

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

DIANA SABELLA AND THE MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION,

Complainants

v.

Docket Nos. 97-BEM-3309
 98-BEM-2316

BOSTON PUBLIC SCHOOLS,
Respondent

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER OF THE HEARING OFFICER**

I. PROCEDURAL HISTORY

On September 16, 1997, Complainant, Diana Sabella, filed a complaint with the Massachusetts Commission Against Discrimination, (the “Commission” or “MCAD”), against her employer the Boston Public Schools (“Respondent” or “BPS”).¹ In her complaint, Complainant alleged that Respondent engaged in unlawful discrimination on the basis of handicap in violation of Massachusetts General Laws, c. 151B, § 4(16).

On July 29, 1998, Complainant filed a second complaint with the Commission alleging that Respondent continued to fail to provide her with reasonable accommodations.² On or about July 20, 1999, the Investigating Commissioner issued a Lack of Probable Cause finding with respect to Complainant’s initial complaint. After Complainant appealed the Lack of Probable Cause determination, the Investigating Commissioner remanded the case for further investigation. On June 30, 2000, the Commission vacated the Lack of Probable Cause determination and credited the allegations in the original complaint. On January 11, 2001, the Commission issued a probable cause finding with respect to Complainant’s second complaint of

¹ MCAD Docket No. 97-BEM-3309.

² MCAD Docket No. 98-BEM-2316.

discrimination. On March 6, 2002, the Commission allowed Complainant's Motion to Consolidate her two complaints and to Amend her Charge of Discrimination to assert additional factual allegations related to her disability claims. On or about January 8, 2003, the Commission certified the cases for Public Hearing. A Public Hearing was held before me on May 24, 25, 27, 28 and June 9, 2004, in Boston, MA.

In deciding this matter, I have considered the entire record, including the testimony and exhibits introduced at the public hearing, and the stipulations of the parties. I have likewise considered the Proposed Findings of Fact and Conclusions of Law submitted by the parties after the public hearing. To the extent that the proposed findings and conclusions are in accord with the findings herein, they are accepted; to the extent that they are not, they are rejected. Certain proposed findings have been omitted as not relevant or necessary to a proper determination of the material issues presented.

II. FINDINGS OF FACT

1. Complainant, Diana Sabella, is a resident of Boston, Massachusetts. From 1985 to the date of the public hearing, Complainant has worked as an english as a second language ("ESL") teacher for Respondent. Complainant testified credibly that at all times pertinent hereto, she performed her job in a competent and satisfactory manner. In addition, Respondent offered no credible evidence that her job performance was substandard at any time. Complainant is an employee within the meaning of M.G.L. c. 151B, section 1(6).

2. Respondent, Boston Public Schools, is the school department of the City of Boston, a municipal corporation organized under the laws of the Commonwealth of

Massachusetts. According to Barbara Fields, the senior officer in Respondent's Office of Equity, the Boston Public Schools has approximately 9,000 employees. Respondent is an employer within the meaning of M.G.L. c. 151B, section 1(5).

A. Complainant's Disability

3. In 1993, Complainant was diagnosed with plantar fasciitis, a refractory orthopedic condition of the feet. Complainant testified that her condition substantially limits her ability to walk and stand. She further claimed that her condition causes her pain and loss of stamina with increasing amounts of time on her feet and, as a result, she can only spend ten to fifteen minutes on her feet at any one time. According to Complainant, after spending fifteen minutes on her feet, she has to stay off her feet for thirty to ninety minutes to recover. She further testified that an increase in the frequency of walking and standing results in a diminution in stamina and an increase in recovery time. I credit Complainant's testimony.

4. Complainant has received treatment from numerous medical care providers for her plantar fasciitis, including Harvard-Vanguard Medical Associates, Spaulding Rehabilitation Hospital, and Children's Hospital Sports Medicine. The medical treatment she has received has included acupuncture, podiatry, orthotics, and physical therapy. Complainant testified that as of the date of the public hearing, she was involved in a chronic pain program and has continued to receive treatment from her primary care physician at Harvard-Vanguard. I credit Complainant's testimony.

5. In 1995, Complainant first notified Respondent of her medical condition. In June 1996, Respondent recognized Complainant as handicapped individual under Section 504

of the Rehabilitation Act. Thereafter, Complainant regularly provided medical documentation to Respondent regarding her condition and her continued need for reasonable accommodations.

6. Complainant testified that from 1995 to the present, she continually requested that Respondent provide her with the reasonable accommodations for her disability, including: working part time; having all her classes taught from one classroom located in close proximity to the administrative offices, office equipment and restroom facilities; having access to an elevator; and, having access to an overhead projector and screen. In 1995, the principal at Brighton High School, as an accommodation for her condition, provided Complainant with an overhead projector and assigned her to a class in proximity to all necessary facilities and elevator access. In addition, the principal authorized a less than full-time job-share arrangement for Complainant. This arrangement lasted for two academic years without any problems.

7. At all times relevant hereto, Respondent had a job-share program that was designed, among other reasons, to “assist in finding individuals reasonable accommodations when they can only work part-time.” Pursuant to a Memorandum of Understanding between the Boston School Department and the Boston Teachers Union, participation in the job-sharing program required the approval of the principal or headmaster at the host school. The particular job-share arrangement could be structured in half days, half years, or half weeks. Unlike part-time assignments, a job-share arrangement allows the participant to retain all of the terms, conditions and privileges afforded to full-time teachers. In addition, under a job-share arrangement each individual maintains full benefits, full healthcare, performs all professional development, and retains

assignment rights and seniority. Teachers participating in the program received compensation of one-half their full salary, one-half of their entitlement to sick leave and personal days, full contribution toward their health insurance, and full credit toward their accrual of time toward seniority. Respondent's administrators and Carol Pacheco, the President of the Boston Teachers Union claimed that a teacher desiring to participate in the job-share program is responsible for finding his or her job-share partner.

8. Respondent's Office of Equity is responsible for receiving, investigating, and responding to complaints of discrimination, and securing reasonable accommodations for handicapped individuals employed in the Boston Public Schools. Fields testified that each year the Office of Equity typically provides reasonable accommodations to approximately 50 handicapped individuals employed with Respondent. Complainant testified that in the months preceding the 1996-1997 academic year and each year thereafter, it became very difficult to obtain reasonable accommodations from Respondent. She claimed that the Office of Equity either did not respond to her requests or processed her requests very slowly. Consistent with Complainant's experiences, Pacheco testified that teachers on numerous occasions had a very difficult time securing accommodations from Respondent. Pacheco claimed she frequently worked with Office of Equity and often spoke to Fields about meeting the needs of disabled teachers. Pacheco stated that on some occasions a teacher would receive the necessary accommodations and other times would not. She also expressed that when Respondent did provide a teacher with a necessary accommodation, it was oftentimes "slow in happening." In addition, Pacheco testified that principals would often "push back" or avoid accepting teachers in need of accommodations. According to Pacheco,

Respondent would also often agree to provide a teacher with reasonable accommodations, but then not follow through with the agreement. I credit Complainant and Pacheco's testimony regarding these matters.

B. The 1996 – 1997 Academic Year.

9. In June 1996, Respondent eliminated or "excessed" Complainant's teaching position at Brighton High School for the 1996-1997 school year. When a teacher is excessed, he or she may bid on open positions available for the next school year by participating in a teacher reassignment pool held each June. Ordinarily, teachers bid on open positions in accordance with seniority. Pursuant to the collective bargaining agreement between Respondent and the Boston Teachers Union, teachers participating in the reassignment pool may bid on three vacant positions. Teachers may then interview with the administrators at the selected schools, and each teacher is guaranteed a position at one of the selected schools. However, teachers designated by the Office of Equity as having a "handicap status" under section 504 of the Rehabilitation Act, are given a preference at the reassignment pool and may bid first for any open position. Pacheco testified that this process allows teachers in need of accommodations to bid on a position best suited for his or her medical needs. A teacher granted a "preference" as a result of his or her handicapped status selects only one school and is presumably guaranteed that position. Pacheco stated that information regarding each school's accessibility is available at the reassignment pool. I credit Pacheco's testimony.

10. In June 1996, Complainant contacted the Office Equity to secure a position for the 1996–1997 academic year. On June 24, 1996, Respondent approved Complainant's request for accommodations under Section 504, and gave Complainant a "preference" at

the upcoming teacher reassignment pool. Complainant claimed that prior to attending the selection pool, Respondent did not provide her with any instructions on how to exercise her “preference” at the pool. Complainant also stated that she received no help from the Office of Equity on how to ensure the school she selected would provide her with the necessary accommodations. According to Complainant, no one from the Office of Equity attended the selection pool. I credit Complainant’s testimony.

11. At the reassignment pool, Complainant selected South Boston High School (“South Boston”). Complainant testified that on her own initiative, she then contacted the principal of South Boston, Lorraine Hamilton. Complainant claimed she explained to Hamilton about her need for reasonable accommodations and her desire to job-share. According to Complainant, Hamilton adamantly insisted that she’d have “no job-sharing at (her) school!” In response to Hamilton’s actions, on July 19, 1996, Complainant wrote to Maria Irizarry in the Office of Equity. In her letter to Irizarry, Complainant wrote:

I am writing regarding my request for “reasonable accommodations” on the job. In the past I’ve requested accommodations in the work area and for specific technology aids. It took a while but thanks to your help last year...I was finally accommodated very nicely in those areas and able to better serve my students, as a result.

I have not previously requested your help in the area of work hours due to the fact that my supervisors were very accommodating regarding my need to job-share. However, presently, I have been excessed out of my job-site. At the excess pool, I was assigned to South Boston High. Since then, I met with the principal there, Ms. Loraine Hamilton. She not only refused to acknowledge my assignment there (it seemed she hadn’t been duly informed), but she also adamantly insisted that she’d have “no job-sharing at (her) school!” I tried to explain my situation, why I’d been assigned and why I job-share as well as my previous successful years doing so. Ms. Hamilton really would not even hear me out.

Enclosed is another request from my physician (you should have received one already) so that I may officially ask that job sharing be part of my reasonable accommodation on record in the Office of Equity.

Complainant claimed that the Office of Equity failed to respond to her concerns in a timely manner. I credit Complainant's testimony.

12. In her letter to Irizarry, Complainant attached a note dated July 2, 1996, from Dr. Moira Cunningham of Harvard Community Health Plan. In the letter, Dr. Cunningham stated in part:

[Complainant] is a 46-year-old woman who for the past four years has had significant disability and discomfort from plantar fasciitis and chronic ankle sprains of the left leg. In spite of these difficulties, she has chosen to continue to work, however, because of her musculoskeletal limitations she is unable to work more than part-time. In addition, she has required the assistance of minimal amounts of homemaker services in order for her to continue her independent lifestyle. These homemaker services are warranted based on her limitations because of her musculoskeletal problems and the patient generally reports she only needs the addition of these services when she is trying to maintain her work life and that the need for them is quite low at approximately four to six hours per week.

13. In addition to contacting the Office of Equity, Complainant sought assistance from the Boston Teachers Union. According to Complainant, the Union advised her to report to South Boston on the first day of school, as assigned. Complainant then reported to South Boston and began her assignment by working full time. On or about October 24, 1996, nearly two months into the academic year, Complainant received notification that her job-share accommodation would be allowed. Fields testified that the Office of Equity had stepped in and successfully arranged for Complainant to get the job-share position at South Boston. Fields further claimed that this was the first time the Office of Equity had dealt with a situation where a teacher had requested less than full-time work as an accommodation. The job-share arrangement permitted Complainant to work full time, but for only the first half of the school year. Complainant testified that this accommodation was grossly insufficient since working full time, even for only a half-

year, failed to accommodate her disability and exacerbated her medical condition.

Notwithstanding, Complainant worked full time pursuant to the job-share arrangement through the first half of the academic year. I credit Complainant's testimony.

14. On December 4, 1996, Fields wrote to Complainant to remind her that "the part-time job sharing arrangement which [you] are engaged in this year does not translate into a commitment on your part to continue in this arrangement next year." Fields further stated, "The job-sharing arrangement is an agreement between you and the Headmaster at South Boston High School. If this arrangement does not meet both of your needs, you have a right to request a reasonable accommodation for next year or engage in another job-sharing agreement if the opportunity is available."

C. The 1997 – 1998 Academic Year.

15. Complainant testified that in January 1997, she met with Hamilton to arrange a full year, part-time, job-share arrangement for the 1997-1998 academic year.

Complainant testified that during this meeting, Hamilton denied her request for another job-share arrangement. In response, Complainant contacted the Office of Equity and spoke with Fields. According to Complainant, Fields told her to "talk to Ms. Hamilton and work it out." Fields testified that between January 1997 and June 1997, she never communicated with Hamilton regarding Complainant's request for a job-share arrangement at South Boston High School. I credit Complainant's testimony.

16. Complainant testified that as of mid-June 1997, the Office of Equity had still failed to contact her with respect to her requests for reasonable accommodations at South Boston or to make alternative arrangements. By letter dated June 20, 1997, Complainant

notified Fields of her desire to participate in the reassignment pool to ensure she did not receive a “left-over” position. Although Complainant expressed that she is protected “under the ADA and Section 504”, she told Fields that she would not request a “preference” in the pool and instead bid for a position by seniority. Complainant testified that she decided against exercising a preference in the pool because she wanted to interview with the principal of each potential school and avoid another difficult situation similar to her experiences at South Boston. I credit Complainant’s testimony.

17. In June 1997, Complainant attended the reassignment pool. She claimed that that the Office of Equity again provided no assistance to her regarding the selection process. At the pool, Complainant bid on three positions: a secondary position available at Curley Middle School; an elementary position at the Hennigan School; and, a 0.5 (half-time) elementary position at the Mendell Elementary School. Complainant claimed she attended an interview at the Curley Middle School, but did not receive an offer for the position. Complainant testified that during her interview at the Curry Middle School, she informed the principal, Valerie Lowe-Barehmi, of her desire to job-share, but Lowe-Barehmi responded that job sharing was not allowed at her school. Lowe-Barehmi did not testify at the public hearing. Complainant also interviewed at the Mendell Elementary School, but she purportedly did not receive an offer for that position because she did not hold a certification in primary education and had no experience teaching at the elementary level. Complainant also stated that she chose not to interview at the Hennigan Elementary School after she discovered that the vacancy was not for an ESL position. I credit Complainant’s testimony.

18. In July 1997, Respondent assigned Complainant to a .5 (part-time) position at the Mather Elementary School (“Mather”). After receiving the appointment, Complainant contacted the principal at the Mather who informed her that the position was full-time, not part-time. Complainant testified that the principal informed her that the full-time position had two components: ESL and special education (“SPED”). Complainant then asked the principal whether she could teach the ESL component on a part time basis. According to Complainant, the principal informed her that he did not “want anybody working part time in my building.” The Principal subsequently filled the full-time position with another individual who unlike Complainant held a certification in SPED, but not in ESL. Although the Mather School apparently had no other available position for Complainant, Respondent’s Human Resources office continued to direct Complainant to report to the school. In an obvious “catch-22” situation, from September 1997 to November 1997, Complainant reported to Mather, but never taught. While reporting to Mather, the principal approved her working only 2 ½ days per week as an accommodation to her condition. During this time period, Complainant claimed she continually attempted to get clarification from the Respondent on this position. She also stated that she became aware of available teaching opportunities in other schools, but the Office of Equity failed to facilitate a timely transfer to any of these vacancies. Complainant testified that the Office of Equity also failed to advocate for her placement in a part-time ESL position at the Mather School. I credit Complainant’s testimony.

19. During the three-month period Complainant reported to the Mather School but performed no teaching work, she attempted to secure an alternative teaching position. In particular, she contacted the principal at the Ohrenberger Elementary School, Carol

Geyer, regarding an available position. Complainant testified that she explained to Geyer that she needed to work in one classroom. In response, Complainant claimed that Geyer stated, “This would not be a good match” since Complainant would need to travel to various classrooms to pick up her students. In an attempt to find an accommodation, Complainant suggested that a paraprofessional could be used to escort the students. According to Complainant, Geyer responded, “I already have one sick lady in this building. The paras are already helping her. We can’t give you any help.” I credit Complainant’s testimony.

20. In addition, Complainant testified that she contacted East Boston High School about an opening and interviewed with Ms. Pina, the Department Head at East Boston. According to Complainant, Pina expressed that she wanted to hire her, but stated “the situation would not work out” because Complainant wanted a part-time work schedule. Complainant also claimed that Pina informed her that the principal at East Boston would not approve a job-share situation. I credit Complainant’s testimony.

21. Toward the end of October, Respondent notified Complainant about an opening at Dorchester High School (“Dorchester”). On or about October 28, 1997, Complainant went to Dorchester and met with Diana Santiago, the Program Director of Bilingual Education. Complainant testified that she had a good interview with Santiago and she believed the opening at Dorchester “would be a good professional fit.” Complainant also believed that Santiago wanted to hire her for the position. Santiago testified that she met with Complainant on two occasions and they discussed Complainant’s qualifications and her request for accommodations, including her need to work in one classroom, an overhead projector, access to an elevator, and being in proximity to the copying machine,

main office, and bathroom. Santiago further testified that the position was originally a .4 position, but she expressed to Complainant that she would try to see if the position could be increased to a .5 position as Complainant had requested. Santiago then informed Complainant that the school had a vacant computer room that would be in close proximity to the bathroom, teacher facilities and supplies. Complainant then questioned the appropriateness of being assigned to the computer room since the room had electrical boxes mounted to the floor, which she believed posed a hazard. According to Complainant, after she questioned the suitability of being in the computer room, Santiago yelled at her in an abusive manner, "I have a building full of people! That's all I have to offer." Santiago testified that she wanted to hire Complainant and, as a result, she submitted a work order to have the electrical plugs removed from the floor of the computer room. In addition, Santiago claimed that she had arranged for changes in some students' schedules so that they could take their classes in the morning in order to accommodate Complainant's part-time schedule. Santiago further stated that she did not want to place Complainant in another room because it would necessitate moving "another teacher who had already been put in another classroom with all hers books and supplies and stuff..." Although I believe Santiago wanted to hire Complainant and attempted to provide all her requested reasonable accommodations, I credit Complainant's testimony regarding Santiago's rude and abusive outburst.

22. Complainant then complained to Fields about Geyer and Santiago's statements.

Specifically, in a letter dated November 3, 1997, Complainant stated:

It is clear to me that BPS has some serious problems with administrative attitudes re: people with disabilities and ignorance of the ADA. It is my right under the law, as you know, to be reasonably accommodated by my employer so that I may successfully continue my professional work and stay in as best health as possible.

I will not be blamed, nor insulted, because of any administrator's frustration in setting up those accommodations. There is nothing in the law that states I have to take abuse of any kind (covert or overt) as part of the process of that accommodation. My own frustration, resultant anxiety and increased physical pain levels from waiting for inordinate amounts of time to be placed in an appropriate position, not being engaged in productive work, and feeling demoralized professionally are already much more than I should ever have to be paying for my continued employment with BPS.

23. On November 18, 1997, Respondent assigned Complainant to a 0.6 ESL position at Dorchester High School effective November 19, 1997. Instead of reporting to Dorchester High School, Complainant requested a medical leave of absence. Complainant claimed that she sought the leave because she had experienced an exacerbation of her musculoskeletal symptoms brought on by the elevated stress attributable to Respondent's failure to facilitate a reasonable teaching accommodation. On November 19, 1997, Dr. Cunningham wrote a letter to Respondent recommending the medical leave of absence, in which he stated in part:

[Complainant] has long standing chronic lower extremity pain due to recurrent ankle strains and plantar fasciitis which has been refractory to multiple interventions... [Complainant] is presently experiencing a flare of her musculoskeletal symptoms as well as elevated stress level because of the lack of resolution of her work situation. This has resulted in a high level of anxiety associated with insomnia. It is my opinion that a three month medical leave of absence will have beneficial effect both on her anxiety level as well as on her chronically painful foot condition... I expect her need for medical leave to be reassessed at the end of three months.

Respondent approved Complainant's medical leave of absence. On February 6, 1998, Dr. Cunningham requested that Complainant's leave be extended for the remainder of the academic year because she continued to experience musculoskeletal problems related to her feet and hips. Respondent again approved the request and Complainant remained on medical leave for the remainder of the 1997-1998 academic year. I credit Complainant's testimony.

24. In response to Complainant's complaint regarding Geyer and Santiago, Fields conducted an investigation. As summarized in her letter to Complainant dated January 12, 1998, Fields stated that Santiago had admitted to losing her patience and making some of caustic comments. However, Fields found that Santiago's comments were an "expression of utter frustration" since Santiago was trying "in every way to accommodate each and every need" that Complainant was requesting. Fields wrote that Santiago "felt that your demands were becoming unreasonable, and never ending." Fields further noted that notwithstanding Santiago's comments, Santiago had offered Complainant the position and had met all of her requests. With respect to Geyer's comments, Fields found that "Geyer was inappropriate in the manner in which she responded to you" regarding your request for the assistance of a paraprofessional. But Fields further found that Complainant's "problematic dialogues" with both Santiago and Geyer amounted to a "communication problem" and "not an issue of an administrator not wanting to provide a reasonable accommodation to you." In addition, Fields noted,

Both administrations spoke on the manner in which you spoke to them. They both characterized your tone of voice and statements as demands and not requests. They both stated that they each had expressed their desire to have you teach in their programs and their intent to provide an accommodation. However, it appears that the manner in which she heard and perceived your comments caused both individuals to respond back to you in the manner in which they did.

25. On February 5, 1998, Complainant received medical attention after suffering what initially appeared to be a heart attack. It was subsequently determined that she did not have a heart attack and instead suffered an anxiety attack. She suffered a similar incident a few days later on February 10, 1998. Although Complainant claimed the anxiety attacks were related to the stress incurred as a result of her work situation, I decline to credit her testimony as she has not produced any credible medical evidence or

documentation corroborating a correlation between Respondent's actions and the panic attacks.

D. The 1998 – 1999 Academic Year.

26. On or about April 9, 1998, Complainant notified Fields of her intent to return to her teaching position for the 1998-1999 academic year. As she had done previously, Complainant requested that Respondent provide her with reasonable accommodations for her condition. Complainant subsequently provided Respondent with a letter from Dr. Cunningham dated April 13, 1998, that specifically requested Complainant be provided with one classroom, access to elevators, and a half-time schedule. Dr. Cunningham wrote that these accommodations would “[allow] her to be maximally productive and minimally limited by her foot condition. This would also have a beneficial effect on her foot condition as prolonged hours of work tend to cause flares of this condition.”

27. Complainant also requested that Fields provide her with the vacancy list for the reassignment pool so she could research the available placements. Complainant testified that she had hoped researching the schools might help “avoid the repeating problems of discrimination...experienced as a result of the reassignment process the [previous] two years.” In response, Respondent again identified Complainant as a handicapped individual under Section 504 of the Rehabilitation Act, granted her a “preference” at the reassignment pool, and agreed to provide Complainant with reasonable accommodations for the 1998-1999 school year. Fields also informed Complainant that she “will receive the vacancy list approximately eight days prior to the reassignment pool per Union contract.” However, Complainant testified that she did not receive the vacancy list from the Office of Equity until two days before the pool. In a letter to Fields dated May 22,

1998, Complainant complained about the failure of the Office of Equity to assist her in researching the available vacancies that could possibly accommodate her disability. In particular, Complainant wrote, “While my 504 status gives me preference in choosing a school, it also limits me to only (1) building choice making the need to be well-informed even more crucial. That right of mine has already been violated by the tardiness of my receipt of the list and the resultant lack of time to investigate the available openings.” I credited Complainant’s testimony.

28. Complainant testified that the only secondary level positions available at the reassignment pool for the 1998-1999 school year were located at Madison Park Technical Vocational High School (“Madison Park”). After selecting Madison Park, Complainant contacted Fields to request assistance in advocating for a job-share arrangement. Complainant claimed that Fields was again unresponsive to her request. In August 1998, Complainant contacted the Massachusetts Office on Disability (“MOD”) for help. On August 13, 1998, Phyllis Mitchell, a civil rights advocate with MOD, wrote to Fields about Complainant’s situation. In her letter, Mitchell indicated that she unsuccessfully attempted to reach Fields by telephone on numerous occasions. At the end of August 1998, Fields responded to MOD by scheduling a meeting with administrators from Madison Park to discuss Complainant’s need for reasonable accommodations. Fields, Complainant, Pacheco, the principal and vice principal of Madison Park, and Vicky Rodrigues, the Program Director for the Sheltered English Immersion program, attended the meeting. Complainant claimed that during this meeting both the principal and vice principal were amenable to Complainant’s request to job-share as well as providing Complainant’s other requested accommodations. However, according to Complainant,

Rodrigues continuously insisted that a job-share arrangement would not work at the school. Notwithstanding, Fields testified that she successfully facilitated a job-share position for Complainant at Madison Park that enabled her to work approximately about twenty hours a week on a half-day basis. I credit Complainant's testimony.

29. Although Fields may have been able to get Madison Park to accept a job-share arrangement, Complainant did not have a job-share partner at the start of the 1998-1999 school year. Rodrigues testified that she endeavored to find Complainant a job-share partner even though the protocol under the job-share program required a teacher to secure his or her own job-share partner. Rodrigues testified that she made arrangements with another teacher, Beza Demena, to work as Complainant's job-share partner and the arrangement between Complainant and Demena lasted the entire 1998-1999 school year.

30. Complainant testified that Madison Park initially provided her with a small classroom in close proximity to her other required accommodations. Rodrigues claimed that the school assigned Complainant to a smaller sized classroom because bilingual classes tend to be smaller than regular education classes and, therefore, the school assigns the smaller rooms to the bilingual and special education departments. However, by mid-October 1998, due to an increased enrollment in the ESL program, Complainant's class size had exceeded the capacity for the classroom and the appropriate teacher/pupil ratio. Complainant then filed a grievance with Respondent as a result of her having an excessively large class. Rodrigues testified that she tried to find a larger classroom for Complainant, but was unable to find a permanent classroom for all her classes and could only locate a larger classroom for her one over-enrolled class.

Complainant complained that having to move from one classroom to another would be

contrary to the reasonable accommodations requested by her physician. She also believed the commute between classrooms would aggravate and exacerbate her medical condition. Notwithstanding, in a memo dated October 28, 1998, Complainant notified Rodrigues that she would accept moving from one classroom to another “with the understanding that, as soon as possible, the class size will be reduced and this will only be a temporary situation.” Additionally, she requested that Rodrigues provide her with assistance in moving the overhead projector and screen from one room to another. In response, Rodrigues assigned a paraprofessional, Theresa Rosa, to assist Complainant. Complainant testified, however, that Rosa often did not get to her classroom on time. Rodrigues admitted that Rosa had other duties and worked with several other teachers. Rodrigues stated that she spoke to Rosa and told her to get to Complainant’s classroom as soon as possible. During this ordeal, Complainant requested that Fields intercede on her behalf. In response, Fields apparently visited Madison Park, walked between the new classroom assignments, and met with Rodrigues regarding Complainant’s situation. Complainant testified that Fields told her that the Office of Equity could do nothing to help her. Moreover, according to Complainant, at no time did Fields engage in an interactive dialogue with her about the impact of the room change on her disability, elicit the assistance of Respondent’s in-house physician to review the situation, or request Complainant provide additional medical information. I credit Complainant’s testimony.

E. The 1999 – 2000 Academic Year.

31. In June 1999, Madison Park began the process of reassigning classrooms for the next academic year. As is common during this process, Complainant and other teachers petitioned the administration for new classroom assignments. On June 20, 1999,

Complainant notified Fields to formally request reasonable accommodations for her post at Madison Park for the upcoming school year. On or about June 25, 1999, Complainant learned that the school had assigned new classrooms to teachers, but had excluded her name from the list of new room assignments. Complainant immediately notified Fields in writing about the problem. In the letter, Complainant stated that she had met with all of her administrators, but the administrators could not agree amongst themselves about an appropriate classroom for her. According to Complainant, none of the teachers receiving new classrooms were disabled. Complainant claimed that Fields again failed to effectively advocate on her behalf. On August 19, 1999, Dr. Cunningham wrote to Fields to reemphasize his previous request that Complainant have all her classes at Madison Park take place in the same classroom. Dr. Cunningham further requested that Complainant only work part time since prolonged standing or walking had a negative impact on her health. Complainant testified that just prior to the beginning of the school year, she still did not have a classroom. Notwithstanding her concerns, by the start of the school year, Respondent had assigned Complainant to a single classroom, Room E3L, which was located in proximity to the copy machine, other teacher equipment, telephones, bathroom facilities, and two elevators.

32. At the conclusion of the 1998-1999 academic year, Complainant's job-share partner left the school system. Over the summer, Complainant claimed she actively engaged in the process of finding a new job-share partner, including contacting professional organizations, the Boston Teachers Union, and local universities. On or about September 1, 1999, Rodrigues sent Complainant a letter informing her that she was solely responsible for finding a job-share partner. The letter further stated, "Full

coverage for students must be provided on the first day of school, September 8, 1999. If you are still interested in job sharing, you have the responsibility of finding a partner. If we do not hear from you by Friday, September 3, 1999, we will have to explore other options.” Complainant testified that Rodrigues’ letter upset her because she believed Rodrigues had threatened to eliminate her job if she did not find a job-share partner. In response, Complainant claimed she contacted Fields. Complainant testified that Fields had previously agreed to assist her in the process of finding a job-share partner as a reasonable accommodation. In addition, Complainant referred potential candidates to both Fields and Rodrigues. According to Complainant, Rodrigues refused to interview most of the candidates deeming them unqualified. Complainant also believed that Rodrigues told at least two qualified of the candidates that no teaching contracts were available at Madison Park. On October 30, 1999, Fields purportedly spoke with Rodrigues regarding the misrepresentation of the availability of contracts and specifically requested that Rodrigues call back one of the rejected candidates. After failing to resolve the issue of finding a job-share partner with Rodrigues, Complainant attempted to garner the assistance of the principal of Madison Park, Dr. Snead. According to Complainant, Snead refused to meet with Complainant and referred her back to Rodrigues. I credit Complainant’s testimony.

33. Complainant worked without a job-share contract for the majority of the 1999-2000 academic year and Respondent rotated substitute teachers to staff the other half of the ESL position. In November 1999, Complainant met a substitute teacher, Barbara Sayess and seized the opportunity to secure Sayess as her job-share partner. On or about November 15, 1999, Sayess executed the “Job-share Participation Agreement.” In

December 1999, however, Sayess informed Complainant that she could not continue in the position and Sayess ceased working for Respondent in January 2000. Complainant did not have a job-share partner for the remainder of the academic year.

F. The 2000 – 2001 Academic Year.

34. Complainant began the 2000-2001 school year at Madison Park with the ordeal of again trying to find a job-share partner. On August 23, 2000, just prior to the start of the school year, Rodrigues sent Complainant a letter that stated, “As you know, the job-share position which you have held for the past two years has been contingent upon your finding a suitable and qualified ESL certified teacher to share the position with you. As yet, we have not heard from you as to whether or not you have found such a person and of course, I will need to conduct an interview.” Complainant claimed, similar to the previous academic year, that she referred potential job-share partners to Rodrigues, but Rodrigues refused to interview them. Eventually, Complainant found Shahin Johnny to work with her as a job-share partner and after the school year started, Rodrigues hired Johnny for the position. The job-share relationship between Complainant Johnny lasted the entire 2000-2001 school year.

35. In addition to the problem of finding a job-share partner, Complainant testified that she experienced numerous problems when she reported to school in September 2000. First, her classroom had been moved to a less accessible area of the school. In addition, the classroom had partitions rather than full walls. She also claimed that Respondent assigned her “Literacy” students as opposed to ESL students. Complainant complained that the Literacy students were “active and unruly and really required somebody else who can be very active with them...” Complainant complained to Fields, Rodrigues, and

other administrators at Madison Park about this situation. In particular, she stated she explained to them that due to her disability, she lacked the mobility necessary to capture and keep the attention of the Literacy students. Complainant also identified the availability of alternative class space. According to Complainant, neither Fields nor the administrators at Madison Park did anything to rectify the situation. Although I credit Complainant's testimony that she was distressed about the problems she experienced at the beginning of the 2000-2001 school year, and complained about these matters, I find that Respondent provided her with all of her requested reasonable accommodations including both a half-day work schedule and a single classroom to teach all of her classes.

G. The Discontinuance of the Job-Share Program at Madison Park High School

36. In March 2001, Rodrigues informed Complainant that her job-share position at Madison Park would be eliminated. Rodrigues then memorialized the decision in a letter to Complainant dated March 19, 2001. In the letter, Rodrigues stated:

As of the School Year 2001-2002 [Madison Park] will no longer be employing teaching faculty in job sharing positions. This arrangement has been found detrimental to optimum teaching and learning for our students.

Therefore, I regret to inform you that we will not be able to utilize your services in the coming year. Please feel free to avail yourself of the service of the Boston Public Human Resources Department to obtain another teaching position with the Boston Public School system.

37. According to Complainant, prior to receiving Rodrigues' memo, Respondent never notified her of any concerns about her teaching performance or any problems with the job-sharing arrangement. In addition, Complainant testified that prior to Respondent's decision, the administrators at Madison Park never mentioned that they were considering the discontinuance of her job-share partnership. Respondent did not

introduce any credible evidence to the contrary regarding these matters and, therefore, I credit Complainant's testimony.

38. Rodrigues and Fields testified that the discontinuance of a job-share arrangement is subject to the discretion of the principal or headmaster of each school. It is undisputed that Rodrigues recommended to Charles McAfee, the Headmaster at Madison Park, that Complainant's job-share be discontinued. McAfee also acknowledged that he had the ultimate and sole authority to end the job-share arrangement. Additionally, he admitted that at the time he made the decision to end Complainant's job-share partnership, he had never met Complainant. With respect to his reasons for discontinuing the job-share arrangement, McAfee testified that he considered the practice to be unsound for teaching and learning. However, McAfee failed to provide any credible testimony to support his assertion that job-sharing is unsound for teaching and learning. In addition, McAfee did not provide any credible evidence that Complainant's particular job-share arrangement posed a detriment to the students in her class. Moreover, McAfee admitted that he made the decision to end Complainant's job-share arrangement without regard for Complainant's teaching quality, ability, or accomplishments. McAfee also acknowledged that he made the decision with full knowledge of Complainant's need for accommodations. In fact, he stated that prior to making the decision, Rodrigues had told him that they had provided Complainant with the job-share arrangement as an accommodation for her disability.

39. Complainant testified that despite discontinuing her job-share partnership, Respondent allowed other personnel at Madison Park to continue with a job-share agreement for the following academic year. McAfee acknowledged that for the 2000-

2001 school year, an informal job-share arrangement existed between two guidance counselors at Madison Park. But McAfee testified that the job-share partnership for the guidance counselors was likewise discontinued prior to the start of the 2001-2002 school year. I credit McAfee's testimony on this particular matter.

40. Complainant testified that after she received Rodrigues' memo, she became extremely upset. She claimed that she felt she had never been welcome at the school and Respondent had continually placed obstacles in her path. She claimed that the situation became particularly distressful since she had been struggling with the accommodation issue for so many years and "this was the third school I was going to be sent away from." In addition, she testified that her professional self-esteem had hit the "bottom of the barrel." She stated that she had "gone from being a very highly esteemed teacher with principals fighting over [her]... to a place where... they're telling [her] that they don't want [her] because now [she had] a medical need." I credit Complainant's testimony.

41. In response to Rodrigues' memo of March 19, 2001, Complainant contacted Fields. According to Fields, she contacted McAfee in response to Complainant's request for assistance. Fields testified that McAfee informed her that they had decided to terminate the job-share program because they had difficulty in getting job-share partners. Notwithstanding McAfee's stated reason for the discontinuation of Complainant's job-share, Fields admitted that she had contacted Shahin Johnny about returning as Complainant's job-share partner for the following academic year and Johnny had agreed to return. Fields claimed that she did not take any further steps toward addressing the discontinuation of Complainant's job-share at Madison Park. On July 20, 2001, Complainant again wrote to Fields in regard to her "continued request for a teaching

position with reasonable accommodations.” Although Fields acknowledged receiving Complainant’s request for assistance, Fields admitted that she did not respond to Complainant or advocate on her behalf in regard to the continuation of the job-share at Madison Park. Fields stated she did not act on Complainant’s behalf because Complainant had applied for a leave of absence. However, Complainant did not apply for a medical leave of absence until August 2001. I credit Complainant’s testimony that Fields failed to take any affirmative action with respect to the discontinuation of her job-share accommodation at Madison Park or advocate on her behalf.

H. Complainant’s Medical Leave of Absence.

42. On or about August 9, 2001, Complainant requested a medical leave of absence for the upcoming academic year. In support of her request, Complainant submitted a note from Dr. Jay Bear, MD. In his note, Dr. Bear indicated that Complainant was under his care for depression and anxiety. He further stated, “[Complainant] is currently involved in a lengthy mediation process with the school and MCAD pertaining to her request for workplace accommodations relating to a physical injury. Her continued presence in her school during this lengthy mediation appears to exacerbate her symptoms, and hence I support her withdrawal on medical leave of absence.” Complainant testified that she requested the medical leave as a result of the exacerbation of her depression and anxiety brought on by the Respondent’s failure to provide her with a teaching accommodation. Respondent granted her request. Complainant was on “paid” leave from September 1, 2001 to November 15, 2001, and then “unpaid” leave from November 16, 2001 to the end of the school year. She then requested a continuation of her medical leave for both the 2002-2003 and 2003-2004 school years. With each request, Complainant submitted

supporting medical documentation. Respondent approved each request. Since August 2001, Complainant has not expressed any interest in returning to her teaching position at the Boston Public Schools or in participating in the reassignment pools. Moreover, Complainant has not contacted the Office of Equity or Respondent's Human Resources Office with respect to coming back to work. Fields testified that the discontinuation of Complainant's job-share arrangement at Madison Park did not preclude Complainant from obtaining another position in the Boston Public Schools. Fields further claimed that Complainant could have obtained another job-share position at a different school for the 2001-2002 school year and the Office of Equity would have assisted Complainant in obtaining her reasonable accommodations had she sought her assistance. Complainant claimed that she was incapable of returning to work due to the exacerbation of her anxiety, depression, pain, and limited stamina brought on by her experiences and efforts to get appropriate accommodations for her condition. I credit Complainant's testimony.

I. Damages

43. Prior to Respondent's alleged wrongful conduct, Complainant had a long and somewhat complicated psychological history. In particular, Complainant admitted that shortly after being diagnosed with plantar fasciitis in 1993, she became depressed, sought counseling, and took anti-depressant medication. Complainant also had a history of other psychologically historical significant events including, but not limited to, a long history of depression, a diagnosis of chronic pain, surgery for a heart defect, an alcoholic father, poor family relationships, poor personal relationships, an eating disorder, and possible sexual abuse. In addition, from 1998 to the present, Complainant has been diagnosed

with depressive disorder, anxiety disorder, possible post-traumatic stress syndrome, dysthymia, and fibromyalgia.

44. However, Complainant testified credibly that by 1996, she had come to accept her disabling physical condition and started feeling better. In particular, she stated that she was happy and “a pretty positive person” at Brighton High School and believed she was a “very creative teacher” with considerable energy. Socially, Complainant testified that during this period she enjoyed the company of her friends, movies, and performed volunteer work for the “Friends of the Boston Harbor Islands.” I credit Complainant’s testimony.

45. Complainant claimed that beginning in 1996, after Respondent purportedly failed to provide her with reasonable accommodations for her disability, she became emotionally distressed and her stress levels “got really high.” She testified that along with the increased stress she suffered a corollary increase in pain and fatigue. As a result, Complainant had to spend less time on her feet resulting in her “whole life [becoming]...less active and less full outside of work time.” Complainant testified that she felt worn down from her constant struggles with Respondent. She further claimed she felt “extremely old and ...very discouraged.” Additionally, she stated that she lost confidence in herself as a teacher, and “[her] whole identity was based on that, and it was just very hard.” I credit Complainant’s testimony.

46. Complainant’s friend, Jane Nawalk testified that prior to Complainant’s problems with Respondent, she had appeared “friendly and outgoing...and seemed very upbeat.” However, Nawalk noticed that Complainant then became “less outgoing [and] would

become emotional easily.” In addition, Nawalk testified that Complainant “seemed like she wasn’t the same person.” Nawalk claimed that she observed Complainant being “under a lot of stress”, “exhausted”, and “in a lot of pain.” I credit Nawlk’s testimony.

47. Complainant testified that as a result of Respondent’s actions, she suffered severe emotional distress and an exacerbation of her medical condition. For example, on November 19, 1997, Dr. Cunningham indicated that “[Complainant] is presently experiencing a flare of her musculoskeletal symptoms as well as elevated stress level because of the lack of resolution of her work situation. This has resulted in a high level of anxiety associated with insomnia.” In addition, she claimed that as a result of Respondent’s actions, she sought and received regular psychiatric and psychological treatment and was prescribed anti-depressant medication. Although Complainant testified that she had no other major stressors in her life during the relevant time period other than the work-related events, her medical records from 1998 to the present indicated that she complained about a number of significant stressors in her life including her family relationships, her ability to perform daily life activities, and her constant pain. However, throughout her therapy sessions, she continually mentioned the ordeal and anxiety associated with her work situation. For example, in medical notes dated May 31, 2000, Complainant’s therapist, D. Milner indicated that Complainant expressed that she “needs to start the process of applying for her [part-time] job and this is very stressful for her. Crying when telling me this.” Milner further indicated, among other things, that Complainant had been asking for accommodations for her medical problems for the past four years, and “has to fight the school system Every year. Very angry at school system for what she has to go thru.” (emphasis in original). On June 27, 2000, Milner wrote that

Complainant reports that she has been “falling apart” the past few days and [after] a discussion we realized the precipitant is her plunging into the overwhelming and ‘catch-22’ process of applying for/developing her p-t position once again.”

48. Shortly after Respondent decided to discontinue Complainant’s job-share program at Madison Park, Complainant obtained therapy from John Moynihan, MSW, for stress and depression related to her work situation and her ongoing MCAD complaint. In notes dated March 2001, Moynihan wrote: “Patient recognizes that she must ‘make some major changes’ in her job – possibly seeking new employment. These work issues have been ongoing x 7-9 years and [patient] now feels ‘forever victimized’ by the process.” On March 29, 2001, Moynihan noted that Complainant “continues depressed state” with decreased sleep and increased tearfulness.” Moynihan diagnosed Complainant as suffering from a major chronic depressive disorder as a result of a “long-standing work-related complaint.” On May 14, 2001, Moynihan described Complainant’s “History of Presenting Problem” as follows:

The patient has been dealing with a seven-year discrimination complaint against her employer, requesting the employer to make accommodations for her, because of chronic and painful plantar fasciitis. She feels victimized by the complaint process. She feels ignored by her employers. She reports that her work as a “good” teacher has been an integral aspect of her self identity, and both her work and her sense of self have faltered during this discrimination complaint process. She feels as though she is not doing the kind of job she use to, and this has left her feeling sad and angry. The patient is experiencing increased eating, both hyper and hyposomnia, hopelessness, episodes of tearfulness, and increased feelings of “being out of sorts.” She reports being very angry. Patient is concerned and anxious about her future, particularly around work and finances.

49. Medical records introduced by Complainant substantiate that since taking a medical leave of absence in August 2001, she has continued to suffer from severe anxiety and depression. For example, on October 31, 2001, her therapist K. Larsen indicated that

Complainant “spoke of work stress... [she] says she feel like she’s lost her job, doesn’t know where she’s heading...[she] fears going back to work [and experiencing] stressors, especially bureaucracy.” Throughout 2002, Complainant she also indicated to Larsen that she “struggles” with or is distressed about work. In 2003, Complainant expressed to Larsen that she experienced intense anxiety over the decision about whether to return to teaching next year. Moreover, in a note from Dr. Baer dated June 4, 2003, Complainant complained of being “intensely anguished when recalls negative experiences for last 5 years of teaching.”

50. Complainant also claimed that due to the alleged discriminatory acts of Respondent, she suffered lost wages. Specifically, during the 1997-1998, she took an “unpaid” medical leave of absence effective November 16, 1997. Complainant testified that she lost \$21,701.62 in lost pay and bonus for the academic year. Complainant also testified that she again had to take an unpaid leave of absence for the 2001-2002, 2002-2003, and 2003-2004 academic years as a result of her depression and anxiety resulting from Respondent’s alleged failure to provide reasonable accommodations. Complainant claimed she lost \$33,988.00, \$35,357.50 and \$36,509.50, respectively, in each of these academic years. In addition to lost wages, Complainant claimed she lost pension contributions equal to 8% of her annual salary for each year she was on an unpaid medical leave. I credit Complainant’s testimony.

51. Notwithstanding her medical condition, in the summer of 2002, Complainant worked for a couple of months for the Boston Harbor Islands National Parks as a visitor use assistant. She also earned a relatively minimal amount of money in 2001 or 2002 teaching a yoga class at Lesley University to special needs college students. Lesley

University paid Complainant \$800 for the whole year. Complainant also taught a few Kripalu yoga classes at the Brookline Center for Adult Education, earning \$32.00 per one hour class.

III. CONCLUSIONS OF LAW

Pursuant to Massachusetts General Laws c. 151B, § 4(16), an employer is prohibited from discriminating against a person on the basis of handicap. In this case, Complainant alleged 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 is a “handicapped person” within the meaning of M.G.L. c. 151B, § 4(17); (2) she is a “qualified handicapped person” capable of performing the essential functions of a particular job; (3) who needed 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. Hall v. Laidlaw Transit, Inc., 25 MDLR 207, 213-214, *aff’d*, 26 MDLR 216 (2004); 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 (1st Cir. 1992). If the Complainant meets her burden by satisfying each of these elements, then the burden shifts to Respondent to prove that the reasonable accommodation would pose an undue hardship on the employer's business. Yates v. Mass-C.E.O.P.S., 17 MDLR

1503, 1514 (1995); Disability Discrimination Guidelines, § IX(A)(3).³ 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).

As discussed in detail below, I find that Complainant has established that Respondent engaged in unlawful discrimination on the basis of handicap as a result of its failure on numerous occasions to provide Complainant with reasonable accommodations.

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, § 4(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. Katz v. City Metal Co., Inc., 87 F.3d 26, 33 (1st Cir. 1996); 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).

It is uncontested that from 1993 to the present date, Complainant has suffered from plantar fasciitis, a refractory orthopedic condition that substantially limited her ability to walk, stand, and work. The list of “major life activities” found in M.G.L. c. 151B, § 1(20) includes the functions of performing manual tasks, walking, and working. Complainant testified credibly that her condition causes her pain and loss of stamina with increasing amounts of time on her feet. The pain is recurrent, persistent, and debilitating.

³ In the alternative, Respondent can demonstrate that it could not provide the reasonable accommodation because Complainant’s disability would pose a “reasonable probability of substantial harm” to himself or others. Ryan v. Town of Lunenburg, 11 MDLR 1215, 1242 (1989), *citing*, Mantolete v. Bolger, 767 F.2d 1416, 1422 (9th Cir. 1985). Respondent, however, has not asserted this defense.

In addition, I credited Complainant's testimony that she can only spend ten to fifteen minutes on her feet without experiencing pain. She claimed that if she spent fifteen minutes on her feet, then she needed thirty minutes to 1½ hours off her feet to recover. Moreover, I credited her testimony that an increase in the frequency of walking and standing results in a diminution in the stamina with a corollary increase in the required recovery time. With respect to the impact of her disability on her major life activities, Dr. Cunningham found that musculoskeletal limitations prevented her from working more than part time. Lastly, Respondent repeatedly identified Complainant as having a "handicap status" under section 504 of the Rehabilitation Act. Under these circumstances, Complainant has established that she is a handicapped individual under the law.

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 can perform the essential functions of her job as a school teacher with or without reasonable accommodations. 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 principal objectives of the job. Woodason v. Town of Norton School Committee, 24 MDLR 21, 25 (2002); Disability Discrimination Guidelines, §II(B).

In this case, Complainant has worked as a school teacher for over fifteen years in a highly satisfactory manner. Beginning in 1995, Respondent provided Complainant with reasonable accommodations that enabled her to continue to perform the essential

functions of her job as a teacher at Brighton High School without any problems. For the 1996-1997 academic year, Complainant again adequately performed her duties and responsibilities at South Boston High School even though Respondent required her to work full days as opposed to her requested half-day, part-time schedule. At the beginning of the 1997-1998 academic year, Respondent assigned Complainant to the Mather School but she never actually taught there because the school had no position for her. However, I credited Complainant's testimony that she was ready, willing, and able to work had Respondent provided her with an actual teaching position. After returning from a leave of absence in September 1998, Complainant worked for three successive academic years (1998-1999, 1999-2000, and 2000-2001) at Madison Park High School. Again, Complainant successfully performed her duties and responsibilities as a teacher during this period. When Respondent cancelled her job-share arrangement for the 2001-2002 school year, the Headmaster, Charles McAfee, testified that Complainant's teaching quality, ability, and accomplishments had no bearing on his decision. Under these circumstances, I find that Complainant is a qualified handicapped individual under the law.

C. Reasonable Accommodations

Since Complainant has established that she is a disabled person who can perform the essential functions of her job, Respondent is obligated to provide a reasonable accommodation unless it can establish that doing so would cause an undue hardship on its business. Cox v. New England Telephone & Telegraph, 414 Mass. 375, 383 (1993). 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); *see*, Ocean Spray Cranberries, Inc. v. MCAD, 441 Mass. 632, 648 n.19 (2004) (definition is in accord with the statutory framework set out in G. L. c. 151B).

In the case at bar, it is undisputed Respondent knew about Complainant’s medical condition. Moreover, as stated above, Respondent provided Complainant with reasonable accommodations for her medical condition when she worked at Brighton High School from 1995 to June 1996. These accommodations included: working part time; having all her classes taught from one classroom located in close proximity to the administrative offices, office equipment and restroom facilities; access to an elevator; and, having access to an overhead projector and screen.

Although Complainant did not allege that Respondent wrongfully exceeded her from her teaching position at Brighton High School, she claimed that Respondent subsequently failed to provide her with both her requested reasonable accommodations and any meaningful assistance in securing her requested accommodations. An employer’s duty to provide a reasonable accommodation is triggered if an employee, as in this case, identifies herself as a qualified handicapped person and requests reasonable accommodations. Disability Discrimination Guidelines, § VII(A). It is also well settled that “the duty to provide a reasonable accommodation is a continuing one.” Donohue v. Sodexo-Marriott Services, Inc., 21 MDLR 204, 207, *quoting*, Ralph v. Lucent Technologies, 139 F.3d 199, 171 (1st Cir. 1998). In particular, an employer is required to engage in an open and ongoing dialogue or “interactive process” with a qualified

handicapped individual about providing a reasonable accommodation. Hall, 25 MDLR at 217. The Commission has broadly construed an employer's obligation, once it knows or reasonably should know that an employee needs an accommodation, to "search out and define what it could do to reasonably accommodate the employee and to communicate the offer to the employee."⁴ Forrest v. Wal-Mart, 23 MDLR 110, 117 (2001), *quoting*, Mortimer v. Atlas Distributing Co., 17 MDLR 1713, 1715 (1995); *see*, German, 25 MDLR at 422, Carter v. Boston Public Schools, 13 MDLR 1800 (1991); Williams v. Town of Stoughton, 1 MDLR 1385 (1991); *see also*, Ocean Spray Cranberries, 441 Mass. at 648-649 (When a complainant is entitled to request a reasonable accommodation, the employer is "obligat[ed] to participate in the interactive process of determining one."), *quoting*, Russell v. Cooley Dickinson Hosp., Inc., 437 Mass. 443, 457 (2002). This 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. Hall, 25 MDLR at 217; Mazeikus v. Northwest Airlines, 22 MDLR 63, 68-69 (2000). "The importance of this interactive process cannot be overemphasized. It 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." Mazeikus, 22 MDLR at 68-69.

1. The 1996-1997 Academic Year

Although Respondent designated Complainant as having a "handicap status" under section 504 of the Rehabilitation Act, and gave her a preference at the

⁴ The Federal regulations associated with the Americans with Disabilities likewise state, "It may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual." Calero-Cerezo v. United States DOJ, 355 F.3d 6, 23 (1st Cir., 2004), citing 29 C.F.R. § 1630.2(o)(1)(iii).

reassignment pool in for purposes of obtaining a position for the 1996-1997 school year, I credited Complainant's testimony that Respondent failed to provide her with any assistance on how to exercise her "preference" at the reassignment pool. In particular, Respondent offered Complainant no help in ensuring that the selected school would provide her with the necessary reasonable accommodations. I believe the lack of assistance provided by the Office of Equity contributed to Complainant's difficulty in securing reasonable accommodations at her selected school, South Boston High School ("South Boston"). After selecting South Boston, Complainant informed the Principal, Lorraine Hamilton, of her need for accommodations including the requirement that she work part time. I credited Complainant's testimony that Hamilton adamantly refused to provide Complainant with a part-time position or job-share partnership and told Complainant she'd have "no job-sharing at (her) school!" The Commission has repeatedly recognized that modifying an employee's work schedule is an appropriate reasonable accommodation depending upon the circumstances. Hall, 25 MDLR at 217; Mazeikus, 22 MDLR at 68; Disability Discrimination Guidelines, § II(C). Clearly, Hamilton's unilateral refusal to consider job-sharing and her unwillingness to investigate possible reasonable accommodations is contrary to Respondent's lawful obligation to engage in an interactive dialogue with Complainant. Hamilton's action was also completely inconsistent with the stated purpose of Respondent's job-share program, which is to "assist in finding individuals reasonable accommodations when they can only work part-time."

Although Fields interceded on Complainant's behalf in eventually getting Complainant a job-share partnership at South Boston, the job-share arrangement required

Complainant to work full time for the first half of the academic year, and then not work at all for the second half of the school year. I find that this accommodation was unreasonable and grossly insufficient under the circumstances since working full time, even for only a half-year, exacerbated Complainant's medical condition and violated the restrictions requested by her physician.

In January 1997, Hamilton then unilaterally denied Complainant's request for a job-share arrangement for the following academic year. I find that Hamilton had an obligation to discuss possible alternative reasonable accommodations with Complainant before she unilaterally decided to discontinue Complainant's job-sharing partnership. Hamilton's apparent rush to judgment is inconsistent with the Disability Discrimination Guidelines, which encourages an employer to work with a disabled employee to identify reasonable accommodations. Kuhn v. The Kimball Companies, 23 MDLR 331, 336 (2001). In addition, the Office of Equity refused to assist Complainant with this particular matter and showed a complete lack of sensitivity, as illustrated by Fields' response to Complainant to merely go "talk to Ms. Hamilton and work it out." Fields also admitted that she never communicated with Hamilton regarding Complainant's request to obtain a job-share arrangement at South Boston for the next school year.

2. The 1997 – 1998 Academic Year.

I credit Complainant's testimony that despite requesting assistance from the Office of Equity throughout the spring of 1997 to obtain necessary accommodations at South Boston or at another school, the Office of Equity failed to contact her. Although Complainant notified Fields in June 1998 that she believed she was protected "under the ADA and Section 504" with respect to her need for reasonable accommodations,

Complainant indicated that she would not request a “preference” at the reassignment pool and instead bid on open positions by seniority. Complainant testified credibly that she decided against exercising a preference in the pool because she wanted to interview with the principal of each potential school and avoid another difficult situation similar to her experiences at South Boston. After selecting three schools at the reassignment pool, Complainant again was unable to secure a placement that would provide her with reasonable accommodations. For example, Complainant testified that during her interview at the Curry Middle School, she informed the principal, Valerie Lowe-Barehmi, of her desire to job-share, but Lowe-Barehmi responded that job sharing was not allowed at that school.

In July 1997, Respondent assigned Complainant to a .5 (part-time) position at the Mather Elementary School (“Mather”). Mather was not one of the schools selected by Complainant at the reassignment pool. After receiving the appointment, Complainant contacted the principal at the Mather who informed her that the position was full-time, not part-time, and a combined ESL and Special Education class. Although Complainant requested to teach the ESL component on a part time basis, I credited Complainant’s testimony that the Principal informed her that he did not want anybody working part time in his building. Complainant was then caught in a catch-22 quagmire – she had to report to the Mather School even though the school had no position for her. This awkward, embarrassing, demeaning, and difficult situation – prompted as a result of Respondent’s failure to accommodate her need for a part-time position – lasted from September 1997 to November 1997. I also credited Complainant’s testimony that during this period she

became aware of available teaching opportunities in other schools, but the Office of Equity failed to facilitate a transfer to any of the vacancies until November.

On her own initiative, Complainant contacted other schools in an attempt to secure an alternative teaching position. In particular, she contacted the principal at the Ohrenberger Elementary School, Carol Geyer. I credited Complainant's testimony that after she informed Geyer of her medical limitations, Geyer commented that Complainant "would not be a good match" at the school since Complainant would need to travel to various classrooms to pick up her students. Complainant then suggested that a paraprofessional could be used to escort the students. According to Complainant, Geyer responded, "I already have one sick lady in this building. The paras are already helping her. We can't give you any help." Complainant also contacted East Boston High School about an opening. She testified that during an interview at East Boston, Ms. Pina expressed that she wanted to hire her, but because Complainant had part-time work schedule requirements, Pina stated, "The situation would not work out." According to Complainant, Pina also informed her that the Principal at East Boston would not approve a job-share situation. I find Geyer and Pina's reaction to Complainant's request for accommodations to be highly illustrative of Respondent's school administrators' insensitivity to qualified handicapped employees and, more importantly, contrary to Respondent's legal obligation to investigate possible reasonable accommodations. Instead of engaging in a meaningful interactive dialogue with Complainant, and searching and defining possible reasonable accommodations, the school administrators took an intolerant and short-sighted position that Complainant could not work in their buildings due to her disability.

3. The 1998 – 1999 Academic Year.

In April 1998, Complainant notified Fields of her intent to return to her teaching position for the 1998-1999 academic year. Complainant also requested that Fields provide her with the vacancy list for the reassignment pool so she could research the available placements. Complainant testified that she had hoped researching the schools might help “avoid the repeating problems of discrimination...experienced as a result of the reassignment process the [previous] two years.” In response, Fields informed Complainant that she “will receive the vacancy list approximately eight days prior to the reassignment pool per Union contract.” However, Complainant testified credibly that she did not receive the vacancy list from the Office of Equity until two days before the pool and the delay in getting the information hindered her ability to find a school that could provide her with her requested reasonable accommodations. In particular, I credited Complainant’s testimony, as summarized in her letter to Fields dated May 22, 1998, that “[w]hile my 504 status gives me preference in choosing a school, it also limits me to only (1) building choice making the need to be well-informed even more crucial. That right of mine has already been violated by the tardiness of my receipt of the list and the resultant lack of time to investigate the available openings.”

After selecting a position at Madison Park High School, Complainant contacted Fields to request assistance in advocating for a job-share arrangement. I credited Complainant’s testimony that Fields was again unresponsive to her request. In August 1998, Complainant was compelled to contact the Massachusetts Office on Disability (“MOD”) for help. At the end of August 1998, Fields eventually responded to MOD by scheduling a meeting with administrators from Madison Park. Complainant claimed that

during this meeting both the principal and vice principal were amenable to Complainant's request to job-share as well as providing Complainant's other requested accommodations. However, I credit Complainant's testimony that Rodrigues continuously insisted that a job-share arrangement would not work at the school.

Madison Park initially provided Complainant with her requested reasonable accommodations, including a part-time job-share arrangement and a single classroom to teach all of her classes. However, by mid-October 1998, due to an increased enrollment in the ESL program, Complainant's class size had exceeded the capacity for the classroom and the acceptable teacher/pupil ratio. Complainant then filed a grievance with Respondent in an attempt to reduce her class size. Rodrigues testified that she tried to find a larger classroom for Complainant, but was unable to find a permanent classroom for all her classes and could only locate a larger classroom for her over-enrolled class. Clearly, forcing Complainant to move from one classroom to another was contrary to the reasonable accommodations requested by her physician. Although Complainant notified Rodrigues that she would "temporarily" accept moving from one classroom to another, I find that Respondent unconscionably forced Complainant to make the difficult choice between teaching in an overcrowded small classroom in violation of the collective bargaining agreement or commute between two classrooms in contravention of the reasonable medical restrictions requested by her physician. In addition, although Rodrigues agreed to Complainant's request that she be provided with a paraprofessional to assist her in moving the overhead projector and screen from one room to another, Rodrigues admitted that the paraprofessional did not always get to Complainant's classroom on time. During this ordeal, Complainant requested that

Fields intercede on her behalf. In response, Fields apparently visited Madison Park, walked between the new classroom assignments, and met with Rodrigues regarding Complainant's situation. However, I credited Complainant's testimony that Fields told her that the Office of Equity could do nothing to help her. Moreover, I credited Complainant's testimony that Fields never engaged in an interactive dialogue with her about the impact of the room change on her disability, elicited the assistance of Respondent's in-house physician to review the situation, or requested that Complainant provide additional medical information. I find that Rodrigues and Field's response to this situation, or lack thereof, clearly violated Respondent's obligation to provide Complainant with reasonable accommodations.

4. The Search for Job-Share Partners for the 1999–2000 and 2000-2002 Academic Years.

At the conclusion of the 1998-1999 academic year, Complainant's job-share partner left the school system. Over the summer, Complainant claimed she actively engaged in the process of finding a new job-share partner, including contacting professional organizations, the Boston Teachers Union, and local universities. On or about September 1, 1999, Rodrigues sent Complainant a letter informing her that Complainant was solely responsible for finding a job-share partner. The letter further stated that “[f]ull coverage for students must be provided on the first day of school, September 8, 1999. If you are still interested in job sharing, you have the responsibility of finding a partner. If we do not hear from you by Friday, September 3, 1999, we will have to explore other options.” I believe Rodrigues' threat to eliminate Complainant's job-share position constituted a violation of Respondent's obligation to provide reasonable accommodations to Complainant. Instead of assisting Complainant in getting

a job-share partner, as she did at the beginning of the prior school year, Rodrigues unreasonably placed the sole burden on Complainant to provide her own accommodation. I also credited Complainant's testimony that Fields had previously agreed to assist her in the process of finding a job-share partner as a reasonable accommodation. After failing to resolve the issue of finding a job-share partner with Rodrigues, Complainant attempted to garner the assistance of the principal of Madison Park, Dr. Snead. I credited Complainant's testimony that Snead refused to meet with her and instead referred her back to Rodrigues.

A nearly identical situation arose the following school year. Specifically, Complainant began the 2000-2001 school year at Madison Park with the same ordeal of trying to find a job-share partner. On August 23, 2000, just prior to the start of the school year, Rodrigues sent Complainant a letter that stated, "As you know, the job-share position which you have held for the past two years has been contingent upon your finding a suitable and qualified ESL certified teacher to share the position with you. As yet, we have not heard from you as to whether or not you have found such a person and of course, I will need to conduct an interview." Under the law, Respondent has the obligation to investigate, define and then provide Complainant with a reasonable accommodation, which in this case meant providing Complainant with a part-time position and assisting her in securing a job-share partner. By placing the sole burden on Complainant to get a job-share partner and threatening to eliminate her position if she did not do so, Respondent wrongfully avoided its legal obligations to provide Complainant with reasonable accommodations.

5. **The Discontinuance of the Job-Share Program at Madison Park High School**

In March 2001, Respondent unilaterally decided to discontinue Complainant's job-share arrangement at Madison Park for the following year, claiming that "this arrangement has been found detrimental to optimum teaching and learning for our students." Complainant testified credibly that prior to being notified of the decision, Respondent's administrators never discussed this matter with her. In addition, I credited Complainant's testimony that no one ever complained about or questioned her teaching abilities. It is undisputed that Rodrigues recommended to Charles McAfee, the Headmaster at Madison Park, that Complainant's job-share be discontinued. Although McAfee acknowledged that he had the ultimate and sole authority to end the job-share arrangement, he admitted that at the time he made the decision to end Complainant's job-share partnership, he had never met Complainant. He also stated that he made the decision to end her job-share arrangement without any regard for her teaching quality, ability, or accomplishments. In addition, he admitted to making the decision without having engaged in any dialogue or discussion with Complainant, even though Rodrigues had told him that Respondent had provided Complainant with the job-share arrangement as an accommodation for her disability. Clearly, McAfee and Rodrigues wrongfully eliminated Complainant's reasonable accommodation without first engaging in an interactive dialogue with her.

After being informed that her job-share position was being eliminated, Complainant contacted Fields. Fields testified that she then contacted McAfee who informed her that they terminated the job-share program because they had difficulty in getting Complainant a job-share partner. However, Fields admitted that she had

arranged for Shahin Johnny to remain as Complainant's job-share partner at Madison Park for the following academic year. Fields also essentially acknowledged that she did not advocate on Complainant's behalf with respect to continuing Complainant's job-share position. In particular, Fields stated that she did not respond to Complainant regarding the discontinuation of job-share at Madison Park because Complainant had already taken a medical leave of absence. The evidence indicated that Complainant first informed Fields about the discontinuation of her job-share position in March 2001, but did not file for a leave of absence in August 2001. I believe Field's inability or failure to take any decisive or effective action on this occasion exemplified the Office of Equity's ineptness in addressing either Complainant's requests for a reasonable accommodation or her complaints that school administrators had wrongfully failed to recognize her lawfully protected rights.

D. Undue Hardship

Since Complainant has established a prima facie case that Respondent failed to reasonably accommodate her disability, Respondent now has the burden of demonstrating that the accommodations sought by Complainant imposed an undue hardship on Respondent's business. Yates v. Mass-C.E.O.P.S., 17 MDLR 1503, 1514 (1995).

Whether an accommodation imposes an undue hardship to the employer's business requires a particularized analysis and balancing of the handicap, the accommodation at issue, and the nature of the employer's business. Disability Discrimination Guidelines, § VII(C). Factors to be considered in determining whether a particular accommodation posed an undue hardship include: (1) the overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget or

available assets; (2) the type of the employer's operation, including the composition and structure of the employer's workforce; and, (3) the nature and costs of the accommodation. M.G.L. c. 151B, § 4(16). In the event a particular accommodation poses an undue hardship, the employer should try to identify another accommodation that would not pose such a hardship. Disability Discrimination Guidelines, § VII(C).

In the case at bar, I recognize that Respondent has the difficult task of managing 9000 employees, and assessing and providing reasonable accommodations to approximately fifty employees per year. In particular, the Office of Equity and the principals and administrators at each school must balance the particular teachers' requested accommodations with both Respondent's obligations under the collective bargaining agreement with the Boston Teacher's Union and the needs of the students. As Respondent has correctly pointed out, it must also foster the most conducive environment for the students to learn and become productive members of society. Notwithstanding, I find that Respondent has failed to show that providing Complainant with her requested reasonable accommodations would constitute an undue hardship.

With respect to Respondent's decision at the beginning of the 1996-1997 school year to provide Complainant with a full-day, half-year position as opposed to half-day work schedule, Fields testified that Hamilton was concerned that her students would better respond to the continuity of having one teacher for an extended period of time. Numerous other school administrators similarly unilaterally dismissed the possibility of providing complainant with a part-time or job-share position. Although these administrators may have genuinely believed that this arrangement would have been detrimental to educational environment for the students, Respondent failed to introduce

any credible evidence that providing Complainant with a half-day schedule in any of these instances would have actually posed a detriment to the educational services provided to her students. Furthermore, Respondent failed to show that when it provided Complainant with a half-day, part-time work schedule, for example at Brighton and at Madison Park, her work schedule interfered with the quality of the educational services delivered to the students. In fact, Respondent has failed to introduce any credible evidence that Complainant's students suffered in any regard when she worked on a part-time schedule.

Respondent asserted that it would be unreasonable to require a particular school to provide a job-share arrangement to Complainant since such a mandate would be contrary to the discretion given to principals or headmasters pursuant to the agreement between Respondent and the Boston Teacher's Union. Respondent relies considerably on the agreed upon provisions of the job-share program, which requires the approval of the principal/headmaster of the host school; conditions the continuation of a job-share partnership "subject to a favorable review by all parties"; and, vests teachers with the responsibility of securing a job-share partner. However, it is well-settled that Respondent may not rely on the terms of a collective bargaining agreement or any other similar agreement to justify discrimination. Yates, 17 MDLR at 1514. In addition, the protocol for the job-sharing program did not either explicitly or implicitly bar the accommodations requested by Complainant. To the contrary, the job-share program was expressly designed in part to assist teachers in finding reasonable accommodations when they can only work part-time. Moreover, Respondent provided Complainant with a half-day work schedule at Brighton and assisted her in getting a job-share partner at Madison

Park. Consequently, Respondent's argument that providing Complainant with a job-share arrangement would constitute an undue hardship is totally undermined by its own actions as well as the expressed intent of the job-share program.

At the end of the 1996-1997, and the 2000-2001 school years, the school administrators at South Boston and Madison Park, respectively, discontinued Complainant's part-time job-share arrangement because they did not feel that job-sharing was the most conducive learning environment for the students. First, I refuse to credit Respondent's purported rationale for discontinuing Complainant's job-share arrangement at South Boston. In particular, Respondent failed to provide any credible evidence that Complainant's job-share arrangement was detrimental to the educational services provided to her students. I note that Hamilton did not testify at the Public Hearing and I declined to credit Fields' testimony regarding Hamilton's rationale for discontinuing the job-share partnership. With respect to Madison Park, as stated above, McAfee testified that he blindly accepted Rodrigues' recommendation to discontinue the job-share arrangement and determined, without speaking to Complainant or investigating the matter, that the job-share partnership was "detrimental to optimum teaching and learning for our students." However, neither Rodrigues nor McAfee provided any credible testimony to support their position. In addition, McAfee inconsistently told Fields that they discontinued Complainant's job-share arrangement because they had difficulty in getting her a job-share partner. But Fields had to embarrassingly admit, contrary to McAfee's assertions, that she had arranged for Complainant's existing job-share partner to return the next school year. I am convinced that Rodrigues recommended that McAfee discontinue Complainant's job-share partnership because she did not want to

deal with the issue of securing a job-share partner for Complainant and because Rodrigues viewed Complainant as a difficult and demanding employee.

Additionally, Respondent failed to establish that it would be unduly burdensome to comply with Complainant's request that she be provided with a paraprofessional to assist in escorting students from class to class at the Ohrenberger Elementary School. First, the principal at the school, Carol Geyer, did not testify at the hearing. Second, Respondent did not introduce any credible evidence that Geyer actually investigated the possibility of utilizing a paraprofessional to assist Complainant, including possibly inquiring about obtaining any funds to hire additional help. Although hiring new personnel or reassigning an existing paraprofessional may, under certain circumstances, constitute an unreasonable accommodation, in this case Respondent has simply not introduced sufficient credible evidence that such an accommodation would prove unduly burdensome.

In summary, Respondent has failed to establish that providing Complainant's requested reasonable accommodations would cause an undue hardship. In its brief, Respondent arrogantly stated, "Although the Complainant lost sight of the important goals and priorities of public education, BPS continually strived for a reasonable balance between those priorities and the needs of the Complainant." The evidence, however, strongly supports the opposite conclusion. Complainant consistently performed her job in a remarkably professional and admirable manner and courageously fought to secure reasonable accommodations for herself despite having to trudge through Respondent's bureaucratic quagmire and overcome obstacles placed in her path by several intolerant and uninformed principals and administrators. Furthermore, on numerous occasions

during the period of 1996 to 2001, Respondent unilaterally and unreasonably discontinued Complainant's reasonable accommodations, and blatantly failed to engage in an interactive process with her or provide her with any meaningful assistance in securing her requested accommodations. In addition, she continually and repeatedly had to complain and make demands in order to get Respondent to recognize her lawful rights as a disabled individual. Clearly, Respondent lost sight of its obligations under the law to provide Complainant with reasonable accommodations. For these reasons, I conclude that Respondent subjected Complainant to unlawful discrimination on the basis of disability in violation of M.G.L. c. 151B, § 4(16).

IV. REMEDY

Upon a finding of unlawful discrimination, the Commission has broad discretion to fashion remedies best to effectuate the goals of G. L. c. 151B. Conway v. Electro Switch Corp., 825 F.2d 593, 601 (1st Cir. 1987). College-Town, Div. of Interco, Inc. v. MCAD, 400 Mass. 156, 170 (1987). This includes affirmative relief, an award of compensatory damages designed to make the aggrieved party whole, and damages for emotional distress suffered as a direct and probable consequence of Respondent's unlawful discrimination. Stonehill College v. MCAD, 441 Mass 549, 576 (2004); Conway v. Electro Switch Corp., 402 Mass. 385, 387 (1988); College-Town, 400 Mass. at 169 (1987); Bournewood Hosp., Inc. v. MCAD, 371 Mass. 303, 315 (1976). For the reasons discussed below, I believe Complainant is entitled to affirmative relief and damages for emotional distress and lost wages.

A. Affirmative Relief

As discussed in detail above, I found that Respondent on numerous occasions

wrongfully discontinued Complainant's job-share arrangements and failed to provide Complainant with any meaningful assistance in securing her reasonable accommodations. For these reasons, Respondent shall give Complainant a preference in applying for any available position for the 2005–2006 academic year; and, promptly and dutifully assist her in obtaining any necessary reasonable accommodations at the selected school. The reasonable accommodations that Respondent shall provide to Complainant shall include a half-day, job-share arrangement at the selected school, one classroom for all of her classes, and any other reasonable accommodations requested by her physician.⁵ Moreover, consistent with Respondent's obligation to provide Complainant with reasonable accommodations, Respondent shall also assume the responsibility for locating and providing Complainant with a job-share partner.

B. Emotional Distress Damages

Complainant is also entitled to monetary damages in compensation for the emotional distress she suffered as a direct and probable result of Respondent's unlawful conduct. Stonehill College, 441 Mass. at 575-576; Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 181-182 (1985). In Stonehill College, the Supreme Judicial Court cited factors that should be considered in determining an appropriate award for emotional distress damages, including: "(1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication)." 441 Mass. at 576. All of these factors are

⁵ The obligation of Respondent to provide a part-time half-day position is based on the assumption that Complainant is still in need of this reasonable accommodation. Respondent may reasonably request, as it does customarily, that Complainant submit medical documentation substantiating her need for any reasonable accommodation.

significantly present in the case at hand.

I credited Complainant's testimony that as a result of Respondent's actions, she suffered severe emotional distress and an exacerbation of her medical condition. Despite a significant history of medical and psychological problems, Complainant testified credibly that just prior to June 1996, she had come to accept her medical condition and started to feel better. Moreover, she stated that she was happy and "a pretty positive person" while working at Brighton High School and believed she was a "very creative teacher" with considerable energy. Complainant testified credibly that prior to June 1996 she enjoyed the company of her friends, movies, and performed volunteer work for the Friends of the Boston Harbor Islands. However, after Respondent failed to provide her with reasonable accommodations for her disability at the beginning of the 1996-1997 school year, she became emotionally distressed. Specifically, she testified credibly that her stress levels "got really high" and she suffered a corollary increase in pain and fatigue. As a result, Complainant had to spend less time on her feet resulting in her "whole life [becoming]...less active and less full outside of work time." Complainant also testified that she felt worn down as a result of her constant struggles to get reasonable accommodations from Respondent. She claimed she felt "extremely old and ...very discouraged." She further stated that as a result of Respondent's actions, she "lost [her] confidence in [herself] as a teacher, and... [her] whole identity was based on that, and it was just very hard."

Complainant's friend, Jane Nawalk testified that prior to Complainant's problems with Respondent, she had appeared "friendly and outgoing...and seemed very upbeat." Nawalk noticed, however, that Complainant then became "less outgoing [and] would

become emotional easily.” In addition, Nawalk testified credibly that Complainant “seemed like she wasn’t the same person.” Nawalk claimed that she observed Complainant being “under a lot of stress”, “exhausted”, and “in a lot of pain.”

The medical documentation likewise causally related Complainant’s emotional distress with Respondent’s actions and supported her need for medical leaves of absence. Specifically, on November 19, 1997, Dr. Cunningham indicated that “[Complainant] is presently experiencing a flare of her musculoskeletal symptoms as well as elevated stress level because of the lack of resolution of her work situation. This has resulted in a high level of anxiety associated with insomnia. It is my opinion that a three month medical leave of absence will have beneficial effect both on her anxiety level as well as on her chronically painful foot condition...” With respect to her medical leave commencing in August 2001, Dr. Bear wrote that Complainant was under his care for depression and anxiety and “is currently involved in a lengthy mediation process with the school and MCAD pertaining to her request for workplace accommodations relating to a physical injury. Her continued presence in her school during this lengthy mediation appears to exacerbate her symptoms, and hence I support her withdrawal on medical leave of absence.”

Respondent correctly noted that Complainant’s medical records from 1998 to the present indicated that she complained about a number of significant stressors in her life, including her family relationships, her ability to perform daily life activities, and her constant pain. As a result, I cannot credit Complainant’s testimony that she had no other major stressors in her life during the relevant time period other than the work-related events attributable to Respondent. Nevertheless, I believe that Complainant has

established that she sought and received regular psychiatric treatment and counseling as a result Respondent's actions. I also find that the emotional distress attributable to Respondent was significant. In particular, throughout her therapy sessions, she continually mentioned the ordeal and anxiety associated with her work situation.

Compare, McGrath v. Local Union No. 12004, 26 MDLR 178, 201-202 (2004)

(complainant's testimony regarding the severity and intensity of the emotional distress undermined by the absence of any discussion of the harassment with therapist); Williams v. Karl Storz Endovision 24 MDLR 91, 110-111 (2002) (small emotional distress awarded warranted where, among other reasons, during period of harassment Complainant never brought up or discussed distress associated with harassment with her medical care providers and consistently attributed her emotional problems to other stressors in her life).

For example, on May 31, 2000, Complainant's therapist, D. Milner indicated that Complainant expressed that she "needs to start the process of applying for her [part-time] job and this is very stressful for her. Crying when telling me this." Milner further indicated, among other things, that Complainant had begun asking for accommodations for her medical problems four years ago, and "has to fight the school system Every year. Very angry at school system for what she has to go thru." (emphasis in original). On June 27, 2000, Milner wrote that Complainant reported that she has been "falling apart" the past few days and [after] a discussion we realized the precipitant is her plunging into the overwhelming and 'catch-22' process of applying for/developing her p-t position once again." On May 14, 2001, John Moynihan, MSW, diagnosed Complainant as

suffering from chronic major depression and described Complainant's "History of Presenting Problem" as follows:

The patient has been dealing with a seven-year discrimination complaint against her employer, requesting the employer to make accommodations for her, because of chronic and painful plantar fasciitis. She feels victimized by the complaint process. She feels ignored by her employers. She reports that her work as a "good" teacher has been an integral aspect of her self identity, and both her work and her sense of self have faltered during this discrimination complaint process. She feels as though she is not doing the kind of job she use to, and this has left her feeling sad and angry. The patient is experiencing increased eating, both hyper and hyposomnia, hopelessness, episodes of tearfulness, and increased feelings of "being out of sorts." She reports being very angry. Patient is concerned and anxious about her future, particularly around work and finances.

Moreover, on October 31, 2001, K. Larsen indicated that Complainant "spoke of work stress... [she] says she feel like she's lost her job, doesn't know where she's heading...[she] fears going back to work [and experiencing] stressors, especially bureaucracy." Throughout 2002, Complainant also indicated to Larsen that she "struggles" with or is distressed about work. In addition, in 2003 Complainant continued to express to Larsen that she experienced intense anxiety over the decision about whether to return to teaching next year. Moreover, in a note from Dr. Baer dated June 4, 2003, Complainant complained of being "intensely anguished when recalls negative experiences for last 5 years of teaching."

Lastly, Respondent failed to introduce any credible evidence to rebut Complainant's testimony and medical documentation that strongly supports the conclusion that she suffered severe emotional distress as a result of its wrongful conduct. In particular, Respondent apparently never subjected Complainant to an independent medical examination and on each occasion approved Complainant's requests for medical leaves of absence.

In summary, Complainant has established that the emotional distress attributable to Respondent's conduct persisted from 1996 to the present, compelled her to take medical leaves of absences, exacerbated her chronic musculoskeletal problems, necessitated her obtaining psychiatric counseling and being prescribed anti-depressant medication, and otherwise adversely affected the quality of her life in a pronounced and significant manner. Given these circumstance, I award Complainant damages in the amount \$195,000 for the emotional distress caused by Respondent's wrongful conduct.

C. Lost Wages and Pension Contributions

Complainant also is entitled to back pay stemming from Respondent's unlawful discrimination. As discussed in detail above, I credited Complainant's testimony that she was compelled to take medical leaves of absence as a direct and proximate result of Respondent's wrongful conduct. Consequently, Complainant is entitled to lost wages for the periods she was on an "unpaid" leave of absence, namely: from November 1997 to June 1998; from November 2001 to June 2002; and, for the entire 2002-2003 and 2003-2004 school years.

Respondent argued that Complainant cannot recover back pay because "[she] voluntarily remained idle and did not seek to find comparable employment to mitigate her damages." Although a complainant is required to mitigate damages by looking for other employment, the burden of proving a failure to mitigate damages or the amount of interim earnings lies with the respondent. Northeast Metropolitan Regional Vocational School Dist. School Committee v. MCAD, 31 Mass. App. Ct. 84, 90 (1991); J.C. Hillary's v. MCAD, 27 Mass. App. 204, 206, 209-210 (1989), Fijal v. Kentucky Fried Chicken, 20 MDLR 45 (1998). In this case, Respondent has failed to introduce

sufficient credible evidence that Complainant was capable of any gainful employment. To the contrary, the medical records introduced by Complainant substantiate that during her leave, she continued to suffer from severe physical ailments as well as from debilitating chronic depression.

Moreover, each time Complainant requested a medical leave of absence, she submitted medical documentation supporting her request. And on each occasion, Respondent approved her request without ever apparently questioning the reasons for the medical leave. In addition, each time Respondent approved her request for medical leave, it sent a notice to Complainant that stated: "...School Committee policy precludes individuals from working elsewhere while on approved leave of absence." (emphasis in original). Consequently, Respondent cannot now inconsistently claim that Complainant should have sought work in direct violation of its medical leave policy. Lastly, although Complainant did sparingly work as a yoga instructor on isolated occasions, her earnings were de minimus. I also believe that Complainant primarily taught the yoga classes for physically and emotionally therapeutic reasons. For these reasons, Complainant is entitled to \$ 127,555.62 in lost wages.

Lastly, I believe that Complainant is entitled to lost pension contributions during the time she was on an unpaid leaves of absence (November 1997 to June 2000, and November 2001 to June 2004), equal to 8% of the salary she would have received if she had been actively working.

V. CIVIL PENALTY

M.G.L. c. 151B, § 5 provides that in the event the Commission finds that a respondent has engaged in unlawful conduct prohibited by this chapter, "it may, in

addition to any other action which it may take under this action,” assess a civil penalty. I believe a civil penalty is appropriate in this case given the egregiousness of Respondent’s actions with respect to Complainant and its repeated bad faith in addressing Complainant’s legitimate issues. As described in detail above, from 1996 to 2001, Complainant had to continually complain and demand that Respondent recognize her right to reasonable accommodations. On numerous occasions, Respondent’s administrators unilaterally and unjustifiably refused to provide Complainant with part-time work or a job-share arrangement. In addition, on two separate occasions, Respondent’s administrators unilaterally discontinued her job-share work arrangement even though they had provided the job-share partnership as a reasonable accommodation for her disability. Lastly, the Office of Equity oftentimes ignored Complainant’s legitimate complaints and demands even though it continually recognized Complainant as a disabled individual in need of reasonable accommodations. For these reasons, I hereby assess a civil penalty against Respondent in the amount of \$10,000.

VI. ORDER

Based on the foregoing findings of fact and conclusions of law, I hereby issue the following order:

1. Respondent, Boston Public Schools, shall provide Complainant, Diana Sabella, with any requested reasonable accommodations related to her obtaining a teaching position in the 2005-2006 academic. Unless otherwise indicated by Complainant’s physician, the reasonable accommodations shall include, but shall not be limited to, a preference in applying for any available position at the reassignment pool; prompt and dutiful assistance in arranging

for the reasonable accommodations at the selected school; a half-day job-share position at the selected school; assistance in obtaining a job-share partner for Complainant; and, assigning Complainant to one classroom for all of her classes.

2. Respondent, Boston Public Schools, shall pay Complainant, Diana Sabella, within sixty (60) days of receipt of this decision, the sum of \$195,000 in emotional distress damages.
3. Respondent, Boston Public Schools, shall pay Complainant, Diana Sabella, within sixty (60) days of receipt of this decision, the sum of \$127,555.62 in lost wages.
4. Respondent, Boston Public Schools, in order to make the Complainant, Diana Sabella, whole for her loss of pension contributions during her unpaid leaves of absence from November 1997 to June 2000 and from November 2001 to June 2004, shall contribute an amount equal to 8% of the annual salary she would have received had she been actively working during these time periods.
5. Respondent, Boston Public Schools, shall pay the Commonwealth of Massachusetts, within sixty (60) days of receipt of this decision, a civil penalty in the amount of \$10,000.00. Payment shall be forwarded to the Clerk of the Commission.
6. Respondent, Boston Public Schools, shall conduct basic annual training sessions on unlawful handicap discrimination for all principals, administrators and any other employees vested with supervisory authority. With respect to such training:

- a. Each training session must be at least four (4) hours in length. All managers and supervisors, as of the date of the training session, are required to attend. No more than twenty-five (25) persons may attend each training session. Respondent shall repeat this training, once each calendar year for the next two (2) years, for all new supervisors and managers who were hired or promoted after the date of the initial training session.
- b. Within thirty (30) days of the receipt of this decision, Respondent shall notify the Commission's Director of Training of its decision to select either the Commission or a private trainer to conduct the initial training sessions. If a private trainer is selected, the trainer must be selected from the list of trainers who have completed the Commission-certified discrimination prevention-training program, available from the Commission's Director of Training. Within one week of Respondent's selection of a trainer, a copy of this hearing decision must be forwarded to the trainer for his or her review.
 - i. If Respondent has selected a private trainer to conduct the initial training sessions, at least one month prior to the training date, Respondent must submit a draft training agenda to the Commission's Director of Training for approval; and, provide the Director of Training with one-month's advance notice of the training date(s) and location(s). If the Commission decides to send a representative to observe the training sessions, Respondent will

provide the Commission representative with unfettered access to the training sessions. Within one month after the completion of the training, Respondent must submit documentation of compliance to the Commission's Director of Training, signed by the trainer, identifying the training topic, the names of persons required to attend the training as identified in paragraph (a) above, the names of the persons who attended each training session, and the date and time of each training session.

c. For purposes of enforcement, the Commission shall retain jurisdiction over these training requirements.

7. The parties shall notify the Clerk of the Commission as soon as the above-described ordered payments have been made. If Respondent fails to comply with the terms of this Order within the time periods allotted, Complainant is instructed to immediately notify the Clerk of the Commission.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So Ordered this 16th day of May, 2005.

EDWARD R. MITNICK
Hearing Officer