findings regarding math and Ms. O'Shaughnessy's assessments also supported Student's reading deficiencies.

Andover is correct that during most of the time preceding Dr. Helmus' evaluation Student had received her education at NCDS. However, once Student entered Andover, Andover was responsible to provide agreed upon services, diligently evaluate all areas of suspected need, and offer Student the services she required to make effective progress based on the needs Student presented at the time.

The informal math evaluation conducted by Andover in May 2011 placed Student in the nineteenth percentile showing significant deficiencies in concepts, word problems and math operations (PE-28). The formal assessment, involving the Key Math Diagnostic Assessment, placed Student's skills in the twenty-fifth percentile but math application fell in the second percentile (PE-27). All of these evaluations clearly supported provision of math services for Student. However, the results of the math evaluations were available so late in the semester that it prevented the Team from implementing modifications that might have proven helpful to Student (PE-10).

By the end of eighth grade Student evidenced progress in reading as measured by the QRI, her reading level increased by two years rendering her able to read at the sixth grade level. Socially, she adjusted well to Andover and made friends. Progress reports for the period ending on June 17, 2011 state that Student progressed in the three areas targeted in her IEP. Mr. Bessette testified that Student's classroom functioning improved in terms of her ability to apply strategies and in the manner in which Student approached the material. Regarding Student's academic self-confidence goal, Mr. Bessette placed her abilities at the emerging stage (SE-30; Bessette).

Dr. Helmus recommended that Student be placed in a language-based program and receive specialized reading instruction (Helmus). This recommendation was embraced by Andover's May 2011 Team and participation in a language-based program was offered for the ninth

grade. On July 8, 2011, Parent rejected the IEP and requested a Hearing before the BSEA raising procedural and substantive transgressions during eighth grade and challenging the appropriateness of the IEP for ninth grade.

**A. Procedural Challenges and Denial of FAPE in the eighth grade:**

Parent alleged that Andover violated Student's procedural due process rights and denied her a FAPE in failing to offer the necessary amount of reading instruction required under her IEP. Parent also alleges that Andover did not evaluate Student's suspected area of need in math in a timely fashion also resulting in a denial of FAPE to Student and a violation of procedural due process rights. In doing so, Parent states that Andover also interfered with Parent's right to meaningful participation.

1. Reading Issues:

Parent contends that Andover failed to provide Student the specialized reading sessions to which she was entitled pursuant to her last agreed upon IEP, and failed to conduct Student's formal and informal math evaluations in a timely manner consistent with federal and state law. Parent alleges that as a result, she was deprived of the opportunity for meaningful participation in the Team meetings and further alleges that these transgressions violated Student's right to a FAPE.

Regarding reading instruction, the Parties agree that since January 2011, Student was entitled to receive three, forty-six minute long specialized reading instruction sessions per week with a reading specialist, which was increased to four, forty-six minute sessions in April 2011 (SE-11). It is also undisputed that in the middle of eighth grade Student was reading at the fourth grade level.

Andover states that as of January 3, 2011, the day on which Student enrolled in Andover, Parent became aware that Student's reading instruction was scheduled for the same time that Student was scheduled to take Spanish. Andover argued that since students with language-based learning disabilities typically have greater difficulties with foreign languages, they generally do not take Spanish (Norton). Student had been taking Spanish at NCDS and Parent believed that if she completed her Spanish requirements in middle school she would only have to take one year of a foreign language in high school (PE-4; Parent). Ms. Scanlon testified that Andy Long, the Assistant Principal at Doherty Middle School, told Parent that this assumption was not correct. In high school, Student would still be required to take two years of foreign language unless this requirement was waived (Scanlon). The record is unclear as to when this information was given to Parent. Nevertheless, Parent opted not to withdraw Student from Spanish and instead suggested that a different time be found during the school day to provide reading instruction.

On January 4, 2011, Kathryn Clark of Andover strongly recommended that Student take reading with the rest of the other students on her team instead of Spanish (SE-45; Clark).

Parent argued that Andover was trying to make Student's needs fit into the school's schedule as opposed to individualizing Student's program to meet her needs (Parent).

Maureen O'Shaughnessy testified that she explained to Parent that because Student had made no progress in reading over the previous two years at NCDS, reading should be a priority over Spanish (O'Shaughnessy). Andover declined to consider Parent's suggestion that the missing reading session be offered during Assisted Study because Ms. O'Shaughnessy was not available at that time. The Spanish teacher, Leela Scanlon, e-mailed Parent informing her that Student was doing poorly in Spanish and that she lacked the foundational skills needed to keep pace in her class (Scanlon).

Later in January 2011, Ms. Clark also offered to have Student change Spanish teachers, physical education and integrated arts to accommodate the necessary reading session during the school day. Parent rejected these options. She wanted Student to complete the year of Spanish, because she believed it would boost Student's self-esteem, and Student had developed good rapport with the teachers and some of her classmates in the classes suggested to be changed. Parent realized at that point that it would be difficult to fit the reading session into the school day without making major changes and as an alternative, agreed to have Student receive the additional reading session after-school as Ms. Clark had initially suggested. She e-mailed Ms. Clark with this option on January 31, 2011<sup>15</sup> (PE-34; Parent).

On February 7, 2011, Parent requested a meeting to discuss these issues but no further meetings or arrangements to provide the remaining missing reading sessions was scheduled until April 2011 (PE33; Parent).

Student's Team convened again in April 2011 to discuss Student's proposed services for the remainder of the eighth grade and for ninth grade. By then, Ms. O'Shaughnessy had advised the Team that Student required four sessions per week of reading instruction due to her severe needs. Through the middle of April 2011, Student had only been receiving two sessions per week instead of three. Parent rejected this IEP on March 28, 2011 (PE-8).

On April 15, 2011, Ms. Clark communicated with Parent informing her that starting the week of April 25, 2011, Ms. O'Shaughnessy was ready meet with Student after school twice per week, thirty minutes each session. The additional reading services would be delivered on Tuesdays and Thursdays (PE-34, 1). Parent agreed to this offer and implementation of the additional afterschool reading services was initiated the last week of April 2011. Parent and Andover also agreed that Andover would provide twenty-five compensatory reading sessions. By October 5, 2011, when the hearing was initiated, Andover still owed seven and a quarter hours of compensatory reading instruction.

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<sup>15</sup> "... at this point in time, it may be a good idea to also discuss your first option of after school services. I understand that we are at an impasse here and hopefully we can examine all the details more closely on Friday and arrive at a sensible resolution" (PE-34, 2; Parent).



Because of the impasse over dropping Spanish, Andover held Parent responsible for its inability to provide Student the third and later the fourth reading session. Andover argued that it had fulfilled its obligation to Student by offering to provide the reading sessions in lieu of Spanish, thereby making reading available and that Student's failure to access the service was the result of Parent's decision that Student not drop Spanish. Andover argued that Parent's actions were equivalent to a choice to "declin[ing] the services".

Andover's argument is unpersuasive, especially since Parent manifested her willingness to consider afterschool services (to which Andover ultimately agreed) as early as January 31, 2011. Ms. O'Shaughnessy testified that while she would have made herself available earlier, Andover did not approach her to request that she offer the afterschool services until mid April, 2011 (O'Shaughnessy). The district knew what its responsibility under the IEP was and it knew that Student's reading issues were significant enough to warrant not three, but rather four sessions of reading per week. Still, it delayed implementation of this much needed service until April 2011, three months after Parent had communicated her openness to afterschool services. Andover failed to offer Student the necessary reading services consistent with the last agreed upon IEP, it failed to implement a viable alternative by offering afterschool reading services after Parent expressed openness to this option in February 2011, thereby depriving Student of the necessary and agreed upon reading services for a significant portion of the semester. As such Andover's actions constitute a violation of Student's right to a FAPE and is responsible to offer Student the remaining seven and a quarter hours of compensatory reading services.

## 2. Math Issues:

Turning to the issue of whether Andover complied with federal and state evaluation requirements, Andover is cognizant of its duty to assess students in all areas of suspected disability consistent with 603 CMR 28.04(2)(a)(1).

Generally, when a student is referred for an evaluation, the school must forward to the parent a written notice of the proposed evaluations and must seek the parent's consent to the proposed evaluations within five school days of the referral. 603 CMR 28.04(1)(a) and (b). Once the school receives a parent's consent to the evaluation, the school district has to complete the evaluations within thirty (30) school days.<sup>16</sup> The school district must convene a Team meeting to discuss the results of the evaluations within forty-five (45) working days after receiving a parent's consent to the evaluation. 603 CMR 28.05(1).

The Parties agree that discussions regarding the math assessments were initiated during the January 26, 2011, Team meeting, at which time two different assessments were discussed: a formal assessment requiring parental consent, and an informal assessment which the school

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<sup>16</sup> Federal law establishes a 60 day period to conduct evaluations from the date of receipt of parental consent, but defers to timelines established by states when the states have established a different timeline. 20 USC §1414(a)(C)(I).

could perform more expeditiously as it did not require parental consent (Parent, Clark). Thereafter the School's and Parent's version of the facts differ.

Andover states that Parent wanted further information on the informal math assessment tools to be used, which the Team liaison, Ms. Clark, agreed to furnish after the January 26<sup>th</sup> meeting (Clark, Parent). According to Ms. Clark, an N-1 (dated January 3, 2011) shows the Team's recommendation and Andover's intention to proceed with an informal assessment (SE-16). The N1 stated

The Team discussed the question of whether or not a benchmark around math skills is needed and decided some informal testing would be appropriate to evaluate her grade-level skills. Ms. Clark agreed to look into what would be appropriate and e-mail [Parent] the content of those informal assessments (SE-16).

The record is clear that as of January 2011, the District agreed to proceed with an informal math assessment and Ms. Clark was responsible for providing Parent with the name of the specific instrument to be used. Ms. Clark testified that there is no requirement that a Parent Consent Form be signed before proceeding with informal assessments/ evaluations and therefore, she was cognizant that Andover could proceed with this assessment forthwith (Clark).

The next relevant exhibit is a document titled Parent's Concerns, forwarded to Andover on February 1, 2011. In this document Parent specifically addresses some of Student's math difficulties, namely, math concepts, computation, word problems and algebra, and requests that the District conduct a formal math assessment (PE-6).

At Hearing, Ms. Clark testified that she was confused and that she had some clarification questions. She understood Parent's communications to mean that Parent was only interested in a formal math assessment as opposed to both a formal and informal assessment. Ms. Clark testified that a series of e-mails ensued in which she advised Parent that the informal evaluation could be completed quicker than a formal one, but understood Parent's request to be that the District should only proceed with the formal evaluation (Ms. Clark). In failing to respond to Parent's February 1, 2011, request for a formal evaluation Ms. Clark failed to initiate the process by sending the Parent Consent Form within the mandated five days, and instead, caused the process to be delayed.

Thereafter, Parent continued to e-mail Ms. Clark seeking updates on the formal and informal math assessments. On February 11, 2011, Parent wrote to Ms. Clark

Was there a math assessment done so the teacher had an idea of where her skills were at the time of her enrollment? If not, I don't know how the teacher could have a clear understanding of her current performance. If an assessment wasn't done, then I guess that should be done immediately for the sake of her math teacher, but I would also like to move forward with a formal assessment.

This is why I included the math piece in the Parent Concerns back in January. The school year is moving forward and I'm concerned that her math skills are not clearly identified at this point. I would like to still move forward with the Key Math (or some comparable formal math assessment) so please forward the Consent Form. Would you please include the name of the math [assessment] (formal)? (PE-33, 17). (Emphasis supplied).

This e-mail clearly shows that Parent still wanted Andover to proceed with the informal math assessment immediately, and also move forward with the formal assessment. Once again, Parent requested that the consent forms be sent to her. Parent had previously made similar requests to Ms. Clark on January 31<sup>17</sup>, February 7 and February 9, 2011 (PE-33; SE-45, 94; PE-33; PE-34).

When questioned about this e-mail, Ms. Clark, held steadfast to her testimony that she did not understand that Parent wanted both the formal and informal assessments. She testified that she mailed a Consent Form on February 14, 2011, which, she opined was five school days after February 7, 2011. In the next N1 to be forwarded to Parent, dated February 14, 2011, Ms. Clark wrote

[Parent] requested that the more formal evaluation take place instead of an informal math screening (SE-17).

Parent testified that she did not receive this N1 or the Consent Form and she continued to request that the Consent Form be forwarded to her (Parent). As noted above, according to Ms. Clark, her logs indicated that the document had been forwarded in February. Parent wrote again on March 16, 2011 telling Ms. Clark that she had given her permission for Andover to conduct the informal math assessment in February so that Student's teachers and staff could gain a better understanding of Student's math needs. Ms. Clark testified that it was on March 17, 2011, when Parent wrote again, that she learned that Parent had not yet received the Consent Form for the formal evaluation. Ms. Clark testified that she mailed the Consent Form again on March 23, 2011 (PE-33, 21 and 22; Clark). Parent signed the Consent form on March 28, 2011 and Andover received it on March 29, 2011 (SE-18). The formal evaluation (Key Math) was conducted on May 4, 2011 and the Team reconvened on May 31, 2011.

The District had forty-five days to complete the math evaluation and convene the Team, and in Andover's view, the clock started ticking on March 29, 2011 (Clark). Parent argued that both the formal and informal evaluations should have been conducted earlier, first, because she requested the formal evaluation on February 1, 2011 and the District did not furnish the

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<sup>17</sup> "Do you have any further ideas on the math eval[uation]? I am still waiting to hear back from Dr. Helmus on what, if any, math testing she will be doing in March" (PE-33; PE-34).

Consent Form within five school days of her request<sup>18</sup>; and second, because no consent form was needed for the informal evaluation which the Team had deemed necessary on January 26, 2011, and which was not conducted until May 2, 2011.

On February 10, 2011, Ms. Clark informed Parent that the informal assessment tools would likely be the Math Level Indicator (AGS Publishing) and the STAR assessment from the Renaissance Learning Math program. The following day, she e-mailed Parent again indicating that the formal math assessment would be the Key Math. Later, on March 29, 2011, Ms. Clark e-mailed Mr. Bessette, making it evident that she was aware that Parent had consented to a formal math evaluation early on and was seeking information as to the test to be administered. Her inquiry to Mr. Bessette further names the Key Math and simply seeks confirmation that this is the test to be used (SE-45).

Andover did not meet its obligation to evaluate Student in a timely manner and its argument that “neither state nor federal laws require districts to conduct informal evaluation while ‘formal’ evaluations are pending” is wholly unpersuasive since the Team determined the need for at minimum an informal math assessment in January 2011.

It is incomprehensible that Ms. Clark waited three months to have the informal assessment conducted especially since there was no need to obtain parental consent for the informal assessment. Furthermore, given the numerous e-mails going back and forth between Parent and Ms. Clark during this period, the urgency of also proceeding with a formal evaluation should have been evident and yet, it was Parent who kept raising the issue of the need for the consent form to proceed with the formal evaluation (SE-45, 92; PE-33, 9; PE-33).

The operative date for Andover to have taken action for the formal evaluation was February 1, 2011, and the informal assessment could have been conducted immediately after the January Team meeting. Andover’s argument that any delay was “*de minimus*” and did not deprive Student of educational benefit is contrary to the facts given that Student did not receive appropriate math intervention between January and June 2011.

Parent raised two other allegations regarding the eighth grade programming. She argued that Andover had failed to provide Student Assisted Study twice per week for forty-six minutes pursuant to the eighth grade IEP, however, Mr. Bessette persuasively testified that this service was provided consistent with Student’s IEP (Bessette).

Lastly, Andover argued that on February 8, 2011, following Student’s January 2011 placement in Andover, Parent communicated with Landmark stating her intention to enroll Student at Landmark for the 2011-2012 school year (SE-48). Andover argues that Parent’s “single-minded refusal to consider any other placement... constitutes an unreasonable approach to the collaborative process” which in itself justifies denial of the requested relief. *C.G. v. Five Town,*

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<sup>18</sup> “When a Student is referred for an evaluation to determine eligibility for special education, the school district shall send written notice to the student’s parent(s) within five school days of receipt of the referral” 603 CMR 28.04 (1)(a).

513 F 3d 279, 288 (1<sup>st</sup> Cir. 2008). Given the voluminous communication between Parent and Andover during the period from January through June 2011, Andover's allegation that Parent disengaged from the collaborative process is without merit.

## **II. Ninth grade IEP:**

When the Team met in May 2011 to review the services previously offered for the period from September 2011 through January 2012 (Student's ninth grade), the Team had available to it the evaluation conducted by Dr. Helmus, its own informal and formal math assessments, Ms. O'Shaughnessy's reading test results, Parent's input and the Doherty Middle School teachers' and service providers' input. For ninth grade, Student was offered participation in a language-based program which ran under a block schedule. The program offered Student Standard English, Standard Math, Standard History and Standard Science, during the first and/ or second semester, all at 2.5 times 82 minutes per five day cycle. According to Andover, the pull-out services in the IEP would focus on decoding/word study reading tutorial, a reading comprehension and writing tutorial, direct speech and language services, and assisted study focusing on organizational skills (PE-10; PE-31). The ninth grade services in the IEP covered the period from September 2011 to January 25, 2012 (PE-10; Norton). Parent rejected the IEP on July 8, 2011, but accepted the 2.5 x 41 minutes each reading services while rejecting the decline in services from the previous IEP calling for reading four times forty six minutes per week (PE-11).

Both Dr. Helmus and Dr. King observed some classes in Andover's program, and found them to offer effective language-based instruction and found that the teachers employed best practices (Helmus, King). Dr. King observed four of the language-based classes in preparation for Hearing. On cross examination Dr. King testified that Student was not in the classes she observed, but then she changed her testimony and stated that she had observed a forty minute class in which Student was present (King, Norton; See footnote #20). Parent never consented to an observation of Student by Dr. King although one was sought by Andover. Prior to Hearing Parent had not been notified that Dr. King had observed Student and her class (Parent, King).

After school started in September 2011, Parent learned that under Andover's block schedule Student would not receive English language arts or math instruction until January 2012. Parent is correct that there is a discrepancy between what is reflected in the IEP and Student's actual schedule. While the IEP calls for both courses to be offered from September through January, the end of the IEP period, in effect, the block schedule called for no provision of either until January 2012 (PE-10; PE-31). Additionally, under the block schedule, Student is not scheduled to receive speech and language services, despite the IEP calling for this service 2.5 times forty-one minutes each or the services in the last agreed upon IEP which calls for speech and language services four times per week for forty-six minutes (PE-10, PE-31; Parent, Fitzgerald). Mr. Norton testified that speech and language was offered during one of the Assisted Study sessions, but this would still fall short of what is called for under Student's proposed or last agreed upon IPEs. Parent testified that according to Student, by October 5, 2011 she had not received speech and language services.

In assessing the appropriateness of the proposed program, Parent's expert, Dr. Helmus criticized two main aspects of the program which form the basis of Parent's complaint: inappropriate peer grouping and use of block scheduling which prevents Student from receiving year-round English and math instruction. I address each one of these separately.

A. Peers:

Nine of the thirty-five peers with whom Student would be grouped in the substantially-separate program carry diagnoses of PTSD, anxiety, ADHD, and Asperger's Syndrome. According to Dr. Helmus, Student, who has strong social and interpersonal skills, would have great difficulty establishing real friendships and peer relationships with this group of students. She also raised concerns regarding the teachers' ability to differentiate instruction for such a diverse population (Helmus).

Andover argued that these conclusions were speculative. According to Andover, even if Student did not form relationships with those nine peers, she could form relationships with the other twenty-six students who participated in the language-based program for some part of the school day. Also, Mr. Norton and Ms. Serapiglia testified that many students in the language-based program participated in sports, clubs and school activities, and some serve as best-buddies for their more disabled peers. According to Dr. King what was important was the communication that occurred among students, that is, that there was a great deal of language going on in the class offering connective dialogue with opportunities to respond so that peers, not just teachers, understand what the disabled student is trying to communicate (King). She noted that she observed a great deal of conversation among the students in the classes she visited.

Dr. King testified that differentiated instruction was the essence of special education, but some of Andover's teachers testified that they did not need to differentiate instruction among this particular group because their language needs were similar (King, Parker, Hand). Andover concluded that there was no evidence to suggest that Student would not derive educational benefit from the peer grouping as a result of the other students' profiles or needs. In contrast, and relying on Dr. Helmus' impressions, Parent argued that such diverse profiles called for significantly different learning requirements.

In weighing the arguments offered by both Parties I find that Parent's argument in this regard is insufficient to demonstrate that the peers as a whole were inappropriate. In the substantially separate program Student would have access to over thirty students with a variety of profiles, and the common denominator is that they all require language-based instruction. I was also impressed with the quality and qualifications of the teachers and service providers who would be responsible for Student's education, and find nothing in the record to suggest that given their expertise, they would not be able to meet Student's needs. In making this finding I also note Parent's position that Student's social skills may be more age appropriate than at least nine of the proposed peers, but little was said about the remaining twenty-six peers and assuming that she had additional opportunities for

mainstreaming throughout the day, the peer grouping alone is an insufficient argument to render the program inappropriate for Student.

B. Block Scheduling:

John Norton, special education program director at Andover High School, supported block scheduling for all special education students and specifically for Student. He explained that in Andover, the semesters are designed to align themselves with the Massachusetts Comprehensive Assessment System (MCAS)<sup>19</sup> so that students take two semesters of the course for which they would take the MCAS exam at the end of that particular year. He explained that freshmen take two semesters of science and one of math, which equates to having completed two years of science courses and one full year of a math course by the end of their freshman year. (This is so because in Massachusetts students take the science MCAS at the end of their freshman year (Norton).) In their sophomore year, students take two semesters of math equating two full years of math, because the math MCAS is offered at the end of the sophomore year. According to Mr. Norton, this formula ensured that all special education students in Andover pass the MCAS last year (Norton). As such, he opined that Andover's proposed program and placement for Student for the 2011-2012 school year would allow her to make effective progress and derive educational benefit (Norton).

In support of its block scheduling, and relying on Dr. King, the School's expert, Andover argued that in order to reach higher order thinking, students must progress from teacher explanation, to direct modeling by the teacher through scripting, to practicing the script by having student-to-student interaction, to a point where students internalize and become independent with the script. Dr. King explained that higher order thinking occurs during the student-to-student interaction phase, especially when these interactions are guided by the teacher. She stated that higher order thinking is what allows students to problem-solve (King). Dr. King opined that in general, students who present with higher order thinking difficulties would benefit from the longer periods available through block scheduling because they would have more time to "travel through the process" (King). Although Dr. King opined that block scheduling benefited all students, she had limited involvement and experience with block scheduling. Dr. King consults to the middle school in Andover which does not follow the block scheduling used in high school (King).

Karen Parker, Andover's language-based high school teacher, also supported block scheduling because it allowed more time for hands-on learning and for the group to work together<sup>20</sup>.

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<sup>19</sup> Regarding measurement of student performance based on the Massachusetts Curriculum Framework learning standards, and consistent with the Education Reform Law of 1993, in order for a Massachusetts student to receive a high school diploma, in addition to local requirements, the student must pass grade 10 MCAS tests in English Language Arts, mathematics and one of the four high school science and technology engineering tests. M.G.L. c.69 §1D; 603 CMR 30.00 et seq.

<sup>20</sup> Ms. Parker testified that research showed that block scheduling increased retention of information for special needs students. When asked about the specific research on which she relied, she vaguely recalled that Brown University, or University of Michigan may have done one such study but she could not cite to even one specific

While the record is clear that there are benefits to the length of the classes under block scheduling in general, the advantages and disadvantages cannot be divorced from Student's current specific needs, and the evidence shows that Student requires consistent instruction in English and math, not just more intense services when these services are available.

Ms. Burt, the language-based teacher who evaluated Student's math abilities in 2009 and who conducted the informal math assessment in May 2011, noted that Student demonstrated gaps in her math knowledge and would benefit from direct math instruction to address math concepts as well as math application throughout the curriculum (PE-23; PE-28; Burt). Ms. Burt opined that daily instruction "would definitely be better" than block scheduling for a student who presented the types of weaknesses Student demonstrated. Mr. Besette, who worked with Student during the eighth grade, also opined that given Student's deficits in math, she required preview and review of material and agreed that Student was the type of student prone to regression, and acknowledged concern over having a six month interruption in services for any disabled child that presented these types of issues.

Dr. King, Andover's expert witness, opined that given Student's serious needs in math and English language arts, she would require year round instruction in these areas. She also expressed concerns about Student's ability to make effective progress if she were to receive only one semester of math and stated her recommendation that Andover offer a math tutorial for the semester that Student was not scheduled to receive math pursuant to the block schedule (King). Parent argued that if there was time for a math tutorial then there would be time for Student to receive math in a class alongside peers, which would be far preferable and less restrictive for Student.

Similarly, the lack of access to English language arts would be detrimental to Student. Dr. King opined that reading services and English language arts were different disciplines that had to be taught separately. A remedial reading tutorial would not cover the more comprehensive type of program included in English language arts which focused on "text structure, writing and developing an understanding of the author's purpose", in addition to the vocabulary awareness and phonemic awareness which is addressed in reading services.

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study that discussed the alleged benefits and instead suggested that the attorneys and the Hearing Officer do online research to find them (Parker). Given this witness' inability to cite to even one solid study, Ms. Parker's enthusiasm about block scheduling could not overcome the lack of credibility of her sweeping comments, which were lacking solid foundation. The IDEA requires that to the extent possible, special education and related services are based on "peer reviewed research to the extent practicable". 20 USC 1414(d)(1)(A)(i)(IV). This implies that educational practices have been designed, studied, evaluated and found to be effective to address the needs of the particular population for which it is proposed as Parent correctly argues. As such, Ms. Parker's comments regarding the benefits of block scheduling for special education students, including Student, is disregarded. Moreover, Andover's own expert, Dr. King, who helped design the language-based program at the Doherty Middle School, had no knowledge of any research on the effectiveness of block scheduling for special needs students or data regarding regression on special needs students that participate in block scheduling. She also did not support Andover's specific block schedule design for Student and suggested modifications (King). Ms. Serapiglia, the ninth grade special education teacher who would be responsible for Student in the language-based program, had not met Student or ever worked with her (Serapiglia).



According to Ms. O’Shaughnessy, English language arts was a critical subject for Student (O’Shaughnessy). Both her reading comprehension and written expression issues must be addressed through a year-round English language arts class (Helmus, O’Shaughnessy).

Dr. Helmus also testified that Andover’s ninth grade block schedule was inappropriate to meet Student’s needs because it failed to provide daily instruction in English language arts and math, which would result in a “huge detriment to Student” (Helmus). Because of Student’s deficiency in consolidating learning and inability to hold on to the information during long breaks she required year-round instruction in those areas (Helmus). According to Dr. Helmus, Student required frequent repetition and review of information to acquire and prevent loss of learned skills, especially at the high school level where much of the curriculum involved more abstract information, an area in which Student is particularly deficient (Helmus).

Andover, argued that Student’s program could be modified to allow her to receive year-round instruction in the aforementioned areas within the context of block scheduling without overburdening Student (Norton). Mr. Norton suggested that a math tutorial could be added if Student dropped a reading tutorial<sup>21</sup> and deferred health to her sophomore year or receive a waiver from the guidance department, without disturbing the rest of Student’s schedule.<sup>22</sup> Dr. King viewed this option as beneficial to Student (King). Mr. Norton testified that scheduling within the block system was like a “giant Sudoku puzzle” and when presented with Student’s schedule to ascertain where the modifications could be implemented he encountered great difficulty articulating any coherent viable solution and could only point to Student’s elective blocks. Looking at her schedule, she has no electives or non-required courses that can be substituted for math and English as Parent correctly argues. Additionally, such modifications would result in Student having minimal opportunities for mainstreaming<sup>23</sup>, resulting in her participating in a highly restrictive program; one in which her opportunities for meaningful participation in the general education program would

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<sup>21</sup> Dr. King opined that Student could drop a reading tutorial because the reading services in Student’s IEP exceeded her needs. She however, reached this conclusion based in part on an observation she made of Student in her reading class during which Dr. King asked only Student to read aloud without parental consent to conduct the observation (King). The evidence shows that Andover had sought parental consent for Dr. King to observe and evaluate Student shortly before the hearing and this request had been denied by Parent. When questioned about this in cross-examination, she testified that she had been guided to that class by Mr. Norton who was aware that Student was there, but that she had not been introduced to Student. She stated that she had not mentioned this earlier in her testimony because she was not sure whether she should have observed Student or not. As such, her comments and her opinion, regarding the appropriateness of Andover’s program for Student is disregarded.

<sup>22</sup> Mr. Norton also suggested offering a full year math course during Student’s first semester and then providing her with a math tutorial during the second semester to avoid regression (Norton). Given that the Hearing took place after Student’s freshman year was underway, this option is moot. Additionally, while Mr. Norton conceded the possibility of regression in Student and suggested the option of a math tutorial to avoid regression during the second semester, in its closing argument Andover argued that nothing in the record suggested that Student would be at risk of regression, citing to previous testing. This argument is not persuasive because. Student’s math needs are significant and she requires continuous instruction to acquire and maintain concepts and skills so that she can eventually access higher math level if she is to receive a high school diploma.

<sup>23</sup> According to Parent, this suggestion would result in Student not being able to take any electives and partaking in only health and gym for mainstreaming, in the best case scenario contemplated by Mr. Norton at Hearing (Parent, Norton).

reduced significantly. Moreover, adding two additional core courses would completely overwhelm Student and would result in her carrying a heavier course load than any of her disabled and non-disabled peers. Adding two core courses destroys any possible benefit that the type of block scheduling described by Andover's witnesses could provide Student. Given the significant deficits she presents, she requires language-based instruction, delivered at a slower pace, across all areas of the curriculum.

While block scheduling may be a widely accepted methodology, and while it may be implemented by well-intended, highly qualified teachers in Andover, it does not offer Student a FAPE at this point in her education, and any attempt to modify Andover's block schedule would result in creating a highly restrictive program, in contravention of the requirement of the law. Parent argued that Andover's block schedule was offered because that is what is available and does not appropriately respond to Student's needs, denying her a FAPE. As such, she argues that she is justified in seeking out-of-district placement for Student. Taking into account Student's current needs and in light of the implications of attempting to address Student's needs within the block schedule model as discussed above, as well as the fact that Andover does not offer a language-based program outside block schedule in high school, Parent's request is justified.

Lastly, Parent argued that speech and language services do not appear anywhere in Student's schedule, and therefore, Student was not receiving speech and language services consistent with her IEP (PE-31). The Parties agreed that Student was entitled to receive 2.5 x 41 minute weekly speech and language services in ninth grade. According to Andover, Student could be pulled from her classes "at logical points" during the week to receive this service (Norton). Mr. Norton testified that the additional Assisted Study session allowed Student to be pulled out to receive speech and language services (Norton).

Helen Fitzgerald, Andover's High School speech and language therapist, was the individual responsible to provide speech and language to Student in ninth grade. Ms. Fitzgerald testified that she spends the first two weeks of classes coordinating schedules and therefore, does not offer speech and language services during that time. She testified that prior to the Hearing in October 2011, and after addressing administrative scheduling issues during the first two weeks of classes, she had met with Student on one occasion. She explained that she had attempted to meet Student on two other occasions but Student had been absent from school on one of those occasions and had not been at the designated area when she went looking for her on a third occasion (Fitzgerald). By October 5, 2011, Student had received only one session of speech and language services.

It is the IEP, as accepted by a parent, what dictates the frequency and duration of services and these must be initiated when the IEP states that they are to be initiated. As a result, Andover owes Student speech and language services for the two weeks from the beginning of the semester (that is September 6, 2011) during which services were not offered, consistent with the accepted portions of Student's IEP.

### **III. Landmark:**

Landmark is a private Massachusetts special education approved school which offers language-based instruction to students with average to above-average cognitive skills, who struggle with expressive language, decoding issues, fluency, and organizational issues. Instruction is delivered in small groups of approximately six to eight students based on skill level with similar profiles. Students receive daily instruction in math, English language arts, science and social studies in addition to an elective. All classes are forty-five minutes in length and provide consistency in the routines. Lesson presentation is done using multi-sensory approaches. A study skills approach involving two column note-taking as well as using graphic organizers is used across all settings. (O'Neil). Student would also have a daily one-to-one language arts tutorial and a class in oral expression, which was described by Melody O'Neil, certified special education teacher and Assistant Admissions Director at Landmark, as a "group language therapy class". Landmark does not offer direct speech and language services but the oral expression and expressive language arts classes are supervised by a certified speech and language pathologist (O'Neil).

Ms. O'Neil testified that Landmark focuses exclusively on students with a language-based disability because the methodology of instruction used would not be appropriate for students with other disabilities such as Asperger's Syndrome or non-verbal learning disabilities.

Student's application was made on or about February 2011, and according to Ms. O'Neil, it is not unusual for students to go through the admission process to ascertain if they are appropriate for the program before they seek funding from the public school. She testified that she reviewed Student's application and that Student participated in a half a day intake process which included some informal screening. Ms. O'Neil testified that Student had been accepted to the expressive language program at Landmark starting in September 2011 (PE-45O'Neil). This program focuses on written composition, but Student would also work on oral expression (PE-29; O'Neil).

Andover argued that Landmark does not offer speech and language services and that there was a high turn-over rate for teachers at Landmark (Norton). Parent argued that it would provide the type of programming that Student requires alongside an appropriate peer group of students with similar needs. More importantly, at Landmark Student would not be removed from the general school community. Dr. Helmus, who has visited Landmark and had knowledge of the program, supported placement of Student at Landmark and found the peer grouping to be better suited for Student than the peer grouping in the proposed program at Andover (Helmus).

The evidence supports a finding that Landmark is an appropriate program and that it is capable of meeting Student's needs at this time.

**ORDER:**

1. Andover shall convene the Team to draft an IEP offering Student placement at Landmark for the remainder of the IEP period, as this placement is reasonably calculated to offer Student FAPE consistent with state and federal law.
2. Andover shall provide Student the remaining seven and a quarter hours it still owes in compensatory reading sessions and will also compensate Student for the speech and language sessions that were not offered at the beginning of the 2011-2012 school year.

By the Hearing Officer,

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Rosa I. Figueroa

Dated: December 2, 2011

December 2, 2011

**COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF ADMINISTRATIVE LAW APPEALS  
BUREAU OF SPECIAL EDUCATION APPEALS**

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**ANDOVER PUBLIC SCHOOLS**

**BSEA #12-0430**

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**BEFORE**

**ROSA I. FIGUEROA  
HEARING OFFICER**

**JEFFREY SANKEY, ESQ., ATTORNEY FOR PARENT  
AMY M. ROGERS, ESQ., ATTORNEY FOR ANDOVER PUBLIC  
SCHOOLS**