

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

In Re: Student v. Westfield Public Schools

BSEA# 2212235

RULING ON PARENTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter comes before the Hearing Officer on *Parents' Motion for Partial Summary Judgment* (the Motion) filed by Parents on September 19, 2022. Said Motion asserts that Parents are entitled to judgment as a matter of law, such that the Westfield Public Schools (Westfield or the District) discriminated against Student in violation of § 504 of the Rehabilitation Act of 1973 on the basis of his disability through a pattern of excessive/disproportionate suspensions between June 17, 2019 and June 17, 2022, inclusive of beginning and end dates. On September 26, 2022, Westfield filed *Westfield Public Schools' Motion in Opposition to Parents' Motions for Partial Summary Judgment*.

Neither party has requested a hearing on its motion. Because neither testimony nor oral argument would advance the Hearing Officer's understanding of the issues involved, this Ruling is issued without a hearing, pursuant to *Bureau of Special Education Appeals Hearing Rule VII(D)*.

For the reasons set forth below, *Parents' Motion for Partial Summary Judgment* is hereby DENIED.

I. ISSUE:

The issue here presented is whether Parents are entitled to summary judgment as a matter of law, such that the District discriminated against Student in violation of § 504 of the Rehabilitation Act of 1973 on the basis of his disability through a pattern of excessive/disproportionate suspensions between June 17, 2019 and June 17, 2022, inclusive of beginning and end dates.

II. RELEVANT PROCEDURAL HISTORY:

On June 17, 2022, Parents filed a due process complaint with the BSEA, asserting claims under both the Individuals with Disabilities in Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973 (Section 504). Specifically, Parents alleged that in violation of the IDEA, the District "committed significant procedural violations that resulted in a denial of [] FAPE" to Student "by changing [Student's] placement through procedural inadequacies in connection with school discipline" and by denying Parents meaningful participation during the manifestation determination review meeting. In addition, Parents asserted that the District discriminated against Student in violation of Section 504 "through a pattern of suspensions and manifestation determination review decisions [in 6th, 7th and 8th grade] made in bad faith and with gross misjudgment"; and that Student's "[p]unishments [were] disproportionately severe for

[the] offenses [committed] and [amounted to] differential treatment." Parents sought to have the BSEA "[o]vertturn MDRs from 2019 and 2022"; "[e]xpunge discipline records" from 2019 to 2022; "return [Student] to school, provide an appropriate continuum of services and supports that will allow him to attend his neighborhood school in order to be in the LRE with his peers"; "[p]rovide all compensatory services in a manner that allows [Student] to access and benefit from said educational services by a fully qualified and licensed professional in-person"; "[a]llow [Student] to register for his classes at Westfield High School"; reimburse Parents for "all legal fees incurred by parents since 2019"; and award any "other such remedies BSEA deems necessary to make corrective measures."

On June 17, 2022, the BSEA granted the matter expedited status pursuant to the IDEA and the applicable *BSEA Hearing Rules*. On June 27, 2022, the District proposed to expunge from Student's record the 34-day suspension and the manifestation determination meeting related to said incident, for purposes of settling the pending expedited claims. On June 28, 2022, the District filed *Westfield Public Schools' Motion to Dismiss Expedited Claims* arguing that in light of the District's proposal to expunge Student's 34-day suspension and the manifestation determination meeting related to said incident, the pending claims should proceed on a regular track along with any counter claims. On June 29, 2022, in *Ruling on Westfield Public Schools' Motion to Dismiss Expedited Claims*, I found that because the District had offered to expunge from Student's record the 34-day suspension and the manifestation determination meeting related to said incident, and since the 2019 suspension and manifestation determination relative thereto were beyond the two-year statute of limitations of the IDEA, there were no claims remaining that satisfied the standard for expedited hearings pursuant to the IDEA and BSEA Hearing Rule II(C).

In addition, on July 26, 2022, I issued *Ruling on Westfield Public Schools' Partial Motion to Dismiss Parents' Amended Hearing Request and Counterclaim*, dismissing several of Parents' claims as beyond the IDEA's 2-year statute of limitations. Specifically, I found that Parents' claims asserting that the District discriminated against Student on the basis of disability in violation of § 504 by failing to conduct proper manifestation determination review meetings and by failing to provide Parents with opportunities to participate meaningfully therein were intertwined with IDEA claims and were hence subject to the two-year statute of limitations. As such, I dismissed any and all claims accruing prior to June 17, 2020 asserting a denial of a FAPE to Student resulting from the District's substantive and procedural violations relative to school discipline.

I found however that any claims asserting discrimination in violation of § 504 on the basis of disability through the administration of disproportionately severe punishments were not FAPE or IDEA based claims as they were not based on a dispute concerning Student's eligibility under the IDEA or § 504 or the discharge of the School's procedural and substantive responsibilities under the IDEA or Section 504 of the Rehabilitation Act of 1973. I applied the three-year statute of limitations applicable to allegations of civil rights violations in Massachusetts to such claims and dismissed all such claims that accrued prior to June 17, 2019.

III. FACTUAL BACKGROUND:

The following facts are not in dispute and are derived from the Hearing Request, Westfield Public Schools' response thereto, *Parents' Motion for Summary Judgment* and exhibits (PE-1 to PE-25)¹, as well as *Westfield Public Schools' Motion in Opposition to Parents' Motions for Partial Summary Judgment*.

1. Student is a ninth-grade student attending a full inclusion program in Westfield Public Schools pursuant to a stay-put Individualized Education Program (IEP). He has been diagnosed with ADHD, specific learning disability (dyslexia), anxiety, and disruptive mood dysregulation disorder (DMDD). (PE-1a through PE-1i).
2. Student struggles with emotional and behavioral regulation, impulse control, taking accountability, advocating for breaks, and staying on task. Behaviors include verbal outbursts, environmental aggression, elopement, non-compliance, and physical aggression, all of which are exacerbated by anxiety. The function of the behaviors appears to be attention and escape. (PE-1a, PE1b, PE-1c , PE-1d, PE-1e, PE-1f, PE-1g, PE-1h, PE-1i) Because Student cannot tolerate redirection or consequences for his behaviors, he feels persecuted, and "this resentment than [sic] fuels a desire for revenge that seems to manifest in increased disruptive and disrespectful behavior" which then results in school discipline, including suspension. (PE-1g, PE-1h, P4a)
3. School and independent evaluations ranging from 2017 to 2021 recommend a highly structured classroom where Student's needs can be addressed in a comprehensive and integrated manner by special education teachers who have additional training an expertise with working with students who have emotional challenges. Student also requires a structured behavioral management plan across all settings. (PE-1a, PE1b, PE-1c, PE-1e, PE-1g, PE-1h, PE-1i, PE-3k)
4. Upon arrival at school on September 13, 2019, Student began swearing and yelling. He was a given a choice of rooms and chose an empty classroom with adult supervision but continued to exhibit noncompliant behaviors. He "did a back flip" in a classroom full of children and threw the lid of a marker in a staff member's eye, hitting him. Student was placed in a "basket hold" for 30 seconds and was then escorted into a time out room which was propped on by a chair, where a staff member sat. Student asked for a water and bathroom break and staff indicated he could have them after demonstrating willingness to comply with staff. Within less than 20 minutes, Student was escorted to the bathroom and to get water. He spent the rest of the day, from 9:30AM on, in the time-out room. Staff repeatedly asked Student if he wanted to leave the room and Student elected to stay and continued to exhibit noncompliant behavior. The record reflects that this in school suspension was imposed "for defiance, insubordination, and inappropriate language". (PE-3c, PE-4a, PE-4b, PE-5)
5. According to Parents, following the incident Student was "traumatized and "afraid." The room had been bare and cold. The District was aware that small rooms exacerbated Student's anxiety. (PE-3c, PE-4a, PE-4b) Parents notified the District that they would "not consent to any activity that involves physically or mechanically restraining" Student. They indicated that Student's "difficulty [in the fall of 2019 was] caused, at least in part, by a failure of the district to produce an IEP that

¹ Parents' exhibit binder includes relevant state regulations, a DESE Technical Assistance Advisory, Dear Colleague Letters, of which the Hearing Officer takes judicial notice. (See PE-6, 7, 8a, 11a, 11b)

- appropriately addressed [Student's need]." Parents also had not been receiving copies of Student's "point sheets" which made them "question if this part of [Student's] IEP [was] being actively followed with fidelity." A behavior support team meeting was scheduled to discuss Student's behavior and interventions. (PE-3a)
6. Westfield school staff have been "trained" in the "restraint and exclusionary protocols provided by the Department of Elementary and Secondary Education." (PE-3d, P-6)
 7. Parents filed a complaint with the Department for Elementary and Secondary Education (DESE) alleging improper use of restraints and seclusion. According to the results of DESE's investigation, the District implemented Student's behavior support plan but failed comply with state law when placing Student in the time out room and allowing him to remain there after he had calmed; specifically, "the principal did not give approval for continuing the exclusionary time out beyond 30 minutes as required." DESE did not find "conclusive evidence" that Student was improperly restrained after hitting the staff member with a marker lid. (PE-5)
 8. A meeting was held in early October 2019 to discuss an extended evaluation and to update Student's positive incentive/behavioral system. Parents felt an extended evaluation was "premature." According to Parents it was inappropriate to discuss "other options" for Student, where his behavior support plan had not been followed with fidelity. Parents requested a BCBA to "to facilitate implementation of a BIP and work with staff on how [Student's] conditions affect behavior and how to better manage his symptoms." (PE-3e, PE-3f, PE-3g, PE-3i, PE-3j)
 9. Meetings were also held in school in mid and late-October 2019. The District agreed to provide multiple independent evaluations, including an occupational therapy evaluation, an FBA and a clinical psychological evaluation. (PE-3k) Parents refused to complete a release of information with Student's pediatrician and therapist. (PE-3j, PE-3k) The District recommended an extended evaluation at an alternative setting, and Parents rejected this option. (PE-3j, PE-3k, PE-3l) Although Student's IEP called for B Grid services from a Behaviorist, Parents requested said services be suspended. The District disagreed with the request, as they did with Parent's request to contract with a BCBA; the District indicated it had trained staff to support Student. Parents also rejected tutoring services, asserting that Student would not be receptive. (PE-3k)
 10. An FBA was conducted at public expense by an outside provider in the fall of 2019. (PE-1e, PE-3k)
 11. During Student's 6th grade school year (2019-2020), there were many documented incidents of school-based disruptions, which included insubordination, disrespect toward other peer groups, disruption of classroom, being out of bounds, and vocal outbursts. Three short term suspensions accompanied some of the disciplinary infractions. Parents declined to attend some of the disciplinary meetings because they disagreed with "disciplinary actions due to [Student's] unsupported disability related behaviors." (PE-1i, PE-2a, PE-2b, PE-2c, PE-3h, PE-10)
 12. One long term suspension was imposed on November 8, 2019. Student was suspended out of school for 85 days for behaviors occurring from October 10, 2019 to November 8, 2019, including insubordination, unacceptable conduct in class, hallways, impermissible use of electronic devices, inappropriate language, lack of care of school property, and tardiness. (PE-2d, PE-3m, PE-9) According to Parents, the District was suspending Student "for disability-related behaviors." (PE-3m) Held

in abeyance pending a manifestation determination hearing, the long-term suspension was ultimately imposed when Student's behavior was found to be not a manifestation of his disabilities. (PE-3n)

13. Parents appealed the long-term suspension to the Superintendent. On February 12, 2020, the Superintendent concluded that the
"suspension stemmed from multiple incidents of disruption of the educational environment by [Student] which interfered with learning of other students. Further, the conduct directed at staff members constituted insubordination, and in some cases, bordered on threats and assault of a staff member. [He] determined the suspension [was] appropriate because the conduct did occur and it was disruptive, insubordinate, and in some cases threatening. [He indicated that Parents] did not dispute the occurrence of most incidents, but rather sought to excuse [Student's] conduct which the Superintendent] not accept.

While [the Superintendent] determined [that Student's] conduct did violate the code of conduct for the school and suspension out-of-school was [] justified, [he] decided to reduce the number of suspension days to 48 (from 85 s) in view of [Student's] matriculation to Agawam as a School Choice student. However, if, for some reason [Student] does not remain in Agawam and transitions back to Westfield, [Student would] be subject to the entire length of the original suspension." (PE-14)

14. During Student's 7th grade school year (2020-2021), there were also several documented incidents of school-based disruptions, which included insubordination, disrespect toward peer groups, disruption of classroom, being out of bounds, once for vaping, once for blowing vape in the face of his counselor, vocal outbursts, swearing at staff, and once for jumping out of a bus window. Two² short term suspension accompanied some of the disciplinary infractions, and Student lost "large bus privileges" beginning on June 4, 2021, at which time, the District proposed an "amendment" for a minivan. Parents declined and chose to drive Student instead. Parents continued to decline to attend the disciplinary meetings because they disagreed with "disciplinary actions due to [Student's] unsupported disability related behaviors." (PE-1i, PE-2a, PE-2b, PE-2c, PE-2e, PE-2f, PE-3h, PE-3o)
15. The District completed an FBA in May-August 2021. (PE-1i)
16. Student began his 8th grade school year (2021-2022) in a 45 day assessment in the Westfield Middle School special education sub-separate RISE program. (PE-1i)
There was no behaviorist on staff within the program. (PE-3p)
17. In the fall of 2021, Student continued not to be allowed on the large school bus. (PE-3o) In each of September and October 2021, Student served a short-term suspension for videotaping a peer and "disrupt[ing] the entire office and guidance area" in response to "los[ing] possession of his phone to administration" and "escalating and repeated comments to [a staff member] about want[sic] to hurt him." (PE-2g, PE-2h, PE-3o) Parents believed there were mitigating circumstances; they argued that

² There may have been a third out of school suspension at the end of May 2021, but the record is unclear. The record shows that the District proposed that Student work with a tutor, that Parents did not agree to a change in placement, and that a hearing was going to be scheduled. (PE-16)

- Student is “highly sensitive and will react with using bad language when he feels threatened”; also, he “is highly sensitive to his friends getting in trouble.” When his friend was sent to the office, [Student] reacted to the para by calling him a bad word and telling his friend to, “punch him in the face ... hardly a legitimate “threat”, let alone one that would warrant an emergency removal.” (PE-2g, PE-2h, PE-3p)
- According to Parents, Student was treated “more harshly in order to push him out of district.” (PE-3p) Moreover, according to Parents, the District failed to provide Student with proper supports while staff was “trying to trigger negative responses in [Student].” Parent continued to request a “BCBA to properly facilitate an FBA/BIP.” (PE-3p, PE-5)
18. On May 2, 2022, the school principal imposed a 34 day out of school suspension when Student threatened to hurt a pregnant staff member.³ According to the principal, although Student was attending a therapeutic program at RISE, the statements he made were “not even ... acceptable in that program.” (PE-2i, PE-21)
 19. On May 13, 2022, Parents appealed the principal’s long-term suspension. The Superintendent upheld the suspension. (PE-22a through PE-22c)
 20. On May 19, 2022, Parents were summoned to the Hampden County Juvenile Court to respond to an application stating that Student was a child requiring assistance (CRA). On June 15, 2022, the District requested that the petition be dismissed and proposed a settlement agreement with Parents, seeking dismissal of their claims against the District.
 21. On June 27, 2022, the District expunged from Student's record the 34-day suspension and the manifestation determination meeting related to said incident, for purposes of settling the claims in the instant appeal.

IV. DISCUSSION:

1. Legal Standards:

A. Jurisdiction of the Bureau of Special Education Appeals (BSEA)

20 U.S.C. § 1415(b)(6) grants the Bureau of Special Education Appeals (BSEA) jurisdiction over timely complaints filed by a parent/guardian or a school district “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.”⁴ In Massachusetts, a parent or a school district, “may request mediation and/or a hearing at any time on any matter⁵ concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law, or procedural protections of state and federal law for students with disabilities.”⁶ Nevertheless, it is well established that matters that come before the BSEA must involve a live or current dispute between the Parties.⁷ In addition, the BSEA “can only grant relief that is

³ The Principal’s letter states that his “finding is based upon the witness account from [the staff member] presented at the hearing as well as supporting interview with two student witnesses after the hearing.” (PE-2i)

⁴ See 34 C.F.R. §300.507(a)(1).

⁵ Limited exceptions exist that are not here applicable.

⁶ 603 CMR 28.08(3)(a).

⁷ See, e.g., *In Re : Student v. Bay Path Reg’l Vocational Tech. High Sch.*, BSEA # 18-05746 (Figueroa, 2018).

authorized by these statutes and regulations, which generally encompasses orders for changed or additional services, specific placements, additional evaluations, reimbursement for services obtained privately by parents or compensatory services.”⁸

B. Summary Judgment

Pursuant to 801 CMR 1.01(7)(h), summary decision may be granted when there is “no genuine issue of fact relating to all or part of a claim or defense and [the moving party] is entitled to prevail as a matter of law.”⁹ In determining whether to grant summary judgment, BSEA hearing officers are guided by Rule 56 of the Federal and Massachusetts Rules of Civil Procedure, which provides that summary judgment may be granted only if the “pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law.”¹⁰ A genuine dispute as to a material fact exists if a fact that “carries with it the potential to affect the outcome of the suit” is disputed such that “a reasonable jury could resolve the point in the favor of the non-moving party.”¹¹ The moving party bears the burden of proof, and all evidence and inferences must be viewed in the light most favorable to the party opposing summary judgment.¹²

In response to a motion for summary judgment, the opposing party “must set forth specific facts showing that there is a genuine issue for trial.”¹³ To survive this motion and proceed to hearing, the adverse party must show that there is “sufficient evidence” in her favor that the fact finder could decide for her.¹⁴ In other words, the evidence presented by the non-moving party “must have substance in the sense that it [demonstrates] differing versions of the truth which a factfinder must resolve at an ensuing trial.”¹⁵ The non-moving party’s evidence will not suffice if it is comprised merely of “conclusory allegations, improbable inferences, and unsupported speculation.”¹⁶

As such, to analyze whether the party moving for summary judgment has met its initial burden such that the burden shifts to the opposing party, I must view all the evidence it has submitted in the light most favorable to the opposing party and determine that there is no genuine issue of material fact related to the claims before me. Only if the moving party is successful in this first step does the burden then shift to the opposing party.

⁸ *In Re: Georgetown Pub. Sch.*, BSEA #1405352 (Berman, 2014).

⁹ 801 CMR 1.01(7)(h).

¹⁰ *Id.*

¹¹ *French v. Merrill*, 15 F.4th 116, 123 (1st Cir. 2021); see also *Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d 576, 581 (1st Cir. 1994).

¹² *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 252 (1986); see also *In Re: Westwood Pub. Sch.*, BSEA No. 10-1162 (Figueroa, 2010); *In Re: Mike v. Boston Pub. Sch.*, BSEA No. 10-2417 (Oliver, 2010); *Zelda v. Bridgewater-Raynham Pub. Sch. and Bristol County Agricultural Sch.*, BSEA No. 06-0256 (Byrne, 2006).

¹³ *Anderson*, 477 U.S. at 250.

¹⁴ *Anderson*, 477 U.S. at 249.

¹⁵ *Mack v. Great Atl. & Pac. Tea Co.*, 871 F.2d 179, 181 (1st Cir. 1989).

¹⁶ *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990).

In the instant matter, therefore, to decide as to Parents' *Motion for Partial Summary Judgment*, I must first determine whether disputed issues of material fact exist or whether, as a matter of law, the District discriminated against Student in violation of § 504 of the Rehabilitation Act of 1973 on the basis of his disability through a pattern of excessive/disproportionate suspensions between June 17, 2019 and June 17, 2022, inclusive of beginning and end dates.

Hence, I first turn to the legal standards regarding disability discrimination and its interplay with school discipline.

C. Discrimination On the Basis of Disability

Pursuant to § 504 of the Rehabilitation Act of 1973, "no otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency . . ."¹⁷ To prevail on her claims under § 504, Parent must establish that (1) Student is a "handicapped individual"; (2) Student is "otherwise qualified" for participation in the program; (3) the program receives federal financial assistance; and (4) Student was "denied the benefits of" or "subjected to discrimination" under the program.¹⁸ Since only the fourth element is at issue in this matter (i.e., whether Student was denied "the benefits of" or "subjected to discrimination" through disproportionate and excessive use of discipline, seclusion and restraint), I will not address the other three elements.¹⁹

The United States District Court for the District of Massachusetts has held that to prevail on an educational disability claim under § 504, a parent "must demonstrate that a school district acted with bad faith or gross misjudgment."²⁰ Hearing Officer Amy Reichbach explored this subject in detail in her 2018 decision, *In Re: Adam and Taunton Public Schools*, where she concluded that "in order to prove bad faith or gross misjudgment, the moving party must establish that the school's actions 'depart[ed] substantially from accepted professional judgment, practice or standards [so] as to demonstrate that the person[s] responsible did not base the decision on such judgment.'"²¹

¹⁷ Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794.

¹⁸ *Darian v. University of Mass.*, 980 F. Supp. 77, 84-85 (D. Mass. 1997) (internal citations omitted).

¹⁹ *Id.* at 85; see also *Lesley v. Hee Man Chie*, 250 F.3d 47, 52-53 (1st Cir. 2001); *Wenger v. Canastota Cent. Sch. Dist.*, 979 F. Supp. 147, 152 (N.D.N.Y. 1997) (internal citations omitted) (finding that in the context of special education, a violation of § 504 is "something more than a mere violation of IDEA").

²⁰ *Nickerson-Reti v. Lexington Pub. Sch.*, 893 F. Supp. 2d 276, 300 (D. Mass. 2012) (internal citations omitted); see *Monahan v. Nebraska*, 687 F.2d 1164, 1171 (8th Cir. 1982) ("either bad faith or gross misjudgment should be found before a § 504 violation can be made out, at least in the context of education of handicapped children"); *K.D. v. Starr*, 55 F. Supp. 3d 782, 788 (D. Md. 2014) (in context of education of handicapped children, "a finding of discrimination based on disability requires a showing of bad faith or gross misjudgment by the school system").

²¹ *B.M. ex rel. Miller v. S. Callaway R-II Sch. Dist.*, 732 F.3d 882, 887 (8th Cir. 2013) (internal citations omitted); see *Monahan*, 687 F.2d at 1171 (stating that there is no discrimination under Section 504 "[s]o long as the state officials involved have exercised professional judgment, in such a way as not to depart grossly from accepted standards among educational professionals").

Courts have found that "statutory noncompliance alone does not constitute bad faith or gross misjudgment;"²² it is a high standard to meet.²³ For example, parents' claim that the district removed a student from honors classes, removed a writing fluency goal from his IEP, and failed to incorporate recommendations from an independent educational evaluation necessary for the student to receive a FAPE, in violation of § 504, was dismissed on summary judgment for failure to demonstrate gross misjudgment.²⁴ Similarly, parents' Section 504 claim regarding, among other things, a district's failure to comply with certain regulations implementing Section 504 and the ADA did not survive summary judgment because the facts, even construed in the light most favorable to parents, did not suggest that the district "deviate[d] so substantially from accepted professional judgment, practice, or standards as to demonstrate that the defendant acted with wrongful intent."²⁵ In other words, parent must provide evidence that the school has "particular animus towards the learning disabled [child]."²⁶

On the other hand, the exclusion of a child from school and other educational activities because of his disability, if proven, would constitute a violation of Section 504,²⁷ and allegations that a school district discriminated against a student with mobility issues in violation of § 504 by failing to maintain physical accessibility of programs, facilities, and activities were sufficient to survive a motion to dismiss.²⁸ A school district may rebut the allegation of discrimination by providing a reasonable explanation for the action or inaction that the moving party is alleging to be discrimination.²⁹

2. Application of Law:

To prevail on their *Motion*, Parents must demonstrate that there is no genuine dispute of material fact on their claims under Section 504.³⁰ After reviewing the pleadings, the submissions of the parties, as well as their thoughtful arguments, and applying the **LEGAL STANDARDS** delineated *supra*, I find that Parents failed to demonstrate that there is no dispute of material fact such that the District "acted with bad faith or gross misjudgment"³¹ by "depart[ing] substantially

²² *Miller*, 732 F.3d at 887-88.

²³ See *D.N. ex rel. Christina Nolen v. Louisa Cnty. Public Sch.*, 156 F. Supp. 3d 767, 776 (W.D. Va. 2016).

²⁴ See *Doe v. Pleasant Valley Sch. Dist.*, 2017 WL 8792704 at * 4 (S.D. IA 2017) (unpublished).

²⁵ See *Miller*, 732 F.3d at 887-88.

²⁶ *Colin K. by John K. v. Schmidt*, 715 F.2d 1, 9–10 (1st Cir. 1983).

²⁷ See *Bess v. Kanawha*, 2009 WL 3062974 at *10 (S.D. W.V. 2009) (unpublished).

²⁸ See *McKay v. Winthrop Bd. of Educ.*, Civil No. 96-131-B, 1997 U.S. Dist. LEXIS 23372, at *4, *5 (D. Me. 1997) (unpublished).

²⁹ See *Zdrowski v. Rieck*, 119 F.Supp.3d 643, 667-68 (E.D. MI 2015) (granting district's motion for summary judgment because even in light most favorable to parents, a teacher dragging a student down the hallway a single time using a hold other than the one recommended did not constitute a violation of § 504 where teacher explained she took such action to prevent additional stress and harm to student).

³⁰ Since the only element at issue in this matter is whether Student was denied "the benefits of" or "subjected to discrimination" through disproportionate and excessive use of discipline, I will not be addressing the other three elements.. See *Darian*, 980 F. Supp. 77 at 85.

³¹ *Nickerson-Reti v. Lexington Pub. Sch.*, 893 F. Supp. 2d 276, 300 (D. Mass. 2012) (internal citations omitted); see *Monahan v. Nebraska*, 687 F.2d 1164, 1171 (8th Cir. 1982) ("either bad faith or gross misjudgment should be found before a § 504 violation can be made out, at least in the context of education of handicapped children"); *K.D. v. Starr*, 55 F. Supp. 3d 782, 788 (D. Md. 2014) (in context of education of handicapped children, "a finding of discrimination based on disability requires a showing of bad faith or gross misjudgment by the school system").

from accepted professional judgment, practice or standards [so] as to demonstrate that the person[s] responsible did not base the decision on such judgment."³² My reasoning follows.

Here, during the relevant school years, Student served seven short-term suspensions, one bus suspension, and two long term suspensions. Parents argue there is no genuine issue of fact that the suspensions were excessive, disproportionate to the offenses, deviated from reasonable professional judgment, and formed a pattern of discrimination. Parents' argument is unpersuasive.

School personnel may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct as long as those removals do not constitute a change of placement under 34 CFR 300.536.³³ Caselaw suggests that, in the context of school discipline, a parent is unlikely to show intentional discrimination where a student is subjected to a short-term suspension.³⁴ In the case of a bus suspension, a student may be removed from the bus for unsafe behavior provided a different mode of transportation is offered.³⁵ Even in a case where a student is disciplined and excluded for more than 10 days for behaviors which are a manifestation of his disability, the court looks for "the record [to] support the conclusion that the school personnel involved in the decisions to suspend the student acted in bad faith or pursuant to a gross misjudgment."³⁶

Here, as a consequence for Student's violations of the code of conduct, the District imposed less than a handful of short-term suspension per relevant school year.³⁷ Parents did not dispute that the behaviors leading to said suspensions took place. The District asserts "it has acted fairly and equitably relative to Student and that it has and continues to have Student's best interest in mind as evidenced by the proposals for a more therapeutic program to meet his needs." The District

³² *Miller*, 732 F.3d at 887.

³³ See 34 CFR 300.530 (b)(1).

³⁴ See *Zell v. Ricci*, 321 F. Supp. 3d 285, 298–99 (D.R.I. 2018), *aff'd in part, vacated in part, remanded*, 957 F.3d 1 (1st Cir. 2020); see also *Mason v. Bd. of Educ.*, No. WMN-10-3143, 2011 WL 89998, at *3 (D. Md. Jan. 11, 2011) (dismissing Plaintiffs' claim under Title II of the ADA and Section 504 of the Rehabilitation Act because "neither a five-day suspension nor an in-school detention implicate[d] the protections of these statutory provisions") (citing *Honig v. Doe*, 484 U.S. 305, 325, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988)); *Twinsburg (OH) City Sch. Dist.*, 58 IDELR 231 (OCR 2011).

³⁵ See, e.g., *Montesano (WA) Sch. Dist. No. 66*, 27 IDELR 616 (OCR 1997) (OCR found that the school district acted properly in suspending the students pending an evaluation, because their disruptive behavior on the bus posed a risk to the safety of all the students on the bus and the bus driver.)

³⁶ *Jonathan G. By & Through Charlie Joe G. v. Caddo Par. Sch. Bd.*, 875 F. Supp. 352, 363–64 (W.D. La. 1994) ("Confronted with a difficult situation and acting pursuant to what they perceived as the best interests of both Jonathan and the entire student body ... employees suspended Jonathan on those occasions when he seemed a threat to the safety of himself or others. While a different course of action should have been pursued (namely, re-evaluation and, when necessary, non-disciplinary exclusion) the Court does not believe that Jonathan was the victim of intentional discrimination").

³⁷ *Thompson By & Through Buckhanon v. Bd. of Special Sch. Dist. No. 1 (Minneapolis)*, 144 F.3d 574, 580 (8th Cir. 1998) ("the record is clear that Thompson's suspensions were for exhibiting dangerous behavior to himself and to others" and therefore were not evidence of discrimination).

convened meetings with Parents to attempt to problem-solve the behaviors and to develop strategies and interventions. It also proposed and conducted evaluations, including two FBAs. The District also proposed an extended evaluation of Student. Although Student was removed from his bus for inappropriate and unsafe behavior, the District offered him a different mode of transportation, which parents declined.³⁸ That Parents disagreed that the District was using the correct interventions does not substantiate a discrimination claim.³⁹ Hence, Parents have not demonstrated that the “professional judgment” exercised by the principal in issuing said short term suspensions and bus suspension “depart[ed] grossly from accepted standards among educational professionals.”⁴⁰ Rather, this is an issue of fact that requires an evidentiary hearing.

In the context of school discipline, discrimination may be found where a district disciplines⁴¹ a student with a disability more harshly than students without disabilities,⁴² as a district may not impose a disciplinary sanction upon a student with a disability if the district would not have imposed the same sanction on a nondisabled student under the same circumstances.⁴³ Nevertheless, school districts are not prohibited from imposing harsher discipline on a particular student as long as the harsher punishment is justified under the circumstances and is not discriminatory.⁴⁴ OCR generally considers three questions when investigating a complaint of

³⁸ See 71 Fed. Reg. 46,715 (2006); *DeLeon v. Susquehanna Cmty. Sch. Dist.*, 747 F.2d 149, 154 (3d Cir. 1984); *Mobile County (AL) Sch. Dist.*, 18 IDELR 70 (OCR 1991) (OCR has implied that merely changing the method of transportation in response to misconduct on the bus will not constitute a change in placement. Therefore, such a change can be made unilaterally by the district without implicating 34 CFR 104.35)

³⁹ See, for example, *D.A. ex rel. Latasha A. v. Houston Indep. Sch. Dist.*, 629 F.3d 450, 455 (5th Cir. 2010) (“D.A.’s mere disagreement with the correctness of the educational services rendered to him does not state a claim for disability discrimination”).

⁴⁰ *T.O. v. Fort Bend Indep. Sch. Dist.*, No. CV H-19-0331, 2020 WL 1442470, at *5 (S.D. Tex. Jan. 29, 2020), *report and recommendation adopted*, No. 4:19-CV-331, 2020 WL 1445701 (S.D. Tex. Mar. 24, 2020), *aff’d*, 2 F.4th 407 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 2811 (2022), *reh’g denied*, No. 21-1014, 2022 WL 3580316 (U.S. Aug. 22, 2022).

⁴¹ 603 CMR 53.00 sets forth, for all public schools and programs in Massachusetts, the minimum procedural requirements applicable to the suspension of a student for a disciplinary offense other than:

1. possession of a dangerous weapon;
2. possession of a controlled substance;
3. assault on a member of the educational staff; or
4. a felony charge or felony delinquency complaint or conviction, or adjudication or admission of guilt with respect to such felony, if a principal determines that the student's continued presence in school would have a substantial detrimental effect on the general welfare of the school, as provided in M.G.L. c. 71, § 37H or 37H½;

It further sets forth the minimum requirements and procedures necessary to ensure that all students who have been suspended, in-school or out-of-school, or expelled, regardless of the type of offense, have an opportunity to make academic progress during their period of suspension, expulsion, or removal from regular classroom activities. See 603 CMR 53.01(2).

⁴² See, e.g., *Belleville Twp. (IL) High Sch. Dist. 201*, 52 IDELR 270 (OCR 2008); and *Allen Village (MO) Charter Sch.*, 116 LRP 16680 (OCR 2015).

⁴³ *OCR Staff Memorandum*, 16 IDELR 491 (OCR 1989); *OCR Memorandum*, 307 IDELR 07 (OCR 1989); see also *Sisseton (SD) Sch. Dist. 54-2*, 66 IDELR 112 (OCR 2015) (finding that a district disciplined a middle school student with bipolar disorder, ADHD, and an anxiety disorder for shooting rubber bands in class the same way it would have disciplined a student without a disability).

⁴⁴ See, e.g., *Allen Vill. (MO) Charter Sch.*, 116 LRP 16680 (OCR 2015) (concluding that a district did not discriminate against a student when it suspended the student for bullying multiple classmates and touching others inappropriately); *Palmer (MA) Pub. Sch. Dist.*, 121 LRP 5068 (OCR 2020) (upholding a district's decision to subject

different treatment in student discipline: “(1) whether there is evidence the school treated the student differently based on disability; (2) whether the school stated a legitimate, nondiscriminatory reason for the different treatment; and (3) whether the school’s stated reason was pretext for discrimination.”⁴⁵ If a school did not have a legitimate, nondiscriminatory reason for different treatment of a student with a disability or if its stated reason was a pretext for discrimination, OCR would find that the school violated Section 504.⁴⁶

Here, Parents have not demonstrated that no material issue of fact exists such that Student’s two long-term suspensions were more severe than those imposed on other nondisabled peers in similar circumstances.⁴⁷ Parents offer no evidence of any other nondisabled student who was treated less harshly under similar circumstances⁴⁸; as repeatedly stated by courts, “Discipline is an essential part of a school’s curriculum; absent a showing that the school’s disciplinary procedures as applied to Plaintiff were significantly different from those applied to other students or otherwise unreasonable, courts should be reluctant to find that a school administrator disciplined a student with retaliatory intent.”⁴⁹ In support of their *Motion* Parents cite to *In re: Adam and Taunton Public Schools*, BSEA # 17-08888.⁵⁰ However, in contrast to the instant matter, in *Adam* the District imposed repeated out of school suspensions

a student with an undisclosed disability to progressively more severe discipline after she engaged in inappropriate behavior during the school year, including cutting class, lying to and disrespecting a teacher, inciting disruptive situations, leaving school grounds, fighting, making threats, and defiance); *Greenville (SC) County Sch. Dist.*, 56 IDELR 145 (OCR 2010) (nature of a student’s threatening remarks to a classmate over a social media website adequately explained a principal’s decision to recommend his expulsion); *Community Unit Sch. Dist. 300 (IL)*, 57 IDELR 235 (OCR 2011) (observing that the expulsion of an intoxicated student aligned with an Illinois district’s disciplinary policies, as the punishment was permitted by the student handbook and within the range of sanctions other students received for the same offense).

⁴⁵ *Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline under Section 504 of the Rehabilitation Act of 1973*, 81 IDELR 111 (OCR 2022).

⁴⁶ See *id.*

⁴⁷ See, e.g., *Independence (MO) Sch. Dist. #30, 60 NDLR 68* (OCR 2018) (a Missouri school district appropriately applied its tiered punishment system to a student with a hearing impairment when it suspended him from the bus); *Hopewell (VA) Pub. Schs.*, 21 IDELR 189 (OCR 1994) (discrimination may occur when the student with a disability is penalized in a different (typically harsher) manner than a nondisabled student would be penalized for the same offense); *Lawrence County (AL) Sch. Dist.*, 52 IDELR 201 (OCR 2009) (although a middle schooler with disabilities received a harsher sanction than her nondisabled classmate when the two acted out in class, OCR found insufficient evidence of disability discrimination due to the student’s history of disciplinary referrals, coupled with the relative severity of her classroom misconduct); *A.N. v. Mart Indep. Sch. Dist.*, No. W-13-CV-002, 2013 WL 11762157, at *12 (W.D. Tex. Dec. 23, 2013), *aff’d sub nom. Nevills v. Mart Indep. Sch. Dist.*, 608 F. App’x 217 (5th Cir. 2015) (where student was punished for confrontational and disruptive behavior, parents could not show that the school’s disciplinary procedures as applied to Plaintiff were significantly different from those applied to other students or otherwise unreasonable); *T.O.*, 2020 WL 1442470, at *6 (Even if T.O.’s disability contributed to his behavior in the hallway on the date of the incident, the allegations fall short of showing discriminatory intent to state a plausible ADA claim or § 504 claim).

⁴⁸ Parents submitted PE-19 and PE-24 in support of their position that the District’s suspension of Student was excessive and disproportionate. However, because the exhibits offer neither a thorough description of the alleged offenses, the profile and educational history of the alleged perpetrators, nor the discipline imposed, a genuine issue of fact remains and the evidence is not conclusory as to Parents’ discrimination claim.

⁴⁹ See, e.g., *A.N.*, 2013 WL 11762157, at *12 (noting that school administrators receive deference “in matters such as discipline and maintaining order in schools”); *Csutoras v. Paradise High Sch.*, 12 F.4th 960, 967 (9th Cir. 2021) (“As other courts have observed before, ‘[j]udges make poor vice principals,’ and thus need to be careful second-guessing a school’s disciplinary decisions or restricting the flexibility that school administrators require and our laws afford”) (internal citations omitted).

over a long period without conducting a single manifestation determination review. Parents also support their *Motion* with instructional exhibits including, but not limited to, *Guiding Principles: a Resource Guide for Improving School Climate and Discipline*. (IPE-11i; see also PE-11a through PE-11h and PE-12a through PE-12d). However, while *Guiding Principles* and the like may offer reasonable guidelines for effective school discipline, in the instant appeal, the school principal and the Superintendent cite to the severity of Student's behaviors as the rationale for the harsh discipline imposed on Student (i.e., suspension of 85 and 43 school days, respectively). Whether such rationale provides "a reasonable explanation" for the suspensions sufficient to "rebut the allegation of discrimination" is a genuine issue of material fact that cannot be resolved via a summary judgment motion.⁵¹

Parents also raise the issue of excessive punishments in the form of inappropriate use of restraints and seclusion. Section 504 does not prescribe particular behavior intervention techniques, and there is no mention of restraint or seclusion therein. In Massachusetts, 603 CMR 46.00 *et seq* governs the use of physical restraint on students in publicly funded elementary and secondary education programs. Judicial and administrative decisions assess the use of restraint and seclusion on a case-by-case basis.⁵² The Office for Civil Rights (OCR) and administrative and judicial decisions have found that restraint in response to student behaviors could constitute disability discrimination.⁵³ In *Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities*, 69 IDELR 80 (OCR 2016), OCR explained that the restraint and seclusion of a student with a disability could violate Section 504 if it: 1) constitutes unnecessary different treatment; 2) is based on a policy, practice, procedure, or criterion that has a discriminatory effect on students with disabilities; or 3) denies a student FAPE.⁵⁴ However, restraint would not constitute unnecessary different treatment if there is no evidence to suggest that the school would

⁵⁰ See *In re: Adam and Taunton Public Schools*, BSEA # 17-08888 (Reichbach, 2018) (concluding that Taunton's failure to conduct manifestation determination reviews in connection with multiple suspensions of Adam beyond ten (10) days during the 2014-2015 school year and again during the 2015-2016 school year constituted both a deprivation of a free appropriate public education under the Individuals with Disabilities Education Act and a violation Section 504 of the Rehabilitation Act of 1973).

⁵¹ See *Zdrowski*, 119 F.Supp.3d at 667-68. The court also held that the failure to replace a classroom aide did not exemplify bad faith or gross misjudgment where, among other things, no aide was required under the student's IEP. See *id.* at 668.

⁵² See, e.g., *In re: Student with a Disability*, 39 IDELR 200 (2003) (upholding use of basket hold); *CJN v. Minneapolis Public Schools*, 323 F. 3d 630 (8th Cir. 2003) ("Because the appropriate use of restraint may help prevent bad behavior from escalating to a level where a suspension is required, we refuse to create a rule prohibiting its use, even if its frequency is increasing"); see also *Florence County No. 1 School District*, 352 IDELR 495 (OCR 1987); *Ohio County Public Schools*, 16 IDELR 619 (OCR 1989) (physical restraint was reasonable under the circumstances); but see, *Heidemann v. Rother*, 24 IDELR 167 (8th Cir. 1996) (a student's right to substantive due process may be violated if he is subjected to bodily restraint (blanket-wrapping technique) when its use is a substantial departure from professional standards and practice); *Portland School District*, 352 IDELR 495 (OCR 1987) (school district violated Section 504 when it repeatedly used restraints on a student with severe, multiple disabilities, including strapping student into a wheelchair and tethering the chair to a radiator); *Oakland Unified School District*, 20 IDELR 1338 (OCR 1990) (mouth-taping of student who talked incessantly was discrimination).

⁵³ See, e.g., *Portland (ME) Sch. Dist.*, 352 IDELR 492 (OCR 1987) (finding the district violated Section 504 when it repeatedly restrained a student with multiple severe disabilities, including strapping the student into a wheelchair and tethering the chair to a radiator); *Oakland (CA) Unified Sch. Dist.*, 20 IDELR 1338 (OCR 1993) (finding that taping a child's mouth shut for screaming and talking excessively was an act of disability discrimination, particularly given that the behavior was a manifestation of the student's disability); *Johnston County (NC) Schs.*, 60 IDELR 24, (OCR 2012) (concluding that a district's use of mechanical restraints on 18 students with disabilities did not comply with Section 504).

have treated a non-disabled student exhibiting the same behavior any differently than it treated a student with a disability; that a student's behavior is "a manifestation of his disability" is not sufficient to demonstrate that school staff utilized restraint or seclusion "by reason of" his disability.⁵⁵ Some courts and OCR Letters of Findings have upheld a district's use of restraint and seclusion as nondiscriminatory especially where restraint and/or seclusion were implemented as emergency measures in the face of imminent harm and in accordance with state law.⁵⁶ Therefore, evidence that a school used inappropriate techniques to manage the behaviors of a student with a disability will not in itself entitle the parent to relief for disability discrimination if the school can show it acted in the student's interest or offer evidence providing a reasonable explanation for the action.⁵⁷

In the instant matter, Parents' argument that no genuine issue of fact exists such that the District discriminated against Student on the basis of his disability by restraining and secluding him is unpersuasive. First, the District's deviation from 603 CMR 46.03 on September 13, 2019 does not per se equate to discrimination.⁵⁸ (PE-5) With regard to the restraint implemented on the same day, Parents offered no evidence that it was implemented inappropriately or that the District acted in a manner that "departs substantially from an accepted professional judgment."⁵⁹ Nor was evidence offered to suggest that the school would have treated a non-disabled student

⁵⁴ This Ruling does not address FAPE or IDEA-based claims that exceed the two year statute of limitations. See my July 26, 2022 *Ruling on Westfield Public Schools' Partial Motion to Dismiss Parents' Amended Hearing Request and Counterclaim*, BSEA # 2212235 (finding that "Parents' claims asserting that the District discriminated against Student on the basis of disability in violation of § 504 by failing to conduct proper manifestation determination review meetings and by failing to provide Parents with opportunities to participate meaningfully therein are intertwined with IDEA claims and are subject to the two-year statute of limitations" but that a three-year statute of limitations applies to "any claims asserting discrimination in violation of § 504 on the basis of disability through the administration of disproportionately severe punishments [as they] are not FAPE or IDEA based claims as they are not based on a dispute concerning Student's eligibility under the IDEA or § 504 or the discharge of the School's procedural and substantive responsibilities under the IDEA or Section 504 of the Rehabilitation Act of 1973").

⁵⁵ *J.V. on behalf of C.V. v. Albuquerque Pub. Sch.*, No. CV 13-01204 MV/KBM, 2015 WL 13333013, at *6 (D.N.M. Mar. 27, 2015), *aff'd sub nom. J.V. v. Albuquerque Pub. Sch.*, 813 F.3d 1289 (10th Cir. 2016).

⁵⁶ See, e.g., *J.V.*, 813 F.3d at 1295 (holding that parents did not establish discrimination under Title II when the district briefly handcuffed a 7-year-old with autism to manage his behavior as parents failed to show the district's actions were based on the child's disability rather than his unsafe conduct); *Chapel Hill-Carrboro (NC) City Schs.*, 66 IDELR (OCR 2014) (finding no evidence of a 504 violation where staff secluded and restrained a fifth-grader only when his behaviors posed a safety risk); and *Valley View (OH) Local Sch. Dist.*, 53 IDELR 335 (OCR 2009) (finding that the district did not discriminate against a student with bipolar disorder by restraining him when he became disruptive).

⁵⁷ See *Kimes v. Matayoshi*, 782 F. App'x 622, 623 (9th Cir. 2019) (upholding judgment in favor of school against Parent's 504 claim, the court found that use of restraints and disciplinary actions against student amounted to no more than two isolated half-day suspensions, both on days when student had acted violently toward others); in contrast, see *Las Cruces Public Schools*, DPH 0405-01, 105 LRP 44660 (SEA NM 2004) ("the use of physical restraints (including basket holds, hand and feet holding, having an adult lay on top of the child, and blanket wrapping)," was found to be excessive and discriminatory "las[t]ing at times more than an hour," were "totally ineffective... were [not] a part of Student's IEP/BIP plan; ... were not administered by staff trained in the use of physical restraint; ... were not used as a last resort; [and] their use went undocumented").

⁵⁸ *Miller*, 732 F.3d at 887-88.

⁵⁹ See, for example, *In re: Stewart v. Acton-Boxborough Regional School District*, BSEA # 21-0106 (Reichbach, 2021). As additional evidence of deviation from reasonable professional judgment, Parents also submitted instructive exhibits including, but not limited to, *Disability Law center's Self-Advocacy Materials: School Restraint, Time-Out and Seclusion Law in Massachusetts*. (PE-8b)

exhibiting the same behavior any differently.⁶⁰ Parents argue that Student was restrained because of his disability, but the fact that a student's behavior is "a manifestation of his disability" is not sufficient to demonstrate that school staff utilized restraint or seclusion "by reason of" his disability.⁶¹ Because a genuine issue of material issue fact remains as to discriminatory intent, Parents are not entitled to summary judgment.

V. ORDER

Parents' *Motion for Partial Summary Judgment* is hereby DENIED. The hearing scheduled to begin on December 5, 2022 will proceed on the following issues:

- A. Whether the District discriminated against Student in violation of § 504 of the Rehabilitation Act of 1973 on the basis of his disability through a pattern of excessive/disproportionate suspensions between June 17, 2019 and June 17, 2022, inclusive of beginning and end dates?
- B. Whether the District denied Student a FAPE, during the time he was not attending school as a result of being suspended between June 17, 2020 and June 17, 2022, inclusive of beginning and end dates?
- C. If the answer to (A) or (B) is yes, what is the appropriate remedy?
- D. Whether Student requires additional supports and services at his current placement at Westfield High School in order to receive a FAPE in the LRE?
- E. Whether an extended evaluation in a therapeutic milieu is necessary to ensure that Student is able to receive a FAPE, in which case substitute consent is appropriate?

So Ordered by the Hearing Officer:

/s/ Alina Kantor Nir

Alina Kantor Nir

Dated: September 29, 2022

⁶⁰ See, for example, *Belleville Twp. (IL) High Sch. Dist. 201*, 52 IDELR 270 (OCR 2008).

⁶¹ *Jonathan G. By & Through Charlie Joe G. v. Caddo Par. Sch. Bd.*, 875 F. Supp. 352, 363–64 (W.D. La. 1994) ("Confronted with a difficult situation and acting pursuant to what they perceived as the best interests of both Jonathan and the entire student body ... employees suspended Jonathan on those occasions when he seemed a threat to the safety of himself or others. While a different course of action should have been pursued (namely, re-evaluation and, when necessary, non-disciplinary exclusion) the Court does not believe that Jonathan was the victim of intentional discrimination").

.COMMONWEALTH OF MASSACHUSETTS
.BUREAU OF SPECIAL EDUCATION APPEALS

EFFECT OF FINAL BSEA ACTIONS AND RIGHTS OF APPEAL

Effect of BSEA Decision, Dismissal with Prejudice and Allowance of Motion for Summary Judgment

20 U.S.C. s. 1415(i)(1)(B) requires that a decision of the Bureau of Special Education Appeals be final and subject to no further agency review. Similarly, a Ruling Dismissing a Matter with Prejudice and a Ruling Allowing a Motion for Summary Judgment are final agency actions. If a ruling orders Dismissal with Prejudice of some, but not all claims in the hearing request, or if a ruling orders Summary Judgment with respect to some but not all claims, the ruling of Dismissal with Prejudice or Summary Judgment is final with respect to those claims only.

Accordingly, the Bureau cannot permit motions to reconsider or to re-open either a Bureau decision or the Rulings set forth above once they have issued. They are final subject only to judicial (court) review.

Except as set forth below, the final decision of the Bureau must be implemented immediately. Pursuant to M.G.L. c. 30A, s. 14(3), appeal of the decision does not operate as a stay. This means that the decision must be implemented immediately even if the other party files an appeal in court, and implementation cannot be delayed while the appeal is being decided. Rather, a party seeking to stay—that is, delay implementation of—the decision of the Bureau must request and obtain such stay from the court having jurisdiction over the party’s appeal.

Under the provisions of 20 U.S.C. s. 1415(j), “unless the State or local education agency and the parents otherwise agree, the child shall remain in the then-current educational placement,” while a judicial appeal of the Bureau decision is pending, unless the child is seeking initial admission to a public school, in which case “with the consent of the parents, the child shall be placed in the public school program.”

Therefore, where the Bureau has ordered the public school to place the child in a new placement, and the parents or guardian agree with that order, the public school shall immediately implement the placement ordered by the Bureau. *School Committee of Burlington v. Massachusetts Department of Education*, 471 U.S. 359 (1985). Otherwise, a party seeking to change the child’s placement while judicial proceedings are pending must ask the court having jurisdiction over the appeal to grant a preliminary injunction ordering such a change in placement. *Honig v. Doe*, 484 U.S. 305 (1988); *Doe v. Brookline*, 722 F.2d 910 (1st Cir. 1983).

Compliance

A party contending that a Bureau of Special Education Appeals decision is not being implemented may file a motion with the Bureau of Special Education Appeals contending that the decision is not being implemented and setting out the areas of non-compliance. The Hearing Officer may convene a hearing at which the scope of the inquiry shall be limited to the facts on the issue of compliance, facts of such a nature as to excuse performance, and facts

bearing on a remedy. Upon a finding of non-compliance, the Hearing Officer may fashion appropriate relief, including referral of the matter to the Legal Office of the Department of Elementary and Secondary Education or other office for appropriate enforcement action. 603 CMR 28.08(6)(b).

Rights of Appeal

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

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

Confidentiality

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

Record of the Hearing

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