

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

In Re: Student v.
Pentucket Regional School District

BSEA # 12-8636 R

DECISION II

The above-referenced matter comes to the BSEA on a Remand from the Federal District Court for the District of Massachusetts for administrative exhaustion and fact finding purposes. The matter was bifurcated via a Ruling issued on March 26, 2015 (later amended via Order issued on April 27, 2015). Following a Hearing in May 2015, a Decision was issued on May 21, 2015 addressing the initial issues which included the scope of the Hearing regarding the statute of limitations. A second Hearing took place on September 9, 2015, addressing Student's substantive claims, including the finding of no eligibility for special education services, procedural claims and the request for compensatory services.

The instant Decision (Decision II) 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.

Those present for all or part of the September 9, 2015, proceedings¹ before Rosa I. Figueroa were:

Paige Tobin, Esq.	Attorney for Pentucket Regional School District
Julie Muse Fisher, Esq.	Attorney for Pentucket Regional School District
James Gordon	High School Psychologist, Pentucket Regional High School
Matt Smith	Guidance Director grades 7-12, Pentucket Regional High School
Melissa McElaney	Special Education Coordinator, Pentucket Regional High School
Danielle Oliva	Speech and Language Pathologist, Pentucket Regional High School
Michael Jarvis	Director of Special Education, Pentucket Regional School District
Jane Williamson	Doris O. Wong Associates Inc., Court Reporter

¹ Student did not attend the Hearing and did not communicate with the BSEA at any point prior to the date of Hearing. As with the first Hearing in May 2015, after the hearing was in process on September 9, 2015, Student/Parent filed an Objection and Request for Recusal. A Ruling on this Motion was addressed separately on October 22, 2015.

Additionally, the following individuals were present during the May 2015 Hearing. I am including their names as I am relying on their testimony and incorporating my previous Findings and conclusions entered in May 2015:

Jack Tiano	Former Director of Special Education for Pentucket Regional School District
Colby Brunt, Esq.	Former Attorney Pentucket Regional School District ²
Jonathon Seymour Student's Father ³	Pentucket Regional School District

The official record of the hearing consists of documents submitted by Pentucket Regional School District (Pentucket) in conjunction with the May 1, 2015 Hearing marked as exhibits SE-1A, SE-1B, SE-2A, SE-3A through SE-3T⁴; and the exhibits received from Pentucket in September 2015, marked as exhibits SEII-1 through SEII-26; recorded oral testimony taken in May and in September 2015, and Pentucket's oral closing arguments made at the conclusion of the Hearing in May and September 2015. Student/ Parent did not appear or submit any exhibits.⁵

On September 9, 2015, the day of Hearing, and after the Hearing was underway, the BSEA received Parent's Objection to the Hearing and Request for Recusal. Pentucket filed an Opposition to Parent's Objection to Hearing and Request for Recusal on September 14, 2015. (While it had been the Hearing Officer's intention to close the record at the conclusion of the presentation of the evidence on September 9, 2015, the record was kept open to allow Pentucket's Response to Parent's Motion due and received within seven days of Parent's filing consistent with Rule VII of the *Hearing Rules for Special Education Appeals*.) As such, the Hearing record on the substantive issues was kept open through September 14, 2015.

By way of background, I note that the BSEA made extraordinary efforts to notify and involve Student/ Parent in the Hearing process, to no avail. A chronology of said efforts follows:⁶

- a) On March 3, 2015 the Hearing Officer issued a scheduling Order including a checklist stating the issues for Hearing as noted in Parent's 2012 Hearing Request and delineated in Judge Woodlock's Remand Order. The attached checklist offered Student/Parent an opportunity to submit their comments.
- b) On March 18, 2015, Student/ Parent responded to the BSEA Order of March 3, 2015 with the checklist indicating their own understanding of the issues.⁷

² Attorney Brunt testified via telephonic conference.

³ As used in the body of this Decision the word Parent shall refer exclusively to Student's mother, not her father.

⁴ Pentucket's right to supplement exhibits and offer additional testimony at subsequent Hearings between the Parties was reserved.

⁵ A copy of the transcripts for both Hearings were forwarded to Student/ Parent at the only address on record for them.

⁶ A similar chronology was included in the Ruling issued on October 22, 2015, in connection with this matter.

- c) Pentucket notified Parent/ Student and the BSEA that it was sending out subpoenas *duces tecum* to Landmark College, Nancy Roosa, Psy.D., NESCA and UMass Dartmouth, independently of the BSEA.
- d) On March 23, 2015, Student/ Parent filed a Motion to Quash All Subpoena *Duces Tecum*: for Judicial Review of Regulations Pursuant to MGL c.30A §7; and for Disclosure of All Names and Positions of all Employees in All Agencies Who May Have Access to Personally Identifiable Information of Student.
- e) A telephone conference call was held on March 23, 2015 to clarify the issues for Hearing, discuss bifurcation of the case and schedule future activity.
- f) An Order was issued on March 26, 2015, scheduling a Prehearing Conference for April 14, 2015, establishing a deadline for submission of exhibits and witness lists regarding the first portion of the case, setting a Hearing for May 1, 2015 (a date convenient and agreeable to Student) on the issues regarding scope of the Hearing *vis á vis* the statute of limitations issue and the parties' understanding in connection with the 2012 settlement agreement, truncating the timelines for responses to discovery requests, and denying Parent's/ Student's Motion to Quash Subpoenas.
- g) Student/ Parent did not appear at the April 14, 2015 Pre-hearing Conference. The morning of the Pre-hearing conference Parent filed notice of her refusal to participate in any proceeding at the BSEA because of her belief that the BSEA had refused to take jurisdiction as ordered by Judge Woodlock. Student did not sign this document, did not attend and did not file any explanation or request for postponement.
- h) Pentucket filed a Motion to Dismiss for Parent's/ Student's refusal to participate in BSEA proceedings on April 14, 2015.

⁷ According to Student/ Parent their understanding of the issues delineated by Judge Woodlock were as follows:

Hearing Issue #1

“develop a record including whether [mother and/ or student] should be permitted to advance parole evidence regarding the understanding of the settlement agreement” since “[mother] reasonably understood this to refer only to her claims for reimbursement for an IEE” (Woodlock, page 21)

Hearing Issue #2

Did refusal to treat parent's 12/20/12 letter, which provided adequate notice of the substance of [student's] claims, as a request for hearing, instead of requiring re-filing of duplicative hearing request reflects an elevation of form over substance in the BSEA decision?

Hearing Issue #3

All claims which properly belong to [student] in 05/23/12 Hearing Request for further development regarding the procedural posture and substantive merits of her claims, even if the precise form of relief sought is not available in the administrative venue.

Hearing Issue #4

Whether the actions of an employee, agent, vendor, contractor, appointee, government unit, bylaw, rule, regulation, law, contract, MOA or MOU of Pentucket, the Commonwealth of Massachusetts, or any political subdivision thereof, interfered with [Mother's] and/ or [Student's] federal due process rights.

The Parties had an opportunity to discuss the issues for Hearing during a telephone conference call on March 23, 2015. At that time, the Hearing Officer agreed that Parent's/ Student's Issues #1 and #3 were issues for Hearing, and noted that Issue #2 was a comment by Judge Woodlock designed to illustrate his reason for the remand and not an issue for hearing. Regarding Issue #4, the Hearing Officer noted that Parent's/ Student's comment was too general and that it was not clear what their specific allegation was.

- i) An Order was issued on April 17, 2015, extending the deadline for Student to respond to the Motion to Dismiss, bifurcating the Hearing and stating the three issues to be decided during the first portion of the Hearing, leaving all substantive claims to be heard during the second portion of the Hearing, and ordering Student to provide her address in Dartmouth, MA and her personal telephone number. The April 17, 2015 Order restated that the first part of the Hearing would be held on May 1, 2015. No response was received from Student.
- j) On Friday April 24, 2015, the BSEA received Pentucket's exhibits and witness list for the May 1, 2015 Hearing. Pentucket's supplemental exhibits and an updated witness list were received on April 30, 2015.
- k) On April 24, 2015, Parent filed a Motion to Stay the Proceedings at the BSEA Pending a Ruling on Federal Injunction. Student did not sign this document nor did she file a separate request stating her intentions.
- l) On April 24, 2015, this Hearing Officer issued a Ruling denying Pentucket's Motion to Dismiss and restating the BSEA's intention to proceed with the first part of the bifurcated Hearing on May 1, 2015.
- m) Pentucket's Opposition to Staying the proceeding was received on Monday April 27, 2015. The same date, Pentucket also requested permission to allow a witness to offer testimony via telephone, which request was granted the same date.
- n) On April 27, 2015, the BSEA issued a Ruling denying Parent's Motion to Stay the Proceedings, and restating the BSEA's intention to proceed with the Hearing on May 1, 2015.
- o) Student wrote to the BSEA on April 28, 2015, objecting to the testimony of her father and to Pentucket's request for production of documents, and joining her mother on her request to stay the proceedings at the BSEA.
- p) The BSEA responded to Student's requests on April 29, 2015. The request to stay the proceeding was denied and again the BSEA restated its intention to proceed with the Hearing on May 1, 2015 as originally scheduled on March 26, 2015. On Wednesday April 29, 2015 BSEA staff left voice mail messages advising Parent and Student of the determination to proceed with the Hearing at the telephone numbers available for Student and Parent.
- q) On May 1, 2015, Parent notified the BSEA that she would not attend the Hearing and stated her objection to the matter going forward.
- r) A Hearing on the first part of the bifurcated case was held on May 1, 2015. Neither Parent nor Student attended.
- s) A Decision on the first part of the bifurcated Hearing was issued on May 21, 2015.
- t) On June 6, 9 and 10, 2015, BSEA staff attempted to contact Student via telephone and left messages informing her of potential dates for holding the second part of the bifurcated Hearing. Student did not respond. Parent was called on June 11 and June 16, 2015 and the same information was provided. Parent also failed to respond or provide her availability by the deadline (June 17, 2015). Pentucket provided its availability on June 8, 2015.
- u) An Order was issued on June 19, 2015, scheduling the Hearing on the substantive issues for September 9 and 10, 2015.

- v) On August 12, 2015, the BSEA issued a Corrected Order (changing only the BSEA number) and Notice to the Parties urging Student to participate and advising the parties that a final BSEA determination would be issued following the Hearing.
- w) On August 31, 2015, BSEA staff again called Student and Parent and left messages for both reminding them that the Hearing would proceed on September 9 and 10, 2015, and that the exhibits and witness lists were due by the close of business on September 2, 2015.
- x) The Hearing on the substantive claims was held on September 9, 2015. At 11:53 a.m., on September 9, 2015, while the Hearing was in progress, Parent faxed an Objection to the Hearing and Request for Recusal. Parent's Motion was filed on her own behalf. The document was not signed by Student who had been a signatory to other parental filings. This document was not brought to the attention of the Hearing Officer until after Pentucket had concluded presentation of its case and made its closing remarks.
- y) On September 10, 2015, one day after completion of testimony in the second Hearing regarding the substantive issues, the BSEA received a packet of documents from Parent. The documents were bound by a rubber band and did not include a cover letter indicating their relationship to pending cases. The documents appeared to be connected to a filing made by Parent in Federal Court in mid-August 2015.
- z) Pentucket filed an Opposition to Parent's Objection to the Hearing and Request for Recusal on September 14, 2015.
- ii) Following Parent's Motion, Student, who is the moving party, did not file any document indicating that she joined in Parent's submission to the BSEA. The last correspondence authored and signed by Student was received at the BSEA on April 29, 2015, requesting delaying the May 1, 2015 Hearing until receipt of a ruling on the preliminary injunction filed by parent in Federal District court. As noted above, Student's request was denied on April 29, 2015.⁸

ISSUES FOR HEARING⁹:

1. Whether Pentucket failed to meet its Child Find obligations regarding Student dating back to May 2010?
2. Whether as a result of Pentucket's failure to identify Student as an IDEA eligible student it failed to offer Student a FAPE?
3. Whether Pentucket violated Student/Parent's procedural due process rights?
4. Whether as a result of its failure to find Student eligible and offer a FAPE, Pentucket owes Student/ Parent compensatory relief in the form of reimbursement for Student's attendance at Landmark College during the 2012-2013 school year?

⁸ The April 29, 2015 Order referenced the Hearing Officer's previous Ruling of April 27, 2015, on Parent's request to stay the proceedings, which request was also denied. See also Ruling on Parent's Objection to the Hearing and Request For Recusal issued separately on October 22, 2015, which contains a very similar chronology.

⁹ See Order dated April 17, 2015.

POSITIONS OF THE PARTIES:

Parent's Position:

In the May 2012 Hearing Request, Parent challenged Pentucket's finding of no-eligibility of Student for special education. Parent asserted that Pentucket had known about Student's disabilities since at least 2002.¹⁰ (Having found that the two year statute of limitations is controlling, the alleged transgressions by Pentucket will be reviewed starting in 2010.)¹¹

Student/Parent assert procedural due process violations by Pentucket (i.e., child find violations and failure to provide Parent with procedural safeguards), which, they allege,

¹⁰ At paragraph 7 of the May 2012 Hearing Request, Parent wrote:

7.) A child find violation is the ultimate failure to identify a student under the requirements of a child find 34 CFR 300.8 and in need of special education even though they are advancing from grade to grade. Procedural safeguards violations: in 2002 parent had in fact referred student for eligibility determination for special education back in third grade. The school did not inform parents of any formal process that was required. The school psychologist did an "evaluation" based on questionnaires given to Parent and teacher in 2002, and produced a report for Parent with recommendations. However, no consent was ever requested or given and no procedural protections were afforded Parent or Student whatsoever. No prior written notice of anything was provided. Pentucket did not comply with any Federal or state laws, which effectively prevented Parent from participating in child's education in violation of 34 CFR 300.501, 300.503, 300.504. Records show that over the next three years Parent communicated with teachers over concerns about Student's difficulty in school with organizational skills, following directions, producing classwork and homework while the school notified Parent of similar concerns which it asserted were "attention" related. Parent received hand written notices from the school asserting that the school had initiated a "team meeting" to discuss Student but did not invite Parent to participate in violation of 34 CFR 300.322. Essentially the school district bypassed all legal requirements related to special education. 34 CFR 300.121.

8.) Student has been denied a FAPE: the school failed to follow special education regulations which resulted in a denial of FAPE and these extensive violations throughout Student's entire elementary and secondary education resulted in Student not achieving to her educational and functional potential. The failure caused Student years of unnecessary harm including a) ineligible to participate in extracurricular activities throughout her high school years due to her failing grades which resulted from her inability to access the curriculum; b) further harm resulted since Student was unable to achieve grades commensurate with her aptitude and educational potential, which barred her from gaining acceptance to a four year college program in her preferred area of interest and supported by her aptitude and potential; c) Student would have arguably received scholarships if she had been allowed to achieve her academic potential as she is in the High Average range both Verbal and Perceptual intelligence, and received advanced on her MCAS and very high on accommodated SAT. d) Eleven years of unnecessary emotional duress as a result of not being able to achieve her academic potential, enduring reprimands and accusations of being lazy and unmotivated by her teachers, and missed opportunities socially all resulted.

9.) This complaint has been filed in accordance with 34 CFR 300.507 (a)(1) as several of these violations could not have been known by the parent due to the significant extent of procedural safeguard violations. Also this hearing request is not intended to limit, but rather to secure the student's rights in accordance with the maximum applicable Federal and state laws afforded her.

¹¹ Via Decision issued on May 21, 2015, the IDEA two year statute of limitations was found to be applicable and therefore, Student's procedural and substantive claims regarding child find and failure to offer FAPE are so limited.

resulted in a denial of FAPE, preventing Student from being accepted to her universities of choice. According to Student/Parent, Student had no other option but to attend Landmark College where her disabilities could be addressed. Student/ Parent seek compensatory education in the form of reimbursement for Student's education at Landmark College during the 2012-2013 school year.

Pentucket's Position:

Pentucket denies all of Parent's/Student's procedural and substantive allegations noting that while Student was a minor and Parent was her guardian, no teacher or provider ever saw reason to refer Student for special education services. Pentucket further asserts that at all times it kept Parent informed of Student's progress as well as her challenges with organization and with completing homework. Pentucket states that, while a regular education student at Pentucket, Student passed the MCAS, placed within the average range of abilities in all Pentucket based testing, obtained credit for all necessary course work, was a candidate for and indeed graduated in 2012. She also achieved solid scores in the SAT. Additionally, Pentucket asserted that it complied with all other publication requirements regarding "child find" during each of the relevant years. As such, Pentucket disputes Student's/ Parent's allegations of procedural due process violations.

Pentucket asserts that it provided Parent the Notice of Procedural Safeguards in May and October 2011, and again in February 2012. Moreover, Pentucket argued that Parent had previously received the procedural safeguards in connection with another child, and, in fact, understanding her rights, filed a Hearing request on behalf of Student's sibling in 2003.

FINDINGS OF FACT:

1. Student is a twenty and a half year-old woman, whose Parent resided in Pentucket, MA, during all relevant time periods covered by this Decision. Student received all of her schooling at Pentucket, between 1999 and 2012. She reached the age of majority (18 years) in late July 2012 (SE-1A). At all times during her enrollment in Pentucket, Student received educational services as a regular education student.
2. Student's mother and father have been divorced since 2005, and while they shared custody of Student, educational decision making was left with Mother. Father testified that while living with his family between 2002 and 2005, he helped Student with her homework from time to time and received her report cards. He was aware of Student's elementary and intermediate school reports but not high school reports (Father, 1st Hearing).
3. Father testified that he did not know the details of what was going on at home after the divorce but noted that he had not noticed Student having any major struggle in elementary or intermediate school. He also never requested a Hearing on behalf of Student with the BSEA (Father, 1st Hearing).

4. On November 18, 2003, at a Team meeting to ascertain Student's sibling's eligibility to receive special education services, Pentucket handed Parent the Parents' Rights Brochure containing IDEA procedural safeguards and related information for Massachusetts (SE-3H). The Narrative Description of School District Refusal to Act notes at the bottom

Parents have the right to take advantage of any dispute mechanism available to refute the team's finding of no eligibility and contact information for the Bureau of Special Education Appeals (BSEA) and the Department of Education Problem Resolution System (PRS) is included in the Parents' Rights Brochure. Alternatively, the parents may notify the district directly of their dispute with this finding, in which case the district will contact the BSEA. School district personnel remain committed to working with student and the student's parents to ensure school success (SE-3H).

5. Upon receiving notification from Mother and Father of their rejection of the finding of no eligibility for Student's sibling, Pentucket forwarded said rejection to the BSEA. On December 13, 2003, the BSEA forwarded a letter notifying them of their options for resolution of disputes through the BSEA, including mediation and Hearing (SE-3I).
6. The Parents' Right Brochure/ Notice of Procedural Safeguards was again provided by Pentucket to Parent on or about October 19, 2005, in connection with Pentucket's request for consent to evaluate Student's sibling; on or about November 15, 2007, pursuant to Parent's request for an evaluation of the aforementioned minor; and again on January 23, 2008 in conjunction with a review of a reading assessment for Student's sibling. Parent's disagreement with Pentucket triggered another BSEA dispute resolution letter on February 20, 2008 (SE-3I).
7. Michael Jarvis became the Director of Supplemental Intensive Services in Pentucket in 2012. Mr. Jarvis serves as the Administrator of Special Education and in that capacity he is the keeper of records relative to both Student and Student's sibling (SE-3K; Jarvis, 1st Hearing). At Hearing, Mr. Jarvis reviewed SE-3B (Student's finding of no eligibility), SE-3D (Student's permanent transcript), SE-3E (Student's 1st to 9th grade transcripts); SE-3F (Student's MCAS results) and SE-3G (Student's high school placement test). He testified that it is Pentucket's practice to hand parents the procedural safeguards at every Team meeting (initial eligibility, annual reviews and any other reconvening of the Team). According to Mr. Jarvis, the same practice continues to date (Jarvis, 1st Hearing).
8. Mr. Jarvis testified that a review of the Pentucket records showed that Parent had been provided the Parents' Rights Brochure (containing the procedural safeguards information) as early as November of 2003 in connection with Student's sibling's first eligibility Team meeting (SE-3I). Thereafter, Pentucket's records showed that Parent had received Parents' Rights Brochures in 2005, 2007 and 2008, relative to Student's sibling (Jarvis, 1st Hearing).
9. John Tiano was Pentucket's Administrator of Special Education for the period from July 2009 through June 2013. During his tenure, he oversaw the special education programs in

Pentucket from pre-Kindergarten to twelfth grade, and there were no parental complaints regarding provision of procedural safeguards to parents during that time period (Tiano, 1st Hearing).

10. Mr. Jarvis and Mr. Tiano testified that the Department of Elementary and Secondary Education (DESE, formerly known as “DOE”) conducts periodic, onsite audits of school districts in Massachusetts to ascertain if the districts are complying with federal special education mandates, such as CFR 300.111; 300.131; 300.209, addressing Child Find, which appears as criterion number “SE 15” in the report (SE-3J). All of the Coordinated Program Review reports containing DESE’s findings for criterion “SE 15”¹² covering the period from 1999 through 2011 note that Pentucket had “implemented” the requirements without the need for any further action (*Id.*). DESE’s Coordinated Program Review for the aforementioned time period also found implementation by Pentucket of legal standards pursuant to M.G.L. c. 71B §3, 603 CMR 28.04(1), CFR 300.503; 300.504(a)(1), appearing as report criterion “SE 25” et seq., as well as 603 CMR 28.07(1), CFR 300.300; 300.504, 603 CMR 28.08(3)(b), CFR 300.510, 603 CMR 28.02(21), CFR 300.322, 300.501, CFR 300.322(b)(1)(i), 603 CMR 28.07(8), CFR 300.322(e); 300.503(c), 603 CMR 28.03(1)(a)(4); 28.07(4), 603 CMR 28.05(4)(a) and (b), CFR 300.320(a)(1)(i) and a(2)(1)(A); 300.321(a)(4)(ii), report “criteria” “SE 27”, “SE 29”, “SE 32” and “SE 33” respectively (SE-3J). According to Mr. Jarvis, online and/or onsite reviews take place periodically to ensure Pentucket’s compliance with federal and state special Education mandates and Pentucket has consistently received an “implemented” rating for the period from 1999 through 2011 (Jarvis, Tiano 1st Hearing). According to Mr. Tiano, implementation was 100% during his tenure (Tiano, 1st Hearing).
11. Mr. Jarvis and Mr. Tiano testified that Pentucket met its Child Find responsibilities by publishing annual Child Find Notices in the *Newburyport News* (or the *Daily News of Newburyport*) and/ or other local newspapers, as well as in physician’s offices. This was done every fall (SE-3L; Jarvis, Tiano, 1st Hearing).

¹² Criterion “SE 15” in DESE’s (a.k.a. DOE) Coordinated Program Review report addresses Outreach by the School District (Child Find) and notes that

When the district has annual or more frequent outreach and continues liaison with those groups below from which promotion or transfer of students in need of special education may be expected, or which would include students in need of special education:

1. Professionals in community
2. Private nursery schools
3. Day care facilities
4. Group homes
5. Parent organizations
6. Clinical/healthcare agencies
7. Early intervention programs
8. Private/parochial schools
9. Other agencies/organizations
10. The school or schools that are part of the district, including charter schools
11. Agencies serving migrant and/or homeless persons pursuant to the McKinney–Vento Education Act for Homeless Children (SE-3J).

12. Student’s Kindergarten to sixth grade report cards note that Student had difficulties completing work consistently and on time, and that she had difficulty organizing her time efficiently. However, it was further noted that over that time period her work habits and skills had improved (SE-3E). Every year, Student was promoted from one grade to the next as she completed the course credit requirements to pass her classes (*Id.*). In terms of work habits, it was noted in the Kindergarten, first and second grade report cards that Student needed time limits and reminders for task completion, that she chatted with others and did not take responsibility for homework. In Kindergarten, she also had a tendency to miss the first 10 minutes of the day (SE-3E). Improvement is noted in the third grade during which, despite being absent 19 days, “she made many academic strides” and was developing good work habits (SE-3E).

13. Letter grades appear beginning in fourth grade. During that year she obtained the following grades:

	1 st Term	2 nd Term	3 rd Term
Language Arts			
Reading	B-	B	B-
Writing	C+	C+	C+
Language Skills	C+	C	C
Mathematics	C+	C+	C
Science	B-	B-	B-
Social Studies	C	C-	B- (SE-3E).

The teacher noted that Student produced acceptable work but that her work habits were inconsistent. When focused, Student worked hard. Overall, she demonstrated understanding of concepts and could apply them in content areas (SE-3E).

14. In fifth grade Student was absent on 22 days, most during the second and third terms. The fifth grade report card showed the following grades:

	1 st Term	2 nd Term	3 rd Term
Language Arts			
Reading	B	B	B
Writing	C	C	C
Language Skills	B-	A-	A-
Mathematics	C+	C	A-
Science	B+	B+	B
Social Studies	D	C-	B+ (SE-3E).

15. Student’s attendance improved in sixth grade.

	1 st Term	2 nd Term	3 rd Term
Language Arts			
Reading	B-	B	B-
Writing	C+	C+	C+

Language Skills	B+	B-	C+
Mathematics	C+	C	C-
Science	C	B+	B-
Social Studies	C-	B+	A- (SE-3E).

Teacher notes that year reflect that Student demonstrated inconsistency in paragraph construction, organization, sentence completion and punctuation skills. However, Student scored 80% on the second term Reading Benchmark Comprehension test which demonstrated her ability to perform at grade level. Areas needing improvement were: maintaining focus and attention, quality homework completion, effective test preparation, editing, following direction and accessing help (SE-3E).

16. In third grade, Student took her first MCAS examination in the area of Reading, performing at the Proficient level (raw score of 34). The result of the fourth grade MCAS examinations placed Student in the Proficient range for English Language Arts (246) and Needs Improvement (236) in Mathematics. In fifth grade Student took the Science and Technology/Engineering MCAS, scoring 240, which placed her in the Proficient level. Student's sixth grade MCAS scores for English Language Arts and Mathematics were 244 and 246 respectively, both within the Proficient level (SE-3F).

17. Student's seventh and eighth grade transcript reflects the following grades:

Grade 7	Qtr 1	Qtr 2	Qtr 3	Qtr 4	FAV
Art 7W			C+		
Computers II	C	B-	D	D	C-
English 7W	B	B	B	B+	B
French 7W			B+		
German 7W				C+	C+
Health 7W				C	C
Music 7W		C			
Physical Ed. 7W		A-			
Science 7W	B	A-	B	C	B
Social Studies 7W	B-	A-	A	B	B
Spanish 7W		B+			
Grade 8	Qtr 1	Qtr 2	Qtr 3	Qtr 4	FAV
AE 8R	A	A			
Art 8R Sec. 6				B-	
Computers IIB 8R A	C+	B	B	B	B-
English 8R	A-	B+	A-	A-	B+
Health 8R Sec.4			B		
Physical Ed. 8R		A			
Science 8R	B	B	A-	C	B
Social Studies 8R	B	B-	B-	B-	B
Spanish 8R	B-	B+	C	C	C+

In eighth grade Student was absent 9.5 times, tardy 12 times and dismissed 9 times (SE-3D).

18. In seventh grade, Student’s MCAS score in English Language Arts was 246 and in Mathematics 260, both within the Proficient level (SE-3F).
19. Student scored solidly within the high average and above average range of ability in her high school placement test administered while she attended eighth grade. This test assessed her cognitive skills (verbal and quantitative abilities) and basic skills including reading, mathematics and language (SE-3G).
20. In high school, Student’s Report cards show that Student displayed mostly satisfactory and excellent conduct and effort in ninth grade, during which Student was placed on Honor Roll in December 2008 (SE-3E). As time went on, while conduct remained excellent and/or satisfactory, effort levels decreased to the “needs improvement level” in tenth, eleventh and twelfth grades with even one “unsatisfactory” ranking in her junior year (*Id.*).
21. Student’s grades and performance during her four years in high school varied widely¹³ (SE-3E). During this time, she worked as a ski instructor, which she greatly enjoyed. (Student

¹³ Student’s high school transcript reflects the following grades:

			Final Grade Avg.	1st Quart	2 nd Quart	Mid-yr Exam	3 rd Quart	4 th Quart	Final Exam
2008-2009									
American Studies	9H	B	A	B-	C+	C+	B-	B	
Biology	9H	C	C+	C+	C-	C	C-	B-	
English	9H	B-	B	B-	C-	B-	B	C	
Geometry	9H	C	A-	C	C+	C+	D+	D	
Health Education	9	A	A	A				A-	
Level II Spanish	CP	B-	A-	A-	C	B	D	C+	
Physical Education	9	A+	A+					A+	
World Foods I	CP	C+				C+	C-	A-	
WR. LAB	9	C-				C-	C-		
2009-2010									
Advanced Algebra	H	C	C	C-	B	C+	C+	D+	
AM Studies 10	H	C	B-	D	B	C+	D-	C	
Basic Design	CP	C-	C-	C				C-	
Chemistry 10	H	C	B-	C	C+	D	C-	B-	
English 10	H	D+	D	F	C	B-	F	B-	
Health Education 10	H	B					B		
Level III Spanish	H	F	D-	F	F	D+	F	F	
Physical Education	10	A+				A+			
Technical Draft/Cadi	CP	B				B	C-	B	
Teach Engineering	CP	A-	A	B+				B+	
2010-2011									
Creative Writing	CP	D	B	F				C	
Drawing	CP	C				C	C	E	
English 11	CP	C-	C+	D-	A-	F	F	E	
Level III Spanish	CP	C+	B-	C-	B+	C	C+	E	
Physics	H	F	C	F	C-	F	F	-	
Pre-Calculus	CP	C+	C	B+	C+	B	D+	E	
Problem Solve/ Tech.	CP	B-				C+	B	E	

was able to choose her schedule and decide how much time she wanted to spend instructing skiing) (Father, 1st Hearing).

22. In 2007, Student obtained a score of 246 (Proficient level) in her English Language Arts MCAS, and a 260 (high range of the Proficient level at the cusp of the Advanced level) in Mathematics (SE-3F). In 2008, she achieved a score of 252 performance level in English Language Arts. Thereafter, in 2009, while Student was a ninth grader, she obtained a score of 248 (Proficient level) in her Biology MCAS. In the 2010 MCAS, taken during Student’s tenth grade, her performance improved in English Language Arts (score of 256) (SE-3F). In Mathematics, while Student scored a 262 (placing at the Advanced level) in 2008, in 2010, her Mathematics score was 260, allowing Student to remain at the cusp of the Advanced level (SE-3F). Student did not receive any accommodations when taking the MCAS or any other standardized testing in Pentucket (Jarvis; Tiano; Seymour, 1st Hearing).¹⁴
23. Jonathan Seymour, High School Principal in Pentucket, has held several positions within the district including social studies teacher, assistant principal and principal since he began working for Pentucket in 1998 (SE-3K; Seymour, 1st Hearing). According to Mr. Seymour, Student’s MCAS results show not just improvement but a strong, solid performance. In reviewing the standard test administered at the end of middle school in connection with high school placement, he testified that Student’s scores in all areas were “pretty strong” (Seymour, 1st Hearing).
24. Mr. Seymour testified that he frequently saw Student in school. He remembered her smile and noted that school personnel never had concerns regarding Student’s educational needs. Similarly, he did not recall any conversations over the years in which Parents raised educational concerns regarding their daughter (Seymour, 1st Hearing).

S World History	CP	B	A-	B+	A-	B-	C	E
20011-2012								
Citizen/ Government English	CP	B	B	B				C+
12	CP	C-	D+	F	A	D	C	B+
Film as Literature	CP	D-				F	F	A+
Health and PE 11	CP	A				A	A	A
Level IV Spanish	H	D-	D-	D-	C	D-	F	C+
Painting I	H	D	C	F			D	D
Painting II	H	C			D-	B-	B-	C
Physics	CP	B	B	B	B	B-	B+	A
Robotics		A	A-	A				C-
Statistics & Prob. H		D	C	D-	C	F	D	C

(SE-3D).

In the transcript above, “H” stands for “Honors” level courses and “CP” for College Preparatory level course. Mr. Seymour testified that honors courses are more difficult than college preparatory courses but also stated that at Pentucket, the level of difficulty for college preparatory and honors level courses is greater than in the average school district (Seymour, 1st Hearing).

¹⁴ This paragraph was lifted from the first Decision following the May 2015 Hearing, it however has been modified to more accurately reflect and explain Student’s MCAS results between 2007 and 2012.

25. Mr. Tiano testified that during his tenure at Pentucket (2009-2013) no teacher ever raised concerns regarding Student's educational performance (Tiano, 1st Hearing).
26. In 2011, concerned about Student's attentional difficulties, Parent inquired of Student's pediatrician about the possible presence of ADHD, inattentive type. Student's pediatrician requested that Student's teachers complete a Vanderbilt Assessment. The results were inconclusive for an ADHD diagnosis (SE-3R; SE-3P). Parent never shared the results of the Vanderbilt with Pentucket (McElaney).
27. On March 14, 2011, Parent completed a Child Neuropsychological History at Neuropsychology and Education Services for Children and Adolescents (NESCA), in preparation for Student's independent neuropsychological evaluation (SEII-26). The intake is fairly unremarkable. Parent notes that "seriously –[Student] is strong in every [subject] area equally" and states that the teachers only concern is homework completion (SEII-26).
28. On May 17, 2011, Parent wrote to Melissa C. McElaney (Special Education Coordinator in Pentucket) requesting a core evaluation for Student and noting

... I realize this is very late in her education to be requesting this, however, [Student's] performance has steadily declined since her 10th grade year, below what I believe is her intellectual ability. Given our family history of learning disabilities and [Student's] early education difficulties, I thought it made sense to have her evaluated (SE-3R; SEII-1).

Attached to the letter was an Evaluation Consent Form prepared by Parent specifically requesting that only certain tests be administered, namely: WAIS-IV, (Wechsler Adolescent Intelligence Scale); the Stanford-Binet Intelligence Scale; Woodcock Johnson III Test of Cognitive Ability; the CTOPP and the RAN RAS (SE-3R; SEII-1). Parent's May 2011 request is the only parental request for an evaluation of Student received by Pentucket (SEII-3; Jarvis, Tiano, 1st Hearing;). Mr. Tiano was surprised that Mother's request for evaluations included a Parental Consent Form listing the specific tests she desired (Tiano, 1st Hearing).

29. On May 26, 2011, Pentucket forwarded to Parent its proposal to evaluate Student noting the district's rejection of some of the tests requested by Parent as unnecessary to the determination of eligibility for special education services. Pentucket proposed to conduct the WAIS (cognitive testing), academic testing, and the WJ-III, Test of Cognitive Abilities (Executive Processes Cluster), the Conner's Rating Scales, classroom observation, a record review, and forms for teachers to complete (SE-3Q; SEII-2; SEII-3). The Notice of Procedural Safeguards was provided to Parent (SE-3Q; Jarvis 1st Hearing; SEII-2; McElaney). By then, Parent had already received several notices of Procedural Safeguards in connection with two of her children and was well aware of her rights and the laws concerning Child Find (Jarvis 1st Hearing). Parent offered to share the results of the Vanderbilt assessment forms that Student's teachers had completed for her earlier in the year but never did (SEII-2).

30. By the time of Parent's May 20, 2011 request for evaluation, Pentucket had attempted to assist Student with her homework completion difficulties by having her stay after school, which Student did sporadically, and through ongoing communication with the guidance counselor (SEII-3).
31. Parent's questionnaire, completed on or about June 1, 2011, notes Parent's suspicion that Student may present with a Specific Learning disability, noting that Student's demise resulted from her taking honors level courses. Parent stated that Student, who did not advocate for herself, struggled to understand expectations that were not explicitly written and also struggled with writing speed, following directions, and with math fluency. Parent opined that Student required more time to complete tasks, needed more explicit instruction, required assistance with organization and with chunking assignments and accurately estimating how long her assignments would take to be completed. Parent also expressed frustration that because Student split her time between Mother's and Father's homes, Mother's efforts to assist Student with estimating time for homework completion and chunking the work at home was not effective (SEII-10).
32. On or about June 8, 2011, Pentucket received Parent's consent for evaluation of Student which Parent had signed and dated May 18, 2011. In addition to the evaluations proposed by Pentucket, Parent requested that Pentucket conduct a psychological assessment that included learning style and evaluated Student's capacity in relation to academic skills, and she also requested that Pentucket perform the CTOPP, the "ren/ras" to assess her coding speed/automaticity, assess her processing speed, reading, writing and math fluency (SEII-4).
33. Sometime during the summer of 2011 Student underwent school-based evaluations to assess her eligibility. Jim Gordon (school psychologist), Angela Bonfanti-Brown (special education teacher) and Danielle Oliva (Speech and Language Pathologist) performed the evaluations on behalf of Pentucket (SE-3B).
34. Student's Educational Assessment Part A notes that Parent referred Student for a special education evaluation at the end of her junior year because Parent was concerned that Student might need additional time for SAT testing (SEII-5). The Assessment notes that over the years Student's progress had been fairly consistent. She appeared to be making effective progress within regular education and her progress was commensurate with that of her peers "who need[ed] to improve effort in some of their classes" (SEII-5). Student appeared to perform better in classes where she was invested. MCAS test scores also indicated that Student was a "bright young woman who had the ability to perform well" (SEII-5).
35. All of the teachers that completed Student's Educational Assessment Part B noted that Student displayed average ability when she applied herself and that she appropriately participated in classroom activities when prepared for class. They also concurred that Student's communication and interpersonal skills were age appropriate and she did not appear to have attentional issues (SEII-6). Additionally, Student's teachers made the following observations:

It seems the toughest part for [Student] was connecting the concepts with the equations in which those concepts appear. She had a good conceptual understanding of almost all the ideas and could express those orally and in writing. However, she could not perform problem solving of all of the most basic level (Christian Langlois, Physics Teacher).

[Student's] ability to process and grammar is good. Vocabulary acquisition is [tied] to her effort. Her level of discourse is good. She can apply her knowledge in a creative format (Spanish Teacher).

Capable student (Dziedziak, History).

[Student] was appropriately placed in pre-calculus- CP. She had a B average for most of the year. Q4 she stopped doing her homework and received a D+. She always paid attention in class and answered questions (Math Teacher).

She is doing quite well so far in the class (Cora Ducolan).

It appears that [Student] is a bright young woman who had the ability to perform well. She participates in all regular education classes and, according to recent MCAS testing, has the ability to succeed. Her future plans include college. At the present time, [Student] is interested in studying architecture (SEII-6).

36. The Conners' Rating scales were given to Student's eleventh grade teachers in June 2011 and later, on August 31, 2011 Student was given the Conners-Wells' Adolescent Self-Report Scale (SEII-7). The results were rated by James Gordon, MA, Pentucket's School Psychologist (SEII-25A). The Conners' Rating Scales are questionnaires that offer measures of child behavior in different dimensions. Mr. Gordon focused on teachers' responses that involved behaviors that related to impulsivity, hyperactivity and attention. In these scales, scores within 40 and 60 are considered average while those between 61 and 55 are considered at risk and those over 66 clinically significant (SEII-7). Student's responses fell with the average range in all areas except for hyperactivity in which she scored 35 and DSM-IV Hyperactivity-Impulsivity in which she scored a 32, both scores in the below average range. The teachers rated her within the average range except that the math and science teachers rated her in the at risk and clinically significant ranges in the areas of cognitive problems/ Inattention and the science teacher rated her at risk for anxious/shy (65) and the Conners' ADHD Index (64) in contrast to the other three teachers (math, "F.L." and history) who rated her well within the average range in those areas. She was rated in the at risk range by the math teacher for DSM-IV Inattentive and DSM-IV total and in the DSM-IV-Hyperactive-Impulsive by the science teacher as well as in the total DSM-IV: Total (SEII-7). According to Mr. Gordon this indicated that Student was at risk for difficulties with organization, task completion and concentration because of inattention issues, and was found to be at risk for criteria consistent with ADHD. Student's twelfth grade English and Spanish teachers were also asked to complete the Conners' Rating Scales and all of Student's scores fell in the average ranges as reported by them (SEII-7).

37. Mr. Gordon testified that Student did not show up for her first appointment with him and later only grudgingly agreed to participate in the evaluation, not really looking forward to doing the evaluation but stating that "this was her mother's idea" (Gordon). Once the evaluation was initiated she was engaged and put forth good effort (Gordon). Mr. Gordon

noted that during the testing Student slowed down for accuracy even in areas where she was supposed to move quickly because the test was measuring speed (*Id.*).

38. On September 6, 2011, the beginning of Student's twelfth grade, Mr. Gordon, performed Student's psychological evaluation (SEII-7). He administered the Wechsler Adult Intelligence Scale–Fourth Edition (WAIS-IV), reviewed Student's record and interviewed Student to ascertain her strengths and weaknesses as a learner.¹⁵ Mr. Gordon found Student to be friendly, cooperative and able to focus and maintain her focus during testing. She also initiated, sustained and shifted her attention as required by the tasks (SEII-7).
39. On the WAIS, Student performed within the High Average range for verbal comprehension (Index score of 118/ 88 percentile) and perceptual reasoning (Index score of 113/ 81 percentile). Working memory abilities fell within the average range (Index score of 102/ 55 percentile) and her processing speed fell within the borderline range (Index score of 79/ 8 percentile). She obtained a full scale IQ score of 106 placing her within the average range of intelligence. Mr. Gordon found that Student's ability to sustain attention, exert mental control and concentrate were within the average range though she displayed some weakness in mental control and with processing visual information quickly. According to him, these weaknesses may make the processing of complex information and of comprehending novel information more time consuming for Student. She also displayed vulnerabilities when processing visual information quickly (SEII-7; SEII-7A; Gordon).
40. Mr. Gordon recommended that Student have additional time to complete assignments and during written test taking, and noted that she would benefit from frequent breaks between tasks so that she did not tire as easily (SEII-7; Gordon). He further opined that Student's issues with processing speed were a relative weakness, but when discussing this with Student, Student had reported that she did not think that she needed additional time because she was able to finish her tasks at the same time as her peers (Gordon). Mr. Gordon concluded that the processing speed deficit was reflective of Student's learning style rather than a disability (Gordon).
41. On September 9, 2011, Parent consented to a speech and language evaluation of Student that included the CTOPPS (SEII-4A). The same date, Parent emailed Melissa McElaney noting Student's willingness to complete the school evaluation after school and stating her concern that there would be enough time for Student to take her college–board tests with accommodations on December 3, 2011. Again Parent stated her concern that

...the reason [she] requested this evaluation is because [Student's] PSAT and SAT scores as well as her performance in school work completion appears to be impaired by slow output. As you know, everything is relative so compared

¹⁵ Mr. Gordon's evaluation notes that Parent had referred Student over concerns that she was struggling across the curriculum and especially had difficulty with math fluency, her ability to follow direction, writing speed and organization. Parent was concerned that she required explicit instruction and additional time to complete tasks (SEII-7).

to [Student's sibling] and [Student's sibling] she was speedy, however, compared to her peers, she is slow (SEII-24).

42. Student's educational evaluation was conducted during and/or after school on September 13, 15, 16 19, 21 and 23, 2011, by Angela Bofanti-Brown (SEII-8). Ms. McElaney testified that Student's first meeting with Ms. Brown did not go well as Student was resistant to being tested. Student did not want to be pulled out of her classes, and wished only to be tested on days when she was staying at her mother's house rather than on days when she was at her father's house (McElaney). However, once engaged in the testing, Student put forth good effort, was cooperative and engaged in the process (SEII-8).

43. Ms. Bofanti-Brown administered the Woodcock-Johnson III, Form A (Selected Achievement subtests) (WJ III), and the Woddcock-Johnson III (Executive Function Processes) (*Id.*). Student's scores in the WJ III (which assessed her abilities in reading, math, written language and academic knowledge) were as follow:

READING	<u>Performance cluster</u>	<u>Standard Score</u>	<u>Percentile Rank</u>
Broad Reading	Average	106	65 th
Reading Comprehension	Average to Advanced	113	81 st
Brief Reading	Average to Advanced	111	76 th
Basic Reading Skills	Average to Advanced	106	65 th
Letter Word Identification	Average to Advanced	108	70 th
Reading Fluency	Average	95	36 th
Passage Comprehension	Average to Advanced	112	78 th
Word Attack	Average	102	54 th
Reading Vocabulary	Advanced	110	75 th
MATHEMATICS			
Broad Math	Average	100	51 st
Brief Math	Average	104	60 th
Math Calculation Skills	Average	95	36 th
Math Reasoning	Average to Advanced	106	66 th
Calculation	Average	101	53 rd
Math Fluency	Limited to Average	82	12 th
Applied Problems	Average to Advanced	104	62 nd
Quantitative Concepts	Average to Advanced	107	69 th
WRITTEN LANGUAGE			
Broad Written Language	Advanced	119	90 th
Brief Writing	Advanced	118	88 th
Basic Writing Skills	Advanced	111	77 th
Written Expression	Advanced	125	95 th
Spelling	Average to Advanced	109	72 nd
Writing Fluency	Average to Advanced	115	85 th
Writing Samples	Advanced	124	95 th

Editing	Advanced	113	80 th
Punctuation/Capitalization	Advanced	121	92 nd

BROAD KNOWLEDGE

Academic Skills	Average to Advanced	108	70 th
Academic Fluency	Average	99	47 th
Academic Application	Advanced	114	82 nd
Academic Knowledge	Average to Advanced	110	76 th

TOTAL ACHIEVEMENT: Average to Advanced 108 71th (SEII-8).

44. Ms. Bonfanti-Brown noted that Student took her time to answer, appeared to be focused, persisted as the level of difficulty increased, and asked for clarification when needed. Student related that she worked better in the mornings than she did in the afternoons. Student’s reading and writing skills were areas of strength and her scores in these portions of the test fell in the average to advanced ranges. In the math portion of the testing, Student’s skills were found to fall within the average to advanced range but her performance was affected by time constraints. Overall, she demonstrated ability to analyze and solve mathematical problems. Here too she persisted and worked through the increasing levels of difficulty asking for clarification when needed and using pen and paper to assist her. Student also performed well in responding to questions involving government, history, geography, science, economics, music, literature and art demonstrating the ability to access information stored in her long-term memory (SEII-8).

45. On the Executive Processes cluster of the WJ III Student performed as follows:

Cluster	Performance Range	Standard Score	Percentile Rank
Executive Processes	Average	105	63 rd
Tests:			
Concept Formation	Average	105	64 th
Planning	Average	108	70 th
Pair Cancellation	Average	100	50 th

46. As explained by Ms. Bonfanti-Brown, Concept Formation measures a student’s ability to mentally shift back and forth, and Strategic Planning the ability to process, select and apply solutions to problems presented. Student performed solidly within the average range in both of these tests. She also scored within the average range on the Pair Cancellation cluster which is a timed task. In this test, Student asked for clarification and worked quickly and efficiently completing this 3 minute test in 2 minutes and 20 seconds (SEII-8).

47. Student’s overall academic and achievement performance on the WJ III fell in the average range when compared to other same grade peers though her written expression abilities were superior to same grade peers. Ms. Bofanti-Brown recommended that Student be present and

a participant at the Team meeting that would be convened to discuss her evaluation performance (SEII-8).

48. Ms. Bonfanti-Brown observed Student during English class on September 14, 2011. She noted that Student appeared “invested, attentive, and on task” (SEII-11). Student followed along, generated written work consistent with the teacher’s instructions, took notes for future use and raised her hand once to offer information on situational irony (SEII-11; SEII-11A). Student’s physics, statistics and probabilities, computer science/ robotics, painting, cit[izenship]/ gov[ernment] and English teachers rated her class performance, attitude/ behavior and class participation as good or excellent and as an active, motivated participant in class but the statistics/ probabilities and painting teachers noted that Student had not turned in her homework and/ or sketchbook (SEII-11B).

49. Danielle Oliva, M.S., CCC-SLP, Speech and Language Pathologist in Pentucket, conducted the Speech and Language Evaluation in September 2011(SEII-9; SEII-25B). Ms. Oliva performed the Comprehensive Test of Phonological Processing (CTOPP), the Listening Comprehension Test–Adolescent, portions of the Test of Auditory Processing Skills, 3rd edition (TAPS-3), Oral Expression: Recreating Sentences subtests of the Test of Language Competence–Expanded edition (TLC-E)–Level 2. According to Ms. Oliva, Student was cooperative, she exerted good effort and completed all test tasks. Student was thoughtful and reflective in her responses, not impulsive, used appropriately effective test taking techniques (such as repeating the information to herself, and requesting clarification or repetition) rendering the results of the evaluation reliable. When asked about school, Student noted that her grades and classes were alright and she did not

...identify any academic areas, or learning or study skills that she found challenging or to be of concern. She did indicate that she is often tired in school which she attributed to having a hard time sleeping at night. She reported that she is looking forward to graduation and attending college to study architecture (SEII-9).

50. On the CTOPP Student obtained an Average performance or composite score in all of the following subtests: Elision (75%tile / standard score 12); Blending Words (63%tile/ standard score 11); Phonological Awareness (73%tile/ standard score 109); Memory for Digits (63%tile/ standard score 11); Nonword Repetitions (50%tile/ standard score 10); Phonological Memory (58%tile/ standard score 103). Student obtained a below average performance or composite score in Rapid Digit Naming (16%tile/ standard score 7); Rapid letter Naming (16 %tile/ standard score 7); and Rapid Naming (12%tile/ standard score 82). On the Supplemental Subtests Student was found to possess average abilities in Phoneme Reversal (50%tile/ standard score 10) and in Segmenting Words (50%tile/ standard score 10), she obtained an above average score for Blending Nonwords and received an average score for Segmenting Nonwords (75 %tile/ standard score12) and achieved an above average score in Blending Nonwords (91%tile/ standard score 14). In the LCT–Adolescent subtests Student achieved Average to High Above Average scores for Main Idea (73%tile/ standard score 109), Details (77%tile/ standard score 111), Reasoning (91%tile/ standard score 120),

Vocabulary and Semantics (84%tile/ standard score 115), Understanding Messages (76%tile/ standard score 111), with a Total Test score of 85%tile/ standard score of 115 placing her in the high/above average range (SEII-9).

51. On the TAPS-3 Student performed solidly in the Average to Above Average ranges for Word Memory (50%tile/ standard score 10), Sentence Memory (84%tile/ standard score 13), Auditory Comprehension (95%tile/ standard score 15) and Auditory Reasoning (95%tile/ standard score 15), also obtaining an Above Average Index score for Cohesion (95%tile/ standard score 125). On the Oral Expression: Recreating Sentences (Subtest 3), Student obtained an Average score (75%tile/ standard score 12) (SEII-9). Ms. Oliva also performed informal assessments for fluency, articulation, voice (quality, pitch, loudness, resonance, stress, intonation, and rhythm), and functional language (pragmatics) raising no concerns in any of the aforementioned areas (SEII-9).
52. Ms. Oliva noted in her report that as many other students, classrooms that used repetition, rephrasing of information, context and visuals would be beneficial to Student. Ms. Oliva further noted Student's strengths and concluded that Student did not require speech and language services (SEII-9). She testified that during her testing Student was observed to slow down in her responses because accuracy was more important to her than speed. Student was observed to be cautious and reflective in her responses. Ms. Oliva opined that Student's rapid naming issues were a relative weakness and not a disability, noting that while Student had a standard score of 7, the average range was a standard score between 8 and 12. She further noted that presentation of auditory information was very effective for Student because this was an area of strength for her as her auditory reasoning scores were in the above-average range.¹⁶ Student also benefited from information being presented in context (Oliva). Ms. Oliva further opined that Student would benefit from classrooms where best teaching practices such as repetition, provision of models and talking through problems were used (Oliva).
53. On October 6, 2011, Pentucket forwarded a Team meeting invitation to discuss the results of Student's initial evaluation and her eligibility for special education services (SEII-12).
54. Student's Team convened on October 18, 2011 (SE-3B; SE-3T; SEII-13). Present at the meeting were: Mathew Smith (guidance counselor), Luana Cavallaro (Spanish teacher), Mother, Student, Melissa McElaney, Jim Gordon, Danielle Oliva, and Angela Bonfanti-Brown (SE-3C; SE-3T; SEII-13). After reviewing the results of Student's evaluation, the school-based Team found that Student was not eligible to receive special education services (SEII-14). Parent and Student opined that Student's slower processing speed was an area of disability but the school-based Team opined that it was a "relative weakness that [did] not impact [Student] on a daily basis" (SE-3B).

¹⁶ Interestingly, I note that during the first telephone conversation with Student and Parent, Student requested to have additional time to process the information shared during the telephone conference call because she had language processing issues.

55. Team meeting notes for the October 18, 2011 meeting indicate that the result of Student's testing placed her in the average range of intelligence and performance, but also showed that Student required extra time for task completion in math to focus on accuracy. The notes further reflect that Student worked meticulously during testing. Student's teachers commented on her performance in class, and Mr. Smith reviewed what a District Curriculum Accommodation Plan (DCAP) was. Student stated during the meeting that she did not require extra time to complete tests, essays or class work but rather it was the studying and homework completion at home where she needed extra time. Parent attributed Student's challenges at home to a slow processing speed, and raised concern over the impact homework completion had on Student's grades. When discussing the colleges in which Student was interested, Mr. Gordon noted that Student's GPA was not high enough for admission to those preferred by Student. Overall, the school-based Team did not find that Student presented with a disability that qualified her to receive special education services (SE-3P; SEII-15).

56. During the October 18, 2011, Team meeting, a list of accommodations, modifications and interventions (available to regular and special education students alike) that may be useful for Student were identified (SEII-16). Some of the helpful teaching strategies identified were:

Offer multi-modality approaches: visual, auditory, kinesthetic, tactile; provide auditory and visual cues –charts, graphics, pictures; hands on activities; manipulatives.

Use explicit teaching: model, think aloud, direct instruction, extended explanations, concrete examples, model reading strategies and skills.

Provide student with learning objective(s) and an overview of the lesson before beginning the lesson.

Simplify, rephrase and clarify language used to communicate ideas.

Adjust the pace of delivery and quantity of material presented.

Modify the quantity of responses on daily class work and homework (SEII-16).

57. Mr. Gordon testified that during the meeting discussion regarding Student's eligibility and the need for special education services, Parent wanted services to be provided. Specifically, Parent sought provision of additional time for Student to complete the SAT, but Student did not express a need for services at the meeting (Gordon). Mr. Gordon noted that the review of the educational assessment results was consistent with what he had seen in the portion of the test conducted by him. He testified that he did not believe that Student presented with a disability or required special education services at any time (Gordon).

58. Ms. Oliva testified that Parent was an active participant during the Team meeting, asking questions and stating her position, while Student was quieter (Oliva). She opined that SEII-15, the meeting notes, accurately reflected the discussions during the meeting (Oliva).

59. At the October 18, 2011 Team meeting Parent was again provided with a copy of the Procedural Safeguards, with contact information for the Bureau of Special Education Appeals and the DESE's Program Resolution System. Parent accepted the document (SE-3P; Jarvis; Tiano). Mr. Tiano and Mr. Jarvis testified that every step of the way they complied with the procedural notice requirements as well as with all other necessary actions, such as forwarding the rejected finding of no eligibility/IEP(s) to the BSEA (Tiano, Jarvis 1st Hearing).
60. On October 24, 2011 Pentucket issued a Notice of finding of No Eligibility (N2) based on the Team's opinion that Student's processing speed was a relative weakness that did not impact Student's performance on a daily basis (SEII-17). Parent and Student disagreed opining that it was a disability. The N2 states that Parent had been provided with the Parents' Rights Brochure and further notes that the family may notify the district directly of their disagreement with the finding and Pentucket would contact the BSEA (SE-3B; SEII-17).
61. On November 2, 2011, Parent rejected the finding of No Eligibility for Student, further noting her disagreement with the school-based testing and findings. In her letter, Parent requested funding for independent speech and language, neuropsychological, developmental visual processing and academic/educational evaluations, and she also requested a copy of Student's records including documentation of any DCAP implemented by Pentucket (SE-3O; SEII-18).
62. On or about November 3, 2011, Pentucket forwarded Parent's rejection of the finding of no eligibility to the BSEA (SE-3N; SEII-19).
63. At Parent's request, Angela Ayre, MS CCC-SLP at Massachusetts General Hospital's Department of Speech, Language and Swallowing Disorders and Reading Disabilities, performed a speech and language evaluation of Student on December 2, 2011 (Administrative Record). Ms. Ayre administered the Test of Adolescent and Adult Language 4 (TOAL-4) (Student performed in the Average, High Average and Above Average ranges in all areas); Test of Language Competence –Expanded Edition, Level 2 (TLC-2) (Student's ability to make inferences fell in the Above Average range); Woodcock Johnson III Tests of Cognitive Ability (WJ-III) (in three of the four subtests Student performed in the Average and High Average areas and her performance fell in the Low Average range (23rd %tile/ standard score 89) for Rapid Picture Naming); Woodcock Reading Mastery Tests–Revised (WRMT–R), Form H (Student scored in the Average range); Test of Word Reading Efficiency (TOWRE), Form A (Student obtained a Total Word Reading Efficiency score in the Below Average Range (16th%tile/ standard score 85) having obtained a Below Average score on Sight Word Efficiency (16th tile/ standard score 85), and a Low Average score on Phonemic Decoding Efficiency (25th%tile/ standard score 90)); Nelson Denny Reading Tests (Student's rate fell in the Low Average Range (23rd tile/ standard score 183), and in the High Average Range/ Grade Equivalence of 14.9 in Comprehension –Standard Timed Condition (75th %tile/ standard score 223), and in the Above Average Range/ Grade Equivalence of 18.7 on Comprehension –Extended Timed Condition (98th%tile/ standard score 244));

Behavioral Assessment of the Dysexecutive Syndrome (BADs) (Student obtained an Average score (4—which is the highest score possible considered average performance) on both measures, i.e., Key Search and Zoo map); and the Learning and Study Strategies Inventory, High School (LASSI–HS) in which Student’s scores varied among Relative Strengths (in information processing, acquiring knowledge, and reasoning, selecting main ideas, use of study aids), Relative Weaknesses (in motivation, time management), and Potential Concern (in the reas if attitude and interest, anxiety and worry, concentration and attention, self–testing, reviewing, test strategies and preparation) (Administrative Record). Oral Mechanism, Voice and Hearing were all found to be within normal limits and adequate for the purpose of communication (*Id.*).

64. Ms. Ayre concluded that Student presented with many strengths in the areas of fundamental and higher–order language skills, but her relative weaknesses in rate of verbal retrieval (falling in the low average range), reading rate (falling in the low average range) and use of active learning strategies could impact Student negatively in her ability to perform at a level commensurate with her cognitive–linguistic potential (Administrative Record). Moreover, Student’s “relative weakness in word–reading efficiency and contextual reading rate suggest that [Student] will likely struggle to complete reading assignments and written exams within the standard time allotted”. Ms. Ayre recommended that Student be provided additional time for test taking, reading and writing assignments and participation in a “study skills/ learning strategies workshop” in high school or upon entering college. Student would also benefit from consultation for study skills and learning strategies and should be placed with a faculty mentor in college. Lastly, Ms. Ayre suggested monitoring for school anxiety (Administrative Record).

65. Student’s SAT scores on the December 3, 2011 were:

SAT	Score	Score Range	Percentile College bound Seniors	
			National	State
Reading	660	630-690	91	88
Math	580	550-610	70	66
Writing	670	630-710	93	90
Multiple Choice	63			
Essay	10 (SEII-23).			

The aforementioned scores demonstrate improvement over the previous SAT scores achieved by Student on June 4 and November 5, 2011(SEII-23).¹⁷

66. On January 30, 2012, Pentucket sent an invitation to reconvene Student’s Team. The purpose of the Team meeting, which took place on February 2, 2012, was to review the report of

¹⁷ Student’s previous SAT scores in tests taken on June 4 and November 5, 2011 were as follows:

Test Date	Grade Level	Reading	Math	Writing	Multiple Choice	Essay
06/04/2011	11 th	620	510	590	63	6
11/05/2011	12 th	620	520	570	62	6 (SEII-23).

Student's independent evaluation performed by Angela Ayre, MS, CCC-SLP, and determine Student's eligibility for special education services (SE-3S; SEII-20). Under the section entitled "What next steps, if any, are recommended?", the meeting invitation states:

Next steps: Parent was offered another copy of the procedural safeguards and she also has a right to take advantage of any dispute mechanism available to refute the Team's finding of No Eligibility. Contact information for the Bureau of Special Education Appeals (BSEA) and the Department of Education Problem Resolution System (PRS) is included in the Parent's Rights Brochure. Alternately, the family may notify the district directly of their dispute with this finding, in which case the district will contact the BSEA (SEII-20).

67. The Team convened on February 1, 2012, discussed the results of Ms. Ayre's evaluation which identified additional areas of strength and weaknesses for Student as well as the testing conducted by Mr. Gordon and Ms. Bonfanti-Brown, again concluding that Student was not eligible to receive special education services (SEII-20A). Ms. Oliva testified that Ms. Ayre's report was consistent with Ms. Oliva's findings in the school-based speech and language evaluation (Oliva). She further testified that as had occurred during the October 2011 meeting, the Team went through the eligibility flow chart (SEII-20A) concluding that Student did not have a disability (Oliva). The Team however, recommended placing Student on a DCAP which would implement the following accommodations:

Upon advocating, [Student] will be granted more time on past, quizzes and in class assignments as needed.

[Student] is to stay after school on Tuesdays with her math teacher and Thursdays with her English teacher to review and complete work.

In order to frequently access her current standing in each of her classes, [Student] will be using weekly progress reports and will pick them up in the guidance office each Friday (SEII-21).

The DCAP process was explained by Mr. Smith who also discussed Student's graduation requirements, and the results of Student's SAT scores. The DCAP committee members were: Parent, Student, Mr. Gordon, Mr. Smith and Ms. McElaney (SEII-21). Student's other teachers were also consulted (Oliva). Parent was handed a copy of the DCAP at the meeting. Her copy contains a hand written notation stating that she received the DCAP on or about February 7, 2012 (SEII-21; Administrative Record).

68. On February 14, 2012, the BSEA forwarded a packet to Parent containing the letter explaining dispute resolution options, explanation of the mediation process, a Hearing Request Form, a directory of low cost legal and advocacy services, and information on SpedEx¹⁸ (SE-3M).

¹⁸ The Hearing Officer took administrative notice of the packet forwarded to parents upon receipt of a school district's notification regarding parental disagreement with a school district's determination.

69. On March 15, 29 and April 5, 2012, Student was evaluated by Dr. Nancy Roosa, of NESCA at Parent's request (Administrative Record). In addition to conducting an interview of Parent and Student and reviewing records which included the previous evaluations performed by Pentucket and Ms. Ayre, Dr. Roosa administered selected subtests of the Wechsler Adult Intelligence Scale-4th edition (WAIS), selected subtests of the Wechsler Individual Achievement Test-3rd edition (WIAT-III), the Gray Oral Reading Test-4th edition, Form A (GORT-4), Test of Written Language-4th edition (TOWEL-4), selected subtests of the Wechsler Memory Scale IV, and California Verbal Learning Test-II (CVLT-II), Rey Complex Figure Test (RCFT), selected subtests of the Delis Kaplan Executive Function System (D-KEFS), and the Integrated Visual and Auditory Continuous Performance Test (IVA+CPT). Dr. Roosa had Parent and Student completed the Achenbach Child Behavior Checklist (CBCL), the Connor's Parent Rating Scales and the Behavior Rating Inventory of Executive Function (BRIEF), and Student completed the Piers Harris Self Report Form: *How I feel about Myself*. Student's painting, wellness, statistics, English, physics and Spanish teachers completed if the BRIEF, and the physics teacher also completed the Connor's Teacher Rating Scale-R (Administrative Record).
70. Dr. Roosa noted that Student worked at a slow pace, displaying excellent behavioral regulation, ability to attend to and sustain attention to tasks, showing no signs of impulsivity, was not fidgety or restless, and could sit quietly for long periods of time (Administrative Record).
71. Overall, the results of Dr. Roosa's evaluation were consistent with the results of the school-based testing; that is, Student performed with the average, high average, above average and very superior ranges in all tests except for the Percent Recency in the CVLT in which Student made several intrusion errors and did not self-correct despite additional repetitions of the list, and her weak score on a control condition, assessing speed of visual scanning in the D-KEFS, but it is noted that she "moved more quickly once she warmed up to the task demands" (Administrative Record). Dr. Roosa also noted that Student scored in the lower end of the Average range on the Cancellation subtest of the WAIS (a test involving speed of identifying target symbols), and further noted that on the Rey Osterreith Complex Figure, Student demonstrated difficulty managing simultaneous processing of large amounts of visual information without explicit directions regarding organizations strategies. Dr. Roosa concluded that Student "required additional time to get used to a task and then develop strategies for managing it" but was "clearly able to develop strategies and work in an organized and systematic manner when she had time and familiarity with tasks" (*Id.*). She also noted that Student had a tendency to focus on the details and work in a manner that was time consuming and inefficient (Administrative Record).
72. Based on the results of her evaluation and those of Pentucket and Ms. Ayre, Dr. Roosa found that Student presented a neurological disorder involving a reduced speed of information processing which impacted her ability to process information within expected timeframes (i.e., a cognitive speed disability). She recommended that Student be provided additional time to complete tests and assignments, receive direct instruction to increase fluency, and

that the amount of work be decreased to fit in the time allotted. Additional accommodations when Student entered college were recommended. Dr. Roosa opined that Student required direct study skills instruction and academic support at least three times per week as well as coaching. In her opinion, in high school, Student had not accessed the curriculum effectively or commensurate with her potential (Administrative Record).

73. On May 9, 2012, Pentucket forwarded another Team meeting invitation to Parent proposing to convene the Team on May 23, 2012, to discuss the result of Student's independent neuropsychological evaluation conducted at NESCA, and discuss Student's eligibility for special education services (SEII-22). The May 23, 2012 date was selected because it was the only date on which Dr. Roosa was available (McElaney). At the time, Student/Parent were working with a special education advocate (Elaine Lord) who specifically requested that Dr. Roosa be present at the meeting. The school suffered a power outage on May 23, 2012 which caused the school to be closed for one day (McElaney, Smith). Ms. McElaney then offered new dates (May 31 and June 1, 2012) to hold Student's and a sibling's meetings but while the sibling's meeting was conducted, a date for Student's meeting was never confirmed by Parent/Student (McElaney).
74. By the end of the 2011-2012 school year, Student earned the course credit necessary to graduate from high school and on June 2, 2012, she accepted her diploma and graduated from Pentucket High School (SE-3D; Seymour, McElaney). Mr. Seymour recalled Student walking across the stage and accepting her high school diploma (*Id.*).
75. Following Student's graduation from Pentucket as a regular education student, Pentucket did not convene the Team to discuss Dr. Roosa's evaluation (SE--D; McElaney).
76. Mathew Smith, Student's guidance counselor at Pentucket during her four years of high school, explained that course selection was a flexible process in which students and parents were part of the decision-making. During her sophomore year, Student had become upset that her grades had declined in some of her honors classes. During junior year, Parent requested that Student be placed in college preparatory English and history classes, but asked that she remain in on honor level science and math. Parent later changed her mind when Student did not do well in her honor math class and requested that Student be moved to college preparatory level math. Student had wanted to stay in honors level because her friends were there (Smith). Mr. Smith explained that Student's poor grades were the result of her not completing homework assignments and inconsistent effort. Student however, tested well (Smith).
77. Mr. Smith testified that during Student's ninth grade he offered organizational strategies by use of an agenda book. According to this witness, neither Student nor teachers ever raised any concerns regarding Student's need for special education during Student's four years at Pentucket. Rather, it was Parent who first raised this concern at the end of Student's 11th grade (Smith). Mr. Smith testified that the only concern raised regarding Student was that she did not always follow through with her assignments (Smith).

78. Mr. Smith testified that Student was an intelligent, good advocate for herself, and remembered her being sad during her Parents' divorce. He testified that student had excelled in "color guard" (involving flag routines) in which she offered mentorship to new participants, and had also participated in softball (Smith).
79. Colby Brunt, Esq., attorney for Pentucket between 2006 and 2013, represented Pentucket when Parent filed her numerous Hearing Requests on behalf of Student and Student's sibling¹⁹. Parent appeared pro-se when she filed on behalf of both her children (Brunt, 1st Hearing).
80. According to Attorney Brunt, Parent's May 23, 2012 Hearing Request on behalf of Student challenged the 2011 finding of no eligibility, sought reimbursement for an independent evaluation, raised Child Find issues and sought compensatory services for Student (retroactive reimbursement and prospective relief). Attorney Brunt filed Pentucket's response denying Parent's requests regarding Child Find, eligibility and compensatory services, and agreeing only to pay the state approved rate for the independent educational evaluation (Brunt, 1st Hearing).
81. Following a Pre-hearing conference with Parent and Pentucket during the summer of 2012, the Parties agreed to have the Hearing Officer decide the independent evaluation reimbursement issue on paper. According to Attorney Brunt, Parent was seeking \$4,000.00 reimbursement and the rate setting rate was much lower. Parent knew this because she had raised the same issue in her previous Hearing Request involving Student's sibling (Brunt, 1st Hearing).
82. Attorney Brunt testified that during the several months prior to September 2012, she, Parent and Attorney Sean Goguen, with whom Parent was consulting relative to her BSEA cases for Student and Student's sibling, had numerous communications regarding settling both Student's and her sibling's cases. Thereafter, the negotiations between Attorney Brunt and Parent continued through December 2012. At the time Parent was appearing on behalf of Student at the BSEA, she had an ongoing case involving Student's sibling in Superior Court. Attorney Goguen is a practicing attorney in Massachusetts who concentrates in special education law. Attorney Brunt referred to the negotiations as protracted and noted that the greatest "road block" to finalizing resolution during that period was Parent's insistence that the Agreement not prevent Student from asserting her rights against Pentucket given that Student had reached the age of majority in the summer of 2012. Between August and December 2012, most of the negotiations involved the language regarding dismissal of Student's case without prejudice (Brunt, 1st Hearing).
83. Attorney Brunt testified that given her extensive experience in this field, when compared to the average pro-se parent, Parent was well versed in legal research, fully understood her

¹⁹ Administrative notice of Parent's filings regarding Student's sibling reflect that Parent requested hearings on his behalf on April 23, 2010, (BSEA #10-6783), September 2010 (BSEA #11-0931) and on June 15, 2012 (BSEA #12-9569). Due to a data system change in 2010, the BSEA is unable to readily track cases filed earlier than 2010.

parental rights, and was savvier than other parents with whom Attorney Brunt had interacted before. Parent had also been very active in the cases involving her son and she consulted with Attorney Goguen on behalf of both students. According to Attorney Brunt, “Parent absolutely understood the process” (Brunt, 1st Hearing).

84. Mr. Tiano testified that he was acquainted with Student and Mother while Student was in high school, initially in conjunction with an OCR complaint filed by Mother on behalf of Student’s sibling. He and Mother spoke quite often during that time. Mr. Tiano described Mother as a very intelligent woman who understood her rights and was capable of discussing the needs of her children and advocating for them effectively (Tiano, 1st Hearing).
85. Communication between Attorney Brunt and Attorney Goguen ceased on or about September 2012 when Parent asked Attorney Brunt to stop communicating with Attorney Goguen because it was costing her money. By then the terms and language of the Agreement had been almost completely negotiated and drafted (Brunt, 1st Hearing).
86. On November 26, 2012, the BSEA received Parent’s letter dated November 25, 2012 responding to an Order to Show Cause issued by the BSEA. (The Order to Show Cause was issued after the Parties informed the Hearing Officer that they were not proceeding to Hearing and that they were discussing the final terms of an agreement.) Parent explained in her letter that the Parties had not reached an agreement and she requested that the matter be placed back on the Hearing calendar (Administrative Record). Parent’s last paragraph stated:

Lastly, since the hearing request was submitted before [Student] turned 18 on July 25, 2012, pursuant to BSEA Rule I (1) [Student] would like her name added to the hearing request and for me to represent her as her advocate pursuant to BSEA Rule I(6). I remain an aggrieved party, financially as a Parent so I will also continue to represent myself Pro Se (BSEA Rule I(2)). If this is not allowable please advise us so that we may seek legal counsel to represent [Student] (Administrative Record).

This letter was signed by both the Parent and Student. According to Pentucket, the district was not copied on this letter.²⁰ Pentucket learned of its existence during a telephone conference call with the Hearing Officer on February 14, 2013, after which a copy was forwarded by the BSEA to Pentucket’s counsel. Parent produced no documentary confirmation that she had forwarded the letter to Pentucket. The BSEA received the hard copy of Parent’s letter on December 10, 2012 (Administrative Record. See also *Ruling on Pentucket Regional High School’s Motion To Dismiss*, BSEA #12-8636, issued on March 11, 2013).

87. Email communications between Attorney Brunt and Parent dated November 30, 2012, noted that following review of Parent’s most recent emails and after discussions with Pentucket,

²⁰ Throughout the period of time during which this matter has been open at the BSEA, Parent has diligently sent her correspondence to the BSEA and Pentucket via fax and mail.

the district was making a “last offer” in an attempt to resolve all of Parent’s claims against Pentucket. The email reflected Pentucket’s offer to fund four years of residential placement for Student’s sibling and reimbursement for his 2012 summer program and his independent educational evaluation, as well as reimbursement for Student’s independent educational evaluation as previously agreed (\$4,418.83). The total offer amount reflected a larger sum than Pentucket would be presenting in an Offer for Judgment in superior court relative to dismissal of Student’s sibling’s case in that venue (SE-1B). The email further states,

The agreement language is similar to the language we previously agreed upon back in August [2012] when you were working with Sean Goguen. We still require that all previous BSEA cases be dismissed as well as the superior court case...

In addition to signing the agreement, you would have to agree to submit the attached motion regarding the issue of continuing jurisdiction to the judge and let the judge decide this issue. However, you must know that if the judge has an issue with the continuing jurisdiction, as both the AG’s Attorney and I understand that he will base [it] on our last hearing, that will in no way invalidate our agreement. As you know, the continuing jurisdiction language is a deal breaker for the AG (I informed Sean Goguen of this via email on or about September 18 [, 2012]) (SE-1B).

88. According to Attorney Brunt, the settlement offer was intended to dispose of the entirety of Parent’s case in both Student’s and Student’s sibling’s matters, leaving only the issues regarding the finding of no eligibility and request for reimbursement alive for Student to pursue separately. Since all of Parent’s claims *vis á vis* both students were being settled, Pentucket requested in exchange that Parent withdraw BSEA #12-8636 without prejudice. The Parties’ understanding would appear at paragraph 9 of their Settlement Agreement discussed below (Brunt, 1st Hearing).
89. Attorney Brunt testified that when the Parties discussed dismissal/withdrawal of BSEA #12-8636 “without prejudice” the Parties specifically referred to disposing of all claims separate from the issue of reimbursement for Student’s independent evaluation because that issue had already been verbally settled between the Parties. The “without prejudice” language discussions referred to the remaining claims appearing in Parent’s May 23, 2012 Hearing Request, which claims could remain alive for Student to pursue separately (Brunt, 1st Hearing).
90. Mr. Tiano testified that during the settlement negotiations with Parent, he and Attorney Brunt discussed the terms of the agreement. According to Mr. Tiano, Pentucket was looking to settle all of Parent’s claims for both children so that Pentucket could be “done with both cases at the same time” (Tiano, 1st Hearing). According to him, the final terms of the agreement were handled by the Superintendent and Attorney Brunt (*Id.*).
91. On Sunday, December 2, 2012, Parent responded that the terms of the agreement were acceptable to her but noted her opinion that filing of a motion in superior court as a

requirement of settlement, would delay the signing of the agreement and defeat the purpose of expediency and not participating in further hearings. Parent expressed her desire to execute the settlement agreement the following day. In a subsequent email the following day, Parent clarified that she was willing to file the motion in superior court as she was not intending to complicate matters (SE-1B).

92. The Settlement Agreement noted at paragraph 8 Pentucket's agreement to reimburse Parent \$4,418.83, (the full cost of Student's independent educational evaluation) within sixty (60) days of execution of the Agreement, and further required

Upon execution of this document, Parent will immediately dismiss with prejudice [Student's sibling's] case pending with the Bureau of Special Education Appeals [BSEA #12-----] and the superior court case (Docket # [--]). Parent will also immediately dismiss without prejudice her BSEA case involving her daughter [Student], (DOB--)(BSEA12-8636) (SE-1A, paragraph 9).

93. The record reflects that the \$4,418.83 agreed to be paid by Pentucket to Parent exceeded the amount originally quoted by Parent in her May 2012 Haring Request for Student's independent educational evaluation. The amount reflected in Parent's Hearing Request was \$3,600.²¹

94. Paragraph 13 of said Settlement Agreement further stated that

The parties to this agreement hereby acknowledge that they had the opportunity to consult with an Attorney or other representative of their choice throughout these proceedings, that they have read this entire agreement, and signed this agreement voluntarily with full understanding of its terms and without any other inducements or promises except for those set forth herein (SE-1A).

95. Via the December 2012 Settlement Agreement Parent would also receive approximately \$60,773.95 in connection with Student's sibling's tuition to a private school (SE-1A).

96. On December 3, 2012, a Settlement Agreement was executed between Parent (acting for herself and Student's sibling who was a minor) and Pentucket. Student was not a participant in any of the discussions regarding the Settlement Agreement and she was not a signatory to this contract (SE-1A).

97. On December 20, 2012, Parent filed an Amended Hearing Request (Amendment) for Student's remaining claims seeking to remove the issue of Parent's reimbursement for

²¹ **VII. PROPOSED RESOLUTION OF THE PROBLEM:** 1.) Pentucket reimburse Parent in full for the IEE which cost \$3,600 and which documentation has already been provided to Pentucket." Parent's Hearing Request further sought funding for one year transition services at Landmark College as well as damages.

Student's independent educational evaluation as it had been settled. Parent thus believed that Pentucket would not object to amending the Hearing Request so as to enable Student to proceed on her remaining issues. Parent noted that since Student had reached the age of majority, the balance of the Hearing should proceed in Student's name and she sought amendment of the Hearing Request "to reflect the substitution of parties", while Parent would continue to appear as Student's representative. Parent clarified that since Student had begun attending Landmark College, the Hearing Request should be further amended to reflect Student's request for reimbursement and prospective funding of the Landmark program inclusive of "transportation, room, board, supplies, books, etc." The timing of the Hearing would determine whether Parent would be the individual to be reimbursed (SE-2A). As such, Parent noted,

5.) Depending on whether a decision reaches the conclusion as requested, the timing of that decision would determine whom payment would need to be directed to as well as the amounts to be paid so we are also requesting Joinder of Mother since Mother is financially responsible for Student until she is emancipated according to Massachusetts law; and if prospective payment is determined to be appropriate, then Landmark College would also need to be joined in order to facilitate fashioning appropriate relief in accordance with the BSEA hearing rule I(J)²² (SE-2A).

98. Parent did not forward a copy of the December 20, 2012 Amendment to Attorney Brunt (SE-2A; Brunt). Upon learning of the letter and Parent's intentions, Attorney Brunt testified that she became quite surprised and very frustrated because her understanding as per the Settlement Agreement was that Parent's case regarding Student was then closed (Brunt, 1st Hearing).

99. During the 2012- 2013 school year Student attended Landmark College. She now attends University of Massachusetts, Dartmouth. According to Father, she is struggling with college

²² This request to Join Parent and possibly Landmark College solely for purposes of payment was and continues to be unnecessary. Other relevant clauses in the Amendment read:

2- As [Student] has reached the age of majority since the original hearing request, in accordance with Massachusetts Special Education Regulations 603 CMR 28:02 (15), legal authority of the Parent shall transfer to the student when the student reaches 18 years of age, the balance of the hearing request should proceed in Student's name. While in Massachusetts this process is automatic, because neither Parent nor Student have received any notice regarding this transfer of legal authority, we are requesting the hearing request be amended to reflect the substitution of parties.

3- Additionally, this [Amendment] serves as written notice that [Student] has authorized Mother to appear on her behalf as Authorized Representative in accordance with [the] Standard Rules of Practice and Procedure 801 CMR 101(3)(a)(b).

4- The postponement(s) of the hearing date further requires us to amend the hearing request to reflect that the student has since begun placement [at] Landmark College and just completed her first semester. As a result, the hearing request should reflect that Student and Parent are now seeking retroactive reimbursement in addition to prospective funding of her program there and all related costs (transportation, room, board, supplies, books, etc.). Since this is not a new issue being brought, we do not believe it will prejudice Pentucket nor require new deadlines (SE-2A).

life and the demands of the courses she is taking (Father, 1st Hearing). Student is interested in the field of engineering and is currently taking math and science courses which also require laboratory participation several days a week. Owing to her college schedule, she was only available to participate in BSEA proceedings on a limited basis, for example, after 3:00 p.m. on Tuesdays, or all day on Fridays, which schedule was accommodated by the BSEA in setting the April 14, 2015 Pre-hearing Conference and the May 2015 Hearing.

CONCLUSIONS OF LAW:

Student's/ Parent's allegations are threefold: 1) that Pentucket violated its "child-find" mandate in failing to refer and find Student eligible; 2) that said failure resulted in Student's inability to make progress commensurate with her abilities thereby depriving her of a FAPE; and 3) that Pentucket's procedural violations (i.e., regarding child find and violations with respect to providing Parent procedural safeguards) were sufficiently egregious so as to result in a deprivation of FAPE, thereby entitling Student/ Parent to funding /reimbursement for her education at Landmark College as compensatory relief.

The Parties disagree that Student was eligible to receive special education services under the Individuals with Disabilities Education Act²³ (IDEA) and state law²⁴ starting in 2010. Student/ Parent further argue that because of Pentucket's failure to find Student eligible, Student failed to make effective progress/reasonable gains while enrolled in general education college preparatory and honors courses while in high school at Pentucket. Student/ Parent argue that as a result, Student is entitled to public funding/reimbursement for Student's 2012-2013 year at Landmark College.

Pentucket denies any violation of its "child find" responsibilities or its responsibility to provide Parent notices of procedural due process rights. Relying on the information available to the Team while Student was a school age child, Pentucket asserts that while Student may present with relative weaknesses in certain areas, she has never met the eligibility criteria to receive special education services and thus, was never denied a free, appropriate public education (FAPE)²⁵.

Lastly, since Student/ Parent carry the burden of persuasion consistent with *Schaffer v. Weast*, 126 S.Ct. 528 (2005), which requires them to prove their case by a preponderance of the evidence²⁶, and since neither Student or Parent appeared for either of the two Hearings held pursuant the remand, Pentucket: a) moved for summary judgment at the conclusion of the presentation of its case in chief²⁷; and b) reserved its right to argue failure to meet the burden of persuasion in any subsequent appeal or review of BSEA #12-8636 or BSEA #12-

²³ 20 USC 1400 *et seq.*

²⁴ MGL c. 71B.

²⁵ MGL c. 71B, §§1 (definition of FAPE), 2, 3.

²⁶ *Schaffer v. Weast*, 126 S.Ct. 528 (2005) places the burden of proof in an administrative hearing on the party seeking relief.

²⁷ Since this matter was remanded and is being adjudicated on the merits, Pentucket's Motion for Summary Judgment is DENIED.

8636 R. Since this matter was remanded to the BSEA for exhaustion, Pentucket's right to contest the burden of persuasion issue was reserved.

In rendering my decision, I rely on the facts recited in the Facts section of this Decision and incorporate them by reference. I have also taken administrative notice of Parent's May 2012 Hearing Request, information contained in the BSEA database, as well as the correspondence, orders and rulings issued in this case since its remand in January 2015 through the date of Hearing on September 9, 2015.

I further note for clarification purposes that Parent and Student were notified of the Hearing date and deadlines to submit exhibits and witness list via Orders and telephone calls,²⁸ but neither Student nor Parent, appeared at the September 9, 2015 , nor did they submit exhibits or witness lists five business days before the Hearing. Instead, Parent and Student have consistently challenged the authority of the Hearing Officer regarding framing of the issues and the determinations rendered via Rulings and Orders. Parent/ Student have consistently asserted that jurisdiction over the issues to be heard by the Hearing Officer rests with the Federal District Court Judge and not with the BSEA. As a result, as with the first scheduled Hearing in May 2015, Parent and Student chose not to participate in the September 2015 Hearing.

This Decision is therefore based on the evidence presented by Pentucket at both at Hearings, Parent's May 23, 2012 Hearing Request, Parent's subsequent submissions in 2012 which are relevant to her substantive issues, and the guidance provided by the Federal Court. Decision II adjudicates Student's/ Parent's challenges regarding eligibility, procedural misconduct and compensatory services, starting in 2010.

I find that Student/Parent failed to meet their burden of persuasion pursuant to *Shaffer* in regard to the substantive issues before me, and that the record supports a finding I favor of Pentucket. My reasoning follows:

I. Pentucket's alleged violation of its "child-find" mandate in failing to refer and find Student IDEA eligible:

In their Hearing Request²⁹ Student/ Parent asserted that Pentucket knew or should have known that Student was a "child with a disability" within the context of the IDEA and should have therefore been found eligible to receive special education services. Pentucket disputes that Student had an underlying disability that would have qualified for IDEA services.

The child find requirements of the IDEA and Massachusetts law are found at 20 U.S.C. 1412(a)(3) and M.G.L. c.71B.³⁰ To the extent that evidence regarding the district's child

²⁸ A BSEA staff also left telephonic messages for Parent and Student informing them that the Hearing was proceeding on May 1, 2015, as scheduled.

²⁹ Since neither Student nor Parent participated in either the Hearing in May or the September 2015 Hearings, their issues for Hearing and position is lifted from the original Hearing Request filed in May of 2012.

³⁰ See also 34 CFR 300.111(c) and (d).

find obligation were addressed in the first Decision in this matter issued after the May 2015 Hearing, those findings and discussions are hereby incorporated by reference and need not be reviewed again. Turning to the information pertaining to the period from 2010 through 2012, Mr. Jarvis', Mr. Seymour's and Mr. Tiano's testimony is persuasive that: a) Pentucket met the child find publication requirements; and b) that at no time did any teacher or service provider raise concern that Student was suspected of presenting with a disability within the meaning of the IDEA, or was unable to access the general education curriculum effectively without specialized instruction (Seymour, Tiano, Jarvis, Smith, McElaney).

Mr. Smith, Student's guidance counselor during her four years in high school, testified that while he was aware that Student had difficulty with homework completion and that her performance was linked to whether she was invested and interested in doing well, she did not require specialized instruction. He testified that Student advocated for herself and that she never raised academic or social-emotional concerns while in high school. Moreover, Student was even initially reluctant to participating in testing to determine eligibility (Smith).

Mr. Smith further testified about his communication with Student and Parent over the years regarding Student's placement in honors and college prep level courses (both of which are designed for students following the college track) and his opinion that Student's specific university preferences were not realistic given her grades (Smith).

The evidence is persuasive that until Parent referred Student for an evaluation in May of 2011, no teacher, administrator or service provider in Pentucket harbored any concerns regarding Student's inability to access the curriculum or make effective progress when she put effort into the task at hand (SEII-6; Smith, Tiano, McElaney).

The evidence shows that Parent referred Student for an evaluation in May of 2011, initially concerned about Student's grades and performance on the SATs *vis á vis* her acceptance into college. Once referred, Pentucket immediately proceeded to conduct a psychological evaluation, academic testing (including Connors rating scales and executive process clustering, and later a speech and language evaluation) as well as an observation of Student in her English class. Additionally, information was sought from Student's teachers regarding her performance.

The Educational Assessment Part A indicated that student was making effective progress across all areas in regular education. Her performance was linked to effort, investment and interest in the subject area, and her difficulties were mostly associated with her failure to complete homework. Student had passed all of her MCAS tests which she took without any accommodations (SEII-5). Her performance was consistent throughout her high school years and her progress was similar to that of her peers (SII-5).

Student's teachers raised no concerns regarding her memory, communication, abilities, participation or interpersonal skills in the Educational Assessment Part B (SEII-6). These assessments included comments that Student did well on her assignments when she turned them in, evidenced average abilities when she applied herself, was an active participant in class, and declining grades were largely the result of her failure to turn in homework (*Id.*).

The teachers' statements were consistent with Parent's view that Student did well in all subjects and that the only issue was homework completion as reported by her in the 2011 NESCA intake sheet (SEII-26).³¹

Mr. Gordon's psychological evaluation of Student demonstrated her strengths across the board. On the WAIS, Student's scores fell solidly within the average range or better in all subtests except for the processing speed, in which she scored within the Borderline range (SEII-7; SEII-7A; Gordon). Mr. Gordon opined that this was reflective of a relative weakness in Student's makeup, and of her learning style, but this weakness did not amount to a qualifying disability under the IDEA. He further opined that the result of his evaluation were consistent with other academic testing performed and with Student's cognitive profile as described by her teachers. He agreed with the October 2011 and February 2012 Team's findings of ineligibility (Gordon).

Ms. McElaney (who had conducted special education evaluations before becoming Pentucket's high school Team chair) discussed Ms. Bofanti-Brown's testing results.³² Student scored in the Average to Advanced ranges in all areas assessed by the WJ III (which had been requested to be performed by Parent), including reading, written language, academic knowledge and most of the math clusters (SEII-8). The only area in which she scored within the Limited to Average range was in the math fluency subtest, a timed test in which according to Ms. Bofanti-Brown, Student slowed down for accuracy. She completed 88 out of 160 possible math problems with 100% accuracy. Ms. Bofanti-Brown opined that without time constraints, Student would have scored in the Average to Advanced ranges (SEII-8). Student's total achievement score on this test fell in the 71st percentile which is an Average to Advanced score (*Id.*). Similarly, Student performed within the Average range in all areas included in the WJ III Executive Processes clusters (SEII-8). Ms. Bofanti-Brown's observation of Student during English class noted that she was attentive, invested, followed the instruction, complied with the teacher's demands and participated (SEII-11; SEII-11B).

According to Ms. Oliva, for the most part, Student performed within the Average, High Average and Above Average ranges in all speech and language evaluation tests, except for the rapid digit and rapid letter naming areas of the CTOPP in which she scored a 7, placing her in the below average range (average scores in this areas are those falling within the 8 to 12 range) (SEII-9; Oliva). Ms. Oliva testified that during the intake portion of her evaluation, when asked, Student reported having no concerns about her education. Ms. Oliva reported no concerns regarding articulation, social pragmatics or communication disorders (SEII-9; Oliva).

³¹ Question: "Do teachers have any concerns about the child's schoolwork or behavior?" Parent's answer: "Nope, except for homework completion. Seriously, [Student] is strong in every area equally" (SEII-26).

³² Ms. McElaney had discussed these results with Ms. Bofanti-Brown who has retired from Pentucket and was unavailable for Hearing because of a family situation (McElaney).

Ms. McElaney testified that Parent never shared the results of the Vanderbilt Assessments completed in 2011, which results were inconclusive in yielding a diagnosis of ADHD (SE-3R; SE-P in the 1st Hearing; McElaney).

Mr. Smith testified that Student's relative weaknesses were appropriately addressed through the DCAP which offered extra time on tests and quizzes, peer tutoring and weekly progress reports (SEII-21).

The totality of the documentary and testimonial evidence hence supports a finding that Student did not meet the eligibility requirements for special education.

The record reflects that Parent's initial concern regarding Student's eligibility was that Student receive extra time on tests because of her concerns regarding Student's performance on the PSAT and the SAT (McElaney). Ms. McElaney testified that at the end of the October 2011 Team meeting, she had asked Parent if she agreed with the Team's findings and Parent's response was that so long as Student were allowed extra time in her college boards, she was in agreement (McElaney). However, by letter dated November 11, 2011, Parent rejected the finding of ineligibility (SE-30; SEII-18; McElaney).

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 address the student's unique needs³³ in a way "reasonably calculated to confer a meaningful educational benefit"³⁴ to the student.³⁵ (Emphasis supplied).

³³ 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").

³⁴ See *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012) where the court explicitly adopted the meaningful benefit standard.

³⁵ *Sebastian M. v. King Philip Regional School Dist.*, 685 F.3d 79, 84 (1st Cir. 2012) ("the IEP must be custom-tailored to suit a particular child"); *Mr. I. ex rel L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1, 4-5, 20 (1st Cir. 2007) (stating that FAPE must include "specially designed instruction . . . [t]o address the unique needs of the child that result from the child's disability") (quoting 34 C.F.R. 300.39(b)(3)). See also *Lenn v. Portland School Committee*, 998 F.2d 1083 (1st 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 (1st 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 (1st 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.").

The key in the aforementioned requirements of the law is that the student is first and foremost be found to be eligible based on the information available to the Team at the time the Team considers a student's eligibility. As discussed *supra*, Student's Team responsibly reviewed the information available to it, none of which supported a finding of eligibility. As such, Student's/ Parent's claim that Student was eligible to receive special education services in May of 2010 or at any point thereafter is without merit.

II. Pentucket's failure resulted in Student's inability to make progress commensurate with her abilities thereby depriving her of a FAPE:

Contrary to Student's and Parent's assertions, the evidence overwhelmingly shows that Student was accessing the regular education curriculum effectively and was making effective progress commensurate with her abilities without the need for specialized instruction or services.

With minor exceptions which were ultimately addressed by the district through its DCAP, the result of all of the evaluations available to the Team at all times placed Student in the average, high average or above average ranges. Her only documented issue as per the evaluation results was in tasks demanding speed. Student passed the MCAS without accommodations, she achieved passing marks in honors and college prep courses where she was interested and invested, however had poor marks in areas of little interest and/ or where homework completion was a problem (SE-D). By the end of twelfth grade, Student had completed all of the necessary requirements for a high school diploma (Seymour, McElaney).

Most notably, the SAT scores between June 2011 and December 2011 show Student's improvement ultimately placing her in the 91st percentile for reading, the 70th percentile for math and the 93rd percentile for writing, when compared to the national scores for college bound seniors (SEII-23). Similarly, all of her scores fell above the median when compared to other college bound seniors in Massachusetts (reading 88th percentile, math 66th percentile and writing 90th percentile) (SEII-23). Clearly, in the sixth months between these two test administrations, Student had continued to access the regular education curriculum, acquired and refined her knowledge.

Student's scores on tests and in her courses are commensurate with her abilities and the level of investment and amount of effort she exerted. Her relative weaknesses were properly addressed through the DCAP and best teacher practices within general education. Since the record contains no basis to conclude that Student presented with a disability that required special education interventions, she was not entitled to specialized instruction or services, and consequently not entitled to FAPE. Therefore, it is axiomatic that no FAPE denial occurred.

III. Pentucket's procedural violations (i.e., regarding child find, parent's procedural safeguards) were sufficiently egregious to result in a deprivation

of FAPE thereby entitling Student/ Parent to funding /reimbursement for her education at Landmark College as compensatory relief:

Student/ Parent contend that Pentucket's procedural violations involve failure to meet the child find mandates and provided Parent/ Student procedural safeguards. Careful review of the evidence shows that Pentucket did not violate Student's or Parent's rights. I can find nothing credible in the record to support Student's/ Parent's contentions in this regard.

As discussed in detail above, the evidence shows that at no point prior to parent's May 2011 referral for evaluation or thereafter, any of Student's teachers or service providers raised any concern that Student presented with a disability.

Upon receiving Parent's request that Student be evaluated at the end of Student's eleventh grade, Pentucket properly forwarded a consent for evaluation form to Parent (containing the majority of the testing specifically requested by Parent), and proceeded to have competent, qualified professionals perform the evaluations within the timeframe required under the law.

Once all of the school-based evaluations were completed, Pentucket convened Student's Team within the timeframe mandated under the statute and included the necessary participants knowledgeable about Student and able to interpret the results of the evaluations performed by the district (and later Ms. Ayre). The evidence shows that the October 2011 team meeting was properly convened, both Parent and Student attended and were able to participate, ask questions and offer their input. Thereafter, Pentucket properly referred Parent's rejection of the ineligibility finding to DESE and the BSEA.

When Parent made the independent speech and language evaluation available to Pentucket, the district immediately convened the Team in February of 2012.³⁶ Pentucket was further prepared to timely review Student's neuropsychological evaluation in May of 2012 and when the meeting had to be canceled due to a power outage causing school closure Pentucket immediately offered Parent alternative dates to convene the team prior to Student's graduation. Parent did not confirm a date for convening the team to review this evaluation prior to Student's graduation.

Pentucket argues that once student graduated all of her procedural protections were extinguished. I however disagree. Since Pentucket was on notice and in receipt of Student's neuropsychological evaluation prior to Student's graduation it was technically responsible to convene the Team to review eligibility. In this regard, Pentucket violated Parent's and Student's procedural due process rights. Pentucket's violation however, does not amount to a denial of FAPE because, even if the evaluation had been reviewed, given the totality of the information available to Pentucket said evaluation did not support a finding of eligibility. In Dr. Roosa's evaluation Student scored within the average, high average and above average

³⁶ Issues regarding Parent's right to reimbursement regarding independent evaluations and any alleged procedural transgression have already been addressed in the Decision following the May 2015 Hearing and/ or in Parent's settlement agreement with Pentucket, and are therefore, not addressed here.

ranges consistent with Pentucket's initial evaluation. She never observed Student in Pentucket nor spoke with the staff therein. Student's progress, average and above average MCAS results and solid SAT scores (which she obtained without accommodations) are indicative of Student's ability to access the curriculum and make effective progress without the need for specialized instruction. Moreover, Student's relative weakness regarding processing speed was properly addressed through the district's DCAP. Dr. Roosa's conclusion that Student presented with a disability that required special education instruction and services to effectively address Student's neurological disability³⁷ is not credible and flies in the face of the totality of the credible evidence. Nothing in the record suggests that the type of interventions recommended by Dr. Roosa could not be addressed through general education interventions, and the record shows that indeed they were.

Even assuming *arguendo*, that Dr. Roosa's evaluation were to have merit regarding Student's entitlement to special education, this information was not available to the Team until shortly before Student's graduation, and it would have been newly discovered information that would have lacked any practical value for purposes of Student's education at Pentucket. It however, may be helpful for Student in college.³⁸

Pentucket is persuasive in its argument that as a matter of law a school district cannot be found liable for a child find violation unless the student is found to have a need for special education services. *D.G. v. Flour Buff Independent School District*, 59 IDELR 2 (5th Cir. 2012). Relying on 20 U.S.C. 1401(3)(A) the *D.G.* case stands for the proposition that in order to be eligible for special education the student must have, 1) a qualifying disability, and 2) as a result of the disability require special education. Since Student was never suspected by her teachers of having any disability, was able to make effective educational progress in regular education, passed all of her MCAS tests, obtained solid scores on her SATs, was observed and evaluated by competent professionals in Pentucket, and was found not to be eligible to receive special education services, Pentucket is persuasive that as a matter of law it did not violate its child find requirement as to Student.

Furthermore, the evidence is convincing that between 2003 and 2012, Parent received several copies of the Procedural Safeguards from Pentucket. Procedural Safeguards issued by Pentucket were consistent with those found on the DESE website, which document satisfies the requirements of the law (Tiano, Jarvis, McElaney). Parent's self-initiated referral of Student for a special education evaluation with the attached copy of a district issued consent form, rejection of finding of ineligibility, and request for hearing are clear indications of her knowledge of the IDEA process and parental and student rights.

³⁷ 603 CMR 28.02(e) defines Neurological Impairment as

The capacity of them nervous system is limited or impaired with difficulties exhibited in one or more of the following areas: the use of memory, the control and use of cognitive functioning, sensory and motor skills, speech, language, organizational skills, information processing, affect, social skills, or basic life functions. The term includes students who have received a traumatic brain injury.

³⁸ Student is currently attending the University of Massachusetts, Dartmouth, Massachusetts (Administrative Record; Father).

Parent and Student further contended that the team process in October of 2011 and February of 2012 were procedurally flawed because the specific documentation for eligibility determination did not meet the legal requirements set forth under the IDEA. Pentucket however, presented persuasive evidence regarding the referral, evaluation and Team process. Ms. McElaney testified about the Team's discussions regarding Student's observation and evaluation findings, and the use of eligibility charts at both Team meetings to determine eligibility. She further testified about Parent's and Student's participation (McElaney). Ultimately, the Team correctly found that Student did not meet any of the eligibility criteria³⁹ under the IDEA and that despite her relative weakness in processing speed, she was effectively accessing the regular education curriculum and making effective progress.

The Massachusetts special education law defines an eligible student as a

... A person aged three through 21 who has not attained a high school diploma or its equivalent, who has been determined by a team to have a disability(ies), and as a consequence is unable to progress effectively in the general education program without specially designed instruction or is unable to access the general curriculum without a related service. An eligible student shall have the right to receive special education and any related services that are necessary for the student to benefit from special education or that are necessary for the student to access the general curriculum. In determining eligibility, the school district must thoroughly evaluate and provide a narrative description of the student's educational and developmental potential. 603 CMR 28. 02(9).

The evidence is persuasive that Pentucket complied with its mandate pursuant to federal and state law. Furthermore, the record lacks support for Parent's/ Student's contention that Student was a child with a disability within the meaning of the federal and Massachusetts special education law.

Lastly, Pentucket is correct that with the exception of convening the Team to consider Dr. Roosa's evaluation, Student's completion of her high school requirements and acceptance of her diploma on or about June 2, 2012, extinguished her special education claims by operation of law. 34 CFR 300.102(a)(3). Based on the overwhelming weight of the evidence, I find that Student was not entitled to, and therefore not denied a FAPE. As such, there is no reason to extend Student's IDEA eligibility beyond high school. Student is not entitled to funding/ reimbursement for the 2012-2013 school year at Landmark College. The evidence is persuasive that Student/ Parent have not met the burden of persuasion pursuant to *Shaffer*, thus, her compensatory education claim is DENIED.

³⁹ 34 CFR 300.8(a)(1) states the 13 possible qualifying disability categories, those being: intellectual disability, hearing impairment, a speech or language impairment, visual impairment, serious emotional disturbance, orthopedic impairment, autism, traumatic brain injury or other health impairment, a specific learning disability, deafness, blindness or multiple disabilities. The Federal regulations further required that as a result of one or more of the aforementioned disabilities student requires special education and or related services. 34 CFR 300.8(a)(1).

ORDER:

1. The record does not support a finding of procedural due process violations by Pentucket in the instant case.
2. Pentucket's denial of special education eligibility for Student is supported by the record.
3. Student's request for compensatory relief in the form of funding of Landmark College for the 2012-2013 school year is DENIED.

By the Hearing Officer,

Rosa I. Figueroa

Dated: October 23, 2015

October 23, 2015

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

PENTUCKET REGIONAL SCHOOL DISTRICT

BSEA # 12-8636 R

DECISION II

BEFORE

**ROSA I. FIGUEROA
HEARING OFFICER**

**STUDENT/ PARENT, PRO-SE
PAIGE TOBIN, ESQ., ATTORNEY FOR
PENTUCKET REGIONAL SCHOOL DISTRICT**