COMMONWEALTH OF MASSACHUSETTS

**Division of Administrative Law Appeals**

**Bureau of Special Education Appeals**

# **In Re: Amherst-Pelham Regional School District BSEA #12-1264**

**DECISION**

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

A hearing was held on April 3 and 4, 2012 in Springfield, MA, and on April 10, 2012 in Amherst, MA before William Crane, Hearing Officer. [[1]](#footnote-1) Those present for all or part of the proceedings were:

Student

Student’s Sister

Student’s Mother

Student’s Father

Elisabeth Doyle Educational Consultant to Parents

Kelly Chase Former IEP Team Chairperson and Special Education Department Chairperson, Amherst-Pelham Reg. High School

Norma Mackey Supervisor, New England Business Associates

Martha Lewin Grants Case Manager, United ARC

Doreen Boyer Transition Services Coordinator, Massachusetts Department of

Developmental Services

Jacquelyn Smith-Crooks Educational Consultant/Parent Advocate

Tina-Lynn Agustin Liaison to Developmental Studies Program, Amherst-Pelham Regional High School

Julie Tanguay BCBA Consultant, Amherst-Pelham Reg. Sch. Dist. (RSD)

Diane Chamberlain Assistant Principal, Amherst-Pelham Regional High School

Jeanne Millar White Student Services Administrator, Amherst-Pelham RSD

JoAnn Smith Interim Director of Student Services, Amherst-Pelham RSD

Fernand Dupere Attorney for Amherst-Pelham RSD

Debbie Leonard Lovejoy Court Reporter

The official record of the hearing consists of documents submitted by the Parents and marked as exhibits P-1 through P-41; documents submitted by the Amherst-Pelham Regional School District (Amherst) and marked as exhibits S-1 through S-25 and S-1A through S-11A; and approximately two and one-half days of recorded oral testimony and argument. As agreed by the parties, written closing arguments were due on May 1, 2012, and the record closed on that date.

I acknowledge, with gratitude, the legal research assistance from BSEA legal intern Stephanie Berger.

## ISSUES

The issues to be decided in this case are the following:

1. Is the IEP most recently proposed by Amherst reasonably calculated to provide Student with a free appropriate public education (FAPE) in the least restrictive environment?
2. If not, can additions or other modifications be made to the IEP in order to satisfy this standard?
3. If not, would a residential education placement satisfy this standard?
4. Has Amherst violated Student’s right to FAPE; and if so, are compensatory services due?

FACTS

Student’s Profile and Currently-Proposed IEP

Student is a twenty-year-old young man who lives with his Parents in Amherst, MA. His Parents have been appointed to be his guardian. Testimony of Mother; exhibit P-31.

Student is kind, cheerful, trusting, friendly and generally cooperative. He appears to enjoy social contact, particularly with certain familiar people and other students. Student has severe and pervasive learning deficits that are not in dispute. He is diagnosed with Autism, Pervasive Developmental Disorder, Severe Mental Retardation, Chronic Encephalopathy and von Willibrand Syndrome. Exhibits P-22, P-23, P-27, S-23, S-6A, 11A.

Student’s deficits have had (and continue to have) a profound effect on his educational development. Currently, he has extremely limited functional communication abilities, and even with the assistive technology being used for Student, he cannot consistently indicate his choices. Because of his limited communication skills, attempts to assess his intellectual ability have not been successful. Student has bowel and bladder incontinence, and at school, he is currently on a toilet training program in which he is scheduled to go to the bathroom every fifteen minutes. He has extremely limited social, self-care and independent living skills. He also has mobility, coordination and balance challenges that require constant supervision in order to avoid falling when he is on his feet. Nearly all instruction is provided on a 1:1 basis. Staff typically combine voice direction together with hand guidance while he performs a particular task. Testimony of Mother, Tanguay, Agustin, Doyle; exhibits P-22, P-23, P-27, S-23, S-6A.

Through its most recently-proposed IEP (exhibit S-11A), Amherst has proposed that Student receive the following direct special education services during the school year:

* adaptive living skills instruction from a special education teacher or special education paraprofessional for 269 minutes on a daily basis;
* two hours per week of adaptive living skills instruction from a behavior analyst or behavior therapist;
* an hour per day of vocational training from a vocational coordinator or special education paraprofessional; and
* extended day services from the New England Business Associates (NEBA) staff for 150 minutes each day.

This proposed IEP also calls for the following related services:

* physical therapy for a half hour, twice per week;
* occupational therapy for a half hour, twice per week; and
* speech-language therapy for a half hour, three times per week.

The IEP also proposes extensive consultation services, including monthly consultation for an hour from the special education team, fifteen minutes per week from the Assistive Technology Coordinator, an hour six times per week from the Behavior Analyst or Behavior Therapist, an hour per week from the Vocational Coordinator, fifteen minutes per week from the occupational therapist, fifteen minutes per week from the physical therapist, and a half hour per week from the speech-language therapist. Full-day summer services are also proposed, including an hour per day from the Behavior Analyst or Behavior Therapist and related services of physical therapy, occupational therapy and speech-language services.

Although Parents have not accepted this IEP, Amherst appears to be providing the services reflected in the service delivery grid. Testimony of Tanguay.

Factual Background

Student has been educated by the Amherst Public Schools for his entire educational career, beginning when he was three years old. It is anticipated that he will continue to be eligible for special education services until his 22nd birthday in December 2013. Testimony of Mother.

Student’s early educational history is described within a BSEA decision, dated May 14, 2007. In that decision, Hearing Officer Rosa Figueroa resolved a dispute between the parties regarding the appropriateness of Amherst’s proposed IEP. In her decision, Hearing Officer Figueroa determined what special education and related services were needed in order for Student to receive FAPE. The dispute at that time challenged the appropriateness of Amherst’s school-based program. Parents did not seek residential placement but instead asked the BSEA to order Amherst to “fund, supervise and coordinate a home/community-based program … designed by Parents and New England Business Associates”. Exhibit S-2, page 10 (Hearing Officer Figueroa’s decision).

Hearing Officer Figueroa found Amherst’s proposed IEP for the 2006-2007 school year (Student’s 9th grade) to be appropriate, with certain modifications. These modifications included the addition of services of an autism specialist, and ABA direct services and consultation (the decision did not specify the amount of these services). The Hearing Officer also required Amherst to increase the occupational therapy (OT) and physical therapy (PT) services, with the result that Student would receive OT for a half hour, twice per week; PT for a half hour, twice per week (in addition to daily PT carryover by special education staff); and speech-language services for a half hour, four days per week. No change was made in the extended day services of 150 minutes each day. Exhibit S-2, pages 35, 55.

The Hearing Officer’s decision provides a comprehensive description of Student and his educational history, including relevant evaluations, through the dates of the evidentiary hearing on March 2007. I therefore will not repeat this part of Student’s educational history, except that I note, below, one evaluation (the Assistive Technology evaluation) which has particular relevance to the instant dispute and one evaluation (by Dr. Pawlikowski) that had been completed but was not considered in the previous dispute.

On November 2, 2006, Student had an Assistive Technology Evaluation at the Collaborative Center for Assistive Technology and Training. The purpose of the evaluation was to help Student’s Team increase Student’s social interactions and communication. Patricia Walsh Cassidy, CCC/SLP and Dale Gardner-Fox, MS, RPT conducted the evaluation and recommended continued implementation of the Picture Exchange Communication system (PECS), and expanding it by adding auditory input into the symbols used as well as engineering the environment by placing individual talking buttons close to preferred activities. They found Student to be a candidate for use of a voiced output communication device, and recommended creating “core words” and “activity specific” overlays. An easel presentation should be used when Student was working with writing utensils. The use of a padded armchair with more hip and trunk support was recommended. They stated that in order for the augmentative communication to be effective, Student would have to be immersed in it. Exhibits P-26.

On October 10, 2006, October 31, 2006 and November 14, 2006, Parents’ private psychologist (Elizabeth Pawlikowski, PhD) conducted a psychological evaluation, which consisted of observation at school and home, staff interviews and review of evaluations and reports over the previous ten years. Dr. Pawlikowski issued a written report that included the following recommendations:

* Student “needs evidence based treatment on a daily basis”.
* A “Functional Analysis of Behavior … needs to be completed as soon as possible.”
* “[Student] needs to develop self help skills in the toileting, dressing, self feeding, and basic communication areas, and can realistically do this in the coming 12 months, once the ABA classroom is up and running.”
* “Once basic self help skills are developed, a plan to generalize them to home, and where appropriate, to public situations needs to be in place.”
* “[Student] needs to learn at least a few practical ways to indicate ways to indicate needs—most individuals of his level of functioning can learn to use at least a few American Sign Language signs for basic needs such as toileting.” [Exhibit P-23.]

On December 5, 2007, Amherst held an IEP Team meeting, which resulted in Amherst’s proposing an IEP for 12/5/07 to 12/4/08, which Parents rejected because Parents wanted additional services during the school day, a longer extended day, additional summer services and a different placement. Exhibit P-32.

In the spring of 2009, Amherst conducted its three-year re-evaluation of Student, including a speech-language evaluation, occupational therapy evaluation, physical therapy evaluation, and an evaluation by Amherst’s BCBA (Elizabeth Smith, MEd, BCBA). Exhibits S-24, S-3A, S-4A, S-5A.

The evaluation, conducted by the BCBA (Ms. Smith) is the most instructive of these 2009 evaluations. In her report dated May 22, 2009, Ms. Smith stated that she conducted a thorough record review of Student’s entire tenure in the Amherst Public Schools (which began when he was three years old). Ms. Smith noted that there have been successes at school for Student and that “[i]t is worth noting that the success can be attributed to consistent approaches and delivery of service.” Exhibit S-4A, page 1.

With respect to communication, Ms. Smith’s report explained that Student does not yet appear to request items but is being instructed in the use of the sign “want” in order to build a foundation for requesting items. Ms. Smith then stated: “Ideally, his program will allow for the introduction of a broader communication approach—one that allows his [sic] to acquire communications tools (signs and approximations) while continuing to focus on shaping and eliciting his picture and vocal repertoire.” Exhibit S-4A, page 4. In her recommendations, Ms. Smith added: “[Student] should have a communication approach that allows his [sic] to be rapidly fluent in a system that he can control and manipulate in order to make his communication intents clear.” Exhibit S-4A, page 8.

With respect to eating, Ms. Smith’s report explained that Student “is able to feed himself with a modified (stabilized) bowl and spoon but requires adult prompting to limit the pace of his eating and the completion of each bite.” Exhibit S-4A, page 7.

With respect to toileting, Ms. Smith’s report explained that Student “is able to follow a toileting schedule with adult prompting and direction. He is less likely to indicate a need to change a soiled or wet diaper, but has remained accident-free for the majority (89%) of measured intervals.” Exhibit S-4A, page 7.

For the 2009-2010 school year, Corrina Trude was Student’s special education teacher. Testimony of White.

On September 30, 2009, Amherst held an IEP Team meeting, which resulted in Amherst’s proposing an IEP for 10/1/09 to 10/1/10. Exhibit P-41.

Through this IEP, Amherst proposed that Student receive the following direct special education services during the school year:

* adaptive living skills instruction from a paraprofessional for 150 minutes on a daily basis and for 243 minutes on a daily basis from special education teacher or special education;
* an hour per day, two days per week, of vocational training from a vocational teacher and one hour per day, two days per week of community skills from a vocational coordinator or special education paraprofessional; and
* extended day services from the New England Business Associates (NEBA) staff for 150 minutes each day.

This proposed IEP also called for the following related services:

* physical therapy for a half hour, twice per week;
* occupational therapy for a half hour, twice per week; and
* speech-language therapy for twenty minutes each day.

Also, academic support was to be provided by a paraprofessional in the regular education classroom for an hour each day.

Parents rejected the IEP, principally for the reason that Parents requested direct services from an ABA specialist. As compared to a previous IEP that included four hours per week of adaptive living skills instruction from a behavior analyst or behavior therapist (see exhibit P-32), this IEP included no direct services from a behavior analyst or behavior therapist. This IEP as well as the previous IEP called for six hours per week of consultation from a behavior analyst or behavior therapist. Parents also rejected the proposed placement. Exhibit P-41.

Between January 26, 2010 and February 12, 2010, Amherst’s psychologist (Patricia Schumm, PhD) conducted a school psychological assessment, through observation of Student, interviewing Mother, review of records and administration of the Stanford Binet Intelligence Scales (5th edition) and the Vineland Adaptive Scales (2nd edition). The “School Concerns” portion of the assessment included the following statement: “The classroom teacher indicated that she would like [Student] to have a formalized means of communication, i.e., through assistive technology, and /or to learn to communicate through signing, which might then enable staff to teach him to do more for himself.” During the assessment, Student “was not able to point with any degree of consistency to indicate his responses.” The assessment report concluded that “[b]ecause of [Student’s] very limited skills of communication, formal testing was attempted but not successful. This psychologist was not able to establish that [Student] understood the instructions at all, even when simplified, as in ‘Pick up the block.’” The assessment report concluded that attempts to assess Student’s intellectual ability “were not successful”. Exhibits P-22, S-6A.

The assessment report’s recommendations included the following:

* “Increased communication, i.e. hand gestures, social stories with picture books; assistive technology.”
* “If and when more effective communication is attained, other skills may be taught, i.e., increased independence with daily living skills.”
* “Support [Student’s] relative strength in socialization skills by increasing his activity in community as well as by training him to participate at his ability level in community”.
* “Vocational training may be attempted if and when a more effective and consistent mode of communication has been reached with [Student].” [Exhibits P-22, S-6A.]

Amherst’s written progress reports at the end of the 2009-2010 school year (dated June 15, 2010) indicated that with respect to the functional academics goal, Student made minimal progress and did not meet any of the benchmarks/objectives. With respect to the personal management goal, Student made minimal progress and partially met some of the benchmarks/objectives. With respect to the vocational goal, Student made minimal progress and partially met one of the benchmark/objective because “at times” he was able to push a cart from one point to another. With respect to the functional life skills goal, Student made progress by pressing a switch to turn pages when a story is being read to him, by feeding himself using adaptive equipment and only needing “moderate assistance to stabilize his wrist position” when eating foods that may slip off his spoon, and by completing several of the laundry tasks with assistance. With respect to the communication goal, he made minimal progress and did not meet his benchmarks/objectives. By June 15, 2010, he was imitating mouth movements by approximating lip closure 30% of the time, and given a structured speech-language task, he was able to press an icon (to indicate his preference or choice) at a level of 20% independence and accuracy. With respect to the motor goal, minimal progress was reported, and it was unclear from the report whether he met any of his benchmarks/objectives. Exhibit S-3.

For the 2010-2011 school year, Keith Arnett was Student’s special education teacher, and Jackie Condon was Student’s BCBA. Testimony of White, Mother.

On September 22, 2010, Amherst held an IEP Team meeting, which resulted in Amherst’s proposing an IEP for 9/22/10 to 9/21/11. The IEP Team meeting included Parents and Amherst staff, including Ms. Chase. This IEP continued to include no direct services from a behavior analyst or behavior therapist. On October 24, 2010, Mother fully accepted the IEP but rejected the placement. Exhibits P-34, P-35, S-6. This IEP was substantially the same as the previous IEP, discussed above, for 10/1/09 to 10/1/10. Exhibit P-41.

On November 29, 2010, Amherst held an IEP Team meeting, which resulted in Amherst’s proposing an amended IEP for 9/22/10 to 9/21/11. The services proposed in this IEP are substantially the same as the previous IEPs, discussed above, except that this IEP includes direct services (to address adaptive living skills) from a behavior analyst or behavior therapist for an hour, twice each week. The IEP Team meeting included Parents and Amherst staff, including Ms. Chase. The record is unclear whether Parents accepted or rejected this IEP. Exhibit S-7.

An observation of Student on February 14, 2011 regarding his eating lunch in the cafeteria indicated that Student “demonstrates improved skills when feeding himself in a quiet, non-distracting environment with one or two people.” For example, on two occasions, he was able to scoop the food and bring it to his mouth independently. “Overall, … he required moderate to maximum assistance for eating.” Exhibit S-5.

Amherst’s written progress reports at the end of the 2010-2011 school year (dated June 6, 2011) indicated that with respect to the functional academics goal, Student made minimal progress and did not meet any of the benchmarks/objectives. The functional academic benchmarks/objectives for this IEP (9/22/10 to 9/21/11) were substantially the same as the benchmarks/objectives from the previous IEP (10/1/09 to 10/1/20). With respect to the personal management goal, Student made minimal progress and partially met some of the benchmarks/objectives. The personal management benchmarks/objectives for this IEP (9/22/10 to 9/21/11) were substantially the same as the benchmarks/objectives from the previous IEP (10/1/09 to 10/1/20). With respect to the vocational goal, there is no indication of what progress has been made. The vocational benchmarks/objectives for this IEP (9/22/10 to 9/21/11) were substantially the same as the benchmarks/objectives from the previous IEP (10/1/09 to 10/1/20). With respect to the functional life skills goal, Student’s level of performance was described, but it was unclear from this description what progress had been made. The functional life skills benchmarks/objectives for this IEP (9/22/10 to 9/21/11) were substantially the same as the benchmarks/objectives from the previous IEP (10/1/09 to 10/1/20). With respect to the communication goal, he made minimal progress and met several of his benchmarks/objectives—more specifically, Student was able to use a two-button assistive technology device to request an object or activity in three out of four opportunities; he was able to follow a verbal command (paired with a visual signal) to stop drinking or eating; and he was able to intermittently vocalize the word “hi”. The communication benchmarks/objectives for this IEP (9/22/10 to 9/21/11) were similar to the benchmarks/objectives from the previous IEP (10/1/09 to 10/1/20). With respect to the motor goal, minimal progress was reported; he met the benchmark/objective of “transition[ing] from different levels to standing with improved body control for greater safety with close supervision/contact guard 80% of the time.” The motor benchmarks/objectives for this IEP (9/22/10 to 9/21/11) were different than the benchmarks/objectives from the previous IEP (10/1/09 to 10/1/20). Exhibit S-4.

On June 9, 2011, Amherst held an IEP Team meeting for the purpose of discussing further evaluations of Student. Mother and Amherst staff, including Ms. Chase and Ms. White, attended this meeting. Exhibit P-12.

For the 2011-2012 school year, Tina Agustin was Student’s special education teacher. Jackie Condon was Student’s BCBA until November 2011 when Ms. Tanguay became Student’s BCBA. Testimony of Agustin, Tanguay.

On October 6, 2011, Amherst held an IEP Team meeting, which resulted in Amherst’s proposing an IEP for 10/6/11 to 10/5/12. Parents fully rejected this IEP by e-mail of October 25, 2011. The services proposed in this IEP were substantially the same as those proposed in the previous IEP (exhibit S-7), discussed above, except that Amherst increased vocational skills to an hour each day (from two hours per week) and added a second paraprofessional for community skills for two hours per week. In their rejection of the IEP, Parents took the position that Student was not being taught to generalize what he had learned across all settings, that Amherst had failed to keep Student safe and healthy, that Student has been a victim of “possible bullying”, that Student should have been toilet trained by now, and that Amherst has generally failed to adequately address Student’s educational needs. Exhibits P-3, S-9, S-11.

On October 23, 2011, Judith Imperatore, EdD, conducted an independent “*Partial* Transition Assessment and Vocational Evaluation” (italics in original). Amherst paid for this evaluation. As a result of her evaluation, Dr. Imperatore generated a written report that included a number of recommendations. She explained in the recommendation section of her report: “Because of his dependencies, he is greatly affected by his surroundings and vulnerable to those caring for him. Without communication, he is further dependent.” Exhibit S-23.

In her report, Dr. Imperatore emphasized that even a student with severe disabilities, such as Student, “unequivocally” can “exercise [his] right to be self-determining”. She went on to explain:

a critical piece that needs serious attention that relates to self-determination in a major way, is the **communication** aspect. A push button device that provides an “I want” or “all done” was mentioned; however, it was not observed being used. Indication of a sure YES or NO response, the foundation of self-determination, is missing. This needs to be addressed. [Underlining and bold in original.]

The IEP Team should consider ways in which self-determination skills can be developed in every aspect of [Student’s ] programming. [Exhibit S-23, page 32.]

With respect to life skills, Dr. Imperatore further noted:

Also, assistive technology (AT) is advancing at an incredible rate. The last AT report for [Student] is dated 11-2-2006 by Hampshire Educational Collaborative. It is highly recommended this be updated. [Exhibit S-23, page 36.]

An additional IEP Team meeting was held on October 27, 2011. This did not result in agreement by Parents who continued to fully reject the IEP and placement. Exhibits S-11, S-12.

Amherst has maintained data regarding task analysis and skills being taught to Student from 12/31/10 to 10/24/11, as well as data charts for periods of time in January 2012. However, many of the charts are undated or are dated without providing the year. Exhibits S-21, S-22, S-9A.

By letter of November 18, 2011, Amherst’s Assistant Principal (Ms. Chamberlain) advised Parents that Julie Tanguay, a BCBA, had been hired “to provide the Autism Consult services previously provided by the late Jacqueline Condon.” Ms. Condon, Student’s previous BCBA, had died earlier in November 2011 as a result of an automobile accident. Exhibit P-19.

By letter of December 9, 2011, Amherst’s Assistant Principal (Ms. Chamberlain) advised Parents that Keith Arnett, one of the liaisons and teacher for the Developmental Studies Program, “will continue to be on medical leave for the next two weeks.” By letter of January 6, 2012, Ms. Chamberlain advised Parents that Mr. Arnett had resigned immediately and that Amherst would recruit a new teacher as soon as possible. Exhibit P-19.

Amherst’s most recent written progress reports dated January 27, 2012 assessed Student’s progress using the IEP goals and benchmarks/objectives from the expired IEP for the period 9/22/10 to 9/21/11. These progress reports did not indicate what progress has been made with respect to the functional academics goal or the personal management goal. With respect to the vocational goal, minimal progress is reported and no benchmarks/objectives were met. With respect to the functional life skills goal, Student’s level of performance was described, but it was unclear from this description what progress had been made. With respect to the communication goal, no progress was reported beyond what appeared in the June 2011 progress reports, except that it was reported that Student is able to greet people with a smile or sound vocalization and will raise his hand and wave “with tactile/hand over hand cuing”. It is clear from this progress report how much Student enjoys social contact and interaction. With respect to the motor goal, progress was reported but it was unclear to what extent he had met the benchmarks/objectives. Exhibit S-4.

On January 24, 2012, Parents’ educational consultant (Elisabeth Doyle, MS) observed Student in his educational program during the school day, during the after-school program, and at home. Ms. Doyle’s written observation report noted that all staff spoke to Student “with care and respect at all times” and she further noted that concern for Student’s safety “appeared to be paramount to all staff/family members.” The report then included the following recommendations:

* Student requires a residential educational program in order to “maintain previously acquired skills and progress further.”
* “Intensive, cross-situational toilet training should be addressed immediately”.
* “On-going communication-based and functional activities should be the focus of [Student’s] school program.”
* “Staff consistency and coordination of [Student’s] needs and goals should be addressed coherently throughout his entire day.”
* Student should “have more socialization opportunities during the school day. Spending his full school day in a separate room does not allow for interactions with others.” Student “should have opportunities for facilitated interaction with other students—both within the school building and within his classroom setting (and in the community). It is recommended that [Student] be given time in the larger communal classroom rather than only in the smaller work room.” Exhibits P-11, S-24.

On January 24, 2012, Ms. Doyle observed Student in his school program from 1:25 pm to 3:45 pm, and observed Student at home from 4:00 pm to 4:45 pm. During the school day observation, Student was working with a paraprofessional as well as Ms. Tanguay (Amherst’s BCBA). Ms. Doyle reviewed Student’s records and spoke with Ms. White and Mother. Testimony of Doyle; exhibits P-11, S-24.

On February 2, 2012, Amherst held an IEP Team meeting, which resulted in Amherst’s proposing an IEP for 2/2/12 to 2/1/13, which Parents rejected. Exhibits P-8, S-19, S-20. On March 15, 2012, the IEP Team met again and proposed the most recent IEP, which is discussed in detail above. Exhibit S-11A.

**LEGAL STANDARDS**

It is not disputed that Student is an individual with a disability, falling within the purview of the federal Individuals with Disabilities Education Act (IDEA)[[2]](#footnote-2) and the Massachusetts special education statute.[[3]](#footnote-3)

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."[[4]](#footnote-4) A purpose of the IDEA is “to prepare children with disabilities for independent living and a reasonable measure of self-sufficiency where possible.”[[5]](#footnote-5)

Student’s right to FAPE is assured through the development and implementation of an individualized education program or IEP.[[6]](#footnote-6) An IEP must be custom-tailored to address Student’s “unique” educational needs.[[7]](#footnote-7) The IDEA requires that FAPE “be provided in conformity with the [IEP]”.[[8]](#footnote-8)

As a general rule, FAPE mandates proposed special education and related services that are “reasonably calculated to enable [Student] to receive educational benefits.”[[9]](#footnote-9) This “does not imply that a disabled child is entitled to the maximum educational benefit possible.”[[10]](#footnote-10) Rather, within the context of FAPE, “[a]ppropriateness and adequacy are terms of moderation.”[[11]](#footnote-11)

“At the same time, the IDEA calls for more than a trivial educational benefit, in line with the intent of Congress to establish a federal basic floor of meaningful, beneficial educational opportunity. Hence, to comply with the IDEA, an IEP must be reasonably calculated to confer a meaningful educational benefit.”[[12]](#footnote-12) On multiple occasions, the Supreme Court has referenced a FAPE standard that a student is entitled to “meaningful access” to his or her education.[[13]](#footnote-13) In the application of these standards, federal case law clarifies that “levels of progress must be judged with respect to the potential of the particular child”[[14]](#footnote-14) unless the potential is “unknowable”.[[15]](#footnote-15)

FAPE is defined by the IDEA to include state educational standards,[[16]](#footnote-16) which may exceed the federal floor.[[17]](#footnote-17) Massachusetts standards require that a proposed IEP include specialized instruction and related services designed to enable Student to make effective progress and develop his or her individual educational potential.[[18]](#footnote-18)

In the instant dispute, Student is diagnosed with autism. Massachusetts state standards explicitly address the need for special education services for students with a disability on the autism spectrum. These standards are found within M.G.L. c. 71B, § 3, which provides in relevant part:

Whenever an evaluation indicates that a child has a disability on the autism spectrum, which includes … pervasive developmental disorder not otherwise specified, … the Individualized Education Program (IEP) team … shall consider and shall specifically address the following: the verbal and nonverbal communication needs of the child; the need to develop social interaction skills and proficiencies; … and other needs resulting from the child’s disability that impact progress in the general curriculum, including social … development.

In response to this statute, the Massachusetts Department of Elementary and Secondary Education issued Technical Assistance Advisory SPED 2007-1: Autism Spectrum Disorder (*Advisory*) on August 25, 2006, “to provide guidance on the ways that the Individual Education Program (IEP) Team may effectively frame complete and thorough discussions of the strengths and needs of a student with Autism Spectrum Disorder (ASD).”[[19]](#footnote-19) The *Advisory* notes that “[i]mpairment in communication is one of the defining characteristics of ASD; therefore communication skill development should be addressed as an essential piece of the student's IEP” and notes the relevance of “the student's ability to use and understand non-verbal communication (e.g., eye gaze, facial expression, gesture)”[[20]](#footnote-20) The *Advisory* further states that “[p]rogress in social skill development is a likely focus within the IEP of every student with ASD”.[[21]](#footnote-21)

In the instant dispute, Parents have alleged violations of Student’s right to appropriate transition services. Under the IDEA and the regulations thereunder, Student has the right to receive transition services that include “instruction [which also includes ‘specially designed instruction’[[22]](#footnote-22)], related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.”[[23]](#footnote-23) The IDEA further explains that transition services are provided to “improve[e] the academic and functional achievement of the [student] to facilitate [his or her] movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation.”[[24]](#footnote-24)

The IDEA and Massachusetts law reflect a preference for mainstreaming disabled students.[[25]](#footnote-25) This entails ensuring, “[t]o the maximum extent appropriate,” that disabled students are taught with nondisabled students.[[26]](#footnote-26) “The goal, then, is to find the least restrictive educational environment that will accommodate the child's legitimate needs.”[[27]](#footnote-27)

In the instant dispute, Parents are seeking a residential educational placement for their son. A residential placement is properly considered more restrictive than a day program, even when the day program places a student in a substantially separate special education program.[[28]](#footnote-28) The appropriate standard, as reflected within several First Circuit decisions, is whether the educational benefits to which a student is entitled can only be provided through around-the-clock special education and related services, thus necessitating placement in an educational residential facility.[[29]](#footnote-29)

In the instant dispute, Parents have made claims for compensatory services. “Compensatory education is a surrogate for the warranted education that a disabled child may have missed during periods when his IEP was so inappropriate that he was effectively denied a FAPE.”[[30]](#footnote-30) The decision-maker needs to make “an informed and reasonable exercise of discretion regarding what services [Student] needs to elevate him to the position he would have occupied absent the school district's failures.”[[31]](#footnote-31)

Parents’ compensatory services include alleged violations dating back to 2006. However, the IDEA has a two-year statute of limitations which reads as follows:

(C) Timeline for requesting hearing. A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part, in such time as the State law allows.
(D) Exceptions to the timeline. The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to--
         (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
         (ii) the local educational agency's withholding of information from the parent that was required under this part to be provided to the parent.[[32]](#footnote-32)

There is no evidence or argument that the above-described exceptions (subpart D) apply to the instant dispute. Accordingly, the two-year rule applies.

Parents filed their hearing request on August 11, 2011, seeking only prospective relief. On February 28, 2012, Parents filed an amendment to their hearing request, raising compensatory claims for the first time. BSEA Hearing Rule I G provides in relevant part: “For issues not included in the original hearing request, the date of the amended hearing request shall be controlling for statute of limitations purposes.”

For these reasons, I will consider Parents’ compensatory claims only from February 28, 2010 forward.

In the instant dispute, Parents have the burden of persuasion that Amherst has not provided Student with FAPE, that its currently-proposed IEP is not appropriate, and that Student requires a residential educational placement in order to receive FAPE.[[33]](#footnote-33)

**DISCUSSION**

At all times relevant to this dispute, Student has received a substantially-separate educational program in the Developmental Studies Program at the Amherst-Pelham Regional High School. Student’s school day is extended each day until 5:15 pm through contracted services; home-based services have been offered but not accepted by Parents; and extensive summer services have been provided.

More specifically, Student receives adaptive living skills instruction from a special education teacher or special education paraprofessional throughout his school day. He also receives two hours per week of adaptive living skills instruction from a behavior analyst or behavior therapist, receives an hour per day of vocational training from a vocational coordinator or special education paraprofessional, and receives speech-language services, occupational therapy, and physical therapy as described in his most recent IEP. Testimony of Mackey, Tanguay, Agustin; exhibit S-11A.

Student receives his extended day services from the New England Business Associates (NEBA) staff for 150 minutes each day. The extended day services are essentially a continuation of his school day allowing Student to continue to work on the skills that his teachers and paraprofessionals have been addressing during the school day, other than eating skills. Testimony of Mackey, Tanguay, Agustin; exhibit S-11A.

It is not disputed that these comprehensive services have in the past and continue to seek to address Student’s most fundamental skill deficits. It is also not disputed that Amherst staff (and those providing extended day educational services) are caring professionals who have expended an enormous amount of time and effort working with Student, typically through 1:1 staffing. Testimony of Mackey, Tanguay, Agustin; exhibit S-11A.

In order to evaluate the appropriateness of this educational program, I consider, in turn, each of the most important educational areas that Amherst has sought to address through Student’s educational program.

Toilet training is, by agreement of Parents and Amherst, the highest priority of Student’s educational program. Toileting and other issues were addressed at the hearing in the instant dispute by Amherst’s current autism/BCBA consultant, Ms. Tanguay, who is working with Student to develop the specifics of his educational programming (including his toileting program) and to oversee its implementation. Through her experience of providing services directly to Student, her expertise as a BCBA and her willingness to testify candidly, Ms. Tanguay demonstrated an objective and knowledgeable understanding of Student. I fully credit her testimony. [[34]](#footnote-34)

Ms. Tanguay testified that she and Mother discussed toileting in December 2011 and decided to make toileting the first priority of Student’s program. For that reason, in January 2012, Ms. Tanguay changed the frequency of toileting from every half hour to every quarter hour. Ms. Tanguay testified that the idea is for Student to spend ten minutes off the toilet and up to five minutes on the toilet if he's willing to stay there for that long, for the purpose of increasing the opportunities for him to void himself on the toilet, at which times he could then receive positive feedback to reinforce such voiding. Ms. Tanguay’s plan is to eventually have Student on a two-hour toileting schedule. Testimony of Tanguay.

During the hearing, Ms. Tanguay, was asked by the Hearing Officer whether she agreed that developing toileting skills should be Student’s first priority. She replied that she agreed with this because “wherever [Student] is when he ages out of—and into adulthood that if he is as independent as possible with his toileting routine, it will increase his quality of life tremendously.” Transcript, vol. one, page 166, lines 6-11.

Parents’ expert (Ms. Doyle) also addressed toileting. As compared to Ms. Tanguay, Ms. Doyle does not have as much knowledge of Student nor does she have the same expertise regarding behavioral treatment in general since she is not a BCBA. Nevertheless, she has extensive, relevant experience with students such as Student, and she has experience evaluating programs both for parents and for school districts. I found her to be a knowledgeable and candid expert witness, and I fully credit her testimony.[[35]](#footnote-35)

Ms. Doyle’s written report of her January 2012 observation and review of records included the following recommendation: “Intensive, cross-situational toilet training should be addressed immediately”. Exhibits P-11, S-24. She testified that learning toileting skills is of the highest priority for Student. Testimony of Doyle.

The evidentiary record indicates a long-standing concern regarding Student’s lack of toileting skills. The 2006 psychological evaluation by Parents’ private psychologist (Dr. Pawlikowski) stated in part: “[Student] needs to develop self help skills in the toileting … areas, and can realistically do this in the coming 12 months, once the ABA classroom is up and running.” Exhibit P-23.

The May 2007 BSEA decision by Hearing Officer Figueroa recognized the importance of toilet training: “Turning to the skills-based program recommended by Ms. O’Donovan and Ms. McIntire for Student, the focus must be on becoming toilet trained, ….” Exhibit S-2, page 46. The Hearing Officer’s Order stated that “Amherst shall incorporate ABA services and consultation into Student’s IEP. … ABA services shall focus on daily living skills issues including toileting,….. Exhibit S-2, page 55, par. 3. The BSEA Hearing Officer further ordered Amherst to “change the emphasis of the after-school program to offer ABA and address daily living skills including toileting, …..” Exhibit S-2, page 55, par. 4.

Notwithstanding the importance of this issue and Amherst’s having worked on this skill for many years and notwithstanding Student’s ability to make progress in this area (as will be discussed below), Student has regressed with respect to his toileting skills. Ms. Tanguay testified that, presently, Student gives no indication when he needs to use the bathroom; and he is voiding in the toilet only on three to five occasions each week. Similarly, one of the three extended day staff (Ms. Mackey) testified that during the time that she is with Student (the equivalent of one and one-half afternoons per week, from 2:30 to 5:15 PM), he voids on the toilet approximately once per week. The only reported progress is that, recently, Student has no longer been resisting staff’s efforts to take Student to the toilet; staff have a bag with items used in the bathroom and when staff grab the bag, Student knows that it is time to use the bathroom; and by showing Student a videotape while he is on the toilet, staff are able to keep Student on the toilet for longer periods of time. For all practical purposes, Student is now completely untrained with respect to his toileting skills. Testimony Tanguay, Agustin, Mackey, Mother.

In contrast, an Amherst evaluation conducted by its BCBA (Ms. Elizabeth Smith), dated May 22, 2009, stated that with respect to toileting, Student “is able to follow a toileting schedule with adult prompting and direction. He is less likely to indicate a need to change a soiled or wet diaper, but has remained accident-free for the majority (89%) of measured intervals.” Exhibit S-4A, page 7.

Communication skills development is also of the highest educational importance for Student. As discussed above in the Legal Standards section of this Decision, the Massachusetts Department of Elementary and Secondary Education has recognized the essential nature of skill development in this area: “Impairment in communication is one of the defining characteristics of ASD [autism spectrum disorder]; therefore communication skill development should be addressed as an essential piece of the student's IEP”.[[36]](#footnote-36)

As explained below, the importance of developing Student’s communication skills has been recognized for a long period of time.

On November 2, 2006, Amherst arranged for Student to have an Assistive Technology Evaluation at the Collaborative Center for Assistive Technology and Training for the express purpose of helping Student increase his social interactions and communication skills. Exhibit P-26.

The 2006 psychological evaluation by Parents’ private psychologist (Dr. Pawlikowski) stated in part: “[Student] needs to develop self help skills in … basic communication areas, and can realistically do this in the coming 12 months, once the ABA classroom is up and running.” The report further noted: “[Student] needs to learn at least a few practical ways to indicate needs—most individuals of his level of functioning can learn to use at least a few American Sign Language signs for basic needs such as toileting.” Exhibit P-23.

In the spring of 2009, Amherst conducted its three-year re-evaluation of Student, including an evaluation by Amherst’s BCBA (Ms. Elizabeth Smith). Ms. Smith’s report explained that Student does not yet appear to request items but is being instructed in the use of the sign “want” in order to build a foundation for requesting items. Ms. Smith then stated: “Ideally, his program will allow for the introduction of a broader communication approach—one that allows his [sic] to acquire communications tools (signs and approximations) while continuing to focus on shaping and eliciting his picture and vocal repertoire.” Exhibit S-4A, page 4. In her recommendations, Ms. Smith added: “[Student] should have a communication approach that allows his [sic] to be rapidly fluent in a system that he can control and manipulate in order to make his communication intents clear.” Exhibit S-4A, page 8.

Between January 26, 2010 and February 12, 2010, Amherst’s psychologist (Dr. Schumm) conducted a school psychological assessment. Exhibits P-22, S-6A. The assessment report concluded that “[b]ecause of [Student’s] very limited skills of communication, formal testing was attempted but not successful.” The assessment report’s recommendations included “[i]ncreased communication, i.e. hand gestures, social stories with picture books; assistive technology” and noted further the educational importance of increasing Student’s communication skills: “If and when more effective communication is attained, other skills may be taught, i.e., increased independence with daily living skills.”

In her October 23, 2011 transition assessment and vocational evaluation report, Dr. Imperatore emphasized that even with his severe disabilities, Student “unequivocally” has the ability to “exercise [his] right to be self-determining”. She went on to explain: “a critical piece that needs serious attention that relates to self-determination in a major way, is the **communication** aspect [underlining and bold in original]”. Exhibit S-23, page 32.

Ms. Tanguay (Amherst’s BCBA) testified that for Student, it is extremely important that he develop his communication skills. She explained that if he cannot communicate his preferences, this significantly impacts the quality of his life. She testified that an augmentative communication assessment and/or an assistive technology evaluation would be helpful if performed by someone with knowledge of ABA principles.

Ms. Doyle’s January 24, 2012 observation report included the following recommendation: “On-going communication-based and functional activities should be the focus of [Student’s] school program.” Ms. Doyle testified that Student’s communication deficits severely impact his ability to gain knowledge and learn new skills, and that he has the potential to learn how to make choices. She testified that he needs to be making choices throughout the day, with the result that his entire school program should be oriented towards choice-making and he should be using his communication skills across all settings. She stated that an assistive technology evaluation should be conducted, with consistent use of technology (for purposes of communication) in all settings. Testimony of Doyle; exhibits P-11, S-24.

In sum, evaluations and reports since at least 2006 have made clear the critical importance of Student’s developing communication skills. Amherst has sought to address this concern through IEP services (and a communication goal) at least since the 2009-2010 school year (the evidentiary record does not include goals and objectives for previous school years) and likely over the course of a much longer period of time.[[37]](#footnote-37) The unrebutted testimony from Ms. Doyle, Dr. Pawlikowski’s report and Dr. Imperatore’s report (all as noted above and discussed in greater detail below) is that Student has the ability to make progress in this area.

Yet, Student has not made any discernable progress in his developing communication skills over the course of his academic career. Currently, Student has no intelligible vocalizations and can only communicate through his behavior by making clear (through resisting) that he does not want to do something, or by communicating through facial or bodily expressions of enthusiasm that he likes what is happening. The most that can be said is that recently, Amherst staff have successfully taught Student to associate a particular object with a particular activity—for example, Student now associates piece of clothing (a “walking shirt”) with going for a walk and can therefore indicate his desire to go for a walk by attempting to move towards or reach this piece of clothing. Similarly, there is a clothing bag that communicates to Student that it is time for his laundry routine, and there is a bathroom bag that indicates to Student that he will be taken to the bathroom. Testimony of Tanguay, Agustin, Doyle, Mother; exhibit S-11A.

Student has, for a number of years, been given a switch for purposes of indicating a preference. His speech-language therapist is working with Student on the use of the switch. June 2011 progress reports indicated Student was able to use a two-button assistive technology device to request an object or activity in three out of four opportunities. However, the unrebutted testimony from Amherst witnesses was that because Student has not learned to reliably use the switch outside of his work with the speech-language therapist, the switch does not currently serve the purpose of allowing Student to generally express preferences. Parents have not been provided this switch for use in the home. Testimony of Tanguay, Agustin, Doyle, Mackey, Mother; exhibits S-3, S-4, S-11A.

In sum, notwithstanding the critical importance of communication skills, as recognized for many years, and not withstanding the substantial amount of time that Amherst has sought to address this area of need, Student has virtually no functional communication skills, with the result that he is not able to express his choices or preferences in a reliable manner with respect to the vast majority of routine decisions and life choices. Yet, Student has never been given an augmentative communication evaluation and the most recent assistive technology evaluation was in 2006. It is not disputed that these evaluations would likely be helpful to Student, particularly an augmentative communication evaluation by someone with knowledge of BCBA principles. Testimony White, Tanguay.

Social skill development is also a central area of focus for Student, as it is generally for all students on the autism spectrum. As discussed above in the Legal Standards section, state law (M.G.L. c. 71B, § 3) requires Amherst to have an IEP for students on the autism spectrum to “specifically address the … the need to develop social interaction skills and proficiencies”.

Except when Student is involved in a specific activity that takes him outside of his classroom (such as getting food from the refrigerator, doing laundry, or going for a walk), all of his special education services are provided to him on a 1:1 basis without any other students present. His classroom is a small room that is connected to a larger room used for special education classes. As a general rule, Student has contact with other students only when he goes to the refrigerator to obtain food or is outside of his classroom—for example, in the hallway—where there may happen to be other students. At these times, part of his educational program is to engage or greet any other students whom he may encounter. The staff accompanying Student assist him with a social greeting or other introduction to the other person. Testimony of Tanguay, Agustin; exhibit S-11A.

It is not disputed that developing social skills is quite important for Student and that in order for these skills to develop, Student should spend more time with others. For example, Amherst’s January/February 2010 psychological assessment report made recommendations that included the following: “Support [Student’s] relative strength in socialization skills by increasing his activity in community as well as by training him to participate at his ability level in community”. Exhibits P-22, S-6A.

Ms. Tanguay testified that for students with autism, opportunities for socialization are particularly important since instruction is often not received within a group. She testified that it would be useful to increase Student’s opportunities for social interactions since he would likely benefit in terms of his development of social skills. Thus, Ms. Tanguay made clear that Student’s current opportunities for interaction with other students (referenced above) are too limited.

Ms. Chase, a former Special Education Department Chairperson at the Amherst-Pelham Reg. High School, also provided testimony on the issue of Student’s social skills progress and why it has been so limited, as well as on other issues discussed below.[[38]](#footnote-38) Amherst sought to attack her credibility by establishing that her employment contract had not been renewed because her work was unsatisfactory.[[39]](#footnote-39) These circumstances raise the possibility that Ms. Chase was testifying from the perspective of someone who was antagonistic to Amherst, and therefore not objective or credible. However, Amherst did not go further than establishing the potential for her testimony to be biased—that is, Amherst never established that her testimony was actually flawed other than her apparent misremembering of who was Student’s BCBA.[[40]](#footnote-40)

With respect to each substantive area of Ms. Chase’s testimony, Amherst had the opportunity to provide rebuttal evidence through the testimony of their own witnesses, but Amherst did not do so. This left the substance of Ms. Chase’s testimony as unrebutted. For example, as discussed later in this Decision, Ms. Chase testified that during IEP pre-meetings that she attended, Ms. White had instructed Amherst staff regarding what they should not say during the upcoming IEP Team meeting chaired by Ms. Chase; and when Ms. White testified, she testified that pre-meetings had occurred but did not testify as to what she said or did not say during the pre-meetings. For these reasons, I find Ms. Chase’s testimony to be unrebutted, to be credible and to have probative value.

Ms. Chase’s testimony is consistent with other evidence that Student has not been receiving sufficient opportunities for development and practice of his social skills. Ms. Chase testified that she was concerned that Student was spending so much time isolated with one or more teachers in a classroom. She explained: “He was enclosed in that room for far more time than he should have been. Teacher Keith Arnett expressed his concern about that to me several times. … I would say that he was being socially cut off from his peers and was not receiving the amount of social skills and pragmatic skills practice that he really should have been receiving.” Transcript, vol. one, page 292, line 24 to page 293, line 24.

Parents’ expert, Ms. Doyle, testified that it is quite important to help Student progress socially and emotionally by providing opportunities to interact with peers who have similar disabilities and who are working on similar tasks. She testified that it is not an appropriate educational program for Student to be taught by himself throughout the school day. She explained that he should be in a classroom with other students for part of the day so that he has other students to interact with while he is learning in the classroom; and at the same time, Ms. Doyle explained that Student needs to be in a quiet environment for his ABA instruction.

Ms. Doyle’s report similarly provided that Student should “have more socialization opportunities during the school day. Spending his full school day in a separate room does not allow for interactions with others.” Student “should have opportunities for facilitated interaction with other students—both within the school building and within his classroom setting (and in the community). It is recommended that [Student] be given time in the larger communal classroom rather than only in the smaller work room.” Exhibits P-11, S-24.

The only evidence of gains in social skills pertains to Student’s having learned to greet people with a smile or sound vocalization and with raising his hand and waving “with tactile/hand over hand cuing”. Exhibit S-4 (progress report as of January 2012). This presumably reflects the fact that staff accompanying Student seek to engage others whom Student encounters when he is outside of his classroom. There is no evidence that Student has been taught or that he has learned any additional social or pragmatic skills.

Daily living skills have also been a focus of Amherst’s educational program for Student. In this area of instruction, Amherst staff have noted that Student has made progress. However, as will be explained below, the amount of progress is limited, particularly in the context of the length of time during which Amherst has been working on these skill areas.

For example, staff have been working on developing Student’s self-feeding skills, which is an important skill area for Student. The May 2007 BSEA decision recognized the importance of training in this area: “Turning to the skills-based program recommended by Ms. O’Donovan and Ms. McIntire for Student, the focus must be on … feeding skills, …..” Exhibit S-2, page 46. The Hearing Officer’s Order stated that “Amherst shall incorporate ABA services and consultation into Student’s IEP. … ABA services shall focus on daily living skills issues including … feeding, …. Exhibit S-2, page 55, par. 3.

Self-feeding has been included within Student’s functional life skills goal on his IEP at least since the 2009-2010 school year. The June 2010 progress reports indicated Student made progress by feeding himself using adaptive equipment and only needing “moderate assistance to stabilize his wrist position” when eating foods that may slip off his spoon. Exhibit S-3.

An observation of Student on February 14, 2011 regarding his eating lunch in the cafeteria indicated that Student “demonstrates improved skills when feeding himself in a quiet, non-distracting environment with one or two people.” For example, on two occasions, he was able to scoop the food and bring it to his mouth independently. “Overall, … he required moderate to maximum assistance for eating.” Exhibit S-5.

Student’s most recently-proposed IEP indicates that his skill level is similar to what has been described above, with Student able to feed himself using adaptive equipment, with minimal assistance with most foods and independently with foods such as oatmeal and mashed potatoes. Amherst staff testified that Student continues to require 1:1 assistance at all times while eating, with staff prompting and often guiding him using hand-over-hand assistance. Amherst staff reported that more recently, Student has made progress in feeding in that earlier in the school year, he required hand-over-hand guidance and assistance with certain feeding tasks, and now it is sufficient for staff to support his elbows. Testimony of Tanguay, Agustin; exhibit S-11A.

In sum, using adaptive equipment, Student had learned to eat some foods with minimal assistance as of February 2011; and staff support has been reduced to guiding his elbows when he eats as of the date of the hearing in the instant dispute. He continues to require moderate to maximum assistance for eating, including 1:1 assistance at all times.

A regular part of Student’s daily schedule is using the laundry at the High School, and each day he may take as many as three or four trips to the laundry to wash and dry clothes. Student has made slow progress in this area. Testimony Tanguay; exhibit P-1.

Amherst staff testified that Student’s progress in laundry skills is reflected in staff’s being able to fade their prompts, thereby giving Student more independence. Student is not able to fold laundry, nor has he learned to independently wash or dry clothes. However, if a staff person hands him a wet wash cloth and ask him to put it into the dryer and if staff guide his hands with your hands, he can put the wash cloth into the dryer. He can shut the laundry room door himself. Student has learned to reach for the dials on the dryer and he has learned to open the dryer door after staff leave the dryer door ajar. He independently reaches for the dryer dials and, at times, he is independent in opening the dryer door after it is left ajar. He also appears to have made progress in learning how to use a cart, which Student pushes when he walks. Testimony of Tanguay, Agustin, Mackey; exhibit P-1.

The above discussion regarding Student’s progress in his toileting skills, communication skills, social skills and daily living skills reveals that these skills have improved only in certain, limited areas (such as self-feeding, laundry skills and making a sound vocalization to greet someone). The undisputed evidence further reveals (also as discussed above) that even in those areas where Student has progressed, his progress has been extremely limited.

Review of Amherst’s written progress reports (summarized in the Factual Background section above) similarly reflects no progress in some areas and extremely limited progress in others. Exhibits S-3, S-4.

Another indicator of the extremely limited scope of Student’s progress was the testimony of Ms. Mackey who is employed by Amherst (through NEBA) to provide Student with extended day services. Ms. Mackey is the only staff person who testified with first-hand knowledge of Student’s progress at school and who has had the opportunity to work with and observe Student over a period of several years. Ms. Mackey worked with Student during the 2009-2010 school year and then again during the 2011-2012 school year. She and two other NEBA staff (whom she supervised) provide 1:1 instruction and assistance to Student during the extended day portion of Student’s school day—from 2:30 to 5:15 PM. Ms. Mackey worked with Student one afternoon per week every other week and two afternoons per week every other week. I found Ms. Mackey to be an experienced special educator who testified objectively and candidly.

Ms. Mackey testified that when she is with Student, she works on the same skills that his teacher and aide address during the school day, except that she does not address self-feeding skills. She testified that since the fall of 2009,[[41]](#footnote-41) Student’s progress has consisted of getting significantly better at stopping and listening, being easier to re-direct, and being more engaged (for example, enjoying doing the laundry this school year). She testified that Student has made no other progress that she could remember.[[42]](#footnote-42) This testimony, which I fully credit, demonstrates Student’s markedly limited progress over a period of more than two school years.

It is perhaps most concerning that the areas of greatest priority in Student’s educational development (communication and toileting skills) have shown negligible or no progress even though Amherst has sought to address these areas for many years. Testimony of Mother; exhibit S-2.

An analysis of the reasons for Student’s lack of progress begins with the question of whether Amherst has provided special education services on a consistent basis. It is not disputed that consistency is an essential ingredient to Student’s making progress. This was recognized in a May 22, 2009 evaluation report by Amherst’s BCBA (Ms. Elizabeth Smith): “the success [at school] can be attributed to consistent approaches and delivery of service.” Exhibit S-4A, page 1.

Amherst’s current BCBA (Ms. Tanguay) testified that there are a number of factors which account for Student’s limited progress regarding the various skills that he is being taught, but she indicated that the central problem has been lack of consistency. Similarly, Parents’ expert (Ms. Doyle) testified: “Given his level of disability and his previously documented inability to generalize, he requires consistency of programming throughout his day in order to maintain skills that he already has and to progress further.” Transcript, vol. one, page 120, lines 5-9. She further explained: “educationally, anyone with the types of disabilities that [Student] has, consistency is a primary requirement for progress.” Transcript, vol. one, page 123, lines 9-12.

In her testimony, Ms. Tanguay provided additional information regarding the reasons that Student’s services have not been delivered consistently. She testified that with respect to each area of skill being addressed by Amherst, Student’s progress has been hampered by the fact that there are so many paraprofessionals teaching him throughout each week—there are four Amherst paraprofessionals during the school day and three NEBA staff during afterschool hours. She explained that seven is too many people for Student to receive consistent instruction; she hopes to reduce the number to two Amherst paraprofessionals and one NEBA staff. She further explained that having seven staff working with Student contributes to communication breakdowns and “treatment drift”—that is, not providing treatment consistently in accordance with Student’s treatment plan. Ms. White testified that at all times relevant to this dispute, Amherst has provided direct services to Student during the school day through four instructional staff. In its written closing argument, Amherst made clear that it was prepared to seek to address this shortcoming in the future.

Ms. Tanguay also testified that in some areas, such as toileting, the lack of consistency between school and home has likely contributed to the lack of progress. Ms. Tanguay has communicated with Mother with an offer of coming into the home to assess the need and make a recommendation regarding services, but Mother has declined the offer. On the basis of what she believes to be a long history of Amherst’s failure to provide appropriate services and its failure to work cooperatively with Parents, Mother apparently has given up any hope of working constructively with Amherst staff and has therefore come to the conclusion that it would not be helpful to Student to allow Amherst staff to provide home-based services. Testimony of Mother, Tanguay. [[43]](#footnote-43)

It is not disputed that there has been high turnover of Amherst staff working with Student over the past several years. As explained in the Factual Background section above, over the past several school years, Student’s special education teacher typically changed each school year. Student’s BCBA has also changed from Ms. Condon to Ms. Tanguay.

Parents’ expert (Ms. Doyle) testified that the turnover of Amherst staff during the past several years has required that Student’s program be “re-started” a number of times, thereby limiting Amherst’s ability to provide consistent programming to Student. For example, during Ms. Doyle’s observation, Ms. Tanguay told her that Ms. Tanguay was still developing Student’s program with his paraprofessional. It was made clear by Ms. Tanguay that she is not developing an entirely new program, but rather, as with any BCBA who begins to work with Student, she is adapting and developing what she believes to be helpful and appropriate for Student. Testimony of Doyle.

Ms. Lewin, who has fourteen years experience in the family support department of the United ARC, testified that she has attended IEP Team meetings since Student was in middle school and has reviewed all documents considered by the IEP Team. She explained that Student requires a high level of consistency in order to learn; yet, there has been a great deal of inconsistency of Amherst staff—both the autism staff and the auxiliary staff working with Student have changed frequently.

Ms. Chase testified that there was not only a high rate of staff turnover that contributed to inconsistent delivery of service. She explained that there was also a high rate of staff absenteeism during the period from October 2009 to June 2011 and that this had a “high level of impact” on Student’s “ability to make progress in the program”.[[44]](#footnote-44) Ms. Chase agreed that Student should be entitled to compensatory education because of the “high level of turnover, absenteeism, and non-implementation of service delivery”. She testified that, as a result, “we – the district failed to meet his intensive needs in a consistent and comprehensive way” from October 2009 to June 2011. Transcript, vol. one, page 288, lines 6-15.

Ms. Chase pointed to an additional, related reason that Student’s services were not consistent, thereby limiting his progress. She testified that during the time period she was at Amherst, Student “never” received “the intensive ABA services that he needed”. She explained the reasons for this, based upon the report to her from Student’s special education teacher at the time (Mr. Keith Arnett): “Well, according to the teacher who was in the classroom at the time, when he came to meet with me as department head and shared caseload information, even though BCBA services were on that IEP service delivery, they rarely happened in the way that they were supposed to. Either the BCBA was involved in other team meetings or other students or she was involved in writing reports or conducting FDAs. So the time that was assigned to [Student] did not happen consistently, if ever.” Transcript, vol. one, page 297, line 24 to page 300, line 1.

Student’s educational development has also likely been hurt by the stressful relationship that has developed between Parents and Amherst over a number of years. Numerous witnesses who have attended IEP Team meetings testified as to the miscommunication and inability to work together. Doreen Boyer, who is the Transition Services Coordinator for the Department of Developmental Services, attended several IEP Team meetings for Student. She was able to testify as a relatively neutral observer who had no affiliation with either party. She noted that effective communication and collaboration between Parents and Amherst are important for purposes of providing Student with the consistent educational services that he needs. Yet, she testified that the communication between Parents and Amherst was so difficult that it would be unlikely that there could be effective consistency between home and school.

There is no doubt that Student has severe cognitive and educational deficits which preclude him from learning many skills. However, Ms. Doyle’s credible testimony and written report speak to Student’s potential to make gains notwithstanding his severe disabilities. Ms. Doyle testified, for example, that someone with Student’s kind of disabilities and who is provided consistent programming, would “certainly, be[] able to indicate choices among a field of two or three or to indicate yes/no response to certain questions”—that is, “[b]eing able to make choices, to indicate desires.” Transcript, vol. one, page 125, lines 13-15, 23-24. She added: “I think he should be able to follow a visual schedule if that's made available. I would like to think that he could be successfully toilet trained, or at least get to the trip training situation where he's dry in between, even if he doesn't ever initiate his toileting. And I think, given adaptive equipment and adaptive technology and hand over hand assistance by staff, he could complete other tasks during a school day.” Transcript, page 128, line 20 to page 129, line 6.

No other witness addressed the question of Student’s educational potential, and Amherst provided no evidence that would rebut Ms. Doyle’s testimony on this topic. I also note that various educational reports either expressly indicated or implied that Student would make progress in these areas if given the appropriate educational program.[[45]](#footnote-45)

I find on the basis of Ms. Doyle’s unrebutted testimony and report that Student has the educational potential to make substantially greater progress in those areas that have been addressed by his educational services over the past several years, including toileting and communication in particular.

For the above-described reasons, I find that from February 28, 2010 through the date of the evidentiary hearing, Amherst has not proposed and implemented IEPs in a manner reasonably calculated to allow Student to make meaningful educational progress (particularly in the areas of toileting and communication, which are most important to his educational development) commensurate with his learning potential.

In addition, Parents have alleged a procedural violation regarding their right to participate and make decisions as part of Student’s IEP Team. More specifically, Parents allege that certain decisions regarding Student’s services were unlawfully predetermined, with the result that Student was denied FAPE.

The IDEA requires that a parent have an opportunity to “participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child.”[[46]](#footnote-46) This requirement places limitations on, but does not prohibit, the school district from discussing the student and how his or her needs may be met without the parent present. Rather, the “purpose of this provision is to prevent school officials from making decisions without considering the parents’ views.”[[47]](#footnote-47) School officials must come to an IEP meeting with “an open mind” but may have given thought to the services and placement to be offered [[48]](#footnote-48) or prepared a document (such as a draft IEP) that reflects those thoughts.[[49]](#footnote-49)

An example of unlawful predetermination is where “the School System had an unofficial policy of refusing to provide one-on-one ABA programs and that School System personnel thus did not have open minds and were not willing to consider the provision of such a program” with the “clear implication … that no matter how strong the evidence presented by the Deals, the School System still would have refused to provide the services.”[[50]](#footnote-50)

Ms. Chase testified that while she was employed by Amherst as Special Education Department Chairperson for the Amherst-Pelham Regional High School from October 2009 to June 2011, she chaired several IEP Team meetings for Student. She testified that with respect to those Team meetings, there were pre-meetings during which Ms. White instructed Amherst staff that some things were allowed to be said and some things were not allowed to be said during the upcoming Team meeting with Parents. Ms. Chase testified that one area, in particular, that was discussed during these Team meetings was whether Amherst would offer direct services from a behaviorist or only consultation services from a behaviorist. Ms. Chase testified that some staff believed that Student needed direct services from a behaviorist but that Ms. White told them during pre-meetings not to agree to this during the Team meetings.[[51]](#footnote-51) Ms. Chase testified that these pre-meetings “played a part” in Student’s receiving “inappropriate services” because “staff were afraid to suggest, recommend -- or make recommendations without getting prior administrative approval.” Transcript, vol. one, page 291, lines 5-12.

In her testimony, Ms. White referenced pre-meetings but was not asked to address what was said or not said during the pre-meetings.

The evidentiary record does not allow for a complete understanding of when Ms. Chase chaired Team meetings for Student. However, what is known from the record is that Ms. Chase attended (and presumably chaired) an IEP Team meeting for Student on September 22, 2010. The result of this IEP Team meeting was a proposed IEP that did not include any direct services from a behaviorist and, as a result, likely denied Student appropriate special education services. Relatively soon after this meeting, on November 29, 2010, Ms. Chase attended (and presumably chaired) another Team meeting for Student. The result of this IEP Team meeting was a proposed IEP that included two hours per week of direct services from a behaviorist. The inclusion of direct services from a behaviorist indicates that there was no predetermination with respect to this IEP Team meeting.[[52]](#footnote-52) Student’s subsequent IEPs (through the most recently-proposed IEP) have included these direct services.

On the basis of this evidence, I find that Amherst unlawfully predetermined Student’s services by foreclosing any direct services from a behavior therapist regardless of what might be said at the Team meeting, but that the practical effect of the predetermination was to deny Student these services only for a period of several months—that is, until the next Team meeting determined that direct services from a behavior therapist should be provided, plus the time needed to implement these services.[[53]](#footnote-53)

I now turn to the question of what relief should be ordered.

Continuation of Student’s current educational program will likely further deny Student FAPE. However, correcting the deficiencies is not so simple as ordering additional special education or related services. I found Ms. Tanguay persuasive when she testified that the BCBA services called for in Student’s current IEP are likely sufficient. There is no evidence that other special education or related services need to be substantially changed. Rather, as discussed above, the causes of Student’s limited progress have more to do with too many staff providing the services both during the school day and during the extended day program, high turnover of key instructional staff, a lack of consistency of instruction as a result, failure to consistently provide all of the services on the IEP, strained relationships between school and home, and delivery of Student’s educational services in an isolated room with the result that Student has had very limited opportunity to learn from and with his peers.

When asked whether Student could progress commensurate with his learning potential if there were an appropriate and consistent program for Student that was properly implanted within the High School and home, Ms. Doyle pointed out two things. First, she noted that Amherst has had considerable amount of time to implement such a program and has not been able to do it. Second, she pointed out that from her experience of working within public school programs for twenty-five years, she has found that the kind of program that Student has been attending at Amherst inevitably has a certain amount of inconsistency that is inherent to its structure and that is not present within a residential school.

I agree with Ms. Doyle that this dispute needs to be understood within the context of Student’s entire educational career within the Amherst Public Schools, beginning when he was three years old. Student is now 20 years old. Amherst has had a very long time to understand and address appropriately Student’s most fundamental educational needs, and no skills are more fundamental than toileting, communication, social skills and basic daily living skills such as self-feeding. To its credit, Amherst has sought to address these deficit areas with extensive and comprehensive IEPs, with services provided by intelligent and committed staff, such as Ms. Tanguay and Ms. Agustin, and with the contracted assistance of NEBA to extend Student’s school day.

Student has only a relatively small amount of time left before he turns 22 years old (in December 2013), thereby ending Amherst’s responsibility to provide him prospective special education services. Not only is there limited time for appropriate special education services to be provided but, importantly, there is little time for Amherst to try to structure its services by finding a way to utilize fewer staff to provide direct services, reduce its high turnover rate, restructure Student’s program so he can learn from and with other students, work more effectively with Parents, and provide more consistent implementation of services on the IEP.

For these reasons, I find that it is time to consider a different approach.

The only placement for which there is any evidentiary support for purposes of likely providing Student with more consistent services is a residential educational placement. As discussed above, it is not disputed that for Student, consistency is critical to his educational success, and the lack of consistency of instruction in the past has likely been the most significant cause of his limited progress. Also as noted above, Ms. Doyle recommended a residential placement precisely for the reason that it would likely be the only placement that would provide Student with the consistency that he requires to make progress commensurate with his educational potential. [[54]](#footnote-54)

In addition, Ms. Lewin, who has fourteen years experience in the family support department of the United ARC, testified that a residential educational program would likely benefit Student by providing him with the intensive and consistent instruction that he needs to make educational progress.

Similarly, Ms. Chase testified that Student “would derive a greater level of meaningful benefit from a [residential educational] program because the services would be consistent with his intensive needs. … [I]t wouldn't be a partial, inconsistent program.” Transcript, vol. one, page 285, lines 1-9.

As these witnesses testified, a residential placement has the advantage of having a built-in structure of consistency of instruction not only throughout the day, but also during evenings and weekends. Such a placement can also likely provide Student with needed opportunities to learn social and pragmatic skills by placing him with his learning peers, thereby avoiding the isolated learning that has occurred for many years within the Amherst Public Schools. A residential placement will also likely provide Student with a greater variety of learning experiences and opportunities such as community trips and social events on the weekends. Testimony of Doyle, Chase, Lewin.

I conclude that only through residential services will Student have any meaningful opportunity to “to prepare … for independent living and a reasonable measure of self-sufficiency where possible.”[[55]](#footnote-55) I further find that in order for Student to receive FAPE in the least restrictive environment, he requires prospective placement at a residential school.

Amherst’s most recently-proposed IEP covers the period 3/15/12 to 3/14/13. Exhibit S-11A. Amherst must place Student at a residential school and amend the IEP to reflect this placement.

I further find that in order to make Student whole for Amherst’s failure to provide appropriate services since February 28, 2010, Amherst must continue to provide residential educational services beyond the life of the current IEP. Amherst shall continue to provide residential services to Student until he reaches his 22nd birthday, at which point it is anticipated that he will be the responsibility of the Massachusetts Department of Developmental Services (DDS).[[56]](#footnote-56)

In addition for purposes of making Student whole, Amherst must offer a residential school that is year-round—that is, unless Parents agree otherwise, Student’s residential school must provide a continuation of services through the school year and summer months in order that Student’s educational services (from now until he turns 22 years old) provide him with as much consistency as possible and therefore as much opportunity as possible to make educational gains.[[57]](#footnote-57)

**ORDER**

Amherst’s most recently-proposed IEP is not reasonably calculated to provide Student with a free appropriate public education (FAPE) in the least restrictive environment.

Additions or other modifications cannot be made to the IEP in order to satisfy this standard.

Student can be provided with FAPE only through placement in a residential education placement. Accordingly, Amherst shall immediately place Student in an appropriate residential educational placement and shall immediately amend Student’s IEP to reflect this placement.[[58]](#footnote-58)

Amherst violated Student’s right to FAPE since February 28, 2010, and compensatory services are due. Compensation shall consist of continuing the above-referenced residential educational placement until Student’s 22nd birthday and, unless Parents otherwise agree, providing a residential educational placement that is year-round.

Amherst shall immediately seek consent from Parents to conduct an augmentative communication evaluation and an assistive technology evaluation of Student. Amherst shall arrange for the evaluations to occur as soon as possible after receipt of written consent from one or both Parents.[[59]](#footnote-59)

By the Hearing Officer,

William Crane

Dated: May 17, 2012

# **COMMONWEALTH OF MASSACHUSETTS**

**Division of Administrative Law Appeals**

# **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. On April 10, 2012, Mother (for purposes of her rebuttal testimony) and Ms. Mackey testified in a conference room in Amherst, with the parties and a court reporter. By agreement of the parties, the Hearing Officer heard this testimony by teleconferencing. Also, Ms. Chase’s testimony (on April 3, 2012) and her rebuttal testimony (on April 10, 2012) were by telephone. [↑](#footnote-ref-1)
2. 20 USC 1400 *et seq*. [↑](#footnote-ref-2)
3. MGL c. 71B. [↑](#footnote-ref-3)
4. 20 USC § 1400(d)(1)(A). *See also* 20 USC 1412(a)(1)(A); *Mr. I. ex rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1, 12 (1st Cir. 2007) (referencing “broad purpose behind the IDEA: ‘to ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living’” citing to 20 USC § 1400(d)(1)(A)). [↑](#footnote-ref-4)
5. *D.B. ex rel. Elizabeth B. v. Esposito*, 2012 WL 975564, \*6 (1st Cir. 2012). [↑](#footnote-ref-5)
6. 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-6)
7. See 20 USC 1400(d)(1)(A) (IDEA enacted "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living"); 20 USC 1401(9), (29) (“free appropriate public education” encompasses “special education and related services,” including “specially designed instruction, at no cost to Parents, to meet the unique needs of a child with a disability”); *Honig*, 484 U.S. at 311 (FAPE must be tailored “to each child's unique needs”)*.* [↑](#footnote-ref-7)
8. 20 USC 1401(9)(D). [↑](#footnote-ref-8)
9. *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley,* 458 U.S. 176, 207 (1982). See also *Lessard v. Wilton Lyndeborough Cooperative School Dist.,* 518 F.3d 18, 23 (1st Cir. 2008) (“IEP must be individually designed to provide educational benefit to [a particular] handicapped child.”) (internal quotations and citations omitted). [↑](#footnote-ref-9)
10. *Lessard*, 518 F.3d at 23 (citations omitted). See also *Rowley,* 458 U.S. at 197, n.21 (“Whatever Congress meant by an “appropriate” education, it is clear that it did not mean a potential-maximizing education.”). [↑](#footnote-ref-10)
11. [*Lenn v. Portland Sch. Comm.,* 998 F.2d 1083, 1086 (1st Cir. 1993)](http://web2.westlaw.com/find/default.wl?tf=-1&serialnum=1993141335&rs=WLW9.05&referencepositiontype=S&ifm=NotSet&fn=_top&sv=Full&referenceposition=1086&pbc=B1A74D31&tc=-1&ordoc=2011844076&findtype=Y&db=350&vr=2.0&rp=%2ffind%2fdefault.wl&mt=122). [↑](#footnote-ref-11)
12. *D.B. v. Esposito*, 2012 WL 975564 (1st Cir. 2012) (internal quotations and citations omitted) (emphasis supplied). The First Circuit and Massachusetts federal district courts have also sometimes articulated a meaningful benefit standard in terms of effective results and demonstrable improvement. See, e.g., *North Reading School Committee v. Bureau of Special Education Appeals,* 480 F.Supp.2d 479, 489 (D.Mass. 2007) (educational program “must be reasonably calculated to provide effective results and demonstrable improvement in the various educational and personal skills identified as special needs”), quoting[*Lenn v. Portland Sch. Comm.,* 998 F.2d 1083, 1090 (1st Cir. 1993)](http://web2.westlaw.com/find/default.wl?tf=-1&serialnum=1993141335&rs=WLW9.05&referencepositiontype=S&ifm=NotSet&fn=_top&sv=Full&referenceposition=1086&pbc=B1A74D31&tc=-1&ordoc=2011844076&findtype=Y&db=350&vr=2.0&rp=%2ffind%2fdefault.wl&mt=122) and [*Town of Burlington v. Dep't of Educ.,* 736 F.2d 773, 788 (1st Cir. 1984)](http://web2.westlaw.com/find/default.wl?tf=-1&serialnum=1984126363&rs=WLW9.05&referencepositiontype=S&ifm=NotSet&fn=_top&sv=Full&referenceposition=788&pbc=B1A74D31&tc=-1&ordoc=2011844076&findtype=Y&db=350&vr=2.0&rp=%2ffind%2fdefault.wl&mt=122), *aff'd* [471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)](http://web2.westlaw.com/find/default.wl?tf=-1&serialnum=1985121789&rs=WLW9.05&ifm=NotSet&fn=_top&sv=Full&tc=-1&pbc=B1A74D31&ordoc=2011844076&findtype=Y&db=708&vr=2.0&rp=%2ffind%2fdefault.wl&mt=122). [↑](#footnote-ref-12)
13. See *Cedar Rapids Community School Dist. v. Garret F. ex rel. Charlene F*., 526 U.S. 66, 79 (1999) (IDEA dispute “is about whether meaningful access to the public schools will be assured”); *Irving Independent School District v. Tatro*, 468 U.S. 883, 891 (1984) (“Congress sought primarily to make public education available to handicapped children and to make such access meaningful”) (internal quotations omitted); *Rowley,* 458 U.S. at 192 ("in seeking to provide ... access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful"). [↑](#footnote-ref-13)
14. *Lessard,* 518 F.3d at 29. [↑](#footnote-ref-14)
15. See *D.B. v. Esposito*, 2012 WL 975564 (1st Cir. 2012). [↑](#footnote-ref-15)
16. 20 USC 1401(9)(b); *Winkelman v. Parma City School Dist.*, 550 U.S. 516, 524(2007) (“education must … meet the standards of the State educational agency”). [↑](#footnote-ref-16)
17. See *Winkelman v. Parma City School Dist.*, 550 U.S. 516, 524(2007) (“education must … meet the standards of the State educational agency”); *Mr. I. v. Maine School Administrative District No. 55,* 480 F.3d 1, 11 (1st Cir. 2007) (state may “calibrate its own educational standards, provided it does not set them below the minimum level prescribed by the [IDEA]”). [↑](#footnote-ref-17)
18. See MGL c. 71B, s. 1 (term “special education” defined to mean “educational programs and assignments including, special classes and programs or services designed to develop the educational potential of children with disabilities.”); MGL c. 69, s. 1 (“paramount goal of the commonwealth to provide a public education system of sufficient quality to extend to all children the opportunity to reach their full potential”); 603 CMR 28.01(3) (IEP Team must “include specially designed instruction or related services in the IEP designed to enable the student to progress effectively in the content areas of the general curriculum”). See also IEP form mandated for all Massachusetts school districts by the Massachusetts Department of Elementary and Secondary Education, at pages 2 of 8 and 3 of 8, which may be found at <http://www.doe.mass.edu/sped/iep/forms/word/IEP1-8.doc> [↑](#footnote-ref-18)
19. Technical Assistance Advisory SPED 2007-1, which may be found at: <http://www.doe.mass.edu/sped/advisories/07_1ta.html> [↑](#footnote-ref-19)
20. Id. [↑](#footnote-ref-20)
21. Id. [↑](#footnote-ref-21)
22. See 34 CFR §300.43(b). [↑](#footnote-ref-22)
23. 20 U.S.C. § 1401(34)(C). See also 24 C.F.R. § 300.43. [↑](#footnote-ref-23)
24. 20 U.S.C. § 1401(34)(A). See also 24 C.F.R. § 300.43. Similarly, the U.S. D.O.E. has stated: “The purpose of [the transition services requirement] is to focus attention on how the child's educational program can be planned to help the child make a successful transition to his or her goals for life after secondary school.” 64 Fed. Reg. 12474-12475 (March 12, 1999), quoting H. Rep. No. 105-95, pp. 101-102 (1997); S. Rep. No. 105-17, p. 22 (1997). [↑](#footnote-ref-24)
25. *See, e.g., Rowley,* 458 U.S. at 202, 102 S.Ct. 3034; *Roland v. Concord School Committee*, 910 F.2d 983, 987 (1st Cir. 1990); MGL c. 71B, s.1. [↑](#footnote-ref-25)
26. 20 U.S.C. § 1412(a)(5)(A); MGL c. 71B, s. 1. See also 20 US § 1400(d)(1)(A); 20 USC § 1412(a)(1)(A); 34 CFR 300.114(a)(2(i); 603 CMR 28.06(2)(c). [↑](#footnote-ref-26)
27. *C.G. ex rel. A.S. v. Five Town Community School Dist*., 513 F.3d 279, 285 (1st Cir. 2008). See also *Honig v. Doe,* 484 U.S. 305, 321, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). [↑](#footnote-ref-27)
28. *Walczak v. Florida Union Free School Dist*., 142 F.3d 119 (2nd Cir. 1998). [↑](#footnote-ref-28)
29. *Gonzalez v. Puerto Rico Department of Education*, 254 F.3d 350 (1st Cir. 2001); *Abrahamson v. Hershman*, 701 F.2d 223, 228 (1st Cir. 1983). [↑](#footnote-ref-29)
30. *C.G. ex rel. A.S. v. Five Town Community School Dist*., 513 F.3d 279, 290 (1st Cir. 2008). [↑](#footnote-ref-30)
31. *Reid v. District of Columbia,* 401 F.3d 516, 527 (D.C. Cir. 2005). See also *Draper v. Atlanta Independent School System*, 518 F.3d 1275, 1289-1290 (11th Cir. 2008) (“record supports the conclusion of the district court that Draper's award is reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place,” citing to *Reid*); *Board of Educ. of Fayette County, Ky. v. L.M*.**,** 478 F.3d 307, 316 (6th Cir. 2007) (“We agree with the district court and the Appeals Board that a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address T.D.'s educational problems successfully,” citing to *Reid*).  [↑](#footnote-ref-31)
32. 20 USCS § 1415(f)(3). This statute of limitations was included, for the first time, within the IDEA as part of the 2004 amendments that became effective on July 1, 2005. [↑](#footnote-ref-32)
33. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005) (burden of persuasion in an administrative hearing challenging an IEP is placed upon the party seeking relief; a party who has the burden of persuasion “loses if the evidence is closely balanced”); *D.B. v. Esposito*, 2012 WL 975564 (1st Cir. 2012) (“burden of persuasion … lies with the party challenging the IEP”). However, a school system does not incur the burden of proof “merely by preemptively seeking an administrative determination that a proposed IEP would not comply with the IDEA.”  See *D.B. v. Esposito*, 2012 WL 975564, footnote 3 (1st Cir. 2012).  [↑](#footnote-ref-33)
34. Ms. Tanguay, who is a BCBA, testified that she has worked as an autism consultant to Amherst since November 15, 2011. She replaced Student’s previous autism specialist who had recently died from an automobile accident. She has responsibility to create, implement and supervise Student’s ABA services. As a general rule, the ABA services are provided by paraprofessionals under Ms. Tanguay’s supervision, but Ms. Tanguay also provides direct ABA services to Student for an hour, twice per week, with Student’s paraprofessional present so that the paraprofessional can observe and learn how to provide these services. Testimony of Tanguay. [↑](#footnote-ref-34)
35. Ms. Doyle has experience as a special education teacher and has worked both in a general education high school setting and in a residential school for special needs students. She is not a BCBA but has been trained in ABA methodology. She has conducted program evaluations for approximately fifteen years, mostly for parents but also, occasionally, for school districts. [↑](#footnote-ref-35)
36. Department of Elementary and Secondary Education issued Technical Assistance Advisory SPED 2007-1: Autism Spectrum Disorder (August 25, 2006), discussed above in the Legal Standards section of the instant Decision. [↑](#footnote-ref-36)
37. For example, the May 2007 BSEA decision noted that Student’s IEP for the period from April 9, 2002 to June 30, 2002 included direct services in the classroom for 45 minutes, three times per week to develop Student’s communication skills. Exhibit S-2, page 11. [↑](#footnote-ref-37)
38. Ms. Chase was employed by Amherst as the Special Education Department Chairperson at the Amherst-Pelham Reg. High School from October 2009 to June 2011. During part of this time (from October 2009 until January 2010), she was also an IEP Team Chairperson and chaired two Team meetings for Student. She also chaired one or more, subsequent Team meeting involving Student when other personnel were not available between January 2011 and June 2011. In her role as Special Education Department Chairperson at the High School, she supervised Student’s special education staff. Previously (since the fall of 2000), she was a special education teacher. Testimony of Chase. [↑](#footnote-ref-38)
39. Ms. Chase was supervised by Diane Chamberlain (Vice Principal of the High School) who had supervisory oversight of special education and all other programming at the High School. Ms. Chamberlain testified that Ms. Chase was told in June 2011 that her employment with Amherst would not be renewed. Ms. Chamberlain testified that this decision was made because of continuing concerns regarding Ms. Chase’s not adequately managing her workload and not meeting mandated timeframes. Testimony of Chamberlain. [↑](#footnote-ref-39)
40. Amherst sought to discredit Ms. Chase by demonstrating that she did not remember correctly who was Student’s BCBA at the time that she worked for Amherst. I agree that her memory was faulty on this particular detail, but this does not serve to discredit Ms. Chase’s testimony on other issues. [↑](#footnote-ref-40)
41. Although Ms. Mackey was not entirely clear when she worked with Student, the record indicates that she first worked with Student during the 2009-2010 school year and currently works with him during 2011-2012 school year. Testimony of White. [↑](#footnote-ref-41)
42. The testimony from Ms. Mackey was as follows:

Q (FROM MOTHER): What kind of progress, would you say, since working with [Student] has made?

A (FROM MS. MACKEY). I think he's gotten a lot better at -- at stopping and listening. He's easier to redirect; I think he's gotten easier to redirect. He seems to -- I don't know. He seems to enjoy doing his laundry. He likes to help, try to help. He always seems happy when he feels he's helping or he's doing something.

Q. And what are the challenges?

MR. CRANE: Let me just finish that -- follow up on that. Is that an actual area of improvement? Or is that what he's always done, in terms of enjoying the laundry and likes to try to help?

THE WITNESS: He seems more engaged, to me, this past year than in the past.

MR. CRANE: Okay. And so when you talk about progress, are you comparing now as compared to when you first started working with him, which was a couple of years ago?

THE WITNESS: Yes.

MR. CRANE: Okay. Any other progress that's worth -- that can be noted?

THE WITNESS: I can't think of anything at this -- Not right now. I can't think of anything.

Transcript, vol. three, page 37 line 21 to page 39, line 1. [↑](#footnote-ref-42)
43. Ms. Tanguay testified as to additional reasons for Student’s limited progress. She explained that the dryer broke, thereby interrupting his laundry routine. She also would like to videotape Student but has not received consent from Parents. [↑](#footnote-ref-43)
44. Ms. Chase testified that staff absenteeism “affected transportation. He didn't always get his speech services. OT and PT people had to be at other team meetings. The vocational planning, it was explained to me, as department head, when I talked with the teacher who was overseeing his programming at the time, that oftentimes the vocational planning, there weren't jobs for the students to do when they arrived at their transitional placement.” Transcript, vol. one, page 286, line 18 to page 287, line 12. [↑](#footnote-ref-44)
45. See exhibit P-23 (Dr. Pawlikowski: “[Student] needs to develop self help skills in the toileting, dressing, self feeding, and basic communication areas, and can realistically do this in the coming 12 months, once the ABA classroom is up and running”); exhibit S-4A, page 4 (Ms. Elizabeth Smith: “Ideally, his program will allow for the introduction of a broader communication approach—one that allows his [sic] to acquire communications tools (signs and approximations) while continuing to focus on shaping and eliciting his picture and vocal repertoire”); exhibit S-4A, page 8 (Ms. Elizabeth Smith: “[Student] should have a communication approach that allows his [sic] to be rapidly fluent in a system that he can control and manipulate in order to make his communication intents clear”); exhibit S-23, page 32 (Dr. Imperatore: “Can individuals with severe disabilities [such as Student] exercise their right to be self-determining? Unequivocally, YES.”). [↑](#footnote-ref-45)
46. 20 U.S.C. § 1415(b)(1). [↑](#footnote-ref-46)
47. *T.B. v. Warwick Sch. Dept.,* No. 01-122T, 2003 WL 22069432, at \*10 (D.R.I. June 6, 2003) *aff'd sub nom. Lt. T.B. ex rel. N.B. v. Warwick Sch. Comm.*, 361 F.3d 80 (1st Cir. 2004). [↑](#footnote-ref-47)
48. See *K.D. ex rel. C.L. v. Dep't of Educ., Hawaii*, 665 F.3d 1110, 1123 (9th Cir. 2011), citing to *Doyle v. Arlington Cnty. Sch. Bd.,* 806 F.Supp. 1253, 1262 (E.D.Va.1992). [↑](#footnote-ref-48)
49. See *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 947-48 (1st Cir. 1991) (coming to the team meeting with a draft IEP does not constitute predetermination). [↑](#footnote-ref-49)
50. *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 858 (6th Cir. 2004). [↑](#footnote-ref-50)
51. Relevant parts of the testimony include the following:

Q (PARENT). And at those premeetings that is strictly for staff, do some of the staff members believe that [Student] needed direct service [from a behaviorist]?

A (MS. CHASE). Yes.

Q. But will it be accurate, if I'm hearing you correctly, that even though the staff knew that [Student], you know, needed direct service, but you guys were told not to agree to that at IEP meetings? Is that correct?

A. Yes.

MR. CRANE: And who told you not to agree to it?

THE WITNESS: Yes.

MR. CRANE: Who told you that, to do that?

THE WITNESS: Administration.

MR. CRANE: Who's administration? Who are you talking about?

THE WITNESS: Ms. White.

MR. CRANE: Ms. White?

THE WITNESS: Yes. She would hold the premeetings.

Transcript, page 277, lines 20-24 to page 279, lines 1-17. [↑](#footnote-ref-51)
52. Cf. *M.B. ex rel. Berns v. Hamilton Se. Sch.*, 668 F.3d 851, 861 (7th Cir. 2011) (no predetermination where final IEP reflected recommendations of parents’ expert); *Fort Osage R-1 Sch. Dist. v. Sims ex rel. B.S.*, 641 F.3d 996, 1005 (8th Cir. 2011) (no predetermination where school district considered the parents’ outside medical evidence, ordered further testing based upon that evidence, and drafted IEPs to incorporate some of parents’ concerns). [↑](#footnote-ref-52)
53. It is possible, of course, that Amherst’s predetermination of direct services from a behaviorist was occurring prior to the September 22, 2010 IEP Team meeting (direct services from a behaviorist did not appear on Student’s IEPs until after the November 2010 Team meeting referenced above), but there is no evidence that Ms. Chase attended any particular Team meeting prior to September 2010, and therefore nothing can be said with respect to any prior Team meetings. [↑](#footnote-ref-53)
54. Ms. Doyle’s report similarly stated that Student requires a residential educational program in order to “maintain previously acquired skills and progress further.” Exhibits P-11, S-24. [↑](#footnote-ref-54)
55. *D.B. v. Esposito*, 2012 WL 975564 (1st Cir. 2012), citing to 20 U.S.C. § 1400(c)(1), (d)(1)(A); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176, 201 n.23 (1982). [↑](#footnote-ref-55)
56. Currently, Student is eligible for services from DDS. He is receiving DDS case management services. Testimony of Boyer. [↑](#footnote-ref-56)
57. It is recognized that even year-round school programs have occasional vacation periods when Students must live at home. What is intended is that the residential school offer Student the opportunity for a continuity of instruction throughout the year with a minimum of breaks or transitions. Nevertheless, if Parents consent to a residential school that is less than year-round, Amherst may propose such a residential school. [↑](#footnote-ref-57)
58. In determining the particular residential educational placement, Amherst shall be guided by its most recently-proposed IEP with respect to the kind of services that Student requires. Amherst shall also seek input from Ms. Tanguay (if she is available to do so) and Parents. [↑](#footnote-ref-58)
59. In determining the nature and scope of these evaluations, Amherst shall seek input from Ms. Tanguay (if she is available to do so) and Parents. [↑](#footnote-ref-59)