

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & JAYD FOUNTAS,
Complainants

v.

DOCKET NOS. 02-BEM-02917
04-BEM-00342

MEDFORD PUBLIC SCHOOLS,
Respondent¹

Appearances:

Marjorie Sommer Cooke, Esquire, for Jayd Fountas
Ross Kimball, Esquire, for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On September 5, 2002 and January 22, 2004, Complainant filed complaints with this Commission charging Respondent with discrimination on the basis of handicap and retaliation, in violation of M.G.L.c.151B§4. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matters failed, and the cases were consolidated and, following a certification conference, the cases were certified for public hearing. The following questions were certified for public hearing: Whether Respondents discriminated against or retaliated against Complainant based on her disability by failing to provide her with the following attributes of employment after her 1996 reinstatement: a teaching position; reasonable parking accommodations; an adequate investigation of her complaints of harassment; and/or; the same resources

¹ Roy Belson, Superintendent of Medford Public Schools, was dismissed as a party Respondent. See discussion at III., A. *infra*

provided other teachers. Whether Respondents' termination of Complainant in May 2003 constituted an act of discrimination or retaliation? Whether Complainant suffered damages as a result of Respondents' discriminatory action and if so, in what amount? A public hearing was held before me on January 3-5, 8-12 and February 26-27, 2007. After careful consideration of the entire record before me, as well as the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Respondent Medford Public Schools is an employer located in Medford, Massachusetts. Complainant, Jayd Fountas became employed as a teacher with the Medford Public School District in 1974 and was granted tenure in 1977.

2. Roy Belson has been the Superintendent of the Medford Public Schools from 1995 to the present, having previously worked as a teacher and administrator at Respondent for many years. (Tr. 1191-92)

3. Complainant is certified to teach grades K– 8. Starting in 1974, she taught reading and language art skills in small groups. She subsequently taught 5th and 6th grades in a regular classroom. In the late 1980s, Complainant became a homebound instructor, teaching a wide range of subjects. In the early 1990s, Complainant returned to teaching English and language arts to small groups. (Tr. 34-35) Complainant was a member of the Massachusetts Teachers Association (“MTA”) (Agreed Facts, ¶3, Joint Certification Memorandum, p. 2)

4. Complainant is disabled by reason of a knee injury and morbid obesity. (Tr. 37; 772; Jt. Ex. 49) As a consequence of her disability, Complainant requires the use of a motorized chair to ambulate and must elevate her leg for brief periods during the day. (Agreed Facts ¶3 ¶4; Joint Certification Memorandum, p. 2)

5. Diane McLeod is the Diversity Director for the City of Medford. In this position she handles employment issues, contract compliance and fair housing issues. She is the also the Americans with Disabilities (ADA) coordinator for the town. (Tr. 1624-1625) McLeod has dealt with disability issues for 25 years (Tr.1628). She also sits on the Massachusetts Architectural Access Board. In the years 2002 and 2003 McLeod was familiar with the required dimensions of parking spaces for handicap accessible vans, and the cross-hatched area adjacent to van accessible spaces, known as the access aisle (Tr.1631)

5. Kirk Johnson was the principal of the Kennedy/Lincoln Elementary School from 2001-2003. He is currently the principal at the Roberts school. (Tr. 1241-1242)

6. Collette Epps has been employed by Respondent for 34 years. In 2002 she was an elementary math coach.

A. Background

7. Previously, in May and June, 2004, Complainant filed complaints with the MCAD against Respondent alleging discrimination on the basis of handicap, failure to provide reasonable accommodations and retaliation. (Jt. Ex. 52.) In January 1995, Complainant was discharged from her position as a teacher with Respondent. In late 1995 and early 1996, her termination was the subject of an arbitration proceeding pursuant to the collective bargaining agreement between the MTA and Respondent. On

July 8, 1996, an arbitrator found that Complainant had been terminated without just cause because Respondent failed to give proper notice pursuant to the Contract. As a result, Complainant was ordered reinstated. In 2000, the MCAD found that Respondent had retaliated against Complainant for having requested accommodations to her handicap, as alleged in her 1994 Complaints. (Jt. Exh. 52)

8. In the fall of 1996, in response to the Arbitrator's order of reinstatement, Complainant, the MTA and Respondent agreed to assign Complainant to Medford High School/Vocational School as an academic support teacher, where her duties were tutoring individuals and small groups of students who needed help with academic subjects. (Tr. 1036-1037) At the time of her reinstatement, Lawrence Volpe was the Director of the Vocational Technical School. Dr. Krueger was Headmaster of the High School.

B. Assignment to the High School/Vocational School

1. 1996-1997

9. At the time of her reinstatement in 1996, Complainant drove a Buick Riviera with a lift off the back bumper for her motorized chair. She parked diagonally across two handicap spaces with a yellow access grid in the back of the Vocational High School. (Shown as #1 on Chalk 1) Complainant testified that she parked diagonally because her car did not fit in either of the spaces, and she needed the extra room to unload her chair off the back. According to Complainant, Lawrence Volpe, then the Headmaster of the Vocational High School, approved this parking arrangement. (Tr. 136-9) Complainant testified that Superintendent Belson had promised to permit her to park in one of the bays at the Vocational School auto shop, however this never materialized. Belson stated that

although this issue was discussed, it was not possible to allow Complainant to park indoors at the Vocational School as the bays were needed for instructing the students.

10. In the spring of 1997, Complainant acquired the van that she used throughout the remainder of her employment with Respondent. (Tr. 138) Instead of a lift off the back, the van has a ramp from which the motorized chair is removed from the passenger side of the vehicle. (Tr. 130)

11. Upon her reinstatement in September 1996, Respondent provided Complainant with a large classroom. Complainant claimed that the room contained broken furniture, filing cabinets, old books, paper and debris, and that numerous electrical outlets protruded from the floor, causing a safety hazard. Complainant testified that she was prepared for her tutoring position, but that Superintendent Belson provided her with inadequate materials to perform her job. I do not credit Complainant's testimony that she was prepared to teach during this year. Her testimony contradicts the credible testimony of Belson, as well as the facts stipulated to by the parties stating that Respondent and Complainant engaged in considerable planning and repeated refining of plans with respect to Complainant's teaching duties. The stipulated facts also state that Belson was fair to Complainant and was committed to making her program work. (Joint Exh. 7)

12. Belson testified that he spoke with Complainant on multiple occasions during the 1996-1997 school year regarding her preparedness to teach students; however, each time they spoke, Complainant told him that she needed more time to prepare academically and to do more decorating in order to ready her room for students (Tr. 1040) I credit his testimony.

13. Belson testified that during this year Complainant's classroom required only minor repairs and that Complainant could have received students, however, she did not develop her own materials and strategies for teaching in the academic year 1996-1997. (Tr.1041) I credit Belson's testimony that Complainant was not assigned students during the academic year 1996-1997 because she told him that she was not prepared to do so.

14. Belson stated that Respondent made numerous repairs and renovations to the room, including painting, building a dividing wall as requested by Complainant so that she could have a separate resting area, removed electrical outlets from the floor, repaired broken lights, put up several bulletin boards, stripped, washed and waxed the floors, placed furniture throughout the room and installed a rail to assist Complainant getting off and on her resting device. (Tr. 1041) In addition, Respondent provided Complainant with a mobile chair. I credit his testimony.

15. On June 13, 1997, Complainant and Respondent signed an agreement that Complainant would serve as a tutor for the 1997-1998 school year. The guidance department at the high school and vocational school would determine which students to refer to Complainant. (Tr.1227-1228)

2. 1997-1998

16. Complainant stated that when she returned to her classroom in September 1997, she made numerous calls to Belson regarding her assignment and seeking assistance with the room. She stated that not until October or November 1997 was the room sufficiently safe, clean and colorful. She stated that during this year she received positive feedback from Belson and Mr. Volpe, the director of the vocational school. I do

not credit her testimony that her room was not suitable for her and for students until this time.

17. Complainant alleges that Respondent was not responsive to her request for students until a member of the Medford City Council complained at a public meeting on October 28, 1997 that Respondent was paying a teacher (presumably Complainant) for not teaching.

18. In November 1997, Respondent referred a group of students to Complainant (Stipulation ¶9) Complainant testified that in addition to the students who were assigned to her, she recruited more students by speaking with the teachers, as well as the guidance counselor at the vocational school. In a memorandum to Belson dated November 14, 1997, Complainant stated that she has “benefited considerably from the materials he provided to her during the training period.” She further stated that Belson had been “very fair” and “committed to the business at hand, to set goals and to provide a positive environment for me to achieve those goals. For this I am grateful.” (Jt. Exh.7)

19. Complainant testified that Mr. Mahoney, then the Assistant Director of the Vocational School, refused to follow up on student disciplinary issues and demeaned her in the presence of others. (Tr.377-380) Complainant claimed that misbehaving students would boast to her that Mahoney did not discipline students whom she sent to his office but would discipline them when they were sent by other teachers. (Tr. 378) According to Complainant, students’ behavior worsened after she sent them to Mahoney and despite her complaints, Respondent took no action to provide disciplinary support. I do not credit this testimony. (Tr. 378-80)

20. Complainant testified that during the 1997-1998 school year, the sign on the handicapped bathroom she used which read “handicapped only” was defaced. The word “only” was scratched out, and the word “sometimes” was added, so that the sign read “sometimes handicapped.” In addition, the words “fat pig” were written on the sign in red ink. (Tr. 372-73; CP Ex. 37) There was no evidence as to who defaced these signs. I credit this testimony.

21. Complainant testified that obstructions were placed in her path to the handicap bathroom. (Tr. 374) She stated that the monitor stationed outside the door of the handicap bathroom refused to move the group of students who congregated in that area, several of whom called Complainant names and swore at her, making Complainant’s entry and exit from the bathroom difficult. She acknowledged that these issues were resolved after a meeting with Belson, Volpe, Gwen Blackburn, (Director of Bilingual ESL), and Diane McLeod held to address her concerns. (Tr. 202-03; 373-4)

3. 1998-1999

22. After acquiring her van, Complainant continued to park in the same location, parking diagonally across two handicap spaces and an access grid. In the winter of 1998, she stopped parking at that location because one of the spaces was needed by a blind colleague. (Tr. 142) Thereafter, Complainant began to park parallel to the sidewalk adjacent to the poolside of the building (shown as location #2 on Chalk 1) and near the door by which she entered the building. The sidewalk at pool side was 12.7” wide. According to Complainant, at Volpe’s request, the Department of Public Works, delineated a space parallel to the curb and marked it with a handicap access emblem. (Tr. 142-49,641; CP Ex. 15)

23. Complainant testified that in the fall of the school year 1998-1999 she was assigned no students. She stated that during this time she began complaining to colleagues, cried over the situation and spoke to “folks around the city,” and also had some “hostile exchanges” with Belson.

24. Complainant met with Belson, Volpe and High School Principal Paul Krueger on December 11, 1998. At this meeting, they decided that rather than teaching study skills, Complainant would instead tutor students for MCAS testing in Math and English. Complainant stated that after that meeting she was assigned very few students, but, by taking the initiative to go before classes and informing students about her class, she recruited up to 20 students during that year.

25. Respondent referred a new group of students to Complainant for tutoring and academic support services in 1998. However, according to Belson, Complainant’s program was not effective. (Tr. 1062) He stated that over the course of the 1998-1999 academic year, he learned of student complaints that Complainant was sometimes absent and her classroom room dark when they went to her for scheduled tutoring sessions. Students also complained that Complainant was not prepared to work with them in the areas where they needed help and that they were not comfortable with her. I credit his testimony.

26. Belson testified that he discussed with Complainant concerns about her ineffectiveness as a tutor. In addition, he asked Volpe and members of the guidance department to find more students to work with Complainant. (Tr. 1062) He also told representatives of the MTA to speak with Complainant in an effort to make the program more effective (Tr. 1064) Despite Belson’s efforts, the guidance department and other

administrators were unable to find students willing to utilize Complainant's services. (Tr.1062). I credit his testimony.

27. Complainant testified that during the 1998-1999 school year, the sign she had hung in her corridor that read "Back to School, J.J. Fountas," was torn down on at least six occasions. (Tr. 382-83; 538-39) In September 1998, a sign on the door of her classroom was defaced. The sign initially read "Back to School," but was defaced to read "coo coo." (Tr. 384-85; CP Ex. 41) I credit her testimony. Complainant complained to Dr. Krueger and the school police officer. According to Complainant, Dr. Krueger acknowledged that the defacement was not appropriate but refused to investigate further, stating that he could not ascertain with certainty what "coo coo" meant. (Tr. 385)

4. 1999-2000

28. Complainant testified that on the first day school in September 1999, she learned that she was no longer assigned as an MCAS tutor, but was given no other assignment throughout that entire academic year. Belson testified that no students were referred to Complainant during 1999-2000 because both Volpe and Krueger were reluctant to assign students to her because they felt she was ineffective, did not work well with students and was unprepared. (Tr. 821) I credit his testimony.

29. On July 31, 2000, this Commission issued a decision with respect to Complainant's 1994 claims that Respondent had unlawfully retaliated against Complainant by suspending and then terminating her employment for "conduct unbecoming a teacher." (Jt. Ex. 52.)

5. 2000-2001

30. In September of the 2000-2001 academic year, Belson referred five students to Complainant. However, Complainant stated that no students came to her that year and that therefore, on her own initiative, she took a workshop at the Landmark School, which deals with troubled children, with the hope of setting up a satellite school in Medford. In addition, she created a teacher package from the Links Program and provided copies to Belson to pass on to administrators and teachers.

6. 2001-2002

31. When Complainant returned to school in September 2001, construction crews were working on the roof near the area where she had been parking parallel to the curb near the pool (shown as location #2 on Chalk 1). There were many construction workers, trucks and cars in the area, and according to Complainant, they inadvertently tarred over the surface of the area where she parked, causing the lines to be faded. She stated that she continued to park in that location during the construction until January 25, 2002. (Tr. 150)

32. At the start of the 2001 school year, Belson and the new vocational school director, Mr. Mahoney, informed her that she would need to vacate part of her classroom to make space for other teachers. In November they informed her that she would have to completely vacate her room and move to an adjoining room that had been a teacher's lounge. Complainant was not assigned any students that year. Belson testified that he believed there was "less conflict" when Complainant did not have an assignment. She continued to perform other work, received pay and appeared content. (Tr. 826, 832) I credit his testimony.

33. Complainant testified that her new class room was excessively hot, too small for her to get around and gave her no place to elevate her leg. Complainant also testified that her colleagues were unhappy that she had moved into their lounge and consequently filed a grievance about the matter, stopped talking to her and “turned their heads,” leaving her feeling isolated. Complainant did not complain to the MCAD or the MTA at the time of the move.

34. Belson testified that Complainant was moved to the lounge because Mahoney and Krueger determined they needed to utilize Complainant’s room to accommodate the increasing number of special needs students. Since Complainant never had more than five students at a time, they moved her to a smaller room. The rooms previously used by Complainant were then used for special education classes. (Tr.1073-1074) Belson adamantly denied that this move was in response to the MCAD decision that issued a year earlier in 2000. He stated that he was not a Respondent in that case and that it did not impact any decisions he made regarding Complainant. (Tr. 977) I credit Belson’s testimony that the reason for the move was to accommodate the special needs students and was not motivated by any discriminatory or retaliatory animus toward Complainant.

35. Paul Edwards, Respondent’s Director of Buildings and Grounds, testified that he was asked to assist Complainant’s move from one class room to another in 2001. (Tr. 1751) He stated that his staff painted the new room, changed all the light bulbs, cleaned all the light vents and stripped and waxed the floor. During the move he observed the interaction between Complainant and some students who were assisting Complainant move her things. He described Complainant as very hostile to the students. (Tr. 1753)

He stated that when his staff finished the move, the room was in excellent condition. I credit his testimony.

36. Paul Edwards testified that the High School/Vocational School is cleaned by an outside vendor in the evenings. (Tr. 1748) He stated that the cleaning crew did not have keys to Complainant's room because she had instructed him not to allow the cleaning crew into her room (Tr. 1749) In June 2001, before Complainant moved to the smaller classroom, he observed the conditions in her previous class room and described them as "deplorable" (Tr.1749) I credit his testimony.

37. Complainant testified that Charlie Murphy, an instructor in the cosmetology shop, deliberately blocked her access to the vocational theatre during a professional day event. (Tr. 161-62) Complainant testified that she reported this incident to Belson; however, Belson denied that Complainant reported this to him. I credit his testimony.

38. Complainant testified that on January 25, 2002, she arrived at work to find that a teacher, Sandra Gianino, had parked in Complainant's usual parking space adjacent to the pool entrance. When Complainant asked Gianino to move her car, she refused and demanded to see Complainant's handicap placard. (Tr. 153-54) Complainant testified that she immediately reported this incident to Mahoney, who said he would be right out. (Tr. 155) However, before Mahoney arrived, some of Gianino's fellow shop teachers came out and began to laughingly mock Complainant, pointing to each other and asking: "Are you disabled? Are you disabled? I'm disabled. Are you disabled?" (Tr. at 155-56) Complainant testified that as she drove away she saw Belson in front of the school as he was getting out of his car and reported the incident to him. Complainant testified that

Belson indicated only that he would look into the matter. When she asked him where she could park, he told her he would not help her with that. (Tr.156-57)

39. Complainant testified that after the incident with Gianino, she attempted to reclaim her space by the pool, but Belson refused to reinstate her parking space. (Tr. 157-58) Thereafter, Complainant parked in the fire lane in front of the Medford High School entrance (shown as location #3 on Chalk 1) for the remainder of that school year. She received no complaints from anyone at the school about parking in the fire lane during that time period. (Tr. 158-60; 839, 911; CP Ex. 20) Although there were several van accessible handicap parking spaces available at the high school/vocational school, Complainant refused to park in those spaces. (Tr.159-160, 505, 698)

40. Belson testified that after Complainant told him of the alleged incident with Gianino, he asked Mahoney to investigate the incident. Mahoney told Belson that he did not believe that the incident took place. I credit this testimony. (Tr. 1072) Belson testified that he never authorized a parking space for Complainant next to the pool area and that the van accessible spaces at the high school were usually empty. (Tr. 1079, 1083) Belson testified that one of the two van accessible spaces in front of the school was for Complainant's exclusive use and contained a sign displaying Complainant's initials. (Tr. 1084-1085) I credit his testimony.

41. Belson testified that in February or March 2002, Complainant told him that she was concerned about the parking at the high school and complained that cars were parking in her space. Belson asked Complainant to use the van accessible spaces; however, Complainant told him that those spaces were not adequate for her. (Tr. 633-634) Belson testified that in February or March, 2002, Complainant demonstrated her

parking needs at the high school. Complainant parked her van with the tires on the passenger side of the van on the yellow line between the parking spaces and the access aisle, rather than parking her vehicle in the middle of the space. She showed him that she went into the adjacent space when removing her scooter from the van.

42. Following Complainant's demonstration at the high school, Belson concluded that if Complainant parked with her van squared in the middle of the space, she could easily fit in the space. (Tr. 982-982) At the end of her demonstration, Belson told Complainant to contact McLeod if she wanted a further accommodation. (Tr.1089) Complainant never contacted McLeod to request further accommodation regarding the high school parking space after discussing this with Belson. The dimensions of the van accessible parking spaces and access aisles in the areas across from both the main entrance to the vocational school and the main entrance to the high school exceeded the state and federal requirements for van accessible handicap parking spaces at all times relevant to this matter. (Tr. 1683-1688)

43. Complainant acknowledged on cross examination that the van handicapped space closest to the high school entrance gave her the most direct access to her classroom. The entrance was on the second floor and her classroom was on the second floor. (Tr. 628) She also acknowledged that she never complained to the union about the parking at the high school. (Tr. 635)

44. Complainant never complained to Mayor McGlynn about her parking space at the high school until after learning of her impending transfer to the Kennedy/Lincoln School. (Tr. 641-642)

45. Complainant testified that once she began parking in the fire lane in front of the Medford High School, she was no longer able to enter the school via the front door because of the hilly terrain. Therefore, she began to enter the school by going around to the back and using the elevator in the kitchen area in order to get to her class room. She would enter the building through the front door on the first level and take the school's sole passenger elevator to her second floor classroom. The only other elevator was a freight elevator that opened onto the loading dock. (Tr. 163-64) The passenger elevator was located in technical school's Culinary Arts area that contains a kitchen.

46. The elevator from the Culinary Arts area can be accessed from a door in the corridor. Complainant testified that when she tried to access the elevator from that door she found the door locked, requiring her to go through the kitchen. On one occasion, when she tried to access the elevator in that way, she found that a rag had been placed on the floor, blocking her access. (Tr. 624; CP Ex. 38) The next day, a cart blocked access to the elevator. On another occasion, a wooden wedge blocked the door. (Tr. 626; CP Ex. 40) Another time, a large table blocked the entire corridor access. (Tr. 205-06; 635; CP Ex. 38) Despite Complainant's assertions, I find that these objects were not deliberately placed in order to block Complainant's access.

47. In a letter dated February 7, 2002, Belson wrote to Complainant that she was disrupting the Culinary Arts Program by entering the food service preparation area and taking pictures of students. The letter prohibited Complainant from taking the elevator, and threatened her with disciplinary action if she did not comply. (Jt. Ex. 11)

48. Complainant denied taking pictures of students or disrupting any programs. She testified that she had merely gone directly to the elevator in the Culinary Arts area in

order to get to her classroom on the second floor. Complainant acknowledged taking a photograph of a staff member, Dennis Moriarty because, according to Complainant, he was blocking her access to the elevator. (Tr. 168-69)

51. Belson testified that it was not necessary for Complainant to enter the Culinary Arts area in order to use the elevator. (Tr. 1073) Belson testified that she never made any complaints to him about being harassed at the high school, other than the incident with Gianino. I credit his testimony.

52. Complainant testified that, after being told not to enter the Culinary Arts area, she stopped using that elevator, and rather than use the freight elevator, she traveled the length of the outside of the school to enter the building on the second level, thereby avoiding the need for an elevator. (Tr. 548-50) The door where she entered was next to her old parking space.

53. Complainant testified that in February 2002, she entered the teachers' room and observed a poster taped to a chair containing the words, "Reserved Parking, Sandra Gianino. Violators will be towed at owner's expense" (C-22) She did not report this incident to anyone.

54. Complainant testified that she was harassed by Paul Edwards and William Mahoney. However, she never complained about such harassment to any administrator. Complainant made no complaints, either orally or in writing to the MTA or to Respondent regarding the fact that she had no students at the high school/vocational school from 1999 until the fall of 2002. (Tr., 621, 623; 1065)

2002-2003

55. On or about September 5, 2002, Complainant arrived at the High School/Vocational School on the first day of the school year and parked in the fire lane. She was approached by a security guard who told her that she could no longer park in that location. Complainant testified that she became overwhelmed with the parking situation and began to cry, holding her two hands in front of her face. She stated the security guard began to admonish her, using hand gestures, and she claimed that her fingertips brushed his hand. The security guard accused her of hitting him, and began to call the police, at which point Complainant backed up her van and drove to the MCAD to file the instant complaint.

56. For the next few days Complainant parked on the diagonal in a small yellow grid area between two handicapped spaces, until a security guard told her she could only park there if she put her bumper up to the curb. However, Complainant claimed that with her bumper up to the curb, she could no longer get out of her van because she had to climb on a grassy knoll to get around her van.

57. On the same day, September 5, 2002, Belson advised Complainant that in November she was to be transferred from the High School/Vocational School to the Kennedy/Lincoln Elementary School, a combination of the two-story Kennedy building and the Lincoln school, an older building with a basement level, first and second floors. Complainant was assigned to work in the Lincoln School building, which had been made handicapped accessible via a ramp to the basement level. (Tr. 211) (Stipulation ¶14) Belson testified that Respondent's goal in transferring Complainant to the Kennedy/Lincoln School was to place her in a working environment where she could tutor

elementary students, consistent with her teaching license. Complainant was to assume the position of academic support teacher in that school, primarily working with students who had failed the MCAS test. (Joint Exhibit 19) Complainant was unhappy about the transfer. (Tr. 199)

58. Complainant testified that on September 11, 2002, she discovered that the lock was missing from her classroom door and the following day she observed that other things were missing, including a gripper stick that she used to pick things up. She got in her van and went to city hall to see Mayor McGlynn, who is also the chair of the Medford School Committee. He agreed to a meeting with Complainant and Belson.

59. On September 13, 2002, Complainant and Belson met with Mayor McGlynn. Complainant told him that she had been suffering and that she was being returned to the Kennedy School, from where she had been fired years before. McGlynn told her he did not involve himself in day-to-day operational issues of the school department and could not help with the matter.

60. On October 15, 2002, Belson gave Complainant a letter telling her to prepare for the move, and asking her to give him a list of things she needed moved from the High School to Kennedy/Lincoln School. The letter also stated that a handicap parking space was provided to her at the Kennedy/Lincoln school. Complainant acknowledged that she did not box up any of her materials between the first day of school and November 6. (Tr. 650) Complainant did not cooperate in any way with the move, even after Belson sent her a letter requesting her cooperation. (Joint Exhibit 12)

61. On November 6, 2002, Complainant reported to the High School/Vocational School, rather than to Kennedy/Lincoln School and observed that all of her materials

were gone. She returned to her home and did not report to the Kennedy/Lincoln school that day.

62. Complainant was granted permission to arrive late and leave early at the Kennedy/Lincoln School, as she had been at the High School/Vocational School (Tr. 1304) On November 7, 2002, Complainant reported to the Kennedy/Lincoln school for the first time that school year. She testified that, rather than park and enter the school, she remained seated in her van in the school's parking lot and asked an employee to summon the school principal, Kirk Johnson because she had "no place to park."

63. Principal Kirk Johnson testified that he was summoned from the cafeteria and told that someone in the parking lot wanted to speak with him. He went out to the parking lot where Complainant was seated in her van in the fire zone by the fence outside the playground. Complainant introduced herself, then immediately proceeded to ask him about the grading of the parking space, about the elevator and about her materials from the High School. He told her he would do his best provide answers to her questions and offered to take Complainant's home telephone number but she refused, so he took her home address. (T. 1272-1273) He stated that Complainant then drove off. I credit his testimony. Following this incident, Johnson wrote a memorandum to Belson and Paul Edwards stating that Complainant was concerned about the grading level in the parking lot for van access, whether the elevator was capable of holding her weight and the weight of her motorized chair, and the items moved from the high school. The memorandum states that Johnson advised Complainant to speak to Belson about her concerns and that he would try to answer her questions as soon as possible. (Jt. Exh. 14)

64. According to Complainant, when Johnson came out to speak to her, she asked him where she should park and he said he didn't know. She asked where her classroom was and he pointed to the building. She observed a ramp going to the basement of the Lincoln building. She asked Johnson about the elevator, as well as other issues; Johnson told her he would discuss these matters with Belson and to wait until she received a memorandum regarding the issues she raised. Complainant returned to her home without entering the school.

65. Complainant testified that she was continually unable to open the door to the Kennedy/Lincoln school and had to wait until someone came along to open the door for her. She asked Johnson whether an automatic door opener could be moved from a location at the Kennedy building and placed on the door that she used. Johnson told Complainant that he would look into it but meanwhile, he arranged to have a custodian open the door for Complainant on the following Monday. Paul Edwards testified that it was not possible to move the automatic door opener from the Kennedy side to the Lincoln side because they had two different doors. (Tr. 1774, 1777, 926-927) Therefore a custodian waited for Complainant at the door each morning.

66. Complainant acknowledged that she observed handicapped parking spaces and a handicap ramp when she arrived at the Kennedy/Lincoln School on November 7, but made no attempt to park in those spaces or enter the school. She acknowledged that one of the handicap spaces abutted a grassy area so that if she opened the door wide in that spot, she would not hit another car. (Tr. 654)

67. On November 8, 2002, Complainant again reported to the High School/Vocational School. When Belson told her that she wasn't supposed to be there,

she claimed that there was no place for her to park at the Kennedy/Lincoln School. Belson responded that the handicapped parking spaces at Kennedy/Lincoln School had been enlarged so that she had adequate space to remove her motorized chair from her van. According to Complainant, Belson arranged to meet her at the Kennedy/Lincoln school on Tuesday, November 12, 2002, but Belson never showed up. However, according to Johnson, who kept a log of Complainant's attendance, on November 12, she arrived at 10:10 at the handicapped parking space, backed up, drove off, returned, parked by the gate and took a picture, then left the school grounds without entering the building. (Tr. 1455-1456) I credit his testimony.

68. Complainant testified that her assigned classroom at the Kennedy/Lincoln school was isolated in a far corner of the basement and using the handicap bathroom required her to take an elevator to the first floor.

69. Edwards testified that his staff was asked to prepare the room at Kennedy/Lincoln for Complainant and that his staff spent one week painting all of the walls, cleaning, stripping and waxing all of the floors, washing the windows, checking the heat, washing the blackboards and hanging a white board. (Tr. 1763) In addition, they divided the room in order for Complainant to have a separate resting area. (Tr. 1764) They moved her battery charger, removed the lock from her classroom at the high school and put it on her door at the Kennedy/Lincoln school, along with chairs, a resting table, a microwave and bookcases. (Tr. 1770-71)

70. Kirk Johnson testified that Complainant's classroom was not isolated. The art room, a gym, a cafeteria and band practice, as well as a pre-school group, were located on the same level. In addition, Complainant could use a land line located in the

vacant office on her floor. He stated he often went to Complainant's room, and she was always in the rest area and was frequently sleeping. (Tr.1428-1429) I credit his testimony.

71. Belson testified that prior to Complainant's transfer to the Kennedy/Lincoln School, at his direction, two additional handicap parking spaces were added to the parking lot on the weekend of September 9 and 10, 2002. The new spaces were the same size at those at the High School, which exceeded the federal and state requirements. (Tr. 859) Belson testified that all four handicap accessible parking spaces at the Kennedy/Lincoln School exceeded the van accessible requirements as of November 13, 2002. (Tr.1642) I credit his testimony.

72. On November 12, 2002, at Belson's request, McLeod measured the dimensions of the handicapped parking spaces at the Kennedy/Lincoln school. McLeod measured the handicapped spaces and the access aisle and checked the path of travel from the access aisle to the door of the building. (Tr. 1634; Exh. RP 26) According to McLeod's measurements, the handicapped space adjacent to the grass is 9'6" wide; the access aisle to its right is 8" wide, measuring from the center of the yellow stripe. The handicapped space on the opposite side of the access aisle is 9'6" wide. Adjacent to the handicap spaces are two van accessible spaces. One of these spaces is 9' wide; adjacent to that space is an access aisle that is 9' wide; adjacent to the access aisle is another handicapped space that is 9' wide. According to McLeod, Federal law requires that spaces are 8' wide and access aisles are 5' wide. Van accessible spaces must be 8' wide with an 8' aisle or 11' wide with a 5' aisle. A van accessible space and aisle must be a total of 16' wide (Tr. 1639). McLeod concluded that the spaces went beyond the

requirements of the ADA . (Tr. 1642). McLeod testified that in addition to measuring the handicapped spaces, she verified that the route from the handicap space to the school is accessible. (Tr. 1640-41) I credit her testimony.

73. On Wednesday, November 13, 2002, Complainant again reported to the High School/Vocational School. Upon seeing her, Belson handed her a letter telling her to report immediately to the Kennedy/Lincoln School, or face disciplinary action. (Exh.19) Belson agreed to meet Complainant that same day at the Kennedy/Lincoln School so that she could demonstrate her parking requirements.

74. On November 13, 2002, Complainant met with Belson and Diane McLeod at the parking lot at the Kennedy Lincoln School for the purpose of demonstrating to them how she loaded and unloaded her motorized chair.

75. According to Complainant's testimony, she pulled into the handicapped parking space at the Kennedy/Lincoln adjacent to another car. Complainant told Belson and McLeod that the space was not wide enough for her and demonstrated that after exiting the van and removing her motorized chair from the van, her body went over the line into the adjacent space. Belson's response was that if Complainant moved her van over, she would have enough space to exit the van without using the adjacent space.

76. McLeod testified that when she arrived at the parking lot she greeting Complainant, who responded, "What's she doing here? I don't want her here." McLeod observed Complainant pull into a space right by the grass, with the wheels of her van touching the access aisle, right up against the line. She saw Complainant open the driver's side door most of the way. It did not extend over the grassy area. Complainant exited the van and came around the back of the van. Then she observed Complainant

remove the scooter from the van by grabbing its handles. (Tr. 1648-1650) Complainant walked the scooter down the ramp. She then stood next to the chair and turned it, standing in front of the wheel. According to McLeod, Complainant and her chair were in the access aisle; and the chair and Complainant's foot protruded into the next aisle by about one inch. (Tr. 1648-1653) I credit McLeod's testimony.

77. McLeod observed that Complainant had ample space to get her chair on and off the van because there were several feet on the driver's side of the van that were not used. She also concluded that Complainant had room at the end of the ramp for her chair. According to McLeod, Complainant told her she needed more space and when McLeod asked her why, Complainant responded that she "just needed more space," but would not tell McLeod how much more space she needed and never told McLeod that she needed to open the driver's door all the way. (Tr. 1659-1660) McLeod told Complainant that she had the option of consulting a qualified individual who could document her need for more space (Tr. 1661) Complainant was very hostile and rude to her during this demonstration (Tr. 1663) I credit McLeod's testimony.

78. Complainant stated that following this demonstration she followed Belson and McLeod into the Kennedy/Lincoln school building. When she went with Belson and McLeod to view the handicap bathroom, she complained that two cabinets blocked her entrance; however she acknowledged that they were immediately removed. She complained that the bathroom was dirty and McLeod stated that it could be cleaned.

At this time Complainant also complained to Belson and McLeod about the elevator and the classroom. With respect to Complainant's complaints about the temperature of her room, Belson offered to reconfigure the room, however, Complainant rejected this offer.

(Tr. 1010-1011) The elevator in the Lincoln building had adequate capacity to transport Complainant and her chair. (Jt. Exh. 15) Handicapped students in both the Kennedy and Lincoln buildings used that elevator. (Tr.1210-1211) Complainant testified that she was concerned that she had no way to communicate with Kirk Johnson, who was in the main building. She stated that when she called out to the custodians, they ran from her, rather than respond.

79. McLeod testified that when she and Belson accompanied Complainant to the elevator, she was afraid to get in because she was concerned about the capacity of the elevator, and worried about getting stuck. McLeod observed a sign stating that it had a capacity of 2000 lbs. (Tr. 1670) Complainant then got on the elevator but said she did not want McLeod on the elevator. (Tr. 1670-1671) Belson and Complainant got on the elevator and McLeod walked up the stairs.

80. They next visited Complainant's classroom. McLeod testified that in the classroom, Complainant was agitated and upset, expressing concern about the condition of the room and continuously asking questions. As she answered one question, Complainant raised another issue. (Tr. 1666) Complainant said she did not like the room and wanted it cleaned. She wanted a new pillow, and a lever on the door. They proceeded into the resting area, where Complainant continued asking Belson questions and he continued to answer them. At one point he called a custodian to address some of Complainant's concerns.

81. McLeod testified that battery pack for Complainant's chair was on a small two-tiered table with wheels. Complainant stated that she did not want the battery on the table, so McLeod moved it to a metal chair near Complainant's resting bed. Complainant

then stated that she did not want the battery pack on that chair. A custodian was present and Complainant asked him to get her a table without wheels. He returned with a table. Then Complainant changed her mind again and said she wanted the battery pack returned to the table with wheels. McLeod testified that she then told Complainant, "Jackie, I took it off the table with wheels and I'm going to leave it there." She denied screaming or slamming her hand down or laughing at Complainant as testified to by Complainant. (Tr.1674) I credit McLeod's testimony that she did not scream or slam her hand down or laugh at Complainant.

82. On November 14, Complainant reported to work at the Kennedy/Lincoln School. She testified that because the parking issue was "not resolved," she drove around the block and parked on Main Street, a public way. She stated that when she arrived at the school, she was unable to open the door to the building and waited outside until a passer-by opened the door for her. She stated that she remained alone in her classroom for the rest of the school day. Johnson stated that he met with Complainant on November 14th. She expressed concern that the parking space did not accommodate her van because it was difficult for her to open the door.

83. On November 15, 2002, Complainant parked her van on Yale Street, a public street beside a length of sidewalk adjacent to the Kennedy/Lincoln school playground. She testified that this location suited her needs because she could exit the van onto a sidewalk and her ramp opened up on the street. Complainant felt she had resolved her parking problem by parking on Yale Street. On those days subsequent to November 13, 2002, when Complainant did appear at the Kennedy Lincoln School, she parked on Yale Street, beyond school property, and unloaded her motorized chair into the

street. (Tr. 298-299, 437-440). In order to do so, Complainant had to maneuver her motorized chair at least fifteen feet across the public street. After Complainant began parking on Yale Street, she never asked for any parking accommodations in the parking lot. (Tr.1724-1726; 2047, 2096)

84. Complainant stated that when she arrived at the Kennedy/Lincoln School the following Monday, November 18, 2002, the custodian was not there to open the door. After circling the block in her van, she drove over to the High School/Vocational School because she needed to use the bathroom. At the High School, she encountered Belson, who told her to park curbside and assured her that her van would not be ticketed. She did not trust him, so she refused, and accused Belson of playing games. Belson retorted that she was playing games and yelled at her. While she was there, Belson provided her with a cell phone. Complainant returned to the Kennedy/Lincoln school, but did not see the custodian and was unable to call the school because her cell phone did not work. She then drove to Medford City Hall in order to use the bathroom there. Complainant testified that by this point many hours had passed, so rather than return to the Kennedy/Lincoln School, she returned to her home and called Johnson to inform him that the custodian wasn't stationed at the door of the Kennedy/Lincoln School. (Tr. 305-307) Johnson responded to Complainant that the custodian was present at the door and had briefly observed Complainant outside the school, before she left the area. Johnson testified that Belson called him that day to ask whether Complainant had entered the building that day and he said that she had not. (Tr. 1457)

85. On around November 18, 2002, Complainant received a letter from McLeod stating that she would need to provide Respondent with a statement from a "certified

disability specialist” in order for Respondent to enlarge the handicapped parking spaces at the Kennedy/Lincoln School. Complainant testified that she did not provide such evidence, because she felt it was a “stall tactic” by Respondent that was intended to engage her in a long process. Moreover, Complainant felt she had resolved the parking issue to her satisfaction by parking on Yale Street.

86. At some time after November 13, 2002, Complainant called Mayor Michael McGlynn’s office to complain about the parking situation at the Kennedy/Lincoln School, telling the secretary that she did not want to speak with McLeod. (Tr. 509)

87. Belson testified that Complainant had, on three occasions provided him with three different measurements she required in order to park her van. (Tr. 1196) He hoped that after receiving his letter of November 13, 2002, Complainant would specify her requirements for parking at Kennedy Lincoln School. (Tr.891) Belson expected Complainant to provide him with specific information, such as a letter from a physiatrist or physician, confirming her requirements for performing the task of unloading and reloading her scooter onto the van. (Tr.897) Belson testified that he wanted Complainant to document her request because over time Complainant had made multiple contradictory requests to him regarding her parking requirements, such as whether she needed “curbs, no curbs, elevated areas, non-elevated areas, more on the front, more on the back.” Belson stated that he wanted to have a definitive request from Complainant in writing from an expert, and would not increase the size of the parking space until knowing exactly what Complainant required. Complainant never provided Belson with any written description of her need for any accommodation or enlargement of the parking spaces at Kennedy/Lincoln School. I credit his testimony.

88. Complainant testified that on November 19, 2002, she came to the Kennedy/Lincoln School where a custodian was at the door to let her in. She stated that her classroom was “freezing,” so she wrapped herself in a blanket. Belson and Johnson then entered the room. She pointed to her thermometer, indicating the low temperature and informed Belson that her cell phone did not work. Belson told her that heating problems were a building-wide issue. She claimed that Belson yelled at her and told her to get up and move around to keep warm. (Tr. 308-310) Belson denied ever yelling at Complainant and telling her to move around. I credit his testimony. When Complainant complained that her classroom was cold, Belson asked the buildings and grounds department to fix the problem. Complainant was also provided with two space heaters. (Tr. 1321-1322)

89. Complainant received a letter from Belson dated November 20, 2002 stating: “If there are specific accommodations which you believe are necessary and to which you are entitled, please complete this form for each item so determined by you. These items should be sent to your supervisor, Mr. Johnson, who will work with the school and safety officials to evaluate each request as quickly and fairly as possible.” (Tr.300) Complainant never submitted any forms to Mr. Johnson.

90. On November 24, 2002, Johnson wrote Complainant a memorandum informing her that she was assigned to be an academic support teacher for students who had scored poorly on the math portion of the MCAS test. Johnson testified that he had previously met with the math coach, Collete Epps, prior to meeting with Complainant, to prepare a “game plan” for the coming year. Epps’ job was to assist all the teachers with math issues, with emphasis on the MCAS (Tr. 1423, 1425). Epps has worked for

Respondent for 34 years; in 2002 she became an elementary math coach. (Tr.1559) Epps testified she met with Johnson to discuss having her work as a math coach to Complainant, working with children who needed help with the MCAS. After meeting with Johnson, they identified 20 children. (Tr. 1576-1577). They scheduled a meeting with Complainant for Friday December 6, 2002. However, Complainant was not present at school on that day. (Tr. 1568; 1578-1579) I credit her testimony.

91. Complainant testified that on the day before Thanksgiving, November 27, 2002, she was unable to park at the school because the parking lot was not plowed, so she left without entering the building. Johnson testified that on November 27th and December 2, Complainant did not come in to the building. On December 4, Complainant came in to school but left at 10:30 a.m. without his permission.

92. Johnson testified that Complainant did not come to school on December 3, 2003, the day of the scheduled meeting with him and Epps. (Tr.1427) On December 5, Complainant went to the MCAD and did not report to school.

93. On December 6, Complainant did not enter the building and therefore did not attend the scheduled meeting with Johnson and Epps. Complainant testified that on that date, the sidewalk where she had been parking on Yale Street was covered with snow. She asked Johnson if the school could remove the snow from the sidewalk and his response was that was not the school's responsibility to do so. (Tr. 1429-1430) Although Epps appeared for their scheduled meeting on that day, Complainant did not come to school that day. The meeting was again re-scheduled for December 10.

94. Steven Mazaka worked at Kennedy/Lincoln School in 2002-2003 school year as acting Senior Custodian. (Tr. 1728) Mazaka testified that the City of Medford was

responsible for snow removal of the handicapped parking spaces at the Kennedy/Lincoln school. (Tr. 1713) However, if the city had removed snow and the area needed to be gone over, the school custodians would go over those spots and would put down rock salt daily, as needed. I credit his testimony.

95. Mazaka testified that he occasionally observed Complainant sitting in her van in the parking lot with the motor running. (Tr. 1717) Mazaka stated that sometimes Complainant entered the school and at other times, she remained in her van. On one occasion, Complainant took his picture. (Tr1718) He stated that he never observed Complainant park in any of the handicapped spaces provided by the school. I credit his testimony.

96. Mazaka testified that custodian Tom Robinson was assigned to wait at the door in order to let Complainant into the building. Mazaka frequently observed Robinson waiting at the door for Complainant, while she sat in her van in the parking lot; sometimes she did not enter the building. Complainant never complained to him that Robinson was not there. He observed Complainant parked on Yale Street when she came to school. (Tr. 1718-1719, 1724) Mazaka stated the temperature in Complainant's room and the elevator were comfortable. (Tr. 1726-1727) Occasionally when Complainant would ask him for help, he would help and he denied ever walking away from Complainant. I credit his testimony.

97. On Sunday, December 8, Complainant wrote a letter to Mayor McGlynn, who is also the School Committee Chairman, complaining about Respondent's failure to remove snow from her parking area. Complainant acknowledged asking McGlynn in a letter for an 11- foot wide space. Later, she asked for a 12- foot wide space. By the time

of the public hearing, Complainant alleged that she needed a total of 237.6.” She never gave Respondent specific measurements as requested by Belson at the time of the demonstration.

98. On December 10, Complainant came to school, and met with Colette Epps and Kirk Johnson in order to discuss her duties as an academic support teacher. Johnson testified that at the meeting he explained that the purpose of the meeting was to plan Complainant’s schedule for the year, including the grouping of students. According to Johnson, a total of approximately 60 students were identified as needing assistance with MCAS math. However the plan was to begin assigning small groups to Complainant in order to transition her slowly to the position. (Tr. 1437)

99. Johnson testified that during the meeting, he told Complainant that as the math coach, Epps would support Complainant in getting acclimated to the position of academic support teacher. (Tr.1441) Complainant discussed materials, preparation time, and requested to observe a class. Complainant told Johnson that, according to her attorney, she should be assigned no more than three students. Johnson told Complainant that he did not know if that was possible, but he would look into it. (Tr.1444) Epps told Complainant that she would help her set up the room. They planned to have Complainant begin meeting with students beginning January 6, 2003.

100. Johnson testified that despite his and Epps’ efforts to discuss the teaching plan for the year, much of Complainant’s discussion concerned non-substantive matters. For example, Complainant asked him to fix a malfunctioning clock and to move items from one area of the room to another. (Tr.1437-1438, 1440-1441; 1449) I credit his testimony.

101. Epps testified that on December 10 she went to Complainant's classroom. Complainant and Johnson were already present and she heard Complainant insisting in a loud voice that she needed something and heard Johnson say that they needed to get on with the meeting.

102. Epps, who has known Complainant for many years as a co-worker, greeted Complainant in a friendly manner. Epps corroborated Johnson's testimony that Complainant spent an inordinate amount of time discussing custodial matters, and was excessively concerned about a non-functioning clock and repeatedly asked Johnson when he intended to fix the clock. Complainant went on to discuss the heaters in the room, while Johnson kept trying to turn the discussion back to academic matters, the purpose of the meeting. (Tr.1583-1584)

103. Epps testified that during this meeting Complainant's mood changed from calm to very demanding, with Complainant working herself up over matters unrelated to the tutoring position. (Tr.1585)

104. Epps stated that during the meeting, Complainant asked to observe a classroom and expressed concern about tutoring such a large number of students. Epps and Johnson assured her that she would start off with small groups of students. Complainant was also concerned about having sufficient materials, and Epps reassured her that she would provide materials to Complainant. (Tr.1591)

105. Epps also observed that Complainant took notes during this meeting, and wanted to make sure she had written everything down. Several times Complainant attempted to clarify something Johnson had said and he kept responding, "No, that is not what I mean." Finally, Epps said to Complainant, "Jackie, he did not say that. Can we

just move on?” She stated that Complainant then turned to her and said, in a threatening manner that she better “watch out.” (Tr.1587) I credit her testimony.

106. Epps testified that subsequent to the meeting she gathered together materials for Complainant in anticipation of their next meeting scheduled for January 3, 2002. However, she never met with Complainant again. Epps stated that she went to Complainant’s room on successive Fridays, January 10, 17 and 31st; however Complainant was not present on any one of these dates. (Tr.1598-1599) After discussing the matter with Johnson, Epps no longer attempted to meet with Complainant. I credit Epps’ testimony in its entirety.

107. Complainant testified that on December 11, 2002 she became ill while at work, yet remained until the end of the school day, when she called paramedics to assist her with loading her motorized chair onto her van.

108. On December 12, Complainant came to work. On December 13, she took a personal day. Complainant testified that from December 13, until the Christmas break, she came to school after parking her car on Yale Street. Johnson testified that on December 18, 19 and 20 Complainant never entered the school building. (Tr. 1458) I credit Johnson’s testimony. Johnson testified that Complainant never called in any of her absences to the substitute secretary as required. (Tr.1460) I credit his testimony.

109. Complainant claimed that on January 2, 2003, the first day back from Christmas break, she was unable to gain access to the school because she could not get anyone to clear the snow, so she left. (Tr.1459-1460) Complainant stated that after the start of the new year, she was only able to come to school one day, January 6, 2003.

110. Complainant testified that on January 16, 2003, she arrived at the school, and drove around in her van feeling physically unable to come into the school.

111. Shortly after February 10, 2003, Complainant received a letter from Belson, stating that she had failed to report to school since January 7, 2003 and ordering her to return to work immediately. Complainant testified that notwithstanding the letter, she did not report to work, because she was frightened and believed she would be subjected to the “the same type of treatment,” and did not know where to park.

112. Following a series of letters between Complainant and Belson, Complainant met on May 8, 2003 with Belson, Attorney Greenspan for the Respondent and Principal Kirk Johnson. According to Complainant, Belson did most of the talking, and she told him of her “hardships” at the school. Complainant testified that she next received a letter terminating her employment dated May 22, 2003.

113. Complainant testified that she did not receive Belson’s certified letters of March 13, 2003, because she was not able to answer her door for the letter carrier, she asked him through her window to sign for the letter and leave it in her mail box. She did not retrieve her mail for several days later. Complainant stated that after realizing Respondent was sending her “official mail,” she would pick up subsequent letters at the post office because she believed for “legal reasons” she should sign them herself. (Tr. 713-714)

114. Belson testified that at the meeting on May 23, 2003, he read through his April 15th letter. With respect to not reporting to work on Feb. 10, 2003, Complainant stated that said she was there, but had difficulty entering the building. He relied on his own experience and concluded she had access and concluded that there was adequate

handicapped parking. With respect to why she did not appear on March 20, 2003 and on April 4, 2003, she stated she could not make it that day and received the notification of the meeting late. Belson stated that he did not believe Complainant was unaware of the meetings. (Tr. 1114-1116) In addition, Belson asked Complainant why she hadn't completed the form requesting accommodation, and she said she did not have enough time, but would not agree to complete the form. Complainant told Belson that she was unable to return to the school because Johnson had changed his behavior toward her (Tr. 1117) Belson asked Complainant whether there was anything else she wanted him to consider and she said no. (Tr. 1118) Complainant's reasons for not completing the forms were that it would have taken a long time, that she had solved the problem herself, and that she thought McLeod and Belson were being disingenuous. (Tr. 298, 2096-2097)

115. Belson testified that after Complainant's continued unwillingness to try to work at her tutoring position, he'd reached the "end of his rope." Despite his belief that the matter would end up in litigation, he felt that as a superintendent and public educator, his obligation to his staff and to the taxpayers and to the credibility of the Medford public schools, required him to take action against Complainant. (Tr. 112) I credit Belson's testimony that Complainant's termination resulted from her refusal to come to work and her refusal to focus on her duties as a teacher and was not in any way based on retaliatory or discriminatory animus toward Complainant.

116. Complainant never attempted to park in one of the handicap spaces, including the van accessible spaces, at the Kennedy/Lincoln School.

117. On May 31, 2005, an Arbitrator upheld the May 2003 termination of Complainant. (RP. 23)

III. CONCLUSIONS OF LAW

A. Individual Liability

Superintendent Belson was dismissed as an individual Respondent during the course of the public hearing, upon Respondents' motion. Notwithstanding, Complainant has subsequently challenged the ruling and thus it merits a discussion.

Complaints alleging violations of M.G.L. c. 151B, § 4(4A) may appropriately name individual employees as respondents under certain circumstances. Where, as in this case, there is only circumstantial evidence of discrimination, individuals may be named if they had the authority or the duty to act on behalf of the employer; their action or failure to act implicated rights under the statute; and there is evidence articulated by the complainant that the action or failure to act was in deliberate disregard of the complainant's rights allowing the inference to be drawn that there was intent to discriminate or interfere with complainant's exercise of rights. Woodason v. Town of Norton School Committee, 25 MDLR 63 (Full Commission)(2003) The evidence in this record does not establish the requisite "*intent to discriminate*" required in order to find Roy Belson individually liable for unlawful discrimination. There was no evidence that Belson acted or failed to act in deliberate disregard of Complainant's rights. In fact, there was evidence that Belson went out of his way to assist Complainant to succeed upon her reinstatement and in the years following. Thus I conclude that Roy Belson was appropriately dismissed as a party Respondent in this matter.

B. Handicap Discrimination

1. High School/Terms and Conditions

Massachusetts General Laws c. 151B, sec. 4(16) makes it unlawful to dismiss from employment or otherwise discriminate against a qualified handicapped person who is capable of performing the essential functions of the job with or without a reasonable accommodation. A claim of handicap discrimination may be proved by showing that the Complainant (1) is handicapped within the meaning of the statute; (2) is capable of performing the essential functions of the job with or without a reasonable accommodation; (3) was terminated or otherwise subject to an adverse action by her employer; and (4) her position remained unfilled and the employer sought to fill it. Dart v. Browning Ferris Industries, Inc., 427 Mass. 1 (1998).

M.G.L. c. 151B§1(17) defines a handicapped person as one who has a physical or mental impairment, a record of such impairment, or is regarded as having an impairment, which substantially limits one or more of the individual's major life activities. The parties have stipulated that Complainant is a handicapped person within the meaning of M.G.L.c.151B because of morbid obesity, knee injury and deconditioning, which substantially limited the major life activity of standing and walking.

Complainant may establish a prima facie case of discrimination by showing that (1) she is a qualified handicapped person; (2) she performed her job at an acceptable level (3) she was terminated; and (4) similarly situated individuals without a handicap were treated more favorably under the circumstances. Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116-117 (2000). Once the complainant establishes a prima facie case of discrimination, the burden shifts to respondent to articulate a non-

discriminatory reason for its actions, supported by credible evidence. *Id.* The complainant is then afforded an opportunity to demonstrate by a preponderance of evidence that the respondent's articulated reason is a pretext for discrimination. *Id.* at 117.

Complainant alleges that following her reinstatement in 1996, she was ready willing and able to perform her duties and claims that Respondent failed to provide her with the support she needed at the high school. Complainant also contends that Respondent failed to provide her with an assignment or students, that she was not evaluated as required by the collective bargaining agreement, nor was she given an assignment for the following year each spring. However, according to the credible testimony, Respondent did not assign students to Complainant during the first academic year (1996-1997) following her reinstatement because, by her own account she was not prepared. For several academic years thereafter Complainant was assigned students, and then in three subsequent years, until her transfer to the Kennedy/Lincoln School, she was not assigned students. According to the credible testimony of Belson, Complainant was ineffective and unable to attract students to come to her for tutoring. Belson testified credibly that Respondent stopped sending students to Complainant because of their unwillingness to go to her for help, and because of the High School/Vocational School administrators inability to find students to send to her. He testified credibly that he did not have Complainant evaluated because he wanted to avoid placing something negative in her record, and further explained that although it was Respondent's practice to assign teachers at the end of each year, it was not required. Finally, while Respondent did not provide Complainant with a specific assignment for several academic years, I conclude

that this did not stem from discriminatory or retaliatory animus toward her. Belson testified credibly that there was “less trouble” when Complainant was not given an assignment, that she was pursuing projects on her own, was receiving a paycheck and was not complaining.

There was credible evidence that at the time of her reinstatement in 1996, Respondent provided Complainant with academic materials for her review and preparation. There was no credible evidence that Complainant was provided with fewer materials than any other teacher. More importantly, the evidence demonstrates that Complainant was more concerned with the physical attributes of her classroom than her duties as a teacher. Many of her concerns were not connected to her handicap and were not accommodations. The credible evidence showed that at the high school, Respondent provided Complainant with a bi-furcated room with a separate resting area, and performed painting, cleaning and renovation on each of her two classrooms located at the high school/vocational school. Furthermore, there was credible evidence that Complainant would not permit cleaners to enter her classroom and when she was moved from one classroom to the other in 2001 and that her classroom was extremely dirty. I conclude that Complainant was not subjected to adverse treatment upon her reinstatement to the High School and that Respondent went out of its way to respond to her concerns and provide her with the accommodations she requested. It is apparent from the credible testimony of all Respondent’s witnesses that Complainant was never satisfied with Respondent’s actions on her behalf and continuously upped the ante, causing enormous frustration among the school administrators.

C. Retaliation

In order to establish a prima facie case of retaliation, Complainant must show that she engaged in a protected activity, that Respondent was aware of the protected activity and that Respondent subjected her to an adverse action and that a causal connection existed between the protected activity and the adverse action. Mole v. University of Massachusetts, 58 Mass.App.Ct. 29, 41(2003).

Under M. G. L. c. 151B, s. 4 (4), a plaintiff has engaged in protected activity if "he has opposed any practices forbidden under this chapter or . . . has filed a complaint, testified or assisted in any proceeding under [G. L. c. 151B, s. 5]." While proximity in time is a factor, "...the mere fact that one event followed another is not sufficient to make out a causal link." MacCormack v. Boston Edison Co., 423 Mass. 652, 662 n.11 (1996), citing Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 617 (1996). That Respondent knew of a discrimination claim and thereafter took some adverse action against the complainant does not, by itself, establish causation, however, timing may be a significant factor in establishing causation.

Complainant asserts that Respondent retaliated against her for having filed discrimination complaints in 1994. Complainant claims that Respondent failed to provide her with an assignment following her reinstatement in 1996, failed to provide adequate teaching materials, gave her substandard class rooms because of her handicap, and did not provide her with performance reviews. However, the facts do not support Complainant's allegations of retaliation. While Complainant was initially assigned to the high school in 1996, her placement was through agreement between Complainant, her union representative and Respondent. She was assigned to the high school instead of an

elementary school because she had been fired from an elementary school and at the time the principals of the only handicapped accessible elementary schools felt unable to work with Complainant because of past run-ins with her, unrelated to her handicap.

At the high school, Complainant was provided with a large classroom that Respondent cleaned, renovated and partitioned in order to accommodate Complainant's handicap. As stated above, the credible evidence demonstrates that Complainant was provided with adequate materials, but was ineffective and failed to attract students to her tutoring classes.

While Complainant effectively had no assignment in the academic years subsequent to her reinstatement, until her transfer to the Kennedy/Lincoln school, the evidence does not support the allegation that this was because of retaliatory animus. Rather, the credible evidence shows that Complainant would not, or could not, perform the job assigned to her at the high school. Superintendent Belson forthrightly acknowledged that Complainant remained at the high school, with full pay, notwithstanding her ineffectiveness as a tutor, because Respondent had been engaged in protracted litigation with Complainant both at the Commission and at arbitration and Complainant had prevailed. Respondent's administrators knew full well that taking any action whatsoever, which Complainant might construe as adverse would propel the town into litigation once again. Moreover, as Belson testified, Complainant never complained about having no students, and continued to do work on her own and collect a paycheck. It was not until Belson determined to transfer Complainant to the Kennedy/Lincoln School, a move that displeased her, that Complainant filed her complaint with this Commission alleging retaliation and discrimination.

D. Kennedy/Lincoln School

With respect to Complainant's transfer to the Kennedy/Lincoln School, there was no credible evidence that this transfer was for retaliatory or discriminatory reasons. As Belson stated, an elementary school assignment was consistent with Complainant's certification and administrators needed to have her working. Belson stated that in addition, the Kennedy/Lincoln School was handicapped accessible and Principal Kirk Johnson was new to the school and had no past history with Complainant to complicate their relationship. Moreover, I draw the inference, from all of the evidence presented, that an additional reason for the move was that Complainant was causing disruption at the High School/Technical School by entering the Culinary Arts program and by refusing to park in the van accessible spots and because of her ineffectiveness as a tutor of high school students.

With regard to the conditions at the Kennedy/Lincoln School, there was no credible evidence in support of her claims that her facilities were substandard. Respondent provided her with a partitioned classroom that it had fixed up with a resting area and moved all of her materials from the high school. There was no evidence that Complainant's room was isolated as she claimed. She shared a floor with the school cafeteria, an art and music room, and a gymnasium. She was provided with a cellular telephone and also had access to a land line located near her class room. Johnson and Epps testified credibly that they had identified students for Complainant to tutor, had offered the assistance of Epps as a support for Complainant, and arranged to meet with Complainant to prepare for her spot as a tutor; however, Complainant never returned to the school after one meeting.

Complainant asserts that the decision to terminate her in this context must have been motivated by discriminatory animus. There is no evidence to support this assertion. Rather, the credible evidence supports Respondent's position that Complainant could not, or would not, report to work as required in order to perform her job. Complainant was absent from work for several months, at first claiming various excuses, such as the door would not open, there was no parking space or that the sidewalk was not plowed. Finally, Complainant simply stopped coming to work and provided no information at all for her failure to show up and her failure to respond to Respondent's letters.

E. Reasonable Accommodation

Complainant has alleged that Respondent engaged in unlawful disability discrimination when it wrongfully failed to provide her with the reasonable accommodation of an adequate parking space. Employers are required to provide reasonable accommodations to disabled employees in order to enable them to perform the essential functions of their jobs. G.L. c. 151B, sec. 4(16). See Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap. See also Forrest v. Wal-Mart, 23 MDLR 110, 117 (2001)

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;" (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); See Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap, at s. IX(A)(3). Complainant may then rebut Respondent's evidence by showing that either the reasonable accommodation would not impose an undue hardship. See Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap, s. IX (A) (3).

Complainant has established that she is a handicapped individual within the meaning of M.G.L.c. 151B. Respondent was also clearly aware of her disability and her need for a van accessible parking space. Respondent had provided Complainant with a van accessible parking space for many years. Respondent was obligated to provide Complainant with 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." See Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap, s. II(C); see, Ocean Spray Cranberries, Inc. v. MCAD, 441 Mass. 632, 648 n.19 (2004) "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, supra, 25 MDLR at 217. 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).

1. High School/Vocational School

Complainant acknowledges that Respondent provided her with reasonable parking accommodations from 1996 until January 2002. When first assigned to the High School, Complainant parked diagonally across two handicapped parking spaces, until a blind co-worker and his driver began to use one of the spaces in 1999. Thereafter, Complainant began to park along the sidewalk by the High School pool entrance, where according to her, then director Volpe created a handicapped parking space for her. Complainant parked beside the sidewalk until January 25, 2002, when co-worker Sandra Gianini parked at Complainant's usual parking location along the sidewalk at the pool entrance and would not move. An altercation followed. While the reasons are somewhat murky, subsequently Complainant no longer parked in this location. Belson testified that he had never authorized the parking space by the pool entrance. For the remainder of the school year, Complainant parked in the fire zone in front of the school, without opposition from Respondent and notwithstanding the existence of a handicap space designated for Complainant that was close to the school entrance. While Complainant may have been disappointed to lose her space near the pool, Respondent was not required

to provide her with the space she wanted, but a space that serves the purpose. (“In determining the type of reasonable accommodation required for an applicant or employee, the employer need not provide the best accommodation available, or the accommodation specifically requested by the individual with the handicap. Rather, the employer must provide an accommodation (at its own expense) that is effective for its purpose.” See Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap, II, C (1998). Petrillo v. Boston Water and Sewer Commission, 20 MDLR 150 (1998). The evidence was that Complainant had available to her at all times a van accessible parking space at the high school that she did not use. Thus I conclude that Respondent at all times provided Complainant with a reasonable parking accommodation at the High School/Vocational School.

2. Kennedy/Lincoln School

In November 2002, Complainant was transferred to the Kennedy/Lincoln School. Prior to her transfer, Respondent created two van accessible spaces that exceeded the dimensions required for van accessibility under state and federal law. In addition there were two existing accessible spaces that were not designated van accessible but which also exceeded the requirements of van accessible spaces. Complainant was informed before her transfer to the Kennedy/Lincoln School that there was accessible parking for her. These spaces were also wider than the requirements Complainant requested to the Mayor of Medford. On November 13, 2002, Complainant attempted to demonstrate to Belson and McLeod that she needed more space than was provided in the existing spaces in order to park, exit her van and unload her motorized chair; however, Belson and

McLeod were both unconvinced that she needed more space and understood the space to be adequate. If Complainant parked in the middle of the space, she would not need to have extended herself into an adjacent space. They requested further documentation in writing from Complainant, because, according to Belson's credible explanation, he understood the space was adequate and because Complainant had already provided him with several conflicting space requirements. He did not want to change the space until Complainant committed to a specific requirement in writing, which she refused to do. He wanted to avoid, as he put it, the "shifting sands" of Complainant's request.

Complainant states that her measurements are irrefutable and conclusively prove that the existing spaces are too small. While Complainant correctly argues that compliance with state and federal requirement should not necessarily be conclusive evidence that the parking space is a reasonable accommodation under all circumstances, the credible evidence demonstrates that the spaces were adequate and reasonable in her case and in fact exceeded federal requirements. It was clear that Respondent provided an acceptable handicapped space to Complainant at the Kennedy/Lincoln School. Moreover, Complainant *never tried to park in the van accessible spaces*. Inexplicably, she immediately gave up and began to park on a public street, farther from the school and not under the school's jurisdiction, a resolution that was satisfactory to her until the winter weather set in and getting to the school from the space became difficult. Complainant's difficult situation was solely of her own doing. Thus I conclude that Complainant's failure to attempt to park in the spaces provided and her refusal to provide written requests specifying the exact requirement of her requested accommodation

constituted a failure on her part to engage in the “interactive process,” and to attempt to make the provided accommodation work.

Respondent has established that it provided a reasonable accommodation to Complainant and that Complainant was solely responsible for the breakdown in the interactive process. Therefore, I conclude Respondent did not fail to reasonably accommodate Complainant in violation of M.G.L. c. 151B, s. 4(16).

F. Harassment

Complainant filed her claims of discrimination with the Commission in September 2002 and January 2004. Although she did not articulate a claim of harassment, she alleged certain acts that if proved, arguably could support a claim of hostile work environment. These claims included allegations of teasing by co-workers and students over a period of years from 1998 to February 2002. The last alleged act of harassment was the incident involving Sandra Gianino on February 25, 2002, more than six months prior to the time of the filing of Complainant’s MCAD complaints. During the relevant time period, General Laws Chapter 151B, §.5, required a complainant to file a charge of discrimination with the Commission within six months of the occurrence of the alleged discriminatory acts or events. Lynn Teacher's Union v. Massachusetts Commission Against Discrimination, 406 Mass. 515, 520 (1990). To invoke the continuing violation doctrine to recover for otherwise time-barred violations, Complainant must first show that the harassing acts were "part of an ongoing pattern of discrimination," and "there is a discrete violation within the six-month limitations period to anchor the earlier claims." Cuddyer, 434 Mass. at 531-532. Consequently, Complainant must establish that at least one incident of unlawful conduct occurred,

"which standing alone might not necessarily support [her] claim, but which substantially relates to earlier incidents of abuse, and substantially contributes to the continuation of a hostile work environment, such that the incident anchors all related incidents, thereby making the entirety of the claim for discriminatory conduct timely." Id. at

533. Complainant has failed to do so.

Accordingly, Complainant's failure to file a discrimination charge within six months of the alleged discriminatory act(s) or event(s) operates as a bar to proceeding before the Commission. Since all of the alleged acts of harassment by various employees of Respondent occurred more than six months prior to the filing of the instant complaints, I conclude that such acts are untimely and are not part of a continuing violation.

G. Termination

Complainant did not establish that Respondent discriminated against her based on her handicap or in retaliation for filing claims against Respondent when it discharged her in May 2003.

The uncontroverted evidence shows that Complainant simply failed to report to work for a period of several months, without calling in or providing a reason. While Complainant contends that this is due to her parking situation, as discussed above, I have concluded that Respondent reasonably accommodated Complainant's parking needs and thus she provided no legitimate reason for her failure to report to work.² Therefore, I conclude that Respondent did not unlawfully terminate Complainant's employment on

² The evidence suggests that Complainant is not a qualified handicapped person, in that she was apparently unable to perform the essential functions of her job, even with a reasonable accommodation. However, as Respondents did not raise this threshold issue, I do not address it here.

the basis of her handicap or in retaliation for her having filed MCAD complaints or for having made any complaints related to her protected status.

IV. ORDER

For the reasons stated above, the complaint in this matter is hereby dismissed.

This constitutes the final decision of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal within ten days of receipt of this order and a Petition for Review within 30 days of receipt of this order.

SO ORDERED, this 27th day of November 2007.

JUDITH E. KAPLAN
Hearing Officer