

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

In Re: Student v. Norton Public Schools

BSEA No. 1609348

DECISION

INTRODUCTION

This decision is issued pursuant to the Individuals with Disabilities Education Act or IDEA (20 USC Sec. 1400 et seq.); Section 504 of the Rehabilitation Act of 1973 (29 USC Sec. 794); the Massachusetts special education statute or “Chapter 766,” (MGL c. 71B) the Massachusetts Administrative Procedures Act (MGL c. 30A) and the regulations promulgated under these statutes. At issue in this case is whether the IEP and placement that the Norton Public Schools (Norton or School) offered to Student for the 2016-2017 school year was reasonably calculated to provide Student with a free, appropriate public education (“FAPE”) in the least restrictive environment, or if not, whether Norton must fund a home-based education program that was developed by the Parents. Also at issue is whether Norton observed the procedural requirements of relevant special education statutes when it developed the 2016-2017 IEP and whether Norton made appropriate extended school year (ESY) services available to Student during July and August 2016.

SUMMARY OF BACKGROUND AND PROCEDURAL HISTORY

This case involves a ten year old child with an Autism Spectrum Disorder who was educated within the Norton Public Schools until the 2016-2017 school year, at which time his Parents began homeschooling him under an approved homeschool program. During the three previous school years (2013-2014, 2014-2015, and 2015-2016), by virtue of private settlement agreements between Parents and Norton, Student’s special education program was housed in and overseen by the Norton Public Schools (Norton or School) but operated and staffed by private vendors under a contract with Norton. The instant case arises from a series of disputes between Parents and Norton over delivery of special education services during the 2015-2016 school year as well as the summer of 2016.

Parents filed their initial hearing request in the instant case with the Bureau of Special Education Appeals (BSEA) on May 10, 2016.¹ In their hearing request, Parents alleged that Norton had committed multiple substantive and procedural violations of federal and state special education law by, among other things, unilaterally changing Student’s special education services during the term of an accepted IEP, failing to

¹ This matter was originally assigned to BSEA Hearing Officer Lindsay Byrne and was administratively reassigned to the undersigned Hearing Officer on November 1, 2016.

implement the accepted portions of an IEP, and predetermining Student's proposed out-of-district collaborative placement for 2016-2017 without meaningful parental involvement. On or about June 10, 2016 Parents filed an amended Hearing Request alleging systemic discriminatory practices by Norton, as well as violation of Student's individual rights under federal and state special education statutes, several other federal and state anti-discrimination statutes, and the Massachusetts Constitution. Parents further raised tort claims including intentional infliction of emotional distress and negligence.

The originally-assigned hearing date of June 10, 2016, as well as subsequently-assigned hearing dates, were postponed for good cause in order to address several pre-hearing motions, narrow the issues to be addressed by the BSEA and frame these issues for hearing. All motions are included in the Administrative Record; however, two such motions are addressed here in detail to clarify the current issues for hearing. First, Norton filed a *Motion to Dismiss* Parents' original Hearing Request, as well as their amended Hearing Request, and Parents duly objected. On August 30, 2016 the original BSEA Hearing Officer issued a ruling on this *Motion* dismissing all claims arising before June 30, 2016, as well as all claims arising under constitutional provisions or any statutes other than the IDEA², MGL c. 71B, or §504 of the Rehabilitation Act. *Ruling on School's Motion to Dismiss*, (Administrative Record, August 30, 2016)

Second, both parties requested a determination of Student's "stay put" services during the summer of 2016, in particular, the "level and frequency of occupational therapy due to [Student] as part of his extended school year program..." *Ruling on Motion for Clarification of Stay Put Services* (Administrative Record, August 30, 2016) The Hearing Officer ruled as follows:

"Based on the submissions of the parties, the IEP developed by Norton Public Schools to cover the period July 1, 2015 through June 30, 2016 is the "operative IEP" for "stay put" purposes. This finding supports the parties' intent, as reflected in their May 4, 2015 Settlement Agreement, that the July 2015 IEP would be implemented throughout the 2015-2016 school year unless ordered by a court. No Amendments to that IEP were approved by a court. No subsequent IEP has been unambiguously accepted by the Parents. Therefore, the July 2015-2016 IEP is the "last accepted" IEP in play. The ESY occupational therapy services set out in that IEP, 30 minute sessions, twice a week, are the level and frequency of direct occupation therapy [Student] should be receiving during the summer 2016. The Parents' Motion for Compensatory Occupational Therapy services is premature. The issue is subject to proof at hearing. Therefore, the Motion is DENIED at this time. *Id.*

A hearing on the merits of Parents' hearing request was held before the undersigned Hearing Officer on November 9, 29, 30, and December 15, 19 and 20, 2016

² The previous hearing officer noted that if any exhaustion requirements arose regarding Parents' ADA and/or §1983 claims, the instant hearing should be deemed to satisfy those requirements.

at the office of the BSEA, One Congress Street, Boston, MA. Those present for all or part of the proceeding were the following:

Student's Mother ³	
Jeanne M. Sullivan	Director, Pupil Personnel Services, Norton Public Schools
Nancy Regan	Director of Student Services, BICO Collaborative
Janelle Guarino	BCBA ⁴ , Realizing Children's Strengths (RCS)
Rebecca Kennedy	Physical Therapist, Easter Seals
Judy LaConte	General Education Teacher, Norton Public Schools
Michelle Roy	Occupational Therapist, S. Coast Educational Collaborative
Rebecca Albert	Team Chair, Norton Public Schools
Colleen Yorlets	BCBA, RCS
Jennifer O'Neill	Asst. Supt., Teaching and Learning, Norton Public Schools
Jennifer Rutland	BCBA, Director of Consulting at RCS
Kelley Lynch	Special Education Teacher, Norton Public Schools
Mary Ricci	BCBA, RCS
Tami Joia ⁵	Advocate for Parents
Michael Long, Esq.	Attorney for Norton Public Schools
Kelly Gonzalez, Esq.	Attorney for Norton Public Schools
Anne H. Bohan	Court Reporter
Nancy M. Kingsbury	Court Reporter

The record in this matter consists of Joint Exhibits (hereafter J) J-1 through J- 353, Parents' Exhibits P-1 through P-16; and School's Exhibits S-1 through S-7. Additionally, Parents' supplemental Exhibits PS-1 through PS-10 are admitted into the record.⁶ The record also consists of electronically-recorded testimony and argument elicited over the six days of hearing as well as oral and written rulings on motions presented during the hearing⁷ and the parties' written closing arguments.

³ Mother participated briefly by speaker phone, on the second day of hearing only (November 29, 2016) and thereafter declined to participate either by telephone or in person, stating that she would rely on the transcript of the proceedings and written closing argument to be submitted by her advocate.

⁴ Board Certified Behavior Analyst

⁵ Ms. Joia participated by speaker phone on the first and second day of hearing (November 9 and 29, 2016) and thereafter declined to participate either in person or by telephone. Ms. Joia chose to rely on the transcript of the proceedings and written closing arguments.

⁶ The Parents' Supplemental Exhibits, which were filed on February 10, 2017, are admitted over the objection of the School in an abundance of caution to ensure that Parents have had an opportunity to present their case.

⁷ The School filed *its Second Motion to Dismiss* during the course of the hearing, which Motion was DENIED on the record.

ISSUES PRESENTED

Pursuant to an Amended Issue List issued by the BSEA on August 30, 2016, the sole issues for hearing in this matter were the following:

- I. Whether the Individualized Education Plan proposed by Norton for the 2016-2017 school year is reasonably calculated to provide a free, appropriate public education for Student; in particular:
 - a. Whether the procedural protections set out in the IDEA were observed in the development of the proposed 2016-2017 IEP;
 - b. Whether the proposed placement in the BICO Collaborative has the necessary and appropriate services and setting to meet Student's identified special needs and to permit him to make effective educational progress;
 - c. Whether Student's special education needs can be met in a less restrictive, in-district program;
 - d. Whether Student's special education needs can be met in a parentally provided/supervised home-based program.
- II. Whether an extended school year program consistent with the July 2015-June 2016 IEP agreed to by the parties and adopted through the May 4, 2015 Settlement Agreement was available to Student during the summer of 2016;
- III. Whether the June 2016 and July 2016 physician notes provided to Norton by the Parent were sufficient to trigger an obligation to provide a home-based extended school year program to Student.

POSITION OF PARENTS

Throughout most of the 2015-2016 school year, the Norton Public Schools committed numerous procedural violations with respect to Student and Parents, including unilaterally changing or eliminating (or attempting to change or eliminate) agreed-upon IEP services, and excluding Parents from the Team process by scheduling Team meetings at times when Parents could not attend. Additionally, Norton failed to implement accepted portions of a partially accepted IEP for December 2015-June 2016, but instead incorrectly treated the entire IEP as having been rejected. Additionally, in May 2016, Norton failed to invite Parents to the Team meeting to develop an IEP for 2016-2017, predetermined a placement in the BICO collaborative for that school year, drafted an IEP that was tailored to the BICO placement rather than to Student's documented needs, and failed to give Parents prior written notice of Norton's intention to change Student's placement. The BICO placement was not appropriate for Student and could not

implement his last accepted IEP. Faced with an inappropriate IEP and/or placement for 2016-2017, Parents notified Norton of their intention to homeschool Student and eventually received approval from the Superintendent to do so. While Parents were awaiting this approval, Norton failed to provide Student with the home-based services listed in his last accepted IEP. Parents seek compensatory services from Norton for this lapse. Additionally, Parents assert that Student's homeschool program constitutes a duly-approved special education private school, and seeks both reimbursement and prospective funding from the district for this homeschool program.

POSITION OF NORTON PUBLIC SCHOOLS

The IEP that Norton proposed for the 2016-2017 school year, as well as the proposed placement in the BICO Collaborative, were based on Student's unique needs as reflected in evaluations, data, and observations of progress, and were reasonably calculated to provide Student with a free, appropriate public education (FAPE) in the least restrictive environment (LRE). The proposed placement at BICO was the LRE for implementation of the proposed IEP because it would offer Student both inclusion opportunities and an appropriate peer grouping for his special education classroom. In contrast, Norton was unable to provide age-matched peers who shared Student's profile, and Student would be the only child in his special education class. Norton complied with all relevant procedural requirements of federal and state special education law in developing the proposed IEP, and Parents were afforded meaningful opportunities to participate in the Team process. If any procedural missteps occurred, they were caused and/or exacerbated by Parents' conduct or decisions.

Norton made an extended school year (ESY) program available to Student for the summer of 2016 as required by his 2015-2016 IEP. Student's non-attendance at this ESY program was based on Parents' decision not to send him. Additionally, Norton was willing to provide this program in Student's home if Parents had provided the necessary medical documentation, but Parents failed to do so. Finally, Student's special education needs could not be met in the approved homeschool program that Parents began providing to Student at the start of the 2016-2017 school year, and Norton had and has no obligation to fund such program.

SUMMARY OF EVIDENCE

1. Student is a now ten-year-old boy who is a resident of Norton. Persons who know or have worked with Student describe him as a sweet, likeable, hard-working, animated and friendly boy who enjoys and is able to participate in many classroom routines. He has developing academic skills, especially in math, but also in reading and writing. (Testimony of Guarino, LaConte, Kennedy, Ex. J-1, P-6).
2. Student's primary disability is Autism Spectrum Disorder (ASD). He also has been diagnosed with a seizure disorder (controlled at the time of the hearing) and apraxia. (J-1) There is no dispute that as a result of his disabilities, Student is eligible for special education and related services pursuant to federal and state law and that, at all relevant

times, the Norton Public Schools (Norton or School) has been the Local Education Authority (LEA) responsible for providing such services to Student.

3. To varying degrees, Student's disabilities affect most areas of his functioning including communication, academics, fine and gross motor skills, socialization, and adaptive behavior. (J-1) The parties agree that Student has needed and continues to need a special education program based on principles of Applied Behavior Analysis (ABA) in order to make effective progress. (J-1)

4. During the 2014-2015 school year, Student was enrolled in Norton's intensive ABA-based program for elementary school children. That program was housed in a Norton elementary school but operated by an outside vendor, Amego, which provided oversight and other services by its own Board Certified Behavior Analyst (BCBA) as well as services by other Amego personnel including occupational and physical therapists. During the spring of 2015, faced with the prospect that Amego sought to end its role, Parents and Norton executed a settlement agreement (Agreement) under which Norton would continue the ABA program for Student (and one other child) using a different private vendor, Realizing Children's Strengths (RCS). (P-2) Like its predecessor agency, RCS was to supply a BCBA for the program as well as other providers to implement Student's IEP. There was some overlap between Amego and RCS towards the end of the 2015-2016 school year, during which Amego provided RCS with information about Student to support his transition, including a discharge summary and data. (Guarino)

5. Pursuant to the Agreement, on July 1, 2015 Norton issued an IEP for Student covering the period from July 2015 through June 30, 2016. (J-9) Amego staff actually had drafted this IEP, which called for Student's placement in a substantially separate, ABA-based classroom for most of the school day, together with supported opportunities as appropriate. The IEP also called for speech therapy (2x45 minutes per week); occupational and physical therapy (OT and PT) (2x30 minutes per week, each); adaptive physical education (APE) (1x30 minutes per week); home based services (5x 120 minutes per week, including monthly clinical review meetings for Parents and staff to review ABA data); a 1:1 aide in inclusion settings, and a six-week ESY program for the summer of 2016. Of particular importance to the instant case, the service delivery grid in this IEP provided for 5x360 minutes--the equivalent of 30 hours per week--of direct BCBA services; that is, the BCBA was present in Student's substantially separate classroom for 30 hours per week. (J-9, Guarino, J-9) Parents accepted this IEP and placement in full in or about July 2015. (J-9)

6. During the summer of 2015, shortly after assuming responsibility for Student's program, RCS proposed to conduct some assessments of Student. The assessments were meant not to fully evaluate Student but to provide RCS with updated baseline data to determine whether Student's goals were still appropriate or would need adjustment. In or about August 2015 Student's Team chair from Norton, Rebecca Albert, forwarded the RCS proposal to Parents. Parent did not consent to the RCS proposed assessments but suggested that instead, the Team should simply advance Student's three-year evaluation from its previously-scheduled date of April 2016, as stipulated in the Settlement

Agreement, to earlier in the 2015-2016 school year. Norton's Team members agreed with Parents' suggestion and sent Parents a consent form for Student's three-year re-evaluation which Parents signed on or about September 22, 2015 (Lambert, J-41, 42, P-6)

7. On November 16, 2015 the Team convened to consider Student's re-evaluation, which consisted of a battery of assessments and observations in the areas of behavior, speech/language, occupational therapy, academics, cognition, and health. In general, these evaluations indicated that Student had been making significant progress in most or all goal areas, and had a range of skills. (Lambert, J-7) Specifically, according to an Assessment of Basic Language and Learning Skills-Revised (ABLLS-R) administered by RCS in October 2015, Student had relative strengths in cooperation, visual performance, receptive language, requesting, social interaction, classroom routines, dressing, eating and fine motor skills. Areas of weakness included motor and vocal imitation, labeling, group instruction, play skills and grooming. (P-10(G)) A functional behavior assessment (FBA) conducted in November 2015 indicated that Student had a history of some maladaptive behaviors, including self-injurious behaviors (SIB), vocal stereotypy and mouthing, but also had learned adaptive substitute behaviors. (P-10(H)). A psychological evaluation dated November 2015 revealed cognitive abilities ranging from the very low to borderline range coupled with a "sweet and very endearing" personality, willingness to please, and excitement about learning. (P-10(I)).

8. Overall, Parents were pleased with the results of the evaluation as discussed at the Team meeting. (Albert, J-25, 38, 154) Among other things, the Team proposed, and Parents agreed to, increasing Student's inclusion time in the second grade classroom. Shortly thereafter, Student joined this classroom for morning activities (to the extent that they did not interfere with his therapies), and met with success. (LaConte)

9. On November 23, 2015 Norton proposed an IEP amendment reflecting the three-year re-evaluation meeting. The proposed amendment contained a list of suggested changes from the prior IEP. These changes, as reflected in the N-1 form, were to include evaluation results in the "key evaluation results" section of the IEP so that all staff would be aware of them, increase Student's OT services from 2x30 minutes per week to 3x45 minutes per week, conduct a music therapy assessment so that the School could consider adding music therapy as a speech/language service, and adjust goals and objectives for all therapies and academics to reflect recent evaluation results and target areas of weakness. A consent form for the music therapy assessment was included with the proposed IEP amendment. The proposed amendment covered the same period as the underlying IEP, namely, July 1, 2015 to June 30, 2016. (J-7)

10. In an email dated December 4, 2015 addressed to the Team Chair, Rebecca Albert, with copies to various staff from RCS, Parent stated that she objected to the Team issuing an amendment to the IEP rather than an entirely new IEP, and further stated that "I am not signing this Amendment as it stands. I am not having a second team meeting at the end of the school year because the district is refusing to write a new IEP now just because they said so." (J-199)

11. Parents responded to the proposed amendment on December 7, 2015 with a partial acceptance and partial rejection. Specifically, Parents consented to the proposed music therapy assessment and fully accepted the increase in OT services as well as all goals and objectives in the areas of behavior, life skills, social skills, speech and language, OT and PT. (J-7) Parents partially accepted the goals and objectives in functional academic skills, English/language arts, and mathematics, stating “the only thing I do not [accept] within these goals [and] objectives is ‘ITT and/or Intensive Teaching Time.’” (J-7) Finally, Parents stated “I also am rejecting that this is an Amendment because as it states in the regulations sec. 300.306... ‘(2) If a determination is made that a child has a disability and needs special education and related services, **an IEP must be developed for the child in accordance with Sec. 300.320 through 300.324**’” (J-7) (Emphasis in original).

12. Norton staff immediately began preparing to implement the accepted portions of the IEP Amendment. (Albert, Guarino)

13. On December 8, 2015, Norton issued an invitation to a Team meeting to be held on December 14, 2015 to discuss the rejected portions of the proposed IEP amendment. (J-27) On the same date, Parents sent an email to Norton’s Director of Pupil Personnel Services, Jeanne Sullivan, and Team Chair, Rebecca Albert, stating, in essence, that Parents intended to “take action on [sic]the district for being in breach of the settlement agreement...” unless, by the following day, Norton developed a new, complete IEP (as opposed to an amendment) based on the results of the 3-year re-evaluation, with dates running from December 10, 2015 to December 9, 2016, and including all changes that Parents had requested. Ms. Sullivan responded by email the same day, stating “we will not be proposing an IEP today per your requirements,” and further stating that a meeting to discuss the partial rejection of the amendment had been scheduled for December 14, 2015 as stated above. (J-253)

14. The December 14, 2015 meeting took place as scheduled. Rebecca Albert chaired the meeting. One Parent attended the meeting as well as nine of Student’s providers from RCS or Norton. The RCS attendees included Janelle Guarino (at that time, Janelle Dulude) who was Student’s BCBA. (J-27, Albert, Guarino, Kennedy, Laconte, Yorlets)

15. Notes from the December 14 meeting reflect that the “Team agreed to push forward with an IEP (IEP dates 12/14/15 – 6/30/16).” (J-27) In addition to discussion of adjustments in goals, objectives, and accommodations, the notes further state the following: “Colleen [Yorlets, BCBA, RCS Clinical Director] –proposing a reduction in BCBA hours—over time—looking at BCBA role—keep service delivery for 2 weeks—slowly reduce over 8 weeks—remain –onsite—during this period. Service delivery would not change. Put trial period in additional info., looking at BCBA responsibilities.” (J-27) This suggestion arose from RCS’ concern that the 30 weekly hours of direct BCBA service that Student was receiving under the accepted IEP was excessive under the circumstances. (Albert, Yorlets)

16. The concern of RCS arose from the generally accepted structure of ABA programming for students with ASD and the apparent departure from that structure in Student's program in Norton. Specifically, to greatly oversimplify for purposes of this decision, ABA is a science-based discipline that uses systematically collected data to understand behavior. (Albert) An ABA-based educational program for students on the autism spectrum entails targeting behaviors to be addressed and skills to be learned, specifically defining that behavior or skill, and using a structured, systematic process of reinforcement to modify that behavior and teach the student to generalize skills and new behaviors. A crucial component of the method is the gathering and analysis of data to measure whether or not the process is effective. Within the general category of ABA programming are specific methodologies including but not limited to Discrete Trial Training (DTT), Intensive Trial Teaching (ITT), and Natural Environment Teaching (NET). These methodologies may be used to address a variety of individual student needs ranging from addressing problematic behaviors to teaching academic and social skills. (Albert, Yorlets, Guarino)

17. In the school context, direct ABA services (that is, working directly with a student to conduct trials of tasks and collect data in order to teach student-specific skills, including academic skills, reduce problematic behaviors, increase adaptive behaviors, and facilitate generalization of learned skills) are generally provided by teachers and/or behavior therapists, and not by BCBA's. (Guarino, Albert) Team chair Rebecca Albert, whose qualifications include a graduate certificate in ABA from UMass Boston,⁸ testified that the role of the BCBA generally is to "oversee [] programming for students with autism-related behavior disorders. They do everything from overseeing behavior programming and reviewing and analyzing and graphing data. Also taking a look at academic programs, just the way it's structured for Discrete Trial Training, Natural Environment Training, and Intensive Trial Teaching." (Albert)

18. Janelle Guarino, who was the initial BCBA from RCS assigned to oversee Student's program in Norton, testified about the respective roles of the behavior therapist and BCBA in most ABA-based educational programs, including Student's program. Ms. Guarino stated that "the direct service staff who are working... 1:1 with [Student] would take daily behavior data, and then I would also be there if... they needed help... handling any maladaptive behaviors." (Guarino). Ms. Guarino clarified that the "direct service staff" were assistant teachers who served as behavior therapists.

19. Colleen Yorlets was the Clinical Director of RCS during the period at issue in the instant case. Ms. Yorlets holds Master's degrees, in psychology and in behavioral analysis and has been a BCBA since 2011. In that capacity, Ms. Yorlets oversees RCS' "clinical coordinators" who are BCBA's who provide oversight to supervisory staff. Additionally, Ms. Yorlets does research in the ABA field. Ms. Yorlets assisted in the

⁸ Ms. Albert is not a BCBA but completed a one-year graduate program in ABA that included coursework and a practicum. Ms. Albert also holds a Master's degree in Educational Leadership and licenses in Elementary Education (1-6), Special Education (K-8), and Special Education Administration (all levels). (Albert)

transition between Amego and RCS during the summer of 2015. Additionally, at all relevant times Ms. Yorlets supervised Janelle Guarino. (Yorlets)

20. Ms. Yorlets testified that BCBA's generally serve as supervisors and consultants, to behavior therapists, and that the professional standard for BCBA service is approximately one to two hours of BCBA supervision for every ten hours of direct service by a behavioral therapist. In light of this guideline, Ms. Yorlets was surprised that Student's 2015-2016 IEP called for 30 hours per week of direct BCBA service, particularly since Student also had a 1:1 behavioral therapist who was providing direct ABA services as well as a special education teacher and related service providers. Ms. Yorlets stated that the only situation in which she could imagine provision of 30 hours per week of direct BCBA services in a school setting would be if there were no other providers available to deliver services directly. (Yorlets)

21. Ms. Yorlets stated that the basis for her recommendation to reduce the number of direct BCBA service hours arose both from her professional understanding and experience regarding the usual role of a BCBA and from the results of Student's three-year re-evaluation in November 2015. This led her to believe that reduction in the number of direct BCBA hours would be clinically appropriate. She also believed that this reduction would be clinically appropriate because it would support increased independence, especially in light of his considerable progress and the numerous service providers that would still be available to him (special education teacher, behavior therapist, and related service providers). Ms. Yorlets shared her opinion with other RCS and Norton staff, and testified that they reached a consensus that the proposed reduction in direct BCBA hours was appropriate. (Yorlets)

22. Ms. Yorlets first raised the issue of reduction of direct BCBA hours with Parents at the December 14, 2015 Team meeting. At that time, Parent indicated that she did not agree with reducing the hours, but wanted to consider a written proposal. Subsequently, Ms. Yorlets and Ms. Guarino (who had been working directly with Student on a daily basis since July 2015) analyzed Student's IEP goals, progress and related data and concluded that the clinically appropriate model for BCBA involvement with Student was 8 (eight) hours per week, with the BCBA serving primarily as a consultant to direct service providers. (Yorlets)

23. Ms. Yorlets drafted a plan for implementing the proposed change that entailed monitoring and graphing data for a two week period with no changes in BCBA hours, then for a four-week period of time, reducing the BCBA involvement to eight hours, while still keeping track of data. The BCBA would be in the school building for the remaining 22 hours per week. Ms. Yorlets forwarded her proposal to Norton for inclusion in the proposed new IEP. (Yorlets)

24. On December 21, 2015 Norton issued a proposed IEP encompassing the November 2015 re-evaluation. This IEP covered the period from December 14, 2015 to June 30, 2016. The IEP contained goals in Adaptive Behavior, Functional Life Skills, Social Skills, Functional Academics, English/Language Arts, Mathematics,

Speech/Language Therapy, Occupational Therapy, Physical Therapy, and Adaptive Physical Education (APE). The service delivery grid provided for home-based BCBA consultation services, as well as consultation services from the occupational and physical therapists and APE teacher in Grid A; aide support during inclusion times in gym, music and the general education classroom in Grid B, and behavioral, academic, related services/therapies in Grid C. Also listed in Grid C were 5x120 minutes per week of home-based services, and 5x360 minutes per week each of services from a BCBA and a 1:1 aide. (J-5)

25. The December 21, 2015 IEP contained the proposal for a trial of reduction of BCBA hours over a six week period referred to above. The proposal included a statement that the eight hours per week of BCBA hours that would be provided during the latter four weeks of the trial would be spent on such tasks as analyzing and graphing data, consulting with team members, completing observations, training staff, and completing program or behavior plan modifications. The BCBA's allocation of time and physical location (within the school building) was left to the BCBA's discretion. For the remaining 22 on-site hours, the BCBA would be available if needed by other staff. The BCBA would be gathering data related to all IEP goals during the trial period, and, at the end of the trial, "if progress is made on at least 80% of the specified objectives, it is recommended that BCBA service delivery be reduced to 8 hours per week, to be completed at the school. Time will be allocated and scheduled as deemed appropriate by the BCBA." (J-5) Under "additional information," the proposed IEP essentially continued provisions from the prior IEP, including a 6-week, 4-day ESY program, in-home services during school vacation periods, and monthly clinical meetings of Parents and School members of the Team to review data, which would be provided to Parents in advance and detailing the respective roles of each classroom staff member (BCBA, special education teacher, and assistant teachers). (J-5)

26. On or about January 12, 2016, Parents gave Ms. Guarino an IEP form containing revised or re-written versions of many of Student's goals and objectives. Ms. Guarino forwarded the document to Norton staff members who were confused because it appeared that Parents were proposing changes to previously-accepted goals and objectives. (J-7, J-194)

27. On January 15, 2016, Parents rejected the previously-accepted portions of the November 23, 2015 IEP amendment by giving Norton staff a copy of the signature page from that amendment with the following statement written in the "Parent Comment" section: "I [Parent's name] rescind my signature on this amendment (11/23/15). I am rejecting this amendment 11/23/15 in full. [Signed, Parent] 1/15/16" (J-6, Albert, Guarino)

28. Between approximately December 7, 2015 and January 12, 2016, RCS and Norton staff had been gathering data and preparing programs in order to implement the accepted portions of the proposed IEP amendment.

29. Norton personnel were confused about how to proceed after receiving Parents' rescission of the partial acceptance of the November 23, 2015 amendment. In an email dated January 19, 2016 to Ellen Convisser of the Massachusetts Department of Elementary and Secondary Education (DESE) Norton's Director of Pupil Personnel Services, Jeanne Sullivan, made the following inquiry:

...I am writing with a clarification question regarding [Student]....[T]he parents signed and accepted an IEP on July 1. The Team met and proposed amendments...to revise goals and objectives after a re-evaluation was completed. Parents did not agree with the Team writing an amendment rather wanted a full IEP. Despite this...parents partially accepted the amendment (only goals, objectives and increase in services.). The Team reconvened, considered the request to develop a full IEP rather than amendment. The Team agreed to write an IEP with the same increase in services, goals and objectives (the only change was tweaking end target in the goal). These IEPs have not been signed yet. In the meantime, given the partial acceptance of the amendment, the Team developed programs and started collecting baseline data...Last week Parents rescinded their consent to the amendments and presented their own goals and objectives to the Team. Parents have been advised that their rescinding of the amendment and their proposed goals will be discussed at the February clinical meeting. Can you clarify for me that I am correct in saying we go back to the IEP that was signed and accepted July 1?

Ms. Convisser's response was "I agree." (J-338)

30. In an email dated January 19, 2016, Ms. Albert informed RCS of the Parents' rescission of the previously partially-accepted amendment and stated, "We received confirmation from DESE that we now need to follow the IEP signed and dated 7/1/15. Please follow the 7/1/15 IEP for service delivery and goals and objectives going forward. The parents have not yet signed the IEP dated 12/21/15." (J-218, Albert, Sullivan)

31. Accordingly, Norton and RCS staff stopped gathering data for the proposed amendment, and returned to implementing the last accepted IEP that had been issued on July 1, 2015. (Guarino, Albert, Sullivan)

32. On or about January 20, 2016 Parents sent Norton their response to the proposed IEP dated December 21, 2015. On the Parent Response page, Parents checked the box indicating that the IEP was partially rejected and wrote "please see attached document." The proposal for a trial of reduction of BCBA service hours was crossed out with what appears to have been a highlighter. Other portions of the IEP were similarly highlighted. Parents appear to have re-written goals and objectives, including changing the measurement of progress on the objectives by requiring 10 trials for each such objective. The end date of the proposed IEP was changed to December 2016. An ESY program was

added to the service delivery grid. Accompanying the IEP was a letter from Parents stating, "Please find the highlighted rejected portions and the subsequent modifications to the highlighted portions of the IEP on the attached document. That I am requesting to be changed, for your convenience I have attached the documentation outlining the changes. Therefore, I am [accepting] the IEP IN PART, the parts I have [accepted] are effective immediately." (J-4, 5)

33. On or about January 26, 2016 Norton sent Parents an N-2 Form entitled "Response to Parent IEP Proposal." The notice stated that Norton was "declining the parents' proposed changes to [Student's] IEP proposed to [Parents] on 12/21/15." The notice further requested "clarification and confirmation of the rejected portions of the IEP as they are not clearly stated" and stated that "any portions...that have been partially highlighted are considered rejected and will not be implemented." The School further declined to adopt the Parents' requested expiration date of December 2016 or to implement other edits, the addition of an ESY program, or the removal of the proposed reduction in BCBA hours without first going through the Team process. (J-3)

34. Norton's stated basis for its refusal to adopt Parents' proposed objectives was that these proposed objectives had not gone through the Team process and, further, that the Parents' proposed requirements for the numbers of trials of each task would, among other things, "limit the ability to individualize [Student's] program per his rate of progress," as well as limit the ability to use several different methods of data gathering. (J-3)

35. What followed was an exchange of emails between Ms. Albert and Parents. In a lengthy email dated January 26, 2016, Parents stated, in sum, (1) that Parents did not wish to attend another Team meeting to discuss their partial rejection; (2) the IEP objectives were not clear with respect to how progress would be measured in each goal and objective; (3) Norton was improperly attempting to unilaterally change the methodology used with Student from "ABA Principles" to "ABA Approaches," (4) Student should continue to receive ESY programming to prevent regression, (5) by shortening the duration of the IEP from one year to six months, Norton was depriving him of annual goals in violation of federal law; (4) nothing in Student's recent re-evaluation results supported a reduction in BCBA hours and such reduction would constitute a unilateral change in placement. (J-149).

36. On January 29, 2016 Ms. Albert responded to Parent's correspondence with a responsive email in which she (1) denied that the School had made unilateral changes to Student's program; (2) declined to extend the IEP past June 30, 2016 because to do so would be contrary to the terms of the settlement agreement which required a Team meeting at that time, because data from the remainder of the 2015-2016 school year would be necessary to plan for the following year; and (3) an ESY program for summer 2016 would not be identified in an IEP that expired in June 2016. Ms. Albert further stated that the district declined to explicitly use the term "ABA techniques or principles" with each objective because the parties did not necessarily agree on the meaning of this term; however, that Student would, in fact, continue to be taught using ABA

methodologies. Ms. Albert asserted that the proposed reduction in BCBA hours did not constitute a change in placement. (J-149)

37. Via email dated February 1, 2016, Parent asked Ms. Albert for all state and federal regulations, policies, practices and procedures upon which the School was relying in Ms. Albert's correspondence referred to above. Ms. Albert responded, citing to the IDEA and MGL c. 71B. (J-149)

38. On February 12, 2016 the Team, including Parents, met to discuss the rejected portions of the IEP issued on December 21, 2015. The Parents and School were unable to reach agreement; therefore, after the meeting Norton continued to implement the 2015-2016 IEP as originally accepted. (Albert, Sullivan)

39. Notwithstanding the above, the School made multiple attempts during late February and March 2016 to convene a Team meeting to discuss the results of the music therapy evaluation, which recommended music therapy for Student. Parent objected to many of the dates proposed and/or scheduled by the School, either because she (Parent) was unavailable or because not every Team member could be present. Parent alleged that the District was disregarding Parents' scheduling needs and availability and was unlawfully failing or refusing to schedule meetings at times convenient to the Parents. The School denied these allegations, citing logistical difficulties, particularly where Student's related service providers served more than one school district. (J-32, 38, 296)

40. Ultimately, the Team convened on April 4, 2016 and agreed that music therapy was an appropriate service for Student. On April 11, 2016 Norton issued a proposed amendment to the 2015-2016 operative IEP adding music therapy goals and objectives. On April 12, 2016 Parents accepted the goals and objectives for music therapy and "the music therapy services themselves," while rejecting the amendment's being associated with the last-accepted 2015-2016 IEP rather than with the rejected IEP issued in December 2015. (J-15)

41. Attached to Student's accepted 2015-2016 IEP was a behavior plan, which had been written by Amego. In approximately March 2016, Mary Ricci, who had taken over Janelle Guarino's role as Student's BCBA, drafted a new behavior support plan for Student with the intention of reflecting the FBA conducted as part of the November 2015 re-evaluation and more effectively remediating Student's maladaptive behaviors. The plan addressed reduction of SIB, nail biting, aggression (hitting, scratching, pinching, pushing), vocal stereotypy and mouthing objects, and also addressed increasing adaptive behaviors, such as clapping (a substitute for SIB), making independent requests, "safe hands," and initiating social interactions. The plan provided for data-gathering on all targeted behaviors throughout the school day and/or at specified intervals depending on the behavior, and graphing of raw data by the BCBA. On April 4, 2016 Parent, Mary Ricci (the BCBA), Kelley Lynch (Student's special education teacher), both of Student's teaching assistants, Janelle Guarino, and the building principal signed off on the behavior plan. (Ricci, Rutland, J-1)

42. The previous behavior plan, authored by Amego, had contained a “bathroom” program, but the RCS plan did not. Ms. Ricci testified that she had removed the plan because Student was mostly independent with toileting, only requiring some help in cleaning himself. (Ricci) In an email dated April 15, 2016, Parent objected to the removal of the program, alleging that this had been done without her knowledge or consent and was the reason why Student reportedly had had two incidents in March 2016 of coming home with soiled underwear and a rash. Parent alleged that RCS staff had failed to clean Student adequately, but that if Student still had his toileting program, he would clean himself and the problem would not arise. Parent asked to revert to the Amego behavior plan, alleging that the RCS behavior plan (which she had signed on April 4) had changed the Amego plan without assessment, parental consent, or explanation. (J-235) In response, RCS added a toileting program, had two staff and the nurse accompany Student to the restroom to ensure adequate cleaning and had the nurse check Student’s underwear for cleanliness in the afternoon. (Ricci)

42. During the spring of 2016, in addition to the dispute over the behavior plan and toileting, the parties experienced conflict over Student’s home services which ultimately resulted in RCS’ temporary refusal to provide those services in the home. In sum, Student’s operative IEP called for extensive home-based services to enable Student to generalize skills including 2 hours x 5 days per week during the school year, 2 hours x 4 days per week during the ESY program, and 2 hours per day x 18 additional days both during school vacations and during the gap between the end of the ESY program and the start of the school year. The direct services were provided by Mary Ricci. Additionally, Ms. Guarino, the BCBA, would meet with Parents and staff weekly to review Student’s progress, including his progress in the home program. (Ricci)

43. While home services were being provided, Parent would generally be on an upper level of Student’s home while Student and the therapist would be working together in a basement playroom/classroom. Parent generally came to the session only if the therapist asked her to attend to discuss a particular issue or item, or if Student needed her help, although she was welcome to attend the entire session. (Guarino, Ricci)

44. On or about April 28, 2016 Jennifer Rutland, who was a BCBA and RCS’ Director of Consultation, notified Parents and Norton that they would be sending two therapists for home-based services because “staff have been put into a number of uncomfortable positions.” Additionally, Ms. Rutland stated that if staff were uncomfortable in the home, the session would end. (Rutland, J-135, 225, 229) The record is unclear as to what the “uncomfortable situations” were specifically within the home. In the school setting, however, this was the time period when Parents and School were in dispute over Student’s behavior management plan, toileting program, and bathroom cleanliness. In addition, during this time Parents had complained that Student was coming home from school with unexplained injuries. Parents accused RCS and Norton of failing to adequately supervise Student to prevent injury as well as failing to promptly inform Parents when injuries did occur. RCS staff felt they were being falsely accused, and disputed the existence and/or severity of the injuries claimed by Parents. (Rutland, Guarino) Parents objected to having two staff come to the home. (J-134)

45. From the beginning of the 2015-2016 school year, Parents had been videotaping the home service sessions with a surveillance camera installed in the room where sessions took place, with the knowledge and reluctant consent of RCS. On April 28, 2016, the same date that Ms. Rutland informed Parents that two therapists would be coming to the home, she also advised Parents that RCS no longer consented to the sessions being videotaped and would not provide services in the home unless Parents ceased taping. RCS and Norton offered to provide the same services within the school building, after school, until the dispute was resolved. Parents refused to either agree to services at school or to suspend videotaping and they declined a proffered meeting to discuss the dispute. (Sullivan, Ricci, J-131) It appears from the record that home services were not provided after on or about April 28, 2016.

46. Under the terms of the 2015 Settlement Agreement, Norton was required to develop an IEP for Student for the 2016-2017 school year by June 2016. Accordingly, in mid-April 2015, Norton began attempting to schedule an annual review meeting for this purpose. Parents raised multiple objections to attending an annual review meeting, stating they did not know the purpose of such a meeting, and would not inform Norton of whether they were available on proffered dates. Parents asserted that instead of conducting an annual review, Norton was required to “fix the partially rejected IEP [issued in December 2015 and partially rejected in January 2016] to reflect all of the agreed upon changes...” Parents stated that Norton should send them a copy of this document, for their review and acceptance. (Albert, J-226)

47. On or about May 6, 2016, Norton sent Parents an invitation for an annual review Team meeting to be held on May 16, 2016. (Albert, J-221) Parents’ advocate responded in an email of the same date (May 6) stating that Parents would not attend an annual review meeting, stating, “the Parent has informed you of her decision regarding the so-called annual meeting. No meeting, no facilitator, just fix the IEP.” (Sullivan, J-221) Based on Parents’ repeated statements that they would not attend an annual review, Norton convened the meeting without Parents present.

48. On or about May 31, 2016, the Norton Team issued a proposed IEP for Student for the 2016-2017 school year. This IEP was similar to the 2015-2016 IEP in that it called for a highly specialized, intensive program based on ABA principles. The service delivery grid proposed the following: in Grid A, 120 minutes per month of BCBA consult/parent training, 120 minutes per week of BCBA consult to classroom staff, 60 minutes per quarter of Team consultation with the BCBA, and 15 minutes per week of consultation among the APE, PE and classroom teachers; in Grid B, assistance by a teaching assistant for “Integration,” and by “classroom staff” to the physical education teacher; in Grid C, 600 minutes per week of home services, 1565 minutes per week of functional academics/life skills, 45 minutes per week of music therapy, 90 minutes per week of speech/language therapy, 135 minutes per week of occupational therapy, 60 minutes per week of physical therapy, and 30 minutes per week of APE. The IEP also called for an ESY program running from July 5 to August 12, 2016 and providing 1020 minutes per week of functional academics. As was the case with the prior, accepted IEP,

the revised RCS Behavior Plan and seizure action plan were appended to the proposed IEP. (J-1)

49. The proposed IEP was drafted by Student's BCBA, Mary Ricci, and his special education classroom teacher, Ms. Lynch, with input from other therapists and providers, all of whom relied on the testing done during the November 2015 re-evaluation as well as data and observations during the 2015-2016 school year. Goals had been made more ambitious based on Student's considerable progress during 2015-2016. Additional changes included changing the BCBA role from that of providing 30 hours per week of direct service to providing consultation services and training to Parents and staff (which also entailed data analysis and graphing and program development), elimination of the 1:1 aide (although Norton would supply an aide if needed), and reduction of clinical meetings from monthly to quarterly. Otherwise, the proposed IEP was similar to the prior IEP in that it called for ABA-based intensive instruction, home-based services during an extended school day, ESY programming, related services (OT, PT, speech/language and music therapies), APE, flexible inclusion opportunities, and regularly-scheduled clinical meetings. (Lynch, Ricci, Kennedy, Albert, Guarino, J-1)

50. The Team proposed placement for Student in the Specialized Elementary Alternative Program (SEAP) operated by the BICO Collaborative housed at the Jackson School in Plainville, MA, contingent upon BICO's acceptance of Student. As will be described more fully below, SEAP is an ABA-based substantially separate program for children on the autism spectrum that also provides for inclusion opportunities within the Jackson School. The rationale for this collaborative placement was that if Student were to remain in the Norton district, he would have no peers and would be educated in a classroom by himself. (Regan, Sullivan)

51. On or about June 6, 2016, Parents rejected the proposed IEP and placement in full, stating, in the parent response section of the IEP, "This was a unilateral decision on the district's behalf to remove services/programming without proper evaluations. Also I as parent had no participation in the development of the IEP." (J-1)

52. On or about June 14, 2016, Student fell off a swing at school and broke his arm. In response to staff inquiries and requests for medical documentation on how to accommodate Student's injury in school, parent provided a medical note stating that Student could not return to school until further notice and requesting home schooling and services "as per in-school and IEP without the use of the [broken] right arm." (J-142, 348)

53. Between approximately June 17 and June 20, 2016 the School made several requests for consent to access medical information regarding Student's injuries. The purpose of these inquiries was to enable RCS to tailor services to safely accommodate Student's broken arm. Parents responded on June 20, 2016 by filing a motion for home-based services with the BSEA. Norton responded with a statement that it was prepared to provide home-based services but needed more information to do so. There is no evidence that Parents provided the additional information before the end of the school year and Student did not return to school after June 14, 2016. Parents provided some abbreviated

medical information with a status report filed with the BSEA on July 22, 2016 which indicated that Student could not return to school or participate in gym or contact sports until further notice, and should get “home schooling services per IEP program.” Additionally, in August or September, Parents provided a medical note dated August 9, 2016 stating that Student could return to school in September. (LaConte, J-120, J-350)

54. Student was entitled to an ESY program under his “stay put” IEP for 2015-2016. Between June 7 and July 2, 2016 Parents and Jeanne Sullivan, Director of Student Services for Norton, exchanged emails regarding the location and staffing for the ESY program, which was scheduled to start on July 7, 2016. On or about July 2, 2016, Ms. Sullivan sent an email to Parents inquiring about Student’s attendance at the ESY program and identifying the ESY staff. Staff could not be identified before this date because the contracts of the school-year RCS providers expired at the end of the school year. Several staff had indicated that they did not wish to renew their contracts over the summer because they had experienced ongoing hostility and accusations from Parents and their advocate during the prior school year, and did not wish to continue the relationship, although they had actively enjoyed working with Student himself. RCS, therefore, had to search for and hire summer staff. Nonetheless, providers were available for the start of the ESY program on July 7, 2016. Parents neither sent Student to the program nor provided additional medical information to support a home-based program. (J-109, 327, Sullivan, Ricci, Kennedy)

55. At a pre-hearing conference held at the BSEA on August 2, 2016, Parents informed Norton of their intention to home-school Student. (S-10) On or about September 1, 2016, Jeanne Sullivan forwarded Parents a homeschooling application, inquired about Student’s status for the 2016-2017 school year, reminded Parents that the “stay put” program under the last accepted 2015-2016 IEP remained available for Student, and asked for medical updates prior to the start of the school year. (Sullivan, S-11)

56. Between September 1 and November 2, 2016, Parents and their advocate exchanged emails and information with Jennifer O’Neill, Norton’s Assistant Superintendent for Teaching and Learning, who was responsible for approving all homeschooling applications for Norton. Pursuant to the requirements for all parents seeking approval to home-school their children, Parents had to provide information about how they would instruct Student in subjects required by the Massachusetts Curriculum Frameworks including art, music and gym, how they would ensure community involvement, and how they would measure progress. Parents had included with their application an IEP that they had drafted themselves, but were required to, and did, additionally submit this curricular information. The application was initially denied as incomplete in October 2016, but ultimately was approved by Norton’s Superintendent on November 2016. (O’Neill, N-4, N-15, PS-1 - 10)

57. Among other things, the Superintendent’s approval letter stated the following:

“...I am approving your home-school application based on the standards relative to parents’ rights to home-school their children,

which standards Norton applies for all students. [citations omitted] These standards are different from the standards applicable to special education matters. Therefore, approval of your homeschool application is not an admission that your proposed program...is appropriate under relevant special education laws or constitutes education in the least restrictive environment. To the contrary, Norton maintains that it is neither. As special education standards do not apply to home-school programs, Norton does not agree with or accept your proposed IEP as such. That form, which you included with your home-school application, may be a helpful tool...but it is not a binding IEP under special education law. Until a Hearing Officer rules otherwise, the stay-put 2015-2016 IEP remains the operative IEP if [Student] re-enrolls in the Norton Public Schools.

As is the case with all home-schooled students, now that your home-school application has been approved, [Student] will be considered withdrawn from the Norton Public Schools...Norton is not required and does not agree to fund any portion of your home-school program. As a student with special needs, however, [Student] is eligible to receive itinerant special education services in district, as agreed to by his team. Based on your lack of response to this offer...made numerous times, I understand that you are rejecting those services at this time...(PS-11)

58. Between June 14, 2016 and November 1, 2016 Student neither returned to the Norton Public Schools nor participated in home-based services from Norton. There is no dispute that Student has been home-schooled pursuant to the approved homeschool plan since approximately November 1, 2016.

59. Norton continued to fund RCS staff and programming for the “stay put” program in Norton pursuant to the BSEA *Ruling on Motion for Clarification of Stay Put* of August 30, 2016. On November 29, 2016 in response to the School’s *Motion for Relief from Stay Put*, the undersigned Hearing Officer issued an oral ruling temporarily suspending Norton’s obligation to fund or implement the “stay put” program, effective November 29, 2016, in light of the Student’s continuous non-attendance in the program at issue since June 2016. Such suspension was allowed contingent upon (1) Student’s continued non-attendance in the “stay put” program and (2) NPS’ representation that the “stay put” program could and would be reinstated within a short time frame if Student were to resume attendance within the Norton Public Schools. This Ruling was memorialized in writing on January 12, 2017.

PROGRAM PROPOSED BY NORTON PUBLIC SCHOOLS

60. As previously stated, Norton proposed placing Student in the SEAP program operated by the BICO Collaborative and housed in the Jackson Elementary School in

Plainville, MA. Originally, Ms. Sullivan, Ms. Albert, and RCS staff observed the SEAP program prior to proposing it in spring 2016 and felt it would be appropriate for Student. The classroom would have six to eight students, ranging from six to nine years old, who appeared to function at the same or slightly lower cognitive and academic level as Student and who did not present with serious behavioral problems. The program is staffed by a special education teacher, who has completed BCBA course requirements and three paraprofessionals of whom two are Registered Behavior Technicians. A BCBA consults to the program and develops ABA programs for individual students in collaboration with the classroom teacher. The program is operated, and Student would be taught, using ABA principles. Student would also be able to receive occupational, physical, speech/language and music therapies and would have inclusion opportunities within the Jackson School as well as home-based services and an ESY program. BICO staff did not feel that Student needed a 1:1 aide but the program had the capacity to add one if needed. (Regan, Sullivan, Albert)

61. After initially rejecting the placement proposal on June 6, 2016, Parents did sign a consent form allowing Norton to send a referral packet to BICO on August 19, 2016. Upon reviewing the referral materials sent by Norton, and after observing Student in his homeschooling program on September 15, 2016,⁹ Ms. Regan as well as Pam Ludwig, BICO's elementary program director, believed that Student was making strong progress with his language and academic skills, especially in math. (Student was working on four-digit addition). For this reason, Ms. Regan and Ms. Ludwig proposed a "hybrid" program for Student under which he would divide his time between the SEAP classroom, where he would develop new skills through discrete trial training and other ABA methodologies, and a second ABA classroom that served students who, like Student, had relatively strong social language and academic skills. (Regan)

62. On September 19, 2017 Parent and her advocate visited the both BICO classrooms that were being proposed for Student. One day later, BICO accepted Student's referral, noting that he could begin immediately and further noting that this acceptance was based on the proposed, previously rejected IEP for 2016-2017. (Regan, S-1)

PROGRAM PROPOSED BY PARENTS

63. Parents have proposed that Norton fund the homeschooling program that they have developed for Student and which Norton's superintendent approved on November 2, 2016. The evidence on the record indicates that Parents have developed a program that includes goals and objectives from an IEP form that they completed themselves, services from a BCBA, a teacher, and possibly related service providers, quarterly assessment of progress using the ABBLs, instruction in a modified third grade curriculum covering the same subjects as in the Norton Public schools, participation in a local gymnastics class, and other unspecified activities with peers in the community. As stated above, Ms. Regan observed Student in his home program in September 2016, (before it had been approved

⁹Student's homeschooling program was not approved until November 1, 2016; however, Parents were providing Student with home instruction at least as early as September 2016. (Regan)

and possibly before it had been fully developed). He was the only child present in the home classroom, and was working with a BCBA and a teacher. Ms. Regan observed that Student was working on 4-digit addition in math. Student greeted Ms. Regan appropriately, shook her hand, and made eye contact, and she was impressed by his language skills. (Regan, O’Neill, PS-1-10)

DISCUSSION

LEGAL STANDARDS

Substantive Components of FAPE

There is no dispute that Student is a school-aged child with a disability who is eligible for special education and related services pursuant to the IDEA, 20 USC Section 1400, *et seq.*, and the Massachusetts special education statute, M.G.L. c. 71B (“Chapter 766”). Student is entitled, therefore, to a free appropriate public education (FAPE), that is, to a program and services that are tailored to his unique needs and potential, and is designed to provide ‘effective results’ and ‘demonstrable improvement’ in the educational and personal skills identified as special needs.” 34 C.F.R. 300.300(3)(ii); *North Reading School Committee v. BSEA*, 480 F. Supp. 2d 489 (D. Mass. 2007); citing *Lenn v. Portland School Committee*, 998 F.2d 1083 (1st Cir. 1993).

While Student is not entitled to an educational program that maximizes his potential, he is entitled to one which is capable of providing not merely trivial benefit, but “meaningful” educational benefit. See *Andrew F. v. Douglas County School District RE-1*, 69 IDELR 174 (March 22, 2017), *Bd. of Education of the Hendrick Hudson Central School District v. Rowley*, 458 US 176, 201 (1982), *Town of Burlington v. Dept. of Education*, 736 F.2d 773, 789 (1st Cir. 1984); 675 F.3d 26, 34 (1st Cir. 2012); Whether educational benefit is “meaningful” must be determined in the context of a student’s potential to learn. *Rowley, supra*, at 202, *Lessard v. Wilton Lyndeborough Cooperative School District*, 518 F.3d 18, 29 (1st Cir. 2008); *D.B. v. Esposito, supra*. As the U.S. Supreme court recently held in *Andrew F.* at 69 IDELR 174, even if a child is not likely to progress at the same rate as non-disabled peers, his or her goals should be “appropriately ambitious in light of [his or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may be different, but every child should have the chance to meet challenging objectives.” *Id.* In cases where a student’s potential to learn is difficult to determine because, for example, the student’s disability is complex and not fully understood, or the student has communication deficits or behaviors that interfere with his or her ability to express thoughts, it is still possible to “assess the likelihood that the IEP will confer a meaningful educational benefit by measurably advancing the child toward the goal of increased learning and independence.” *D.B. v. Esposito, supra*. Finally, eligible children must be educated in the least restrictive environment (LRE) consistent with an appropriate program; that is, students should be placed in more restrictive environments, such as private day or residential schools, only when the nature or severity of the child’s disability is such that the child cannot receive FAPE in a less restrictive setting. On the

other hand, the opportunity to be educated with non-disabled students does not cure a program that otherwise is inappropriate. *School Committee of Town of Burlington v. Dept. of Education of Mass.*, 471 U.S. 359 (1985).

Procedural Components of FAPE

Both federal and state special education law provide procedural protections for students with disabilities and their parents, designed to support the parent-school collaboration envisioned by these statutes. Parents are full members of the Team that develops IEPs, which are the blueprints for providing services for eligible students, 20 USC §1414(d)(1)(b)(i). Parental participation in the planning, developing, delivery, and monitoring of special education services is embedded throughout the IDEA, MGL c. 71B, and corresponding regulations. Courts have consistently emphasized the centrality of parental participation to the IDEA scheme. In *Rowley*, 458 U.S. 405-406 (1982), the Supreme Court stated "...Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process...as it did upon the measurement of the resulting IEP against a substantive standard." See also: *In Re Framingham Public Schools and Quin*, 22 MSER 137 at 142 (Reichbach, 2016), and cases cited therein.

Notwithstanding the above, it is well settled that although parents are Team members, entitled to fully participate in the IEP development process and to have their views considered, they are not entitled to dictate the terms of an IEP. On the contrary, a school is not required to negotiate with parents to reach a result with which parents agree if by doing so they propose an IEP that the school believes is not appropriate for the child. Rather, schools are obligated to propose what they believe to be FAPE in the LRE, whether or not the parents are in agreement. *In Re Natick Public Schools*, 17 MSER 55, 66 (Crane, 2011) Moreover, within the basic framework of an IEP, schools have considerable professional discretion and flexibility in how they fulfill their responsibilities. *M. v Falmouth School District*, 847 F.3d 19 (1st Cir. 2017) Thus, for example, schools generally have discretion over such items as classroom placement, staff assignments, and methodologies, as long as the goals and objectives of the IEP can be met and the student can make effective progress. *In Re: Dennis-Yarmouth Regional School District*, 10 MSER 64, 70 (Putney-Yaceshyn, 2004)

Intertwined with the concept of parental participation is the requirement of notice to parents at various points in the special education process. Of relevance here is the IDEA's requirement that school districts give parents "written prior notice" whenever the district "proposes to initiate or change" or "refuses to initiate or change" the "identification, evaluation, or educational placement of the child or the provision of a free, appropriate public education to the child." 20 USC §1415(b)(3)(A) and (B). A closely related, fundamental component of the procedural protections afforded parents and students is the "stay put" rule. "Stay put" means that during the time that parent and school district are engaged in the IDEA dispute resolution process, "unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child..." 20 U.S.C. Sec 1415(j); 34 CFR Sec. 300.514; *Honig v. Doe*, 484 U.S. 305 (1988); *Verhoven v. Brunswick School Committee*,

207 F.3d 1, 10 (1st Cir. 1999); *M.R. and J.R. v. Ridley School District*, 744 F.3d 112 (3d Cir. 2014); M.G.L. c. 71B; 603 CMR 28.08(7). “Stay put” has been described as “an automatic preliminary injunction.” *Drinker v. Colonial School District*, 73 F.3d 859, at 864 (3d Cir. 1996), the purpose of which is to protect students from unilateral changes in placement by school districts and to reflect the preference of Congress for maintaining the stability of a disabled child’s placement and minimizing disruption to the child while the parents and school are resolving disputes. *Verhoven, Ridley, supra*. Once a student’s “current educational placement” has been determined, the student is entitled to an order maintaining that placement “without satisfaction of the usual prerequisites to injunctive relief.” *Drinker*, 78 F. 3d at 865.

The critical question is identifying the child’s “then current placement,” because not every alteration in a child’s educational services constitutes a change in placement that triggers the “stay put” requirement. Neither the IDEA nor its implementing regulations define the term “then current placement” or provide an exhaustive list of circumstances that do or do not constitute a change triggering “stay put” protection. *Id.* Neither the First Circuit nor other courts have provided an unequivocal definition of the term. Rather, when courts throughout the country have addressed this issue, they have done so in a highly individualized and fact-intensive way. *Hale ex rel. Hale v. Poplar Bluff R-1 School District*, 280 F.3d 831, 834 (8th Cir. 2002).

There are several general principles that guide most such court decisions, however. First, since the purpose of “stay put” is to preserve the status quo, in the interests of stability for a child while a dispute is being resolved, courts look for the “operative placement” or IEP that is “actually functioning at the time the dispute first arises.” *Drinker*, 78 F.3d at 867. Second, courts inquire whether there is a “fundamental change in...a basic element of the educational program...” *Sherri A.D. v. Kirby*, 975 F. 2d 193, 206 (5th Cir. 1992). More recent decisions in other circuits have elaborated on this standard to emphasize the impact on the student. For example, in *AW. v. Fairfax County School Board*, 41 IDELR 119 (4th Cir. 2004), the Fourth Circuit reviewed several “stay put” decisions and noted that important factors to be considered in deciding whether a change (in location, in that case) is a true “change in placement” are whether the change impacts FAPE by “diluting” the quality of services or increasing the restrictiveness of the student’s program. The 8th Circuit decided similarly in *Hale v. Poplar Bluff R-1 School District, supra*, (Court found that providing identical services in a different setting constituted a change in placement under the facts of that particular case because of the impact of the change.)

Remedies

In the instant case, Parents are seeking two remedies, compensatory services for Norton’s alleged failure to provide required services during the 2015-2016 school year (including ESY services for summer 2016) and both reimbursement and prospective funding of their homeschooling program. Both compensatory services and reimbursement are in the nature of equitable remedies. *Diaz-Fonseca v. Comm. of Puerto Rico*, 451 F.3d 13 (1st Cir. 2006). As such, a hearing officer may consider the conduct of

parents in determining whether reimbursement or compensatory services are warranted, and may deny reimbursement if parents unreasonably obstruct the IEP process or otherwise interfere with the ability of the school district to fulfill its obligations. See *C.G. and B.S. v. Five Town Community School District, et al.*, 513 F.3d 279 (1st Cir. 2008), citing *Roland M. v. Concord School Committee*, 910 F.2d 983 at 987 (1st Cir. 1993); *Murphy*, 22 F.3d at 1197.

Compensatory services may be available to make a student whole if a school district commits procedural violations that result in a denial of FAPE to an eligible student. *Pihl v. Mass. Department of Education*, 9 F.3d 184 (1st Cir. 1993). On the other hand, compensatory relief will not generally be awarded for merely technical, de minimis violations that do not result in a denial of FAPE or preclude parents from meaningful participation in the Team process. *Murphy v. Timberlane Regional School Dist.*, 22 F.3d 1186, 1196 (1st Cir. 1994), quoting *Roland M. v. Concord School Committee*, 910 F.2d 983, 994 (1st Cir. 1990).

Parents also are seeking reimbursement for the expenses incurred in their unilateral placement of Student in their approved homeschooling program, in essence arguing that this program is analogous to a private school placement. Setting aside for the moment whether this analogy is correct, the underlying principle is that under certain circumstances, parents may be reimbursed for the costs of self-help. That is, a public school district may be required to reimburse parents for the cost of unilaterally placing a child in a private school if the parents can demonstrate that (1) the public school failed to offer the child an appropriate program and (2) that the placement provided by the parent is appropriate. *Florence County School District Four v. Carter*, 510 US 7, 13 (1993). Parents are not required to meet state education standards in making a unilateral placement, as long as the school chosen is capable of providing the student with FAPE; that is, the placement is “appropriately responsive to [a student’s] special needs,” so that the student can receive educational benefit. *Matthew J. v. Mass. Dept. of Education*, 989 F. Supp. at 387, 27 IDELR 339 at 343-344 (D. Mass. 1998), citing *Florence County, supra*.

In a due process proceeding to determine whether a school district has offered or provided FAPE to an eligible child, the burden of proof is on the party seeking to change the *status quo*. In the instant case, as the moving party challenging the School’s proposed IEP, Parents bear this burden. That is, in order to prevail, Parents first must prove, by a preponderance of the evidence, that Norton’s proposed IEP and services for 2016-2017 were not appropriate, at the time they were written, *i.e.*, were not reasonably calculated to provide Student with FAPE. If the evidence is equivalent, the School will prevail. Parents also have the burden of proving the necessary elements of their claims for compensatory services and for reimbursement. To establish a claim for compensatory services, Parents must demonstrate that Norton committed procedural violations or excluded Parents from the Team process, and that as a result, Student was deprived of a FAPE. As for reimbursement, Parents must prove both that the program and services that Norton offered for 2016-2017 were inappropriate and, if they meet that burden, that their chosen homeschooling program is appropriate. *Schaffer v. Weast*, 546 U.S. 49, 44

FINDINGS AND CONCLUSIONS

Based on the foregoing summary of the evidence and legal framework, I will address each of the issues in this matter in turn.

I. Appropriateness of the proposed 2016-2017 IEP and placement

The overwhelming weight of the evidence in this matter indicates that the proposed IEP and placement for the 2016-2017 school year was appropriate for Student, offering him, goals that are “appropriately ambitious in light of his circumstances, and a placement calculated to enable him to reach those goals. See *Andrew F.* at 69 IDELR 174. The parties do not dispute that Student requires an intensive educational program based on ABA principles to reduce maladaptive behaviors and to acquire and advance his skills and independence in all areas of functioning, including academics, communication, social interaction, fine and gross motor activities, and activities of daily living. There is no dispute that Student made substantial progress in all of these areas pursuant to the accepted “stay put” IEP running from July 2015 through June 30, 2016 as well as the attached behavior plan. For example, between approximately June 2015 and May 2016, the frequency of Student’s self-injurious behavior declined from hundreds of instances per day to fewer than three per day. (Guarino, Ricci)

The proposed successor IEP for 2016-2017 is similar to this previously-accepted, highly effective “stay put” IEP in that it is based on ABA principles and addresses all of Student’s undisputed areas of need, and contains roughly the same number of hours of direct instruction in life skills/academics, speech/language and physical therapy, and adaptive physical education, as well as an extended school day for home services and an ESY program for the summer of 2017. The disputed IEP contains increased occupational therapy services (from 2x30 minutes per week to 3x45 minutes per week) and music therapy, and, generally, has updated the last accepted IEP to reflect the November 2015 re-evaluation as well as data demonstrating Student’s progress during 2015-2016.

Many of the services, goals and objectives in the disputed IEP are the same as those that Norton previously had proposed in the November 2015 Amendment as well as in the December 2015 IEP. Parents initially had fully or partially accepted most of these services, goals and objectives including increased occupational therapy services, the addition of music therapy, “tweaking” of academic and social goals and objectives to reflect Student’s advancement, and increasing inclusion time, and wanted Norton to begin implementing these accepted items immediately. Although Parents ultimately fully or partially rescinded their acceptance of, or rejected, the proposed goals and objectives, they presented no evaluations or other objective information to support their actions, either to the Team or at the hearing. Moreover, Parents’ rescission/partial rejection appears to be based on dissatisfaction with various procedural matters (*e.g.*, the School’s initially having drafted an IEP amendment after the November re-evaluation rather than a

full IEP) as well as their objection to the proposal contained in the December 2015 IEP to study reduction of BCBA hours.

One of Parents' primary objections to the disputed IEP was the change in the model for delivery of BCBA services from the 30 hours per week of direct BCBA instruction to the more customary consultation model, wherein the BCBA's role would be to collaborate with teachers and other staff as well as Parents to develop programs, graph data, assess progress and adjust programming as needed in light of the data. The uncontroverted testimony at hearing of two BCBA's (Guarino, Yorlets) as well as a Team Chair with a Master's degree in behavior analysis (Albert) established that the consultation model was the generally accepted practice in the ABA field as well as appropriate for Student. Parents presented no evaluations or other evidence to the contrary.

As is the case with the IEP for 2016-2017, the uncontroverted evidence on the record is that the proposed placement at the BICO collaborative was highly appropriate for Student. BICO initially considered placing Student exclusively in the SEAP classroom, which is a substantially-separate ABA classroom for children on the autism spectrum. After further reviewing Student's records as well as observing him in his home, BICO's Director of Student Services, Ms. Regan, and Director of Elementary Services, Ms. Ludwig, proposed a hybrid program to allow Student to learn skills in the SEAP classroom and then practice them in a different classroom with peers who had more advanced social language and academic skills. The evidence establishes this program had the capacity to fully implement the proposed IEP as well as make any adjustments needed to reflect Student's changed needs and/or growth. Parents presented no evidence to the contrary.

Moreover, the BICO program was not overly restrictive. Housed in a public school building, the program would have afforded Student access to a community of similar and/or compatible peers within two substantially separate classrooms as well as to non-disabled peers during inclusion periods. By way of contrast, Norton would not have been able to provide age-appropriate peers for the substantially separate program for 2016-2017. Student had been educated with only one other peer during 2015-2016 and would have been the only child in his substantially separate classroom for the following year. To insist that such an arrangement is the least restrictive environment for Student simply because of its location in his home school district, instead of in a public school building in a nearby town, elevates form over substance. This is especially striking in view of evidence that Student is a friendly, socially interested child who thrived on peer contact with his second grade general education class. There is no evidence to suggest that Student would not also thrive with even more peer contact—with both disabled and non-disabled children—in the BICO placement. (See testimony of LaConte)

Because I have concluded that the program offered by Norton for 2016-2017 is appropriate, I do not reach the issue of whether or not Student's needs could be met in Parents' homeschooling program. Parents have the right to homeschool their child. *MGL c. 76, Care and Protection of Charles*, 399 Mass 324. They have developed a

homeschooling program for him which has been duly approved by Norton's superintendent. This program may or may not be appropriate for Student within the meaning of the IDEA or MGL c. 71B, but I do not reach that question here because at all relevant times, there was an appropriate IEP and placement available for Student.

Norton observed the procedural requirements of the IDEA and MGL c. 71B when developing the IEP for 2016-2017. As discussed in the Summary of Evidence, Norton staff reached out to Parents in an attempt to schedule an annual review meeting in May 2016 in compliance with the Settlement Agreement. Parents would not confirm their availability for any of the proffered dates, and indicated that they did not know the purpose of the meeting. Ultimately, Parents stated more than once that they would not attend an annual review meeting; instead, they directed Norton to "fix" the previously-rejected IEP from December 2015 according to Parents' specifications.

Faced with Parents' failure to confirm dates when they would be available for a Team meeting and eventual refusal to attend such a meeting, Norton convened the annual review without the Parents, on May 16, 2016. I find that Norton acted reasonably and made diligent efforts to assure that the meeting was held at a time when the Parents would be available and able to participate.

Moreover, I find that when it was clear that Parents would not attend an annual review meeting, Norton acted properly and in accordance with its obligations in convening the meeting in Parents' absence. 34 CFR §300.322(d) Further, the unrefuted evidence on the record demonstrates that the Norton and RCS members of the Team duly considered pertinent information about Student to develop an appropriate IEP that met Student's documented needs.

Finally, Parents' allegation that the Team pre-determined Student's proposed placement at BICO is without foundation in the record. That Norton discussed the possibility of a BICO placement and visited the program before the Team meeting does not constitute pre-determination. In fact, it seems prudent and appropriate for school members of a Team to be informed about possible placements in advance of the meeting so that they can share this information with Parents. The record is clear that Norton did not actually propose BICO in a formal manner until after the IEP had been developed. Parents are entitled to disagree with Norton's proposal of the BICO program, but have presented no evidence that Norton decided Student's placement outside of the Team process or otherwise violated Parents' or Student's procedural rights when they developed the IEP for 2016-2017.

II. Availability of an extended school year program during the summer of 2016

Parents have alleged that the ESY program to which Student was entitled was not available during the summer of 2016. This allegation is not borne out by the record. Despite some turnover in staff at the end of the school year, Norton witnesses testified that by on or about July 2, 2016 they had identified summer staff, and that a program was

in place for Student at the start of the ESY program on or about July 7, 2016. Parents have presented no evidence to the contrary.

III. Sufficiency of Physician’s Notes for Home-Based ESY Program

State special education regulations and DESE standards make clear that school districts may only provide home or hospital based educational services if such services are necessary because of a child’s medical condition. 603 CMR 28.03(3)(c) provides that “upon receipt of a physician’s written order verifying that any student...must remain at home or in a hospital...for medical reasons and for a period of not less than fourteen days in any school year, the principal shall arrange for services in the home or hospital. Such services shall be provided with sufficient frequency to allow the student to continue with his or her educational program, as long as such services do not interfere with the medical needs of the student.” The regulation goes on to say that for special education students, the services shall encompass those delineated in the child’s IEP. *Id.* The DESE *Home Services Guide* elaborates that at a minimum, the physician’s signed notice must include information including the date the student was confined to home, the medical reasons for confinement, the expected duration, and the medical needs of the student that should be considered in planning services. *Id.* Because home-based services are highly restrictive, the BSEA has required strict adherence to these standards. See, *e.g.*, *In Re Stoneham Public Schools*, 15 MSER 142-143.

In the instant case, the requisite standards for a home-based ESY program were not met. Parents submitted a total of four notes from medical providers, none of which contained all of the information required by the DESE *Guide* or regulation. The first two notes, dated June 15 and July 12, 2016, simply stated that Student had a broken arm and requested “home schooling per his IEP,” saying nothing about whether Student was confined to home or the expected length of confinement. Subsequent notes were similarly deficient. Repeated inquiries to Parents from Norton staff about adjustments that needed to be made, at home or in school, to accommodate Student’s broken arm were not answered.

Based on the foregoing, I conclude that the Parents have not demonstrated that the notes provided triggered an obligation to provide a home-based ESY program for the summer of 2016. Further, even if there were some basis for concluding that Norton was overly-strict in its requests for adherence to the terms of the DESE *Guide*, Parents’ failure to respond to inquiries about how to deliver services to Student in light of his injuries obviate any claim for compensatory services on this issue.

CONCLUSION AND ORDER

Based on the foregoing, the Parents have not met the requisite burden of proof on any of their substantive or procedural claims. The IEP and placement for Student for the 2016-2017 school year were reasonably calculated to provide Student with FAPE, and were developed in compliance with the procedural requirements of the IDEA and MGL c. 71B. There was an ESY program available for Student for the summer of 2016 as

required by his IEP. Parents neither provided sufficient medical information to trigger home-based ESY services nor responded to Norton's inquiries on how to accommodate Student's injury during the summer of 2016.

RULING ON MOTION FOR SANCTIONS

Prior to the Hearing in this matter, Norton filed a *Motion for Costs and Sanctions* relative to the conduct of the Parents' advocate in this matter. While I deny this *Motion* because I am not persuaded that the BSEA has authority to impose "costs and sanctions" as requested by Norton, such denial should not be construed as validation or approval of the advocate's conduct in this matter.