COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MARY MCTERNAN,
Complainant

v. DOCKET NO. 97-BEM-4521

BOSTON PUBLIC SCHOOLS
Respondent

Appearances: Pamela N. Joseph, Esq. for Complainant
Alissa Ocasio, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On November 25, 1997, the Complainant, Mary McTernan filed a complaint with the Commission charging the Respondent, Boston Public Schools, with discrimination on the basis of her age and her handicap in violation of G.L. c. 151B § 4. The Investigating Commissioner found lack of probable cause on both allegations of the Complainant, the Complainant appealed this determination and the matter was remanded for further investigation. The Investigating Commissioner subsequently found probable cause to credit Complainant's charge of handicap discrimination. Attempts to conciliate the matter failed and the case was certified for a public hearing. A public hearing was held before the undersigned hearing officer on February 24, 25, 26 and April 13 and 14, 2004. Following the close of the public hearing, both parties submitted proposed findings of fact and conclusions of law in August of 2004.

II. FINDINGS OF FACT

1. Complainant, Mary McTernan, is a 64 year old woman who lives in Peabody, MA. Complainant, who suffered from polio as a child, was diagnosed with post-polio syndrome in the late 1980's. Complainant retired from the Boston Public Schools on January 31, 2001, after 34 years of service. (Ex.C-3).

2. Respondent, Boston Public Schools, is a department of the City of Boston, a municipal body organized under the laws of the Commonwealth of Massachusetts, whose principal place of business is located at 26 Court Street in Boston, Massachusetts. Respondent is an employer within the meaning of G.L. c. 151B, s. 1.

3. Complainant began teaching in the Boston Public Schools in 1967. She has a B.S. degree in elementary education, a Masters Degree in Guidance and Counseling, and a Ph.D. in Education from Boston College. Her experience includes teaching primary grades, serving as a special education liaison and teaching reading at the secondary level. Complainant has certifications in reading, special education, elementary education, elementary principal and administrative supervisor/director.

4. Dr. Stephen Moskowitz, Complainant's treating physician since 1990, testified on Complainant's behalf. Dr. Moskowitz is Board Certified in Physical Medicine and Rehabilitation (Ex. C-5). He has extensive experience in the diagnosis and treatment of post-polio syndrome and was qualified as an expert in this area. (Ex .C-5). Dr. Moskowitz described post-polio syndrome as causing progressive weakness, decreased muscle endurance, and severe and sometimes disabling fatigue. People suffering from post-polio syndrome must pace themselves and conserve their energies in order to avoid

extreme fatigue, balance problems, and risk of falling. With proper pacing and conservation of energy, many people with post-polio syndrome are able to be functional and productive. Complainant is unable to walk or stand for pro-longed periods of time. She is unable to climb stairs and any pro-longed physical activity or exertion leaves her fatigued. Because Complainant's condition limits her ability to stand and her physical mobility she is required to use a wheelchair in the classroom in order to avoid excessive muscle fatigue.

5. In 1990 Complainant filed an application seeking reasonable accommodations for her disability pursuant to s. 504 of the Federal Rehabilitation Act. These included modifying her work schedule so that she would not work more than 90 minutes without a break, teaching at a school no more than one-half hour driving time from her home, and avoiding extended periods of standing. Her application was supported by a letter from Dr. Moskowitz, who also recommended that Complainant be able to use a motorized wheelchair and that she have a handicapped parking space available. (Ex. C-3).

6. There is no dispute that from 1991 to 1997, Respondent provided Complainant with reasonable accommodations. During the 1996-97 school year, Complainant taught reading at Charlestown High School. The Complainant's position at Charlestown High School provided all of the accommodations she requested. She had a handicapped parking space, a classroom next to the elevator, and a place to secure her wheelchair. She did not teach more than two classes without a break, and her commuting time was 25-30 minutes.

7. In June of 1997, Complainant's position at Charlestown High School was eliminated and Complainant was "excessed." Complainant had sufficient seniority entitling her to

be assigned to another position within Respondent's system. Respondent's Office of Equity recommended that she be granted a preference in the pool of returning teachers for the 1997-98 school year as a "504" accommodation to her disability (referring to Section 504 of the Federal Rehabilitation Act of 1973.) (Ex. C-8) Respondent's Office of Equity is responsible for, among other things, securing reasonable accommodations for handicapped individuals employed by Respondent and ensuring that those accommodations are in place. Barbara Fields is Respondent's Senior Equity Officer.

8. The "504" accommodation granted Complainant a preference to select any available position at an assignment pool for the following school year in one of her specialty areas. This right was testified to by Carol Pacheco the union representative and Beverly Pina of Respondent's Human Resources Department.

9. On June 5, 1997, Complainant wrote to Barbara Fields, Respondent's Senior Equity Officer, to address the accommodations that had been in place for her at the Charlestown High School since 1990 and to indicate she would need said accommodations in any subsequent position. Complainant requested comparable accommodations in a new assignment, or alternatively, that she be allowed to remain at Charlestown High School. (Ex C-7). On June 18, 1997, Complainant wrote to Barbara Fields again expressing concern about the lack of information on accessibility and the lack of time to review the information before the assignment pool. She asked to be considered for a position at Charlestown High School or for other non-teaching positions for which she was qualified and certified. (Ex. C-9). Complainant received no response to either of those letters.

10. On June 23, 1997, the last day of school, Complainant received a hand-delivered written notice that she was "excessed" and a list of vacancies in the reading re-

assignment pool, which was to be held the following day. That same day Complainant called all of the schools on the list of reading vacancies and did not find any that were handicap accessible. She also called Maria Irizarry in the Office of Equity who told Complainant it was Complainant's responsibility to acquire information about which schools were accessible in order to make her selection at the re-assignment pool.

11. On June 24, 1997, Complainant participated in a re-assignment pool. Complainant was granted a "504" selection preference because of her disability, but according to Complainant there were no accessible positions available in the reading pool. Carol Pacheco, Complainant's union representative was present at the re-assignment pool and suggested to Complainant that she participate in the elementary school pool, since she was also certified in elementary education.

12. The re-assignment pool was run by Beverly Pina, the Assistant Director for staffing in Respondent's Human Resources Department. No one from the Office of Equity was present. Both Ms. Pina and Ms. Pacheco, the union representative advised Complainant that her best choice was the Warren Prescott School in Charlestown. Ms. Pacheco had taught at the school and knew that it was handicap accessible. Complainant was also familiar with the school from her previous position as Special Education Liaison and believed the school to be suitable for her needs.

13. Acting on the advice of Pina and Pacheco, Complainant selected the Warren Prescott School. Pursuant to Respondent's policy and procedures for granting a 504 preference, Complainant should have been guaranteed the position at the Warren Prescott School.

14. On June 25, 1997, Complainant called and scheduled a meeting wit the Principal of the Warren Prescott School, Dr. Dominic Amara, for the same day. When she met with

him, he told her he would be interviewing other candidates for the position and asked her to return the following day. Complainant, who understood her choice of the Warren Prescott position to be guaranteed by reason of her "504" preference, was stunned by Dr. Amara's response. Complainant called Beverly Pina and Maria Irizarry to inform them of the situation and Irizarry returned her call to say that she had contacted Beverly Pina and Freda Johnson in Respondent's H.R. department to discuss the situation.

15. Complainant returned to the Warren Prescott School the next day to meet with Dr. Amara. He informed her that the position could not be filled by a person using a wheelchair because the classroom was located on the second floor, the building had no elevator, and the job involved escorting the students to and from classes, lunch and recess. Dr. Amara said that even if the classroom was on the first floor, the job could not be done by someone in a wheelchair because the escorting duties had to be done by a teacher and not by a paraprofessional. He asked Complainant to meet with him again the following day.

16. Complainant again met with Dr. Amara on June 27, at which time he told her explicitly that her assignment to the position would not work, and that everyone, including parents and other teachers would be unhappy. He told her that he would call the Cluster Leader to change her assignment, and told Complainant to call him back that afternoon to find out the resolution of the matter. Complainant called Dr. Amara periodically for several days thereafter but never got any response from him as to what would be done about the situation.

17. Complainant believed it was feasible for her to be accommodated at the Warren Prescott School by moving her classroom to the first floor. She also believed that she

could have been relieved of any duties to physically escort students up and down the stairs as a reasonable accommodation to her handicap.

18. After her meetings with Dr. Amara, Complainant called Carol Pacheco and told her that Dr. Amara had tried to dissuade her from taking the position at the Warren Prescott and went so far as to tell Complainant he would call the Cluster Office to get her assignment changed. Ms. Pacheco investigated the situation by calling the Union's building representative, Anna Simmons. Ms. Simmons reported to Ms. Pacheco that Dr. Amara had a provisional teacher that he wanted to keep in the job, and Simmons assumed that was why Dr. Amara was trying to dissuade Complainant from claiming the position. Ms. Pacheco also spoke to Beverly Pina about Complainant's situation and Ms. Pina told Ms. Pacheco that she was aware that Amara wanted to keep the provisional teacher in the job. I find that despite the existence of policies to assist and accommodate disabled teachers, in this case, Respondent allowed an individual school principal to ignore or overrule the policy and to institute his own preference.

19. According to Respondent, as of the 1997-98 school year, the Warren Prescott School was not rated as a handicapped accessible building and did not have an elevator. Dr. Amara testified that all the third grade classes were grouped in a cluster so that classes could share materials, teachers could plan together and support one another and the students could work together as a group. He testified that he could not move the third grade class from the second floor without breaking up the cluster and he believed that to do so would be "detrimental" to the entire grade cluster and would not be a sound educational decision.

20. Carol Pacheco testified that based on her experience teaching at the Warren Prescott School from 1970-78, she believed that it was feasible to accommodate Complainant there. She stated that Complainant's classroom could have been moved to the first floor, which is fully accessible. She also stated that all of the classes of the same grade did not have to be on the same floor and stated that when she taught at the school, there were two third grade classes on the second floor and one on the first floor. Pacheco also testified that no one at Respondent ever informed her that Complainant could not be accommodated at the Warren Prescott School, nor was she given any reasons why this was not feasible. She was told only that the Prinicpal of that school wanted to hire a young provisional teacher. Although the Respondent's Office of Equity had the authority to enforce Complainant's 504 preference, there was no evidence that Respondent took any steps whosoever to enforce the 504 preference. In Pacheco's discussions about the situation with Beverly Pina, Pina never indicated that she would speak to the Principal of the Warren Prescott or advise him that he had to accommodate Complainant. Pacheco testified that the Office of Equity had authority to enforce Complainant's 504 preference but they did nothing. The Union grieved Respondent's failure to grant Complainant her preference. I credit Pacheco's testimony in its entirety.

21. Dr. Amara testified that no one in Respondent's administration informed him that he was required to reasonably accommodate Complainant's handicap. He stated that had he been told this, he would have done so. He testified that while it was his preference to keep classes of the same grade together, he admitted that the classroom could have been moved to the first floor. He also testified that it would have been possible for him to relieve Complainant of her duties to escort students if he had been told by Respondent's

administration to make this accommodation. According to Amara, it was Complainant who decided against the Warren Prescott School after she learned that the building did not have an elevator. I do not credit this assertion. However, I do believe Complainant told Amara she was also looking into other schools. Amara's assertions are refuted by the fact that Complainant filed a union grievance over the failure of Respondent to grant her 504 preference at the Warren Prescott. Moreover there is evidence to suggest Amara wanted to fill this position with a provisional teacher and he in fact did so. I find that the accommodations Complainant would have required at the Warren Prescott School were not unreasonable.

22. From June 30 until mid-August of 1997 Complainant frequently called the Respondent's Human Resources Department, the Office of Equity and Carol Pacheco attempting to resolve the issue of securing an assignment that met her needs. At one point Irrizarry and Pachecho told Complainant the Quincy School was still available and she expressed an interest in this assignment as a second choice. She was subsequently told by Irizarry that the Quincy School was no longer available but was given no explanation for why she could not select this assignment. Irizarry told Complainant she would send her a list of accessible schools, but Complainant never received any such list and she testified that Irizarry was very difficult to reach by telephone. On July 19, 1997, Complainant contacted Beverly Pina who gave her the names of four schools that still had available positions. Pina also informed her that at least one of those schools was not accessible. Pina encouraged Complainant to make a selection "soon" but she did not tell Complainant there was any deadline. Complainant had concerns about the location and accessibility of these schools in terms of the commuting distance from her home in

Lynnfield, and discussed this with Pacheco. Pacheco told Complainant that she should not be pressured into accepting one of these schools and that other options could be investigated, including the Quincy School.

23. The teacher's Union advised Complainant to attend a "comeback" pool on August 4, 1997. At that pool, Complainant was unable to find a position that met her need for accommodation. However, she spoke to Freda Johnson of Human Resources who was in charge of secondary and middle school assignments. Johnson asked Complainant if she would accept a position as a building substitute for Charlestown High School. Complainant enthusiastically agreed and Johnson suggested that Complainant update her English certification, which she did. Complainant testified that Johnson advised her that she would investigate the possibility of assignments as a building substitute or English teacher at Charlestown High. Complainant never heard back from anyone at Respondent about this option.

24. According to Complainant and Pacheco, Complainant was given no deadline for selecting a position for the 1997-98 school year. Respondent rejects this assertion and in a letter addressed to Complainant several months later on October 21, 1997, Maria Irizarry stated to Complainant that she had been given a number of available positions to choose from at schools that were handicapped accessible and had refused to choose an assignment. The letter went on to state that, as a result, Complainant was assigned to a school that in Respondent's view met her needs. (C-14). Irizarry did not testify at the public hearing in this matter and Pina testified that she did not recall any conversations with Complainant, Pacheco or Amara after the assignment pool. Pina testified that Irizarry told her that Complainant's selection at the pool did not work out and that they

were researching other options. Pina did not know why Complainant did not get the assignment at the Warren Prescott School which she had chosen at the assignment pool. She was also not aware of any other circumstances in which an applicant with a 504 preference did not receive a selected assignment. Pina recalled that Irrizarry requested a list of available assignment options for Complainant and she passed that along to Complainant. Pina testified that she held these positions open waiting to hear from Irizarry that Complainant had made a selection. She had no memory that Complainant was given a deadline for selecting a position and she did not recall who assigned Complainant to the Blackstone School.

25. On August 15, 1997, Complainant was assigned to the Blackstone Elementary School. The assignment at the Blackstone School was to teach 5th grade and the classroom was located on the first floor of the building. Complainant was upset to receive this notice because she had not been told that the four schools on the list provided to her were her only options and she believed Respondent was exploring other assignments. She was also concerned about the commute to the Blackstone. Complainant consulted with Carol Pacheco who advised her to report to the assignment.

26. Complainant contacted the principal of the Blackstone School, Millie Ruiz-Allen, who was newly assigned to the school. At the time of this initial conversation, Ruiz-Allen was not aware that Complainant had been assigned to the Blackstone. Complainant advised Ruiz-Allen that she utilized a wheelchair and that she would need a secure place to store the chair. Complainant also visited the school prior to the date teachers were required to report to meet the principal and prepare her classroom. During that visit Ruiz-Allen showed Complainant her classroom, which was near the elevator, and told

Complainant she could store her wheelchair in the principal's office. Ms. Ruiz-Allen also indicated there was a handicap parking space right outside the school that she would make available to Complainant. Complainant was advised that she would have to be in the school yard in the morning to meet and escort students but was not informed she would have any other escorting duties.

27. Prior to the start of the school year, Barbara Fields, Senior Equity Officer from Respondent's Office of Equity also visited the Blackstone School on at least two occasions to ensure that reasonable accommodations were in place for the Complainant. Ms. Fields confirmed that the school was handicapped and wheelchair accessible, that there was a handicapped parking space designated for the Complainant "very close" to the school, that Complainant's classroom was located close to the elevator, and that there was a place to secure her wheelchair. Fields testified that Ruiz-Allen took her on a tour of the school to view these accommodations and Fields determined that Complainant's need for accommodations were adequately addressed because she was in a wheelchair accessible building, and had a parking space close to the school.

28. Fields also testified that she discussed with Ruiz-Allen how Complainant would escort her students from one place to another. Complainant's union representative had requested that a paraprofessional/aide be assigned to assist the Complainant. Ms. Fields made a determination that this was an unreasonable request on the grounds that such an accommodation was never recommended by Complainant's physician and there were other ways to address the Complainant's duty to transport her students. Ruiz-Allen testified that other than wheelchair accessibility, a place to store her wheelchair, a parking space and a classroom next to the elevator, Complainant made no request for

additional accommodations during their meeting. Nonetheless, she anticipated that she would be able provide Complainant with some assistance as needed with volunteers. She also stated that the paraprofessional assigned to the classroom next to Complainant could assist her in transporting the students as needed. Ruiz-Allen also testified that she was not informed that Complainant would need to have rest breaks in her schedule. I credit Ruiz-Allen's testimony that she may not have been fully informed of the full panoply of accommodations Complainant required.

29. Complainant had a number of concerns about accessibility issues at the Blackstone. She testified that she was concerned that the passageways were too narrow and the elevator too small to accommodate both a teacher in a wheelchair and a class of twenty students. She was also concerned that the commute to the Blackstone School was 30-35 minutes longer during rush hour than her previous commute to Charlestown High School. She did not discuss these concerns with Ruiz-Allen. By the time Complainant arrived at the Blackstone on the first day of school, she was already fatigued. The handicapped parking space that had been shown to her by the principal was taken by another car and Complainant had to find parking on the street and walk to the school, which increased her fatigue. She informed Ruiz-Allen the parking space was not available on her first day.

30. On the first day of classes, Complainant was told by a Cluster Leader assigned to supervise teachers, that she was expected to escort students to lunch, recess, restrooms and dismissal. Complainant testified that while meeting the students in the morning was not a problem, escorting them throughout the day would be very difficult for her. Complainant stated she was assigned to a 5th grade class of very active boys and that the boy's bathroom was not accessible by wheelchair because it was located on a landing.

Therefore, she was unable to supervise the boys when they were going to and from the bathroom. She stated that other escorting duties were difficult because of the narrow passageways. Complainant found that with these additional duties she was unable to take a break every 90 minutes and therefore could not rest and pace herself as advised by her doctor. She was exhausted by the end of the first day of school and spoke to the principal about the unavailability of the handicapped parking space. Ruiz-Allen promised she would take care of this.

31. Complainant informed the Cluster Leader that she needed assistance with escorting the students. She did not address this issue with Ruiz-Allen because she understood that the protocol was that the Cluster Leader would discuss the issue with the principal, and Complainant believed Ruiz-Allen was aware of the problem. The Cluster Leader told Complainant she had no one available to assist her with escorting the students. Ruiz-Allen testified that teachers who wanted to discuss or make changes in their duties and responsibilities were to come directly to her and she had advised Complainant to come to her with any concerns she might have regarding accommodations so they could talk it over and work it out. Ruiz-Allen talked with Complainant both days that she was at the Blackstone to ask how things were going. She testified that Complainant did not voice any concerns regarding her duties, including escorting the students and Complainant did not ask to be relieved of these duties. Complainant did not raise any concern when Ruiz-Allen arranged for the lunch monitors to meet students at the top of the steps while Complainant took the elevator. Nor did she complain when Ruiz-Allen arranged for the paraprofessional assigned to the class next door to escort Complainant's students.

32. When Complainant arrived at the school the next morning, the handicapped parking space was again unavailable and Complainant had to walk one to two blocks to get to the school. Complainant's end of the day assignment for escorting students was changed from the cafeteria to the ramp outside the office and at the end of the day a special education teacher came to help Complainant escort her students, but by then the students has already left. By the end of the second day of classes, Complainant was more exhausted than the first day and her legs ached and were so fatigued that she had difficulty getting back to her car with out falling.

33. Complainant called her physician, Dr. Moskowitz, in tears when she arrived home after the second day of teaching. Dr. Moskowitz told her that she should not return to work until she received the necessary accommodations as she would be jeopardizing her health if she continued working under the current conditions. The next day, Complainant notified her union that she had not been provided with the necessary accommodations at that Blackstone School. She did not contact Ruiz-Allen nor did she request a meeting with her to discuss these issues.

34. Complainant called in sick each day for several days thereafter, hoping that a resolution could be reached and she could return to teaching. When she heard nothing from Ruiz-Allen or any representative of Respondent, she requested that Dr. Moskowitz provide her with a letter documenting her inability to return to work under the conditions at the Blackstone School. Dr. Moskowitz wrote a letter dated September 12, 1997, stating that because the Blackstone assignment caused Complainant to suffer physical and emotional stress, he advised her not to return to work unless the previously afforded

accommodations were provided to her. Copies of this letter were sent to Beverly Pina in Human Resources and Maria Irizarry in the office of equity.

35. Subsequent to this letter being sent, Complainant was not contacted by anyone from Respondent's Office of Human Resources or Office of Equity. Indeed, no one from Respondent ever contacted Complainant or Dr. Moskowitz to discuss the required accommodations or how best to facilitate her return to work at the Blackstone School.

36. In response to Dr. Moskowitz's letter of September 12, 1997, Complainant received a letter from Maria Irizarry dated October 21, 1997. (Ex. C-14). In this letter Ms. Irizarry asserted that she had contacted the principal of the Blackstone School and had been assured that all of Complainant's requests for accommodations were met. The letter also referenced the fact that Barbara Fields had visited the Blackstone to ensure that provisions had been made to accommodate Complainant.

37. Complainant contacted her union representative, Carol Pacheco, shortly after going out sick from the Blackstone School. She told Pacheco that the handicapped parking had not been available and that she had been required to escort students around the building. Complainant filed a union grievance over this issue. Sometime in the first week of September, Pacheco visited the Blackstone School to investigate the situation. She had a conversation with Ruiz-Allen about the possibility of Complainant having a paraprofessional assigned to assist her in escorting the students. Ruiz-Allen told Pacheco that it was not possible to assign an additional paraprofessional to Complainant because of staffing limitations. She also told Pacheco that Complainant was responsible for getting students from one floor to another even if she had to take the elevator and leave the students unattended. Both Complainant and Pacheco testified that they did not believe

it was appropriate to leave fifth grade students unattended. Fields testified that she determined that Complainant should be relieved of the duty of escorting students as an accommodation to her condition, and claims that she relayed this to Ruiz-Allen. I credit this testimony. Fields also testified that she did not consider Complainant's request to have breaks at least every 90 minutes to be a reasonable accommodation in an elementary school. While this may be so, had Complainant been relieved of the duty to escort students at various times throughout the day, she would have been able to take the needed breaks.

38. Ruiz-Allen testified that all teachers at the Blackstone School, including Complainant were responsible for escorting students from place to place within the building. She claimed to be unaware that Complainant would have difficulty performing these duties and stated Complainant did not ask her for help. This testimony is contradicted by her testimony that there were volunteers available to assist Complainant and that the teacher next door was willing to share her Special Education paraprofessional. Ruiz-Allen also denied that Complainant told her the handicapped parking space was not available. I do believe that Complainant raised the issue of the parking space with Ruiz-Allen on the first day of class, and Ruiz-Allen may have not remembered this. Ruiz-Allen testified that the first days of school were very hectic and she was a new Principal at the Blackstone. However, in the weeks after Complainant left the Blackstone School, Ruiz-Allen never contacted Complainant or her physician to discuss the accommodation issues raised by Complainant and her physician.

39. Respondent made no effort to assign Complainant to any other position after she went out sick from the Blackstone School, either through the regular administrative

process or through a settlement of Complainant's grievance, because it contended that Respondent had met its obligations to accommodate Complainant at the Blackstone School. As a result, Complainant remained out on sick leave for the remainder of the school year.

40. The Collective Bargaining Agreement governing Complainant's employment at the time stated: "Vacancies will continue to be filled until late August, at which time teachers who are not matched against vacancies will be assigned in a suitable professional capacity, including substitute service, and will remain eligible to fill vacancies as they occur up to November 1." [Ex. C-16, p. 86, Par. J (6).] Complainant maintains that she could have been assigned as a building substitute at Charlestown High School, where she had previously been accommodated. She also asserts that Respondent could have assigned her to an administrative position. Pacheco concurred that Complainant could have been assigned to Charlestown High as the building substitute for the 1997-98 school year and that furthermore, it was Respondent's practice at the time to assign teachers to administrative positions if they had not been placed in the regular assignment process.

41. Ms. Fields acknowledged Respondent's duty to engage in an ongoing dialogue with a disabled employee to fashion a reasonable accommodation. However, she was personally unaware of what, if anything, Respondent had done to engage in such a dialogue because the responsibility for assigning Complainant to a suitable position was primarily that of Field's assistant, Maria Irizarry, who was not called to testify at the hearing. It was Ms. Irizarry's job to work with Human Resources to determine what positions were available and which were accessible, and to provide this information to

teachers. Ms. Irizarry continued to be employed by Respondent as a teacher at the time of the hearing in this matter and there was no representation that she was unavailable to testify.

42. Ms. Fields had no knowledge of why Complainant was not ultimately assigned to the Warren Prescott School which was her first choice. She did not know whether a principal had discretion to reject a teacher with a 504 preference. She had no knowledge of what, if any, investigation had been undertaken by the Office of Equity after receiving the letter from Complainant's doctor about the failure to provide the necessary accommodations at the Blackstone School. She testified that the procedure would have been for Ms. Irizarry to make a field visit to the school to determine whether the accommodations were adequate. There is no evidence to suggest what if anything was done by Ms. Irizarry. Ms. Fields had no knowledge of the circumstances of Complainant's assignment to the Blackstone School and testified she believed Complainant had selected that assignment.

43. Complainant's grievance over the forced use of sick time was resolved by settlement in May of 1998 when the grievance was scheduled for arbitration. Complainant had used 180 days of sick leave during the 1997-1998 school year. (Ex. C-12). As part of the settlement, Respondent agreed to restore 135 days of sick leave to Complainant. The settlement also provided that Respondent would give Complainant a suitable assignment for the following year. For the 1998-1999 school year, Complainant was assigned to a Special Education position at Charlestown High School, which she held until her retirement on January 31, 2001.

44. Forty-five days of sick leave were not restored to Complainant pursuant to the settlement of her grievance. Had Respondent restored the 45 days to her, Complainant

would have been entitled to be compensated for those days upon her retirement in 2001. At the time of her retirement, Complainant was compensated in the amount of $4,602.51 for 31 unused sick days. The rate of compensation was $148.468 per unused sick day based on 40% of her last per diem pay rate of $371.17. If Respondent had restored to Complainant the 45 sick days, Complainant would have been entitled to an additional $6,681.06 at the time of her retirement.

45. Complainant testified and I find that she suffered severe emotional distress as a result of Respondent's numerous failures to assist her in accommodating her disability thereby forcing her to take a year off from teaching. Dr. Moskowitz testified that Complainant was normally quite stoic and a "can do" person, like many people who have post-polio syndrome, and that it was very much out of character for her to call him up in tears after her last day at the Blackstone School. Complainant's good friend Florence McManus also testified that Complainant called her when she left the Blackstone and was extremely upset. After her few days of teaching at the Blackstone under adverse conditions, Complainant was so exhausted she could not even maintain her home. Her exhaustion also made it difficult for her to care for her adult daughter who has a seizure disorder and cannot feed herself.

46. Complainant is a highly motivated person who derives a great deal of satisfaction from her work and that she viewed teaching as a vocation and not just a job. Prior to 1997, the longest Complainant had ever been out of work was one month for surgery in the late 1980's. As the school year progressed and it became clear Respondent had no intention of addressing or re-visiting the effectiveness or sufficiency of accommodations at the Blackstone School and no intention of offering Complainant an alternative

assignment, she became more upset and depressed. Complainant testified she felt humiliated, useless, and depressed at being deprived of the opportunity to teach and make a contribution. She felt forced out of her job for no legitimate reason after devoting more than thirty years of service to the Boston Public Schools. Her distress was manifested in difficulty sleeping and waking up early in the morning with severe anxiety. Complainant testified she felt anxious and distraught for many weeks as was demonstrated by the fact that she continuously called the Union, to the point where she was told stop calling because the Union did not hold out much hope for an assignment in the near future. Complainant was unable to distract herself or enjoy life during this stressful time. She declined her friend, Florence's frequent invitations to travel because she could not relax and was concerned that she might miss a phone call about a potential assignment.

47. Complainant felt it particularly frustrating and upsetting for her to be denied a suitable assignment because she knew from her own experience in administration and many years in the system, that there are always many jobs that become available during the school year, and she knew there were hundreds of jobs she was qualified for and could have performed. It was therefore, a source of great frustration and humiliation not to be allowed to work, as she viewed it, because of her handicap. She was very anxious for the entire year about being forced to use her sick time because she feared she would be forced into retirement.

III. CONCLUSIONS OF LAW

General Laws c.151B s. 4(16) prohibits an employer from discriminating against a qualified handicapped individual who is capable of performing the essential functions of a position with reasonable accommodations, unless the employer can demonstrate that the accommodations required would impose an undue hardship on the employer's business. In this case Complainant alleges that Respondents failed to accommodate her handicap both in refusing to honor her initial choice of placement and in failing to provide the needed accommodations at the Blackstone School. She further alleges the failure to accommodate her disability constituted handicap discrimination within the meaning of G.L. c. 151B § 4(16).

In order to establish a prima facie case of handicap discrimination in violation of G.L. c. 151B s. 4(16) Complainant must demonstrate that (1) she is handicapped within the meaning of the statute; (2) she is a "qualified handicapped person" who can perform the essential functions of the job with reasonable accommodations; (3) her employer was aware of the handicap and the need for an accommodation; (4) her employer was aware of or through a reasonable investigation could have become aware of a means to reasonably accommodate the handicap; and (5) her employer failed to provide the Complainant with reasonable accommodation. *See, Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap,* at 2-5 (1998). If the Complainant has satisfied each of these elements, the burden shifts to the employer to prove that the reasonable accommodation sought would prove an undue hardship on the employer's business. Yates v. Mass-C.E.O.P.S., 17 MDLR 1503, 1514

(1995). The Complainant may rebut this proposition by showing that the reasonable accommodation would not impose an undue hardship.

It is undisputed that Complainant is a handicapped individual within the meaning of the statute. Having contracted polio as a child she now suffers from post-polio syndrome a condition that progressively weakens her muscles and causes decreased muscle endurance and often debilitating fatigue. She is significantly limited in stamina and mobility which causes her to be substantially impaired in the major life activities of standing, walking and climbing stairs. Complainant is unable to walk long distances or stand for long periods of time without experiencing great fatigue and exhaustion. She cannot climb stairs. Any pro-longed physical activity or exertion, including just walking a few blocks, leaves her weak and fatigued, and she frequently uses a wheelchair in the classroom.

It is also undisputed that Complainant is a "qualified handicapped person" who was capable of performing the essential functions of her teaching job with reasonable accommodations. The "essential functions" of a job are those functions which must be performed by the employee to accomplish the principal objectives of the job. MCAD Guidelines: Employment Discrimination on the Basis of Handicap-Chapter 151B [hereinafter "MCAD Guidelines"] Sec. II B. (1998); <u>Dahill v. Police Department of Boston</u>, 34 Mass. 233 (2001) (MCAD Guidelines entitled to substantial deference even though they do not carry the force of law). Since 1990, Respondent had identified Complainant as a qualified handicapped person pursuant to section 504 of the Federal Rehabilitation Act and had afforded her accommodations that enabled her to function in a number of positions in the Boston Public Schools. In the Spring of 1997, when

Complainant was excessed from her position as a reading teacher at Charlestown High School, she was successfully performing her job with the accommodations of a motorized wheel chair, a handicapped parking space, a commute of less than thirty minutes, and a work schedule which allowed her to avoid extended periods of sitting or standing and enabled her to teach for no more than 90 minutes at a time without a break. Respondent's obligation to provide Complainant with accommodations to her handicap did not end when her position at Charlestown High School was eliminated. Such obligation is ongoing and extended to assisting her in securing a new position and ensuring the necessary accommodations would be in place in any such position.

The duty to accommodate requires an ongoing dialogue between employers and employees to determine the nature, scope and feasibility of accommodations. Russell v. Cooly Dickenson Hospital, Inc. 437 Mass. 443, 457 (2002); Ocean Spray Cranberries, Inc. v. MCAD, 441 Mass. 632, 649 (2004). In addition, by contract with the Boston Teachers Union there was a process in place for reassignment of teachers who had been "excessed." Respondent acknowledged its continuing duty by granting Complainant a "504" preference to select any available position of her choice for which she was qualified.

In practice, the "504" preference was not a meaningful accommodation for Complainant, because Respondent fell short of its obligation to communicate with her and to identify schools that were handicapped accessible or positions that could accommodate her needs, leaving Complainant to do the research and leg work on this issue. Complainant alerted Respondent to her concerns about short notice and lack of information about accessible schools in her letters of June 5 and June 18, 1997, to which

she received no response. (Ex. C-, C-9). Notice of less than twenty-four hours was given to Complainant regarding available positions to be bid on at the June 24th reassignment pool with no information about which of these positions were at handicapped accessible schools. Respondent refused to engage Complainant in dialogue or provide fundamental information about feasibility of accommodations and accessible positions and did not respond to her inquiries and letters. Armed with little to no reliable information about appropriate placements, Complainant reasonably relied on the recommendations of H.R. Representative, Beverly Pina and her union representative, Carol Pacheco, in selecting the Warren Prescott School. Even after Complainant selected the Warren Prescott position, Respondent neglected to notify the principal of her selection and the fact that she would require certain accommodations.

The "504 preference" was not effective as an accommodation because of Respondent's failure to enforce the preference. Respondent's contention that Complainant decided that the Warren Prescott position was not suitable is not credible, given that the principal did his utmost to dissuade Complainant from taking the position, telling her the school had no elevator, that her classroom would be on the second floor and that he was interviewing other candidates for the position. Notwithstanding his discouraging comments, Complainant met with the principal of the Warren Prescott School three times in pursuit of this position and each time he expressed his view that the school could not accommodate her and that she would not work out in the position. No one in Respondent's administration took action to enforce Complainant's "504" preference, nor was she assured the assignment was hers, despite the fact that the preference guaranteed her choice of assignment. When, at Complainant's urging, the

Union representative, Pacheco, made inquiry about the Warren Prescott placement she was told by the Union's building representative at the school that the principal wanted to offer the job to a provisional teacher who was already teaching at the school. The credible evidence suggests that Complainant could have been accommodated at the Warren Prescott School, had the principal welcomed her and had Respondent enforced the preference. The evidence also suggests that despite having adopted policies to accommodate disabled teachers, Respondent failed to enforce those policies allowing a school principal to act in flagrant disregard of the "504" preference.

Respondent's position that all the classrooms for one grade be on the same floor and suggestion that changing this to accommodate Complainant would be an undue burden is not credible, particularly given Pacheco's testimony that this rule had not existed in the past. I conclude that Complainant could have been accommodated at the Warren Prescott School by placing her classroom on the first floor and by relieving her of the duty to escort students to the second floor, or providing her with assistance in escorting students. Had the Principal been instructed by Respondent to make the necessary accommodations, he would have done so. I also conclude that the Office of Equity had authority to enforce Complainant's "504 preference" and could have done so, by ordering the Principal of the Warren Prescott to make the necessary accommodations. The Office of Equity took no measures to enforce its mandate in this regard.

After June of 1997 and throughout the course of the summer Respondent failed to enter into any meaningful dialogue with Complainant to identify any alternate position in which she could be accommodated despite Complainant's numerous phone calls to Respondent's Human Resources Department and Office of Equity. She received little

satisfactory response to her inquires prior to receiving a notice on August 14, 1997 that she was assigned to the Blackstone School, a school she had not chosen. It is apparent that any lack of communication between the parties was not for want of trying on Complainant's part. Beverly Pina did finally provide Complainant with a list of four available positions when Complainant called her on July 19, 1997 but one of those was not handicap accessible.

Ultimately, when Complainant received an assignment to the Blackstone School in mid-August of 1997, she reluctantly accepted the position and immediately made preparations to go there believing that no alternative assignment would be offered to her at that point. She was utterly frustrated by the Respondent's lack of meaningful co-operation and responsiveness in securing her a suitable placement and resigned herself to teaching at the Blackstone School despite some serious concerns.

Finally, when the reasonable accommodations Complainant was assured would be provided to her at the Blackstone School did not materialize she was left with no option but to leave the school. Respondent's subsequent failure to address the issue with her required her to remain on a long term medical leave of absence for the entire academic year. I conclude that a number of accommodations Respondent knew Complainant needed were not provided to her at the Blackstone School. Ruiz-Allen testified that she received a phone call notifying her of Complainant's placement at the Blackstone School and informing her that all Complainant needed was a place to store her wheelchair and a handicapped parking space. It is not clear that Complainant's need to be relieved of escorting students and to have breaks in her schedule at least every ninety minutes was communicated to the Principal, Ruiz-Allen, by Fields or Complainant in those first few

hectic days prior to the start of the academic year. Since Ruiz-Allen seemed sincere in her belief that Complainant was accommodated in all respects, there was clearly insufficient dialogue regarding the scope of Complainant's disability and her needs. I cannot conclude that all the blame for failure to accommodate Complainant's needs lies with Ruiz-Allen since Complainant left school at the end of the second day of classes and never contacted her again and never returned to the school. I do, however, conclude that had the issue of escorting students been addressed head on, the issue could have been resolved without placing any undue burden on Respondent. There was conflicting evidence from Ruiz-Allen about whether volunteers or para-professionals could have been made available to Complainant to assist with this duty but there is no evidence to suggest this accommodation could not have been worked out. Moreover, I am not convinced that this was an essential function of the job or that it would have been an undue hardship for Respondent to relieve Complainant of this duty. Undue hardship must be considered in light of the (1) 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. G.L. c. 151B, § 4 (16). Respondent introduced no evidence with respect to issues one and three. While there was some testimony about the lack of available resources to escort students, I conclude that Respondent failed to meet its burden of demonstrating that this accommodation would have been unduly burdensome. Likewise, the feasibility of modifying Complainant's schedule to assure that she was given the opportunity to take breaks from teaching was not addressed with her and there is little evidence to suggest

that this request was unreasonable. Had Complainant been relieved of the duty to escort students at various times throughout the day, she could have taken breaks during these periods. Modification of work schedule may be considered a reasonable accommodation depending on the circumstances. MDAC Guidelines, pp. 6, 24. Given that this accommodation had been in place for Complainant since 1990, I conclude that had the parties actually addressed this issue, a satisfactory accommodation could have been reached.

There is no dispute that Complainant was promised a handicapped parking space just outside the school but she alleges that on the first two mornings that she arrived for classes, the designated spot was occupied. This required Complainant to walk a much longer distance from her car to the school than she had anticipated and left her exhausted even before the start of the school day. After her first day, Complainant brought this to the attention of Ruiz-Allen, but despite her complaint, the space was once again occupied the next morning. In this instance Respondent clearly failed to provide and ensure the availability of a reasonable accommodation.

Once Complainant left the Blackstone School and contacted the Administration about the deficiencies in her accommodations, there was no communication from Respondent and no attempts by the Office of Equity or the Human Resources Department to address or resolve any of the outstanding issues surrounding the failure to accommodate Complainant. Ruiz-Allen did not contact Complainant to discuss if or how they could address her issues at the school. Fields testified that pursuant to Office of Equity procedures, Irizarry would have done a field investigation in response to Complainant's concerns, but there is no evidence in the record to suggest that this ever

occurred. Hearing nothing from Respondent, Complainant was justified in concluding no further efforts would be made to accommodate her needs should she return to the Blackstone. Complainant filed grievances over the failure to accommodate her disability and Respondent made no attempt to address or resolve those grievances until the matter was scheduled for arbitration. Thus, Complainant had no alternative but to remain out on medical leave, although she would not have chosen this option and was extremely frustrated by it. She testified quite compellingly that she loved her work, considered it a vocation and wanted to be teaching. She, in fact, returned to teaching the following academic year at Charlestown High with her previous accomodations.

Given all of the above, I conclude that Respondent violated G.L. c. 151B by failing to provide reasonable accommodation to Complainant in the position she was assigned, failing to engage her in a dialogue about her need for accommodations, failing to enforce the "504" preference granted to Complainant by virtue of her disability and finally failing to identify and consider alternative positions that would provide such accommodations.

IV. REMEDIES

Upon a finding of discrimination, the Commission is authorized to award remedies to make the Complainant whole and to ensure compliance with the anti-discrimination statute by fashioning relief that accomplishes the statute's broad purposes. G.L. c. 151B § 5; Stonehill College v. MCAD, 441 Mass. 549, 576 (2004). This includes awards of damages for lost compensation and benefits and for emotional distress that is suffered as a direct and probable consequence of the unlawful discrimination.

Bournewood Hospital Inc. v. MCAD, 371 Mass. 303, 315 (1976). The Commission is also authorized to impose civil penalties ranging from $10,000 to $50,000 against Respondents who have been found to have engaged in unlawful practices. G.L. c. 151B §5; Stonehill, supra. at 573.

In this case Complainant was forced to use 180 days of accrued sick leave time during the academic school year of 1997-1998, the value of which she is entitled to recoup. Her medical leave was a direct result of Respondent's discriminatory acts in failing to accommodate her disability during that school year. While she was compensated for 135 of those days in settlement of her union grievance, she remains entitled to compensation for the remaining 45 days to the extent she would have received certain value for them at the time of her retirement. Complainant should be paid for the remaining 45 days at the payout rate for unused sick time at the time of her retirement in January of 2001, an amount of $6, 681.06.

In addition, Complainant is entitled to damages for emotional distress she suffered as a direct and proximate result of Respondent's unlawful actions. Emotional distress awards must be fair and reasonable and proportionate to the distress suffered. Stonehill, supra. at 576. According to the Stonehill case factors to be considered in rendering such awards "include: (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…" There must also be "sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress" Id. at 576. I have considered all these factors and conclude that a such an award is justified.

In this case, Complainant testified quite credibly and I find that she suffered emotional distress as a direct result of Respondent's unlawful actions. She was extremely upset and distraught throughout the entire summer of 1997 as she tried to get information about an alternative assignment and anxiously awaited information and assistance from Respondent regarding a suitable placement. She became increasingly upset by Respondent's refusal to enforce her "504" preference and assign her to the Warren Prescott School, after she had visited the school and met with the Principal three times. Upon being assigned to the Blackstone School Complainant was anxious about the commute and had other concerns. When she arrived at the school to begin teaching, the unavailability of the promised handicap parking space was extremely frustrating and disconcerting to her. With no-one to help her escort students and no provisions made for her to take breaks she became increasingly frustrated and physically exhausted. Complainant testified credibly that this situation was embarrassing and humiliating to her and by the end of the second day of teaching she was extremely fragile emotionally. She went home and called her doctor and cried about how difficult her first two days had been and how she couldn't go on without the necessary accommodations.

Complainant was a highly motivated and dedicated teacher who had worked successfully to overcome her disability for many years. The fact that she was compelled to leave teaching for an entire year devastated her. She testified that she was depressed, anxious, lost sleep and felt useless for the entire academic year, as she waited for a response that never came from Respondent. As the academic year wore on and it became apparent that Respondent would not address her situation, Complainant became increasingly frustrated and had difficulty attending to normal daily activities and

household tasks including caring for her disabled adult daughter. Her emotional distress was corroborated by her physician who stated it was very unlike Complainant to cry or admit defeat, as she had to him after her first two days teaching. I conclude that Complainant's emotional distress was significant and lasted for at least the entire academic year, as her situation remained unresolved. Her distress at these events was still evident at the public hearing in March of 2004, some 7 years later. Thus, I conclude that Complainant is entitled to an award of emotional distress in the amount of $125,000.00.

Affirmative Relief

Consistent with the Commission's authority and my findings and conclusions above, I hereby order the Respondent to take the following affirmative steps with respect to its handling of disability discrimination complaints and requests for reasonable accommodations from any and all employees.

1) The office of equity shall report to the MCAD for the next 5 years each and every complaint of disability discrimination or request for reasonable accommodation it receives from any employee and detail its response to such complaint or request. In the interest of privacy and to protect the confidentiality of any claimant, parties need not be identified by name. However, the date of request, nature and type of accommodation requested and action taken by Respondent or accommodation provided shall be noted.
2) Respondent, Boston Public Schools, shall conduct a basic annual training session on issues related to handicap discrimination and reasonable accommodation for

all administrators including any 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 and reporting requirements.

Civil Penalty

Consistent with the Commission's authority to award civil penalties, I find that this matter is appropriate for the assessment of such an award against Respondent. Given that the Office of Equity failed in its obligation to ensure that Complainant be granted reasonable accommodations and ignored her repeated requests for assistance for a period of an entire academic year, I hereby conclude that a civil penalty in the amount of $10,000 is in order.

V. ORDER

Consistent with the findings of fact and conclusions of law recited herein, Respondent, Boston Public Schools is hereby Ordered to:

1) Pay to the Complainant, Mary McTernan, within 60 days of receipt of this decision, the amount of $6,681.06 to reimburse her for sick leave time taken.

2) Pay to the Complainant, Mary McTernan, within 60 days of receipt of this decision, the amount of $125,000.00 in damages for emotional distress suffered as a direct and proximate result of Respondent's conduct.

3) Pay to the Commonwealth of Massachusetts within 60 days of receipt of this decision, a civil penalty in the amount of $10,000. Payment shall be forwarded to the Clerk of the Commission.

4) Conduct training and other reporting as outlined above.

5) Cease and desist from engaging in discriminatory practices relative to disability discrimination and requests for reasonable accommodation.

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 by filing a Notice of

Appeal of this decision with the Clerk of the Commission within ten (10) days of receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So Ordered this 10th day of May, 2005

Eugenia M. Guastaferri
Hearing Officer