

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

In Re: Student v.
Lincoln Public Schools

BSEA# 2007623

DECISION

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

The BSEA received Parents' Hearing Request on February 14, 2020 and Lincoln Public Schools' Response to the Hearing Request was received on February 21, 2020. Lincoln filed a Sufficiency Challenge and a Motion for Summary Judgment on the basis that Parents were seeking relief beyond the jurisdiction of the BSEA. Several substantive Rulings were issued prior to Hearing and Parents Amended their Hearing Request on May 11, 2020¹ seeking public funding for their unilateral placement of Student at the Carroll School. Lincoln Public Schools filed its response to the Amended Hearing Request on March 18, 2020.

This matter was administratively reassigned to Hearing Officer Rosa I. Figueroa on August 19, 2020. The Hearing was held remotely via Zoom on August 24 and 25, 2020, before Hearing Officer Rosa Figueroa. Those present for all or part of the proceedings were:

Father	
Mother	
Glens Colman	Director of Curriculum, Carroll Lower School
Barton Herskovitz, M.D.	Student's psychiatrist
Mary Ellen Sowyrda, Esq.	Attorney for Lincoln Public Schools
Mary Emmons	Administrator for Student Services, Lincoln Public Schools
Nancy J. Cohen	School Psychologist, Lincoln Public Schools
Carroll Kusintz	Stenographer, Doris O. Wong Associates

The official record of the hearing consists of documents submitted by Parents marked as exhibits PE-1 to PE-24; PE-26, PE-36 to PE-88² except that only the first part of PE-49 (the email) was admitted and the rest of the exhibit was excluded, and Lincoln Public Schools' (Lincoln's) documents marked as exhibits SE-1 through SE-9 and SE-11 to SE-19³; recorded oral testimony, and written closing arguments. Following granting of the Parties' August 25,

¹ PE-88.

² PE-25 was withdrawn by Parents via email dated August 23, 2020.

2020 request to continue the case to submit written closing arguments, the record closed on September 11, 2020 upon receipt of said written closing arguments.

ISSUES FOR HEARING:

1. Whether Lincoln Public Schools’ proposed IEP for the 2019-2020 school year, calling for Student’s fifth grade placement at the Landmark School, offered Student a free, appropriate public education (FAPE) in the least restrictive environment and was capable of meeting Student’s needs; if not,
2. Whether Parents are entitled to reimbursement for their unilateral placement of Student at the Carroll School for the 2019-2020 school year.

POSITIONS OF THE PARTIES:

Parents’ Position:

Parents assert that Student is eligible to receive special education services in an out-of-district private placement because of his profound language-based learning disabilities. According to them, Student also presents with significant social emotional challenges that impact his ability to transition well into new situations. Over the past five years, Student has received educational services at the Carroll School (Carroll) where, according to Parents, he has met with educational success. Lincoln funded the first four years and Parents funded the fifth.

Parents concede that while Landmark is a Massachusetts Department of Elementary and Secondary Education (DESE) approved school that offers language-based programming, it is, according to Parents, inappropriate for Student because it would not meet his social/emotional or academic needs. Parents argue that the pervasiveness and profound severity of Student’s disability and the mental health impact of moving to another school, in addition to the travel distance, would be of such magnitude that Student would not be able to access his education or make effective progress. Parents are adamant that Landmark thus is inappropriate for Student because it cannot meet his unique needs and circumstances.

As such, Parents argue that it is crucial for Student to remain at Carroll in to continue to meet with educational success. Moreover, Parents argue that Carroll is the only school that can meet Student’s needs at the present time. Ideally, Parents would like Student to remain at Carroll through his eighth grade year before he transitions to any other school.

Parents seek reimbursement for their unilateral placement of Student at Carroll for the 2019-2020 school year.

Lincoln’s Position:

³ School Exhibit 19 is a Stipulation between the Parties in reference to Landmark. SE-10 was withdrawn by Lincoln on the first day of Hearing.

Lincoln does not dispute Student's entitlement to special education or to an out-of-district private school that offers language-based programming. Lincoln disputes Parents' assertion that only Carroll can meet Student's needs, noting that Student has been accepted to Landmark and that all of his areas of need can be appropriately met at Landmark.

Lincoln notes that in the past it was able to meet Parents' request for placement of Student at Carroll because no other appropriate approved program was available for Student. That however, was not the case during the 2019-2020 school year when Landmark offered Student admission. Lincoln states that at Parents' request it attempted to obtain Individual Student Program approval for Carroll through DESE, but Carroll failed to complete the approval process. Lincoln asserts that Landmark is not only a DESE approved school but, more importantly, that Student's needs can be appropriately met at Landmark and that Landmark was and remains available for Student. As such, Lincoln refused Parents' request for reimbursement of Carroll tuition for the 2019-2020 school year.

STIPULATION:

The Parties have stipulated that Landmark is a DESE approved special education school that offers language-based programming to students with language-based learning disabilities (SE-19).

FINDINGS OF FACT:

1. Student is a ten-year-old resident of Lincoln who has attended Carroll for the past five years. He is eligible to receive special education services under a communication category (SE-2). He has been described as kind, charming, and cooperative, he has a wonderful sense of humor, is extremely empathetic to peers and has a very open personality (Father, Mother, Cohen, Colman). Student is also smart and very resilient (Mother). He loves sports and is very artistic (Colman, Mother, Father).
2. Student has been diagnosed with a severe language-based learning disability, including dyslexia and Attention Deficit Hyperactivity Disorder (ADHD) which requires comprehensive special education and language-based instruction with delivery of services in small groups with like peers (PE-3; SE-1; SE-6). He is aware of his disability and worries about its impact on his future, as he has expressed a desire to attend college and have a good job (Father, Mother). Over the years he has made slow, but steady progress in his special education programs at Carroll (PE-20; PE-37; Father).
3. According to Parents, Student's Kindergarten year in Lincoln was a difficult one. They initially accepted the IEP proposed by Lincoln for in-district programming. After receiving the results of Dr. Ann Brochin's neuropsychological evaluation of Student, dissatisfied with his progress and concerned about his academic, social and emotional well-being, Parents rejected Student's IEP in April of 2015 (PE-2; PE-3; PE-4; PE-5; PE-6; PE-7; PE-8; PE-9; PE-10; PE-11; PE-14; PE-15; PE-16). By then, Student had been

seeing Lisa St. Mary, LICSW (since January 2015) to address emotional distress and school related anxiety. Ms. St. Mary diagnosed Student with Adjustment Disorder with Anxiety (PE-12). Dr. Brochin observed Student in his Kindergarten placement in Lincoln and recommended that he participate in a small group, language-based program with like peers across all areas of the curriculum, and that he receive specific interventions to remediate his skills (PE-4; PE-13). On August 14, 2015, Parents informed Lincoln of their unilateral placement of Student at Carroll and of their intention to seek public funding for said placement (PE-17; PE-18). Eventually, the Parties resolved their disagreement for that year (PE-20; PE-21; PE-22; PE-23; PE-24; PE-36).

4. Mary Emmons, Lincoln's Administrator of Student Services, testified that Lincoln funded Student's placement at Carroll during first, second, third and fourth grades (PE-36; PE-39; PE-40; Emmons). During the first three years, Carroll was a Massachusetts DESE approved school, but later, Carroll chose not to pursue DESE approval and has not sought or received it again since September of 2018 (the beginning of Student's fourth grade) (PE-53). DESE approval is required for public placement of special needs students in Massachusetts because of the commitment to comply with federal and state mandates that assure the provision of FAPE (PE-75; Emmons).
5. Dr. Ann Brochin, pediatric neuropsychologist, evaluated Student on three occasions over the past several years. She conducted her second evaluation of Student in January and February of 2018 at Parents' request. She has also observed Student at Carroll (PE-41; Father).
6. Dr. Brochin administered the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V), selected subtests of the Wide Range Assessment of Memory and Learning-Second Edition (WRAML2), Boston Naming Test-Second Edition, selected subtests of the Comprehensive Test of Phonological Processing-Second Edition, Rey Complex Figure Test, selected subtests of the Delis Kaplan Executive Function System, selected subtests of the Wechsler Individual Achievement Test-Third Edition (WIAT-III), Gray Oral Reading Test-Fifth Edition (GORT-V), Form B, Child Behavior Checklist, Teacher Report Form, and the Incomplete Sentence for School Children. She also conducted an interview and reviewed records, including a review of systems/medical history (PE-41).
7. Dr. Brochin concluded that Student presented with a significant, pervasive, language-based learning disability, including double deficit dyslexia in the severe to profound range. He demonstrated deficits in reading, writing, oral expressive and receptive language skills. He also continued to evidence inattention and executive functioning deficits consistent with a diagnosis of ADHD. She noted that Student had evidenced difficulties following instructions and managing classroom routines since Kindergarten, and that being aware of his differences, he remained vulnerable to deterioration of his emotional functioning in academic settings where he was misunderstood or unable to achieve (PE-41; PE-46).

8. During her observation at Carroll, Dr. Brochin found that Student was the lowest reading student among his third grade cohort, and noted that Student's deficits impacted all areas of his life, across all settings. Student was also noted to have difficulties with directionality, including not knowing where the bathroom was or where he should be. Father testified that these difficulties were observed when Student was playing sports; he did not always know where he was supposed to be on the field (Father).
9. In March of 2018, Dr. Brochin referred Student to a psychiatrist to assess the need for/benefits of medication. She also recommended Student's placement in a full-time, specialized language-based program that offered aggressive reading and writing interventions (PE-41; PE-46; PE-47; Father, Herskovitz).
10. Sometime between March and June 2018, Student started seeing Dr. Barton Herskovitz. Dr. Herskovitz is a board certified psychiatrist who has been treating Student for ADHD, and has been managing his medication. Once on medication, Student's attention and comprehension improved and he was better able to access his education (Colman, Father, Herskovitz).
11. Dr. Herskovitz also addressed Student's emotional issues by offering cognitive behavioral therapy strategies. These strategies have helped Student manage stress and anxiety effectively. He noted that in the beginning, Student was quiet, but after two or three sessions he was able to get through to Student. He noted that things fell into place during Student's fourth grade and he began to have fewer meltdowns and struggles (Herskovitz).
12. In March of 2018, Lincoln conducted Student's three-year re-evaluation. Student was in third grade. The educational evaluation conducted by Alechia Torchia, M.Ed., W.D.P. Special Education Teacher, showed that Student was able to remain focused and access strategies to complete the tasks.⁴ He however, performed below expectations and demonstrated significant weaknesses in all areas of literacy, including foundational skills. He showed weaknesses in orthographic processing per the Kaufman Test of Educational Achievement, Third Edition (KTEA-3) with significant weaknesses in his ability to decode and encode fluently and accurately. Student's challenges with reading accuracy and vocabulary impacted his comprehension. According to Ms. Torchia, Student evidenced deficits in both listening and reading comprehension. Deficits were also noted in Student's written language (PE-45; SE-7).
13. Ms. Torchia noted that Student required

...daily small group specialized instruction in phonemic analysis, decoding, encoding, automaticity, fluency and comprehension. The approach should be explicit, systematic and multisensory to develop accuracy and automaticity at the sound and word level,

⁴ Selection of instruments for this evaluation was impacted by Parents' private neuropsychological evaluation conducted by Dr. Brochin, a month earlier (PE-42).

along with a scaffold approach to generalize taught skills in reading and spelling at the word and sentence levels. These challenges will impact him across the curriculum, thus the impact should be considered for all academic subjects (PE-45; SE-7).

14. Ms. Torchia concluded that Student required “daily small group specialized instruction in phonemic analysis, decoding, encoding, automaticity, fluency and comprehension” in all academic subjects, through a systematic, explicit, multisensory, scaffolded approach, so that Student could “develop accuracy and automaticity at the sound and word level” (PE-45; SE-7).
15. Student’s Lincoln Speech and Language Evaluation was conducted by Laurey G. Mauck, SLP in March of 2018 (PE-43; SE-8). She noted that Student demonstrated quiet inattention with some reduced self-monitoring during the evaluation, likely resulting in his missing key information when questions were presented orally. He however, was able to advocate for himself by asking for repetition, prompts and clarification, which he received in addition to being provided with short breaks, additional time and reminders of the test directions. Ms. Mauck noted that Student’s articulation skills and single word receptive and expressive vocabulary skills were within age-level expectations. Weaknesses were noted with receptive and expressive language skills, responding to lengthy verbally presented questions, answering questions that require critical thinking and making inferences, and in his efficiency recalling word labels. He also had difficulty formulating grammatically correct sentences which contain correct, specific vocabulary during open ended tasks. Ms. Mauck concluded that Student had a disability in the area of communication and recommended numerous classroom accommodations (PE-43; SE-8).
16. Lincoln’s psychological evaluation was conducted by Anique Lebel, MA, CAGS in March of 2018. Ms. Lebel conducted a classroom observation of Student at Carroll, noting that he benefitted from multisensory exposure and review of words and letter pattern sounds, as he evidenced “difficulty with identifying rhyming patterns with explicit teaching”. In the small group setting he was able to maintain attention and was an active participant during classroom discussions (PE-44; SE-9).
17. Ms. Lebel noted mild concerns regarding hyperactivity and attention in the home setting per the behavioral rating scales completed by Parent, while higher-order executive functioning skills were identified in the school setting in areas involving Student’s ability to “initiate, hold information in mind (working memory), plan, organize and self-monitor” (SE-9). She made recommendations to help Student succeed in the classroom setting, consistent with those previously made by other evaluators (PE-44; SE-9).
18. In preparation for Student’s fourth grade, Lincoln forwarded referral packets to Learning Prep School (Learning Prep) and Landmark on behalf of Student. Student was accepted to Learning Prep, but Landmark had no spaces available and denied him admission (PE-50; PE-51; PE-52; Emmons).

19. Student's Team met on or about April 12, 2018 to discuss the result of the evaluations and plan for Student's fourth grade. The Team agreed with the recommendations for continued language-based instruction in an out of district setting, and finding Learning Prep inappropriate for Student, Lincoln filed an application for Individual Student Program approval of Carroll with DESE for the 2018-2019 IEP period/ school year (PE-46; PE-47; PE-48; PE-50; PE-54). Approval was granted and Student was placed at Carroll by Lincoln (PE-48; PE-54; Emmons). The Memorandum of Agreement between the Parties specifically notes that funding is for one year only and includes a waiver of placement pending appeal (stay-put) after fourth grade; stay-put would be a DESE approved private day program (PE-53).
20. Via email dated May 14, 2018, Parents' noted their acceptance of Lincoln's proposed IEP calling for programming at an out-of-district private day school (PE-49). Parents stated their preference for Student's continued placement at Carroll, and declined consent to any specific school, since one had not yet been identified in the IEP (*Id.*). On September 20, 2018, Parents accepted the proposed placement at Carroll for the period from September 4, 2018 to June 14, 2019 (PE-48).
21. Via a Memorandum of Understanding dated August 31, 2018, Parent and Lincoln agreed that Lincoln would fund Student's placement at Carroll during the 2018-2019 school year in exchange for which Parents agreed to comply with the application process to Landmark, which process was completed during in the winter of 2018-2019 (SE-17).
22. By all accounts, Student made effective progress (academic and social) during his fourth grade at Carroll, although overall his learning pace has been slow (SE-6; Father, Herskovitz, Colman). Student's progress appeared to be impacted by social/emotional issues which ameliorated during Student's fourth grade due to the support provided at Carroll, his increased comfort level and the structure offered (Colman, Herskovitz).
23. While at Carroll, Student did not receive direct speech and language services as recommended by Student's Team during fourth and fifth grades. At Carroll, academic instruction is delivered in accordance with the Common Core Standards (CCS) used in conjunction with the Track My Progress Assessments based on the CCS (Colman).
24. Carroll is a private school that offers language-based programming. For the past two years it has not met with the Massachusetts DESE approval. Carroll does not follow District issued IEPs and is not subject to monitoring contracts. Instead, Carroll develops internal action plans for students and the staff meets with parents at least four times per year to discuss students' needs and progress. Additionally, students are given an annual assessment.⁵ Carroll currently serves 430 students on three campuses. The teachers and staff are trained in Orton-Gillingham and Carroll is an Orton-Gillingham Academy accredited instructional site (Colman). The record lacks information as to whether any of

⁵ The annual assessment was not given during the 2019-2020 school year owing to the COVID-19 state health emergency school closures and the difficulties that remote learning posed (Colman).

Student's fourth and fifth grade teachers at Carroll possess certification in moderate special needs (Colman).

25. Student participated in Landmark's admission screening Test on February 25, 2019 (PE-55).

26. On February 26, 2019, Landmark communicated Student's acceptance to its program for fifth grade, academic year 2019-2020⁶ (PE-56; SE-2; SE-17). The letter noted Landmark's confidence that it could provide Student with the

...tools necessary to help [Student] develop his reading and writing skills to a level more commensurate with these abilities. Through small classes and a daily one-to-one tutorial [Student's] program will emphasize the development and improvement of basic language skills as well as independent learning strategies and study skills. Given the structure and support of our program, together with [Student's] commitment and hard work, I am sure he soon will experience success and increased self-confidence here at Landmark (SE-1).

27. Landmark is a DESE approved special education school located in Beverly, Massachusetts, that offers language-based programming to students with average cognitive abilities, through small group and individual instruction in language arts (including reading, spelling and vocabulary), oral expression, literature, science, social studies and mathematics. Landmark offers individual and group counseling to its students (PE-19; PE-69; Emmons). In addition to formal academic instruction, Landmark offers a variety of extra-curricular activities, including numerous sports (SE-19; Emmons). All of these would be available to Student (Emmons).

28. As a Massachusetts DESE approved school, Landmark follows and implements students' IEPs, completes progress reports, allows monitoring by the sending school district through announced and unannounced visits, follows special education regulations and the district's monitoring contracts. Its staff attends IEP meetings, monitors and updates goals and objectives, conducts pre- and post-assessment testing, and works collaboratively with parents and districts (PE-55; SE-19; Emmons).

29. Landmark is located 37 miles away from Student's home in Lincoln, an approximately fifty-two minutes ride with light/normal traffic, and closer to an hour on days with heavy traffic. On occasion, the commute may be longer than an hour due to inclement weather conditions or accidents (PE-86; SE-5; SE-17; Emmons, Father).

30. Ms. Emmons explained that 603 CMR 28.06(8)(a) requires that Teams consider and approve any transportation arrangements that may result in a student spending more than an hour on transportation each way, which Student's Team did when it met and proposed

⁶ On February 27, 2019 Landmark communicated its preliminary acceptance via email (SE-16).

placement at Landmark on or about March of 2019 and again in March of 2020 (Emmons).

31. At Parents' request Dr. Brochin performed a neuropsychological consultation Student on March 3, 2019. As part of her evaluation, she administered the following educational and academic assessments: selected subtests of the Wechsler Individual Achievement Test- Third Edition (WIAT III) and the Gray Oral Reading Test- Fifth edition (GORT-5) Form B. Dr. Brochin conducted a record review and interviews (PE-57). She noted that Student had worked "incredibly hard" during testing and despite having demonstrated improvement, Student's overall scores fell within the below average range (PE-57; SE-13).
32. On the WIAT III Student obtained the following standard scores (with a mean of 100 and standard deviation of 15): Word Reading- 82 (65)⁷; Pseudoword Decoding- 103 (81); Numerical Operations- 87 (78); Math fluency: Addition- 85 (72), Subtraction- 84 (76), Multiplication- 73 (N/A); Sentence Combining- 85 (77); Sentence Building: 71 (70); Essay Composition: word Count 103 (80), Theme Development and Text Organization 70 (86), and Spelling 76 (75) (PE-57).
33. Dr. Brochin noted that Student "required considerable time to execute all tasks of reading, writing and math" and retried items multiple times. He was observed to put forth maximum effort while attempting to access skills and information he had learned. Student's performance on reading achievement measures showed considerable improvement since his previous evaluation a year earlier, scoring one standard deviation higher and falling within the average range (PE-57; SE-13). Student's arithmetic scores fell within the below average range as he continued to show profound reduced fact fluency. His written skills scores also fell within the below average range and his abilities on less-structured measures were profoundly reduced and contained numerous spelling errors. When asked to write about a subject of interest, his scores for the number of words written fell within the average range despite writing a 77 word run-on sentence with only one capitalization at the beginning of the sentence. His score on essay organization and development was profoundly reduced and he evidenced severe impairments in spelling/ encoding skills (5th percentile) with errors reflecting a lack of mastery of spelling rules and basic sound/symbol correspondences (PE-57; SE- 13).
34. The GORT-5 was administered to assess Student's ability to read connected text. Student's scores on this test were a standard deviation higher than the scores earned in the previous year's evaluation: Rate SS 4 (previously 1), Accuracy SS 6 (previously 2), Fluency SS 5 (previously 2), and Comprehension SS 6 (previously 3) (PE-57; SE-13). Despite the improvements, Student's scores, falling within the below average range, continued to show profound weaknesses in rate, accuracy and fluency making it difficult for him to comprehend what he read (PE-57; SE-13).

⁷ The numbers appearing in parenthesis reflect Student's 2018 scores on the same measures.

35. Dr. Brochin noted that while Student had improved during fourth grade, he had struggled a great deal to make gains. Student reported feeling happy at Carroll where he had friends and felt understood by his teachers; the idea of changing schools made him visibly uncomfortable (PE-57). Dr. Brochin opined that,

...given [Student's] demonstrated progress on standardized measures of academic achievement, the proximity of his school to his home, and his comfort and exceptional adjustment to his learning environment, it is recommended that he continue to be placed at Carroll (PE-57).

36. Student's Team convened on March 26, 2019, for the annual review. This meeting resulted in Lincoln offering Student placement at Landmark for the period from March 26, 2019 to March 25, 2020, consistent with 603 CMR 28.06(3)(d). Most of this IEP covered Student's fifth grade (PE-58; PE-59; SE-2). Landmark would also comply with the requirements of 603 CMR 28.06(3)(f) (PE-75).

37. The March 26, 2019 to March 25, 2020 IEP notes Student's

...reduced ability to process, recall, and retain verbally presented information, and his difficulty with conveying his ideas clearly and concisely affect his ability to access and participate in grade-level curriculum instruction across the school day. [Student's] significant deficits in phonemic analysis, decoding, encoding, automaticity, fluency and comprehension impact his literacy across all academic subjects. Attention and executive functioning weaknesses impact his organization of information for learning and attention to task (SE-2).

38. This IEP contains goals to address receptive and expressive language, decoding/encoding/fluency, reading comprehension, written language and mathematics. The Service Delivery Grid calls for substantially separate instruction for speech and language, science, social studies, decoding/encoding/comprehension, written language and mathematics (PE-59; SE-2). The Team discussed the potential school transition impact on Student's social/ emotional needs and also discussed the impact of traveling from Lincoln to Beverly, concluding that any impact would be minimal (PE-59; SE-17).

39. On or about April 3, 2019, Parents accept the proposed IEP and placement at Landmark. Lincoln received Parents' acceptance of the IEP and placement on April 10, 2019 (PE-59; PE-71). Later, Parents declined the proposed placement at Landmark in favor of continuing Student's placement at Carroll (PE-61; PE-62; PE-69; PE-70; SE-2; SE-3; Father; Emmons).

40. On April 10, 2019, Lincoln received a letter from, Dr. Herskovitz, dated April 1, 2019 (PE-60; SE-4).

41. Dr. Herskovitz testified that between 2018 and August of 2020, he has seen Student approximately 10 to 12 times for half-hour to one hour sessions, every four months or so (although at times it was monthly) (Herskovitz).

In 2018 Dr. Herskovitz met with Student once in April, May, June and in mid-December 2018. Prior to writing the April 2019 letter, he had last seen Student in mid-December 2018. He testified that of the nine of the 12 sessions were in person and three consults were via Zoom.

42. Dr. Herskovitz' April 2019 letter noted that Student had made good progress during the previous 10 months, demonstrating less anger, anxiety and having fewer melt-downs in the home (PE-60; SE-4). According to Dr. Herskovitz, this was a significant accomplishment given the severity of Student's special education needs. Dr. Herskovitz attributed Student's growth and self-confidence to a combination of ADHD medication and his program at Carroll. Dr. Herskovitz further noted that

There is no clinical reason for [Student] to change schools at this time. In fact, it would undoubtedly be detrimental to his mental health and to his progress to have to change schools, have to make new friends, and have to commute long distances every day. All of these stresses would undoubtedly be deleterious to [Student's] emotional state and would undermine further growth for a significant period (PE-60; SE-4).

43. Dr. Herskovitz testified that a change of schools in 2019 would have been harmful to Student. Referring to his letter of April 1, 2019, he testified that he

...felt [it] was important when [he] wrote the letter – because at that point [Student had] a pretty good year with a lot of changes – was that he's really, in my view, a very fragile kid. The number of difficulties he has are really Promethean. He has working memory issues, he has trouble understanding language, he has trouble sort of understanding how the world works, as well as dyslexia (Herskovitz).

44. Dr. further noted that Student was really amazing at making a go of things and that Student's progress comes at a great cost as it takes him a great deal of energy and his "flexibility to deal with new challenges is quite limited". He opined that Student does best when all of his needs are met; otherwise he would be at risk of becoming symptomatic. He opined that having to get used to a new school, friends and routines, while traveling far for his education, and not being able to do sports, would place Student at risk for becoming very stressed, symptomatic and unhappy (Herskovitz).

45. Dr. Herskovitz opined that sport team participation contributed to Student's self-esteem as it made him feel competent. Thus, it would be important for Student to be able to

continue to participate in his sports teams (Herskovitz). Dr. recognized that while Student had met with educational success in 2019, life was still a daily struggle and he remained vulnerable (Herskovitz).

46. At Hearing Dr. Herskovitz agreed that Student's mental/emotional difficulties do not rise to a clinical level. Student has never required psychiatric hospitalization.
47. Dr. Herskovitz testified that Student no longer requires therapy to deal with stress and that counseling services would be of limited value to Student because of his mental profile and his difficulties trusting people. He testified that Student is strong willed and tends to mask his feelings pretending that everything is well. Because of his difficulty trusting people and discussing his true feelings. Dr. opined that counseling would be of limited value and that a transition to Landmark would make Student have to focus on learning about his new environment and structure, amidst new relationships taking time away from his education.
48. Dr. Herskovitz is neither an educator nor a psychologist and his knowledge of Landmark is limited, acquired through other patients who attended said school. He has never visited Landmark or Carroll (Herskovitz).
49. Upon receiving Dr. Herskovitz' letter, Lincoln sought Parents' consent to have Nancy Cohen, School Psychologist, conduct a psychological evaluation of Student to assess his then current social/emotional development (PE-73; PE-74; SE-5; SE-6; Emmons, Cohen). Parents consented to the evaluation on June 20, 2019 (PE-73; SE-5). However, on the date of the evaluation (July 2, 2019), Mother told the evaluator that she was very reluctant about having Student undergo testing. Student was upset about being at the Smith School in Lincoln and having to be tested, although he was cooperative during the evaluation (PE-74; SE-6; Cohen).
50. Ms. Cohen conducted a review of Student's record, conducted a student interview and administered the Behavior Assessment System for Children 3(BASC-3)- Parent and Self Reports, the Kinetic Family Drawing, Sentence Completion Test, the Thematic Apperception Test (TAT)- select cards and Three Wishes Test, which Student stated were: to stay at Carroll, not keep going to Lincoln for testing and keep learning more (PE-74; SE-6; Cohen).
51. Ms. Cohen noted that Student was doing well at Carroll, felt comfortable with the environment and desired to stay there because he felt understood. He is kind and has a good sense of humor. Outside of school Student has close family ties, is well-liked by his peers and is involved in several community sports including hockey, soccer, baseball and lacrosse. Student reported feeling good about himself and liking who he was. Student and his psychiatrist opined that he was doing well on the medication he takes during school days and no longer required regular therapy (PE-74; SE-6; Cohen).

52. Student did not report significant issues with “hyperactivity, inattention, depression, anxiety or somatization” on the BASC-3, suggesting “the absence of clinical syndromes associated with these scales” (SE-6; Cohen). Similarly, Mother’s responses to on the BASC-3 did not “indicate significant elevations for Externalizing Problems, Internalizing Problems, or Attention Problems scales.” Ms. Cohen concluded that Parent’s responses were also indicative of no clinically significant social-emotional issues. Mother indicated that Student possessed good coping skills and was resilient (PE-74; SE-6; Cohen).
53. Ms. Cohen concluded that Student’s presentation was not consistent with having an Emotional Disability (SE-6; Cohen).
54. Dr. Herskovitz, testified that he would have expected Student to do well on Lincoln’s psychological assessment because of Student’s desire to appear normal and the fact that the evaluation occurred during the summer when Student did not have the stresses of school (Herskovitz).
55. During the 2019-2020 school year, Lincoln and Parents spent considerable time attempting to support Student’s placement at Carroll, Parents’ preferred placement, and obtain approval for public funding of Carroll for Student through DESE (PE-62; PE-63; PE-64; PE-65; PE-66; PE-67; PE-68; PE-72; PE-75; PE-76; PE-77; PE-78).
56. On or about July 22, 2019, Mary Emmons, Lincoln’s Administrator for Student Services, filed a 28M/3 Form, Notification of Intent to Seek Approval for Individual Student Program (ISP/individual pricing) with DESE pursuant to 603 CMR 28.06⁸(3)(e)(4) and accompanying supporting documents⁹ (PE-75; PE-76; PE-77; PE-84; SE-4; SE-18). The justification section of the document stated

Initial request:

- 1) List what Massachusetts approved special education schools were first considered and
- 2) Why the Team determined the unapproved program to be the appropriate educational setting for this student

[Student] is currently a 4th grade student who has attended the Carroll School since 1st grade (4 years). He started school at the time the Carroll School was an approved program. The district has pursued approved programs as mandated after the Carroll School discontinued their DESE approved Private school status (2028-2020). [Student] has been accepted to the Landmark School, an

⁸ 603 CMR 28.06(3) et seq. cover the Massachusetts DESE requirements when school districts make out-of-district placements at approved and ISP approved schools. Pertinent sections are discussed later in the Conclusions portion of this Decision.

⁹ Attached was an Addendum offering a description of Carroll School, Dr. Herskovitz’ April 1, 2019 letter supporting continued placement of Student at Carroll, a blank Out of District Monitoring Report, unsigned contract and monitoring plan, and other supporting information (PE-75; SE-4).

approved program that can meet his educational needs. In addition, parents have signed consent to send [Student] to Landmark and fully participated in the process of placement at an approved school.

After acceptance of the IEP placing [Student] at the Landmark School, his parents reached out to the district to request continued placement at the Carroll School due to concerns regarding the distance and the difficulty transitioning to a new school at this time in his education. [Student's] parents are requesting that the district seek approval to have him continue at the Carroll School for social-emotional and educational reasons. [Student's] outside psychiatrist, Dr. Barton S. Herskovitz, has written a letter to the district indicating that removing him [Student] from Carroll School would "undoubtedly be detrimental to his mental health and to his progress". He further states, "these stresses would undoubtedly be deleterious to [Student's] emotional state and would undermine further growth for a significant period" (PE-84; SE-4).

The certification portion of the 28M/3 Form notes that Carroll did not share licensure/certification as requested, preventing Lincoln from verifying the teachers' and service providers' credentials, and Carroll had not submitted "school committee approval to operate the lower school in Waltham, Massachusetts" (PE-75; PE-78; PE-84; SE-4).

57. One of the documents attached to Lincoln's 28M/3 Form included Carroll Special Education Administrator's (Stephen M. Wilkins) statement of assurances, noting that it was signed on July 1, 2020 "under protest and reserving all rights" (E-84; SE-4).
58. Lincoln and Carroll attempted to resolve the issues regarding the monitoring contract given that Carroll was no longer a DESE approved school (SE-14). Communication between Ms. Emmons and Deb McCarthy at Carroll School dated October 21, 2019 specifically inform Carroll that DESE could not move forward with Lincoln's request for public funding of Carroll without Carroll's completion of the OSD financial page with a signature. Similarly, Carroll had not yet signed the monitoring/contract form.¹⁰ Despite Lincoln's and DESE's numerous efforts between September 12, 2019 and October 22, 2019, Carroll failed to submit the necessary forms and did not complete/signed the monitoring contract (Emmons).
59. In a communication dated September 24, 2019 to Ms. Emmons, Carroll informed Lincoln of the contractual terms by which it would agree to abide if it received public funding for Student's placement (PE-78). Some of the salient aspects of what Carroll offered to do included the following: the core academic program and philosophy of Carroll would dictate Student's educational program; progress reports would be provided to Lincoln when reports were given to Parents; site visits by DESE and Lincoln would be allowed

¹⁰ Parents were copied on this communication.

only upon reasonable advanced notice; only documents necessary to verify and evaluate the educational services provided at public expense would be made available to Lincoln and DESE; Student would be assured substantive and procedural rights afforded to publicly funded students (PE-78). Carroll's proposed agreement did not comply with all the terms required pursuant to 603 CMR 28.06 (3) *et seq.*, and significantly limited Lincoln's and DESE's oversight needed in order to obtain ISP status. Ms. Colman testified that Carroll does not follow IEPs goals, objectives or benchmarks and that Carroll's progress reports are different than those expected pursuant to IEPs (Colman). At the time, Lincoln also had reservations given that Student was not evidencing the degree of progress Lincoln would have expected Student to have made after four years at Carroll (Emmons).

60. In a communication between Carroll and Parents dated October 8, 2019, Carroll blamed Lincoln's unwillingness to change the contract for the ISP process having gotten stuck (PE-78; PE-82; PE-83). Ultimately, Carroll was disqualified from receiving DESE's ISP approval to educate Student in fifth grade (PE-78; PE-79; SE-14; Emmons). (The entire ISP application process was described by Ms. Emmons to Parents in a communication dated March 10, 2020, SE-14). Lincoln forwarded to DESE the incomplete forms from Carroll twice (PE-75; PE-84; PE-85; SE-4; Emmons).
61. On September 19, 2019, Student's Team convened to discuss the results of Ms. Cohen's evaluation and to discuss the family's concerns regarding placement at Landmark during the 2019-2020 school year, Student's fifth grade (PE-80; PE-81; SE-5).
62. Carroll representatives were invited to participate in the September 2019 Team meeting, but none attended because Carroll staff no longer attended Team meetings as of September 2018 (SE-15). A description of the Carroll program is found in the Addendum at PE-84 and SE-4. The class schedule at Carroll is a rotating schedule Monday to Thursday, and on Fridays Student participates in three remedial classes: a one-to-one tutorial with a trained (not necessarily certified) Orton-Gillingham tutor, a language class in a homogeneous group of eight or fewer students to one teacher, and a small group remedial math class (Colman). The school also offers a robust science and social studies curriculum and numerous extracurricular activities including art, sports, technology and the like, on a rotating basis throughout the year (Colman).
63. Glens Colman, Carroll's Director of Curriculum for the Lower Division, testified that once Carroll stopped seeking DESE approval, it no longer followed students' IEPs or the goals, objectives and benchmarks in the IEPs, did not issue IEP progress reports, and did not permit announced or unannounced visits by the funding school district (all visits had to go through the parents). Carroll does not honor the provisions delineated in the out-of-district monitoring contracts and therefore, does not sign them (Colman).
64. Ms. Colman did not know whether Student's fourth and fifth grade teachers held Massachusetts special education certification, although she agreed that Student's double

deficit dyslexia placed him in the category of students requiring the most intensive supports and certification (Colman; Emmons).

65. Ms. Colman opined that Student was a “relationships kid” (Colman). She noted how important familiarity with routines, structure and trust in people were to his educational advancement. She distinguished Student’s fourth and fifth grade experiences at Carroll, noting that Student evidenced variability and challenges on many measures of academic achievement, including retrieval skills. She opined that Student’s progress by fourth grade was the result of his time there learning structures, routines and because of the community at Carroll. Ms. Colman testified that teachers and tutors had been carefully selected including assigning him to the same tutor for fourth and fifth grade, to which Student responded positively (Colman). According to Ms. Colman, this consistency with staff and routines

...has been crucial for [Student]. I think that having that safe, connected foundation is really what helps him to take the risks and put himself forth in an area that hasn’t always felt comfortable (Colman).

66. On March 10, 2020, Lincoln convened Student’s Team for the annual review and in preparation for the 2020-2021 school year (SE-13). Lincoln proposed to continue substantially separate programming for Student, but did not identify a specific placement (SE-13).

67. Both, the 2019-2020 and 2020-2021 IEPs cover the period from March to March, although the contracts with the proposed private day school encompassed the entire school year. For both of those academic years Lincoln forwarded packets on behalf of Student to Landmark, and for the period from 2019-2020 also forwarded a packet to an adjacent public school program (SE-12; SE-16; Emmons).

68. In June of 2020, Landmark extended its offer of admission to Student for sixth grade, that is, the 2020-2021 school year, and Lincoln offered this placement for sixth grade (SE-12; Emmons).

69. Parents view Student’s progress at Carroll as modest and uneven, arguing that he remains fragile. According to them, Student underwent a long period of adjustment until he finally achieved academic and social/emotional success during the 2018-2019 and 2019-2020 school years, noting that he had to work hard to make those gains despite the intensive educational interventions received. They are concerned that Student remains vulnerable to academic and emotional setbacks. They assert that Student’s disabilities have impacted his social-emotional wellbeing since Kindergarten, and note that they have expressed these concerns to Lincoln during Team meetings since 2015, including the meeting in March of 2019 when planning for Student’s fifth grade took place (Father; Mother).

70. Parents continue to see Student as a very vulnerable child who has faced many challenges due to his disability and does not deserve to face additional obstacles that would be posed by the daily long-distance commute to Landmark. Additionally, the long commute would prevent Student from continuing to participate in his sports teams, which foster relationships and have boosted Student's self-esteem. Student also should not have to face a new and unfamiliar environment and community at Landmark, given that he has already built a community at Carroll, where he is comfortable and happy. Remaining at Carroll, according to Parents, would allow Student to focus on his education (Father; Mother).
71. Father testified that Student loves sports and participates in after-school sports. He frequently travels to different Massachusetts towns for his hockey games. Participation in sports has boosted his self-esteem (Father). He also travels frequently to the family's vacation house on a nearby island, which involves driving over one hour to Cape Cod, taking an approximately forty-five minute long ferry boat and driving another half-hour to the house. Student does not like to travel, but he tolerates travelling well (Father).
72. Parents assert that Student's struggles continue to date owing to the severity of his disabilities and the challenges posed by remote learning due to the COVID-19 state health emergency school closures (Father; Mother).
73. Dr. Herskovitz testified that Parents were in touch with him after remote learning ensued because Student's anxiety had gotten worse as he depends on the routines and people around him to provide structure, which was difficult via remote learning. As a result, Dr. Herskovitz prescribed anxiety medication (Herskovitz).
74. Ms. Emmons testified that once Landmark accepted Student in 2019, Lincoln was obligated to offer Student this placement over Carroll, as Landmark is a DESE approved language-based school (Emmons).
75. During the summers, Student participates in a summer program/working farm at the location of the vacation home. He is a very social and likeable child and he has made friends in school, sports teams, his neighborhood and at summer camp (Father). Parents noted that some of the children in the aforementioned settings are children with whom student attends school or are neighbors (Mother, Father).
76. Student recently completed fifth grade at Carroll after having been unilaterally placed by Parents. According to Parents and Dr. Herskovitz, he had a difficult time switching to on-line learning due to the COVID-19 Massachusetts health emergency school closures because he did not feel that he was receiving the support he needed, but has been taking medication to manage stress, with positive results (Herskovitz, Father).
77. Ms. Cohen testified that Student would require support and strategies during a transition period to another school, but was confident that Landmark would be able to offer them as

it has experience helping students succeed during transitions. She also opined that Parents' support during the transition period would also help Student succeed (Cohen).

CONCLUSIONS OF LAW:

In the instant case, Lincoln offered Student placement at Landmark for the 2019-2020 school year (Student's fifth grade). Parents challenged the appropriateness of the proposed placement and unilaterally placed Student at Carroll, thereafter seeking reimbursement for said unilateral placement. While this matter assesses the appropriateness of Lincoln's proposed placement, it addresses an even more important issue: a school district's responsibility when offering to place a student out-of-district.

As the party challenging the appropriateness of the proposed placement, Parents carry the burden of persuasion and must prove their case by a preponderance of the evidence pursuant to *Shaffer v. Weast*, 126 S. Ct. 528 (2005).

I note that in rendering my decision, I rely on the facts recited in the Facts section of this decision and incorporate them by reference to avoid restating them except where necessary.

The IDEA allows parents to seek reimbursement from a school district for the costs of a unilateral placement when the district fails to make a timely offer of an appropriate IEP. 20 USC §1412(C)(a)(ii); *School Committee of Burlington, Mass. v. Mass. Department of Education*, 471 U.S. 359, 373-374 (1985) To prevail on a reimbursement claim, a parent first must prove that, taking into account the information available to the Team at the time the IEP was developed, the IEP and placement proposed by the district at the time the unilateral placement was made was not reasonably calculated to provide the student with a FAPE. *Roland M. v. Concord School Committee*, 910 F.2d 983, 992 (1990). When parents make unilateral placements they do so at their own risk. Parents however, may be entitled to reimbursement for their unilateral placement if, after demonstrating that the district's proposed IEP and placement were not appropriate, they demonstrate that their chosen placement was appropriately responsive to the student's needs. To be reimbursed, parents' chosen placement need not meet state standards for special education schools, provided that the school chosen by the parents is "otherwise proper" under the IDEA, *Florence County District Four, et al. v. Shannon Carter, et al*, 510 U.S. 7, 14 (1993), that is, "appropriately responsive to [the child's] special needs." *Matthew J. v. Massachusetts Department of Education, et al.*, 988 F. Supp. 380, 391 (1998).

Upon consideration of the evidence, the applicable legal standards and the arguments offered by the Parties, I find that Parents have not met their evidentiary burden of persuasion and thus, they are not entitled to reimbursement for their unilateral placement of Student at Carroll. My reasoning follows.

The Parties agree that Student is eligible to receive special education pursuant to the Individuals with Disabilities Education Act¹¹ (IDEA) and the state special education statute¹², to address his significant language-based learning disability and double-deficit dyslexia.

They further agree that Student was entitled to receive educational services at an out-of-district, language-based private school for fifth grade, and while they stipulated that Landmark is such a placement, Parents dispute its appropriateness to meet Student's unique needs.

In 2018, after initially accepting Lincoln's proposed IEP and placement at Landmark, Parents requested public funding to continue Student's education at Carroll for the 2019-2020 school year. Lincoln refused Parents' request. Having unilaterally funded the Carroll placement Parents now seek reimbursement. Parents would like Student to remain at Carroll through eighth grade (Father). Carroll is a private school that offers language-based programming. It is not approved by the Massachusetts DESE.

The IDEA and the Massachusetts special education statute and regulations require school districts to offer eligible students a FAPE. A FAPE mandates that a student's individualized education program (IEP) be tailored to address the student's unique needs¹³ in a way "reasonably calculated to confer a meaningful educational benefit"¹⁴ to the student.¹⁵

This standard has been adopted in Massachusetts and is aligned with the Supreme Court's decision in *Andrew F. v. Douglas County Sch. Distr.*, 137 S. Ct. 988 (March 22, 2017) requiring that a student's program and placement be "reasonably calculated to enable [the

¹¹ 20 USC 1400 *et seq.*

¹² MGL c. 71B.

¹³ 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").

¹⁴ See *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012) where the court explicitly adopted the meaningful benefit standard.

¹⁵ *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.").

student] to make progress appropriate in light of the child’s circumstances.”¹⁶ *Andrew F. v. Douglas County Sch. Distr.*, 137 S. Ct. 988 (March 22, 2017); *D.B. ex rel. Elizabeth B.*, 675 F.3d at 34.

Additionally, the IEP services must be delivered in the least restrictive environment appropriate to meet the eligible student’s needs.¹⁷

Pursuant to *Andrew F.*, *supra*, and the standards implemented in Massachusetts, public schools must offer eligible students a special education program and services specifically designed to meet the individual student’s unique needs and enable development of that individual’s educational potential.¹⁸ Educational progress is thus measured in relation to the potential of the particular student.¹⁹ The IDEA does not however require that school districts provide the best possible program for the student.²⁰

The program and services designed for each student must be delineated in the student’s IEP, which is the vehicle by which the school district proposes to educate the student. The adequacy of the IEP depends on the circumstances of the individual for whom it is created. *Andrew F.*, at 1001. Development of the IEP requires consideration of the student’s: strengths, parental concerns, recent evaluations, and the academic, developmental and functional needs of the child. 34 CFR 300.324(a)(i-v). The IEP must be reviewed no less than once a year (the annual review) to consider the information available on the child including progress, lack of expected progress toward goals and the general curriculum, evaluative information, information provided by the parents and the anticipated needs of said child. 34 CFR 300.24(b)(ii)(A-E). Consistent with federal law, parental participation is paramount to the Team’s determination of the special education to be accorded the disabled

¹⁶ In *Andrew F.*, the “merely more than *de minimis*” standard adopted by the Tenth Circuit, was rejected. The Tenth Circuit standard afforded students significantly less than the standard utilized in Massachusetts prior to *Andrew F.*

¹⁷ 20 USC 1412 (a)(5)(A).

¹⁸ MGL c. 69, s. 1 (“paramount goal of the commonwealth to provide a public education system of sufficient quality to extend to all children the opportunity to reach their full potential... ”); MGL c. 71B, s. 1 (“special education” defined to mean “...educational programs and assignments . . . designed to develop the educational potential of children with disabilities”); 603 CMR 28.01(3) (identifying the purpose of the state special education regulations as “to ensure that eligible Massachusetts students receive special education services designed to develop the student’s individual educational potential...”). See also Mass. Department of Education’s Administrative Advisory SPED 2002-1: [Guidance on the change in special education standard of service] from “maximum possible development” to “free appropriate public education” (“FAPE”), effective January 1, 2002, 7 MSER Quarterly Reports 1 (2001) (appearing at www.doe.mass.edu/sped) (Massachusetts Education Reform Act “underscores the Commonwealth’s commitment to assist all students to reach their full educational potential”).

¹⁹ *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 199, 202 (court declined to set out a bright-line rule for what satisfies a FAPE, noting that children have different abilities and are therefore capable of different achievements; court adopted an approach that takes into account the potential of the disabled student). See also *Lessard v. Wilton Lyndeborough Cooperative School Dist.*, 518 F.3d. 18, 29 (1st Cir. 2008), and *D.B. v. Esposito*, 675 F.3d at 36 (“In most cases, an assessment of a child’s potential will be a useful tool for evaluating the adequacy of his or her IEP.”).

²⁰ E.g. *Lt. T.B. ex rel. N.B. v. Warwick Sch. Com.*, 361 F. 3d 80, 83 (1st Cir. 2004) (“IDEA does not require a public school to provide what is best for a special needs child, only that it provide an IEP that is ‘reasonably calculated’ to provide an ‘appropriate’ education as defined in federal and state law.”)

child, and the parent’s input must be considered as part of the totality of the information available to the Team. The Team must consider the requirements of the general education curriculum, and the need for specially designed instruction and/ or related services to allow the student to progress effectively in the content areas of the general education curriculum.

The Team is also charged with the responsibility of determining a student’s placement for delivery of the IEP in the context of the least restrictive environment.²¹

The educational authorities carry the “primary responsibility for formulating the education” to be provided to the disabled student and for selecting the educational method most appropriate to meet the student’s needs. *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.* (Lessard II), 592 F.3d 267, 270 (1st Cir. 2010)(citations omitted), quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S. Ct. 3034, 73 L.Ed. 2d 690 (1982).

When a public school is not able to educate a student in district, the Massachusetts Special Education Regulations allow funding of appropriate, DESE approved out-of-district programs consistent with 603 CMR 28.06(3). The aforementioned regulation requires that DESE and school districts follow strict guidelines when identifying programs and while the student is placed out-of-district. These guidelines impose close monitoring of the out-of-district program, including adherence to instructional grouping requirements, as students are entitled to the full procedural protections under the IDEA while placed out of district.

When selecting programs the Massachusetts Special Education Regulations establish a preference for DESE approved programs. 603 CMR 28.06(3)(d) dictates that,

Preference to approved programs: The school district shall in all circumstances, first seek to place a student in a program approved by the Department pursuant to the requirements of 603 CMR 28.09. Preference shall also be given to approved programs located within the Commonwealth of Massachusetts if the choice of such program is consistent with the needs of the student and choice of such program complies with LRE requirements. No student in an out-of-district placement as of June 1, 2000 shall be required to transfer to a facility in Massachusetts unless such

²¹ The Massachusetts special education regulations require that students be “educated in the school that he or she would attend if the student did not require special education” unless some other arrangement is dictated by the IEP. 603 CMR 28.05(6). To the maximum extent appropriate, the student must be educated with non-disabled peers and only removed from the general education setting when “the severity of the disability is such that education in general education classes with the use of supplementary aids and services cannot be achieved satisfactorily” in the general education setting. 603 CMR 28.06(2)(C). In *C.D. v. Natick Public School Dist.*, 924 F. 3d 621, 631 (1st Cir. 1919) (internal citations omitted), citing *Roland M. v. Concord School Committee*, 910 F2d 983, 992-993 (1st Cir. 1990), the First Circuit noted that in considering the least restrictive environment requirement the court ‘weighed’ this preference for mainstreaming ‘in concert with the’ FAPE mandate... For schools, complying with the two mandates means evaluating a potential placement’s ‘marginal benefits’ and costs and choosing a placement that strikes an appropriate balance between the restrictiveness of the placement and educational progress.”

transfer is consistent with the student's IEP and the LRE requirement of the law. When an approved program is available to provide the services on the IEP, the district shall make such placement in the approved program in preference to any program not approved by the Department. (Emphasis supplied).

This regulation mandates that when a Massachusetts public school determines the need for out-of-district programming, the public school must: a) first seek and consider DESE approved programs capable of implementing the student's IEP, and b) if and when a DESE approved program is identified (and the program offers the student admission), the district makes that program available over any other program not approved by DESE.

That is precisely the situation in which Lincoln found itself in 2019 (and 2020), when Landmark, a DESE approved school capable of meeting Student's needs, offered Student admission.

Despite Lincoln's misgiving about Carroll, when Parents insisted that Student remain at Carroll, in a good faith attempt to bridge their differences, Lincoln attempted to obtain ISP approval for Carroll, but when it learned that Carroll would not agree to Lincoln's programmatic oversight or assurances that it would implement Student's IEP or attend Team meetings, as required pursuant to 603 CMR 28.06(2)(f) and (3)(b), Lincoln correctly concluded that placing Student at Carroll would be inappropriate and unlawful. Pursuant to 603 CMR 28.06(2)(f),

The school district shall implement the placement decision of the Team and shall include consulting with personnel of the school contemplated to provide the program for the student to determine that the school is able to provide the services on the student's IEP. The Team shall not recommend a specific program unless it is assured that the adequacy of said program has been evaluated and the program can provide the services required by the Student's IEP.

When a private school that is not on the list of Massachusetts DESE approved schools receives ISP approval after having successfully completed the application process, the Massachusetts special education regulations require that the public school district monitor the student's placement to ensure delivery of the services in the student's IEP. Addressing individual program oversight, 603 CMR 28.06(3)(b) requires school districts

... to monitor the provision of services to and the programs of individual students placed out-of-district, Documentation of monitoring plans and all actual monitoring shall be placed in the files of every eligible student who has been placed out-of-district. To the extent that this monitoring requires site visits, such site visits shall be documented and placed in the student's file for review. The duty to monitor out-of-district placements cannot be

delegated to parents or their agents, to the Department, or to the out-of-district placement. The school district may however, contract directly with a person to conduct such monitoring.

The strict guidelines delineated in the regulations *supra*, exist because a school district is always ultimately responsible for the provision of a FAPE to eligible resident students through proper implementation of IEPs, whether those IEPs are implemented in or out of district.

The IEP is the vehicle through which services agreed to by the signatories are provided. The IEP states the areas of need to be addressed, describe a student's strengths and weaknesses, the goals and objectives to be met, the frequency and manner in which services are to be delivered. The IEP is the result of informal evaluations, testing, observation, and the student's day to day struggles. Information is gathered and shared through informal discussions, quarterly progress reports and Team meetings. The IEP is therefore, the product of thoughtful discussions and considerations regarding the particular student based on the data gathered through anecdotal and data driven documentation by those with educational responsibility and knowledge about that student. It is a deliberate and informative instrument. It dictates what a district is responsible to do and what a parent can reasonably expect their child to receive. Once accepted, the IEP ensures that districts can be held accountable for the provision of FAPE. To ensure accountability, the IEP Team is mandated to meet at least annually with all relevant members to discuss the student's progress pursuant to the IEP. If that accountability were to be removed or diluted parents would be left without the means to ensure that their child is appropriately educated and given the tools to becoming as independent and productive as he or she is able by the end of the entitlement period.

To assist districts in ensuring accountability, DESE created a mechanism through which private special education schools are approved based on their agreement to abide by IDEA mandates, such as implementing the IEPs promulgated by the district and agreeing to a higher level of oversight by the sending school district. Without this level of collaboration it would be impossible for a district to fulfill its obligations toward the particular student. It is for this reason that whenever a student's Team identifies a DESE approved program as being appropriate for a student, and said school accepts the student, the school district is mandated to offer this program to the student. In instances where no approved out-of-district programs are available for the student, DESE has created a sole-source mechanism through which an unapproved special education school may be considered for the particular IEP period.

Parents are correct that the Team's selection of a proposed program/school must be made in light of the particular student's needs and circumstances, and not simply be selected from a handful of available DESE approved programs. However, when an approved program is both appropriate and available the Team need look no further.

A private school's unwillingness to abide by DESE mandates by following IEPs, attending IEP Team meetings and remaining transparent (by allowing district supervision/ collaboration) creates an untenable situation for the district seeking to place a student and

erodes the system created under the IDEA at its core. It makes it impossible for a sending district to meaningfully discuss or monitor a student's progress to ensure appropriate implementation of the student's IEP. As such, a private school that takes the position of not seeking DESE approval, as in the instant case, and refuses to cooperate with the ISP approval process, may not to be considered when a DESE approved, appropriate option exists.

The evidence shows that Lincoln supported Student's placement at Carroll during the 2018-2019 school year after the Team considered that the only other *available* language-based school (Learning Prep) was inappropriate for Student. In contrast, during the 2019-2020 school year, Landmark offered Student placement and the Team determined this to be appropriate for Student. Landmark, a DESE approved school, deemed appropriate by Student's Team and available to him, was Lincoln's only legal option for Student's placement, especially when DESE did not grant Lincoln permission to fund Student's placement at Carroll. Carroll's administrators, teachers and service providers do not attend Team meetings, it does not follow IEPs promulgated by Districts and Carroll does not permit unannounced site visits (SE-15; Emmons). Additionally, Ms. Colman could not offer information regarding Student's fourth and fifth grade teachers' and tutor's special education certification status (Colman).

In contrast, Landmark offers language-based instruction to students with average cognitive abilities, grades one through 12, and as a Massachusetts DESE approved school abides by all of the requirements of 603 CMR 28.06(03) *et seq.* The Parties have stipulated to Landmark's mission and that it offers language-based programming.

Lincoln's efforts and continued attempts to work with Parents to secure Student's placement at Parents' preferred program over the past two years are noteworthy. The evidence shows that even when Landmark became available and the school-based members of the Team supported this placement (essentially fulfilling their responsibilities toward Student), the Team continued to collaborate with Parents and honor their preference for Carroll, by trying to secure ISP approval. In the end, Carroll chose not to follow through with the process raising concerns about its level of commitment to Student.

Parents argue that the one-hour travel distance would negatively impact Student because he may not feel well or like long distance car rides, and because he would be exhausted after the ride, making it difficult for him to remain cognitively available for other tasks upon returning home. Parents also argue that the distance would prevent Student from participating in sports team activities that provide him social/emotional stability and boost his self-confidence, helping Student overcome the negative feelings associated with his disability.

Lastly, Parents argue that Student, who has difficulties trusting people and building relationships, would be negatively impacted by the transfer to a new and unfamiliar environment with new teachers and peers, in a different community, and that the time he would require to develop trust and reach the comfort level he has attained at Carroll would negatively impact his ability to focus on learning and availability to the educational experience.

Regarding travel to Landmark, the total daily drive is close to one hour, meeting the requirements of 603 CMR 28.06(8)(a). The evidence shows that Student travels regularly to sports games and to the family's island summer house, which involve traveling for up to two and a half hours. While Student may not like long distance travel, the record does not reflect that his discomfort results in a level of significant dysfunction. Once he arrives at his destination, he is not impaired from functioning in the particular environment. Parents' argument that a longer commute would have dire effects on Student's functioning and prevent him from learning is simply not supported by the evidence.

Parents also argue that the longer travel time to Landmark would interfere with Student's ability to participate in sports and other activities which provide the opportunity for him to build/maintain the friendships and community so important to his self-esteem.

Landmark offers a variety of after-school sports and activities which would be available to Student and would help him build community. Given that Student is described as friendly and likeable, and the fact that he has been able to form lasting relationships with a number of adults and children over the years, there is nothing to suggest that in time, he will be unable to make friends at Landmark and expand his community. Moreover, Dr. Herskovitz testified that while Student has difficulty trusting adults, he was able to establish a trusting relationship with Student after two or three sessions, a month apart, suggesting that Student can successfully establish new relationships at Landmark in a relatively short period of time given his daily participation in that program (Herskovitz). Parents, Dr. Herskovitz and Ms. Colman further noted that overtime Student was successful in his transition to Carroll and was able to form trusting relationships with peers and staff. Even if Student were to experience some difficulty during the transition period, this would likely only be temporary. Moreover, he would not be the first student to face this challenge at Landmark, an institution fully committed to helping students make successful transitions through counseling, check-ins and other necessary interventions (Emmons; Cohen).

I further note that Student's mental/emotional challenges do not rise to the clinical level and, according to Dr. Herskovitz, Student no longer requires therapy to address anxiety and stress; he has acquired strategies that help him manage them effectively and has responded well to medication (Herskovitz). Student has made significant gains and he does not present with issues associated with depression, somatization, hyperactivity or inattention. His ADHD issues are well managed with medication and the elevated stress and anxiety he once showed is well managed with the strategies he has acquired, and more recently with medication (Cohen, Herskovitz). The evidence does not support a finding that Student's social/emotional vulnerabilities rise to a level likely to have significant consequences for Student. While it would not be unexpected for him to experience a temporary setback during the transition period, a potential temporary setback is insufficient basis for bypassing a school placement that can offer Student an appropriate educational experience.

Moreover, Student's strengths cannot be ignored or undermined. He has been described as kind, empathetic to peers and possessing a very open personality. He has also been described

as hard-working, resilient, and motivated to put forth maximum effort when attempting tasks. He can access learned skills and has good coping skills. All of these attributes will undoubtedly aid him during the transition period and beyond (Mother, Father, Herskovitz, Cohen, Colman).

In addition, Student has demonstrated an ability to overcome initial challenges with respect to trusting people and learning routines in a variety of settings (e.g., school, summer camp, sports teams, neighborhood). He is able to adjust well when structure and support are offered. Nothing in the record suggests that his initial distrust of people impedes him from eventually forming new relationships and developing friendships. Therefore, Student can reasonably be expected to make a successful transition to Landmark and form meaningful, trusting relationships. Landmark can and will offer the necessary supports to assist Student in making a successful transition (Emmons, Cohen).

In conclusion, Parents' arguments regarding the long-term negative impact of Student's switching schools *vis-a-vis* his ability to access his education and maintain/build community, is not persuasive and insufficient to overcome the appropriateness of the Landmark placement. At Hearing, Parents did not call any educational evaluators to support their position that Student has been or would be denied a FAPE at Landmark. The overwhelming weight of the evidence does not support Parents' position that Landmark is inappropriate for Student, or, that after a supported transition period, Student could not adjust and benefit from its program. None of Parents' arguments justifies setting aside the well-conceived mechanism developed by DESE to assure the level of accountability the IDEA requires to ensure that eligible students receive a FAPE.

I find that Landmark was the appropriate placement for Student during the 2019-2020 school year (and continues to be so). Therefore, Lincoln met its obligations under the IDEA when offering this placement to Student for the 2019-2020 school year. I further note that Landmark remains available to Student for the 2020-2021 school year (Emmons).

As noted above, when Parents proceeded with Student's unilateral placement at Carroll, they did so at their own risk. *Florence County District Four, et al. v. Shannon Carter, et al*, 510 U.S. 7, 14 (1993). The evidence is persuasive that in the instant case Parents are not entitled to reimbursement for their unilateral placement of Student at Carroll for the 2019-2020 school year.

ORDER:

1. Lincoln is responsible to continue to offer Student placement at Landmark.
2. Lincoln is not responsible to reimburse Parents for their unilateral placement of Student at Carroll for the 2019-2020 school year.

By the Hearing Officer,

Rosa I. Figueroa

Dated: October 20, 2020

