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

**SPECIAL EDUCATION APPEALS**

**In Re:**  Sutton Public Schools v. **BSEA #**12-6333

 Student

# DECISION

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

Sutton Public Schools requested a Hearing in the above-referenced matter on March 16, 2012. The Parties also participated in a Pre-Hearing Conference on March 22, 2011, during which the issues and scope of the Hearing were discussed and agreed to by the Parties. The Hearing was held on May 24, 25 and 26, 2011, at the Bureau of Special Education Appeals, 75 Pleasant St., Malden, Massachusetts, before Hearing Officer Rosa I. Figueroa. Those present for all or part of the proceedings, in person or via speaker telephone were:

Student’s mother

Student’s father

Harry Bakow Psychologist, Private Practice

Regina Williams Tate, Esq. Attorney for Sutton Public Schools

Margo Austein Special Education Director, Sutton Public Schools

Gina Iadorola Occupational Therapist, Sutton Public Schools

Lisa Hughes Speech and Language Pathologist, Sutton Public Schools

Christen Bianchi BCBA Consultant

Barbara Burek Intensive Special Education Teacher, Sutton High School

Ted Friend Superintendent Sutton Pubic Schools

Susan Neafsey School Psychologist, Sutton Public Schools

Cynthia Davis One-to-one aide, Sutton Public Schools

Erin Christiano School Adjustment Counselor, LMHC

Lauren Alessandro School Psychologist, Sutton Public Schools

William R. Nelson Intensive Special Needs Classroom Teacher, Sutton Public

 Schools

Rebecca K. Ronstadt Private Lindamood Bell Instructor

Ann E. Zimmage School Nurse, Sutton Public Schools

Nancy Oliver Occupational Therapist, French River Education Center

Shaina Wamsley BSEA Legal Intern

Amie Rumbo Catuogno Court Reporter

The official record of the hearing consists of documents submitted by Sutton Public Schools (Sutton) marked as exhibits SE-1 through SE-106, and those submitted by Parents marked as exhibits PE-1 through PE-2, PE-3 (excluding the first page of PE-3**)**, PE-5 through the first two pages of PE-20, PE-21 through PE-50, PE-52 through PE-53, recorded oral testimony, and written closing arguments. The Parties’ Closing Arguments were received on July 24, 2012, and the record closed on that date.

**HEARING ISSUES:**

1. Whether the IEP developed for the period starting on January 26, 2012 through January 2013 is reasonably calculated to provide Student with a free and appropriate public education (FAPE) in the LRE[[1]](#footnote-1);
2. Whether Student is making meaningful progress in his Sutton placement commensurate with his abilities and taking into account his significant learning disabilities;
3. Whether Sutton denied Parents the right to meaningfully participate in the IEP Team meetings.
4. Whether Parents are entitled to reimbursement for part or all of their costs associated with the educational interventions provided to Student as a result of any denial of FAPE by Sutton.
5. Whether Parents are entitled to reimbursement for costs of experts they hired to evaluate Student.

**POSITIONS OF THE PARTIES:**

**Sutton’s Position:**

Sutton seeks declaration by the BSEA that the IEPs and placements it has offered Student since his return to Sutton in 2010, have provided Student a FAPE and continue to do so. Sutton agrees with Parents that Student requires language instruction, math, science, physical therapy, occupational therapy, speech and language, social pragmatics, and transition services that prepare Student for as independent an adult life as Student is capable of having. It further agrees with Parents that toileting training is at the forefront of Student’s programming and services and argues that since Student has been successful with toileting in school, any difficulties with toileting success in the home is the result of Parents failure to implement the program developed by the BCBA. Sutton however, agrees that having Student fully toilet trained is essential to his ability to achieve adult independence.

Sutton disputes that it has denied Student a FAPE and asserts that he has made effective progress commensurate with his abilities in all areas, but argues that that Student has not been able to avail himself of the full benefit of the program offered/ available to him because he arrives late and/ or leaves school early several times per week. This causes him to miss some of the services, activities and or instruction available to him. Similarly, he has not been allowed to participate in the outings organized by Sutton, and in the past school year did not participate in the cooking club or track and field, both of which are after school activities, because he leaves school. Until such time as Student participates in his entire day program in Sutton, Sutton is not willing to consider providing the after school services sought by Parent.

Sutton states that it looked into the efficacy of the Fast ForWord reading program at Parents’ request, concluding that it would not be beneficial to Student because there was little evidence that it would help a child such as Student who is severely apraxic.

Sutton is adamant that Parents are not entitled to reimbursement for any expert consultation services (provided by Dr. Bakaw), or evaluation costs (Rebecca K. Ronstadt) secured in contemplation of the Hearing.

Sutton is frustrated with Parents’ lack of cooperation. It recognizes that the Parties have reached an impasse and is willing to fund any private day placement for Student to which Sutton and Parents agree, when one becomes available.

**Parents’ Position:**

Parents assert that Student has not made effective progress since his return to Sutton and instead regressed in certain areas. They state that Sutton has denied him a FAPE. In order to assist Student, Parents state that they have engaged and provided additional services to Student such as those offered by Autism Intervention Specialists, and Dr. Bakaw, a psychologist, who has provided play-therapy to Student since approximately 2007. Parents hold Sutton responsible for the increase in Student’s anxiety and the resurfacing of his seizure activity. Moreover, at the center of their disagreement is their view on Student’s toileting program, and Parents frustration with the fact that despite being almost fifteen years of age, Student is still not toilet trained. Parents further disagree with the protocol developed by Sutton’s consultant. Parents assert that Sutton’s protocol highlights Student’s differences and fails to conform with what is natural for males in western society.

Parents are further concerned that Student, who their experts opine is of average intelligence, does not have sufficient access to like peers as his program in Sutton places him with mostly developmentally delayed individuals who are not Student’s intellectual peers. Parents hope that Student will attend college, and are concerned that he is still unable to read and has very limited communication skills. Parents wish for reading to be a priority in Student’s program and also wish for Sutton to implement Fast ForWord immediately.

Parents do not feel heard by Sutton, and assert that Sutton has ignored their requests including their request that Student participate in athletics. Regarding the school outings, Parents are concerned that Sutton does not have an appropriate toileting protocol in place for outings and worry that Student may be embarrassed in front of his peers.

Parents assert that they are entitled to reimbursement for part or all of their costs associated with the educational interventions provided to Student as a result of Sutton’s denial of FAPE.

Specifically, they seek reimbursement for the services offered by Dr. Bakaw and Autism Intervention Specialists.

Parents also seek reimbursement for the consultation services provided by Rebecca K Ronstadt, Student’s former private Lindamood Bell instructor who assessed and observed Student prior to Hearing.

Parents agree that Student would best be served in a private day school outside Sutton.

**FINDINGS OF FACT:**

1. Student is a fifteen-year-old resident of Sutton, Massachusetts. As an infant, student experienced seizures which resulted in severe neurological deficits later identified as apraxia. Student’s apraxia has affected many of his developmental milestones as it hinders motor movement, planning, and sequencing (SE-5; SE-20; Parent). Student has difficulty with expressive and receptive language, auditory processing, sensory integration, ocular motor capabilities, fine motor skills, and executive functioning. Student has also been diagnosed with anxiety (SE-5; SE-20; Parent; Bakow). Despite Student’s challenges with communication, learning, and development, he is a social, engaging, and a friendly young man who is motivated to learn and please others (SE-5; SE 30; Parent).
2. Student’s IEP has been the issue of dispute in multiple BSEA hearings between Sutton and Parents. In March 2005, Parents unilaterally withdrew Student from Sutton to give Student the opportunity to participate in privately-arranged special education services. The private services included academic tutoring, occupational therapy, speech-language services, vision therapy, physical therapy, psychotherapy, and social group services (Administrative Notice of BSEA #09-7983; Parent).
3. The most recent BSEA hearing concerned two IEPs developed for Student for 10/25/07 to 10/24/08 and 10/27/08 to 10/26/09. On January 26, 2010, the Hearing Officer issued his decision that the 10/25/07 to 10/24/08 IEP as a whole was not reasonably calculated to provide Student with FAPE, and the 10/27/08 to 10/26/09 IEP was not reasonably calculated to provide FAPE in regards to Student’s toileting needs. Sutton was ordered to reimburse Parents for academic tutoring provided from 10/25/07 to 10/26/08, occupational therapy from 10/25/07 to 10/26/08, and consultation sessions for developing a toilet training protocol from 10/27/08 to 10/26/09 (Administrative Notice of BSEA #09-7983).
4. The current dispute concerns Student’s education since his reentry into Sutton Public Schools in June 2010.
5. It should be noted at the outset that Student’s educational level cannot be accurately tested due to his disability. Dr. Marcel Fajnzylber conducted a cognitive and psychological evaluation of Student. Dr. Fajnzlber reported that Student’s cognitive testing is affected by setting, examiner, and neurological (SE-20; PE-40). Dr. Fajnzyler opined that conventional testing “cannot begin to address the impact of [Student’s] neurological limits on cognitive functioning” (SE-20; PE-40). Dr. Bakow, Student’s neuropsycholigst, (C.V. at PE-6) opined that Student is of average intelligence and has a great learning ability. Dr. Bakow reached this conclusion because of Student’s receptive language skills and ability to understand and follow directions (Bakow). Dr. Bakow has been Student’s neuropsychologist since 2007 and sees Student every week. Parents agree that Student is of average learning intelligence pointing to Student’s verbal repertoire which has increased to between 500 and 1,000 words (Parent).
6. Susan Messier, M.A., CCC-SLP (C.V. at SE-106), conducted a speech-language evaluation of Student over three sessions in March and April 2009. Messier administered the following tests: Expressive One Word Picture Vocabulary Test, Peabody Picture Vocabulary III (Form-A), Goldman-Fristoe Test of Articulation-2, Clinical Evaluation and Language Fundamentals-Preschool, as well as informal measures and observations to obtain Student’s communication skills. Student’s apraxia caused difficulty with initiating phonation, coordinating breath support with speech production, articulating speech sounds, and accurately producing speech with increased length and complexity of sounds. Student’s receptive and expressive language skills were below age expectations, stringing typically one to three word utterances together. Messier noted that despite the communication challenges Student faced, he maintained a positive and cooperative attitude during testing (SE-1).
7. Jillian Valentine, OTR/L, completed an occupational therapy evaluation of Student during one 60-minute session on April 22, 2009. Valentine conducted clinical observations, informal assessments, a chart review, and a parent interview. She noted that Student demonstrated difficulty with fine motor activities and did not consistently use a dominant hand. He was unable to perform design copy tasks and chose only to scribble. Student strung beads and blocks, and built peg towers, but he appeared to have difficulty because of his decreased visual perception. Student was not able to effectively utilize scissors. Although Student had difficulty with tracking (i.e., using his eyes to follow a moving object), he compensated through trial and error. Parent informed Valentine that Student was able to undress himself, but had difficulty donning clothes because of his decreased visual perception. Parent also told Valentine that Student needed to master dressing and toileting in order to achieve independence (SE-2).
8. On November 5, 2009, Rebecca Ronstadt (C.V. at PE-10) completed a three months progress report on Student (PE-7). Ronstadt holds a Masters in Education acquired in 2009 (PE-10; Ronstadt). Her previous experience includes working for companies that assessed students reading needs and implemented programs. She lacks special education and reading training and certification (Ronstadt).
9. Ronstadt met with Student approximately 2 hours per day, Monday through Fridays, between March 2007 and November 2009 (Ronstadt). Ronstadt’s November 2009 report noted Student’s improvement in receptive and expressive language skills, and motor planning and control over the two and a half years that she worked with him (PE-7).
10. Lisa Olshefski, M.S., CCC-SLP, completed a speech and language, and communication progress report on February 3, 2010. Olshefski, an employee of Chatterboxes, met with Student five times per week. She reported that Student’s progress for the preceding three months had been remarkable, demonstrating progress in producing blends, using the pronoun I, using spatial terms such as “in” and “on,” increasing the length of utterances, describing objects functions, and using verbs with the aid of visual, gestural and phonemic cues. Olshefski recommended that Student continue to receive speech and language therapy five times per week (SE-4).
11. In March of 2010, Student’s IEP Team began to discuss the possibility of Student transitioning back to Sutton (Austein). Margo Austein, Sutton’s Director of Special Education (C.V. at SE-106), has been responsible for coordinating Student’s Team meetings and drafting the N1 summary notes (Austein).
12. Student’s Team convened on March 1, 2010 for the annual review, to discuss Student’s re-evaluation results and proposed placement (SE-3, SE-5). At the meeting, Parents expressed concerns about Student’s transition back into the public school because of his toileting issues and the academic programming (SE-5). Parents’ vision statement included their goals that Student participate in an accepting social environment with appropriate peers, that he gained independence with toileting and other life activities, develop emotionally to overcome his anxiety, and use assistive technology in the classroom (SE-8).
13. The March 2010 Team proposed an IEP covering the period from 03/01/10 to 02/28/11 with placement in an intensive needs classroom within Sutton (SE-5; Austein). The IEP contained the following services to begin on 03/01/10:
* speech/language (provided by speech language pathologist 1:1 for 30 minutes 4 times per week);
* academic/behavioral support (provided by 1:1 assistant for 6.75 hours 5 times per week);
* speech/apraxia (provided by speech language pathologist 1:1 for 30 minutes 5 times per week);
* social pragmatics (provided by 1:1 assistant for 45 minutes 1 time per week; 1:1 social adjustment counselor for 30 minutes 1 time per week);
* academics (provided by special education teacher or assistant 180 minutes 5 times per week);
* physical therapy (provided by physical therapist/1:1 aide for 30 minutes 2 times per week);
* adaptive physical education (provided by adaptive physical education teacher for 30 minutes 1 time per week);
* occupational therapy (provided by occupational therapist for 30 minutes 5 times per week) (SE-5; SE-8).
1. The IEP also contained the following services to begin on 7/6/10:
* social behavior/summer program (provided by 1:1 assistant for 4 hours 4 times per week);
* speech/language (provided by speech language therapist for 30 minutes 4 times per week);
* academic instruction (provided by special education teacher or 1:1 aide for 5 hours 4 times a week); and
* occupational therapy (provided by occupational therapist for 30 minutes 4 times per week) (SE-5).
1. On March 24, 2010, Parents accepted the IEP in part, conditioning their acceptance on considering alternative private placements for Student (SE-5; Austein).
2. On March 2, 2010, Sutton sought consent from Parents to conduct a Toileting Assessment, an Assistive Technology Assessment, and a Clinical Psychological Evaluation. Sutton also sought to obtain Parents’ consent for release of information and documents from Student’s outside evaluators in order to send referral packets to private day schools (SE-6). Parents provided consent for the assessments and for Sutton’s Release of Information to private schools (SE-9; SE-10).
3. On March 22, 2010, Sutton sent letters supporting Student’s application to Learning Prep, the Carroll School, and Pathways Academy (SE-11; SE-13; Austein). Student was not accepted into any of these programs (SE-13; SE-17; Austein). Since that time, Sutton has continued to look for private special education programs for Student (Austein). By the conclusion of the Hearing no private school had accepted Student.
4. On March 22, 2010, Sutton received the report of Student’s visit to Athos Bousvaros, MD, MPH a GI/Nutrition Clinic, on February 18, 2010. Bousvaros, who evaluated Student for constipation opined that the problem was neurodevelopmental in etiology. At the time, Student was typically sitting for both urinating and bowel movements. Bousvaros recommended the use of laxatives as well as implementation of a behavioral program to assist Student in his bowel movements (SE-12). Dr. Bakow, Student’s psychologist since 2007 disputed this recommendation because there was no reference to Student’s neurological issues (Bakow).
5. Dr. Bakow testified that a several years back, he had drafted toilet training programs for apraxic children while working at Children’s Hospital. He further testified that approximately 10% of the apraxic children in his study were still not toilet trained when he left the hospital (Bakow).
6. On April 8, 2010, Nancy Oliver, OTR/L, and Gina Iadarola, COTA/L at Sutton (C.V. at SE-106), conducted a home evaluation of Student to assess his toileting abilities. Oliver, employed by French River Education Center, completed the evaluation which was based on a review of previous evaluations, including Dr. Bousvaros’ note, the toileting/bathroom task analysis checklist completed by Mother, the Large Allen Cognitive Level Screen-5, a short sensory history profile completed by Mother, clinical observations and discussions with a previous evaluator and Student’s Mother (SE-15; PE-12).
7. During the home evaluation, Oliver and Iadarola were not able to observe Student using the toilet. They testified that when they were going upstairs for the observation Mother told Student that he did not have to let them watch if he felt uncomfortable, and Student stopped and did not go into the bathroom (SE-15; SE-12; Oliver; Iadarola). It was reported that Student understood the difference between “wet” and “dry” and Mother stated that Student was successful approximately 75% of the time when using the toilet with her assistance. Student required Mother’s assistance with aiming while urinating into the toilet and wiping. Oliver reported that Student had the physical skills for self-toileting, but seemed to be dependent on his Mother waiting for her cues and prompts. Oliver recommended implementing a behavioral program that involved assisting Student with all of the toileting steps except the last one, steps that were broken down with visual icons, using manipulatives to indicate when steps were completed, and using incentives for successful voids. Oliver further recommended that this program start within the home (SE-15; PE-12; Oliver).
8. Olshesfki issued another report on April 23, 2010 describing her work with Student at Chatterboxes. Olshefski reported that she continued to see progress in receptive-expressive language from her previous report in February. She reported that Student continued to make steady gains in targeted areas and recommend continued practice as well as a pragmatic skill therapy program to facilitate Student’s peer interactions (SE-21).
9. On April 29, 2010, Sutton sent a contract to Spaulding Rehabilitative Services to complete an independent evaluation of Student (SE-16).
10. Student was not accepted at any of the private schools to which Sutton forwarded packets (SE-13; SE-17).
11. Student’s Team reconvened on May 28, 2010 to discuss programming in Sutton (SE-18; SE-19). The focus of the meeting was the toileting program to be implemented as soon as Parents’ accepted the IEP and placement. Parents reiterated their concerns that Sutton was not addressing Student’s needs properly. Sutton proposed the same IEP that had been developed at the March 2010 Team meeting (SE-19).
12. On June 6, 2010, Parents accepted the March/ May 2010 IEP and placement (SE-22). Parents also signed a release of information form for Sutton to have communication with Dr. Bakow and Chatterboxes (SE-19).
13. Student returned to Sutton on June 7, 2010, at which point the signed and accepted IEP was first implemented (SE-22; Austein). Sutton transitioned Student back by providing him individualized instruction in a classroom by himself with a one-to-one male aide (Nelson).
14. Iadarola, who had experience toilet training students with apraxia, began monitoring parts of the program recommended by Oliver for Student. Iadarola asked Parents for their preference for Student’s position (standing or sitting) for urination. Parents indicated their preference for standing which they understood to be more normal for males. Iadarola testified that other than preference, there is no biological reason for standing versus sitting. At this time, Student was on a regimented schedule to help diminish his anxiety over using the bathroom. Student learned the program quickly for one bathroom with the goal of generalizing these skills to other bathrooms. Iadarola recognized that Student’s apraxia impacted his ability to wipe after bowel movements, and she worked with Student on practicing said motion (Iadarola)
15. William Nelson (C.V. at SE-106) was Student’s one-to-one aide when he returned to Sutton in June 2010. Nelson was responsible for implementing Student’s academic instruction and toileting program. He used positive reinforcements when Student successfully voided, such as telling him good job, or letting him participate in physical activities (e.g., going for a jog or playing with a ball) (Nelson).
16. On June 7, 2010, Sue Messier wrote to Parents noting that Student needed encouragement “crossing the threshold into the bathroom” (PE-25). The following day Messier wrote to Parents again stating that the assistant teacher and she had tried to eat lunch with Student but that he had refused to eat or drink. Responding to Student’s eating habits, Parent wrote back “glad” that Messier could witness Student’s “anxiety in a social setting” which Parent stated was “very typical” (PE-25).
17. Parent testified that Student did not have a smooth transition back into Sutton. She testified that when she asked him how his day had been, Student would respond, “horrible” (Parent). Parent believed that Student was relieved once he got into the car at the end of the school day (Parent).
18. On June 15, 2010, Sutton proposed an IEP amendment which involved bridge services to begin when the school year ended and before the formal summer program began, in an effort to prevent regression and continue to aid Student transition back into public school. The proposed bridge services would be provided between 8 a.m. and 12 p.m., Monday through Thursday, for the weeks of June 21 and June 28, 2010. Parents accepted this IEP amendment (SE-22; Austein).
19. In early August 2010, Parent contacted Sutton via email expressing concerns over Student’s toileting program as Student’s accidents had increased. Sutton replied that Student was making “slow but steady progress” and toileting would be a topic at the upcoming IEP meeting. Parent’s email also asked whether neuropsychologist Dr. Chaskelson, an independent evaluator, would be financially supported to attend Student’s IEP meeting. Sutton confirmed that she would (SE-25; PE-29). Shortly afterward Sutton sent a contract to Dr. Chaskelson offering to cover her consultation services in developing the IEP (SE-26; PE-42; Austein).
20. Sometime in or around August 2010, Sutton contacted the Integrated Center for Child Development (ICCD) to develop a contract for in-home behavioral consultation to address Student’s toileting needs (SE-41). Parent had requested that Sutton fund a home-based toileting program by ICCD as early as October 2008 (Administrative Notice of BSEA #09-7983).
21. During the 2010-2011 school year Nelson became Student’s teacher (Nelson). In November 2010 Cynthia Davis became Student’s one-to-one aide responsible to provide instruction under the direction of Nelson. After beginning to work with Student, Davis received ABA training but without a particular focus on children with apraxia (Davis). She was trained by Nelson on the implementation of Student’s toileting protocol for which she became responsible (Nelson). During the 2010-2011 school year, Student received instruction in his own classroom (Nelson, Davis).
22. During the 2010-2011 school year, Student participated in a “lunch-bunch” group facilitated by Erin Christiano, Sutton’s school adjustment counselor (C.V. at SE-106). This involved Student choosing a peer with whom he could eat and play a game during the lunch block. Initially Student needed to be cued to open his lunch. Over time he required less cueing about this although he continued to need assistance with opening lids, which other students in the lunch-bunch did for him. The lunch-bunch grew from two to approximately five students during the school year. Christiano opined that Student enjoyed and benefited from the lunch-bunch experience (Christiano).
23. On September 10, 2010, the Assistive Technology Center at the Spaulding Rehabilitation Hospital issued its report indicating that Student could benefit from assistive technology, but recommending further assessments (SE-29; Austein).
24. Student’s Team reconvened on September 14, 2010 to develop Student’s IEP (SE-28; SE-30). The Team discussed Student’s progress since his return to Sutton in June stating that Student was making slow but steady gains in all areas. In toileting, Student was reported to independently pull-up and push- down his pants; his anxiety while standing in front of the toilet had decreased; his aim was 70% accurate in the toilet; he was independently washing hands; he was independently drying the back of his hands 75% of the time. He also had started to communicate when he needed to urinate (SE-30). Having found the Spaulding assessment of little value, the Team discussed pursuing another assessment by Tech Access (SE-35; SE-31). The Team also agreed to seek support from an outside consultant for toilet training (SE-35). The Service Delivery grid in this IEP reflected the same services outlined in the March 2010 IEP (see paragraphs #13 and #14 above), as well as academic instruction provided by the special education teacher or the one-to-one aide, five hours, four times per week (SE-30). Parents did not sign this IEP and Sutton and Parents agreed to “relax the timelines for this proposal since a signed and accepted IEP” was already in place (SE-35; Austein).
25. On September 20, 2010, Sutton proposed to conduct further assistive technology evaluations (SE-31). Parents consented to the additional evaluations and to release information to TechAccess to conduct the evaluation (SE-32; SE-33; SE-34).
26. Dr. Gregory Holmes, Student’s neurologist, completed a neurological report on Student on June 16, 2010. Sutton received this report on September 21, 2010. Dr. Holmes’ evaluation discussed Student’s anxiety and recommended that Student be separated from his Mother more frequently to reduce dependence (SE-35).
27. In early November 2010, Parent and Sutton communicated via email about Student’s toileting needs. Sutton informed Parent that it had signed a contract with ICCD for weekly behavioral consultation in the home (PE-41).
28. On November 4, 2010, Sutton requested that Parents sign and return the IEP proposal from the September team meeting (SE-39). On November 18, 2010, Parents rejected the proposed IEP (SE-30).
29. Parents authorized release of information to Drs. Bakow and Chaskelson on November 18, 2010 (SE-41; SE-42). Dr. Bakow’s release form was signed with the goal of facilitating communication between Dr. Bakow and Christiano in particular (Parent). Christiano testified that she spoke with Dr. Bakow on approximately three occasions over a two year period. One of these was a conference call with Dr. Bakow and Susan Neassi, the school psychologist (C.V. at SE-106), but Dr. Bakow was not prepared for this call (Christiano). In November of 2012, Christiano tried to contact Dr. Bakow again after Parent gave her Dr. Bakow’s personal cell phone. Dr. Bakow was not pleased that Christiano contacted him on this number (Christiano).
30. Although Susan Neassi has never worked directly with Student, she spoke with Dr. Bakow in order to develop a more comprehensive understanding of Student’s anxiety (Neassi). Neassi did not receive any specific recommendations from Dr. Bakow on how to address Student’s anxiety. Dr. Bakow agreed that it might be helpful for him to observe Student in the school setting, but that he did not think it was necessary (Neassi, Bakow). To date, no observation has occurred (Neassi).
31. On November 18, 2010, Parents authorized release of Student’s information to Kristin Bianchi, a toilet training behavioral consultant (C.V. at SE-106; PE-24) (SE-40). Bianchi, had experience implementing toilet training protocols in schools and in homes (Bianchi). When Parents first met Bianchi sometime in or around November 2010, Parents asked her if she had any experience with apraxic children. She stated her experience was limited, but because of the behavioral aspect of the toilet training protocol, she was confident it would prove successful (Bianchi). Bianchi was trained in the researched-based Foxx Azrin toilet method under a licensed doctor while she worked in a different school district. Bianchi stated the Foxx Azrin method is one of the fastest and most successful toilet training methods (Bianchi).
32. On November 30, 2010, Austein wrote to members of the IEP team that Sutton had “developed a contract with BCBA Kristin Bianchi” (PE-48). Bianchi was not yet BCBA certified at this point although she did obtain this certification in May 2011 after her work with Student had started (Bianchi). Austein testified that she did not recall misrepresenting Bianchi’s credentials and stated that she had represented Bianchi as a behavioral consultant (Austein).
33. Bianchi observed Student in the home and school, reviewed records, and interviewed staff members (SE-43; PE-18; Bianchi). She issued a report on December 7, 2010, recommending that the same toileting protocol be implemented in the home and school so as to facilitate Student’s toilet training, noting that her recommendations had indicated that consistency across all settings was imperative to maintenance of skills (Bianchi).
34. Bianchi suggested that Student sit for all voids, citing four main reasons:
35. To provide consistency across all settings with regards to body positioning and toileting at home and at school. [Student] stands in school and sits at home for voiding.
36. Due to [Student]’s apraxia, coordination that is required to stand while voiding, and visual discrimination and attention required to urinate toward the target location (which changes depending on using a toilet vs. urinal), it is beneficial for him to sit down at every placement in order to avoid multiple steps for the process. For example, each time [Student] enters the bathroom whether to urinate or have a bowel movement, he will always sit. This one expected routine –sit when voiding – will be easier for [Student] to follow especially when he moves towards increased independence.
37. In order to teach [Student] appropriate sitting and relaxing so that he can learn to have a bowel movement on the toilet, it is crucial that [Student]sit on the toilet at every placement. If [Student] has to have a BM, he can do so at any time. Currently, [Student] is placed on the toilet to sit and try for a BM once per day in the school setting only. This has proved ineffective as [Student] typically has a BM at home during the evening hours. He has not yet had the exposure to sitting on the toilet at the times when BM’s are more likely to occur. Trying to foresee potential bowel movements and subsequently placing [Student] in the sitting position at that time is a guessing game, at best. [Student] may not be able to discriminate which position to be in when voiding, since he would have to first decide if he has to urinate or defecate. Once he decides, he would then choose the appropriate position. This potential confusion could be eliminated if one position was implemented.
38. [Student] will have more practice sitting on the toilet, becoming independent when aiming the urine into the toilet bowl (as opposed to parent assistance with aim), and relaxing his muscles while voiding. When standing and maintaining balance, [Student’s] ability to fully relax in being compromised. When bowel movements occur, [Student] will be comfortable with sitting and relaxing in order to allow success with voiding on the toilet SE-43).
39. Bianchi made additional recommendations for toilet training at school including Student doing “dry pants checks” every 30 minutes, verbalizing his desire to urinate, using images to help him remember steps if needed, and increasing fluid intake. For positive reinforcement, she recommended a thumb-tap that only be used for his successful toileting, and “Perfect!” or “That’s perfect!” with the “a-okay” sign when Student correctly identified his pants were dry (SE-43; PE-18; Bianchi).
40. Sutton received Bianchi’s toilet training protocol and report on December 22, 2010. The protocol described materials needed, how to get started, intervals at which Student should be placed on the toilet, the reward system, dry pants check, toileting steps to promote independence and initiation of bathroom use (SE-47; Bianchi). Bianchi reported that at that time, Student could “independently walk into the bathroom, shut the door, pull [his] pants down, sit on the toilet, and urinate” (SE-47). He had one successful bowel movement in the toilet, and two other bowel movements where half was in his pants and the rest in the toilet. She noted that Student demonstrated minimal anxiety when Parents or adults were present during toileting. Bianchi also noted areas requiring improvement such as having Student assist cleaning up when he had accidents, and practicing wiping after bowel movements (SE-47; Bianchi). Bianchi did not observe Student’s ability to wipe (Bianchi). Other areas in which Student’s independence should be fostered included walking into the bathroom and sitting on the toilet without Parent present (SE-47; Bianchi). Bianchi noted that the timer should be used more frequently to reduce Parental prompting (SE-47; Bianchi). She opined that Student’s lack of consistent success resulted from “lack of parent follow-through” (Bianchi). Parent testified that both parents understood the protocol developed by Bianchi, but were never told explicitly that the protocol would not work if they did not completely follow it. Parent further testified that she found some aspects of the protocol to be cruel (e.g., Student assisting with the clean-up) and stated that she never implemented Bianchi’s protocol (Parent).
41. Bianchi spoke on the phone with Dr. Bakow once. During this phone call, Dr. Bakow encouraged Bianchi’s efforts but also recommended she remember Student’s neurological issues (Bakow; PE-48). Until the day of the Hearing, Dr. Bakow had not seen Bianchi’s written protocol. He opined that Bianchi’s protocol did not take into account all of Student’s challenges (Bakow). Specifically, Dr. Bakow did not think that Student could learn motor planning by sitting, it was not effective to limit public outings, and it was not effective to withhold praise when Student did not successfully void (Bakow). He testified that Mother’s toilet training worked well in his opinion (Bakow).
42. At Bianchi’s request, Iadarola altered Student’s school toileting program so he would be sitting at all times. Iadarola did not express any concern that Bianchi’s methods would prove futile (Iadarola). Davis did not believe standing was successful with Student because of his inability to aim (Davis). Parents were unaware that the aide had helped Student with aiming while standing to urinate using her gloved hand over Student’s hand (PE-48; Davis, Parent).
43. On December 20, 2010, Dr. Bakow wrote to Parents expressing concern over Student’s “dramatic increase in anxiety and apprehension” demonstrated during therapy since Student’s return to Sutton (PE-3; Bakow). He recommended that Student be placed in an educational setting with “professionals who have a clinical understanding of apraxia” who would relay Student’s progress to Parents on a weekly basis (SE-3; Bakow). Dr. Bakow opined that Sutton did not address Student’s tension, anxiety over social issues, toilet training, and apraxia appropriately, and noted that Student’s toileting issues were also contributing to his anxiety. He further stated that “prolonged exposure” to this “stress and anxiety could have serious long term implications for his social, emotional, and educational growth” (PE-3; Bakow). Dr. Bakow has never observed Student in Sutton, he has never observed Student’s program and or services and has had limited communication with Sutton personnel since Student’s return there in 2010 (Bakow). He testified that he did not find that communication with Sutton would advance his work with Student in anyway (Bakow).
44. The December 20, 2010 academic progress report indicates that Student was working on 2-letter rhymes, sight words, reading comprehension, counting with and without manipulatives, counting coins, telling time, and understanding shapes (SE-46).
45. Dr. Holmes evaluated Student again on December 22, 2010. His report mentions Student’s on-going issues with anxiety for which he prescribed anti-anxiety medication. Nonetheless, Dr. Holmes found Student’s neurological examination had improved and was getting “better and better” and noted that Student “continues to make progress” (SE-44; PE-39). Dr. Holmes agreed with Dr. Fajnzylber’s evaluation of Student and reaffirmed his belief that formal evaluations of Student might be misleading of his ability (SE-44; PE-39).
46. An occupational therapy progress report dated January 11, 2011, states that Student’s postural stability and hand development were improving. Student was able to “assume and maintain a grasp on hammer, tweezers, pegs of various sizes, beads, nuts/bolts, clothespins, scissors, and keys” (SE-48). Student’s visual motor capabilities were also improving as he was able “to toss beanbags to [a] static target with 75% accuracy and a moving target with 20% accuracy” (SE-48). His ability to effectively utilize his writing programs improved as well as his legibility. When presented with a choice of five activities, Student pointed and verbally expressed his choice for a desired activity “with confidence and clear interest” and was also ordering these activities in the manner in which he wished to approach them maintaining attention through completion (SE-48). Sensory breaks were built throughout Student’s school day and when the noise bothered him he would state “it is loud out there” and at times requested to close the door. His ability to transition from one activity to the next had also improved as he was demonstrating “increased independence, speed and accuracy…” (SE-48).
47. The occupational therapy report also states that Student did not “display any stress or anxiety with urination in the school environment” and that he showed pride when successfully using the toilet (SE-48). Student also demonstrated improvements using fasteners, zippers and buttons, completing multi-step directions with the assistance of pictorial cues, and tracking moving objects (SE-48). His adaptive physical therapy and gross motor progress reports were similarly positive (Id.).
48. On January 12, 2011, Bianchi compiled a Data Summary of the Toilet Training program after 4 weeks and 8 visits. She noted that Student was successfully urinating in the toilet with only one accident (excluding spray when missing while toilet aiming). He did not need any physical assistance while urinating and only needed some, if any, verbal guidance. Student continued to have bowel movements in his pants, with only one successful bowel movement in the toilet. By January 12th, he was also able to use bathrooms that he had previously avoided. She found that the protocol was not being followed as designed since Student was not being placed on the toilet at proper intervals, was not sitting on the toilet for the proper amount of time, the timer was not consistently used, wiping had not been attempted at home, “pants checks” were not being regularly implemented, and data collection was sporadic. Bianchi recommended correcting the preceding protocol errors as well as increasing fiber and fluid intakes to induce more voids (SE-50; PE-18).
49. Student’s Team reconvened on January 13, 2011 to develop Student’s IEP (SE-49). Sutton proposed an IEP covering the period from January 13, 2011 to January 12, 2012 with continued placement in Sutton (SE-51). Team members reported having seen incidents of Student’s anxiety in the beginning, but noted that these occurrences had decreased as Student became more familiar with the school (SE-51). The Team acknowledged receipt of Dr. Bakow’s report regarding Student’s anxiety and apprehension but questioned his conclusions since he had never observed Student in Sutton, and Sutton personnel was not seeing anxiety from Student in school (SE-51; Austein). Regarding opportunities for socialization, Student participated in structured socialization activities in school and moved throughout the building during the day, which gave him opportunities to interact with different individuals (SE-51). In School, he was successfully voiding in the toilet 100% of the time (SE-51; Austein).
50. The January 13, 2011 Team could not implement assistive technology goals at that time because they were still awaiting the evaluation to be completed. The only change to the IEP was the addition of a once per week, thirty minute counseling session proposed in response to Parents’ concerns over Student’s anxiety (this counseling session would replace the social pragmatics time Student spent with the school adjustment counselor). Sutton further requested consent to photograph and videotape Student to show Parents his progress but Parents did not consent and did not sign the IEP until March 2011 (SE-51; Austein).
51. On January 7, 2011, Dr. Chaskelson wrote to Parents regarding her consultation services. Dr. Chaskelson was going to act as a consultant, but Sutton did not retain her as she and the superintendent “mutually agreed that [her] services should stop and resume at a time in the future, when it is useful for the district to receive consultation relating to [Student’s] neurological conditions” (PE-42; Parent).
52. On February 3, 2011, Parent wrote to Austein with concerns that the January 19, 2011 N-1 did not accurately reflect the Team meeting or the Student’s needs. Particularly, Parent raised concerns that Sutton was not properly addressing Student’s anxiety, indicating that Student is “tense, barely speak[s], picks his nose and bites his nails” when he is picked up from school by Mother (SE-52; PE-27). Also, no one from Sutton had discussed the issue with Dr. Bakow. Parent opined that anxiety within the school was the cause of Student’s recent change in brain activity indicating his epilepsy may have returned. Parent was also concerned about Student’s toilet training and questioned Sutton’s assertions that Student was “100% toilet trained” since he was not having any bowel movements during school hours, and had continued to defecate in his pants at home and in the community. Parent further disagreed with the sitting for all voids policy, stating that it was outside cultural norm for males to sit while urinating. Parent noted that Student was still not receiving assistive technology, and had begun to “hurl[] strings of profanity” at his Mother (SE-52; PE-27). Parent attributed the inappropriate language to the interaction with his peers (SE-52; PE-27).
53. Sutton responded to Parent’s letter, reaffirming its efforts to work with Parents to meet Student’s needs (SE-54; PE-27). In regard to Dr. Bakow’s report, Sutton responded that his report was short with no indication for the basis of his conclusions. Sutton again requested permission to videotape and photograph Student to show Parents that he does not exhibit anxiety within the school. Sutton also pointed to school data showing that Student’s toileting had improved in the school. Sutton further responded that the assistive technology evaluations had yet to be completed. Regarding the allegations that profanity was learned in school, it asserted that Sutton does not permit profanity and that it was unreasonable to assume that Student learned that language in school (SE-54; PE-27).
54. On February 28, 2011, Bianchi sent Sutton graphs showing Student’s toileting success, and also sent the “Parent Training Feedback Sheets” that Bianchi completed during her visits to the home (SE-55; Bianchi). Bianchi noted that although Student’s bowel movement success was taking time, “the data represent[ed] some progress” (SE-55).
55. Bianchi had difficulty completing the toileting training with Student because of Parent cancellations during January and February 2012 (PE-48; Bianchi). Her toileting summary and recommendations report dated March 1, 2011, reflects that Student had successfully used the bathroom for bowel movements eight times over a two week data collection period, though he had accidents in his pants and in bed. While Bianchi was impressed with Student’s ability to communicate, initiate, and urinate independently, she was concerned that the focus of the program had been overlooked. That is, Student needed to sit on the toilet at proper intervals for the proper amount of time, use the timer, increase the number of bowel movements on the toilet, and Parents needed to engage in correction trials. Bianchi continued to stress the need for consistency for the program to be successful (SE-57; Bianchi). She forwarded a copy of the Summary of the Toilet Training protocol status to Parent, asserting her confidence in Mother’s and Student’s capacity to complete “all components of the recommended program . . . if all components [were] run exactly as prescribed” (SE-58).
56. On March 2, 2011, Iadarola wrote a letter expressing concerns that Student’s toileting skills were becoming prompt dependent even though he had initially met with great success within the school setting (SE-59; PE-19; Iadarola). The letter also commented on Student’s positive accomplishments. She noted that Student was beginning to use two different bathrooms in school and “on two occasions [he had] initiat[ed] toileting without prompt” (SE-59; PE-19). Iadarola opined that Student was “ready to continue towards independent toileting including initiating and gaining awareness of his body signals and communicating his needs to staff” (SE-59; PE-19). Iadarola testified that Student had not regressed in toilet training since returning to Sutton in June 2010 and stated her agreement that there was no physical limitation calling for Student to sit while urinating. She suggested that as Student demonstrated success for all voids he could be trained to use a urinal; urinating while standing would be the following step in the toileting program (Iadarola). In her report of March 2, 2011 she explained that

[Student] was switched to seated urination to help desensitize him to sitting on the toilet in hopes of fostering more successful bowel training in the home environment. Home data sheets demonstrated [Student]’s regular bowel schedule to be late afternoon/early evening. [Student] adjusted to the changes in his school toileting program very quickly and successfully (SE-59; PE-19).

1. On March 8, 2011, Parents partially rejected the IEP (SE-51) but consented to Student’s placement in Sutton’s intensive special needs classroom (SE-56). Parents raised their concerns about the remainder of the IEP in a letter dated March 8, 2011, asking for re-evaluation of the toileting goals, and many academic goals which Parents found not suitable given Student’s potential, and noted that there was no transition plan ready for implementation (SE-60; PE-27). Parents again stated their opinion that Sutton’s goal regarding Student’s anxiety was inappropriate because Student should not be trained to deal with his anxiety, but rather, the causes of his anxiety should be identified and eliminated. Parents refused Sutton’s request to videotape and photograph Student to document his progress (SE-60; PE-27).
2. On March 14, 2011, Sutton responded to Parents’ concerns (SE-63; PE-27; Austein). Sutton reiterated Student’s success with toileting within the school and “encourage[d] Parents to implement the recommendations and protocol that [was] developed to assist [Student]” (SE-63; PE-27). Sutton stated that their goal to address Student’s anxiety was appropriate because it was “unlike[ly] that all anxiety provoking issues can ever be eliminated” and he should rather be provided with strategies to deal with anxiety so can access the curriculum (SE-63; PE-27). The Team planned to address assistive technology at the next meeting once the final technology report was completed (SE-63; PE-27). The assistive technology evaluation took a long time because Student had to be evaluated in multiple settings, at multiple different times (Austein). The transition plan would also be completed at the next meeting. The Team intended to integrat Student into the special needs classroom as previously discussed (SE-63; PE-27).
3. On March 17, 2011, Sutton completed a transition planning form. They forwarded the form to Parents on April 4, 2011. Sutton reported that they were “slowly transitioning [Student] to be part of the [Middle School] intensive special education classroom rather than a one-to-one setting with his assistant” (SE-53).
4. On April 12, 2011, TechAccess completed Student’s Assistive Technology Evaluation. TechAccess recommended consistent computer access, adapted computer hardware, and academically based computer software (SE-64; SE-65; PE-13).
5. On April 17, 2011, Parents sent a letter to Sutton’s Superintendent requesting that Fast ForWord software be added to Student’s curriculum. Parents explained that Student had met with Crystal Sargent, M.A., CCC-SLP who had given him a preview of the software. Parents enclosed a 2009 report from the Scientific Learning Corporation that offered an overview of Fast ForWord products, a 2007 Scientific Learning Corporation report, and Scientific Learning case studies regarding various school districts use of Fast ForWord and noting the success of the program with special needs students (PE-22). None of these reports offered any indication that apraxic students experienced particular success with Fast ForWord, although Parents contacted Fast ForWord to inquire specifically about this (PE-23).
6. Olshefski completed a Chatterboxes report on April 22, 2011, which the school received on September 21, 2011 (SE-74). Student’s receptive and express language, motor speech/articulation, and phonological awareness skills all continued to show steady improvement. So as to increase communication effectiveness and speech intelligibility in the community and at home, Olshefski recommended continued speech and language therapy five times per week. Olshefski was aware that Student received speech and language therapy in Sutton (SE-74).
7. On May 6, 2011, Sutton received a letter from the Title I Director of Everett Public Schools (Everett) regarding Fast ForWord recommending Fast ForWord “for any student who is struggling in any subject” , and commenting on the success of the program for English as a second language students in Everett (PE-46). It also noted that special education students did well on Fast ForWord (PE-46).
8. The team reconvened to discuss the assistive technology report and to have a general progress update on May 12, 2011 (SE-66; SE-67). Following the meeting, the team proposed to amend the IEP to include the assistive technology supports, devices, and software. The amended IEP also increased reading and math goals to prepare Student for MCAS testing that will occur during his sophomore year (SE-67). Parents did not sign the IEP at this time (SE-70).
9. Student did not attend Sutton’s extended school year program during the 2011 summer (SE-68; Austein).
10. On July 25, 2011, Sutton again referred Student to Pathways Academy without committing to funding this placement and stating that Student was “being appropriately supported within the district in a less restrictive placement” (SE-69).
11. As of August 23, 2011, Parents had not yet responded to the IEP following the May 2011 Team meeting (SE-70).
12. Barbara Burek, a licensed special education instructor, (C.V. at SE-106) became Student’s teacher in the special intensive needs classroom for the 2011-2012 school year (Burek). Student was no longer in his own classroom although his schedule continued to be highly individualized (Davis; Burek). The intensive special needs classroom serviced nine students (seven boys and two girls), and was assisted by a job coach and 5 one-to-one aides (Burek). Burek described the nine students in the following manner: some were nonverbal, some had intellectual disabilities, some were high functioning autistic, some were in the self-contained classroom all day, and others were mainstreamed for part or all day with the assistance of a one-to-one aide (Burek). Burek testified that when Student started in this classroom, he needed prompting to interact with his peers, but as the year went on he developed a relationship with at least three other students for whom he asked by name when he came into the classroom (Burek; Davis).
13. Ms. Davis continued to be Student’s one to one aide during the 2011-2012 school year. Ms. Davis is not certified in special education. She received ABA training and became ABA certified in November of 2010 (Davis). Ms. Davis testified that Student was friendly with four or five other special education students and a few other non-disabled students who came into the intensive special needs classroom during the day (Id.).
14. Student’s daily schedule began with a whole class morning meeting during which they reviewed the weather, day, date, week, and current events (PE-36; Burek). This was followed by Student engaging in a computer-based Edmark reading program, during which he paired verbal words with written words to improve his sights words. Student’s first lessons, however, began with pictures. Burek chose this program to improve Student’s sight words, but neither she nor Austein could point to any specific research that supported Edmark for a child as Student (Burek; Austein). Student also used a News 2 You program that integrated current events with building language and augmenting reading comprehension. Student’s schedule also included money management (how to use coins and dollar bills), offered social pragmatics during snack time, math and 20 minutes of science per week which followed an adapted version of the Massachusetts Curriculum Frameworks (Burek). Student did not receive homework during the 2011-2012 school year (Davis). It was proposed that Student participate in the alternative portfolio MCAS assessment (Burek). Student did not participate in the lunch-bunch program during the 2011-2012 school year because construction in the cafeteria was overwhelming for him (Davis).
15. Sutton offered a vocational program for the students in Student’s class, which involved school based jobs in the library, mail room, and the cafeteria. The vocational program was designed to help students attain and practice skills that they could utilize at home, but Student did not participate in the vocational program because Parents could not see the value in the training program offered (e.g., stocking shelves). Later, students engaged in community jobs to which they would be accompanied by a coach (Parent; Burek).
16. During the 2011-2012 school year, Student used a bathroom located across the hall from the classroom (Burek). At the direction of the School Principal this bathroom contains no icon or signage that marks it as a bathroom, so as to discourage others from using it (Burek).
17. Student worked daily with Lisa Hughes, Sutton’s CCC-SPL, who has had experience working with both apraxic children and adults (Hughes). Hughes focused on Student’s expressive and receptive language and articulation skills over the 2011-2012 school year in both individual and group settings. She described the other children in Student’s group as having varying language levels, some of whom were good role models for Student to emulate. Additionally, during the group sessions, students had opportunities to practice social pragmatics including turn-taking, greetings, asking and responding to questions, and playing games (Hughes).
18. Sometime on or around September 13, 2011, Burek informed Austein that Parents had notified Sutton that Student had begun to have seizures again over the summer of 2011(PE-16). On September 14, 2011, Ann Zimage, Sutton’s school nurse, contacted Parents regarding this issue. Zimage placed Student on a seizure alert (Zimage). Dr. Bakow opined that Student’s seizures were connected to the level of anxiety Student was experiencing (Bakow). Christiano testified that she saw evidence of anxiety in Student at the beginning of the 2011-2012 school year when he was transitioning into the new setting, but did not see any evidence of anxiety after October 2011 (Christiano).
19. Parents requested to observe Student in an academic classroom and the observation was scheduled for one-hour during the morning of Monday, September 19, 2011 (SE-72).
20. The Team reconvened on September 21, 2011 to offer an opportunity for the new Team members to meet and to review Student’s IEP (SE-75; SE-76). Parents presented a list of concerns and shared reports from a psychologist, neurologist, and OTR/L which described Student’s abilities. Some of these evaluations, issued by Gregory Holmes, M.D. and Susan L. Ross, OTR/L IMC, described Student as falling within the autism spectrum (SE-76). This was the first time Sutton had seen the term autism spectrum disorder relating to Student (Austein). Parents expressed concerns about the disagreement between Sutton and the independent evaluators regarding Student’s abilities (SE-76; SE-77). Parents requested that the new psychologist speak with Dr. Bakow, and she agreed to do so.
21. At the meeting, Parents also raised concerns that Student was still not able to read and again proposed the Fast ForWord reading program (SE-76; SE-77; Austein). Sutton had received mixed reviews from other school districts regarding the effectiveness of the Fast ForWord program, concluding that it would not be effective for Student (SE-76; Austein). Nonetheless, the speech-language pathologist, occupational therapist, and special education teacher agreed to look into it further.[[2]](#footnote-2) Austein noted that Parents had not requested that Student be assigned to work with a reading specialist prior to this meeting (Austein).
22. Parents disapproved of the increase in the amount of time that Student spent with nondisabled peers and Mother specifically disagreed with Student being grouped with “mentally retarded” students as she did not think that they were an appropriate peer grouping for Student (SE-76; Austein). Austein disagreed with Parent’s use of the term “mentally retarded” and explained that Student had been placed in an intensive special needs classroom which met his needs appropriately (SE-76; Austein). In light of Parents’ concerns, Student’s special education teacher, occupational therapist, and adjustment counselor agreed to explore and implement more opportunities for inclusion.
23. On September 25, 2011, Parents partially rejected the IEP, accepting the implementation of the assistive technology recommendations, Student’s participation in athletics, and the Edmark program, conditional on an evaluation by a reading specialist experienced with children with apraxia (SE-76).
24. Student’s athletic participation in track and field never occurred. Burek thought Parents would speak directly with the coach to implement this program (Burek). Furthermore, since Student left school early several times per week and activities such as track and field were offered after school, Student would not have been in school at the time required for him to participate in the athletics program during the 2011-2012 school year (Burek).
25. On October 6, 2011, Student had an intake assessment at Autism Intervention Specialists (AIS) (SE-102). At this time, Sutton was unaware that Student would receive services from AIS (SE-89). Prior to Hearing, Sutton had not seen the AIS documents and reports (Austein).
26. On October 11, 2011, Student received a progress report indicating that he had obtained B’s in all courses which report included positive teacher comments (“work reflects much effort,” “participates with enthusiasm”) (PE-31).
27. On October 12, 2011, Parents did not allow Student to attend a theater performance outside school, opting for Student to work on his literacy and math skills instead (SE-31). Parent testified that given Student’s toileting issues she was concerned about how the school would appropriately address this need during an outing. Parents did not want Student to have an accident on one of these outings and be embarrassed and ashamed in front of his peers (Parent). Student did not participate in any community outings during the 2011-2012 school year (Burek).
28. One of the after school activities available to disabled and non-disabled students in Sutton is the cooking club, in which Student participated during the 2010-2011 school year (Burek). The purpose was to foster friendships among the students. Participation was offered to Student again for the 2011-2012 school year. On October 17, 2011, Parents informed Sutton that Student would not participate in the club meeting scheduled for October 20, 2011(SE-79). Burek forwarded to Parents the remainder of the dates for the cooking club but Student did not attend any of the meetings (SE-83).
29. AIS completed two more assessments of Student at his home on October 18, 2011 (SE-103). AIS’ report identified 20 goals on which they planned to work with Student (SE-105). AIS’ logs indicate that toileting was one of the skills on which they worked and according to Parents, this was the focus of AIS’s work with Student (PE-32; Parent). Male AIS staff showed Student how to urinate standing up but at the time of the Hearing Student still had trouble aiming while urinating (Parent).
30. AIS noted Student’s noncompliant behaviors. Iadarola testified that she had never seen roughness before from Student in Sutton (Iadarola). Burek also testified that she had not seen Student engage in protest behaviors (Burek). No witnesses from AIS offered testimony at the Hearing.
31. Parents sought assistance from AIS in Student’s morning routine (Parent). Parent testified that Student was sometimes resistant in the morning and needed assistance tying his shoes, putting toothpaste on his brush, and taking his medication (Parent). During the time that AIS provided morning services to Student, he arrived at school on time most of the time (Parent).
32. In mid-October 2011, Austein emailed Sutton’s counsel and Superintendent to discuss the “the possibility of [] going on the offensive and requesting a hearing” before the BSEA (PE-49).
33. On October 25, 2011, Parent wrote to Sutton raising concerns about the accuracy of the N1 issued after the September 21, 2011, Team meeting. Parent stated that: Parents should not have to officially request the service of a reading specialist because it was the District’s responsibility; Sutton did not properly explore Fast ForWord; Sutton’s approach to Student’s literacy skills was inappropriate; and Student should receive extended day services to supplement his reading lessons (SE-81). Parent noted that the N1 should also include the fact the school adjustment counselor was going to find a male peer mentor for Student, that Student was learning inappropriate language in Sutton and calling his Parents inappropriate names, Student’s toileting issues, and Sutton’s failure to respond to the reports from the Student’s neurologist, OTR/L, and Chatterboxes. The N1 should also reflect the manner in which the Special Education director “chastised” Mother when she used the term “mentally retarded” (SE-81). After receiving this letter, Austein spoke with Student’s teacher, who confirmed that inappropriate language does not happen in her classroom (Austein). Burek testified that she has never heard Student use inappropriate language in school (Burek).
34. Austein responded to Parent’s letter on October 25, 2011 stating that FastForWord had not received positive support that it would augment Student’s reading abilities. In contrast, Student was making progress with his then current reading program so Sutton would not pursue Fast ForWord further (SE-82; PE-27; Austein). Regarding extended day services, Austein replied that Sutton would consider them when Student was present in school for full days (SE-82; PE-27; Austein). Sutton agreed to look for a male mentor, but requested Parents “description of [Student]” before moving forward (SE-82; PE-27). Austein also explained that Sutton did not condone inappropriate language and the staff did not know where Student would have learned profanity. She noted that Sutton continued to support Student’s toileting needs, but stated that a proper program was still not being implemented at home (SE-82; PE-27; Austein). The letter also acknowledges receipt of reports from Dr. Holmes, Susan Ross and Chatterboxes and explained that the history was shared for “informational purposes only” (SE-82; PE-27). In a reply submitted by Parent, Parents only addressed the issue of the male mentor (PE-27). Parents were not aware that before Sutton could provide Student with a peer male mentor, Parents would need to take further action by providing “a description of [Student]” as the Parents opined that the whole Team understood what Parents wanted in a peer male mentor (PE-27; Parent).
35. On October 26, 2011, Student was seen by Sutton’s nurse after receiving a call from the classroom staff concerned that Student had had a seizure, indicated by some facial dropping and drooling. Student remained responsive throughout the incident (PE-53; Zimage).
36. Burek testified that she was aware of Student’s seizures, and saw him have one in the classroom one time after lunch. She did not contact Dr. Holmes to discuss Student’s seizures and also, did not contact Dr. Bakow regarding Student’s anxiety. Though she was not given explicit consent, she was aware that Sutton had consent to speak with Bakaw (Burek).
37. On November 15, 2011,Parent contacted Burek via email and asked why Student “wet his clothes so frequently in school” (PE-29). Burek responded that Student was successfully urinating in the toilet, but sometimes urine got into his pants because he leaned back as a “response to his feeling of success” (PE-29). Burek also noted that she had spoken with Iadarola and they felt that “in order to foster greater success male modeling at the method of voiding completion in the toilet may assist [Student]” (PE-29). Iadarola testified that the male modeling she was referring to was to be provided by Father, not a male within the school (Iadarola).
38. In November 2011, Parent emailed Burek stating that he thought “male assistance may be more appropriate” for assisting Student in the bathroom (PE-49). On November 15, 2011, Burek acknowledged Parent’s concern that Student be provided male model for toileting (PE-29). Burek agreed it would be more beneficial if Student had a male model, but Sutton did not have any male aides able to provide this service (Burek). Dr. Bakow testified that in his opinion a male model was necessary and stressed that Student needed to learn to stand while urinating (Bakow).
39. Parents shared Austein’s letter, addressing among other issues the appropriateness of Fast For Word for Student, with Sargeant who opined from her interactions with Austein that Sutton was not interested in implementing Fast ForWord for Student. Sargeant noted that few districts funded Fast ForWord, “unless they choose it for a general reading curriculum for their whole school” (PE-43). Sargeant further stated that she felt Austein had been “aggressive” in her questioning and she had not expected to have to defend Fast ForWord (PE-43). Sargeant recommended the first part of Fast ForWord to everyone because it offered an “excellent foundation” (PE-43).
40. Student met with Dr. Holmes on December 14, 2011. The week prior, Parent told Dr. Holmes that Student had a seizure. Dr. Holmes stated it seemed to be a “simple partial seizure” and explained that Student’s “EEGs ha[d] demonstrated generalized spike and wave discharges” (PE-39). Dr. Holmes noted in his report that Parent opined that Student had progressed tremendously since starting AIS services in the areas of language, eye contact, toileting, and social skills (PE-39). According to Dr. Bakow the only time he saw positive progress in Student was after he started at AIS although he never observed Student in Sutton (Bakow).
41. Sometime on or around January 12, 2012, Sutton received a rescinded placement page for Student’s IEP covering the period from January 13, 2011 to January 12, 2012 (SE-86; SE-87; PE-2; PE-49). In it, Parents requested that Student be removed from the resource room where they believed that Student was learning “adverse behaviors” and inappropriate language. Parents also raised concern that Student was being toilet trained with the assistance of female staff members (SE-86). Nelson testified that he did not recall whether Parents raised their concerns regarding the female aide providing the toileting training during the preceding school year but could also not recall if he had told Parents that a female, Davis, had assumed responsibilities for implementing the toileting program (Nelson). He noted that Davis had been signing the daily communication logs that went home every day (Nelson).
42. Beginning in January 2012, Dr. Bakow testified the number of toilet accidents Student had in his office had increased, with three urinations from January to June 2012 (Bakow).
43. On January 9, 2012, Student called Dr. Bakow an “a-- hole” during a therapy session (Bakow). Dr. Bakow opined that Student had learned this language in Sutton. That same day, Student had a urination accident later during the session (Bakow).
44. Student’s Team met on January 26, 2012 for an annual review of Student’s progress, program and placement (SE-87; SE-88). Parents inquired what had been done to address Student’s anxiety, and Sutton informed them that Student had been provided with an arousal meter to assist Student understand his physical arousal level. The “alert meter” had three arousal levels: too low, just right, and too high (Iadarola; PE-26). Iadarola testified that Student had done well with the mood meter and stated that when asked “How does your body feel?” Student could identify when his arousal level was too high or still low, but was still working on getting the level to “just right” (PE-26; Iadarola). Dr. Bakow opined that the alert meter would not be effective (Bakow).
45. At this meeting, Christiano, the school adjustment counselor, stated that she had attempted to contact Dr. Bakow as Parents requested, and had used the cell phone number provided by Parent, but Dr. Bakow was not happy and asked her not to use that number again (Christiano).

When the team reached the area of academics, the discussion escalated (Austein). The N1 states that:

[Mother] says holding up the reading binder, “Sh--! This is appalling. He is 15 year[s] old and he can’t read. ‘Sh--! What are you doing? I want the principal here, I want the superintendent, the school committee.” The parent turned her attention to the Team chair and questioned her role (SE-87; SE-88).

1. Even though the Team had not finished reviewing Student’s progress, an hour into the meeting they switched to the IEP development. At the meeting, Sutton was openly told that Student had been receiving AIS services (SE-89). Sutton had previously noticed that Student was being dropped off in the morning by a non-family member, and had seen the reference to AIS in a report by Student’s neurologist (SE-87; SE-88). Sutton did not contact AIS to discuss their involvement with Student. Parents continued to raise concerns regarding reading stating that Sutton was “making excuses for [Student’s] inability to read” (SE-87; SE-88). Parent stated “You’re sad. . . . How do you sleep at night?” to Ms. Austein and repeated “Sh--!” multiple times during the meeting (SE-87; SE-88).
2. The IEP noted that Student was having difficulty taking his lunch out without prompts (SE-89). Burek testified that Student was not capable of opening his own lunch (Burek). Christiano, who had facilitated the lunch-bunch program in the 2010-2011 school year, did not opine that this was evidence of regression given that Student was in a new setting with new people (Christiano). Parent testified that at home Student got everything himself, used the toaster, and needed minimal help to read the buttons on the microwave (Parent).
3. The January 26, 2012 Team meeting lasted over two hours, and ended with the intention of reconvening to finish developing the IEP (SE-89). Sutton planned to have a BSEA facilitated Team meeting (SE-87; SE-88). At the conclusion of the meeting, the SLP’s binder was missing. Parent testified that she had taken it accidently and thus, returned it to Student’s aide the following week “without explanation or apology” (SE-87; SE-88). Parent did not understand why Sutton had included this incident in the N1 (Parent).
4. The school-to-home communication log sheet for January 27, 2012 indicated that Student “kept banging the screen with his head and hand” so the aide turned the computer off (PE-38). The communication log is completed by the one-to-one aide and reviewed by Burek before it is sent home (Burek). Burek testified that she considered the aforementioned behavior as a sign of Student’s anxiety (Burek). Davis testified that at times Student pretended to kiss or hit the screen (Davis). According to Dr. Bakow, this nonverbal expression (banging the screen) demonstrated that Student was not appropriately placed in Sutton (Bakow).
5. On February 4, 2012, Parents told Sutton via e-mail that they would not utilize a BSEA facilitator for a Team meeting and that they would review the IEP and return it with comments (SE-89; PE-29). Parents also expressed their frustration that the meeting could not be finished in one day disregarding Parents’ needs for work and other plans (PE-29).
6. On February 9, 2012, Burek wrote a note home to Parents explaining that Student’s underpants had been changed when Burek noticed an odor following adaptive physical education and found “soil marks in the bank of his underwear” when she took him to the bathroom (PE-30). She noted that Student’s pants were dry and that he indicated (by shaking his head no) that he did not need to have a bowel movement. Burek changed his underwear (PE-30).
7. Parent wrote Sutton via email to inform them that on February 9, 2012, Student went home “with feces coagulated in his buttocks” (PE-30). Parent testified these feces had hardened and that she believed that it had happened during Student’s adaptive physical education (PE-30; Parent).
8. On February 13, 2012, the school-to-home communication sheet noted that Student “sat with his hands over his face” which according to Dr. Bakow was likely a demonstration of Student’s frustration (PE-38; Bakow). Dr. Bakaw opined that the Sutton staff did not know Student well enough nor was the staff clinically trained to understand what the behaviors displayed by Student (who is greatly non-verbal) meant (Bakaw).
9. The Team was not reconvened with Parents but on February 13, 2012, Sutton forwarded the 1/26/2012 to 1/25/2013 IEP and summary of the meeting to Parents (SE-89). By then Sutton had attempted to communicate with AIS multiple times to no avail. The proposed IEP offered the following direct services:
* speech/language (individual services provided by the speech language pathologist for 30 minutes 3 days per week);
* speech language (expressive/receptive language services for 30 minutes 3 days per week);
* academic/behavioral support (provided by the one-to-one aide for 6.75 hours 5 days per week);
* academic instruction (provided by the special education teacher or aide for 2.5 hours 5 days per week);
* physical therapy (provided by the physical therapist for 30 minutes 1 time per week);
* adaptive physical education (provided by the adaptive physical education teacher for 30 minutes 1 time per week);
* occupational therapy (provided by the OT/ one-to-one aide for 30 minutes 5 times per week)
* life skills (provided by the special education teacher or 1:1 aide for 330 minutes);
1. The IEP also contained consultation services provided by the school adjustment counselor, occupational therapist, 1:1 aide, and other school staff (SE-89).
2. On February 14, 2012, Parents contacted Austein via email stating that, effectively immediately, Student should be placed in the standing position for urination. Austein disseminated this information to the rest of the Team (PE-50). Iadarola communicated with Austein via email, asking if the change should be implemented and stating, “I prefer the standing and am fine with making the switch effective immediately” (PE-49; PE-50). Sutton did not implement the change at this time as they wanted to wait to speak with AIS (PE-40; PE-50).
3. Parents wrote to Austein on February 15, 2012, disagreeing with the N1’s depiction of the January 26, 2012 N1 (PE-27). Parents found it to be inaccurate, misleading and misrepresenting the meeting and them. Parents opined that it showed “an agenda on the part of Sutton to portray us in as negative a light as possible while portraying Sutton as overly accommodating . . .” (PE-27). They raised their specific objections to the IEP and restated their concerns regarding Student’s anxiety, reading, and toileting needs. Parents also stated that the Special Education Director was “literally spitting [she was] so angry” (PE-27).
4. Parents requested that Student be instructed in American Sign Language (ASL) (SE-89; PE-27). Iadarola emailed Austein that she thought Student’s apraxia would affect his ability to use ASL. Iadarola stated that she could teach Student a modified version of ASL, but also believed adding ASL could make communication more difficult (Iadarola). Hughes agreed that adding sign language to Student’s communication may make it more challenging. She had never observed Student use signs independent of verbal communication (Hughes). Sutton could not find a Parental request for Student to be taught ASL from June 2010 until February 2012 (PE-49).
5. Sometime around mid-February, Parents that requested Sutton refer Student to Woodstock Academy. Sutton informed Parents that it needed assurance that Woodstock could implement the IEP before making the referral (PE-34).
6. On February 27, 2012, Parents refused placement in Sutton’s intensive special needs classroom and rejected the 1/26/2012 to 1/25/2012 IEP Parents enclosed a letter accompanying their rejection (SE-89; PE-27). They restated all of their concerns and questioned Sutton’s truthfulness in wanting to work cooperatively with Parents. According to Parents, Sutton had ignored all of their requests. Parent added, “Insofar as you chose to issue the IEP without any input from us, however, it is clear that you did not desire our participation in its development” (SE-89; PE-27).
7. Sometime in late February, Parents insurance stopped covering Student’s AIS Services (PE-16). When Sutton contacted AIS shortly thereafter, to get information about the services delivered, it was informed that Student was no longer being serviced by AIS (PE-16).
8. In March and April, Parent continued to raise toileting concerns, informing Sutton when Student had accidents at home. Sutton responded to these concerns through email and also through legal counsel (SE-90; SE-91; SE-92; SE-93; SE-94; SE-95; PE-28; PE-29; PE-30; PE-49).
9. Iadarola responded to Parents’ concerns by increasing the amount of sitting time in the bathroom prior to dismissal so that Student could have a bowel movement if needed. The protocol that Bianchi had developed was still being implemented, but the frequency of bathroom visits had decreased (Iadarola).
10. On March 12, 2012, Parents requested that Sutton send referral packages to all potential in-state private placements. Parents also requested that Sutton begin to and continue to pay for Student’s AIS which Parents found to be positive in addressing Student’s ADL needs (PE-34).
11. During Student’s therapy session with Dr. Bakow on March 12, 2012, Student pushed Dr. Bakow, and while physically restrained tried to bite Dr. Bakaw. Student remained restrained for most of the session. Student also had an urination accident in the office on this day (Bakow).
12. On March 15, 2012, Burek emailed regarding “skidmarks” in Student’s underpants (PE-50). When traces of feces were noticed in Student’s underpants, requiring a change of underwear, Burek and Davis noted their observations in the school-to-home communication log using (PE-38). Parents did not think that the term “skidmarks” was appropriate language to use for communicating (Parent).
13. On March 31, 2012, nearly two and a half years after her previous observation, Ronstadt observed Student and informally assessed him (PE-8; Ronstadt). Student walked up to Ronstadt and shook her hand. Ronstadt saw improvement in Student’s engagement, comfort, ability to follow directions, and pencil control. She did not see an improvement in Student’s rate of processing or the amount of prompting Student needed for decoding (PE-8; Ronstadt). Ronstadt testified she would have expected greater improvement after two and a half years (Ronstadt).
14. On April 6, 2012, Dr. Nazarian, Pediatrician at University of Massachusetts Children’s Medical Center, issued a report opining that per Parents’ report Student was experiencing anxiety in school and this was responsible for Student’s failure to resolve his toileting issues. Dr. Nazarian consulted with Student’s therapist who also agreed that Student was in need of a home-based program. Thus, Dr. Nazarian concluded that it was “medically necessary that [Student] remain out of school for at least 14 days” to resolve his encopresis (SE-97; PE-11). Sutton’s counsel informed Parents via letter dated April 17, 2012 that the pediatrician could not make this determination (PE-28; Parent).
15. Parents informed Sutton on April 10, 2012 that Student would not attend a field trip to a baseball game because of his encopresis (PE-30).
16. On April 12, 2012, Sutton’s psychologist and school adjustment counselor drafted a document to gather data capturing Student’s alleged anxiety (Christiano). The recording sheets reflected what Student generally did and did not do while anxious (i.e., placed his hands under his arms, independently initiated interactions with others, independently initiated activities without verbal and/or non-verbal prompting, and bit his nails) (SE-98; PE-28; Christiano). Davis testified that she has seen Student bite his nails and put his hands under his arms when Parent picks him up at the end of the school day but she has not seen this behavior in school (Davis). Sutton forwarded this plan to gather data to Parents on April 17, 2012 but only collected data for a short period of time before discontinuing data collection when Student did not show any signs of anxiety for two to three weeks (SE-100; Christiano).
17. As Parents’ concerns over Student’s toileting and anxiety issues increased, Sutton offered to conduct a functional behavioral assessment for Student’s morning routine. Sutton forwarded a request for consent to Parents labeling the request by acronym “FBA” but without providing an explanation of what FBA stood for (Austein). Parents understood what the FBA was but failed to follow up with Sutton’s request (Parent). Sutton had identified Dr. Jeff Bostic, M.D., Ed.D., as the individual to conduct the FBA (C.V. at SE-96; SE-106) but did not forward his CV to Parents (Austein). In a letter dated April 13, 2012, Parents raised concern that they needed “to determine if the persons you propose to conduct these assessments are appropriately qualified” (PE-27). At the time of this hearing, Sutton had not received consent from Parents to proceed with the evaluation (Austein).
18. On May 7, 2012, Student had an accident at the beginning of his therapy session with Dr. Bakow. While Dr. Bakow opined that this stemmed from what was happening in school, he never contacted anyone in Sutton to inquire. He stated that he did not want to contact the school because of the adversarial relationship between Parents, him and Sutton. He also testified that he did not need information from the school to assist him in his work with Student (Bakow).
19. Dr. Bakow testified that people cannot necessarily see anxiety. He explained that a person can be anxious while appearing “happy and willing” (Bakow). He concluded that Student was anxious from the themes and behaviors displayed by Student during the play-therapy sessions. He explained that during play therapy he engaged Student in nonverbal exercises, such as interactive games and play material, to assess Student’s state of mind from Student’s storylines. Dr. Bakow testified that Student’s stories engage themes of destruction when he has thrown toys, crashed airplanes, and hit dolls against toy toilets. He has also seen themes of sadness when for example Student has played with two dolls, and suddenly he stopped having the dolls interact with each other. Student does not always allow Dr. Bakow to engage in interactive play with him (Bakow).
20. Dr. Bakow testified that it was unlikely that other individuals lacking his clinical training would be able to pick up on Student’s nonverbal cues denoting anxiety, but conceded that Mother would be able to understand the nonverbal cues because of her years of experience with Student (Bakow).
21. At Parents’ request, Ronstadt observed Student for approximately forty minutes on April 19, 2012, during his reading block at Sutton (PE-9; Ronstadt). The session was shortened from one hour to forty minutes because Student arrived to school late after having a “difficult night” (SE-99). Student did not greet Ronstadt in the same friendly manner he had during her March 31, 2012 assessment, nor did he appear to have the same level of energy while engaging in his lesson (Ronstadt). Austein had introduced Ronstadt to Student, potentially unaware that Ronstadt and Student knew one another (Ronstadt). Ronstadt opined that Student was not making much progress and was concerned that his IEP lacked sufficient development on addressing executive functioning skills, oral language connected to orthography, independence, and engagement (PE-9; Ronstadt). Ronstadt testified that she has no experience writing IEPs (Ronstadt). Ronstadt noted that Student needed more prompting than he had required when they worked together, and stated that Student “seemed a little confused by [her] presence and insecure since everyone was looking at him” (PE-9; Ronstadt). After the session, Burek informed Ronstadt that Student required more prompting during her observation than he normally needed (SE-99; PE-9; Ronstadt).
22. A progress report completed on May 25, 2012 indicated Student’s “[g]reetings had expanded to additional conversational exchanges,” Student is “consistently cooperative and often [an] engaged participant” during speech, Student had a “warm, friendly demeanor and was eager to learn ways to appropriately interact with peers and adults,” he was an “excellent worker” during PT, Student “continue[d] to amaze” the APE teacher, and the counselor stated Student was a “wonderful young man” and “appear[ed] to be comfortable and [was] able to interact with others without issue” in school (PE-52). Hughes also testified to Student’s progress with his increase in mean length of utterances, ability to focus, and spatial relations (Hughes).
23. Bureck calculated Student’s grades by averaging all of his grades during the term. Student received a 75 during after the first term of the 2011-2012 school year (PE-37). The 75 Student received was based on the 20 minutes of science Student receives per week (Burek). Burek testified that Student continued working on 2-letter rhymes in June 2012 (Burek).
24. Christiano testified that her services would be better utilized as a consultant because Student had made significant progress with positive social behaviors (Christiano).
25. Dr. Bakow diagnosed Student with anxiety when he first started seeing Student in 2007, but opined that since his return to Sutton Student was experiencing a generalized anxiety disorder. Dr. Bakaw testified that when Student first started in therapy, he would hit, spit, and engage in other aggressive behaviors toward Dr. Bakow, but these behaviors abated over time, however increased following Student’s return to Sutton. He expressed concern that the increasing anxiety could lead to an avoidant personality disorder. Dr. Bakow was adamant that Sutton was not the proper placement for Student, but he did not have a different recommendation and stated that he could probably come up with one if asked for a specific recommendation. He agreed that Student required provision of speech language therapy, occupational therapy, physical therapy, and social skills development with opportunities for practice (Bakow).
26. Iadarola testified to Student’s progress since June 2010. Iadarola stated that Student was always willing and eager to participate in testing. She noted that Student could use both hands while sitting on the floor, string together three poses during yoga, write his name with 80% legibility in a designated place, wait to greet others, follow directions, pull up a zipper once it was engaged, modulate his voice for the environment he’s in, button ¾-inch buttons, make eye contact with peers, initiate greetings, and increase in the number of utterances to 5 words together. When Iadarola was going to work with other children, Student liked to pick these children up from their classrooms. He asked the teachers for the children by name. Iadarola estimated that Student missed 16 OT sessions during the 2011-2012 school year because he left early for what she understood to be doctor appointments. She testified that children with apraxia need regularity and consistency to become comfortable and make progress. Iadarola expects Student to continue to make progress. Iadarola was unaware of Student ever having defecated in Sutton within the past two years (Iadarola).
27. At Hearing Parent testified that she does not trust anyone at Sutton and does not believe she can ever gain that trust (Parent). Parents believed that Sutton is not the best program for Student (Parent).

**CONCLUSIONS OF LAW:**

The Parties do not dispute that Student presents with a constellation of special needs including apraxia, and that he is an individual with a disability falling within the purview of the Individuals with Disabilities Education Act[[3]](#footnote-3) (IDEA) and the state special education statute[[4]](#footnote-4). The Parties agree that Student is entitled to a free, appropriate publiceducation (FAPE).[[5]](#footnote-5) Generally the dispute involves whether Sutton has failed to offer Student a FAPE, whether it has violated Parents/ Student’s procedural rights, and whether Parents are entitled to reimbursement for private services and other costs. Parents dispute the appropriateness of the IEP and placement offered by Sutton for the period from 2011 through the end of the most recent IEP period, January 25, 2012 to January 25, 2013 (SE-89). In rendering my decision, I rely on the facts recited in the Facts section of this decision and incorporate them by reference to avoid restating them except where necessary.

The IDEA and the Massachusetts special education law, as well as the regulations promulgated under those acts, mandate that school districts offer eligible students a FAPE. A FAPE requires that a student’s individualized education program (IEP) be tailored to address the student’s unique needs[[6]](#footnote-6) in a way reasonably calculated to enable the student to make meaningful[[7]](#footnote-7) and effective[[8]](#footnote-8) educational progress. Following the First Circuit’s guidance in *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012), two Massachusetts federal district courts have embraced the “meaningful benefit” standard used in FAPE analysis. *I.M. ex rel. C.C. v. Northampton Public Schools*, 2012 WL 2206887, \*1 (D.Mass. 2012), citing *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012); see also, *Sebastian M. v. King Philip Regional School Dist*., 685 F.3d 79, 2012 LW 287788, \*3 (1st Cir. 2012)[[9]](#footnote-9).

Additionally, the program and services must be delivered in the least restrictive environment appropriate to meet the student’s needs.[[10]](#footnote-10) Under the aforementioned standards, public schools must offer eligible students a special education program and services specifically designed so that each eligible student may develop his/ her educational potential.[[11]](#footnote-11) Educational progress is then measured in relationto the potential of the particular student.[[12]](#footnote-12) School districts are responsible to offer students programs and services that provide meaningful educational benefit.[[13]](#footnote-13)

I note that at the beginning of the Hearing Sutton took the position that while it was defending the adequacy of the IEP, it was not seeking to change the status quo and therefore, it did not carry the burden of persuasion. The Supreme Court addressed the question of burden of persuasion in *Schaffer v. Weast*, 546 U.S. 49 (2005). In *Schaffer*, the parents requested a due process hearing to challenge the IEP developed by the school district. *Id*. at 55. The court held that

[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. In this case, the party is [Parents]. But the rule applies with equal effect to school districts: If they seek to challenge an IEP, they will in turn bear the burden of persuasion before an ALJ.” *Id*. at 62

The Court in *Schaffer* noted “at the onset that this case concerns only the burden of persuasion.” 546 U.S. at 56. The burden of persuasion concerns which party “loses if the evidence is closely balanced” while the burden of production concerns “which party bears the obligation to come forward with the evidence at different points in the proceeding.” *Id*.

Sutton does not dispute that it bears the burden of production but asserts that Parents carry the burden of persuasion pursuant to *Schaffer*. The Court of Appeals for the First Circuit addressed this issue in *D. B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26 (1st Cir. 2012), the court, citing *Schaffer*, stated

The burden of persuasion in the resulting hearing lies with the party challenging the IEP. *Id*. at 35.

The court clarified its position in a footnote stating

We understand [*Schaffer*] to mean that a school system does not incur the burden of proof merely by preemptively seeking an administrative determination that a proposed IEP would comply with the IDEA as in this case. In that instance, the school system is defending the adequacy of the IEP, not challenging it. (“[T]he rule applies with equal effect to school districts: If they seek *to challenge* an IEP, they will in turn bear the burden of persuasion before an ALJ.” (Emphasis added)). However, if a school system challenges an existing IEP as over-accommodating, the burden presumably lies with the school system. *Id*. at 35

In the instant case Sutton is not challenging the IEP but rather is “preemptively seeking an administrative determination that a proposed IEP would comply with IDEA”. Thus, as the party challenging the adequacy of Student’s proposed IEP and seeking to change the status quo, Parents carry the burden of persuasion pursuant to *Schaffer v. Weast*, 126 S.Ct. 528 (2005)[[14]](#footnote-14), and must prove their case by a preponderance of the evidence. Also, pursuant to *Shaffer*, if the evidence is closely balanced, in the instant matter, Parents will lose. *Id*.

Upon consideration of the evidence, the applicable legal standards and the arguments offered by the Parties, I conclude that the IEP offered by Sutton, with minor modifications, is reasonably calculated to provide Student a FAPE in the least restrictive environment.[[15]](#footnote-15) My reasoning follows:

**I Provision of FAPE and the 2011-2012 and 2012-2013 IEPs:**

There is no dispute between the Parties that Student requires special education, and related services including occupational therapy, physical therapy, speech and language, a toileting protocol, vocational opportunities, transition services (which include activities of daily living, and social skills development with opportunities for practice) in order to receive a FAPE (Bakow, Austein, Burek, Iadarola, Hughes). Parents also wish for Student to be taught how to read and that he attend college. Sutton disputes that college attendance may be a realistic goal at this time and instead, once Sutton ascertained Student’s abilities and limitations upon returning to Sutton in 2010, the Team developed IEPs designed to meet Student at his then current level of performance.

For purposes of this decision I embrace Parents’ position that Student is at least of average intelligence but that because of his severe apraxia and related disabilities, one cannot exactly know what he will be capable of achieving in time. At this juncture it is not likely that he will be prepared to attend college by the end of his entitlement to special education. While Parents are persuasive that efforts should continue to be expended to provide him with an education that increases the possibility of Student being able to attend college at some point in time (including continuation of reading instruction and access to the Massachusetts Curriculum Frameworks), his current level of functioning and the severity of his disabilities. Similarly, Student’s level of comfort and desire to partake in activities with other students with whom he feels comfortable, even if those students present with greater intellectual limitations than he, cannot be ignored. There are benefits to Student’s exposure to a variety of students especially from a social pragmatics standpoint.

While it is therefore possible that he may attend college in his lifetime, at present he is similarly compromised by his disabilities and therefore, any program capable of offering him a FAPE must address his needs as he presents today. Several areas, not the least of which is development and generalizing of toileting skills, must be at the forefront of his programming (as discussed later in this decision.)

The evidence shows that Sutton has attempted to provide FAPE and also that Student has made effective progress following his re-entry into Sutton in June 2010. Sutton offered Student the skillful committed services of Nelson during Student’s transition into Sutton. Nelson later became Student’s teacher and, together with Davis, continued to help Student through the transitional period and through the 2010-2011 school year. Both credibly testified as to Student’s behaviors when he first started in Sutton, including anxiety with toileting routines and being in a school setting. In the beginning he walked behind the aide, but in time was comfortable enough to walk by her side and initiate greetings with others (Davis, Nelson).

From an objective standpoint, Dr. Holmes found Student’s neurological examination to have shown improvement. His report notes that Student was getting “better and better”, continuing to show progress (SE-44; PE-39). Dr. Holmes and Dr. Fajnzylber agreed that Student was capable of more than he was able to demonstrate through formal evaluations (SE-44; PE-39), and Student’s improvement since returning to Sutton would suggest so.

The 2011-2012 IEP, rejected by Parents on or about January 12, 2012 shortly before it was due to expire, and the 2012-2013 IEP offered in February 2012, are almost identical (SE-51; SE-89). These IEPs, and specifically the 2012-2013 IEP target all of Student’s areas of need including academics, social pragmatics, speech and language, occupational therapy, speech and language therapy, life-skills, physical therapy and offer one-to-one academic support as well as a summer program (SE-89). Consistent with the credible testimony of Sutton’s witnesses, I find that both IEPs offer Student a FAPE.

Parents are however, correct that at this point, there are areas where Sutton’s program can be modified to further address Student’s ability to consistently demonstrate acquisition of skills (e.g., toileting skills) across all settings. Additionally, further direct intervention opportunities must be provided by the special education teacher throughout the day. At present, most of Student’s academic program is being delivered by the aide (Davis). Regarding peers, Sutton’s witnesses are persuasive that the peers in the intensive special needs classroom are appropriate at this time given Student’s current performance level, and additional opportunities for access to regular peers, such as those provided in 2011-2012, (e.g., lunch bunch) are found to be appropriate opportunities for social pragmatics instruction.

However, in order for Student to access a FAPE, he must attend his full day program in Sutton and must also be provided opportunities to participate in after-school activities including track and field or other appropriate athletics.

In sum, despite not attending his full program in 2011-2012 and partial gains due failure to participate in his full program and Parents’ failure to implement the toileting program as designed in the home, the progress reports for 2011 and 2012, as well as in the evaluations conducted by Dr. Holmes, persuasively document Student’s progress. Regarding toileting, Sutton offered and attempted to implement a comprehensive toileting program that included home-based services but its lack of complete success resulted from Parents’ failure to implement the program consistently in the home setting. The evidence supports a finding that Sutton’s proposed program conferred and will continue to confer Student meaningful educational benefit and that a fully implemented program with some modifications will offer Student a FAPE.

**II. Meaningful effective progress commensurate with Student’s abilities:**

The evidence shows that Student has made meaningful progress in his Sutton placement commensurate with his abilities his significant learning issues.

In addition to the neurological progress identified by Dr. Holmes, Student’s language has developed and his vocabulary now includes between 500 and 1000 words. He is able to use a computer touch screen although his command of the mouse is compromised by his motor apraxia. In school Student has had minimal toileting accidents although this is still a problem at home and in the community (Davis).

Burek testified that throughout the 2011-2012 school year, Student developed positive relationships with three of his classmates in particular (Burek; Davis). Student knew their names and sought to initiate interactions with them (Burek; Davis). Student also had a relationship with a middle school student who viewed Student as a role model (Davis). Student also said “hi” to the guidance counselor on a daily basis and greeted some paraprofessionals by name (Burek). Burek opined that Student will continue to make progress in Sutton (Burek). By the end of the school year in May 2012, Student’s “[g]reetings had expanded to additional conversational exchanges,” and was described as a “consistently cooperative” participant who was engaged during speech and was an excellent worker in PE (PE-52). Hughes (speech and language pathologist in Sutton) testified as to Student’s progress, noting increases in his ability to focus, spatial relations and in mean length of utterances (Hughes). Student presented with a “warm, friendly demeanor and was eager to learn ways to appropriately interact with peers and adults”. He “continue[d] to amaze” the APE teacher with his progress. According to his counselor, Student was a “wonderful young man” who “appear[ed] to be comfortable and [was] able to interact with others without issue” in school (PE-52).

Iadarola (Student’s occupational therapist in Sutton) testified to Student’s progress since June 2010. Iadarola stated that Student was always willing and eager to participate in testing. She noted that Student could use both hands while sitting on the floor, string together three poses during yoga, write his name with 80% legibility in a designated place, wait to greet others, follow directions, pull up a zipper once it was engaged, modulate his voice for the environment, button ¾-inch buttons, make eye contact with peers, initiate greetings, and increase in the length of utterances to 5 words. When Iadarola was going to work with other children, Student liked to pick these children up from their classrooms. He asked the teachers for the children by name. Iadarola estimated that Student missed 16 occupational therapy sessions during the 2011-2012 school year because he left early for what she understood to be doctor appointments. She testified that children with apraxia need regularity and consistency to become comfortable and make progress. Iadarola was confident that Student would continue to make progress in Sutton (Iadarola).

Similarly, Nelson, Davis, and Christiano testified to Student’s progress as described in the Facts section of this decision.

The record shows that Student arrived late and left school early approximately twice per week, presumably to meet with Dr. Bakow. In this sense, Parents have placed themselves in a difficult position to argue that Sutton failed to offer Student a FAPE. The fact that frequent early dismissals interrupted the occupational therapy session and prevented him from participating in after school activities cannot be ignored as these removals impeded Student’s ability to fully access the program and services specifically designed for him in Sutton. [[16]](#footnote-16)

Parents and Bakow argued that Student’s progress was solely the result of the after-school programs Parents provided. I find no evidence in the record to support this conclusion, and note Parents’ concession that progress has been made. There was no testimony offered by any of the private providers who have been providing Student direct services (e.g., AIS) other than Dr. Bakow, and Dr. Bakaw has had extremely limited contact with Sutton. Also, he has never observed Student in his program. Ronstadt testified that her informal assessment showed little progress but her expertise is limited (Lindamood-Bell) and she measured only one area of Student’s progress. Her observation was further impacted by the fact that Student arrived late that morning and did not appear comfortable with so many eyes on him (Ronstadt). While it is possible that the private services provided by Parents may have positively influenced Student’s progress, there is simply no way to ascertain the extent of their contribution. Parents however, are to be commended for their tireless efforts to augment Student’s educational experience. Moving forward, the benefits of any private after-school program in which Parents enroll Student will be maximized if the efforts of *all* those responsible to provide services to Student, including Sutton, are coordinated.

One last area deserving special scrutiny is the toileting program.

1. **Toileting Program**

Student’s toileting routines and training have been the subject of bitter dispute between the Parties. Parents are very concerned that toilet training remain at the forefront of Student’s programming, and have expressed their disagreement with Bianchi’s recommendation that Student be seated for all of his voids as this is not “acceptable” for males in this society. Parents have expressed a strong preference for Student to urinate while standing, something that, given his severe apraxia, is more difficult for Student to do 100% successfully. Given Parents disagreement with the recommendation that Student be seated for all voids in school and at home, and given that Parent did not feel comfortable making Student sit for extended periods at prescribed intervals, Parents did not implement the toileting program designed by Bianchi in the home (Parent). They very much want Student to be toilet trained but at present he is often not successful in making it to the bathroom in time to avoid accidents and continues to defecate in his pants (Parent). Parent also testified that she did not require him to clean his accidents because she thought that this was too difficult for him (Parent).

Sutton is in agreement that toilet training is essential, but argues that Student has been successful, with only minimal accidents in school. This is the result of partial implementation of a plan: Student demonstrates progress in the school setting but has not successfully evidenced this progress across all settings. Without a doubt, toileting is an area of vital importance and

it is imperative that this almost sixteen year old student be fully toilet trained if he is to have a real chance at independence (Bianchi, Austein, Iadarola).

Student’s frustration with toileting is clear from Student’s play therapy with Dr. Bakow, as demonstrated by his smashing dolls against miniature play toilets. When asked about his support of the toileting protocol Parents had established in the home, Dr. Bakow testified

It’s pragmatic. It’s trying to encourage [] to use the toilet, trying to encourage him to stand up while he urinates. It’s trying to encourage him to actually get the bowel movements in the toilet. It’s encouraging him to help clean up when it’s appropriate. It’s all - - you know, hit or miss. There’s no real predictability to it because of his neurological situation (Bakow).

Clearly, this approach has not been successful for Student who is still displaying toileting difficulties. It is essential that he achieve success and this surpasses parental preference and the desire for Student to appear normal when using the men’s rooms. In this regard, Sutton is persuasive that once [Student] is able to successfully perform all of his voids in the bathroom, he can be taught the difference as to when to sit or stand (Bianchi).

Bianchi was also persuasive that teaching Student to use the stall for all of his voids (whether sitting or standing) was likely to keep him safer during the training period as well as into the future. Bianchi stressed the importance of consistency in generalizing learned skills. She explained that Student had difficulty while standing, sitting would avoid discrimination from others in the public setting, and it would ensure that Student could learn to have a bowel movement on the toilet (SE-43; PE-18; Bianchi). Bianchi raised the concern that Student may have difficulty deciding if he needs to defecate while standing because he is only familiar with urinating while standing. She testified that once he was in the stall others would not be able to see whether he was sitting or standing making him less of a target (Bianchi). The record contains testimony supporting Student learning to urinate while standing (something that he has been able to perform in the past although not consistently or successfully). Therefore, his toileting protocol should include learning to do this before his toileting goal is fully achieved.

Parents also raised concerns that a female, Davis, was responsible for implementing the toileting protocol since late 2010. They expressed their preference for a male assistant in this regard because of the opportunities for male modeling. Parents also took issue with the gloved hand over hand assistance with aim provided by Davis (Davis, Parent). While recognizing the benefits of a male aide, neither Bianchi nor Oliver expressed concern that a female could not implement the protocol. Both expressed concern that Student seemed more compliant when his mother was not present and that she seemed to inhibit him (Oliver, Bianchi).

Furthermore, Student is having his bowel movements in mid or late afternoon. Student’s needs are what guide his services and what Sutton is ultimately responsible to address. Therefore, the protocol that is implemented must be designed to help Student be successful consistently, across all settings. Once Student is successful, then Sutton shall proceed to working on standing for urination. Parental preference in this regard should be secondary to what is more likely to work for Student. As such, it will be necessary to extend toileting services under Sutton’s direction to after school hours, as it is unlikely that Parents will consistently support/ implement a protocol that deviates from what they think best. Parent, by her own testimony, has not been willing to implement the Azrin-Foxx methodology.

Similarly, Sutton must take into account Student’s unique needs in offering him participation in activities and or outings which involve leaving the school building. Parents are correct that a viable toileting plan must be in place before Student participates in outings. This may include identifying the location of bathrooms in the particular setting and ascertaining if a handicap bathroom exists separate from a ladies or men’s bathroom, and if not, identifying where Student will be taken and who will accompany him. If for example, the outing is to a theatre, Student should be provided preferential sitting in the aisle and the toileting plan must continue to be implemented at the same frequency and consistency as it is in school to avoid accidents. The plan should also take into account what to do if accidents do occur. In this regard, the plan must be coordinated with Parents.

In light of the above, Student’s Team shall reconvene to discuss implementation of a toileting plan that contemplates provision of extended day services in the home to promote consistency of implementation of the toileting plan across all settings.

**III. Denial of Parents’ right to meaningfully participation in the IEP Process:**

Parents assert that they have been denied meaningful participation in the IEP process. They point particularly to the Team meeting in January 2012 which was interrupted after two hours and then not reconvened with Parents in attendance. This led Parents to reject Sutton’s proposed IEP covering the period from January 26, 2012 to January 25, 2013, as well as Student’s placement in the intensive special needs classroom on February 27, 2012 (SE-89; PE-27). In their letter, Parents restated all of their concerns and questioned Sutton’s truthfulness in wanting to work cooperatively. According to Parents, Sutton had ignored all of their requests and had chosen to promulgate an IEP without parental input (SE-89; PE-27).

The evidence shows that Sutton indeed ended the meeting in January 2012 before the review of Student’s progress had been completed and before Student’s proposed program had been fully discussed. However, the January 2012 Team meeting underscores the hostility and complete breakdown of communication between the Parties. It is clear that by then both Parties were completely frustrated and Parent had a very difficult time controlling herself and indeed, interruption of the meeting after two hours was justified (see Fact# 111). Thereafter, when Sutton proposed to re-convene the Team and have it facilitated by a BSEA mediator/facilitator, Parents refused (SE-87; SE-88; SE-89).

Federal courts have maintained that “[I]f parents act unreasonably in the course of [the IEP development] process, they may be barred from reimbursement under the IDEA.” *D.B., E.B. v. Sutton School District, Sutton School Committee and the Massachusetts Department of Elementary and Secondary Education*, Civil Action No. 10-10897-FDS (Saylor, J. August 14, 2012), citing *C. G. v. Five Town Cmty. Sch. Dist.*, 513 F.3rd 279 (1st Cir. 2008). The evidence shows that Parent’s behavior during the aforementioned Team meeting was disruptive of the Team process. Furthermore, the IEP promulgated in February 2012 did not deprive Student of a FAPE. As such, Sutton’s procedural violation did not result in harm or a deprivation of FAPE to Student.

**IV. Reimbursement for Privately Obtained Services:**

In their Response to Sutton’s Hearing Request and Counterclaim, Parents sought the following remedies: a) funding of Student’s participation in a social group of their choice; b) funding and implementation of the Fast ForWord program; and, c) that Student be placed at Woodstock Academy in Woodstock, Connecticut or a similar private day school not over one hour drive from Student’s home.

1. **Funding for Student’s Participation in a Social Group:**

Parents sought reimbursement for the services privately provided by AIS. No AIS provider testified at Hearing, at which time most of the substantive information regarding this service was provided by Parent. Sutton’s witnesses testified that they learned informally of AIS’ involvement when a non-family member transported Student, and subsequently formally learned of AIS through a reference to this service in one of the reports shared by Parent with Sutton. In opposing Parents’ entitlement to reimbursement Sutton relies on 20 U.S.C. §1412 (a)(10)(C)[[17]](#footnote-17), stating that it had offered FAPE to Student, and on the notice requirements under 34 CFR 300.148[[18]](#footnote-18).

The evidence is insufficient to ascertain the benefits that Student may have derived from AIS assistance, especially where a determination was entered earlier in this decision that Sutton had offered a program capable of providing FAPE to Student, but Student did not fully participate in said program. As such, Parents have not met their burden of proof in this regard and are therefore not entitled to reimbursement for AIS services.

1. **Fast ForWord:**

Parents have expended great effort in researching Fast ForWord (Mother; PE-43). Similarly, Sutton inquired into the appropriateness of this program for students with Apraxia, and specifically for Student. According to Sutton, Student was benefiting from Edmark (Austein, Burek). The evidence is however, not convincing that the Sutton should dismiss the possible appropriateness of Fast ForWord for Student at this juncture. Sargeant recommended the first part of the Fast ForWord because of the foundational benefits but her assessment of Student for Fast ForWord was inconclusive (PE-43; Parent). As such, Sutton shall further consider whether this program may be suitable for Student and the Team shall review the results to ascertain if it should be added to the IEP.

1. **Placement at Woodstock Academy or a similar Private Day School**:

Parents request that Student be placed at Woodstock Academy in Woodstock, Connecticut, or a similar private day school not more than one hour drive from Student’s home. Sutton forwarded a referral packet to Woodstock Academy and also to the Learning Clinic. No evidence was offered at Hearing regarding Woodstock, the Learning Clinic or any other placement. In a footnote contained in Sutton’s Closing Argument, Sutton stated that Student has not been accepted to any private placement. Notwithstanding Student’s current rejections from the aforementioned private schools, given the Parties stated agreement to place Student privately if an appropriate p placement becomes available, and the lack of evidence regarding any private placement, I decline to comment further on this issue and leave the determination of private placement to Parents and Sutton.

**V. Parents Entitlement to reimbursement for Costs/ Private Services:**

At Hearing Parent sought reimbursement for the expert services rendered by Ronstadt, Parents’ consultant at Heairng, and Dr. Bakow. Parents also requested that Sutton be ordered to fund Student’s therapy with Dr. Bakow to address anxiety issues.[[19]](#footnote-19) Relying on *Arlington Cent. School Dist. Bd. Of Educ. v. Murphy,* 548 U.S. 291 (2006), Sutton adamantly opposed said reimbursement.

While it can be argued that the issues of reimbursement for Bakaw and Ronstadt are not properly before me, there is so much testimony from Ronstadt and also from Dr. Bakow, as well as evidence regarding the usefulness of Dr. Bakow service provision that I feel compelled to address them here.

In the *Arlington* matter, after prevailing in an IDEA case against the school district, the parents of a disabled student sought to recover fees for the services rendered by their educational consultant during the proceedings. Relying on the language found in 20 U.S.C. §1415(i)(3)(B) regarding the award of reasonable attorneys’ fees to a prevailing parent of a disabled child for the costs incurred in litigation the Court reasoned

While this provision provides for an award of “reasonable attorney’s fees,” this provision does not even hint that acceptance of IDEA funds makes a State responsible for reimbursing prevailing parents for services rendered by experts ...[t]hus, the text of 20 U.S.C. §1415(i)(3)(B) does not authorize an award of any additional expert fees, and it certainly fails to provide the clear notice tht is required uner the Spending Clause. *Id*.

With unequivocal language, Justice Alito, delivering the opinion of the Court, concluded that “prevailing parents may not recover the costs of experts or consultants.” *Arlington Cent. School Dist. Bd. Of Educ. v. Murphy,* 548 U.S. 291 (2006)

The services provided by Ronstadt fall squarely within those strictly prohibited pursuant to *Arlington*. As such, Parents are not entitled to reimbursement for services offered by her. Similarly, Parents are also not entitled to reimbursement for services offered by Dr. Bakow as an expert witness.

I now turn to Parents’ request for funding of Bakow’s therapeutic interventions to address Student’s anxiety.

Parents have placed all their faith on Dr. Bakow and the play therapy he has been providing to Student. They further rely on Dr. Bakow in making their case that Student’s anxiety stems from his Sutton experience and the toileting protocol designed by Bianchi. The evidence however, supports a finding different than the one Parents’ suggest.

It is noteworthy that Bakow’s office and therapy sessions are the only places where Student has displayed actual aggression against another and has attempted to destroy property. In the last year, Student has had more frequent toileting accidents in Bakow’s office than in Sutton, has used foul language not heard in school, has been the reluctant to go for therapy, or resistant to cooperate in therapy. Student has not had to be restrained in Sutton but Dr. Bakow has had to restrain him in his office (Bakow). While Parents and Bakow would suggest that this is because Student feels comfortable to express himself with Dr. Bakow, the evidence as discussed below suggests the opposite.

The record shows that Student displayed anger in no other place more blatantly than in Dr. Bakow’s office, and has not been physically aggressive against anyone in Sutton since his return in 2010, as he has been toward Dr. Bakow. Similarly, he has not consistently displayed the level of tension and anxiety that was displayed at Dr. Bakow’s office. Dr. Bakow noted a progressive deterioration in his sessions noting that Student was displaying behaviors that had not been seen since they initiated their play-therapy work in 2007

…in terms of hitting me or kicking me or throwing the play materials or trying to destroy the materials, or when we’re doing an interactive game, he might take the ball and throw it at me hard. If we are using the paper airplane, he’ll crush it, stuff like that… (Bakow).

Dr. Bakow interpreted this behavior as a reflection of the stress Student was experiencing. While Student’s behavior does seem to be an indication of stress, it appears to be stress regarding the sessions with Dr. Bakow.[[20]](#footnote-20)

If taken at face value, a description of the sessions between January and May 2012 offer insight as to Student’s state of mind and lack of desire to participate in play-therapy at this point in his life. While his urination accidents continued to decrease in school, they occurred in four of the play therapy sessions in a five month period (Bakow, Parent). Student urinated during the 2:00 p.m. sessions on Monday January 9, Monday March 12, and Monday May 7, 2012.

On Monday January 9, 2012, Student called Dr. Bakow an “a--hole” in the waiting room. During the session Student brought in a great deal of tension expressed through the play material and did not answer questions posed to him by Bakow, looking away instead.

On March 12, 2012, Student went into Dr. Bakow’s office but

…pushed [Bakow] as [they] walked in on March 12. This escalated to the point where [Bakow] had to physically restrain him. This took most of the session before [Student] calmed down, so [Bakow] could let him go. As [Bakow] restrained him, [Student] used profanity and kept trying to bite [Bakow]. [Bakow felt that] this is a level of stress that [Student] is carrying. [Bakow] wondered how long before [Student] starts to develop symptoms of trauma… (Bakow).

The session on May 14, 2012 was cancelled by Mother because Student defecated immediately prior to leaving for the session and it took Mother a long time to clean up (Mother, Bakow). Dr. Bakow was unclear as to how often during the years Student had also defecated while in his office because Mother had reported finding out shortly after the sessions that Student’s pants had been soiled (Bakow).

Dr. Bakow described the following behaviors exhibited by Student: he stayed silent and looked away when he did not wish to answer questions or laughed in a forced way to express tension (Bakow).

When asked whether the level of stress Student was displaying in his office demonstrated through the themes of destruction (such as pulling the head off of one of the puppets), sadness (two puppets no longer been held to interact with one another) and destruction (miniature dollhouse items such as toilets are trashed or figures banged against the toilet) was an indication of how Student was feeling at that moment, Dr. Bakow dismissed this possibility stating that he did not think so (Bakow).

Dr. Bakow’s demeanor and testimony also raised questions as to the reliability of his statements. According to him, only trained individuals with years of experience and clinical background were able to understand Student, his behavior and demeanor. He testified that the reason Mother was able to interpret Student’s behaviors was because of her years of non-verbal contact with Student.

Dr. Bakow has also been reluctant to engage in a cooperative, communicative relationship with Sutton’s staff. When asked about the benefits of open communication between Sutton’s staff and himself, Dr. Bakow found no benefit to open communication and insisted that the relationship with him was hostile. It would seem that he interpreted any hostility against Parents as hostility against himself.[[21]](#footnote-21) The record shows that Dr. Bakow was not interested or willing to initiate or engage in ongoing communication with Sutton. He did not contact anyone in Sutton, never observed Student in the school setting, and when contacted by Sutton provided minimal assistance. He was unsupportive of any attempt initiated by Sutton that deviated from Parental preference, as with the toileting program which he initially appeared to support until Parents no longer agreed with the protocol developed by Bianchi.

In the end, Dr. Bakow conceded that he did not have as much information about the toileting protocol/ implementation as he would like (Bakow).

In light of the aforementioned, even if the issue of reimbursement for Dr. Bakow’s play therapy services was properly before me, the evidence does not support a finding that this service is needed by Student at this time.

Lastly, the Parties have been equally zealous in their advocacy of services they deem necessary and appropriate for Student. However, the level of distrust, animosity and intransigence in their positions has poisoned their ability to work together. This acrimonious relationship has had a negative impact on Student. The Parties are at an impasse that must be resolved if Student is to experience the full benefit of any educational programming, especially as the possibility that he may not be accepted to a private school is contemplated. This would leave Sutton as the district responsible to deliver Student’s special education and services.

Furthermore, it is clear that years of attending to Student have taken a great toll on Parents. In the hopes that common ground may be found, Sutton shall proceed with the functional behavioral assessment it seeks to have Dr. Bostic conduct. Dr. Bostic shall conduct the functional behavioral assessment and evaluate Student in school and at home, shall meet with Parents, and may make further recommendations to the Team consistent with the results of his evaluation.

**ORDERS:**

1. Sutton shall fully implement the 2012-2013 IEP in the intensive special needs classroom with increased direct attention from the special education teacher.
2. Student’s Team shall reconvene to discuss implementation of a toileting plan that contemplates provision of extended day services in the home to promote consistency of implementation of the toileting plan across all settings. Sutton shall also use best efforts to identify a suitable male aide to implement the toileting portion of Student’s program.
3. Sutton shall further consider the suitability of the Fast ForWord program for Student.
4. Parents are not entitled to reimbursements for services rendered by Ronstadt, Bakow and AIS.
5. Dr. Bostic shall proceed with the Functional Behavioral Assessment across settings.
6. Sutton shall reconvene Student’s Team to address: the suitability of the Fast ForWord program and Dr. Bostic’s Functional Behavioral Assessment’s results.

So Ordered by the Hearing Officer,

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Rosa I. Figueroa

Dated: August 17, 2012

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I would like to express my sincere gratitude and appreciation to Shaina Wamsley, summer 2012 BSEA legal intern, for her extremely valuable assistance and contributions to this decision.

#  August 17, 2012

# COMMONWEALTH OF MASSACHUSETTS

# DIVISION OF ADMINISTRATIVE LAW APPEALS

# BUREAU OF SPECIAL EDUCATION APPEALS

**SUTTON PUBLIC SCHOOLS**

**BSEA #12-6333**

### BEFORE

**ROSA I. FIGUEROA**

**HEARING OFFICER**

**REGINA WILLIAMS TATE, ESQ., ATTORNEY FOR**

**SUTTON PUBLIC SCHOOLS**

**PARENTS PRO-SE**

1. At Hearing Parents disputed the appropriateness of the 2011-2012 IEP which they rejected in January 2012. [↑](#footnote-ref-1)
2. The aforementioned looked at the Fast ForWord material, contacted other districts in Massachusetts, and spoke with Crystal Sergeant, CCC-SLP, Parent’s contact for this program. The program would be difficult for Student given that he was not functionally able to use a touchpad mouse during the demo session but Sargeant recommended it because Student, who is very cooperative and wishes to please adults, had engaged in the program during the session. Sargent did not offer a written recommendation for the use of Fast ForWord with Student (Austein; SE-82). [↑](#footnote-ref-2)
3. 20 USC 1400 *et seq*. [↑](#footnote-ref-3)
4. MGL c. 71B. [↑](#footnote-ref-4)
5. MGL c. 71B, ss. 1 (definition of FAPE), 2, 3. [↑](#footnote-ref-5)
6. E.g., 20 USC 1400(d)(1)(A) (purpose of the federal law is to ensure that children with disabilities have FAPE that “emphasizes special education and related services designed to meet their unique needs . . . .”); 20 USC 1401(29) (“special education” defined to mean “specially designed instruction . . . to meet the unique needs of a child with a disability . . .”); *Honig v. DOE*, 484 U.S. 305, 311 (1988) (FAPE must be tailored “to each child's unique needs”). [↑](#footnote-ref-6)
7. *Board of Education of Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, 192 (1982) (goal of Congress in passing IDEA was to make access to education "meaningful"); *Deal v. Hamilton County Board of Education,* 104 LRP 59544 (6th Cir. 2004); (“IDEA requires an IEP to confer a ‘meaningful educational benefit’ gauged in relation to the potential of the child at issue”); *G. by R.G. and A.G. v. Fort Bragg Dependent Schs*, 40 IDELR 4 (4th Cir. 2003) (issue is whether the IEP was reasonably calculated to provide student meaningful educational benefit); *Weixel v. Board of Education of the City of New York*, 287 F.3d 138 (2nd Cir. 2002) (placement must be “‘reasonably calculated’ to ensure that [student] received a meaningful educational benefit”); *Houston Independent School District v. Bobby R*., 200 F.3d 341 (5th Cir. 2000) (educational benefit must be "meaningful"); *Ridgewood Board of Education v. NE for ME*, 172 F.3d 238 (3rd Cir. 1999) (IDEA requires IEP to provide "significant learning" and confer "meaningful benefit"). [↑](#footnote-ref-7)
8. *Lenn v. Portland School Committee*, 998 F.2d 1083 (1st Cir. 1993) (program must be “reasonably calculated to provide ‘effective results’ and ‘demonstrable improvement’ in the various ‘educational and personal skills identified as special needs’”); *Roland v. Concord School Committee*, 910 F.2d 983 (1st Cir. 1990) (“Congress indubitably desired ‘effective results’ and ‘demonstrable improvement’ for the Act's beneficiaries”); *Burlington v. Department of Education*, 736 F.2d 773, 788 (1st Cir. 1984) (“objective of the federal floor, then, is the achievement of effective results--demonstrable improvement in the educational and personal skills identified as special needs--as a consequence of implementing the proposed IEP”); 603 CMR 28.05(4)(b) (Student’s IEP must be “designed to enable the student to progress effectively in the content areas of the general curriculum”); 603 CMR 28.02(18) (“*Progress effectively in the general education program* shall mean to make documented growth in the acquisition of knowledge and skills, including social/emotional development, within the general education program, with or without accommodations, according to chronological age and developmental expectations, the individual educational potential of the child, and the learning standards set forth in the Massachusetts Curriculum Frameworks and the curriculum of the district.”). [↑](#footnote-ref-8)
9. The IEP must be “reasonably calculated to confer a meaningful educational benefit. ” *Sebastian M. v. King Philip Regional School Dist*., 685 F.3d 79, 2012 LW 287788, \*3 (1st Cir. 2012). [↑](#footnote-ref-9)
10. See generally *In re: Arlington*, 37 IDELR 119, 8 MSER 187, 193-195 (SEA MA 2002) (collecting cases and other authorities). [↑](#footnote-ref-10)
11. MGL c. 69, s. 1 (“paramount goal of the commonwealth to provide a public education system of sufficient quality to extend to all children the opportunity to reach their full potential… ”); MGL c. 71B, s. 1 (“special education” defined to mean “…educational programs and assignments . . . designed to develop the educational potential of children with disabilities . . . .”); 603 CMR 28.01(3) (identifying the purpose of the state special education regulations as “to ensure that eligible Massachusetts students receive special education services designed to develop the student’s individual educational potential…”). See also Mass. Department of Education’s Administrative Advisory SPED 2002-1: Guidance on the change in special education standard of service from “maximum possible development” to “free appropriate public education” (“FAPE”), effective January 1, 2002, 7 MSER Quarterly Reports 1 (2001) (appearing at [www.doe.mass.edu/sped](http://www.doe.mass.edu/sped)) (Massachusetts Education Reform Act “underscores the Commonwealth’s commitment to assist all students to reach their full educational potential”). [↑](#footnote-ref-11)
12. *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 199, 202 (court declined to set out a bright-line rule for what satisfies a FAPE, noting that children have different abilities and are therefore capable of different achievements; court adopted an approach that takes into account the potential of the disabled student); *Deal v. Hamilton County Board of Education,* 104 LRP 59544 (6th Cir. 2004); (“IDEA requires an IEP to confer a ‘meaningful educational benefit’ gauged in relation to the potential of the child at issue”); *HW and JW v. Highland Park Board of Education*, 104 LRP 40799 (3rd Cir. 2004) (“benefit must be gauged in relation to the child's potential”); *Houston Independent School District v. Bobby R*., 200 F.3d 341 (5th Cir. 2000) (progress should be measured with respect to the individual student, not with respect to others); *T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ.,*205 F.3d 572, 578 (3d Cir. 2000) (appropriate education assessed in light of "individual needs and potential"); *Ridgewood Board of Education v. NE*, 172 F.3d 238 (3rd Cir. 1999) (“quantum of educational benefit necessary to satisfy IDEA . . .requires a court to consider the potential of the particular disabled student”); *Mrs. B. v. Milford Board of Ed.*, 103 F.3d 1114, 1122 (2d Cir. 1997) (“child’s academic progress must be viewed in light of the limitations imposed by the child's disability"); *MC v. Central Regional School District*, 81 F.3d 389 (3rd Cir. 1996), *cert. denied* 519 US 866 (1996) (child’s untapped potential was appropriate basis for residential placement); *Roland v. Concord School Committee*, 910 F.2d 983 (1st Cir. 1990) (“academic potential is one factor to be considered”); *Kevin T. v. Elmhurst*, 36 IDELR 153 (N.D. Ill. 2002) (“Court must assess [student’s] intellectual potential, given his disability, and then determine the academic progress [student] made under the IEPs designed and implemented by the District”). [↑](#footnote-ref-12)
13. E.g. *Lt. T.B. ex rel. N.B. v. Warwick Sch. Com*., 361 F. 3d 80, 83 (1st Cir. 2004)(“IDEA does not require a public school to provide what is best for a special needs child, only that it provide an IEP that is ‘reasonably calculated’ to provide an ‘appropriate’ education as defined in federal and state law.”). See also, *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012); *I.M. ex rel. C.C. v. Northampton Public Schools*, 2012 WL 2206887, \*1 (D.Mass. 2012); *Sebastian M. v. King Philip Regional School Dist*., 685 F.3d 79, 2012 LW 287788, \*3 (1st Cir. 2012). [↑](#footnote-ref-13)
14. *Schaffer v*. *Weast*, 126 S.Ct. 528 (2005) places the burden of proof in an administrative hearing on the party seeking relief. [↑](#footnote-ref-14)
15. Both Parties agree that if an appropriate private placement becomes available and or endorsed by the Team, Student would be placed there by Sutton. Therefore, despite the fact that Parents did not meet their burden of persuasion pursuant to *Shaffer* with respect to Student’s need for a private placement, it is understood that this may occur subsequent to issuance of the instant Decision. [↑](#footnote-ref-15)
16. Regarding athletics, Sutton explained that activities such as track and field were offered after school. Since Student was leaving early, it was not possible for him to partake in this activity. The record further shows that there was a breakdown in the communication between Sutton and Parents as Sutton expected Parents to speak with the athletic instructor directly while Parent testified that she was not aware of this. Parents also did not pursue the invitation for Student to participate in the cooking club (Parent). [↑](#footnote-ref-16)
17. “… if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.” 20 U.S.C. §1412 (a)(10)(C). [↑](#footnote-ref-17)
18. “[T]he cost of reimbursement… may be reduced or denied if… 10 business days (including holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency….” 34 CFR 300.148. [↑](#footnote-ref-18)
19. Parents’ request for funding of Bakow’s therapeutic interventions to address Student’s anxiety was not part of Parents’ original counterclaim. Furthermore, the current benefits of his interventions warrant consideration. [↑](#footnote-ref-19)
20. The therapy sessions with Dr. Bakow also seem to indicate that some of Student’s stress is caused by his toileting issues. [↑](#footnote-ref-20)
21. Exerpt of an exchange between the Hearing Officer and Dr. Bakow:

 **Hearing Officer**: Is there any reason specifically that communication between the school and

 You[has not occurred]?

 **Dr. Bakow**: Yeah. As long as I’ve been involved, it has always been adversarial.

 **Hearing Officer**: With you?

 **Dr. Bakow**: There’s always been an adversarial relationship between the family and the

school system.

 **Hearing Officer**: No. I’m talking about you specifically.

**Dr. Bakow**: Well, you know, when I went to that first IEP meeting, I didn’t feel I would go to any others because I sat there while there was a lot of adversarial stuff going on back and forth. It was really clear no one was interested in my opinion.

**Hearing Officer**: Okay. Would it be helpful to you, in terms of your clinical work with [Student],

if there were communication between you and a designated individual in the school on a regular basis?

**Dr. Bakow**: For what purpose?... [↑](#footnote-ref-21)