COMMONWEALTH OF MASSACHUSETTS

**Division of Administrative Law Appeals**

**Bureau of Special Education Appeals**

**In Re: Neville[[1]](#footnote-1) v. Sutton Public Schools BSEA #07-7534**

**on remand to the BSEA**

**DECISION**

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

**I. Introduction**

By Memorandum of Decision and Order, dated December 6, 2011 (hereinafter, “Superior Court Decision”) [[2]](#footnote-2), the Superior Court reversed, in part, my earlier decision of July 1, 2008 (BSEA # 07-7534) (hereinafter, “my Previous BSEA Decision”), and remanded this matter to the Bureau of Special Education Appeals (hereinafter, “BSEA”) for further proceedings consistent with the Superior Court Decision.

The instant Decision is issued pursuant to the Superior Court’s remand. Parents are pro se; Sutton Public Schools (Sutton) is represented by an attorney.[[3]](#footnote-3)

By agreement of the parties and pursuant to BSEA Hearing Rule XII, this matter is decided on the basis of the evidentiary record from the original BSEA evidentiary hearing in this matter (on April 29, 2008), without additional exhibits or additional testimony.[[4]](#footnote-4)

As agreed by the parties, initial written closing arguments were due March 9, 2012, with rebuttal written arguments due March 30, 2012. The record closed on March 30, 2012.

II. Issues

The issues to be decided are whether Sutton deprived Student of a free appropriate public education (hereinafter, “FAPE”) by failing to issue an IEP for the 2006-2007 school year and by failing to conduct a three-year re-evaluation; and, if so, whether Sutton must reimburse Parents for expenses they incurred in privately providing an alternate educational program to Student throughout the 2006-2007 school year.

**III. Procedural History**

For reasons that will become apparent later in the instant Decision, important parts of the procedural history of this case include a prior BSEA decision by Hearing Officer Sara Berman, involving the same parties as in the instant dispute. In a decision dated March 26, 2007, Hearing Officer Berman found that the IEPs developed by Sutton for the 2005-2006 school year for the Student in the instant dispute were appropriate to meet his special education needs. Parents had the burden of persuasion on this issue. Hearing Officer Berman further found that Sutton had not demonstrated that Parents’ private educational services had denied Student FAPE. Sutton had the burden of persuasion on this issue.[[5]](#footnote-5)

Parents appealed Hearing Officer Berman’s decision to federal District Court, which affirmed the BSEA’s determination that the IEPs were appropriate. However, the Court did not rule on the question of whether Sutton had met its burden regarding its claim that Parents had denied Student FAPE.[[6]](#footnote-6) On March 23, 2012, the First Circuit affirmed the federal District Court’s decision.[[7]](#footnote-7)

Subsequent to Hearing Officer Berman’s March 26, 2007 decision regarding the 2005-2006 school year but prior to the federal Court Decision affirming the BSEA decision, I heard the parties’ dispute with respect to the subsequent school year—that is, the 2006-2007 school year. The dispute over which I presided did not address the appropriateness of an IEP but rather considered three procedural claims under the IDEA. Parents alleged that Sutton failed to (1) develop an IEP for the 2006-2007 school year, (2) conduct a three-year re-evaluation of Student in advance of a May 25, 2006 Team Meeting, and (3) appropriately consider, through the May 25, 2006 IEP Team meeting, several educational evaluations obtained by Parents.

Parents argued that these three procedural failures resulted in the denial of FAPE, with the result that Parents should be reimbursed for their privately-obtained special education services for the 2006-2007 school year. Parents sought no relief other than reimbursement.

Sutton conceded that it did not develop the requisite IEP and that it did not perform the requisite re-evaluations in a timely manner, but took the position that its actions were justified under the circumstances. Sutton further argued that the IEP Team appropriately considered each of Parents’ educational evaluations that it was required to consider. Parents disagreed.

In my Previous BSEA Decision, I found that Parents, through their attorney at that time,[[8]](#footnote-8) and Sutton, through its attorney, had orally agreed that Parents waived their right to a three-year re-evaluation and to an IEP for the 2006-2007 school year. For this and other reasons, I resolved the first two procedural claims in Sutton’s favor. I further concluded that Parents had not carried their burden of persuasion regarding their remaining procedural claims relative to what occurred during an IEP Team meeting, with the result that Sutton prevailed on the Parents’ third claim. Finally, I found that, in any event, Parents could not obtain reimbursement because they had not carried their burden regarding the appropriateness of their privately-obtained educational services. For these reasons, I found in favor of Sutton on all claims.

The Superior Court agreed that the parties’ attorneys had entered into an oral agreement, but concluded that the oral agreement was not binding upon Parents because they were unaware of it.[[9]](#footnote-9) The Court further determined that because the agreement between the attorneys was not in writing, it was unreasonable for Sutton to rely upon it.[[10]](#footnote-10)

The Superior Court agreed with my determination that Sutton should prevail on Parents’ third procedural claim.[[11]](#footnote-11)

For these reasons, the Court found that Sutton had violated Parents’ procedural rights by not issuing an IEP for the 2006-2007 school year and by not conducting the required three-year re-evaluation. The Court did not address the following two questions: first, whether these violations resulted in a denial of FAPE, and second, whether Parents were entitled to reimbursement of their expenses for private educational services they have provided for their son during the 2006-2007 school year. The Court directed that these remaining two questions be addressed by the BSEA on remand.[[12]](#footnote-12)

**IV. Student’s Profile, Sutton’s Proposed Services and Parents’ Private Services**

At the time of my Previous BSEA Decision (July 1, 2008), Student was 11 years old, was in 5th grade, and lived with his Parents in Sutton, MA. Testimony of Mother; exhibit S-69.

Student had many strengths. He was described as delightful, friendly, polite, happy, and endearing. Student also had complex and significant neurological deficits that included verbal apraxia and a sensory integration disorder that have had a substantial and pervasive effect on his development. Student had delayed expressive language as well as a receptive language deficit, an auditory processing deficit, and an ocular motor deficit. Exhibits P-2B, P-2C, P-2D, P-2E, S-51, S-52, S-53, S-54, S-69.

The educational services proposed by Sutton for the 2006-2007 school year were reflected in the IEPs for the 2005-2006 school year since no IEP was generated for the 2006-2007 school year. The proposed educational services were:

1. consultation services for several hours per week (the IEP is unclear as to the precise amount of consultation services);
2. the following services to be provided in the general education classroom: 1x30 minutes per week of physical therapy and 10 x 45 minutes per week of “social;” and
3. the following services to be provided in the language based classroom and/or therapy rooms: speech/language of 1x30 minutes per week and 3x30 minutes per week; speech/apraxia of 4 x 30 minutes per week and 3 x 30 minutes per week; occupational therapy services for 2 x 30 minutes per week and 1 x 30 minutes per week; language arts for 5 x 90 minutes per week, math for 5 x 75 minutes per week, and physical therapy services for 1 x 30 minutes per week. [Exhibit S-31.]

Parents removed their son from the public schools effective March 2, 2005, and from that date forward, they have privately provided all of his educational services.

The educational services provided by Parents during the 2006-2007 school year, for which Parents seek reimbursement, were Lindamood Bell services (15 hours per week), occupational therapy (3 hours per week), speech-language therapy (2 to 3 hours per week), tutoring (approximately 4.5 hours per week), and informal opportunities for recreation. Testimony of Mother.

**V. Discussion**

**A. Legal Standards**

Student is an individual with a disability, falling within the purview of the Individuals with Disabilities Education Act (IDEA)[[13]](#footnote-13) and the state special education statute.[[14]](#footnote-14) The IDEA was enacted "to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living."[[15]](#footnote-15) Neither Student’s eligibility status nor his entitlement to FAPE is in dispute.

The only relief sought by Parents is reimbursement for privately-obtained educational services.[[16]](#footnote-16) The IDEA allows for reimbursement under the following circumstances:

If the parents … enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.[[17]](#footnote-17)

The Supreme Court has established a three-pronged framework for reimbursement under the IDEA. The school district will be required to reimburse only when each of the following three conditions has been met: (1) the IEP and placement offered by school district were inadequate or inappropriate (in other words, the school district failed to offer FAPE) (2) the parents' privately-procured services were appropriate for their student’s needs, and (3) the balance of the equities favors reimbursement.[[18]](#footnote-18)

As noted in my Previous BSEA Decision, Parents had the burden of persuasion with respect to each issue in dispute when this case was originally heard by the BSEA. Parents continue to have the burden of persuasion with respect to each of the disputed issues because Parents continue to be the party seeking relief from the BSEA.[[19]](#footnote-19)

**B. Denial of FAPE**

I begin with consideration of whether Sutton’s not providing an IEP for the 2006-2007 school year resulted in a denial of FAPE. Although I had decided this issue in Sutton’s favor in my Previous Decision, I take this opportunity to reconsider this issue on remand.

In my Previous Decision, I found in favor of Sutton on this issue principally because I concluded that, by oral agreement between counsel, Parents had waived their right to an IEP for the 2006-2007 school year, that the agreement caused Sutton not to propose an IEP, and that because of this agreement, Parents may not reasonably seek reimbursement for the lack of such an IEP. As discussed above, the Superior Court has determined that it was unreasonable for Sutton to rely upon the agreement and that Parents were unaware of, thereby reversing the principal bases for my finding on this issue.

My Previous Decision also added language indicating that, in any event, the lack of an IEP for the 2006-2007 school year did not deny Student FAPE.[[20]](#footnote-20) The Superior Court did not explicitly reverse this additional language. However, I will now take the opportunity to reconsider the additional language in light of the written closing arguments and rebuttal arguments from the parties, and in light of the Superior Court’s general directive to reconsider the issue on remand.[[21]](#footnote-21) For the reasons explained below, the instant Decision modifies my Previous BSEA Decision with respect to the question of whether the lack of an IEP for the 2006-2007 school year denied Student FAPE (and as will be explained below, the instant Decision also modifies slightly my analysis of the question of whether the lack of a three-year re-evaluation denied Student FAPE, and provides additional analysis of the question of whether Parents’ privately-obtained services are appropriate).

I begin by noting the central importance of Student’s individualized education program or IEP. FAPE is provided through the development and implementation of the IEP.[[22]](#footnote-22) The “IEP [is] the centerpiece of the statute's education delivery system”.[[23]](#footnote-23)

An IEP is not only for the purpose of directing a school district to provide certain services. “An IEP … must include, at a bare minimum, the child's present level of educational attainment, the short- and long-term goals for his or her education, objective criteria with which to measure progress toward those goals, and the specific services to be offered.”[[24]](#footnote-24)

The IDEA makes clear that a school district has a responsibility to conduct an annual review of an IEP and prepare a new IEP for the next year.[[25]](#footnote-25) The reasons for this are explained by the First Circuit: the “IDEA recognizes that children's needs change over time, and it thus requires annual evaluation and development of an IEP for each school year.”[[26]](#footnote-26) The “IDEA requires [the school district] to generate an annual IEP based on [student’s] current needs.”[[27]](#footnote-27)

As discussed earlier, Student had complex and far-reaching neurological deficits that resulted in pervasive developmental delays. At all times relevant to this dispute, Student’s learning challenges remained extensive and severe. During the 2005-2006 school year, Student received a variety of services to address his learning deficits, Parents obtained a number of evaluations to determine the nature and extent of Student’s disabilities (described below), and, of course, he grew older. As a result, Student’s learning strengths and deficits were changing and over the course of this school year, more was known about Student and how to address his needs appropriately. Testimony of Mother; exhibits P-2B, P-2C, P-2D, P-2E, P-3, P-5B, S-51, S-52, S-53, S-54, S-69.

However, without a new IEP for the 2006-2007 school year, Sutton continued to propose the identical IEP from the 2005-2006 school year.

Although a school district’s failure to have *any* IEP in place for a student “is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP”,[[28]](#footnote-28) the lack of a *current* IEP does not constitute a *per se* denial of FAPE.[[29]](#footnote-29) Rather, it is a procedural violation, and as with any other procedural violation, the IDEA provides that Student is denied FAPE only if the procedural violation impeded Student’s right to FAPE, significantly impeded Parents' opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefits.[[30]](#footnote-30)

I am persuaded that a new IEP for the 2006-2007 school year would likely have been different than the 2005-2006 school year IEPs because, as discussed above, Student’s educational needs (and the parties’ understanding of how those needs should be met) were changing. Not only would the special education and related services listed on the IEP likely have been somewhat different, but also the description of Student’s current level of educational attainment and the goals and objectives in the new IEP would likely have changed.

As noted above, FAPE is provided through the development and implementation of the IEP. Given the central importance of an IEP to the provision of Student’s services, I find that the failure to propose a current IEP for the entire 2006-2007 school year (where a 2006-2007 IEP would likely have differed from the previous IEPs) impeded Student’s right to FAPE.

At the same time, I note that there is insufficient probative evidence to determine whether the failure to provide a new IEP caused Student any actual deprivation of educational benefits. It cannot be known whether Parents would have accepted or rejected a new IEP.[[31]](#footnote-31) It is clear that if Parents had rejected the IEP, they would have continued to provide all of Student’s educational services privately (which they had been doing since March 1, 2005).

I now turn to the question of whether Sutton’s failure to propose a new IEP harmed Parents’ rights to participate in the decision-making process relative to their son’s education. “To ensure the continued adequacy of a child's IEP, the IDEA requires that it be reevaluated annually through a collaborative process that involves the child's parents and educators.”[[32]](#footnote-32) This “collaborative process” is the IEP Team meeting that would have provided an important opportunity for Parents to meet and participate with Sutton’s educational professionals for the purpose of discussing and determining (as part of the IEP Team meeting) how Student’s educational needs should be met during the 2006-2007 school year.[[33]](#footnote-33)

Consequently, I find that Sutton’s failure to convene an IEP Team meeting for the purpose of proposing an IEP for the 2006-2007 school year significantly impeded Parents' opportunity to participate in the decision-making process regarding FAPE.

In sum, I find that Sutton’s failure to propose a current IEP for the 2006-2007 school year denied Student FAPE because the failure to propose a current IEP for the entire 2006-2007 school year impeded Student’s right to FAPE and significantly impeded Parents' opportunity to participate in the decision-making process regarding FAPE.

I next considerwhether Sutton’s failure to conduct the required re-evaluation of Student denied FAPE.

Every three years, or sooner if necessary, a school district must, with parental consent, conduct a full three-year re-evaluation.[[34]](#footnote-34) A three-year re-evaluation serves the important purpose of ensuring that a school district periodically conducts a thorough review of a student’s special education needs, which change over time, so that the school district’s special education and related services can be adjusted as necessary to be responsive to the student’s current educational needs.

As of May 2006, Sutton’s most recent evaluations had occurred in January 2003 (speech language and occupational therapy evaluations), and January 2004 (educational assessment). Sutton concedes that a three-year re-evaluation was due to be completed (but was not) during the spring of 2006.

Parents had been doing their own evaluations, which had been provided to Sutton. By the date of the May 2006 Team meeting, Parents’ private evaluations included a neuropsychological evaluation completed by Dr. Chaskelson in January 2006, a phonology/childhood apraxia of speech evaluation conducted Dr. Velleman in November 2005, occupational therapy and dynamic listening systems evaluations conducted by Ms. Carley of Project CHILLD (Center for Holistic Integration, Listening, Learning and Development) in February 2006, an eye care examination conducted by Dr. Thamel in June 2005, a receptive language evaluation conducted by Ms. Urquhart in January 2006, and a quantitative EEG analysis conducted by Dr. Thatcher in April 2006. Written progress updates for Student were also completed by the Lindamood Bell program on a regular basis. During this time, all of Student’s educational services were being privately provided by Parents and none of Student’s educational services placed him within a school setting. Testimony of Mother; exhibits P-2B, P-2C, P-2D, P-2E, P-2F, P-3, S-51, S-52, S-53, S-54.

I determined in my Previous BSEA Decision (at page 16) that “Parents’ private evaluations and progress updates (referenced above) provided a comprehensive review of Student’s educational needs and how they should be met. Within this context, it is unclear what benefit would have been served by the additional three-year evaluations to be performed by Sutton.”

Similarly, Sutton’s attorney’s letter to Parents’ attorney, describing the oral agreement between the parties and the reasons for this agreement, explained the parties’ understanding that proceeding with the requisite three-year re-evaluation was not in Student’s best interests: “Both of us agreed that it would be in [Student’s] best interest to delay the reevaluation until [Student’s] placement and other information is more settled, so that [Student] does not have to undergo unnecessary testing and disruption.” Exhibit S-38. There is no evidence indicating that Parents’ attorney ever responded to or otherwise contradicted this statement. Also, the IDEA makes clear that, as a general rule, duplicative or unnecessary testing should be avoided.[[35]](#footnote-35)

As discussed above, a procedural violation, such as a failure to conduct requisite evaluations, results in a denial of FAPE only if the procedural violation impeded Student’s right to FAPE, significantly impeded Parents' opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefits.[[36]](#footnote-36) In other words, for Parents to prevail on a finding of denial of FAPE, it is not sufficient simply to establish that Sutton should have done the evaluations and that a school district’s evaluations generally serve the important purpose of providing current evaluative information for Student. Rather, Parents must establish that in this particular dispute, Student or his Parents have likely been harmed.

Parents argue that Sutton needed to conduct the re-evaluations in order to be able to understand Student’s current educational deficits (which were changing) and then propose an IEP that would appropriately address these deficits. I agree that the failure to conduct the re-evaluations may have negatively impacted Sutton’s ability to propose a new IEP that would have been appropriate to address Student’s then current needs. However, an inappropriate IEP, not the lack of evaluations *per se*, would have been the educational harm to Student.

As discussed above, Sutton never proposed a new IEP. Thus, the harm to Student pertains to the failure to propose *any* new IEP for Student. In other words, Sutton’s failure to conduct the required re-evaluations did not result in any discrete harm to Student over and above the harm that occurred as a result of Sutton’s not proposing a new IEP for the 2006-2007 school year.

For these reasons, I find that Sutton’s failure to conduct the required three-year re-evaluations did not result in Student’s being denied FAPE over and above the denial of FAPE as a result of the lack of a new IEP for the 2006-2007 school year.

**C. Appropriateness of Services Obtained by Parents**

As discussed within the Legal Standards section above, in order to obtain reimbursement for Parents' private educational services, Parents must satisfy each of the following three conditions: (1) the IEP and placement offered by Sutton were inadequate or inappropriate (in other words, Sutton failed to offer FAPE) (2) the Parents' private services were appropriate for Student’s needs, and (3) the balance of the equities favors reimbursement.

Parents appeared to take the position in their closing argument (pages 22-25) that so long as they can establish the first condition—that is, that FAPE was denied—reimbursement should be ordered. However, this is an incorrect understanding of the law.

As the First Circuit made clear in *Rafferty v. Cranston Public School Committee*, 315 F.3d 21, 26-27 (1st Cir. 2002), a finding that a parent’s privately obtained services were appropriate to meet Student’s particular needs is an essential component of a viable reimbursement claim. In *Rafferty*, the Court found it “unnecessary to consider whether the District was providing [student] with a FAPE” for purposes of resolving parents’ reimbursement claim because it determined that the parents’ private school was an inappropriate placement. *Id*.

Similarly, the Supreme Court has made clear that a FAPE violation, by itself, is not sufficient to allow for reimbursement; rather, a finding that a parent’s private services were appropriate is always necessary:

parents who … unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials … are entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act.[[37]](#footnote-37)

Thus, Parents have the burden of persuasion (as discussed above in the Legal Standards section above) to establish that their private educational services were appropriate.

In my Previous BSEA Decision, I determined that Parents had not met their burden on this issue. For the reasons explained in that Decision, I continue to find in favor of Sutton and against Parents on this issue. However, in order to respond to Parents’ arguments in their written closing argument and rebuttal argument and in order to provide a more complete explanation of the basis for my finding on this issue, I provide additional analysis below.

During the evidentiary hearing in the instant dispute, neither party provided expert testimony or other written report regarding the appropriateness of Parents’ private educational services for the 2006-2007 school year. There were only three witnesses. First, Ms. Esposito Balboni, who was the Director of Student Services, testified as to what happened procedurally—for example, with respect to Team meetings and evaluations. Second, Dr. Chaskelson (who was Parents’ educational expert and who had evaluated Student and issued a written report) testified regarding whether the IEP team failed to consider relevant student information presented to it by the parents—that is, Dr. Chaskelson’s report. Transcript, page 229, lines 10-17. Her report (exhibit P-2E) had already been considered by BSEA Hearing Officer Berman and was addressed in her decision at pages 25, 31. It is undisputed that the testimony of Ms. Esposito Balboni and the testimony of Dr. Chaskelson bear no relevance to the question of the appropriateness of Parents’ privately-obtained services for the 2006-2007 school year.

The third and final witness was Mother. The principal focus of her testimony was the procedural issues in dispute. However, she was also asked about Student’s private services and how those had changed during the 2006-2007 school year. Her testimony includes brief references to Student’s progress and his need for the services that he received.

Neither party submitted as an exhibit any written report or evaluation regarding what progress, if any, Student had made or would likely have made (or what other benefit Student had attained or would likely have attained) as a result of Parents’ private educational services during the 2006-2007 school year.

Parents, in their closing written argument (at pages 25-26), relied entirely on the testimony of Mother to establish the appropriateness of Parents’ private educational services during the 2006-2007 school year. For example, Parents’ closing arguments stated that “mother testified that [Student’s] program included methodologies recommended by apraxia experts and that [Student] was receiving services that he needed” and “mother testified that [Student’s] program was changed to meet his constantly changing needs” and mother “stated that [Student’s] progress was as satisfactory with three hours of Lindamood Bell as with four”. Parents’ closing argument, page 25.

I have re-reviewed Mother’s entire testimony, including, in particular, those parts of her testimony relied upon by Parents in their closing argument. The following is illustrative of Mother’s testimony. Mother testified: “The methodologies that David's getting are very necessary for an apraxic child and the best experts in the world recommended it ….” Transcript, page 294, lines 21-23. When discussing Sutton’s consideration of Parents’ evaluations, Mother testified: “This is my son's life. My son's life; to talk and to read and my son's doing both and I'm thrilled.” Transcript, page 296, lines 2-6. Mother discussed what progress was being made by the time Sutton issued its N1 form (exhibit S-55) on June 20, 2006: “Because I think [Student], he had made progress. If the data from Lindamood-Bell had been analyzed, I mean, other specialists had seen it, they could see his progress.” Transcript, page 320, lines 13-16. Mother similarly explained when the N1 form was issued: “I would not sign an IEP that wasn't showing my son with growth, there was no way, and I knew what it took to get him there. I would not do it.” Transcript, page 322, lines 4-13.

Mother’s testimony, as illustrated above, provides only general statements about the need for and the benefit from Parents’ private educational services. None of Mother’s testimony specifically describes the nature or extent of benefit or progress, nor does it describe Student’s rate of progress—for example, comparing his skills at one point in time with his skills at another point in time. More often than not, her testimony (including the testimony relied upon by Parents in their reply brief) does not pertain specifically to the 2006-2007 school year, but rather reflects a general statement regarding an unspecified period of time, or relates to the 2005-2006 school year. As a result, Mother’s testimony has little probative value regarding the appropriateness of Parents’ private services during the 2006-2007 school year.

Moreover, even if Mother had rectified these shortcomings, her testimony would not be sufficient. As the First Circuit has cautioned, it is not enough for a parent simply to choose a private educational program in which the student can make academic progress.[[38]](#footnote-38) Rather, the “reasonableness of the private placement [for purposes of reimbursement] necessarily depends on the nexus between the special education required and the special education provided.”[[39]](#footnote-39) Establishing this nexus is the province of educational experts who know Student, who know the particular educational program within which he has been placed, and who can testify regarding the appropriateness of the educational program’s addressing Student’s unique special education needs.[[40]](#footnote-40)

There is no doubt that Mother has been dedicated to Student’s well-being; she is a devoted parent who likely knows her son better than anyone else; and she has likely spent countless hours talking to Student’s service providers for the purpose of arranging their services. Mother is more than capable of providing important and relevant information regarding what she has observed as a layperson. Yet, it is not disputed that neither by training nor experience is Mother an educational expert with respect to how her son’s educational needs may be appropriately met or with respect to whether a particular service or program utilized by Parents was educationally appropriate for their son.

For these reasons, I find that Mother’s testimony, upon which Parents have exclusively relied in their closing argument, does not establish the appropriateness of Parents’ privately-obtained services during the 2006-2007 school year for purposes of reimbursement under the IDEA.

Parents added an argument in their rebuttal brief. Parents (at pages 12-13 of their rebuttal brief) made the following additional argument regarding the appropriateness of their private services:

Sutton has cited favourably [sic] to Sarah [sic] Berman’s decision that determined that Parents provided [Student] with an appropriate education wherein he made progress. Judge Ricciardone noted at pp. 11-12 of his decision that “Mr. Crane also determined that equitable considerations prevented Parents from receiving reimbursement for the outside educational services they had provided to [Student] despite the fact that Ms. Berman concluded in the BSEA 05-3840 Decision that such outside services provided [Student] with FAPE.” [Emphasis added.]

To respond to this additional argument, I will review Hearing Officer Berman’s decision in the prior dispute, including her findings and conclusions regarding the 2005-2006 school year, as well as the probative value of these findings and conclusions relative to the question of the appropriateness of Parents’ private services for the 2006-2007 school year. I will also consider the federal Court’s view of the evidence that Parents relied upon to seek to establish the appropriateness of their private services for the 2005-2006 school year. Finally, I will consider the difficulty of relying upon findings as to what may possibly have benefited Student during the 2005-2006 school year where there is no probative evidence regarding how Student’s admittedly changing needs impacted the appropriateness of Parents’ privately-obtained services during the 2006-2007 school year.

In her decision, Hearing Officer Berman explained that on or about March 1, 2005, Parents withdrew Student from all public educational services provided by Sutton and re-enrolled Student in the Lindamood-Bell program in the Lindamood-Bell Learning Center in Arlington, MA.[[41]](#footnote-41) (Parents had first enrolled Student in the Lindamood Bell program in Arlington during the summer of 2004.) Later, Parents added Student’s other services.[[42]](#footnote-42)

Because the Lindamood Bell educational services provided by Parents were Student’s principal special educational program (with tutoring and related services later added to it), both Hearing Officer Berman and the federal Court focused principally on this program and any benefits that it may have provided Student.

Hearing Officer Berman explained in her decision that “Lindamood-Bell Centers are not schools *per se*, but sites for intensive instruction in various aspects of the pre-reading reading and writing process.”[[43]](#footnote-43) “Typically, students attend the Lindamood-Bell center for four hours per day, five day per week.” [[44]](#footnote-44) Student was provided Lindamood Bell services at this level during the 2005-2006 school year.[[45]](#footnote-45)

Hearing Officer Berman considered the appropriateness of Parents’ services for the 2005-2006 school year for the purpose of resolving Sutton’s claim that Parents had denied their son FAPE. Because Sutton was the party seeking relief on this issue, Hearing Officer Berman determined that “[t]his claim is clearly the School’s burden to prove under *Shaeffer* [sic].”[[46]](#footnote-46) Under *Shaffer*, the Supreme Court has placed the burden of persuasion in a special education administrative hearing upon the party seeking relief. The Court explained that a party who has the burden of persuasion “loses if the evidence is closely balanced”.[[47]](#footnote-47)

In their reply brief (quoted above), Parents take the position that “Sarah [sic] Berman’s decision … determined that Parents provided [Student] with an appropriate education”. The reply brief also quotes from the Superior Court decision indicating that “Ms. Berman concluded in the BSEA 05-3840 Decision that such outside services provided [Student] with FAPE.” However, a close reading of Hearing Officer Berman’s decision reveals that these statements are inaccurate.

Hearing Officer Berman concluded only that “[Sutton] has not proved that Parents’ placement denies Student FAPE”.[[48]](#footnote-48) This only tells us what was not proved, rather than that Parents’ placement was appropriate. More specifically under the *Shaffer* burden of persuasion standard discussed above, Sutton would have failed to meet its burden of persuasion if it did not present any credible in support of its claim or if the evidence was closely balanced or if the evidence favored Parents. Ms. Berman’s decision does not tell us which of these occurred. Thus, from Parents’ perspective, nothing can be gleaned from Hearing Officer Berman’s holding regarding the appropriateness of Parents’ private services for the 2005-2006 school year, much less the services for the 2006-2007 school year.

Hearing Officer Berman’s decision provides minimal findings regarding Parents’ private services for the 2005-2006 school year. She stated that Student “derived educational benefit from his Lindamood-Bell instruction, with his speech therapist, tutor, and occupational therapist.”[[49]](#footnote-49) Hearing Officer Berman never reached the issue of whether the benefit from these services was sufficient to meet the legal standard of appropriateness for purposes of reimbursement. She explained: “Because I have found that Sutton had proposed an appropriate program in March 2005, I must find that Parents are not entitled to reimbursement for their unilateral placement, nor to prospective placement, and need not examine the appropriateness of that placement for that purpose.”[[50]](#footnote-50)

Any claim by Parents that Student derived benefit from Parents’ services during the 2005-2006 school year is cast in doubt by the federal District Court’s review of the evidence on which Hearing Officer Berman relied. The federal Court Decision affirmed Hearing Officer Berman’s decision but did not review Hearing Officer Berman’s ruling that Sutton had not met its burden to establish that Parents had denied Student FAPE. Nevertheless, for purposes of its consideration of the appropriateness of Sutton’s services, the Court reviewed the evidence regarding Student’s progress as a result of Parents’ privately-obtained services after Parents withdrew him from the Sutton Public Schools. The Court explained, at footnote 26, as follows:

it is worth noting that [Student’s] post-Sutton progress has not been as consistent as plaintiffs seem to contend. Despite spending approximately a year and a half in the Lindamood-Bell program—a program that plaintiffs’ witnesses all contend is the best fit for [Student]—by some accounts he had hardly progressed at all. A witness from Lindamood-Bell, Tara Reynolds, conceded that [Student’s] progress has been “very slow.” (AR at 1812). She stated: “I am familiar with . . . the fact that [Student] has had a very difficult time. We have been unable to do many measures with him.” (AR at 1790). Ms. Reynolds conceded that his independent verbalizing between October 2005 and June 2006 had not improved much. (AR at 1811). As of October 2006, at the age of ten, he still could not read. (AR at 1812). Ms. Reynolds stated that any progress that he had made at Lindamood-Bell “may not show up on standardized testing.” (AR at 1790). As of the date of the hearing, [Student] was scoring a zero on phonemic awareness, the skill on which Lindamood-Bell’s LiPS program is focused. (AR at 1788-89). The struggles and setbacks at Lindamood-Bell starkly demonstrate the severity of his disability and the consequent difficulties faced by his educators. They are objective indications of his limitations, even in a highly individualized, one-on-one setting. [Emphasis added.]

What progress [Student] has made has been irregular and requires frequent goal adjustment. As Ms. Reynolds explained: “We have to constantly re-evaluate. So, we may have at times started some of those tasks with VV [visualizing and verbalizing] and then taken them off for a break for several weeks and then gone back to them.” (AR at 1768). The Lindamood-Bell staff encountered similar difficulties trying to teach him spatial concepts. They have been working on stabilizing his spatial concepts on and off since he first came to Lindamood-Bell in the summer of 2004. (AR at 1814). Some spatial concepts may have stabilized by March 2006, but he was still working on others. [Student’s] progress on LiPS, for which spatial concepts were something of a prerequisite, also appeared stalled. (AR at 1768-69). When the Lindamood-Bell staff finally resumed LiPS in mid-August of 2006, they “had to reintroduce a lot of the beginning LiPS tasks.” (AR at 1769, 1772). In a progress report prepared after June 24, 2005, the staff cautioned that “[a]lthough it is likely that sensory-cognitive stimulation will result in further progress, due to the present low level of [Student’s] scores, prognosis for attaining age level appropriate performance is necessarily guarded.” (AR at 2459). [Emphasis added.]

The Court’s review of the evidence effectively raises a question as to whether there were any demonstrable benefits from Parents’ private services during the 2005-2006 school year, thereby raising the question (unanswered by the evidence) as to whether Student would likely attain any demonstrable benefits from continuing with these same kinds of services in the 2006-2007 school year. This, again, makes it not possible for Parents to rely upon the findings in the dispute regarding IEPs for the 2005-2006 school year.

There are two additional factors to consider when seeking to understand the relevance of Hearing Officer Berman’s findings (regarding the 2005-2006 school year) to the appropriateness of Parents’ private services during the 2006-2007 school year.

First, the private educational services provided by Parents during the 2005-2006 school year (and reviewed by Hearing Officer Berman and the federal Court) changed during the 2006-2007 school year. Mother testified that during the 2006-2007 school year, Lindamood Bell services were reduced by five hours per week (from the 20 hours per week provided during the 2005-2006 school year) to 15 hours per week; speech-language therapy was increased by one hour per week (from the two hours per week during the 2005-2006 school year) to three hours per week starting in June 2007; and the level of tutoring and occupational therapy remained the same. As noted above, Hearing Officer Berman found that typically students attend Lindamood Bell for four hours per day, five days per week for a total of 20 hours.

Mother’s testimony regarding why she reduced Lindamood Bell and increased speech-language services makes clear that this change in services was not made in response to any recommendation from the service provider, another educator or other expert. Mother testified why the change was made: “Well, first of all, I'll be honest with you, we couldn't afford four hours a day [of Lindamood Bell services] and our speech services were more -- we could afford them more.” Transcript, page 324, line 24 to page 325, lines 1-3. She later testified that she did not believe that there were any negative educational implications from this change of services and that this was part of her decision-making process. Transcript, page 336, lines 14-24 to page 337, lines 1-10.

In sum, Parents substantively changed Student’s services for the 2006-2007 school year by reducing Student’s principal educational program (the Lindamood Bell services) by five hours per week below the standard amount of services typically provided by Lindamood Bell, and increasing speech-language services by one hour per week, but Parents were not guided by expert opinion in making the change, and there was no expert opinion introduced in the instant dispute (or in the previous dispute) as to the educational implications of this change in services or as to the appropriateness of the change.

This, again, makes it impossible for Parents to rely upon any findings regarding the benefits of Parents’ different educational program during the 2005-2006 school year.

Second, as discussed above (part V B, above), Student’s special education needs (and what was known about those needs) were changing over the course of the 2005-2006 school year, thereby requiring a revised IEP for the 2006-2007 school year. This is not disputed by Parents. In her testimony, Mother was quite clear regarding the fact of Student’s changing needs (“there was no way possible he hadn't changed”; transcript, page 322, lines 9-10); and in their closing argument (pages 10-15), Parents have taken the same position.

For the same reasons that Student’s changing needs necessitated a new IEP for the 2006-2007 school year, Student’s changing needs (and what was known about those needs) would also have required that Parents adjust their privately-obtained services accordingly for the 2006-2007 school year. But, as noted above, neither party provided any expert evidence as to how Student’s changing needs would impact the appropriateness (or inappropriateness) of the educational services that were actually provided by Parents during the 2006-2007 school year, as compared to the services that were provided the previous school year.

This, again, makes it impossible for Parents to rely upon any findings regarding the benefits of Parents’ program in the 2005-2006 school year.

In sum, Parents first rely entirely on Mother’s testimony describing the 2006-2007 school year services. However, Mother is not an expert and her testimony has insufficient probative value to establish the appropriateness of these services for purpose of establishing an entitlement to reimbursement under the IDEA. Parents then rely on Hearing Officer Berman’s decision regarding Parents’ services during the 2005-2006 school year. However, Hearing Officer Berman’s decision provides no probative basis for a determination regarding the appropriateness of Parents’ 2006-2007 school year services because (1) Hearing Officer Berman only considered Parents’ 2005-2006 school year services and she made no findings regarding the appropriateness of these services; (2) the federal District Court’s Decision leaves it unclear whether Student attained any demonstrable benefit from Parents’ privately-obtained educational program in 2005-2006; (3) Parents changed their services from the 2005-2006 school year to the 2006-2007 school year without relying upon or providing any expert evidence as to the appropriateness of doing so; and (4) Student’s educational needs were changing throughout this time, but there was no expert evidence regarding the relevance of these changes to Parents’ private educational services for the 2006-2007 school year.

For these reasons, I find that Parents have not met their burden of establishing that their private educational program was appropriate for purposes of seeking reimbursement from Sutton. I have, above, found that Sutton denied Student FAPE, but the failure of Parents to meet their burden of persuasion regarding the appropriateness of their private services requires that Parents’ reimbursement claim be denied.

**D. Balance of the Equities**

As discussed above in the Legal Standards section, the third standard that must be met by Parents is that a balance of the equities favors reimbursement. This is because “[r]eimbursement is an equitable remedy”.[[51]](#footnote-51) “Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors”[[52]](#footnote-52) and it is appropriate for the BSEA to do the same.[[53]](#footnote-53)

I need to address the balance of equities only if I first determine both that Student had been denied FAPE and that Parents’ private services were appropriate. A balance of equities analysis is unnecessary where, as in the instant dispute, Parents cannot obtain reimbursement because their private services were not determined to be appropriate.

Nevertheless, in order to provide the parties with a complete understanding of my view of all aspects of this dispute, I briefly address this remaining issue.

I find Sutton’s written closing argument and rebuttal argument to be persuasive that the balance of equities do not favor reimbursement. Simply stated, Sutton recites to facts which I believe are established in the record and which indicate, persuasively, that Sutton’s conduct was reasonable under the circumstances and Parents’ conduct was not. Thus, even if I were to conclude that Parents’ private educational services were appropriate, I would find, for reasons set forth by Sutton in its written arguments, that reimbursement should be denied on the basis of equitable considerations.[[54]](#footnote-54)

Finally, I note one additional point, which is that any actual educational harm to Student (as a result of Sutton’s failure to provide a new IEP for the 2006-2007 school year and its failure to re-evaluate Student) is in doubt. The parties’ attorneys reached an oral agreement that Sutton need not provide a new IEP or re-evaluate Student. It is undisputed that the oral agreement was the *only* reason that Sutton did not then propose a new IEP for the 2006-2007 school year and did not re-evaluate Student.

The attorneys’ oral agreement was reached *not* for purpose of settling the merits of the case (when a party may be willing to give up something of value in order to obtain something else of greater benefit to that party), but rather was part of the on-going discussions between the attorneys regarding what IDEA processes should be followed by Sutton while the parties attempted to resolve the underlying dispute regarding Student’s special education services. Within this context, there is a presumption that Parents’ attorney (who was an experienced special education lawyer[[55]](#footnote-55)) would not knowingly have caused educational harm to his client by simply giving up well-established procedural rights under the IDEA.

For reasons explained earlier in the instant Decision (part V B), it cannot be known whether Sutton’s failure to provide the requisite IEP and re-evaluation, caused Student to suffer any actual deprivation of educational benefits.

For these reasons, I find that the balance of equities does not support reimbursement.

**ORDER**

Sutton’s failure to issue an IEP for the 2006-2007 school year resulted in a denial of FAPE.

Sutton’s failure to conduct a three-year evaluation did not result in a denial of FAPE in addition to the denial of FAPE caused by its failure to propose a new IEP for the 2006-2007 school year.

There was no probative evidence regarding the appropriateness of Parents’ privately-obtained educational program for Student during the 2006-2007 school year. Therefore, Parents failed to meet their burden of persuasion on this issue for purposes of their reimbursement claim. Parents’ request for reimbursement is denied on this basis.

The balance of equities does not support reimbursement.

Parents are not entitled to reimbursement of any of their expenses of their privately-obtained educational program for the 2006-2007 school year.

By the Hearing Officer,

William Crane

Dated: April 19, 2012

**COMMONWEALTH OF MASSACHUSETTS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**THE BUREAU’S DECISION, INCLUDING RIGHTS OF APPEAL**

**Effect of the Decision**

20 U.S.C. s. 1415(i)(1)(B) requires that a decision of the Bureau of Special Education Appeals be final and subject to no further agency review. Accordingly, the Bureau cannot permit motions to reconsider or to re-open a Bureau decision once it is issued. Bureau decisions are final decisions subject only to judicial review.

Except as set forth below, the final decision of the Bureau must be implemented immediately. Pursuant to M.G.L. c. 30A, s. 14(3), appeal of the decision does not operate as a stay. Rather, a party seeking to stay the decision of the Bureau must obtain such stay from the court having jurisdiction over the party's appeal.

Under the provisions of 20 U.S.C. s. 1415(j), "unless the State or local education agency and the parents otherwise agree, the child shall remain in the then-current educational placement," during the pendency of any judicial appeal of the Bureau decision, unless the child is seeking initial admission to a public school, in which case "with the consent of the parents, the child shall be placed in the public school program". Therefore, where the Bureau has ordered the public school to place the child in a new placement, and the parents or guardian agree with that order, the public school shall immediately implement the placement ordered by the Bureau. *School Committee of Burlington, v. Massachusetts Department of Education*, 471 U.S. 359 (1985). Otherwise, a party seeking to change the child's placement during the pendency of judicial proceedings must seek a preliminary injunction ordering such a change in placement from the court having jurisdiction over the appeal. *Honig v. Doe*, 484 U.S. 305 (1988); *Doe v. Brookline*, 722 F.2d 910 (1st Cir. 1983).

**Compliance**

A party contending that a Bureau of Special Education Appeals decision is not being implemented may file a motion with the Bureau contending that the decision is not being implemented and setting out the areas of non-compliance. The Hearing Officer may convene a hearing at which the scope of the inquiry shall be limited to the facts on the issue of compliance, facts of such a nature as to excuse performance, and facts bearing on a remedy. Upon a finding of non-compliance, the Hearing Officer may fashion appropriate relief, including referral of the matter to the Legal Office of the Department of Education or other office for appropriate enforcement action. 603 CMR 28.08(6)(b).

**Rights of Appeal**

Any party aggrieved by a decision of the Bureau of Special Education Appeals may file a complaint in the state court of competent jurisdiction or in the District Court of the United States for Massachusetts, for review of the Bureau decision. 20 U.S.C. s. 1415(i)(2).

An appeal of a Bureau decision to state superior court or to federal district court must be filed within ninety (90) days from the date of the decision. 20 U.S.C. s. 1415(i)(2)(B).

**Confidentiality**

In order to preserve the confidentiality of the student involved in these proceedings, when an appeal is taken to superior court or to federal district court, the parties are strongly urged to file the complaint without identifying the true name of the parents or the child, and to move that all exhibits, including the transcript of the hearing before the Bureau of Special Education Appeals, be impounded by the court. See *Webster Grove* *School District v. Pulitzer Publishing Company*, 898 F.2d 1371 (8th Cir. 1990). If the appealing party does not seek to impound the documents, the Bureau of Special Education Appeals, through the Attorney General's Office, may move to impound the documents.

**Record of the Hearing**

The Bureau of Special Education Appeals will provide an electronic verbatim record of the hearing to any party, free of charge, upon receipt of a written request. Pursuant to federal law, upon receipt of a written request from any party, the Bureau of Special Education Appeals will arrange for and provide a certified written transcription of the entire proceedings by a certified court reporter, free of charge.

1. “Neville” is a pseudonym chosen by Hearing Officer Lindsay Byrne (the previous BSEA Hearing Officer in this dispute) for confidentiality and classification purposes. Ms. Byrne was the Hearing Officer for this dispute until April 23, 2008 when the matter was re-assigned to the present Hearing Officer for administrative reasons. [↑](#footnote-ref-1)
2. *Elizabeth B., as next friend v. Sutton School District, et al*, Civil Docket # WOCV2008-02104-E (December 6, 2011) (unpublished). [↑](#footnote-ref-2)
3. Sutton is represented by Attorney Regina Williams Tate. Parents are pro se, but Father is an attorney. [↑](#footnote-ref-3)
4. The evidentiary record from the original BSEA evidentiary hearing consists of documents submitted by the Parents and marked as exhibits P-1A through P-10B, with the exception of exhibits P-1A, P-1B, P-1C, P-4, P-5A, and P-5C which were excluded; documents submitted by the Sutton Public Schools (Sutton) and marked as exhibits S-1 through S-83, with the exception of exhibits S-29, S-30, and S-32 which were withdrawn by Sutton; and approximately one day of recorded oral testimony and argument. By agreement of the parties, the record also included the entire transcript from the evidentiary hearing in a previous dispute between the parties in BSEA # 05-3840. [↑](#footnote-ref-4)
5. *In Re: Sutton Public Schools*, BSEA # 05-3840, 13 MSER 95, 110 (SEA MA 2007). [↑](#footnote-ref-5)
6. *D.B. v. Esposito*, Civil Action No. 07-cv-40191-FDS (September 30, 2009) (unpublished). [↑](#footnote-ref-6)
7. *D.B. v. Esposito*, 2012 WL 975564 (1st Cir. 2012). [↑](#footnote-ref-7)
8. Although Parents were pro se during the evidentiary hearing in the instant dispute, they were represented by an attorney from March 2005 (when Parents removed their son from Sutton Public Schools) until March 26, 2007 (when a decision was issued in the previous BSEA dispute), but not thereafter. Testimony of Mother; transcript, page 300, line 24 through page 301, lines 1-6. [↑](#footnote-ref-8)
9. See Superior Court Decision, page 12. In a footnote, the Superior Court also concluded that Parents’ attorney only represented Parents in the previous dispute before the BSEA and that this representation did not extend to the 2006-2007 school year. See *id*. at footnote 12. [↑](#footnote-ref-9)
10. See *id*. at 13-14. [↑](#footnote-ref-10)
11. See *id*. at 16-18. [↑](#footnote-ref-11)
12. See *Id*. at 15-16. The Superior Court also dismissed Count II, Count III, and Count IV of Parents’ Complaint, but these parts of the case are not relevant to my resolution of this dispute on remand. *Id*. at 20. [↑](#footnote-ref-12)
13. 20 USC 1400 *et seq*. [↑](#footnote-ref-13)
14. MGL c. 71B. [↑](#footnote-ref-14)
15. 20 USC 1400(d)(1)(A). *See also* 20 USC 1412(a)(1)(A); MGL c. 71B, ss. 2, 3. [↑](#footnote-ref-15)
16. At the evidentiary Hearing in response to a question from the Hearing Officer, Father made clear that this is the only relief that Parents are requesting. [↑](#footnote-ref-16)
17. 20 USC 1412 (a)(10)(C)(ii)). [↑](#footnote-ref-17)
18. *See Florence County Sch. Dist. Four v. Carter,* 510 U.S. 7, 11-13, 16 (1993); *Sch. Comm. of Burlington v. Dep't of Educ.,* 471 U.S. 359, 369-370, 373-374 (1985). See also *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 31 (1st Cir. 2006); *Rafferty v. Cranston Public School Committee*, 315 F.3d 21, 26-27 (1st Cir. 2002) [↑](#footnote-ref-18)
19. See *Schaffer v. Weast*, 546 U.S. 49, 62 (2005) (burden of persuasion in an administrative special education hearing is placed upon the party seeking relief). [↑](#footnote-ref-19)
20. My Previous Decision (page 13) provided in relevant part:

    I further find that the lack of an IEP for the 2006-2007 school year did not impede Student’s right to FAPE, did not significantly impede Parents' opportunity to participate in the decision-making process regarding the provision of FAPE, and did not cause a deprivation of educational benefits. [↑](#footnote-ref-20)
21. See Superior Court Decision, page 15 (“the matter must be remanded to the BSEA for a determination of whether the District's failure [to issue an individualized education program for the 2006-2007 school year] deprived [Student] of FAPE”). [↑](#footnote-ref-21)
22. See 20 USC 1414(d)(1)(A)(i)(I)-(III); *Honig v. Doe,* 484 U.S. 305, 311-12 (1988); *Board of Education v. Rowley*, 458 U.S. 176, 182 (1982). See also *D.B. v. Esposito*, 2012 WL 975564 (1st Cir. 2012) (“The ‘primary vehicle’ for delivery of a FAPE is an IEP.”). [↑](#footnote-ref-22)
23. *Honig v. Doe*, 484 U.S. 305, 311 (1988). [↑](#footnote-ref-23)
24. *D.B. v. Esposito*, 2012 WL 975564 (1st Cir. 2012). [↑](#footnote-ref-24)
25. 603 CMR 28.04(3) provides as follows:

    (3) Annual reviews and three-year reevaluations. The school district shall review the IEPs and the progress of each eligible student at least annually. Additionally, every three years, or sooner if necessary, the school district shall, with parental consent, conduct a full three-year reevaluation consistent with the requirements of federal law.

    See also MGL c. 71B, s. 3 (“educational progress of any child placed in a special education program shall be reviewed at least annually”). [↑](#footnote-ref-25)
26. *Rome School Committee v. Mrs. B*., 247 F.3d 29, 32 (1st Cir. 2001). [↑](#footnote-ref-26)
27. *Id.* at 33 -34. [↑](#footnote-ref-27)
28. *Forest Grove School Dist. v. T.A*., 557 U.S. 230, 129 S.Ct. 2484, 2491 (U.S. 2009). See also *Knable v. Bexley City Sch. Dist.,* 238 F.3d 755, 766 (6th Cir. 2001) (“absence of an IEP at any time during [the student’s] sixth-grade year caused [him] to lose educational opportunity”). [↑](#footnote-ref-28)
29. See *C.H. v. Cape Henlopen School Dist*., 606 F.3d 59, 68-69 (3rd Cir. 2010) (in reimbursement dispute, court must determine “whether, under the circumstances, this violation [of failing to have a current IEP] can meaningfully be said to have impeded the child's right to a FAPE or caused a deprivation of an educational benefit” (internal quotation marks and citations omitted); *Garcia v. Board of Educ. of Albuquerque Public Schools*, 520 F.3d 1116, 1126-1127  (10th Cir. 2008) (in dispute where school district failed to provide a current IEP, “liability under IDEA is determined … by determining whether the preponderance of the evidence indicates that the school district's procedural failures resulted in a denial of educational benefit to the student”). [↑](#footnote-ref-29)
30. See 20 USCS § 1415(f)(3)(E)(2)(ii), which provides as follows:

    Procedural issues. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies--          (I) impeded the child's right to a free appropriate public education;

    (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or(III) caused a deprivation of educational benefits.

    See also cases cited in the footnote immediately above. [↑](#footnote-ref-30)
31. Mother testified only that if the services on a proposed 2006-2007 IEP had been the same as the services on the previous IEPs, she would have rejected the 2006-2007 IEP. Testimony of Mother; transcript, page 311, lines 5-17. [↑](#footnote-ref-31)
32. *D.B. v. Esposito*, 2012 WL 975564 (1st Cir. 2012). [↑](#footnote-ref-32)
33. As is reflected within the Superior Court Decision (pages 12-13), the IDEA explicitly recognizes the importance of parental involvement in educating disabled children, and the IEP Team meeting provides the most important opportunity for this to occur. See also 20 USC 1414(d)(1)(A)(i)(I)-(III); *Honig v. Doe,* 484 U.S. 305, 311-12 (1988); *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 182 (1982). [↑](#footnote-ref-33)
34. 20 USC §1414(a)(2); 34 CFR 300.303; 603 CMR 28.04(3). [↑](#footnote-ref-34)
35. See 603 CMR 28.07(2)(a) (“All efforts shall be made to avoid duplicative or unnecessary testing.”). [↑](#footnote-ref-35)
36. See 20 USCS § 1415(f)(3)(E)(2)(ii). [↑](#footnote-ref-36)
37. *Florence County School Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 366 (1993) (underlining supplied) (italics in original) (internal quotations and citation omitted). [↑](#footnote-ref-37)
38. See *Rafferty v. Cranston Public School Committee*, 315 F.3d 21, 26-27 (1st Cir. 2002) (“Even if the child makes academic progress at the private school, that fact does not establish that such a placement comprises the requisite adequate and appropriate education. Therefore, we reject Rafferty's argument-that a parent can seek any alternative school she wishes if the public school education is inadequate.”) (internal quotations and citation omitted). [↑](#footnote-ref-38)
39. *Mr. I. ex rel. L.I. v. Maine School Admin*., Dist. No. 55  480 F.3d 1, 25 (1st Cir. 2007). [↑](#footnote-ref-39)
40. I am not aware of a single BSEA or judicial decision in which parents have met their burden of persuasion (that their privately-obtained educational program was appropriate for purposes of reimbursement) only through the testimony of a layperson such as Mother. Compare, for example, the evidence presented by Parents in the BSEA dispute before Hearing Officer Berman in which they sought reimbursement from Sutton. [↑](#footnote-ref-40)
41. *In* *Re: Sutton Public Schools*, BSEA # 05-3840, 13 MSER 95, Findings of Fact, pars. 55, 70, 78 (SEA MA 2007). [↑](#footnote-ref-41)
42. *Id.*, Findings of Fact, par. 70. [↑](#footnote-ref-42)
43. *Id.*, Findings of Fact, par. 55. [↑](#footnote-ref-43)
44. *Id.* [↑](#footnote-ref-44)
45. *Id.*, Findings of Fact, par. 78. [↑](#footnote-ref-45)
46. *Id*. [↑](#footnote-ref-46)
47. *Schaffer v. Weast*, 546 U.S. 49, 56, 62 (2005). [↑](#footnote-ref-47)
48. *In Re: Sutton Public Schools*, BSEA # 05-3840, 13 MSER 95, 109 (SEA MA 2007). [↑](#footnote-ref-48)
49. *Id*. The quoted language in context reads as follows:

    A review of the testimony and documentary record indicates Student received regular, intensive, services, by licensed professionals or by a program (Lindamood-Bell) that is well established for providing certain literacy-related services. Moreover, while Student’s progress is uneven and difficult to measure accurately regardless of the settings he is in, there is evidence on the record that Student in fact derived educational benefit from his Lindamood-Bell instruction, with his speech therapist, tutor, and occupational therapist.

    Hearing Officer Berman did not make any additional findings regarding Parents’ private educational services. [↑](#footnote-ref-49)
50. *Id.* (emphasis supplied). [↑](#footnote-ref-50)
51. *School Union No. 37 v. Ms. C.,* 518 F.3d 31, 34 (1st Cir. 2008). See also *Florence County School District Four v. Carter*, 510 U.S. 7, 16 (1993); *School Committee of Burlington v. Department of Education of Mass.,* 471 U.S. 359, 374 (1985); *Diaz-Fonseca v. Commonwealth of Puerto Rico*, 451 F.3d 13, 31 (1st Cir. 2006) (“Reimbursement is a matter of equitable relief, committed to the sound discretion of the district court”) (internal quotations omitted). [↑](#footnote-ref-51)
52. *Florence County School Dist. Four v. Carter By and Through Carter*, 510 U.S. 7, 16 (1993). [↑](#footnote-ref-52)
53. See *Forest Grove Sch. Dist. v. T.A*., 2009 WL 1738644, \*8, n.11, and \*10 (2009) (in an IDEA dispute, the authority of a Hearing Officer and the authority of a Court are concurrent with respect to the equitable remedy of reimbursement); *Ivan P. v. Westport Bd. of Educ*.**,** 865 F.Supp. 74, 84 (D.Conn. 1994)(“logical to infer that a hearing officer should have the same equitable discretion as the district court”);[*Cocores v. Portsmouth, N.H. Sch. Dist.,* 779 F.Supp. 203, 206 (D.N.H.1991)](http://web2.westlaw.com/find/default.wl?tf=-1&serialnum=1991209373&rs=WLW9.06&referencepositiontype=S&ifm=NotSet&fn=_top&sv=Split&referenceposition=205&pbc=AE8B496A&tc=-1&ordoc=1994206708&findtype=Y&db=345&vr=2.0&rp=%2ffind%2fdefault.wl&mt=122) (“Given the importance the IDEA places on protections afforded by the administrative process, this court finds and rules that the hearing officer's ability to award relief must be coextensive with that of the court. To find otherwise would make the heart of the [Act's] administrative machinery, its impartial due process hearing less than complete.”) (footnote and internal quotations omitted). [↑](#footnote-ref-53)
54. See, in particular, pages 13-17 of Sutton’s *Memorandum in Response to The Superior Court’s Remand Order*, and pages 6-9 of Sutton’s *Response to Parents’ Closing Argument*. [↑](#footnote-ref-54)
55. I take administrative notice of the fact that, by the time the parties’ attorneys entered into the oral agreement, Parents’ attorney had represented numerous parents before the BSEA over the course of a number of years. [↑](#footnote-ref-55)