

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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ANDIRA FERRAZ and  
MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION

Complainants

Against

Docket No. 01 BEM 10927

BOSTON PUBLIC SCHOOLS,  
Respondent

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Appearances: David O. Scott, Esq. for Complainant  
Alissa Ocasio, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On November 19, 2001, Andira Ferraz, (“Complainant”), filed a complaint with the Massachusetts Commission Against Discrimination charging that she was discriminated against on the basis of national origin and handicap by the Boston Public Schools, (“Respondent”) in violation of M.G.L. c.151B, section 4. The Investigating Commissioner found probable cause in regard to the charge of handicap discrimination. On November 18, 2005, the case was certified for public hearing. A public hearing was conducted on October 23 and October 24, 2006.

The parties submitted three joint exhibits. Complainant submitted nineteen

additional exhibits, and Respondent submitted twenty-four additional exhibits.<sup>1</sup>

The Complainant and Barbara Fields testified at the public hearing. In addition, the testimony of Complainant and Dr. Janie Ortega before the Commonwealth's Department of Industrial Accidents was accepted into evidence. The parties submitted post-hearing briefs on or around February 2, 2007.

In deciding the matter, I have considered the entire record, including the testimony of the witnesses and exhibits introduced at the public hearing. To the extent the testimony of the witnesses or other evidence is not in accord with or irrelevant to my findings, it is rejected. Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

## II. FINDINGS OF FACT

1. Complainant, Andira Ferraz, ("Complainant") was employed by the Boston Public Schools ("Respondent") as an English as a Second Language ("ESL") and bilingual teacher. She first started taking medication for anxiety and depression in 1984. Complainant commenced employment with Respondent in 1992 and over the course of her employment as a Boston public school teacher, taught at three schools: the John D. O'Bryant High School, Hyde Park High School and the Donald McKay School. Complainant began teaching at the McKay School in 1995. From September of 1997 until April 26, 2002, she was assigned to a bilingual third grade class at the McKay School. The class was taught

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<sup>1</sup> Complainant's Exhibits 13-19 and Respondent's Exhibits 19-24 consist of transcripts of proceedings before the Commonwealth's Department of Industrial Accidents in Ferraz v. City of Boston School Department.

primarily in English, with support in Spanish. The bilingual program in the Boston Public Schools is a transitional program designed to give non-English speaking children English language skills in order to transition them into the regular curriculum. Respondent's Exhibit 19 at 95-97.

2. In 1998, Dr. Janie Ortega ("Dr. Ortega") was hired as Principal of the Donald McKay School and served as its Principal until 2004. Prior to 1998, Dr. Ortega worked in San Antonio, Texas where she was a bilingual resource teacher, a third grade teacher, an Assistant Principal for three years and a Principal for three years in elementary schools. As an Assistant Principal, Dr. Ortega supervised teachers, including those in bilingual classrooms. Dr. Ortega received her doctorate in educational administration in May of 2001. Respondent's Exhibit 23 at 48.
3. The Donald McKay School is a K-8 school in the City of Boston with a bilingual program and a population of between 550 and 650 students. Respondent's Exhibit 19 at 24; 28. Dr. Ortega was recruited by the then-Superintendent of the Boston Public Schools to "turn around" the school, i.e., to improve its literacy curriculum, its instruction, and its standardized test scores. Respondent's Exhibit 19 at 23. Dr. Ortega described the school as "in total disarray" in terms of discipline and instruction when she first arrived. Respondent's Exhibit 19 at 30. Her job responsibilities included supervising and evaluating McKay teachers. Respondent's Exhibit 19 at 6-9.<sup>2</sup>

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<sup>2</sup> The parties agreed that the transcript of Dr. Ortega's testimony before the Commonwealth's Department

4. When Dr. Ortega arrived at the McKay School, no literacy model existed, the curriculum was disorganized, the teachers were not communicating with each other, and the test scores were low. Id. at 12. Dr. Ortega helped to develop a literacy program for the school which consisted of approximately two hours of instruction per day in reading and writing. A core component of the literacy program was “guided reading.” Id. at 57. The guided reading program groups children according to their reading skills and provides them with a variety of reading experiences such as shared reading in small groups. Id. at 58.
5. Dr. Ortega observed and evaluated teachers on a regular basis pursuant to the Collective Bargaining Agreement between Respondent and the Boston Teachers Union. Dr. Ortega did not provide advance notice of teacher observations. Respondent’s Exhibit 19 at 107.
6. Dr. Ortega administered her first formal evaluation of Complainant in November of 1998. Respondent’s Exhibit 1. Dr. Ortega gave Complainant an overall rating of satisfactory. Dr. Ortega commented in her evaluation that Complainant’s lesson was “very effective” and “well-planned.” Dr. Ortega observed that students were “well-behaved, paid attention, and followed directions” and “enjoyed the lesson.” In the section of the evaluation designated as areas for development, Dr. Ortega commented that Complainant, “needs to consistently be on time – arrival and departure.” Dr. Ortega testified at Complainant’s hearing before the

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of Industrial Accidents in Ferraz v. City of Boston School Department would submitted in lieu of live testimony in this case. Joint Exhibits 19-24

Department of Industrial Accidents that in 1998, Respondent was already raising concerns in regard to Complainant's absenteeism and tardiness, both at arrival time and throughout the school day when she was required to pick up her students in other parts of the building. Respondent's Exhibit 19 at 119.

7. Complainant justified some of her tardiness based on the need to go to the post office to pick up reading materials for her students. The materials were offered in pamphlets which every teacher received once a month from the "Scholastic Reading Program." Respondent's Exhibit 20 at 7-8. The pamphlets offered books and toys for parents to order out of a catalog. According to Dr. Ortega, all the other teachers who participated in the program had Scholastic Reading materials delivered to school and did not report any problems with the deliveries. Id.
8. Dr. Ortega next observed Complainant on April 27, 2000 and gave her another overall satisfactory evaluation on May 10, 2000. Respondent's Exhibit 2. Dr. Ortega watched Complainant teaching a forty-five minute literacy block. In the written evaluation which followed the observation, Dr. Ortega noted that, notwithstanding the overall satisfactory evaluation, Complainant did not plan instruction effectively, did not connect the book she used to the illustrations that students were asked to draw, and did not communicate clearly with her students. Dr. Ortega stated that Complainant did not, "use appropriate instructional techniques," did not "use any visible assessment for student learning," and did not "[align] the

lesson . . . with BPS [Boston Public Schools] learning standards.” Id. Dr. Ortega commented that Complainant was not effectively implementing the literacy model and that additional writing should have been assigned to the students instead of drawing exercises. When Dr. Ortega asked to see a lesson plan, Complainant told her that she left it at home for fear of it being stolen. Id. Dr. Ortega noted that Complainant had not implemented guided reading, literacy and writing strategies, did not accept suggestions for improvement, was characterized by other teachers as difficult to work with, and had problems with the paraprofessionals assigned to her. According to Dr. Ortega, part of her ongoing frustration with Complainant was that she did not divide her class into small groups of students at the same learning level but, rather, worked with the entire class as a single unit. Respondent’s Exhibit 23 at 33-34; 71.

9. Dr. Ortega noted that Complainant’s seventeen absences for illness and one personal day did not set a positive example for student attendance and that Complainant had been tardy in delivering and picking-up students from lunch and from specialties. Id.
10. Dr. Ortega evaluated Complainant again in November of 2000 and rated her performance as overall unsatisfactory. Respondent’s Exhibit 3. Prior to issuing her evaluation, Dr. Ortega observed Complainant for a fifty-minute lesson on language arts instruction. Dr. Ortega noted that Complainant switched the focus of the period eight times with no apparent rationale and described the lesson as not well-planned. She noted that

Complainant did not use appropriate instructional techniques that involved and motivated students but, rather, stood in front of the room and lectured. Dr. Ortega observed that Complainant was not using the books prescribed by the third grade curriculum as evidenced by the fact that none of her literacy, science, or math books had been removed from their boxes. Dr. Ortega commented that Complainant did not maintain a professional relationship with colleagues and that four paraprofessionals had asked to be reassigned because of difficulty in working with Complainant. Id.; Respondent's Exhibit 20 at 66.

11. Complainant refused to meet with Dr. Ortega about the unsatisfactory evaluation dated November 21, 2000. Respondent's Exhibit 3.
12. Barbara Fields ("Fields") is the Senior Equity Officer for the Boston Public Schools' Office of Equity. She holds a Masters Degree in Education and has been the Senior Equity Officer for twenty-seven years. The responsibilities of the Office of Equity include receiving, investigating and making recommendations regarding civil rights complaints, including claims of disability discrimination, and arranging reasonable accommodations for staff under the Americans with Disabilities Act.
13. An employee requesting an accommodation must fill out a "Confidential Employee With a Disability Voluntary Self-Identification Form" and supply a recent doctor's statement as supporting documentation. Following the submission of the required material, the employee is

required to attend a meeting at the Office of Equity to discuss whether the specified condition rises to the level of a disability, whether a reasonable accommodation is warranted, and how to implement an accommodation, if the employee's condition is determined to be a qualifying disability. In determining whether an employee has a qualifying disability, Fields reviews the information submitted by the employee's medical doctor, talks to the employee, and reviews the request with the Boston Public Schools' Director of Health Services, Dr. Linda Grant. Fields considers whether the employee can perform the essential functions of the job. Fields may also consult with Dr. Grant to determine if an accommodation is reasonable. If Fields determines that an accommodation is unreasonable, she informs the employee, provides reasons why the requested accommodation is unreasonable, and discusses alternative accommodations.

14. On November 29, 2000, Complainant submitted to Fields a letter from her treating physician, Dr. Jacob Karas, stating that, "Ms. Ferraz is known to have chronic asthmatic bronchitis, which has entitled her to handicapped status. Given her respiratory condition, it is imperative that she avoid any environment that is dusty, moldy, or lacks adequate ventilation. The physical conditions in her present work situation adversely affect her health." Joint Exhibit 1. Dr. Karas "strongly" recommended that Complainant be transferred to a "more suitable environment." Id.

15. On January 18, 2001, Dr. Ortega attempted to observe Complainant for an interim evaluation, however, Complainant was not prepared to teach a lesson. Dr. Ortega postponed the observation until February 15, 2001. The observation resulted in a February 26, 2001 interim evaluation in which Dr. Ortega rated Complainant as “Does Not Meet Standards.” Dr. Ortega noted that Complainant was not up-to-date on curriculum content and did not show a good understanding of the subject matter.
- Respondent’s Exhibit 4. According to Dr. Ortega’s evaluation, Complainant failed to provide the correct number of student handouts, failed to apply the school’s language arts curriculum, limited her communication to English even though several students did not understand English, failed to make effective use of her paraprofessional assistant, failed to communicate learning goals, failed to involve and motivate students, and failed to plan lessons. Dr. Ortega further noted that Complainant did not take advantage of in-house specialists, such as a literacy specialist, a math transitions teacher, and a bilingual reading teacher. Dr. Ortega also stated that Complainant was not a congenial member of the staff and did not work well with other professionals. Id.
16. Complainant refused to sign the February 15, 2001 evaluation or meet with Dr. Ortega to discuss the evaluation unless a field representative from the Boston Teachers’ Union was present. Respondent’s Exhibit 20 at 87.
17. In or around February of 2001, Complainant contacted Fields about a transfer from the McKay School and about her claim of disability. Fields

scheduled a meeting with Complainant relative to her request for a transfer, sent Complainant a “Voluntary Self-Identification Form” pertaining to her claim of disability, and contacted the Boston Public Human Resource Department regarding job vacancies in Complainant’s area of certification(s). Complainant cancelled the meeting because of weather-related concerns and because she did not think she would receive a transfer.

18. Complainant took a leave of absence beginning in March of 2001. In a March 1, 2001 letter to the Human Resource Department of the Boston Public Schools, Complainant’s treating psychiatrist, Dr. Ralph E. Talbot, stated that Complainant was unable to work due to depressive illness and would likely require at least thirty days of sick leave, outpatient counseling, and pharmacotherapy. Complainant’s Exhibit 13. Dr. Talbot wrote a subsequent letter dated April 5, 2001 stating that Complainant was unable to return to work and required an additional thirty days of sick leave. Id. On April 12, 2001, Dr. Talbot again wrote to the Human Resource Department stating that Complainant would be able to return to her job, effective April 17, 2001. Complainant did not return until April 23, 2001. Id.

19. Complainant submitted to the Boston Public Schools a “Voluntary Self-Identification Form” dated April 18, 2001 and a request to transfer to another school. Complainant’s Exhibit 12 D. Complainant listed her

disabilities as: 1) major depressive disorder, 2) recurrent, moderate; panic disorder without agoraphobia; and 3) chronic asthmatic bronchitis.

20. In May of 2001, Fields received a cover letter from Complainant's attorney accompanied by the office visit notes of Dr. Talbot, Complainant's treating psychiatrist. Respondent's Exhibit 9. In a letter dated May 29, 2001, Fields advised Complainant's attorney that the office notes did not satisfy the Respondent's requirements for a medical statement. Respondent's Exhibit 14. Fields also indicated that a transfer to another school was not possible at the end of May. Id.
21. On or about August 27, 2001, Complainant submitted to Respondent's Office of Equity a letter from Dr. Talbot detailing Complainant's psychiatric symptoms (depressed mood, irritability, impaired concentration, low energy, anxiety, hopelessness and lack of any enjoyment in life) which he described as major, chronic, and substantially limiting her ability to socialize and deal with interpersonal stress. Dr. Talbot also referenced Complainant's preoccupation with Dr. Ortega which he characterized as "extreme," "time consuming," and reaching "pathological proportions." He recommended that Complainant be transferred to another school as a reasonable accommodation to assist her in performing the essential functions of her job. Respondent's Exhibit 15.
22. In a letter dated September 4, 2001, Dr. Talbot recommended that Complainant begin a sick leave because of her deteriorating medical condition. Complainant's Exhibit 13. The record does not establish

whether Complainant took a leave and, if so, when she returned from the leave.

23. Fields wrote to Complainant's counsel on September 7, 2001 that reassigning Complainant from one teaching position to another would not be a reasonable accommodation because it would not alleviate her inability to socialize and to deal with interpersonal stress. Respondent's Exhibit 16.
24. Following a discussion between Dr. Grant and Dr. Talbot, Fields wrote Complainant's attorney on October 25, 2001 that she agreed to recommend a reassignment for Complainant subject to the availability of a position and Complainant's agreement to continue treatment. Respondent's Exhibit 17. Fields stated that such reassignment, "would allow the school department to determine if [Complainant's] difficulties are specific to her current assignment or are part of a larger problem." Id. Fields notified the Human Resources Department of the Boston Public Schools to look for vacant positions in Complainant's areas of certification. According to Fields, no vacancies were available at that time in any of the areas in which Complainant was qualified to teach. Id.
25. On October 5, 2001, Acting Superintendent of the Boston Public Schools Michael Contompasis wrote Complainant that Principal Ortega would continue to monitor her performance during the 2001 to 2002 academic year through classroom visits, would offer prescriptions for improvement,

and might recommend dismissal for continuing failure to meet standards.  
Respondent's Exhibit 8.

26. Dr. Ortega gave Complainant an interim evaluation dated October 17, 2001 in which she rated Complainant as "Does Not Meet Standards." Respondent's Exhibit 5. During the observation for the October of 2001 interim evaluation, Dr. Ortega noted that Complainant failed to implement appropriate literacy models, did not complete lesson plans, did not implement "guided reading," did not "demonstrate an understanding of child development," failed to reinforce the English language with visual and auditory materials, and did not adequately communicate with her students who had limited English language skills. Respondent's Exhibit 5. According to Dr. Ortega, Complainant demonstrated the same performance issues that were a concern in previous evaluations. Complainant refused to sign the October of 2001 evaluation.

27. Fields sent another letter to Complainant's attorney dated October 25, 2001 informing him that there were still no vacancies in Complainant's areas of certification which would permit her to transfer schools. Respondent's Exhibit 17.

28. Dr. Ortega conducted another interim evaluation in November of 2001, in which she again rated Complainant as "Does Not Meet Standards." Respondent's Exhibit 6. According to Dr. Ortega, Complainant failed to implement the "Prescription for Improvement" which required a meeting

between the Principal and Complainant to go over lesson plans focusing on the guided reading aspect of the literacy program.

29. During the fall of 2001, Complainant refused to meet with Dr. Ortega about her unsatisfactory evaluations.
30. Dr. Ortega conducted another interim evaluation of Complainant in February of 2002 and again rated Complainant's performance as "Does Not Meet Standards." Respondent's Exhibit 7. According to Dr. Ortega, Complainant failed to establish a curriculum map, taught a math lesson during the scheduled literacy block period, and failed to implement guided reading. Id.
31. In 2002, none of Complainant's students met the minimum benchmark score for the Scholastic Reading Inventory Test (SRI). The benchmark is used to determine whether or not a student is ready to be promoted to the next grade level.
32. In March of 2002, Dr. Ortega notified Complainant that her termination was being recommended for failing to implement programs, curriculum, and instruction techniques that were mandated by Boston Public Schools, failing to follow her "Prescription for Improvement," failing to adhere to policy and procedures, having excessive absences, and failing to communicate and get along with other staff members. Respondent's Exhibit 8.
33. Complainant's employment was terminated effective April 26, 2002.

34. During Dr. Ortega's tenure at the McKay School, she terminated two tenured teachers including Complainant.

35. In July of 2004, Dr. Ortega was promoted to one of three Assistant Superintendent positions within the Boston Public Schools. Respondent's Exhibit 19 at 37.

36. In February of 2005, the McKay School was nominated by the Massachusetts Commissioner of Education as a National Title I Distinguished School and received an award for the designation in Atlanta, Georgia. Respondent's Exhibit 19 at 37.

### III. CONCLUSIONS OF LAW

Pursuant to Massachusetts General Laws c. 151B, sec. 4(16), an employer is prohibited from discriminating against a person on the basis of handicap. In this case, Complainant alleges that Respondent engaged in unlawful discrimination when it wrongfully failed to provide her with reasonable accommodations for her disability. In order to establish a prima facie case of disability discrimination for failure to provide a reasonable accommodation, Complainant must show: (1) she has a "handicap" within the meaning of M.G.L. c. 151B, sec. 1(17); (2) she is a "qualified handicapped person" within the meaning of M.G.L. 151B, sec. 1(16), i.e., capable of performing the essential functions of a particular job with or without a reasonable accommodation; (3) she requires a reasonable accommodation to perform her job; (4) Respondent was aware of the handicap and the need for a reasonable accommodation; (5) Respondent was also aware, or through a reasonable investigation could have become aware, of a means to reasonably accommodate the handicap; and, (6) Respondent failed to provide

Complainant the reasonable accommodation. See Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap, § IX(A)(3) (2002) (“Disability Discrimination Guidelines”), *citing* Wayne v. Tufts Univ. Sch. Of Med., 932 F.2d 19, 25 (1<sup>st</sup> Cir. 1992); Hall v. Laidlaw Transit, Inc., 25 MDLR 207, 213-214, *aff’d*, 26 MDLR 216 (2004). If the Complainant meets her burden by satisfying each of these elements, then the burden shifts to Respondent to prove that the reasonable accommodation required by Complainant would pose an undue hardship on the Employer's business. See Disability Discrimination Guidelines, § IX (A)(3); Yates v. Mass-C.E.O.P.S., 17 MDLR 1503, 1514 (1995). Complainant may then rebut Respondent’s evidence by showing that the reasonable accommodation would not impose an undue hardship. Disability Discrimination Guidelines, § IX(A)(3).

**A. Handicapped Person**

As a threshold issue, Complainant must prove that she is a “handicapped person” within the meaning of M.G.L. c. 151B, § 1(17). The statute defines a “handicapped person” as one who: (a) has a physical or mental impairment which substantially limits one or more major life activities; (b) has a record of such impairment; or, (c) is regarded as having such impairment. See Dahill v. Police Department of Boston, 434 Mass. 233, 241 (2001); Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1, 3 (1998); Talbert Trading Co. v. MCAD, 37 Mass. App. Ct. 56, 61 (1994).

The evidence establishes that Complainant is handicapped based on her diagnosis of anxiety and depression but not based on her diagnosis of chronic asthmatic bronchitis. Regarding the latter diagnosis, Complainant’s asthmatic condition is supported by a single note from Dr. Jacob Karas dated November 29, 2000, stating that Complainant “is

known to have chronic asthmatic bronchitis, which has entitled her to handicapped status. . . . it is imperative that she avoid any environment that is dusty, moldy, or lacks adequate ventilation.” Beyond Dr. Karas’s sweeping assertions, the record is devoid of any diagnostic tests, office notes, or history of treatment supporting a claim of handicap status. Dr. Karas fails to describe the seriousness of the condition, i.e., whether it is debilitating or merely annoying, and fails to identify which, if any, major life activity Complainant is prevented from performing as a result of having asthma. Dr. Karas’s note was submitted to the Boston Public Schools’ Office of Equity on or around November 29, 2000, but Complainant did not file a Voluntary Self-Identification form until April 18, 2001, over five months later. As Senior Equity Officer Fields observed in her response to the submission, Complainant failed to outline what, if any, limitations the condition imposed relative to her job responsibilities. Complainant subsequently submitted additional medical information, but none of it addressed her asthma/bronchitis.

Complainant’s history of anxiety and depression is better documented and more relevant to her major life activity of working. The record indicates that she first started taking medication for anxiety and depression in 1984. Complainant took a seven-week leave of absence beginning in March of 2001, based on the opinion of her treating psychiatrist Dr. Ralph E. Talbot that she was unable to work due to depressive illness. Complainant submitted to the Boston Public Schools a Voluntary Self-Identification form dated April 18, 2001. Complainant listed her psychiatric disabilities as “major depressive disorder, recurrent, moderate” and “panic disorder without agoraphobia.” On or about August 27, 2001, Complainant submitted to Respondent’s Office of Equity a letter from Dr. Talbot detailing Complainant’s psychiatric condition, his description of

Complainant's need for limitations in performing teaching responsibilities, and his recommendation that Complainant be transferred to another school. Dr. Talbot referred to Complainant's psychiatric symptoms as major, chronic, and substantially limiting her ability to socialize and deal with interpersonal stress. In September of 2001, Dr. Talbot recommended that Complainant begin another sick leave because of her deteriorating medical condition. Based on the foregoing, I conclude that Complainant's psychiatric condition substantially limited the major life activity of working, rendering her a handicapped person.

**B. Qualified Handicapped Individual**

In order to be a "qualified handicapped person" within the meaning of M.G.L. c. 151B, § 1(16), Complainant must establish that she could perform the essential functions of her job as a school teacher with or without reasonable accommodations. See German v. Building Technologies Engineers, Inc., 25 MDLR 414, 421 (2003); Disability Discrimination Guidelines, § II (B). The "essential functions" of the job are those functions that must necessarily be performed by the employee in order to accomplish the position's primary objectives. See Woodason v. Town of Norton School Committee, 24 MDLR 21, 25 (2002); Disability Discrimination Guidelines, § II(B). The evidence supports a conclusion that Complainant was capable of performing the essential functions of her position in 1998 but could no longer do so between November of 2001 and April of 2002 when Dr. Ortega terminated her.

Upon Dr. Ortega's arrival at the McKay School in 1998, Dr. Ortega described the McKay School as "in total disarray" educationally, but gave Complainant an overall rating of satisfactory. Respondent's Exhibit 1. Dr. Ortega's 1998 evaluation of

Complainant described her lesson as “very effective” and “well-planned.” Dr. Ortega observed that students were “well-behaved, paid attention, followed directions,” and “enjoyed the lesson.” The only area of concern directed specifically towards Complainant was the comment that she needed to “consistently be on time – arrival and departure.”

Complainant’s initial satisfactory evaluation was followed by a May of 2000 evaluation which rated Complainant’s teaching as overall satisfactory but expressed substantial concerns about Complainant’s ability to plan, instruct, communicate, and assess students. Respondent’s Exhibit 2. Dr. Ortega justified her overall satisfactory rating of complainant as a supportive way of placing her on notice that if she failed to improve, she would receive an overall unsatisfactory rating in the future. Respondent’s Exhibit 20 at 62. In the May of 2000 evaluation, Dr. Ortega graded Complainant as unsatisfactory in five out of nine subcategories of performance, including effective teaching and collaboration with colleagues. After observing Complainant teach a forty-five minute block, Dr. Ortega noted that Complainant did not plan her lesson effectively, did not connect the book she used to the illustrations that students were asked to draw, and did not communicate clearly with her students. Dr. Ortega commented that Complainant did not effectively implement educational models for literacy, guided reading, and writing, that she assigned students a drawing project rather than a writing activity, that she drew undue attention to one student’s behavioral problems, and that she did not communicate clearly to her class. When Dr. Ortega asked to see a lesson plan, Complainant told her that she left it at home for fear of it being stolen. Dr. Ortega commented that Complainant was difficult to work with and had problems with the

paraprofessionals assigned to her. Dr. Ortega stated that part of her ongoing frustration with Complainant was that she did not divide her class into small groups of students at the same learning level but, rather, worked with the entire class as a single unit. Dr. Ortega noted that Complainant was absent on seventeen occasions during the school year, was tardy in delivering or picking up her students from lunch or from specialists, and was not receptive to suggestions for improvement.

Dr. Ortega next evaluated Complainant in November of 2000 and, for the first time, gave Complainant an overall unsatisfactory evaluation. Respondent's Exhibit 3. Dr. Ortega observed a fifty-minute lesson on language arts instruction. She noted that Complainant switched the focus of the period eight times with no apparent rationale and did not use appropriate instructional techniques that involved and motivated students but, rather, stood in front of the room and lectured. Dr. Ortega observed that Complainant was not using the books prescribed by the third grade curriculum as evidenced by the fact that none of her literacy, science, or math books had been removed from their boxes. Dr. Ortega commented that Complainant did not maintain a professional relationship with colleagues and that four paraprofessionals had asked to be reassigned because of difficulty in working with Complainant. Complainant refused to meet with Dr. Ortega about the unsatisfactory evaluation dated November 21, 2000.

On January 18, 2001, Dr. Ortega attempted to observe Complainant for an interim evaluation, however, Complainant was not prepared to teach a lesson. Dr. Ortega postponed the observation until February 15, 2001. The observation resulted in a February 26, 2001 interim evaluation in which Dr. Ortega rated Complainant overall as "Does Not Meet Standards." Respondent's Exhibit 4. Dr. Ortega noted that Complainant

was not up-to-date on curriculum content and did not show a good understanding of the subject matter. According to Dr. Ortega's evaluation, Complainant failed to provide the correct number of student handouts, failed to apply the school's language arts curriculum, limited her communication to English even though several students did not understand English, failed to make effective use of her paraprofessional, failed to communicate learning goals, failed to involve and motivate students, and failed to plan lessons. Dr. Ortega further noted that Complainant did not take advantage of in-house specialists, was not a congenial member of the staff, and did not work well with other professionals. Complainant refused to sign the February 15, 2001 evaluation or meet with Dr. Ortega to discuss the evaluation unless a field representative from the Boston Teachers' Union was present.

Dr. Ortega gave Complainant another interim evaluation dated October 17, 2001 in which she again rated Complainant overall as "Does Not Meet Standards." Respondent's Exhibit 5. During the observation for the October of 2001 evaluation, Dr. Ortega noted that Complainant failed to implement appropriate literacy models, did not complete lesson plans, did not implement "guided reading," did not "demonstrate an understanding of child development," failed to reinforce the English language with visual and auditory materials, and did not adequately communicate with her students who had limited English language skills. According to Dr. Ortega, Complainant demonstrated the same performance issues that were a concern in previous evaluations. Complainant refused to sign the October of 2001 evaluation.

Dr. Ortega conducted another interim evaluation in November of 2001, in which she again rated Complainant overall as "Does Not Meet Standards." Respondent's

Exhibit 6. According to Dr. Ortega, Complainant failed to implement the “Prescription for Improvement” which required a meeting between Dr. Ortega and Complainant to go over lesson plans focusing on the guided reading aspect of the literacy program. During the fall of 2001, Complainant refused to meet with Dr. Ortega about her unsatisfactory evaluations. Dr. Ortega conducted another interim evaluation of Complainant in February of 2002 and again rated Complainant’s performance as “Does Not Meet Standards.” Respondent’s Exhibit 7. According to Dr. Ortega, Complainant failed to establish a curriculum map, taught a math lesson during the scheduled literacy block period, and failed to implement guided reading.

In 2002, none of Complainant’s students met the minimum benchmark score for the Scholastic Reading Inventory Test (SRI). The benchmark is used to determine whether or not a student is ready to be promoted to the next grade level.

The foregoing evaluations offer a carefully-documented analysis of a teacher whose effectiveness in the classroom deteriorated dramatically between 1998 and 2002. Whether or not the root cause of her professional decline was anxiety and depression, the fact remains that between 2000 and 2002, Complainant failed to perform the essential functions of her position in the opinion of Dr. Ortega. See Mammone v. President and Fellows of Harvard College, 446 Mass. 654 (2006) (Court refuses to read into c. 151B a lower standard of qualifying conduct for handicapped employees than for employees without handicaps). Dr. Ortega’s analysis is thoughtful, specific and well-documented. There is no evidence that she used different standards to evaluate Complainant than she used to evaluate other teachers on her staff. Dr. Ortega’s testimony and evaluations provide convincing evidence that Complainant was unable to implement the prescribed

curriculum of the Boston Public Schools from 2000 through 2002 and was resistant to receiving help.

There is no credible evidence, moreover, that transferring Complainant to another school would have alleviated her problems, i.e., that she would have been able to perform the essential functions of the job with this accommodation. A “reasonable accommodation” is defined as “any adjustment or modification to a job (or the way a job is done), employment practice, or work environment that makes it possible for a handicapped individual to perform the essential functions of the position involved and to enjoy equal terms, conditions and benefits of employment.” Disability Discrimination Guidelines, § II(C). Once an Employer knows or reasonably should know that an employee needs an accommodation, it is obligated to “search out and define what it could do to reasonably accommodate the employee and to communicate the offer to the employee.” Forrest v. Wal-Mart, 23 MDLR 110, 117 (2001), *quoting*, Mortimer v. Atlas Distributing Co., 17 MDLR 1713, 1715 (1995). See also Ocean Spray Cranberries, 441 Mass. 632, 648-649 (2004) (recognizing requirement of interactive process once a complainant requests a reasonable accommodation). The interactive process is intended to identify the precise limitations associated with the employee's disability, and the potential adjustments to the work environment that could overcome those limitations. See Mazeikus v. Northwest Airlines, 22 MDLR 63, 68-69 (2000).

There was an interactive process in this case which officially began in the spring of 2001 when Complainant took a seven-week leave of absence, submitted to the Boston Public Schools a Voluntary Self-Identification form dated April 18, 2001, requested a transfer to another school. See Mammone, 446 Mass. at 669 (Employee’s request for an

accommodation triggers an obligation to participate in an interactive process).

Correspondence followed between the Boston Public Schools' Office of Equity and Complainant's attorney. Senior Equity Officer Barbara Fields indicated on May 29, 2001 that Complainant's medical statement was inadequate and that a transfer could not be arranged so late in the school year. Several months later, as the 2001-2002 school year was about to begin, Complainant's psychiatrist supplemented his office notes with an explanation of Complainant's psychiatric condition, a description of Complainant's need for limitations in performing teaching, and a recommendation that Complainant be transferred to another school. From this point forward, Complainant insisted on a transfer as the only accommodation she would consider.

Complainant's insistence on a transfer doomed the interactive process to failure. Complainant maintained that a transfer was the only acceptable accommodation that would have allowed her to perform the essential functions of her job, but the evidence does not support this contention. Given Complainant's psychiatric history, her interpersonal problems with teachers, specialists, and paraprofessionals, and her inability to implement the Boston Public School curriculum, Complainant unreasonably demanded a transfer to another school as the only solution to her situation. Prior to insisting on a transfer, Complainant had received a seven-week leave of absence and a detailed "Prescription for Improvement" to remediate her teaching deficiencies. In the "Prescription for Improvement," Dr. Ortega offered Complainant assistance in the form of a literary specialist, coaches, team teaching opportunities, and administrative review of her teaching plans on a weekly basis. Complainant refused to avail herself of any of these supports. Complainant's focus on a transfer as the only reasonable accommodation

ignores the Respondent's valid observations, expressed by Fields in September of 2001, that a transfer would not alleviate Complainant's inability to socialize with her peers and to deal with interpersonal stress.

Based on the foregoing, I conclude that Complainant was unable to function as a satisfactory teacher between 2000 and 2002 as a result of her psychiatric condition and not as a result of harassment by Dr. Ortega. The record supports a conclusion that Complainant would have encountered similar difficulties with any principal who required that she conform to teaching protocols for literacy instruction, lesson plans, and attendance. Dr. Talbot's assessment that Complainant's problems stemmed from "harassment" by Dr. Ortega is beyond his purview as a treating physician, is unsupported by the evidence, and is not credible given Complainant's inability to meet the Boston Public Schools' performance standards and teaching requirements.

The Employer need not provide an accommodation simply because it is requested by an individual with a handicap. See Disability Discrimination Guidelines, sec. 11C. Respondent allowed Complainant to take a seven-week leave as an accommodation. When Complainant requested a transfer as an additional accommodation, the requested transfer was considered and initially rejected by the School Department on the basis that transferring Complainant from one school to another would move the locus of the problem but not address its underlying cause. Despite Respondent's initial rejection of Complainant's transfer request, Fields subsequently agreed to consider a reassignment for Complainant in order to determine if Complainant's difficulties were "specific to her current assignment or part of a larger problem." However, Respondent's willingness to

consider a transfer if an appropriate vacant position were found, does not convert a potential reassignment into a mandated accommodation.

I conclude that from 2000 until the date of her termination, Complainant was not a qualified handicapped individual capable of performing the essential functions of her teaching position without or without a reasonable accommodation. Respondent ultimately terminated Complainant because of her continued failure to teach in a satisfactory manner and because of her resistance to supervision and suggestions for improvement. Compare Mammone, 446 Mass at 687 (no violation of c. 151B where employee was terminated for misconduct stemming from a handicap as opposed to the handicap itself). There is no evidence that an accommodation in the form of a transfer would have ameliorated Complainant's significant pedagogical shortcomings. The record is also devoid of any evidence that Dr. Ortega harbored discriminatory animus toward Complainant on account of her disability. Accordingly, the record supports a conclusion that Respondent did not discriminate against Complainant by terminating her rather than transferring her to another school, and as a result, the complaint must be dismissed.

This decision represents the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may seek review by the full Commission by filing a notice seeking review within ten (10) days of receipt of this decision, and a petition for review within thirty (30) days of receipt of this decision.

So ordered this 6th day of April, 2007.

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Betty E. Waxman, Esq.

