*Note that some redacted portions of the instant published version of this Decision (e.g., those where the word “REDACTED” appears, and select bracketed words) were not redacted in the original version of the Decision sent to the parties.*

COMMONWEALTH OF MASSACHUSETTS

**Division of Administrative Law Appeals**

**Bureau of Special Education Appeals**

# **In Re: CBDE Public Schools[[1]](#footnote-1) BSEA #10-6854**

**DECISION**

[*corrected for typographical errors on March 27, 2012*]

This decision is issued pursuant to the Individuals with Disabilities Education Act (20 USC 1400 *et seq*.), Section 504 of the Rehabilitation Act of 1973 (29 USC 794), the state special education law (MGL c. 71B), the state Administrative Procedure Act (MGL c. 30A), and the regulations promulgated under these statutes.

A hearing was held on September 12 and 13, 2011, October 24 and 25, 2011, November 28, 29, and 30, 2011, and December 1, 2011 before William Crane, Hearing Officer. Those present for all or part of the proceedings were:

Student’s Mother

Student’s Father

School (Guidance) Counselor, CBDE High School

School Adjustment Counselor, CBDE High School

School Psychologist, CBDE High School

Special Education Teacher, CBDE High School

Special Education Teacher and Evaluator, CBDE High School

Assistant Director of Special Education, CBDE Public Schools

Former Director of Special Education at CBDE Public Schools

Assistant Principal, CBDE High School[[2]](#footnote-2)

Principal, CBDE High School

Superintendent, CBDE Public Schools

Therapist at Residential School that Student currently attends

William Bainbridge[[3]](#footnote-3) Educational Consultant, Private Practice

Barbara Berkowitz Forensic Psychologist, Private Practice

Geraldine Cassens Neuropsychologist, Private Practice

Elizabeth Adams Attorney for Parents and Student

William Levesque Attorney for Parents and Student

Michael Turner Attorney for Parents and Student

Lynne Turner Attorney for Parents and Student

Doris MacKenzie Ehrens Attorney for CBDE Public Schools

Mary Ellen Sowyrda Attorney for CBDE Public Schools

John Cronin Attorney for CBDE in related federal court case

Laurie Jordan Court Reporter

Darlene Coppola Court Reporter

The official record of the hearing consists of documents submitted by the Parents and marked as exhibits P-A through P-Z (except for P-O), P-AA through P-ZZ (except for P-PP), and P-1 through P-51; documents submitted by the CBDE Public Schools (CBDE) and marked as exhibits S-1 through S-86; and approximately seven days of recorded oral testimony and argument. As agreed by the parties, closing arguments were due (and filed) on February 3, 2012, with reply briefs due (and filed) on February 24, 2012. The record closed on February 24, 2012.

**I. INTRODUCTION**

This dispute arises within the context of Student’s being raped[[4]](#footnote-4) by a CBDE employee who was Student’s [CBDE employee] in the fall of 2008 when Student was a freshman in high school. In March 2009, Student disclosed the rape to CBDE staff. In May 2010, fourteen months after the rape disclosure, CBDE found Student eligible for special education services for the first time and proposed an IEP calling for a residential educational placement for a 45-day extended evaluation. An IEP was subsequently proposed for Student’s continued placement in a residential educational placement. Parents fully accepted this IEP, and Student remains placed within this residential program.

Parents’ principal allegation is that CBDE failed to refer Student, in a timely manner, for evaluation and consideration of eligibility under “child find” obligations within special education laws and Section 504 of the Rehabilitation Act (Section 504), with the result that Student was educationally harmed by not receiving services, supports and accommodations to which she was entitled.

Prior to the commencement of the evidentiary hearing in the instant dispute, all substantive educational claims were dismissed. The only remaining claims pertain to monetary damages, which the Bureau of Special Education Appeals (BSEA) has no authority to award; but I have concluded (for reasons explained within the Procedural Background section, below) that I am required to make findings relevant to these claims in order to allow Parents to exhaust their administrative remedies prior to their seeking monetary damages in state or federal court.

The instant Decision is issued solely for the purpose of making findings relevant to Parents’ monetary damages claims. I limit my findings to those that would be made by a BSEA Hearing Officer in a compensatory education dispute involving child find claims under the special education laws and Section 504—that is, whether child find legal standards were violated and, if so, what educational harm, if any, was caused by these violations. My findings are set forth in part VII, below, and are summarized in subpart VII E near the end of this Decision.

The events described in this Decision have had tragic consequences for Student, and Parents undoubtedly have deeply suffered as well. It should also be recognized that many CBDE staff, who committed themselves to teaching and working with Student, have also been affected. At various times over the course of hearing, it was clear that CBDE staff wished that Student had been referred for an evaluation at the earliest possible time. The federal lawsuit, in which six CBDE staff have each been individually sued for a million dollars has, undoubtedly, also taken a substantial toll. Although the purpose of this Decision is limited to making findings to allow Parents to exhaust BSEA procedures, my hope is that these findings may also possibly facilitate the informal resolution of this dispute in its entirety.[[5]](#footnote-5)

## II. ISSUES

The issues to be considered in this case may be summarized as follows:

1. Did CBDE violate its child find responsibilities to Student under Massachusetts law, the Individuals with Disabilities Education Act (IDEA) or Section 504 of the Rehabilitation Act?
2. If so, what, if any, educational harm occurred?[[6]](#footnote-6)

III. PROCEDURAL BACKGROUND

On April 23, 2011, Parents filed a hearing request with the BSEA seeking prospective residential placement, reimbursement of any past payments for residential services, and monetary damages. More specifically, the hearing request sought the following relief:

* A therapeutic residential school for Student, “of the parent’s choosing, at the end of the CBAT Assessment so that there will be a seamless transition.”
* Payment by CBDE of “any outstanding costs the parents were obligated to pay by Germaine Lawrence or other facility.”
* Monetary damages for Parents, as well as for Student’s brothers and sisters for the alleged “rape, hostile educational environment, deliberate indifference, indecent assault and battery, intentional infliction of emotional distress, loss of consortium, and negligence” by individual defendants and the Town of CBDE.[[7]](#footnote-7)

Almost immediately after the filing of the hearing request, the parties began working together cooperatively, focusing on the substantive educational claims. Hearing Officer-initiated conference calls were used to discuss Student’s continuing special education needs and the parties’ progress in addressing those needs. By agreement and request of both parties, any resolution of the monetary damages claims was postponed while the parties sought to resolve the more pressing, substantive education issues.

Relatively quickly, CBDE proposed an IEP calling for residential educational placement, and Parents fully accepted this placement.

CBDE then filed its first motion to dismiss, seeking to have the entire hearing request dismissed. By ruling dated February 24, 2011, I dismissed all substantive educational claims without prejudice after determining that Parents had no remaining, disputed special education claims, either with respect to Student’s prospective services and placement or with respect to any compensatory or reimbursement claims.

In my February 24th ruling, I denied the motion to dismiss with respect to fact finding required for purposes of exhaustion of Parents’ IDEA and Section 504 claims for damages because I concluded that the First Circuit’s decision in *Frazier v. Fairhaven School Committee,* 276 F.3d 52 (1st Cir. 2002) left me no choice but to conduct a fact-finding hearing for this purpose. My ruling further explained that the fact finding would be comparable to that in a compensatory education dispute involving alleged child find violations, where a BSEA Hearing Officer would need to determine whether violations occurred and, if so, what compensatory education relief should be awarded to make Student whole.

Parents sought BSEA findings not only with respect to their child find claims, but also as to their damages claims under Title IX, which provides that no person shall, on the basis of sex, be subjected to discrimination under any education program or activity receiving federal financial assistance.[[8]](#footnote-8) The February 24, 201 ruling found that Parents’ Title IX claim does not require exhaustion of BSEA proceedings.

Parents also sought BSEA findings to determine facts and violations of law regarding the Americans with Disabilities Act (ADA). I declined to make factual findings or determinations of liability with respect to Parents’ and Student’s ADA claims beyond my findings and determinations under Section 504, noting that there is unlikely any difference between Parents’ Section 504 claim and their ADA claim for purposes of the instant dispute.

In the February 24th ruling, I also declined to make findings with respect to state claims under Article CXIV of the Massachusetts Constitution, the Massachusetts Civil Rights Act, and tort law. In sum, I ruled that Parents must exhaust BSEA administrative procedures with respect to damages claims premised on alleged violations of the IDEA and Section 504 but not with respect to their other claims.[[9]](#footnote-9)

CBDE then filed a second motion to dismiss, making further argument that since there were no substantive education claims remaining, the BSEA lacked jurisdiction to further consider this dispute. I denied this motion, again finding that pursuant to the First Circuit’s decision in *Frazier v. Fairhaven School Committee,* 276 F.3d 52 (1st Cir. 2002), I was constrained to make findings relevant to Parents’ damages claims under the IDEA and Section 504. This ruling re-affirmed (with more extensive analysis than) my ruling on CBDE’s first motion to dismiss.

CBDE then filed a complaint in federal District Court, seeking to enjoin the BSEA proceedings. On June 2, 2011, the federal Court (Judge Woodlock) heard and denied this request from the bench. The BSEA, through the Attorney General’s Office, then filed with Judge Woodlock a motion to dismiss CBDE’s complaint. Judge Woodlock has not issued a written ruling on this motion. However, from the bench during the motion hearing on July 21, 2011, he stated that it was his “present intention” to grant the BSEA’s motion to dismiss. Judge Woodlock also stated that the BSEA should not further delay its fact-finding hearing. (In this regard, I note that throughout the course of this dispute, all postponements of hearing dates have been by agreement of the parties and have never been initiated by the BSEA.)

CBDE then filed its third motion to dismiss, essentially putting forth variations of arguments already made in support of its previous two motions to dismiss. Using a motion for reconsideration standard, I denied this motion through a ruling dated September 7, 2011.

Parents and Student then filed a motion seeking reconsideration of my February 24, 2011 ruling on CBDE’s first motion to dismiss in so far as that ruling dismissed Student’s and Parents’ compensatory education claims. Through a ruling dated September 8, 2011, I denied the reconsideration motion.[[10]](#footnote-10) My September 8th ruling also noted that my February 24th dismissal had been *without prejudice*, thereby allowing for the possibility of subsequent compensatory claims, but no such claims have been filed.

Parents and Student filed a motion to require that witnesses be sequestered. By ruling dated September 8, 2011, I determined that all witnesses must be excluded from the hearing room so that they cannot hear the testimony of other witnesses; provided, however, that the following persons may be present: (1) Parents, (2) an officer or employee of CBDE who is designated as its representative by its attorney, (3) a person whose presence is shown by a party to be essential to the presentation of the party's case, and (4) a person authorized by statute to be present.[[11]](#footnote-11)

On September 9, 2011, Parents and Student filed a related lawsuit in federal District Court, seeking monetary damages of eight million dollars against CBDE and one million dollars against each of six current or former employees of CBDE. The employees were sued both in their official and in their individual capacities. Many of the Court claims mirrored the claims made in the instant dispute before the BSEA.[[12]](#footnote-12)

On September 12, 2011, the BSEA hearing commenced. (September 12th was the first of five scheduled hearing days from September 12 through 16, 2011.) Parents and Student sought to begin their case with the testimony of a number of CBDE employees who had been named in the above-referenced federal lawsuit. These employees appeared at the hearing and were sworn in, but then declined to answer any questions, stating that they would not answer because they were named in the related federal lawsuit. During the second day of hearing on September 13, 2011, one of Parents’ and Student’s experts (Dr. Bainbridge) testified, and then Parents’ and Student’s attorneys requested a postponement (which was unopposed and which I granted) to allow the attorneys time to seek an order in state Superior Court to enforce BSEA subpoenas requiring certain current and former CBDE employees to testify at the BSEA hearing.

Parents and Student then filed a complaint in the Superior Court, seeking enforcement of the BSEA subpoenas. In his decision, Judge Muse noted that the defendants took the position that the BSEA lacked jurisdiction to conduct the hearing, on the basis that there were no remaining educational disputes, and that for this reason, Parents and Student have exhausted the administrative process. Defendants also claimed that they should not be compelled to testify as this may prejudice their defense in the related federal District Court action. In an October 11, 2011 decision in Civil Action No. BACV2011-00532, Judge Muse allowed Parents’ and Student’s complaint for enforcement to compel witnesses to testify.

The BSEA evidentiary hearing then resumed on October 24, 2011, with no further refusals to testify, and was completed on December 1, 2011. The parties agreed to written closing arguments, followed by an opportunity for reply briefs. The record closed on February 24, 2012 with the filing of the parties’ reply briefs.

IV. STUDENT PROFILE

Student, who is seventeen-years-old, is generally thought of as a happy, fun-loving and affectionate person, with a good sense of humor. She has a love for (and is very capable at) a number of high school sports [REDACTED]. Dr. Berkowitz, who interviewed Student, added that Student appreciates others who deal with her directly and forthrightly through reciprocal communications. Student often tests boundaries and is mischievous. Testimony of Mother, Berkowitz.

Student’s overall intellectual abilities are solidly in the average range. However, in general, she is not highly motivated to do well academically but rather is content to do only what is minimally necessary at school. Testimony of Mother, Berkowitz; exhibit S-89 (page 11).

Student is diagnosed with Post Traumatic Stress Disorder, Depressive Disorder Not Otherwise Specified (NOS), Polysubstance Abuse, and Oppositional Defiant Disorder. She has been described as “an affectively and behaviorally unstable young woman”. Her depression, mood lability, impulsivity, oppositional and aggressive tendencies compromise her cognitive and interpersonal functioning. Her feelings of self deprecation and self-condemnation are significant; family discord has also been a pervasive issue for Student and her family. Testimony of Mother, Berkowitz; exhibits P-1 (page 20); S-89 (page 11).

Neuropsychological testing has further indicated the following deficits: Attention Deficit Hyperactivity Disorder, Reading Disorder (Residual) and Learning Disorder NOS (Executive Dysfunction). Exhibit S-89 (page 11).

Student currently resides at a therapeutic residential placement. It is not disputed that she is in need of significant, further professional treatment if she is to recover from her traumatic experiences and be able to live a reasonably productive adult life in the community. She does not perceive that she is appropriately designated as a special education student although she does understand her need for therapy. Testimony of Cassens; exhibit P-1 (page 20).

**V. FACTUAL BACKGROUND**

1. For 7th and 8th grades (the 2006-2007 and 2007-2008 school years), Student attended a CBDE middle school. Her grades were generally good. During that time, she had several, relatively minor behavioral difficulties at school and at home—for example, she would run away from home for several hours and then return home independently, and her report card for 8th grade includes a notation of insubordination. Student occasionally spent time with a guidance counselor at school. Testimony of Mother, Cassens; exhibit P-R.
2. During the summer following 8th grade, on July 19, 2008, Student’s beloved cousin died in a pedestrian-automobile accident. Student and her cousin (who was two years older than Student) “grew up together”. They were extremely close friends. Student considered her cousin to be her mentor. Testimony of Mother.
3. Her cousin’s death was a huge loss for Student, and it had an immediate and substantial, negative effect on her. For example, at home, during September and October of freshman year in high school (the 2008-2009 school year), Mother found Student to be emotionally fragile, sometimes falling apart if the name of her cousin was mentioned. Student’s grief was very raw during this time. Testimony of Mother, Berkowitz.
4. Mother noticed that Student’s emotional well-being took another downward turn during the fall, sometime soon after day light savings time changed, when Student told Mother that “you have no idea how messed up my life is.” Mother did not know what her daughter was referring to specifically, but assumed that her daughter’s difficulties continued to be due to her cousin’s death. Testimony of Mother.
5. Mother testified that around this time, it started to become difficult to get her daughter up in the morning and off to school. For the first time, Student’s conduct started to become more physically threatening—for example, threatening another girl with physical violence. Mother found it very difficult to talk with her daughter about these concerns. Occasionally, Student would run away from home, as she had done in the past, but now she would run away for longer periods of time and would not come home independently. Mother continued to assume that her daughter’s increased emotional and behavioral difficulties were part of the process of grieving her cousin’s death. Testimony of Mother.
6. Early in her freshman year, Student began seeing a CBDE High School counselor (Guidance Counselor). When Student became angry or upset at school, she would sometimes initiate a visit with the Guidance Counselor. At other times, a CBDE teacher or staff would send Student from the classroom to the Guidance Counselor—for example, when there were uncontrollable crying spells. Continuing through the 2008-2009 school year, the Guidance Counselor was seeing Student at least once or twice per week. Student would sometimes just “pop in” to see her Guidance Counselor but more often, there would be a more extended discussion for as long as 30 to 45 minutes. Testimony of Guidance Counselor.
7. Student’s Guidance Counselor knew that Student’s beloved cousin had died during the previous summer, that Student had seen her cousin in the hospital emergency room after she was pronounced dead, and that all of this likely had a substantial emotional impact on Student. Discussions between Student and the Guidance Counselor often centered on Student’s grief as a result of her cousin’s death. Discussions with the Guidance Counselor also focused on Student’s outbursts at school, which were typically directed at her peers, as well as Student’s conflicts with Mother. The Guidance Counselor testified that Student often seemed sad and appeared to be grieving, but to the Guidance Counselor, Student did not appear to be depressed. Testimony of Guidance Counselor.
8. Student appeared to feel comfortable spending time with and talking with the Guidance Counselor, and the Guidance Counselor made herself available to Student as often as Student needed to see her. The Guidance Counselor became Student’s primary resource at the High School for purposes of discussing Student’s immediate concerns and helping her with educational interventions. The Guidance Counselor demonstrated a commitment to helping Student in any way that she could. Testimony of Mother, Guidance Counselor.
9. As a result of Student’s grieving process and difficulties at school during this time, the Guidance Counselor, teachers, and administration developed a number of services, supports and accommodations for Student. As listed within CBDE’s discovery responses (exhibit P-D at page 8), these were as follows:
	* notifying teachers of the death of Student’s cousin and her difficulty concentrating;
	* asking the teachers “to keep an eye on [Student]” and that they send her to guidance if her behaviors raised any concerns;
	* requesting that teachers be accommodating with respect to Student’s behaviors and assignments;
	* increased latitude as to arriving late to class and the ability to leave class when Student felt it necessary;
	* extended time to complete assignments;
	* after-school tutoring by teachers;
	* meeting with guidance and adjustment counselors (school adjustment counseling started in January 2009) on an “as needed basis”;
	* anger management program (March to June 2009);
	* expanded opportunities as to dates and locations for taking the January 2010 mid-year exams.
10. The CBDE High School has a Child Study Team (CST) that is established for the purpose of helping any student who is struggling academically, emotionally or behaviorally. A student may be referred to CST by a teacher, counselor, coach or parent. CST meets weekly for purposes of discussion and triage. CST typically discusses regular education services, supports and accommodations, but also occasionally discusses special education services, supports and accommodations. Other than through a parent request, the CST serves as the principal way in which students are referred for evaluation to determine special education eligibility. Testimony of Guidance Counselor, Adjustment Counselor.
11. During the 2008-2009 school year, CST members included the High School Assistant Principal (who acted as the chair or facilitator of the meetings), School Psychologist, two School Adjustment Counselors (including the person who would become Student’s Adjustment Counselor), the Guidance Director, two Guidance Counselors (including Student’s Guidance Counselor), a School Nurse, and a person responsible for special education testing and evaluation. Testimony of Guidance Counselor, Adjustment Counselor, Assistant Principal[[13]](#footnote-13); exhibits P-D, S-2 (pages 3, 9).
12. Sometime during the fall of 2008, Student was referred to CST and by late October or November 2008, she began to be discussed by CST during its weekly meetings. During the winter of her freshman year, CST was discussing and monitoring Student on a regular basis. The CST members focused on ways to support her within the High School, including what accommodations, supports and services should be offered. Testimony of Guidance Counselor, Adjustment Counselor.
13. During her freshman year, Student demonstrated sadness and anger. Her behavior included verbal outbursts, leaving class without permission, uncontrollable crying in class, and uncontrollable anger. Although the general kinds of emotional and behavioral difficulties did not seem to change over the course of the school year, by January 2009, Student was exhibiting her anger and sadness more frequently and in more extreme forms—for example, becoming more vocal, demanding and pushy. In January, she had an explosion, pushing and shoving another girl, and yelling and screaming at her in the hallway at school. Testimony of Guidance Counselor.
14. CBDE’s answers to Parents’ interrogatories (exhibits P-D, S-2 at page 12) explained that during the fall and winter of her 2008-2009 school year, Student exhibited the following emotional and behavioral difficulties:

[Student] exhibited mood swings and outwardly moody behavior. [She] also exhibited excessive, uncontrolled, displaced anger reactions involving peers, teachers, and authority figures. She was highly socially distracted. She was frequently texting others and using earphones to listen to music when she should have been paying attention. She was often angry at someone, usually another girl or her mother, according to her guidance counselor, and she would raise her voice and swear over [social issues]. She also became angry in class and would storm out, often find her way to the Guidance Office to [the Guidance Counselor or School Adjustment Counselor] for de-escalation.

1. Grief counseling had been earlier recommended to Student but not accepted. However, in January 2009, she agreed to participate in grief counseling. Testimony of Guidance Counselor, Mother.
2. The Guidance Counselor testified that she had learned from a middle school counselor that Student had somewhat similar difficulties the previous year with peer interactions and her relationship with Mother. Nevertheless, Student generally attained good grades in 7th and 8th grades. In contrast, by January of her freshman year at the High School, it had become clear that Student’s sadness and anger were having a substantial, negative impact upon her academic progress and grades, as well as her emotional and behavioral wellbeing. Testimony of Guidance Counselor; exhibits P-R (pages 7, 8).
3. This is also reflected in a January 28, 2009 e-mail from the Guidance Counselor to Mother stating:

I am concerned about [Student], however, being “stuck” in the grieving process. Every time [Student] has an issue, it seems that her cousin‘s death is somehow at the root of it. Everyone grieves in their own time and own way, but I believe this has really gotten in the way of her progress in school. [Exhibit P-ZZ (page 45).]

The Assistant Principal testified that she was aware of Student’s difficulties in school at this time. Testimony of Assistant Principal.

1. In January 2009, CST referred Student to a CBDE School Adjustment Counselor. In contrast to Student’s Guidance Counselor who is not a therapist and whose principal responsibilities included addressing Student’s immediate issues and concerns at the High School and making educational adjustments for Student, the School Adjustment Counselor is a trained therapist who met with Student for the purpose of addressing Student’s emotional and behavioral issues at a deeper level. The School Adjustment Counselor has a master’s degree in social work and has significant experience and expertise working with adolescents with emotional and behavioral difficulties, including trauma survivors. He has received continuing professional education in the area of counseling trauma survivors. He also has a substantial amount of experience chairing special education team meetings. Testimony of Guidance Counselor, School Adjustment Counselor; exhibit S-83 (resume of School Adjustment Counselor).
2. During the sessions with the School Adjustment Counselor, Student revealed that she had significant anger that was directed at others, including other students, teachers, and Mother. Student’s moods were often unstable, and the School Adjustment Counselor found that her anger may have been related to mood swings. He also found that anger appeared to derive from situations where Student was told things (by Mother, a student or a teacher) that she did not agree with. The School Adjustment Counselor sought to process these issues with Student and to help her understand her anger and to learn strategies to cope with anger. The School Adjustment Counselor testified that he did not find these issues to be substantially different than the Student’s issues that were reported from middle school. Testimony of School Adjustment Counselor.
3. Beginning in January 2009 and continuing until January 2010, the School Adjustment Counselor met with Student at least weekly for 20 to 60 minutes per session; and during some weeks, he saw her two or three times. Testimony of School Adjustment Counselor.
4. In February 2009, the CST referred Student to the CBDE High School Anger Management Program because of Student’s recurring outbursts of insubordination and offensive language, and because Student would frequently leave class. The in-school behavior which led to the referral included verbal outbursts at others, leaving class without permission, disciplinary record of in-school behavioral incidents, Student’s acknowledgement that she had difficulty controlling her anger reactions, and her test scores on the State-Trait Anger Expression Index on February 27, 2009. Testimony of Mother, School Adjustment Counselor; exhibit P-D (page 4).
5. Both the Guidance Counselor and the School Adjustment Counselor believed that Student’s demonstrated anger, which she did not appear to be able to control and which was most frequently directed at her peers, warranted her participation in this group. Mother testified that she met with the School Adjustment Counselor around this time. He mentioned to her the anger management group, and she was in favor of it since she believed that her daughter’s anger was part of the grieving process and might be addressed through this group. Student agreed to participate. Testimony of Mother, School Adjustment Counselor.
6. Near the end of February 2009, Parents learned from a friend of their daughter, that their daughter likely had had an inappropriate relationship with a CBDE staff member. At that time, Parents did not know the extent of this relationship or what had occurred as part of it. Mother testified that until this time, neither she nor anyone else had any idea that Student’s difficulties were being caused by anything other than her grief from her cousin’s death. Within a few days after learning of the possibility of an inappropriate relationship, Father spoke with [another CBDE employee] (who knew Student well) about what Parents had learned. Then, on March 11, 2009, Parents met with CBDE staff to notify them of what they knew about the relationship between Student and the CBDE employee. Testimony of Mother, School Adjustment Counselor.
7. On March 12, 2009, two CBDE staff (including Student’s School Adjustment Counselor) initiated a private meeting with Student who then disclosed to them that she had been raped by a CBDE employee during the fall of 2008. At first, Student was hesitant to disclose but slowly divulged, step-by-step (except for the details of the rape itself) what happened. From Student’s disclosure, it was apparent to the School Adjustment Counselor that the rape was a confusing and traumatic event for Student, particularly because the rape was a violation of a trust relationship with the [CBDE employee]; and that even making the disclosure to the School Adjustment Counselor and [another CBDE employee] was traumatic for Student. Testimony of School Adjustment Counselor; exhibit P-D, S-2 (page 16).[[14]](#footnote-14)
8. Mother testified that her daughter was likely high from smoking marijuana when the rape occurred and that her daughter did not desire to have a sexual relationship with the [CBDE employee]. Rather, Mother testified that her daughter thought that he was her “friend”. Testimony of Mother.
9. On the day they learned from Student that she had been raped (March 12th), the two CBDE staff notified the High School Principal who notified the Superintendent. CBDE immediately notified the police and suspended the [CBDE employee]. By the date of the disclosure, the [CBDE employee] had already been placed on paid administrative leave pending investigation of alleged misconduct involving other students. Exhibit S-6. On March 12th or 13th, CBDE staff filed Abuse and Neglect Reports (under MGL c. 51A) with the Massachusetts Department of Children and Families (DCF). The [CBDE employee] subsequently pleaded guilty to criminal charges of statutory rape of a child and related offenses. On March 12, 2009, the CBDE Superintendent notified the [CBDE employee] of intent to terminate, and on March 21, 2009, he was terminated by the Superintendent. Testimony of the Assistant Principal; exhibits P-A (page 7), P-D, S-2 (page 16), S-7, S-8, S-9, S-10.
10. Soon after the disclosure, the CBDE Crisis Response Team (which included the members of the CST, and the High School Principal) met to discuss what had been disclosed and what needed to be done. Student was referred to an outside agency that specializes in providing counseling and support to rape victims. Student and her family also began receiving family therapy from an outside agency. Although there was occasional communication between those providing this therapy and CBDE staff, there was no coordination of services. Testimony of Assistant Principal, Guidance Counselor, School Adjustment Counselor; exhibits P-D, S-2 (page 16).
11. Meetings at the High School were called for the purpose of informing students and staff that a student had been raped. Separate meetings were held for each grade (approximately 125 students in each grade), and there was a meeting for parents and a meeting for staff. During these meetings, Student was not named but the CBDE employee was named by those leading the assembly. For privacy reasons, CBDE decided not to inform Student’s teachers that she had been raped, but many of the High School teachers likely learned directly or indirectly that it was Student who had been the rape victim.[REDACTED]. Testimony of Assistant Principal, Guidance Counselor, Mother; exhibits P-D, S-2 (page 16).
12. REDACTED
13. Mother testified that after the rape disclosure, her daughter had a very difficult time at home and school. Mother explained that her daughter resisted going to school. Mother testified that at school, several other students knew that she had been the rape victim, and they blamed her for the rape and told her that it was her fault that the [CBDE employee] (who was popular among some students) had been terminated. Mother stated that her daughter felt that other students were often talking about her behind her back. Dr. Berkowitz testified that this created a school environment that was “toxic” to Student and that she likely perceived as unsafe. During these times, Mother found that it did not take much for her daughter to fall apart and become angry. Testimony of Mother, Berkowitz.
14. After the disclosure of the rape, the CST continued to discuss Student’s educational, emotional and behavioral difficulties. All members of the CST were aware that Student had been raped by the [CBDE employee]. Testimony of Guidance Counselor, School Adjustment Counselor, Assistant Principal.
15. From March to June 2009, Student participated in an anger management group that was led by the School Adjustment Counselor. Student voluntarily participated in six, 45-minute sessions and appeared to enjoy the group. She learned what triggered her anger and strategies for dealing with her anger (for example, leaving the classroom) but she was not as successful as the School Adjustment Counselor had hoped in using this group to address or resolve her anger issues. Testimony of School Adjustment Counselor; exhibits P-D, S-2 (page 4), P-BB, P-CC, S-2D, P-EE, S-18, S-19.
16. Mother testified that Student initially did well with the rape counseling that was provided to her outside of school by a private agency twice per week. However, by late March or early April 2009, it became known to the School Adjustment Counselor and (at some point in time) to the Guidance Counselor that Student was resistant to the outside rape counseling, and that it was likely that Student was not well engaged with this therapy. Student talked with the School Adjustment Counselor about how difficult the rape counseling was for her. Testimony of School Adjustment Counselor, Guidance Counselor, Mother.
17. Nevertheless, the School Adjustment Counselor testified, and it is not disputed, that Student was likely receiving some benefit from this counseling. The School Adjustment Counselor testified that he had some contact with the agency providing the rape counseling, but further explained that he did not recall speaking with the rape counselor. He further testified that the rape counselor would not likely have provided information to him regarding what occurred within the therapy sessions. Neither the School Adjustment Counselor nor the Guidance Counselor followed up on their concerns regarding the effectiveness of the outside counseling. Testimony of School Adjustment Counselor, Guidance Counselor.
18. After the rape disclosure, the School Adjustment Counselor and Guidance Counselor continued to meet with and work with Student as before. They did not specifically raise the rape incident or Student’s feelings about the rape as they believed that these issues were more appropriately addressed outside of school through the private counseling that Student was receiving specifically for this purpose; however, they did talk about anything that Student initiated talking about, including anything related to the rape. Testimony of Guidance Counselor, School Adjustment Counselor.
19. From the perspective of the School Adjustment Counselor and Guidance Counselor, they continued to work on essentially the same issues and concerns that they were seeking to address prior to the rape disclosure. Thus, they continued to focus on Student’s anger, oppositional behavior, attendance gaps, sadness and her generally being upset in school. Similarly, the academic supports and accommodations (noted above) that were in place prior to her disclosure continued without substantial change after the disclosure. Testimony of Guidance Counselor, School Adjustment Counselor.
20. By the spring of the 2008-2009 school year, the School Adjustment Counselor testified that he recognized that the rape had contributed to Student’s emotional fragility and vulnerability. The School Adjustment Counselor testified that Student continued to have anger, difficulties with peers and some attendance gaps, all of which were negatively impacting her learning. The School Adjustment Counselor and Guidance Counselor testified that they did not observe any behavior that was substantially different than Student had previously demonstrated. The School Adjustment Counselor also testified that he did not see any of the classical signs of a post traumatic stress disorder. However, the Guidance Counselor testified that the frequency of Student’s behavior and emotional episodes increased over the course of the school year. And, the Assistant Principal testified that as the year progressed, the frequency with which Student left the classroom increased, and she noted, in general, a difference in severity in Student’s conduct prior to and subsequent to the rape in the fall of 2008. Testimony of School Adjustment Counselor, Guidance Counselor, Assistant Principal.
21. During this time, Student had been staying late after class to receive additional help from her teachers on Tuesdays, Wednesdays and Thursdays. However, by May 2009, Student stopped staying late for this purpose, and it was apparent that that the academic supports and services offered by CBDE were not effective for Student. Mother testified that her daughter lost interest in school until it appeared that she might not pass, and then, near the end of the school year, became motivated to at least try to pass her courses for the year. During this time, the Guidance Counselor noted a general, pervasive sense of unhappiness, and Student continued to demonstrate moody, depressed behavior. Testimony of Mother, Guidance Counselor.
22. In May or June 2009, Student had been accepted for voluntary services through DCF, and family stabilization therapy (FST) was provided twice per week through DCF. Through FST, a therapist came into the home to work with the entire family, but Student rarely participated. Mother found this service to be helpful to her and her husband for purposes of parenting Student. These services continued until September 2009, at which point Parents tried to continue to use the tools provided by FST. Testimony of Mother.
23. Student’s emotional and behavioral difficulties at school and their impact upon academics continued unabated through the end of the 2008-2009 school year. Student’s final grades for the 2008-2009 school year fell dramatically in comparison to the previous year. She received one final grade of C+, one final grade of D, two final grades of D-, and one final grade of F. Nearly all of the incident reports for the year occurred in the fall and winter, and involved excessive “tardies” and insubordination to one particular teacher (who reportedly excessively filed insubordination complaints against students). Testimony of Assistant Principal; exhibits P-D, S-2 (pages 12-13), P-R (page 1), S-36, P-X, P-FF, S-37.
24. During the summer of 2009, Student took a make-up math class in algebra because she had failed this course. Instruction was provided with a small number of students, and Student was allowed to work at her own pace. She did well in this class, receiving a grade of B plus. Testimony of Mother.
25. Student’s sophomore year in high school (2009-2010 school year) began with her continuing to receive the services, supports and accommodations that had been provided in the second half of the previous school year. The Guidance Counselor had numerous discussions with Mother about Student’s difficulties and how they could be addressed, but did not see Student as frequently as the previous school year. There was no improvement in Student’s academic, emotional and behavioral difficulties. Testimony of Guidance Counselor, Mother.
26. During the fall of 2009 Student was exhibiting anger towards her sister for liking a boy who Student liked, resulting in a tirade just prior to Christmas 2009. There were frequent telephone conversations at this time between the Guidance Counselor and Mother to discuss strategies and outside counseling. Testimony of Mother, Guidance Counselor.
27. By late fall, the Guidance Counselor noted that Student appeared, for the first time, to be depressed. By November 2009, Student was often not at school and could not access her education. Student’s grades for the first semester were generally in the D and F range, with a number of incompletes. Mother testified that by November 2009, she understood that Student was having difficulty staying focused in the classroom and did not feel comfortable within the High School classroom setting. Testimony of Guidance Counselor, School Adjustment Counselor, Mother; exhibits P-D, S-2 (page 6), P-R (page 1), P-GG.
28. During the late fall of 2009, the trial date for the CBDE employee was approaching. Mother testified that it was extremely difficult for Student to engage in (or talk about) anything related to the rape, and Student refused to meet with staff from the District Attorney’s office. The CBDE employee pled guilty to statutory rape and related charges. A week earlier, Student’s grandfather died. Testimony of Mother.
29. During December 2009 or January 2010, Mother spoke to the Guidance Counselor about Student’s being uncooperative at home, her staying out late, Student’s difficulties with her sister, and Mother’s inability to control Student. Around this time, Mother also asked the Guidance Counselor about additional educational services for Student because Mother believed that her daughter was sometimes completely falling apart in the classroom. Mother met with the Guidance Counselor to discuss alternative educational options—specifically, the CBDE’s “PM” program and a collaborative program that Mother had heard about. The Guidance Counselor advised Mother that a student had to be a high school junior to qualify for the PM program (because only at that time, would a student have enough high school credits to be able to graduate with credits earned in the PM program) and therefore it would not be appropriate for Student. There were no programs similar to the PM program that were available for high school sophomores. The Guidance Counselor also advised Mother that the collaborative she mentioned would not likely be appropriate for Student because Student’s needs were not as extensive as those of the students attending the collaborative. Mother also talked with the Guidance Counselor about transferring to another high school through school choice. Testimony of Mother, Guidance Counselor.
30. Mother testified that as a result of these discussions with the Guidance Counselor, she understood that the only services available for Student were a continuation of meetings with the Guidance Counselor and School Adjustment Counselor, and extra help after school from Student’s teachers on Tuesdays, Wednesdays and Thursdays—that is, the services and accommodations that were already being provided. Testimony of Mother.
31. The School Adjustment Counselor testified that until January 2010, he believed that it was appropriate to let the CBDE services, supports and accommodations (together with the outside services) continue in order to determine whether they would be successful in allowing Student to resolve her emotional and behavioral difficulties and re-engage with her learning at the High School. Testimony of School Adjustment Counselor.
32. Mother stated that by January 2010, she learned that after an initial period of time, the rape counseling had become more difficult for her daughter, and by then, Student did not want to return to rape counseling, at least at this agency. Testimony of Mother.
33. In January 2010, Student became very upset with a male friend (another student) at school and began yelling at him. Later, he began talking with Student’s sister, which caused Student to become even more upset. On January 18, 2010 while at home, Student became very agitated [and engaged in self-injurious behaviors; and later, on same date, engaged in assaultive behavior in the community]. The police were called, and Mother decided to take her daughter to a local hospital where Student was evaluated. At the hospital [REDACTED]. Exhibit P-6. Student was released from the hospital that same day. Mother immediately called the DCF worker who came to their home and observed Student. Testimony of Mother.
34. On January 20, 2010, Student was screened by a mobile crisis unit at the request of her DCF worker. Student was found to have increased risky and self-injurious behaviors, poor judgment, assaultive behaviors, and increased depressive symptoms. On January 21, 2010, Student was admitted to a Community Based Acute Treatment (CBAT) program. She was placed in a staff-secure cottage where she engaged in structured activities and therapeutic groups. On January 21, 2010, Student received a psychiatric evaluation while at the CBAT. This evaluation provided diagnoses of Post-Traumatic Stress Disorder, Mood Disorder NOS, and polysubstance dependence. Recommendations from the psychiatric evaluation and the CBAT treatment team included providing Student with a safe, well-supervised environment for diagnostic evaluation and stabilization, individual and family therapy, assessment for medication, and collaboration with the school regarding educational planning. The CBAT discharged Student to her home on February 3, 2010. Exhibits P-9, P-10, P-11, S-51.
35. The CBAT discharge summary indicated that Student “responded extremely well to this CBAT admission”; she reported “feeling safe and secure on this campus”; and she was “able to work on developing coping skills and grounding techniques in order to better manage her moods and intense affect.” The discharge summary’s recommendations included “continuing with individual and family therapy to address clinical needs”. The discharge summary further recommended: “She should continue to be educated at the [CBDE] High School. The family may schedule a meeting as they see fit in order to establish additional supports for [Student].” Exhibits P-11, P-12, S-53.
36. The discharge summary, which was faxed to the Guidance Counselor within a day or two after the discharge of February 3, 2010 (and shared with the School Adjustment Counselor very soon thereafter), stated that the CBAT treating psychiatrist diagnosed Student as having Post-Traumatic Stress Disorder, Mood Disorder NOS. After discharge from the CBAT facility and receipt of the discharge summary, CBDE continued to provide Student with the same regular education services, supports and accommodations. Testimony of Guidance Counselor, School Adjustment Counselor; exhibit P-9.
37. Student returned to school in February 2010. The Guidance Counselor made arrangements with Student’s teachers and worked to transition Student back into her academic routine. This was a difficult transition for Student since now not only did a number of other students know that she had been raped, but some students now also knew that she had been in a psychiatric residential facility. During February 2010, Student frequently dropped in to see the Guidance Counselor, but often for only a brief visit. In late February and early March 2010, Mother called the Guidance Counselor on a number of occasions, expressing her frustration about being unable to control Student who was staying out all night, refusing to go to school, and being argumentative. Testimony of Guidance Counselor, Mother.
38. Beginning in January or February 2010, the School Adjustment Counselor saw Student only sporadically. Testimony of School Adjustment Counselor.
39. On March 10, 2010, Parents filed a Child in Need of Services (CHINS) petition with the juvenile court. Parents were very frustrated by their difficulty getting Student to school and getting her to do her school work, and they believed that the court process might help. Testimony of Mother; exhibit S-12.
40. In early March 2010, Mother informed the Guidance Counselor for the first time that Mother did not believe that CBDE was the right school for Student. By a note dated March 18, 2010, Mother made a request to the Guidance Counselor that Student be evaluated. CBDE received this note on March 23, 2010, and the Guidance Counselor immediately filled out the appropriate paperwork and spoke with the school psychologist. Testimony of Guidance Counselor; exhibit P-D, S-2 (pages 7, 14), P-II (page 1), S-15.
41. On March 23, 2010, CBDE sent Parents a Notice of Proposed School District Action (N1 form) indicating that it proposed to conduct an initial evaluation of Student for purposes of determining whether Student was eligible for special education and related services. Parents signed this form on March 26, 2010, and CBDE received back the signed consent form from Parents on March 30, 2010. Exhibit P-II (page 2), S-20, S-28.
42. The Guidance Counselor and School Adjustment Counselor continued to be the CBDE staff who were principally responsible to work with Student regarding her academic, emotional and behavioral difficulties until April 2010 when Student no longer attended CBDE on a consistent basis. Testimony of Guidance Counselor, School Adjustment Counselor.
43. On April 7, 2010, Student and Parents appeared in juvenile court regarding the CHINS petition. Student was out of control and was involuntarily taken from the court to a psychiatric hospital where she was then admitted. The hospital notes indicate that the “presenting problem” was, as stated by Mother, that “we cannot ensure her safety” and [Student] is leaving house at night, not following rules.” The hospital notes also cited Student’s depression, [REDACTED], decreasing school attendance, and anger. On her admission date of April 7th, Student received a psychiatric evaluation at the hospital. Student remained hospitalized until April 16, 2011 when she was “stepped down” to a CBAT residential program (which was not the same CBAT program to which she had previously been admitted). This second CBAT was funded by DCF. Testimony of Mother; exhibits P-14, P-15, P-16, S-12.
44. On April 23, 2010, Parents filed their request for hearing with the BSEA. In their hearing request, Parents sought a determination of special education eligibility and need for a residential, educational placement, as more specifically discussed within the Procedural Background part, above, of this Decision. At this time, Student continued to reside at the second CBAT, and Parents urged that CBDE provide a residential educational placement immediately so that Student would have continuous residential services. Exhibit P-A.
45. By April 28, 2010, the CBAT program considered Student to be stable and ready for discharge, but “stuck in discharge planning”. CBAT program notes of May 11, 2010 indicate that Student was “doing well” in the milieu, and that she was “engaged and participating”. The notes further indicate that “parents do not want [Student] home at this point.” The notes of May 12, 2010 indicate that [Student] is ready to discharge, her family is resistant to having her home.” Exhibit P-33 (pages 2-3).
46. Student remained at the CBAT program, waiting for a determination as to where she would be placed. As reflected within CBAT documents, one of the discharge options considered by CBAT was Student’s returning home with “wrap around services”. (CBDE’s expert, Dr. Cassens, testified that wrap around services would have included the possibility of private psychotherapy, a therapeutic day school, and anything else that would have addressed her needs.) Other options referenced in the CBAT documents were various residential programs. Exhibit P-33 (page 2).
47. On May 10, 2010, the CBDE school psychologist conducted a psychoeducational evaluation. The evaluation recommended resumption of outside individual therapy, the initiation of family therapy, special education services “to support her current academic difficulties”, and placement in a public high school other than the CBDE High School “as she addresses issues of past abuse related to the school environment.” Exhibit S-23 (page 10).[[15]](#footnote-15)
48. On May 13, 2010, CBDE determined, for the first time, that Student was eligible to receive special education and related services. CBDE then agreed to extend Student’s residential placement for purposes of evaluation. Exhibits P-II (pages 6-8), P-KK, P-LL.
49. The CBAT discharge summary, dated May 20, 2011, indicated that the CBAT program “recommended that [Student] return home with wraparound services and appropriate school placement with supports in place” but that CBDE “agreed to fund a 45 day educational placement”. Exhibit P-41 (page A). The recommendations from the discharge summary indicated that Student had “done well with the structure and behavior management system” of the CBAT program, that she had “generally remained stable and engaged in treatment throughout the duration of her placement despite continued feelings of frustration around discharge planning.” The summary recommended a school environment smaller than the CBDE High School, “with supports in place so that can work with providers at school to manage her emotions in an appropriate manner.” Exhibit P-41 (page D), S-57.
50. On May 20, 2010, Student was discharged to the residential school component within the same placement where the CBAT program was located. The May 20th placement was for purposes of a 45-day educational assessment, which, as noted above, CBDE had agreed to fund. Exhibit S-29. The treatment plan for this assessment focused on “stabilization, safety planning, emotion regulation, assessment, and discharge planning.” Exhibit P-36 (page A).
51. During this 45-day assessment, a trauma evaluation indicated that Student was sad about continuing to be away from home and angry that she had not been allowed to return home after her CBAT program discharge. She was reported as “more ready to delve into issues related to her experiences of grief and loss” but was generally “avoidant” regarding “treatment for experience [sic] sexual assault”. It was noted that Student declined to take or read offered materials regarding the impact of rape on survivors. The trauma evaluation then noted: “Forcing [Student] to participate in trauma treatment or attempting to force her to process her experience before she is ready is not only not indicated but could lead her to re-engage in unsafe behaviors.” Exhibits P-42 (pages C, D), S-56.
52. On May 25, 2010, a licensed clinical psychologist conducted a review of Student’s school records, CBAT records, and hospital records. He concluded that Student has a “probable” post-traumatic stress disorder “most likely related to her sexual trauma but possibly amplified by the cumulative effect of multiple traumatic events including the death of her cousin.” The report further noted: “Certainly multiple traumas are likely to be somewhat synergistic in their impact ….” He concluded that “it seems quite clear to me that any intervention with this young lady need[s] to focus very specifically on helping her manage the combined factors of trauma and dysregulation of behavior.” Exhibit S-25.
53. Treatment recommendations from the 45-day assessment, dated June 21, 2010, included placement in a “small school setting outside a public high school where she could be provided with consistent individual attention, academically challenging classes with access to the teacher or teaching assistants, and therapeutic supports.” Also recommended was that, “upon returning home”, Student and her family “work with an intensive in-home therapy team”. Exhibit P-43 (pages A and B), S-59.
54. Then, for approximately one month, there were on-going discussions and negotiations between Parents and CBDE. CBDE took the position that a therapeutic day placement would be appropriate, with Student living at home. CBDE’s position was consistent with the treatment recommendations, noted above, from the 45-day evaluation. However, Parents sought continued residential placement for their daughter. Parents, who often brought their daughter home for the weekend, believed that their daughter was not safe at home since they could not control her behavior, she often left the home to spend time in the community, and it was difficult to bring her back to school. Testimony of Mother.
55. On July 8, 2010, the IEP Team met and agreed that Student should be placed at a residential, therapeutic educational placement. On July 9, 2010, which was the end of the 45-day assessment period, Student was discharged. CBDE proposed an IEP calling for Student to be provided with a residential placement. Parents fully accepted this IEP and placement on July 14, 2010. Exhibits P-MM, P-50, S-31.
56. By this time, Student had left the residential placement where the assessment had occurred. After Parents learned that CBDE had agreed to propose an IEP providing residential services, they picked up their daughter at a place in the community where she was hiding. They tricked their daughter, telling her that they were taking her to a residential school simply to observe it; and when they arrived at the school, they turned their daughter over to the school staff and left. Admission to the school occurred on July 22, 2010. Mother related this as a “horrible” experience. Student has continued through the date of the hearing to be placed at this residential school. Testimony of Mother; exhibits P-MM, P-44 (page A).
57. Effective August 23, 2010, Student’s DCF case was closed because Student was in a residential placement and DCF determined that DCF services were no longer needed. Exhibit P-51.
58. On April 7, 2011, the IEP Team met and continued to propose an IEP for a residential educational placement, with Student to be placed in her current school. On June 3, 2011, Parents accepted a residential placement as called for in the IEP, but not at the specific school that Student had been attending. Exhibit S-34.
59. The Residential School Therapist testified that Student has had difficulty engaging in therapy in her current residential educational placement which she has attended since July 2010. Part of the challenge for Student is that her in-school therapist has changed on several occasions, and she has not been receiving any outside therapy. The Residential School Therapist also testified that at school, Student has refused to participate in the classroom in the past, has been oppositional, has been caught using illegal drugs, and has run away on at least one occasion. However, the Residential School Therapist testified that within several weeks prior to the close of the hearing on December 1, 2011, Student was demonstrating a willingness to engage in individual and group therapy, was participating in the classroom and has generally been doing better, although it was too early to know whether this reflected a more long-term change. Testimony of Cassens, Residential School Therapist.
60. Mother testified that recently, her daughter had also begun to be willing to talk to her about the details of the rape, and Mother believes that this reflects her daughter’s progress as a result of being placed in a residential school. Mother testified that she believes her daughter also has benefited from being in a residential school because it has made her accountable for her actions. Testimony of Mother.
61. CBDE’s expert (Dr. Cassens) testified that Student continues to want to leave the residential school and live at home. She misses living with her family very much. Parents believe that there is not sufficient structure or control in order for Student to live at home safely at this time. When Student turns 18 years old in the spring of 2012, it is anticipated that she will sign herself out from and leave the residential placement. But, at least at the time of the evidentiary hearing, the evidence was undisputed that Student was not yet ready to transition from a residential facility to a day therapeutic program and live at home. Testimony of Mother, Berkowitz, Cassens.

**VI. LEGAL STANDARDS**

**A. IDEA and Section 504**

It is not disputed that currently Student is an individual with a disability, falling within the purview of the federal Individuals with Disabilities Education Act (IDEA)[[16]](#footnote-16) and the Massachusetts special education statute.[[17]](#footnote-17) The IDEA was enacted "to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living."[[18]](#footnote-18) The Massachusetts special education statute also includes a FAPE requirement.[[19]](#footnote-19) FAPE must be provided in the least restrictive environment.[[20]](#footnote-20)

It is also not disputed that currently, Student is protected under Section 504 of the Rehabilitation Act of 1973 (Section 504), which provides in part, that “[n]o otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....”[[21]](#footnote-21)

Section 504 provides that, “[f]or the purposes of this section, the term ‘program or activity’ means all of the operations of ... a local educational agency ... or other school system....”[[22]](#footnote-22)

In contrast with the IDEA, Section 504 is a discrimination statute. Nevertheless, Section 504 and the IDEA both include a FAPE requirement.[[23]](#footnote-23) The IDEA and Section 504 FAPE requirements are similar but not identical.[[24]](#footnote-24) Section 504 regulations provide that adopting an IEP sufficient to satisfy the IDEA will also satisfy the FAPE requirements of section 504.[[25]](#footnote-25)

**B. Child Find Standards**

I now turn to the specific legal requirement at issue in the instant dispute, which is CBDE’s responsibilities for so-called “child find” under Massachusetts law, the IDEA and Section 504.

I begin with the Massachusetts special education statute, which includes a requirement that “the school committee of every city, town or school district shall identify the school age children residing therein who have a disability, as defined in section 2, diagnose and evaluate the needs of such children, propose a special education program to meet those needs”.[[26]](#footnote-26) The Massachusetts Department of Elementary and Secondary Education special education regulations do not specifically address child find considerations.

The IDEA includes the following similar requirements:

All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.[[27]](#footnote-27)

The regulations under the IDEA provide a substantially-similar mandate as the language quoted above,[[28]](#footnote-28) as well as the following additional requirement:

Other children in child find. Child find also must include--

(1) **Children who are suspected of being a child with a disability under §300.8 and in need of special education**, even though they are advancing from grade to grade. [Bold type face added.][[29]](#footnote-29)

In accordance with these standards, “courts have held that a state's child find duty is triggered when it has a reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability.”[[30]](#footnote-30) The court decisions make clear, and it is not disputed by CBDE (see page 7 of its closing argument), that this obligation applies to a school district regardless of whether the parent (or anyone else on behalf of the student) has actually requested special education eligibility or services.[[31]](#footnote-31)

Similarly, under Section 504, a school district has an affirmative duty to “establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards”.[[32]](#footnote-32) As with the IDEA, this duty under Section 504 is often referred to and understood as a school district’s “child find” obligation.[[33]](#footnote-33) At least one court has read the IDEA child find obligations and Section 504 child find obligations as providing essentially the same obligations: “School districts have a continuing obligation under the IDEA and § 504 to identify and evaluate all students who are reasonably suspected of having a disability under the statutes.”[[34]](#footnote-34)

It may be noted that the Massachusetts, IDEA and Section 504 child find standard differ somewhat from each other. The IDEA child find standard reflects the IDEA’s eligibility standards of requiring both a disability and the need for special education services as a result of that disability.[[35]](#footnote-35) However, the IDEA also requires that state educational standards, which exceed the federal standards, must also be satisfied as part of IDEA requirements.[[36]](#footnote-36) Massachusetts special education eligibility standards are met if a disabled student needs a related service to access the curriculum even though special education services may not be required.[[37]](#footnote-37) This effectively broadens the scope of the IDEA child find inquiry to those students who are suspected of having a disability and in need of *either* special education services *or* related services. This is because the sole purpose of child find requirements is to identify students who may be eligible under special education laws. In sum, the IDEA and Massachusetts child find standards, when read together, require referral for evaluation when a student is suspected of being a child with a disability under and in need of special education or a related service.

Similarly, as noted above, Section 504 standard focuses on having a disability in combination with either special education or related services. But, there is another difference regarding Section 504. Although Massachusetts and the IDEA use essentially the same standards for defining “disability”, Section 504 uses the term “handicap” which is defined somewhat more generally and broadly than “disability”. The Section 504 definition of handicap includes any “physical or mental impairment which substantially limits one or more major life activities” (34 CFR 104.3(j)); a physical or mental impairment includes an “emotional or mental illness” (34 CFR 104.3(j)(2)(i)); and a major life activity includes “learning” (34 CFR 104.3(j)(2)(ii)).

**C. Compensatory Damages under Section 504**

The sole purpose of the instant Decision is to make findings relevant to Parents’ claims for money damages. I therefore consider the legal standards relevant to the question of when compensatory damages may be available under Section 504.

In *Nieves-Marquez v. Puerto Rico,* the First Circuit stated there may be a claim for compensatory damages under Section 504 only if the discrimination was “intentional”.[[38]](#footnote-38)  The First Circuit has not directly ruled on the question of how the requisite intentionality may be satisfied in a Section 504 damages claim. Review of court cases generally reveals that the “requisite intent for a Section 504 claim has been measured by both a ‘deliberate indifference’ standard and a ‘gross misjudgment or bad faith’ standard.”[[39]](#footnote-39)

A number of courts have utilized a deliberate indifference test to establish intentionality in a Section 504 dispute.[[40]](#footnote-40) Parents, in their written closing argument (pages 48-49) have urged that I adopt this approach.

Several courts that have applied a deliberate indifference standard have used a two-part test, which requires that an official with authority to address the alleged discrimination has "both knowledge that a harm to a federally protected right is substantially likely, and ... fail[s] to act upon that likelihood."[[41]](#footnote-41) The first element of this two-part test (i.e., knowledge or notice) may be satisfied “[w]hen the plaintiff has alerted the public entity to his need for accommodation (or where the need for accommodation is obvious, or required by statute or regulation)”. The second element (i.e., failure to act) is satisfied “by conduct that is more than negligent, and involves an element of deliberateness".[[42]](#footnote-42)

A “deliberate indifference” standard under Section 504 does not require a showing of personal ill will or animosity toward the disabled person since intentional discrimination can be inferred from a defendant's “deliberate indifference”.[[43]](#footnote-43)

In its written closing argument (page 27), CBDE takes the position that, instead of a deliberate indifference standard, a bad faith or gross misjudgment standard applies. For reasons explained below, I agree with CBDE because the First Circuit has indicated a preference for this standard.

In *Nieves-Marquez,* the First Circuitreferenced a deliberate indifference standard by stating simply that"it may be that § 504 claims require some showing of deliberate indifference not required by IDEA".[[44]](#footnote-44) This would appear, on its face, to indicate that the First Circuit would likely apply a deliberate indifference standard. However, in support of this quoted statement, the First Circuit Court cited only to the Fourth Circuit’s decision in *Sellers by Sellers v. School Bd. of City of Mannassas, Va*. In *Sellers*, the Fourth Circuit held: “We agree with those courts that hold that either bad faith or gross misjudgment should be shown before a § 504 violation can be made out, at least in the context of education of handicapped children.”[[45]](#footnote-45) In addition, the First Circuit, in its discussion of discriminatory animus towards learning disabled children in *Colin K. by John K. v. Schmidt*, 715 F.2d 1, 9 -10 (1st Cir. 1983), cited to *Monahan v. Nebraska*, 687 F.2d 1164, 1170-1171 (8th Cir. 1982) for the proposition that discrimination under Section 504 may require “bad faith or gross misjudgment”.

Other Circuit Courts and several federal District Courts (including one Massachusetts federal District Court) have adopted the standard of “bad faith or gross misjudgment” to establish discriminatory animus under Section 504 in the context of a special education dispute.[[46]](#footnote-46)

In *Monahan* (to which the First Circuit has cited with approval; see above) the Eighth Circuit explained its understanding of the gross misjudgment standard:

We do not read s 504 as creating general tort liability for educational malpractice, especially since the Supreme Court, in interpreting the EAHCA [now, the IDEA] itself, has warned against a court's substitution of its own judgment for educational decisions made by state officials. We think, rather, that either bad faith or gross misjudgment should be shown before a s 504 violation can be made out, at least in the context of education of handicapped children. … So long as the state officials involved have exercised professional judgment, in such a way as not to depart grossly from accepted standards among educational professionals, we cannot believe that Congress intended to create liability under s 504.[[47]](#footnote-47)

In a more recent decision, the Eighth Circuit has similarly explained (this time, in slightly different language) that, in order to state a claim under section 504 in the context of education of a disabled student, parents must show that the school district “acted in bad faith or with gross misjudgment by departing substantially from accepted professional judgment, practice or standards as to demonstrate that the persons responsible actually did not base the decision on such a judgment.”[[48]](#footnote-48) I find this to be a useful description of the gross misjudgment standard.

As discussed above, the First Circuit referenced in *Nieves-Marquez v. Puerto Rico* (without explanation) a “deliberate indifference” standard, and it may be useful to consider how the First Circuit has understood this phrase in other contexts. Since the First Circuit has never applied a “deliberate indifference” standard within a Section 504 dispute (other than referencing to *Sellers*), I turn to the First Circuit’s application of this standard in the similar contexts of Title IX and 42 USC 1983.

In the First Circuit’s deliberate indifference cases, it has used language somewhat similar to a gross misjudgment standard—for example, it has explained that deliberate indifference “will be found only if it would be manifest to any reasonable official that his conduct was very likely to violate an individual's … rights”.[[49]](#footnote-49) In other deliberate indifference cases, the First Circuit has provided different explanations, none of which is inconsistent with a gross misjudgment standard—for example, that deliberate indifference “requires a showing that the institution's response was clearly unreasonable in light of the known circumstances”,[[50]](#footnote-50) “requires a showing of greater culpability than negligence but less than a purpose to do harm”,[[51]](#footnote-51) and is “directed at a form of scienter in which the official culpably ignores or turns away from what is otherwise apparent”.[[52]](#footnote-52)

In conclusion, what little guidance that has been offered by the First Circuit indicates a preference for a bad faith or gross misjudgment standard in a Section 504 dispute for purposes of establishing the requisite intentionality, and I will therefore utilize it.

I also note that, as a general rule, a bad faith or gross misjudgment standard is understood to be a higher standard (and therefore more difficult for plaintiffs to meet) than a deliberate indifference standard.[[53]](#footnote-53) Therefore, it may be that if, in the instant dispute, Parents can establish bad faith or gross misjudgment, they could also establish deliberate indifference.

**D. Response to Intervention**

Response to Intervention (RTI) has been raised as a defense by CBDE. I now consider whether, as a matter of law, RTI may be relevant to CBDE’s responsibilities under child find.

CBDE argues that CBDE had the right (and responsibility) to utilize regular education interventions for a period of time so that CBDE could determine whether these interventions would be effective, prior to having a responsibility to refer Student for an evaluation under child find. CBDE takes the position that there is support for its argument within the RTI process as well as Massachusetts law.

Under the IDEA, this issue has been directly addressed in a Memorandum dated January 21, 2011 from the Director of the Office of Special Education Programs (OSEP) of the United States Department of Education to State Directors of Education (OSEP Memorandum).[[54]](#footnote-54) The OSEP Memorandum’s title, which reveals the Memorandum’s conclusion, is as follows: “A Response to Intervention (RTI) Process Cannot Be Used to Delay-Deny an Evaluation for Eligibility under the Individuals with Disabilities Education Act (IDEA)”.

The OSEP Memorandum explained that OSEP “supports State and local implementation of RTI strategies to ensure that children who are struggling academically and behaviorally are identified early and provided needed interventions in a timely and effective manner.”

However, the OSEP Memorandum explained that it “has heard” that some school districts may be using RTI to “delay or deny a timely initial evaluation to determine if a child is a child with a disability and, therefore, eligible for special education and related services”. The OSEP Memorandum then makes clear its opinion that such a practice is not permitted under the IDEA:

The use of RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation, pursuant to 34 CFR 300.304-300.11, to a child suspected of having a disability under 34 CFR 300.8. [OSEP Memorandum, pages 2-3.]

The Office for Civil Rights of the US Department of Education has likewise concluded under Section 504:

Although the initiation of RTI strategies may have been justified to identify promising instructional strategies to benefit the Student, RTI does not justify delaying or denying the evaluation of a child who, because of a disability, needs or is believed to need special education or related services.[[55]](#footnote-55)

I can find nothing within the relevant federal statute and regulations under the IDEA and Section 504 that casts doubt on these conclusions.

In its closing argument (page 5) and reply brief (page 13), CBDE seeks to rely on Massachusetts law that arguably provides a state-equivalent to RTI. CBDE points out, correctly, that M.G.L.A. 71B § 2 provides as follows:

Prior to referral of a school age child for evaluation under the provisions of this chapter, the principal of the child's school shall ensure that all efforts have been made to meet such child's needs within the regular education program. Such efforts may include, but not be limited to: modifying the regular education program, the curriculum, teaching strategies, reading instruction, environments or materials, the use of support services, the use of consultative services and building-based student and teacher support and assistance teams to meet the child's needs in the regular education classroom. [Emphasis supplied.]

CBDE appears to rely on this statutory language to permit CBDE to delay a referral for evaluation under special education and Section 504 for a period of time while it provides regular education services and accommodations.

However, the next sentence of the Massachusetts statute makes clear that “[s]uch efforts [to meet a student’s needs within the regular education program] and their results … shall not be construed to limit or condition the right to refer a school age child for an evaluation under the provisions of this chapter.” Similarly, the IDEA precludes Massachusetts from adopting state educational standards that diminish the rights and protections under the IDEA.[[56]](#footnote-56)

Therefore, I decline to interpret Massachusetts law as diminishing Student’s rights under child find, and I therefore find that RTI does not, in any way, diminish Student’s state and federal rights under child find.[[57]](#footnote-57)

In sum, I conclude that RTI does not provide a viable defense to a child find violation, and I therefore do not consider it further.

**VII. FINDINGS**

**A. Introduction**

For reasons explained within my February 24, 2011 ruling on CBDE’s first motion to dismiss (discussed above in the Procedural Background part of this Decision), my findings in this Decision are comparable to those in a compensatory education dispute involving alleged child find violations. I will limit my findings to whether child find violations occurred and, if so, what educational harm, if any, was caused by the violations. As used in this Decision, the term “educational harm” is intended to be broad enough to include social, emotional, behavioral and academic considerations, but only to the extent that they impacted Student’s learning.[[58]](#footnote-58)

After careful consideration of the entire evidentiary record and the comprehensive and helpful briefs of the parties, I make the findings set forth below. In making these findings, I consider the facts that were actually known by CBDE at the time in question; and for purposes of determining child find violations (but not for purposes of determining whether standards of compensatory damages were met under Section 504), I also consider facts that CBDE reasonably should have known at the time in question.

**B. Violation of Child Find Obligations**

I first consider whether, prior to Student’s disclosure of rape on March 12, 2009, what was known by CBDE or reasonably should have been known about Student provided a sufficient basis to conclude that, under child find, CBDE had an obligation to refer Student for an evaluation for special education or Section 504 eligibility.

During the fall and winter of her 2008-2009 school year, it was apparent to the Guidance Counselor that Student was exhibiting substantial emotional and behavioral difficulties. Student’s sadness and anger included verbal outbursts, leaving class without permission, uncontrollable crying in class, and uncontrollable anger. Although the general kinds of emotional and behavioral difficulties did not seem to change over the course of the school year, by January 2009, Student was exhibiting her anger and sadness more frequently and in more extreme forms—for example, becoming more vocal, demanding and pushy. In January, she had an explosion, pushing and shoving another girl, and yelling and screaming at her in the hallway at school. Testimony of Guidance Counselor.

These difficulties, that were known to CBDE at the time, are summarized within CBDE’s answers to Parents’ interrogatories, where CBDE responded as follows to the request to describe any “aberrant behavior [CBDE] witnessed [Student] exhibit from September 2008, until the time of her placement”:

During the fall and winter of 2008-2009, [Student] exhibited mood swings and outwardly moody behavior. [She] also exhibited excessive, uncontrolled, displaced anger reactions involving peers, teachers, and authority figures. She was highly socially distracted. She was frequently texting others and using earphones to listen to music when she should have been paying attention. She was often angry at someone, usually another girl or her mother, according to her guidance counselor, and she would raise her voice and swear over [social issues]. She also became angry in class and would storm out, often find her way to the Guidance Office to [the Guidance Counselor or School Adjustment Counselor] for de-escalation. [Exhibits P-D, S-2 (page 12).]

By February 2009, CBDE had referred Student to an Anger Management Program. CBDE’s answers to Parents’ interrogatories explained that the in-school behavior which was known to CBDE and which led to the referral included verbal outbursts at others, leaving class without permission, disciplinary record of in-school behavioral incidents, Student’s acknowledgement that she had difficulty controlling her anger reactions, and her test scores on the State-Trait Anger Expression Index on February 27, 2009. Testimony of School Adjustment Counselor; exhibits P-D, S-2 (page 4).

It is not disputed that Student’s emotional and behavioral difficulties were negatively impacting her ability to access make educational progress, and that this was known not only to Student’s teachers but also to the Guidance Counselor and Assistant Principal. Testimony of Guidance Counselor, Assistant Principal. For example, on January 28, 2009, the Guidance Counselor wrote an email to Mother stating:

I am concerned about [Student], however, being “stuck” in the grieving process. Every time [Student] has an issue, it seems that her cousin‘s death is somehow at the root of it. Everyone grieves in their own time and own way, but I believe this has really gotten in the way of her progress in school. [Exhibit P-ZZ (page 45) (emphasis supplied).]

I therefore must consider whether Student’s difficulties warrant a finding that CBDE violated its child find responsibilities. In order to answer this question, I begin with the question of whether, at that time, it should have been suspected that Student had a disability that was negatively impacting her progress in school.

CBDE’s expert, Dr. Cassens, testified that Student’s academic, emotional and behavioral difficulties during the fall and winter of the 2008-2009 school year, appeared to be the result of a combination of factors, including her grieving the loss of her beloved cousin, Student’s somewhat emotionally fragile, oppositional and volatile personality that had been in evidence since middle school, and her use of marijuana.[[59]](#footnote-59)

Dr. Cassens further explained that prior to her cousin’s death in July 2008, Student was using marijuana, which alone could cause depression. She also noted that Student’s long-demonstrated oppositional behavior and growing discord with her Mother likely made it difficult for her to fully utilize the emotional support that was available from Parents after her cousin’s death. (Dr. Cassens and Mother testified that after the cousin’s death and prior to the rape disclosure, Student’s family relationships deteriorated.) Dr. Cassens explained that all of this likely impacted Student’s emotions and behaviors in a way that would make it unreasonable for CBDE staff to suspect, at this point in time, that Student had a disability. Testimony of Cassens.[[60]](#footnote-60)

Parents’ expert, Dr. Bainbridge, lent support to Dr. Cassens’ opinion regarding the difficulty, at that time, of suspecting that Student had a disability that would qualify Student for special education services. Dr. Bainbridge reviewed documents that made clear Student’s behavioral, emotional and academic difficulties that were known to CBDE (and that are essentially undisputed) during the fall and winter of the 2008-2009. See, for example, exhibit P-D (CBDE’s answers to Parents’ interrogatories). And, as is clear from other parts of his testimony and is amply noted in CBDE’s closing argument and reply brief, he was not hesitant to express strong, unequivocal opinions that were highly critical of CBDE staff when he believed that such opinions were warranted. He also has an exceptional breadth and depth of experience reviewing the actions of school districts.[[61]](#footnote-61) Yet, in response to a question from the Hearing Officer, Dr. Bainbridge testified that he did not have enough information to conclude that CBDE should have known, at that time, that Student may have had a special education disability; and he “could understand” CBDE’s belief that Student’s difficulties had not “risen to the level of an IEP”.[[62]](#footnote-62)

Similarly, Dr. Bainbridge’s written report reflects his opinion that CBDE’s child find violation under Section 504 occurred when CBDE had knowledge of the rape. His report explained: CBDE’s violation of Section 504 occurred “after the high school administration was informed … that [Student] had been raped.” Exhibit P-P (page 10).

Dr. Berkowitz, who was an expert witness for Parents, disagreed. She testified that by January 2009, Student’s behaviors and difficulties at school, which were known to CBDE, should have provided sufficient basis to suspect that Student had a disability that was negatively impacting her education. She opined that if Student had been evaluated at this time, she would likely have been diagnosed with acute PTSD and clinical depression (as reflected in her agitation and anger). She also testified that, as of January 2009, Student likely had an “emotional disturbance”, as that term is defined as one of the requisite disabilities under 34 CFR §300.8(c)(4)(i) of the IDEA regulations.[[63]](#footnote-63)

Parents point out, correctly that, as discussed above, child find under the IDEA does not require actual knowledge to trigger child find protections, but rather only a *suspicion* that Student had a disability and was in need of special education or related service. On the basis of Dr. Berkowitz’s testimony, Parents argue thatStudent’s grieving from her cousin’s death was sufficiently substantial and lengthy so that the grief itself should have resulted in a suspected disability. After careful consideration of Parents’ arguments, I am not persuaded for the following reasons.

At the outset I note that I must be careful to assess liability not as to what would have been appropriate for Student in hindsight or on the basis of what an evaluation would likely have revealed, but on the basis of what was known (or reasonably should have been known) at the time in question and on the basis of the context at the time in question.

Dr. Berkowitz’s own report acknowledged the difficulty of understanding Student’s behavior prior to the disclosure of the rape. Her report stated: “At that time, the sexual assault had not been disclosed, so her behavior was not readily understood.” Exhibit P-1 (page 22).

Also, Dr. Berkowitz’s testimony supported the position that Student’s grieving process was somewhat unpredictable and unique to her. More specifically, Dr. Berkowitz testified that, as a general rule, the initial onset, length and severity of symptoms as a result of grief vary substantially from one individual to another, and cannot be easily predicted. Factors such as an adolescent’s personality, emotional stability, coping systems and supports, and relationship with the deceased may have an impact on the symptoms from grieving, as well as the length of the grieving process. Testimony of Berkowitz. This would likely complicate CBDE’s ability to understand whether Student’s grief symptoms might reflect a disability.

CBDE staff testified credibly that a student’s grief does not normally indicate a disability, and that Student’s behavior and difficulties were not atypical of what may happen to a 9th grader who is grieving. CBDE staff reasonably believed that, as with other students who suffer a death in the family and who have other concurrent issues that may diminish their adapting skills, Student appeared to be suffering from a combination of temporary factors, including grief, that were impacting her education rather than from a disability as that term is defined within special education law. Testimony of Assistant Principal, School Adjustment Counselor, Assistant Special Education Director.

On the basis of this evidence, I summarize my findings as follows. Student appeared to be in a process of grieving from the loss of her beloved cousin, and this interfered with her learning. Even though Student’s grieving was protracted, it was not sufficient for CBDE to suspect that she had a disability that would make her eligible for special education services or Section 504. This is because there were a number of additional factors that likely were contributing to her difficulties at school—that is, Student’s somewhat limited coping skills, her use of marijuana, her deteriorating relationship with her Mother, her pre-existing emotional/behavioral difficulties in 7th and 8th grades, and her general lack of commitment towards school work. Without any reason to know of (or even to suspect) Student’s rape, I find Dr. Cassens, Dr. Bainbridge and CBDE staff persuasive that this combination of factors made it unreasonable to expect that, at that time, CBDE should have suspected that Student’s emotional and behavioral difficulties indicated that she had a disability.[[64]](#footnote-64)

For these reasons, I conclude that CBDE did not violate Student’s child find rights prior to the disclosure of the rape. However, once Student disclosed the rape to CBDE on March 12, 2009, the disclosure substantially expanded CBDE’s knowledge of the likely source of her difficulties in school and the likely long-term nature of Student’s emotional and behavioral deficits.

Courts have occasionally noted, in general, the likely severe, traumatic impact of rape.[[65]](#footnote-65) And in this particular case, the testimony of the School Adjustment Counselor (who has significant expertise regarding the impact of rape on adolescents) leaves no doubt that CBDE understood immediately after the rape disclosure that Student had been traumatized.[[66]](#footnote-66)

Importantly, the rape was by a CBDE employee who, in his role as Student’s [CBDE employee], had been in a position of authority over Student (while she was engaged in this [activity]) and in a relationship of trust with Student. Student’s disclosure to CBDE also made clear that Student was not seeking a sexual relationship with the CBDE employee. It was acknowledged by the School Adjustment Counselor in his testimony and it is undisputed by CBDE staff that this combination of factors intensified the likely trauma to Student. Testimony of Assistant Principal, School Adjustment Counselor, Guidance Counselor.[[67]](#footnote-67)

Dr. Bainbridge testified persuasively that the disclosure of rape by a school employee who was in a position of authority over Student should have led CBDE staff to immediately know that Student likely had been traumatized and that, as a result, she would likely have a disability for purposes of special education services. More specifically, Dr. Bainbridge testified that “the probability of a child being raped by a school professional having posttraumatic stress disorder would be about 90%.” Testimony of Bainbridge; transcript of 9/13/11 (page 70). He further testified that a “rape case is bad enough. But when a child is raped and violated by an [CBDE employee], … and a person who is supposed to be an authority figure over them, it has a great propensity to cause trauma.” Testimony of Bainbridge; transcript of 9/13/11 (page 86). He emphasized the clarity of his position: “I think it's a black-and-white issue. I think there is no situation when a child is raped by a staff member that the special education staff should not jump in to the business of creating an IEP and a plan for this child that has been violated by the school district itself.” Testimony of Bainbridge; transcript of 9/13/11 (page 91).[[68]](#footnote-68)

It is also important that the rape occurred relatively soon after the death of Student’s beloved cousin. It is not disputed that her cousin’s death in July 2008 turned out to be a devastating loss for Student, sending her into an emotional tailspin. Testimony of Cassens, Berkowitz. Student was still distraught from her cousin’s death at the time when she was raped (probably in November 2008). It is not disputed that this likely magnified the traumatic impact of the rape. See, for example, the following excerpt from Dr. Cassens’ testimony:

Question from the Hearing Officer: “What does the disclosure of the rape tell you about the possibility or likelihood that [Student] had a disability as a result of the trauma?”

Dr. Cassens’ response: “Common sense would tell me that two traumas within a year would be significant, especially in an adolescent who was very vulnerable.” [Transcript, 11/30/11 (page 249).]

Also, it would have been sufficiently clear once the rape was disclosed that after the rape and prior to the suspension of the CBDE employee, Student would have been further exposed to the [CBDE employee] since he was present in the High School. During this time period, the [CBDE employee] continued to text Student. Student likely found school to be an unsafe place because of the possibility of a further sexual advancement by the CBDE employee, thereby exacerbating her trauma. Testimony of Mother, Berkowitz.

CBDE’s own expert (Dr. Cassens) supported the conclusion that Student should have been referred for special education testing as a result of the rape. Dr. Cassens testified as follows:

Q. Do you know that the school has a legal obligation to request that testing?

A. For what?

Q. For special education services.

A. I do, but the question was special education to be requested for grief counseling?

That doesn't seem appropriate to me. Was it -- should it have been for special education as a result of a rape by a school professional or paraprofessional? The answer is yes on that one. … [Transcript, 11/30/11 (page 248).][[69]](#footnote-69)

The knowledge of Student’s rape immediately provided CBDE information that Student had likely been seriously traumatized as a result of her being raped by a person in a position of trust and authority, particularly as this followed relatively quickly after the death of Student’s cousin, and that Student may have PTSD; that the trauma was the likely cause of her emotional and behavioral difficulties that were interfering with her learning (discussed extensively above); and that these emotional and behavioral difficulties would likely require special education and related services to allow Student to participate effectively in her education. Testimony of Bainbridge, Berkowitz.

In response, CBDE points to the testimony of the School Adjustment Counselor, who has significant experience working with trauma survivors and who was providing counseling to Student at the time.[[70]](#footnote-70) He testified that after the rape disclosure:

I didn't see some of the classic benchmarks of PTSD during the school day. I saw a continuation of some of the volatility, upsetment, conflicts. That's what I saw with her. In school again, there wasn't a dramatic bang or a spike that was dramatic. It was a continuum. And I knew that [the rape] may exacerbate some things. A dramatic spike I didn't see.” Transcript, 10/25/11 (pages 89-90).

The School Adjustment Counselor was a careful and credible witness, and I find his testimony persuasive that on the basis of what he observed or learned regarding Student, she was not exhibiting “some of the classic benchmarks of PTSD”. I also accept the implications of this testimony, which are that, on the basis of what information was available to CBDE at that time, it would be inappropriate to conclude that Student had PTSD.

However, there is nothing within the School Adjustment Counselor’s testimony that rebuts Dr. Bainbridge’s testimony that the rape and the circumstances surrounding it would have likely precipitated PTSD in the vast majority of cases. Rather, on the basis of what was observed by the School Adjustment Counselor, it can only be stated that it would be quite difficult to know with any certainty whether or not Student actually had PTSD.[[71]](#footnote-71) As Dr. Berkowitz’s unrebutted testimony made clear, it was only through a comprehensive evaluation that CBDE could determine the nature and extent of Student’s emotional deficits that were now linked to the rape.

Moreover, even without a diagnosis of PTSD, the School Adjustment Counselor and Dr. Cassens agreed that Student had been traumatized. Ultimately, the question is whether, on the basis of this trauma and Student’s history of emotional and behavioral difficulties, CBDE should have suspected that Student had a disability for purposes of special education eligibility and Section 504, not whether Student likely had PTSD. As discussed below, the likely disability that would qualify Student for special education services was “emotional disturbance” not PTSD. Testimony of Cassens, School Adjustment Counselor.

Finally with respect to the testimony of the School Adjustment Counselor that he did not see any dramatic change in behavior, I note the testimony of the Guidance Counselor and Assistant Principal that from the likely time of the rape (November 2008) going forward through March 2009, the frequency of Student’s behavioral and emotional difficulties increased, the intensity of some of Student’s emotional and behavioral difficulties increased, and Student was spending more time outside of the classroom. On this point, I find the testimony of the Guidance Counselor and Assistant Principal (rather than the testimony of the School Adjustment Counselor) to be persuasive.

I now turn more specifically to the disability (under the IDEA and Massachusetts special education law) that Student most likely met immediately after the rape disclosure. Dr. Berkowitz testified that even prior to the rape disclosure CBDE should have suspected that Student’s difficulties reflected a disability of “emotional disturbance” as that term is defined as one of the requisite disabilities under 34 CFR §300.8(c)(4)(i) of the IDEA regulations.

The IDEA regulations provide that a student meets the definition of “emotional disturbance” by “exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely that adversely affects a child’s educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal school problems.”

I focus, in particular on subpart (C) above—that is, whether Student was “exhibiting” “[i]nappropriate types of behavior or feelings under normal circumstances” “over a long period of time and to a marked degree that adversely that adversely affects a child’s educational performance”.

As discussed above, it has been acknowledged by CBDE (through its answers to Parents’ interrogatories) that during the fall and winter of 2008-2009, Student “exhibited mood swings and outwardly moody behavior”, “exhibited excessive, uncontrolled, displaced anger reactions involving peers, teachers, and authority figures” and “was often angry at someone, usually another girl or her mother”. “She also became angry in class and would storm out, often find her way to the Guidance Office … for de-escalation.” Exhibits P-D, S-2 (page 12). It is not disputed that these were “inappropriate types of behavior and feelings” that were occurring “under normal circumstances” at the High School. In addition, it is not disputed that it was well known to the School Adjustment Counselor, Assistant Principal and Guidance Counselor that by the time of the rape disclosure on March 12, 2009, these behaviors and feelings had been occurring for more than six months, which is “over a long period of time”, that they were occurring “to a marked degree”, and that they were “adversely affect[ing] [Student’s] educational performance” at the High School. Importantly, the rape disclosure also made clear that these behaviors and feelings were not simply the result of grieving, but rather likely reflected a traumatic experience with long-term implications. Testimony of School Adjustment Counselor, Assistant Principal and Guidance Counselor, Berkowitz; exhibit P-ZZ (page 45) (e-mail).

For these reasons, I find that it should have been apparent at the time of the rape disclosure that Student likely had a disability of “emotional disturbance” for purposes of child find under special education law. For the same reasons, it was likely that Student had a “mental impairment which substantially limits one or more major life activities” (which, in this case, was “learning”) under Section 504.[[72]](#footnote-72)

I now turn to the question of whether the second prong of the child find standard was met under the IDEA and Section 504—that is whether it should have been suspected that Student needed special education or related services as a result of her disability.

It cannot be seriously disputed that as a result of this disability, Student at least required services that are properly considered to be “related services” under special education law and probably special education services. By January 2009, CBDE had referred Student to the School Adjustment Counselor for counseling and Student was regularly receiving this counseling. It is not disputed that this counseling was needed for Student to access the curriculum and make effective progress.

As the School Adjustment Counselor testified, the counseling service that he provides is properly characterized as a special education service when it is provided to a special education student.

The IDEA regulations make clear that he is correct. The IDEA regulatory definition of “related service” (found at 34 CFR §300.34(a)) states:

Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training. [Emphasis supplied.]

These same regulations (at 34 CFR §300.34(c)(2)) further provide: “Counseling services means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.” It is not disputed that the School Adjustment Counselor is a qualified social worker. Testimony of School Adjustment Counselor.

Thus, the evidence is persuasive that on the basis of the information known to CBDE immediately following the rape disclosure on March 12, 2009, CBDE should have suspected that Student had a disability resulting in the need for special education or related services, thereby triggering its child find responsibilities under the IDEA, Section 504 and Massachusetts law. For these reasons, I find that CBDE violated child find in March 2009 when it did not refer Student for evaluation to determine eligibility under special education and Section 504.[[73]](#footnote-73)

**C. Compensatory Damages Standard under Section 504**

Having found that CBDE violated child find, I turn to the question of whether this violation satisfied the compensatory damages intentionality standard of bad faith or gross misjudgment, discussed in the Legal Standards part of this Decision.

To address this part of the dispute, I turn to the testimony of CBDE employees who explained why no referral was made under child find. I have not considered this testimony earlier in this Decision because it bears no relevance to the question of whether the child find legal standards were met—for example, evidence that CBDE had Student’s interests in mind, were working closely with her, and never purposefully denied her rights under child find is not relevant to the question of whether CBDE complied with child find standards under Massachusetts law, the IDEA and Section 504. However, the testimony of CBDE employees is relevant to my consideration of whether Parents have satisfied the intentionality requirements for compensatory damages under Section 504.

The CBDE Guidance Counselor, School Adjustment Counselor and Assistant Principal credibly testified, and it is not disputed, that Student was being provided therapy from an outside agency to address issues regarding the rape (and that it would not have been appropriate for CBDE staff to also provide therapy regarding the rape), that Student was being provided family therapy from an outside agency, that Student participated in an anger management group, and that CBDE was providing guidance counseling, adjustment counseling, and academic support and accommodations. The CBDE Guidance Counselor, School Adjustment Counselor and Assistant Principal testified that, in their opinion, CBDE could not provide anything further (through either regular education or special education) that would benefit Student.

In addition, the School Adjustment Counselor was appropriately mindful that Student strongly desired to remain within the general education High School environment, and that there was nothing more that could be done to help her accomplish this goal. The School Adjustment Counselor also testified credibly that prior to considering something more restrictive (such as a substantially-separate, therapeutic placement), it was in Student’s best interests for CBDE to continue the present, regular education services and interventions (combined with the outside therapy) for a period of time to determine whether they could be successful. The School Adjustment Counselor, who has an extensive clinical background working with trauma survivors, further testified that he believed he had sufficient knowledge of Student and the causes of her emotional and behavioral deficits so that further evaluation (that would have occurred through an initiation for special education eligibility) would not be useful to him, and that he also took into consideration Student’s general resistance to therapy for her emotional difficulties. Testimony of Guidance Counselor, School Adjustment Counselor, Assistant Principal.

I agree with CBDE that the Guidance Counselor and School Adjustment Counselor were fully engaged with and providing useful counseling services and support to Student. The Guidance Counselor and School Adjustment Counselor were fully committed to helping Student through this difficult period of time and were seeking to address her academic, emotional and behavioral needs to the best of their abilities. It is not disputed that they appropriately relied upon specialized rape counseling by a private agency to address directly Student’s rape experience.

In her testimony, the Superintendent (who had had a reasonable basis for understanding what CBDE staff had done and why they had done it) summarized the reasons that no referral had been made by CBDE staff and, at the same time, she accepted CBDE’s responsibility for its failure as follows:

Ms. Adams: So we're talking about the time immediately after the rape or the disclosure in March of 2009 to May of 2009. …

Ms. Adams: I'm asking what she knew at that time. … Did you know why at that time no one had referred her for an evaluation?

Superintendent: No one thought of it. It was not a question of did someone think about it and decide not. It just didn't come up. If people had thought about it or if they thought that it would be something that would have helped [Student], they would have done it.

Ms. Adams: Isn't that a failure? ….

Ms. Ehrens: Failure of what? ….

Ms. Adams: Isn't that a failure in terms of a number

of people's responsibilities under the IDEA and Section 504?

Superintendent: In hindsight, yes. But at the time, people felt that they were doing everything possible to support [Student] and her family. … if they thought referring her would have helped her, they would have done that. [Transcript 11/28/11 (pages 334-355).]

I fully credit the Superintendent’s testimony in this regard. I found the Superintendent to be a careful, candid, forthright and credible witness.

On the basis of this evidence, I make the following findings. CBDE staff was fully engaged in working with Student to ameliorate her difficulties to the best of their abilities. No decision was made to refer Student for evaluation because it simply did not occur to CBDE staff to consider making the referral. CBDE staff would likely have referred Student for evaluation under special education or Section 504 if they had considered it and believed that it would have been in Student’s interests. Also, for reasons discussed later in this Decision, CBDE staff had a reasonable basis for concluding in March 2009 that eligibility for special education services (or Section 504) would not likely lead to different or better services than she was already receiving, at least over the short term.

I begin the analysis of the Section 504 intentionality standard by concluding that, with respect to CBDE’s child find violation, there was no bad faith by CBDE. CBDE’s violation was not purposeful—that is, CBDE never made a deliberate choice to exclude Student from special education services and did not knowingly deny her rights under child find. Also, CBDE did not ignore Student—rather, multiple CBDE staff recognized that Student needed help and worked with her to address her emotional and behavioral difficulties. The question remains, however, whether the child find violation meets the “gross misjudgment” component of the Section 504 intentionality standard.

As discussed above in the Legal Standards part of this Decision, to satisfy the gross misjudgment standard, Parents must persuade me that CBDE departed substantially from accepted professional judgment, practice or standards so as to demonstrate that the persons responsible actually did not base their decision on such a judgment. I will consider this issue on the basis of what was actually known by CBDE by the time of the rape disclosure in March 2009, rather than on the basis of what CBDE knew or should have known at that time.

I address this issue in two parts. First, I consider whether it was gross misjudgment for CBDE not to make *any* decision as to whether or not Student should be referred for evaluation under child find.

By March 2009, CBDE knew that Student had been traumatized by a rape, and that the traumatization was likely exacerbated by the fact that the rape was committed by a CBDE staff person who was in a position of authority and trust, and by the fact that the rape followed the death of Student’s cousin.

CBDE also knew that for more than six months while attending the CBDE High School, Student “exhibited mood swings and outwardly moody behavior”, “exhibited excessive, uncontrolled, displaced anger reactions involving peers, teachers, and authority figures” and “was often angry at someone, usually another girl or her mother”. “She also became angry in class and would storm out, often find her way to the Guidance Office … for de-escalation.” Exhibits P-D, S-2 (page 12).

CBDE also knew that these emotional and behavioral difficulties were adversely affecting Student’s educational performance at the High School and that their frequency was increasing, with the result that Student was spending more time out of class. Testimony of School Adjustment Counselor, Assistant Principal, Guidance Counselor; exhibit P-ZZ (page 45) (e-mail).

CBDE witnesses agreed that each member of the Child Study Team (CST) bore general responsibility to refer students for an evaluation under child find where appropriate to do so. The CST members included the School Adjustment Counselor, Guidance Counselor, School Psychologist and Assistant Principal. CBDE staff testified that, as a practical matter, the CST served as the primary gateway for Students to be referred for special education services, other than parent referral. The School Adjustment Counselor, Guidance Counselor, School Psychologist and Assistant Principal had all been trained regarding their obligations under child find, and the School Adjustment Counselor and School Psychologist had substantial experience in the area of special education evaluation and services. Testimony of School Adjustment Counselor, Guidance Counselor, School Psychologist and Assistant Principal.

Under child find mandates, “School districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction. Instead, school systems must ensure that all children with disabilities residing in the State ... regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated.”[[74]](#footnote-74) “School districts have a continuing obligation under the IDEA and § 504 to identify and evaluate all students who are reasonably suspected of having a disability under the statutes.”[[75]](#footnote-75) As explained by the Supreme Court, child find requirements reflect “Congress' acknowledgment of the paramount importance of properly identifying each child eligible for services.”[[76]](#footnote-76)

Also, as explained in a Memorandum dated January 21, 2011 from the Director of the Office of Special Education Programs of the United States Department of Education to State Directors of Education (page 1),

The provisions related to child find in [the IDEA] require that a State have in effect policies and procedures to ensure that the State identifies, locates and evaluates all children …. It is critical that this identification occur in a timely manner and that no procedures or practices result in delaying or denying this identification. [Emphasis supplied.][[77]](#footnote-77)

In sum, CBDE had an on-going, affirmative responsibility under the law to monitor all of its students and refer those for evaluation when a disability and need for special education or related services are suspected. Simply stated, child find mandates did not permit CBDE simply to ignore its responsibilities to consider making a referral for an evaluation in light of what was known about Student at the time. For these reasons, I find that CBDE’s failure by omission—that is, not to make any decision whether to refer Student for evaluation under child find—was not, and could not have been, based upon an accepted professional judgment, practice or standard under the factual circumstances of this dispute.

Second, I consider whether a decision by CBDE staff not to refer Student for an evaluation immediately following the rape disclosure would have been (or could have been) consistent with an accepted professional standard or judgment.

The testimony (summarized above) of Dr. Bainbridge and Dr. Berkowitz strongly supports the proposition that, based upon what was known to CBDE at the time of the rape disclosure, it would be manifest to any reasonable educational professional that Student had a suspected disability resulting in the need for special education or related services and that a decision by CBDE not to refer Student for a special education evaluation would therefore very likely violate Student’s rights under the IDEA and Section 504.[[78]](#footnote-78)

In response, CBDE relied on the testimony of the School Adjustment Counselor that Student, at the time of the rape disclosure, did not demonstrate “classic” signs of PTSD. I have explained above (see text accompanying footnotes 70 and 71) why this testimony does not support a professional judgment that Student should not have been suspected of having a disability under the IDEA and Section 504 and why his testimony bears little relevance to child find standards.[[79]](#footnote-79)

Also, as discussed above, CBDE’s own expert witness (Dr. Cassens) testified that referral should have been made following the rape disclosure. Dr. Cassens’ testimony in this regard is in contrast to her testimony defending CBDE’s not making a referral prior to the rape disclosure.

Rather than directly argue this point further, CBDE (throughout its closing argument and reply brief) relies heavily on the proposition that Student would have attained no benefit from different or additional services if found eligible under special education or Section 504, and that CBDE would have referred Student for an evaluation if CBDE had considered the question of whether a referral should be made under child find and had concluded that the referral would benefit Student.

With respect to CBDE’s argument, I agree (as discussed below when I specifically consider educational harm) that over a certain period of time, Student would have not likely received substantially different or additional services under special education. Nevertheless, as a result of Student’s not being referred for an evaluation, there were important procedural protections that were denied Student and her Parents even during that period of time when no different or additional services would likely have been provided (see discussion below). And, as also discussed below, over time, it became evident that different or additional special education services were needed.

A more fundamental weakness to CBDE’s argument is that it pertains to the nature and extent of the educational harm as a result of CBDE’s not referring Student for an evaluation and to CBDE’s motivations, rather than to the question of whether CBDE made a decision on the basis of the legal and professional standards under child find. Simply stated, child find requires that decisions be made on the basis of whether there is a suspected disability that may require special education or related services, rather than on the basis of whether the educator believes that referral for an evaluation would benefit Student. In short, the evidence does not support the existence of any accepted professional judgment or standard upon which CBDE may rely.

On the basis of this review of the evidence, I find that, within the circumstances known to CBDE immediately after the rape disclosure, there was no accepted professional basis for CBDE staff to conclude that Student should not be suspected of having an emotional disturbance disability under special education (or an emotional impairment that substantially impaired one or more life activities under Section 504), requiring special education or related services.

For these reasons, I conclude that with respect to the time period immediately following disclosure of the rape in March 2009, Parents have satisfied the gross misjudgment standard regarding CBDE’s child find violation, thereby meeting the intentionality standards that the First Circuit would likely use for compensatory damages under Section 504.[[80]](#footnote-80)

For the same reasons, I also conclude that, to the extent that they are relevant to Parents’ claims for compensatory damages under Section 504, the “deliberate indifference” standards utilized by the First Circuit in the related areas of Title IX and 42 USC 1983 quoted within the Legal Standards part of this Decision (see the text accompanying footnotes 49-52) have been satisfied.

In order to provide further guidance to the parties (and, possibly, any court reviewing my findings), I continue the compensatory damages analysis by considering what happened from March 2009 through February 2010 when many, additional “red flags” appeared regarding Student’s disability and need for a special education evaluation.[[81]](#footnote-81)

As discussed in greater detail in the Factual Background part of this Decision, on January 20, 2010, Student was found to have increased risky and self-injurious behaviors, poor judgment, assaultive behaviors, and increased depressive symptoms, and the next day was admitted to a residential psychiatric program. The discharge summary stated that the treating psychiatrist diagnosed Student as having PTSD and a Mood Disorder, NOS. The discharge summary was faxed to the CBDE Guidance Counselor within a day or two after the discharge of February 3rd and was shared with the CBDE School Adjustment Counselor very soon thereafter. Testimony of Guidance Counselor, School Adjustment Counselor; exhibits P-9, P-10, P-11, S-51.

When given an opportunity by the Hearing Officer to explain or justify why no referral for evaluation was made upon CBDE’s receipt of the psychiatric discharge summary in February 2010, the School Adjustment Counselor declined to do so.[[82]](#footnote-82)

By February 2010, CBDE’s regular education services had been provided for nearly a year, without success. Student’s underlying emotional and behavioral disabilities continued to compromise her ability to access and succeed in school.

As is reflected in the testimony of Dr. Cassens, the School Adjustment Counselor and the former CBDE Director of Special Education, these events significantly increased the need for (and made even more obvious the responsibility to make) a referral for a special education evaluation under child find.

Dr. Cassens testified: “But I can say certainly when she started cutting and certainly when she had a hospital admission, absolutely, there should have been an evaluation without any question.” Transcript, 11/30/11 (page 252).

CBDE’s former Director of Special Education testified that by now, Student should have been referred for an evaluation because of the intensity of her special education needs.

I also note that the Guidance Counselor testified that, by a substantially earlier date (May 2009), Student had a disability that entitled her to be referred for evaluation under the IDEA and Section 504.[[83]](#footnote-83) The Guidance Counselor also testified that by late fall of 2009, she noted that Student appeared, for the first time, to be depressed.

I do not suggest that even by February 2010, CBDE was acting in bad faith or that it had made a deliberate choice not to refer Student for a special education evaluation or that it was purposefully denying Student her rights under child find or that it was simply ignoring Student’s needs. But by this time, in light of Student’s documented diagnosis of several disabilities, her psychiatric residential placement, and her very long, continuing failure at school as a result of her emotional and behavioral difficulties, I find that CBDE’s failure to make a child find referral went even further past any accepted professional standard or judgment. What began in March 2009 as a failure by omission, had become a blatant disregard of Student’s rights under child find.

**D. Educational Harm**

In determining the extent of educational harm, I first establish the time period during which Student was actually harmed by CBDE’s child find violation. I have already found that upon learning of the rape in March 2009, CBDE should have immediately referred Student for a special education evaluation. Pursuant to Massachusetts special education regulations, this would have resulted in a process of evaluation, eligibility determination and initial IEP development that would have been completed within 45 school days (“school days” are defined to mean any day that students are in attendance at school for instructional purposes) from receipt of a parent’s consent for evaluation.[[84]](#footnote-84) Once a parent accepts part or all of the services proposed within the IEP, the “school district shall implement all accepted elements of the IEP without delay”.[[85]](#footnote-85)

Accordingly, if one assumes that CBDE had requested Parents’ consent for evaluation on the day after the disclosure (Friday, March 13, 2009) and assuming that Parents would have signed and returned the consent form on the next school day (Monday, March 16, 2009), CBDE would have had 45 school days, or nine weeks plus a week of school vacation during April and Memorial Day (May 25, 2009) to determine eligibility and propose an IEP, with the result that an IEP would have been proposed on or before Tuesday, May 26, 2009. (This assumes, of course, that Student would have been determined eligible; but on the basis of the above review of the evidence, I believe that this would have been a virtual certainty.) Assuming that Parents reviewed and consented to the IEP by the end of that week, CBDE would have had responsibility to begin services on Monday, June 1, 2009 or very soon thereafter.[[86]](#footnote-86)

Another way of considering the time period during which Student was denied eligibility for special education and Section 504 is to compare when she should have been referred for special education services (March 2009) with when she was actually referred for special education services by Parents (March 2010). Thus, Student essentially lost one year of eligibility.

With respect to May 26, 2009 (when Student should have received a proposed IEP), there is no indication that, at that time, Student should have received extended school year services under the IEP. Accordingly, the special education services would have been provided only for the approximately three weeks of school during the month of June 2009, and then resumed at the beginning of the 2009-2010 school year.

I now turn to the question of what substantive services, supports and accommodations Student would have likely received had she been determined eligible during this timeframe, how this compared with what she actually received, and the likely impact on Student.

I begin by finding that it is reasonably likely that the Guidance Counselor and School Adjustment Counselor are correct that had Student been evaluated and determined eligible for special education services pursuant to the above timeframe, Student would have continued to receive essentially the same kinds of services, supports and accommodations through special education that she had been receiving through general education, at least through the end of the 2008-2009 school year and likely into the beginning of the 2009-2010 school year.

This is because, pursuant to the above assumed timeframes for Student’s being determined eligible and provided an IEP that would have been accepted, at least in part, by Parents, there would have been only part of one school month (June 1, 2009 until the end of the school year) for implementation of these services. This would have likely provided a substantial, practical obstacle to Student’s being transferred into and gaining any significant benefit from different services or a different program that would have ended approximately three weeks later.

Also, short of placing her into a private, therapeutic program (which would be extremely unlikely at this late date in the school year), there was little, if anything, more of benefit that CBDE could offer her through either special education or regular education (for example, substantially-separate services within the High School, such as the CBDE Student Support Center, would have not likely been appropriate for Student); and it seems likely that the general education services and accommodations she was receiving would have continued (but would have been listed as special education related services and accommodations under an IEP), with monitoring to determine whether Student could be successfully educated within the regular education school environment in which she desired to remain. Testimony of Guidance Counselor, School Adjustment Counselor.[[87]](#footnote-87)

Also as discussed in the Legal Standards part of this Decision, the IDEA includes an important principle of educating students within the least restrictive environment possible, Student very much wanted to remain within the general education environment, and it would have been too early to determine that a substantially-separate, therapeutic school was the least restrictive placement that could appropriately allow Student to access her education and make effective progress. Testimony of Mother, School Adjustment Counselor.

Of course, it is possible that had Student been determined eligible for special education after comprehensive evaluations, something else could have been identified that did not then exist and this could have been created to address her particular needs; but without the benefit of these evaluations and an IEP Team meeting, it is simply not possible to know with any certainty whether any such services could have been identified and, if so, what those services would likely have been. In short, there was no probative evidence that different or additional services would have been provided to her through special education or Section 504. Testimony of Guidance Counselor, School Adjustment Counselor.[[88]](#footnote-88)

It also is likely that no different services, supports and accommodations would have been proposed for the beginning of the next school year, but rather the IEP Team would have wanted to wait until September 2009 to determine Student’s needs at that time and decide whether the services being provided (both by CBDE and the private rape counseling services) would effectively assist her to access the curriculum and make effective progress. Testimony of School Adjustment Counselor.

Thus, I find that for the 2008-2009 school year and during approximately the first month of the following school year, it is unlikely that CBDE’s failure to comply with child find requirements caused Student to receive services, supports and accommodations substantially different in kind than what she actually received.

However, as the 2009-2010 school year unfolded, it should have quickly become apparent to an IEP Team within approximately one month after the beginning of the school year that a continuation of the same services and accommodations from freshman year was as inadequate as these services were in freshman year.[[89]](#footnote-89) The IEP Team would then have had a responsibility to re-convene quickly to consider what additional or different services should be provided. As Dr. Berkowitz explained in her report, “[c]ontinuing to offer the same types of supports for such a long period of time, without any appreciable benefit seems highly problematic and ineffectual.” Exhibit P-1 (page 23).

Thus, I find that the responsibility of the Team to propose special education and related services different than or in addition to the educational services and accommodations that she had been receiving likely would have begun approximately six weeks after the beginning of the school year (the six weeks includes approximately one month to determine that Student’s needs were not being met during the 2009-2010 school year and approximately two weeks to convene an IEP Team meeting and propose different or additional services). The need to propose different or additional services would have likely continued and reached its highest point starting in January 2010 when the intensity of Student’s unmet emotional and behavioral difficulties resulted in a series of inpatient admissions.

I now consider the nature and extent of the educational harm that likely occurred as a result of CBDE’s failure to provide appropriate special education and related services from approximately six weeks after the beginning of the 2009-2010 school year until May 20, 2010 when Student was admitted into a residential educational program.

The only probative evidence establishing educational harm came from Dr. Berkowitz’s testimony and report. Dr. Cassens’ testimony and report are also relevant in responding to Dr. Berkowitz. The third expert (Dr. Bainbridge) is not a clinician (see footnote 61, above) and did not provide any probative evidence regarding this issue.

As discussed earlier within the Factual Background part of this Decision, once it became known within the CBDE High School that there had been a rape of a student by a CBDE employee, the school environment likely became very difficult for Student in a new way. Several other students knew that she had been the rape victim, and they blamed her for the rape and told her that it was her fault that the CBDE employee had been terminated. Mother stated that her daughter felt that other students were often talking or texting about her behind her back, and starting rumors about her. Dr. Berkowitz testified persuasively that Student’s anger and hostility towards others at school likely served as a defense mechanism so that others would leave her alone and, in Student’s mind, keep her safe.

Dr. Berkowitz’s testimony was persuasive that Student was essentially forced to go to school in an environment that felt threatening, hostile and unsafe; and that her continued attendance at school likely further traumatized Student, likely making her PTSD chronic (and not merely acute) and making it more difficult to treat.

Dr. Berkowitz’s report persuasively summarized this harm as keeping Student for many months in an “extremely toxic environment” that perpetuated her being “in a state of chronic anxiety, depression, and traumatization. In essence, her acute PTSD became ongoing, chronic PTSD, a condition more difficult to ameliorate.” Exhibit P-1 (page 29) (underlining in original).

Dr. Berkowitz further testified persuasively that “[t]he longer someone functions dysfunctionally, the higher the negative behaviors, the higher the habit strength becomes. It becomes her routine way of acting or reacting to stimuli, rather than an occasional behavior. It also takes an extreme toll on her self-perception and her sense of being able to manage herself in society.” Transcript 11/30/11 (page 138).

In addition, as Dr. Berkowitz’s report persuasively explained, Student lost the benefits of appropriate services:

With a combination of targeted, individualized special educational supports, a strong ongoing therapeutic relationship, and an effectively educated and sensitized school environment, it is quite probable that [Student’s] overall functionality—academically and personally—would be much healthier. Her self-esteem would probably be stronger, her propensity for self-destructive acting-out would likely be lessened, she would likely be academically on-target, and she would probably be more comfortable interacting with her peers. [Exhibit P-1 (page 29).]

These opinions by Dr. Berkowitz (regarding the negative implications from Student’s continued placement at the CBDE High School and from CBDE’s failure to provide appropriate services) were essentially unrebutted, I find them persuasive, and I therefore adopt them as my findings, with two caveats.

The first caveat pertains to Student’s academic functioning. In this regard, CBDE provided rebuttal evidence through Dr. Cassens and her evaluation. She testified that “academically [Student] appeared to stay consistent with her peers in the sense that her scores did not go down, academically in terms of her achievement scores.” Transcript 11/30/11 (page 203). This testimony refers to Student’s achievement test scores on the neuropsychological evaluation administered by Dr. Cassens. I fully credit Dr. Cassens’ testimony and these test scores.

At the same time, however, what remains unrebutted is that as a result of Student’s emotional and behavioral difficulties, Student lost learning opportunities during the 2009-2010 school year because on many occasions she had to leave the classroom, she was not able to attend school, or she was unable to effectively participate at school. Testimony of Guidance Counselor, Assistant Principal, Mother. I find that this resulted in substantial academic harm.

The second caveat is that while I fully credit Dr. Berkowitz’s testimony and report regarding the *nature* of the educational harm to Student, I cannot fully credit Dr. Berkowitz’s testimony and report regarding the *extent* of likely harm. Dr. Berkowitz’s testimony and report address Student’s likely harm on the basis of her belief that CBDE should have evaluated Studentin the fall of 2008 or winter (January or February) of 2009, rather than on the basis of my finding that CBDE failed to provide appropriate services starting approximately six weeks after the beginning of the 2009-2010 school year. Testimony of Berkowitz; exhibit P-1 (page 29).

Consequently, I am able to identify the nature of the harm (not receiving the benefit of appropriate services, being further traumatizing and her recovery being delayed) and to conclude that the harm was likely substantial, but I am otherwise unable to make findings regarding the *extent* of educational harm as a result of CBDE’s child find violations.

For reasons explained below, there are additional factors that preclude any further findings regarding the extent of the educational harm to Student.

Beginning approximately six weeks into the school year (when CBDE’s responsibility to propose different or additional services began), an IEP Team would have had few, if any, useful options to address Student’s severe emotional and behavioral needs, other than placing Student in a day or residential therapeutic placement. CBDE’s alternative education paths (such as the PM program) were not appropriate for Student, and the special education services of a resource room would also not likely have been appropriate for Student. In addition, it is not disputed that a simple transfer to another high school through school choice would not likely have resolved the problem since students in other schools in the area had already learned of the rape, Student did not want to leave the CBDE High School where she still had friends, and she would have likely felt punished if forced to transfer. Testimony of Mother, Berkowitz, Guidance Counselor, School Adjustment Counselor.

Faced with no other viable alternatives to consider and in the face of mounting evidence that the High School environment was inappropriate for Student, the IEP Team should have considered a day or residential therapeutic placement, which would likely have had the advantages of taking Student out of a toxic high school environment and placing her within an educational context with new opportunities to work through her emotional deficits and the potential to become engaged in school. Testimony of Berkowitz; exhibit P-1.

For these reasons, I find that such therapeutic placements should have been considered by an IEP Team beginning approximately six weeks after the start of the 2009-2010 school year. Nevertheless, I further find that it cannot be established that during the fall of 2009 (or at any subsequent time until Student was actually placed within a residential educational placement in May 2010), CBDE should have proposed a placement in a therapeutic learning environment, nor can I determine what specific services or placement should have been proposed.

As Dr. Cassens and Dr. Berkowitz agreed in their testimony, appropriate special education and related services should have been proposed; but, without the benefit of appropriate evaluations at that time, it is speculative as to precisely what the proposed special education and related services should have been. Testimony of Cassens, Berkowitz. I also note that even when Student was admitted to inpatient psychiatric facilities during the second half of the 2009-2010 school year, none of the evaluations or discharge summaries recommended placement in a therapeutic school setting. Exhibits P-11, P-12, P-41 (page D), S-53, S-57.

Similarly, I am not able to make any findings as to whether Student’s residential psychiatric placements or her eventual residential educational placement would have likely been avoided through earlier, appropriate special education services. No witness has stated anything more than that this *may* have been the result.

For example, Dr. Berkowitz wrote in her report: “Hospitalizations may have been prevented, and she may or may not have had to undergo placement in a specialized, residential academic setting. Exhibit P-1 (page 29). Her testimony provides no further clarity on this point. Also, in Dr. Bainbridge’s report where he responded to a question as to whether Student would likely have required hospitalization or a residential placement if CBDE had provided special education services at an earlier date, he stated, in part, that if the appropriate services had been in place, “the school may have avoided the need for residential placement.” Exhibit P-P (page 19). Thus, Dr. Berkowitz’s and Dr. Bainbridge’s opinions simply provide for the possibility that these placements would have been avoided, but a mere possibility has no probative value.

For these reasons, I conclude that Dr. Cassens’ testimony was unrebutted that it would be speculative to make a finding regarding Student’s likely course of treatment or a finding regarding what specific services should have been proposed by CBDE pursuant to the special education (or Section 504) process.

In sum, CBDE’s child find violation resulted in substantial educational harm to Student. The evidentiary record does not support any additional findings or clarification regarding the extent of this harm.

Finally, I turn to the additional educational harm that likely occurred as a result of Parents being denied various *procedural protections* as a result of CBDE’s child find violations.

Compliance with the procedural safeguards of the IDEA is vital to fulfilling the purpose of the Act. The Supreme Court has explained that "adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.”[[90]](#footnote-90) “Congress placed every bit as much emphasis upon compliance with [special education] procedures . . . as it did upon the measurement of the resulting IEP against a substantive standard.”[[91]](#footnote-91)

Had Student been referred to special education as required under child find, Student would have received comprehensive evaluations. [[92]](#footnote-92) The evaluations, if appropriate, would likely have illuminated the nature and extent of Student’s disabilities and informed how Student’s services should be provided. Testimony of Berkowitz.

Student would have likely been determined eligible for special education services, and an IEP would have been developed. The IEP would have been custom-tailored to address Student’s “unique” educational needs.[[93]](#footnote-93) Student’s special education and related services would then “be provided in conformity with the [IEP]”.[[94]](#footnote-94)

Equally important, the special education process would have changed the decision-making from the CST (which was likely guided by the School Adjustment Counselor and Guidance Counselor who were working with Student, and the Assistant Principal who chaired the meetings) to an IEP Team in which Parents would be equal and important participants and in which greater special education expertise would inform the decision-making.[[95]](#footnote-95) Through the IEP process, Parents would have been informed about their additional procedural and substantive rights, including the right to obtain an independent evaluation and engage in dispute resolution processes.[[96]](#footnote-96)

In addition, without the special education process in place, CBDE had too little ability to make informed special education decisions regarding Student’s overall needs and services. For example, the Guidance Counselor and School Adjustment Counselor eventually determined that Student was not well engaged with the outside counseling regarding the rape, but did not consider it to be their responsibility to follow up or address this concern. An IEP Team would have had overall responsibility to ensure that all Student’s emotional difficulties (including those specifically from the rape) impacting upon her learning were being addressed appropriately. Testimony of Former Director of Special Education.

The IDEA makes clear that a procedural violation will constitute a denial of a FAPE if the procedural inadequacies “significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child” even if it cannot be established that the procedural violations “caused a deprivation of educational benefits”.[[97]](#footnote-97) It is not disputed that CBDE’s failure to comply with child find requirements (with the result that Parents could not participate in decisionmaking regarding FAPE) met this standard.

I also find that, given the seriousness of the trauma to Student and the potential long-term implications of this trauma if left inadequately addressed through special education and related services, it was important that Parents have the benefit of these procedural protections as quickly as possible and that this failure likely resulted in substantial educational harm to Student.

In sum, I find that as a result of CBDE’s failure to timely refer Student under child find, there was substantial educational harm to Student from approximately six weeks after the beginning of the 2009-2010 school year until Student was placed in a residential, therapeutic school placement on May 20, 2010.

**E. Summary of Findings**

My findings, which are explained in detail above, may be summarized as follows.

* In the fall (probably November) of 2008, Student was raped. As a result, she was seriously traumatized, particularly because she was raped by a person in a position of trust and authority and because the rape followed the death of her beloved cousin in July 2008. When Student disclosed the rape to CBDE on March 12, 2009, CBDE was immediately aware of the likely traumatizing effect of the rape; and CBDE knew that since the beginning of the school year, Student had been struggling with emotional and behavioral difficulties, requiring accommodations and counseling and causing her grades to plummet.
* CBDE violated child find requirements by failing to refer Student for an evaluation to determine eligibility under special education laws and Section 504 immediately after Student’s disclosure of the rape on March 12, 2009. No evaluation occurred until after Parents requested an evaluation in March 2010. Thus, Student essentially lost one year of eligibility.
* CBDE’s failure to refer Student for an evaluation under child find in March 2009 cannot be supported by any accepted professional judgment or standard; Parents therefore satisfied the compensatory damages standards under Section 504. By February 2010, CBDE’s continuing failure to refer Student for an evaluation, even after a residential psychiatric admission and diagnoses of PTSD and Mood Disorder (NOS), became a blatant disregard of Student’s child find rights.
* As a result of CBDE’s child find violations, there has been educational harm to Student. CBDE’s violations likely caused Student to be denied the benefits of appropriate special education and related services beginning approximately six weeks after the beginning of the 2009-2010 school year and continuing until Student was placed in a residential, therapeutic school on May 20, 2010. The denial of appropriate services likely resulted in Student’s being further traumatized and her recovery made more difficult. In addition, Parents were denied important procedural protections.
* Although the nature of the harm can be identified (as described in the paragraph immediately above) and although it is likely that the educational harm to Student was substantial, it is not possible to make any further findings regarding the extent of the harm. It would be speculative to make any determination as to what particular special education services should have been provided or any determination as to whether certain events (such Student’s admission to psychiatric residential facilities or her residential educational placement) would likely have been avoided if appropriate services had been provided.
* Throughout the time period in question, CBDE was motivated to help Student. Prior to the rape disclosure and for a number of months after the disclosure, CBDE provided (through regular education) all of the services and accommodations that Student likely would have received under special education laws and Section 504. At all times, CBDE acted in good faith. CBDE staff never made a deliberate choice not to refer Student for a special education (or Section 504) evaluation and never purposely violated her child find rights.

**ORDER**

Because all substantive educational issues have previously been dismissed, leaving only the issue of monetary damages, and because the BSEA does not have authority to award monetary damages, this Decision includes only the above findings and no relief is ordered.

By the Hearing Officer,

William Crane

Dated: March 19, 2012

APPENDIX A

# **COMMONWEALTH OF MASSACHUSETTS**

**Division of Administrative Law Appeals**

**Bureau of Special Education Appeals**

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#  )

In Re: [Student] )

 )

& ) BSEA #10-6854 )

CBDE School District )

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***STATEMENT OF ISSUES TO BE ADDRESSED AT HEARING***

**[Note: the original Statement of Issues has been redacted by using the**

**term “CBDE” in place of all references to the name of the School District]**

After consideration of CBDE’s and Parents’ responses[[98]](#footnote-98) to a draft statement of issues, I find that the parties may address the following issues as part of the fact-finding hearing relevant to Parents’ claims for monetary damages:

1. Did Student exhibit behaviors to CBDE staff before January 2010, which should have led CBDE to request consent to evaluate her for special education eligibility or for Section 504 eligibility? And, if so,

 a. what were the behaviors?

b. when did they occur?

c. where did they occur?

 d. when did CBDE learn (or reasonably should have learned) of these behaviors?

e. when should CBDE have requested consent to evaluate Student?

2. Did Student exhibit signs of trauma to CBDE staff between November 2008 and May 13, 2010? And, if so,

 a. what were those signs of trauma?

b. to whom were they exhibited?

c. when were they exhibited?

d. where were they exhibited?

e. how and when did CBDE respond?

3. Did CBDE violate any of its IDEA obligations (including child find) to Student? And, if so,

 a. what obligations were violated?

b. when did the violations occur?

c. did CBDE fail to provide evaluations required under the IDEA?

d. did CBDE fail to provide special education or related services required under the IDEA?

4. Did CBDE violate any of its Section 504 obligations to Student? And, if so,

a. what obligations were violated?

b. when did the violations occur?

c. when did she meet eligibility standards under Section 504?

d. what was the nature of Student’s disability (for purposes of Section 504) when she first met Section 504 eligibility standards, and has this disability changed over time?

e. when did CBDE know (or reasonably should have known) that Student was eligible under Section 504?

f. did CBDE fail to provide evaluations required under Section 504?

g. did CBDE fail to provide accommodations or services required under Section 504?

h. did CBDE demonstrate the required “deliberate indifference” for relief under Section 504?[[99]](#footnote-99)

5. If CBDE failed to conduct evaluations required under the IDEA or Section 504,

 a. what evaluations should have occurred?

 b. when should the evaluations have occurred?

c. what educational harm,[[100]](#footnote-100) if any, occurred as a result?

d. as a result of the evaluations that should have been provided, would CBDE have likely learned about Student’s alleged rape; and if so, by when?

6. If CBDE failed to provide required special education, related services or accommodations under the IDEA or Section 504,

a. what special education, related services or accommodations should have been provided?

b. did CBDE fail to provide a required residential educational placement?

c. during what period of time did CBDE fail to provide special education, related services or accommodations (including any required residential placement)?

d. what educational harm, if any, occurred as a result?

7. Did CBDE provide regular education accommodations, services and supports to Student during the 2008-2009 school year while she attended CBDE High School; and if so, what supports did it provide and over what period of time?

8. If CBDE violated Student’s rights under the IDEA or Section 504,

a. what is the likelihood that Student would not have required hospitalization or a residential placement if CBDE had provided special education or related services as required, as opposed to the regular education services and supports that she received?

b. has the residential placement CBDE has provided and is providing Student brought her to the level where she would have been if CBDE had not violated the IDEA or Section 504?

c. does Student require any services in addition to those provided by her current residential placement to bring her to the level where she would have been if CBDE had not violated the IDEA or Section 504? And if so,

d. what additional services does she require to bring her to the level where she would have been if CBDE had not violated the IDEA or Section 504?

9. How long does the process take to request and obtain consent to evaluate, evaluate, determine eligibility, and develop an IEP? And, how long with respect to developing a Section 504 plan?

10. Was CBDE’s ability to evaluate and test Student hindered? And, if so,

 a. how was CBDE’s ability to evaluate and test Student hindered?

 b. over what period of time was CBDE’s ability to evaluate and test hindered?

11. What harm, if any, has occurred to Parents (as compared to any harm to Student) with respect to any violation of their rights under the IDEA or Section 504?[[101]](#footnote-101)

Parents’ claim of improper destruction of records is not included within the above issues, but evidence may be presented on this claim if it has relevance to the probative value of other, relevant evidence.

By the Hearing Officer,

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

William Crane

Dated: April 28, 2011

# **COMMONWEALTH OF MASSACHUSETTS**

**Division of Administrative Law Appeals**

# **Bureau of Special Education Appeals**

# **THE BUREAU’S DECISION, INCLUDING RIGHTS OF APPEAL**

**Effect of the Decision**

20 U.S.C. s. 1415(i)(1)(B) requires that a decision of the Bureau of Special Education Appeals be final and subject to no further agency review. Accordingly, the Bureau cannot permit motions to reconsider or to re-open a Bureau decision once it is issued. Bureau decisions are final decisions subject only to judicial review.

Except as set forth below, the final decision of the Bureau must be implemented immediately. Pursuant to M.G.L. c. 30A, s. 14(3), appeal of the decision does not operate as a stay. Rather, a party seeking to stay the decision of the Bureau must obtain such stay from the court having jurisdiction over the party's appeal.

Under the provisions of 20 U.S.C. s. 1415(j), "unless the State or local education agency and the parents otherwise agree, the child shall remain in the then-current educational placement," during the pendency of any judicial appeal of the Bureau decision, unless the child is seeking initial admission to a public school, in which case "with the consent of the parents, the child shall be placed in the public school program". Therefore, where the Bureau has ordered the public school to place the child in a new placement, and the parents or guardian agree with that order, the public school shall immediately implement the placement ordered by the Bureau. *School Committee of Burlington, v. Massachusetts Department of Education*, 471 U.S. 359 (1985). Otherwise, a party seeking to change the child's placement during the pendency of judicial proceedings must seek a preliminary injunction ordering such a change in placement from the court having jurisdiction over the appeal. *Honig v. Doe*, 484 U.S. 305 (1988); *Doe v. Brookline*, 722 F.2d 910 (1st Cir. 1983).

**Compliance**

A party contending that a Bureau of Special Education Appeals decision is not being implemented may file a motion with the Bureau contending that the decision is not being implemented and setting out the areas of non-compliance. The Hearing Officer may convene a hearing at which the scope of the inquiry shall be limited to the facts on the issue of compliance, facts of such a nature as to excuse performance, and facts bearing on a remedy. Upon a finding of non-compliance, the Hearing Officer may fashion appropriate relief, including referral of the matter to the Legal Office of the Department of Education or other office for appropriate enforcement action. 603 CMR 28.08(6)(b).

**Rights of Appeal**

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

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

**Confidentiality**

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

**Record of the Hearing**

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

1. CBDE is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student. Throughout this Decision, names of CBDE and other staff, names of private programs that Student attended, and other names from which Student’s identity might be determined have not been used. [↑](#footnote-ref-1)
2. “Assistant Principal” refers to the person who was the High School Assistant Principal during the 2008-2009 school year, rather than the current Assistant Principal. [↑](#footnote-ref-2)
3. This witness testified by telephone conference call and was not otherwise present at the hearing. [↑](#footnote-ref-3)
4. As used in this Decision, all references to “rape” or “raped” refer to statutory rape of a child. The [CBDE employee] pleaded guilty to statutory rape of a child and related offenses. Exhibit P-A (page 7). [↑](#footnote-ref-4)
5. This case was perhaps more intensively litigated than any case over which I have presided as a Hearing Officer over the past 12 years. Multiple attorneys for each party provided vigorous and thorough representation throughout these proceedings. I acknowledge, with gratitude, the high quality of the parties’ arguments and briefs. For many of the disputed issues, valid arguments were presented on each side. [↑](#footnote-ref-5)
6. A more detailed list of issues is set forth in my order of April 28, 2011, which is attached and incorporated herein as Appendix A. This detailed list of issues was developed with the assistance of attorneys for both parties and was accepted by Parents’ attorneys as appropriate. However, in their written closing arguments and reply briefs, neither party actually addressed this detailed list of issues, but instead simply focused on the more general statement of issues described above. I follow the parties’ lead and address the issues generally within part VI of the Decision, without separately addressing each of the detailed issues identified in Appendix A. [↑](#footnote-ref-6)
7. Parents’ claim for monetary damages was made pursuant to Section 504 of the Rehabilitation Act of 1973 (Section 504), the Americans with Disabilities Act (ADA), 42 USC 1983 (Section 1983), Article CXIV of the Massachusetts Constitution, the Massachusetts Civil Rights Act, and Title IX of the Education Act Amendments of 1972 (20 USC 1681) (Title IX). Parents’ damages claim also asserted that CBDE “intentionally, and or negligently inflict[ed] emotional distress upon [Student] and her family and caused loss of consortium.” [↑](#footnote-ref-7)
8. Education Amendments of 1972, § 901; 20 USC § 1681. [↑](#footnote-ref-8)
9. In my February 24, 2011 ruling, I noted that in a previous dispute, I took a more expansive view of the appropriate scope of fact finding for purposes of exhaustion in a damages dispute. See *In* *Re: Mashpee*, 14 Mass. Spec. Educ. Rep. 143 (BSEA 08-0998) (2008). However, in the February 24th ruling, I found that fact finding more closely limited to the role and expertise of a BSEA Hearing Officer in resolving special education disputes is appropriate. I found nothing within First Circuit case law that requires a broader scope of fact finding, and I noted the more limited fact-finding is consistent with what the First Circuit in *Frazier* found to be appropriate when it reviewed a previous BSEA decision (*In Re: Brockton Pub. Schs*., 6 Mass. Spec. Educ. Rep. 17, 23 (BSEA 00-2572) (2000)). See *Frazier*, 276 F.3d at 64. [↑](#footnote-ref-9)
10. My ruling on the reconsideration motion concluded that the compensatory claim had been appropriately dismissed because the hearing request had included only a general reference to the possibility of a compensatory claim (“parents request that the hearing officer make such other findings of fact and ruling of law as the facts may develop even if not presented herein and order compensatory educational services as is deemed reasonable”) and because during the motion hearing pertaining to the February 24th ruling, the attorneys for both parties expressly stated that dismissal of all substantive educational claims was appropriate. [↑](#footnote-ref-10)
11. The ruling essentially adopted the substance of Rule 615 of the Federal Rules of Evidence. In the ruling, I noted that the “sequestration of trial witnesses is a practice of long standing” within the federal courts. See *United States. v. Magana*, 127 F.3d 1, 5 (1st Cir. 1997). The purpose is twofold. “It exercises a restraint on witnesses ‘tailoring’ their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than candid.” *Geders v. United States*, 425 U.S. 80, 87-88 (1976). Neither the BSEA Hearing Rules, the Massachusetts Department of Elementary and Secondary (DESE) regulations governing BSEA proceedings, nor the Executive Office of Administration and Finance Adjudicatory Rules of Practice and Procedure address the question of whether (or when) witnesses are to be sequestered; and the general practice within the BSEA is not to sequester witnesses, although occasionally exceptions have been made. However, I reasoned that the instant dispute is unusual in that a hearing is being held solely for the purpose of making findings to assist a federal court to resolve the parties’ damages dispute. For this reason, I found it appropriate to be guided by Rule 615 of the Federal Rules of Evidence. [↑](#footnote-ref-11)
12. The BSEA hearing and the instant Decision can only be understood within the context of the related federal lawsuit, referenced above, that was filed by Parents in September 2011. As explained in my earlier rulings in this case, the BSEA evidentiary hearing occurred because I concluded that, in light of the First Circuit’s decision in *Frazier*, I was constrained to hold a hearing in order to make findings relevant to Parents’ damages claims even though all substantive educational issues had been dismissed; and that if I did not do so, a federal court would likely remand the case back to the BSEA for an evidentiary hearing.

As explained above in the text, I determined that the BSEA hearing should approximate a special education hearing regarding compensatory claims, and should not consider evidence or make findings outside of what would normally be relevant to those claims. Throughout the BSEA hearing, it became apparent that there were many differences between the fact finding that may be necessary in Parents’ federal lawsuit, and the scope of the BSEA hearing that would approximate a compensatory education dispute. For example, the federal lawsuit alleged individual liability of six named CBDE staff and the city or town of CBDE, yet the scope of the BSEA hearing was limited to the liability of the CBDE Public Schools. Also, Parents will need to address related Title IX and negligence claims that could not be considered by the BSEA. As a result, there were many instances where facts relevant to Parents’ potential legal claims in federal court were not relevant to the issues to be determined within the BSEA hearing. For example, Parents’ attorneys sought to establish that CBDE staff had inappropriately communicated information about the rape through relatively large school assemblies (rather than through small discussion groups which arguably would have been more appropriate), and that this had contributed to making a toxic school environment for Student. This claim of inappropriately communicating information to other students might possibly be relevant to Parents’ federal lawsuit, yet I found no relevance to CBDE’s responsibilities under special education law or Section 504, and therefore I did not consider this evidence and have not addressed this issue in the instant Decision.

I also note that the relationship between the BSEA hearing and the federal lawsuit may possibly have influenced negotiations regarding the informal resolution of the BSEA dispute. The attorneys representing CBDE Public Schools in the BSEA dispute had no authority to settle the federal lawsuit (and, consequently, no authority to settle the BSEA dispute) because the city or town of CBDE was being represented separately for this purpose by attorneys retained through CBDE’s insurance company. On several occasions during conference calls prior to the BSEA hearing, Parents’ attorneys made clear their interest in seeking to negotiate a resolution of the dispute, and CBDE Public Schools attorneys indicated that they would have favored at least having discussions for this purpose, but no negotiations occurred because, apparently, the attorneys retained through CBDE’s insurance company declined to negotiate with Parents’ attorneys prior to the completion of the BSEA hearing. The attorneys retained by the CBDE insurance company observed the BSEA hearing but did not enter an appearance in the BSEA dispute.

Parents’ attorneys filed their related federal lawsuit in court prior to exhausting the BSEA process because they apparently determined that they needed to do so in order to comply with statute of limitations considerations; but then Parents’ attorneys chose not to serve their complaint on defendants apparently so that defendants would not be able to raise exhaustion claims at least until the BSEA evidentiary hearing was completed. Nevertheless, the filing of the federal lawsuit did not prompt the parties to begin negotiations prior to the completion of the BSEA proceedings. [↑](#footnote-ref-12)
13. “Assistant Principal” refers to the person who was the High School Assistant Principal during the time period in question. [↑](#footnote-ref-13)
14. Portions of the School Adjustment Counselor’s testimony (in response to questions from Parents’ attorney) are reproduced below in order to provide a more complete description of Student’s disclosure and the School Adjustment Counselor’s understanding of the impact upon Student.

Q. You mentioned that she gave you step-by-step details of everything leading up to the

actual assault but couldn't talk about the assault; is that accurate?

A. She did talk about the assault a little bit. [REDACTED]. She didn't want to go any further than that [in terms of speaking about the assault]. We didn't certainly force that. We had obviously enough information. There was no point then to go any further to us.

Q. When you say she did not want to go any further, she did not want to talk about what else happened?

A. The details, that's correct.

Q. What was her affect when she told you that information?

A. Very upset, she was crying. She was sad.

Q. Was it obviously traumatic for her?

A. To tell us, yes.

Q. Traumatic to tell you?

A. Yes.

Q. Was it obvious that the event itself was traumatic to her?

A. Yes. I think it was traumatic and confusing to her….

Q. You mentioned all of this was confusing to her. Can you describe what you mean by that?

A. She was very upset. I think she had this question as to why this whole thing was

happening, why it happened. Why [the CBDE employee] was approaching her. I saw it as a break in the trust relationship and that's what I attributed it to that she found herself in this situation and was kind of confused as to how it all happened and why it happened.

Q. Was the trust relationship based on the fact that he was her [CBDE employee]?

A. Yes.

Q. And an employee of the school?

A. Correct….

Q. Did that make it more difficult for her that she had this trust relationship with him because of the fact he was an employee? Could you assess the impact of that on her?

A. Yes, that made it worse certainly I believe.

Q. What else did you glean from her disclosure in terms of her mental state and the fact that she was a victim of this assault? What clinical information did you get from that?

A. She had been traumatized, certainly. It was a traumatic experience. So, that had an impact on her.

Q. She was traumatized by it?

A. She was upset by it. I use the word trauma, but yes, she was clearly very upset by the whole thing and that it had happened. Once she disclosed, she really didn't want to dwell on it, dwell on it. She had given us enough information.

[Transcript, 10/25/11 (pages 77-80).] [↑](#footnote-ref-14)
15. The written report of Parents’ expert (Dr. Berkowitz) took the position (and it was not disputed by any evidence) that the May 10, 2010 evaluation by CBDE was not appropriate or comprehensive. Dr. Berkowitz’s report explained that the evaluation did not include projective testing, the use two of the four subtests of the Wechsler Abbreviated Scale of intelligence was contraindicated (the age-appropriate, full Wechsler Intelligence Test should have been administered), the Bender Gestalt Visual Motor Test was clinically interpreted (rather than appropriately used as a screening tool for visual-motor learning style deficits), and the Draw-A-Person was used (even though it has generally been discredited and does not meet recent or current standards of practice). Exhibit P-1 (page 27). [↑](#footnote-ref-15)
16. 20 USC 1400 *et seq*. [↑](#footnote-ref-16)
17. MGL c. 71B. [↑](#footnote-ref-17)
18. 20 USC 1400(d)(1)(A). *See also* 20 USC 1412(a)(1)(A). [↑](#footnote-ref-18)
19. MGL c. 71B, ss. 1, 2, 3. [↑](#footnote-ref-19)
20. The phrase “least restrictive environment” means that, to the maximum extent appropriate for the particular student, the student is to be educated with other students who do not have a disability. 20 USC 1400(d)(1)(A); 20 USC 1412(a)(1)(A); 20 USC 1412(a)(5)(A); MGL c. 71B, ss. 2, 3; 34 CFR 300.114(a)(2(i); 603 CMR 28.06(2)(c). [↑](#footnote-ref-20)
21. 29 U.S.C. § 794(a). [↑](#footnote-ref-21)
22. 29 U.S.C. § 794(b)(2)(B). [↑](#footnote-ref-22)
23. The applicable 504 regulations require a school district to “provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.” 34 CFR § 104.33. The Section 504 regulations further provide that “the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36”. 34 CFR § 104.33(b). [↑](#footnote-ref-23)
24. See *Mark H. v. Lemahieu,* 513 F.3d 922, 933 (9th Cir. 2008). [↑](#footnote-ref-24)
25. See 34 CFR § 104.33(b) (“Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.”). [↑](#footnote-ref-25)
26. MGL c. 71B, s. 3. [↑](#footnote-ref-26)
27. 20 USC § 1412(a)(3). [↑](#footnote-ref-27)
28. 34 CFR §300.111(a) (“State must have in effect policies and procedures to ensure that … [a]ll children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated”). [↑](#footnote-ref-28)
29. 34 CFR § 300.111(c). [↑](#footnote-ref-29)
30. *J.S. v. Scarsdale Union Free School Dist.*, 2011 WL 5925309, \*22 (S.D.N.Y. 2011) (internal quotations omitted) (and cases cited therein). [↑](#footnote-ref-30)
31. See *Board of Educ. of Fayette County, Ky. v. L.M.,* 478 F.3d 307 (6th Cir. 2007) (“Even children who are only suspected of having a disability, although they are progressing from grade to grade, are protected by [child find] requirement.”); *W.B. v. Matula,* 67 F.3d 484, 501 (3d Cir.1995) (child find requires school district to identify and evaluate children “who are suspected of having a qualifying disability” within a reasonable time after they are “on notice of behavior that is likely to indicate a disability”); *Murphy v. Town of Wallingford*, 2011 WL 1106234, \*3 (D.Conn. 2011) (“Given the importance of identifying disabled children and providing those children with special education services, the “Child Find” obligation even extends to children who are suspected of having a disability, despite that the children may be progressing from grade to grade in an acceptable manner.”); *C.G. v. Five Town Community School Dist.*, 2007 WL 494994 (D.Me. 2007) (child find duty triggered when school district had reason to suspect that student has a disability and that special education services may be needed to address that disability) (see also cases cited therein), *report and recommendation adopted* 2007 WL 1051605 (2007), aff’d 513 F.3d 279 (1st Cir. 2008). [↑](#footnote-ref-31)
32. 34 CFR 104.36. See also 34 CFR § 104.32 (“A recipient that operates a public elementary or secondary education program or activity shall annually: (a) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education ….). [↑](#footnote-ref-32)
33. See *Cain v. Owensboro Public Schools,* 2011 WL 5386651, \*12 (W.D. Ky. 2011); *B.H. v. Portage Public School Bd. of Educ.,* 2009 WL 277051, \*6 (W.D.Mich. Feb. 2, 2009). [↑](#footnote-ref-33)
34. *P.P. ex rel. Michael P. v. West Chester Area School Dist*., 585 F.3d 727, 738 (3rd Cir. 2009). [↑](#footnote-ref-34)
35. See *Mr. I. v. Maine School Administrative District No. 55,* 480 F.3d 1 (1st Cir. 2007) (discussing IDEA eligibility requirements). [↑](#footnote-ref-35)
36. See *Winkelman v. Parma City School Dist.*, 550 U.S. 516, 524(2007) (“education must … meet the standards of the State educational agency”); *Mr. I. v. Maine School Administrative District No. 55,* 480 F.3d 1, 11 (1st Cir. 2007) (in an eligibility dispute, the Court explained that “[t]hough the IDEA establishes a basic floor of education for children with disabilities, … it does not displace the states from their traditional role in setting their own educational policy”; state may “calibrate its own educational standards, provided it does not set them below the minimum level prescribed by the [IDEA]”); *David D. v. Dartmouth School Committee*, 775 F.2d 411, 416-423 (1st Cir. 1985) (incorporating into the IDEA a higher, state educational standard), cert. den., 475 U.S. 1140 (1986); *Town of Burlington v. Department of Education*, 736 F.2d 773, 792 (1st Cir. 1984) (states are “free to exceed, both substantively and procedurally, the protection and services to be provided to its disabled children”). [↑](#footnote-ref-36)
37. See 603 CMR 28.02(9) (defining an eligible student as a child who, as a consequence of one or more of the requisite disabilities, “is unable to progress effectively in the general education program without specially designed instruction or is unable to access the general curriculum without a related service.”). See also MGL c. 71B, s.1 (definition of “School age child with a disability”); 603 CMR 28.05(2)(a)1 (using same eligibility standard). [↑](#footnote-ref-37)
38. *Nieves–Marquez v. Puerto Rico,* 353 F.3d 108, 126 (1st Cir. 2003) (“private individuals may recover compensatory damages under § 504 ... only for intentional discrimination”). [↑](#footnote-ref-38)
39. *Adam C. v. Scranton School Dist.*, 2011 WL 4072756, \*5 (M.D.Pa. 2011). [↑](#footnote-ref-39)
40. See *Meagley v. City of Little Rock*, 639 F.3d 384, 389 (8th Cir. 2011); *Barber ex rel. Barber v. Colorado Dept. of Revenue*, 562 F.3d 1222, 1229 (10th Cir. 2009); Loeffler v. Staten Island Univ. Hosp., 582 F.3d 268, 275-276 (2nd Cir. 2009); *Lovell v. Chandler*, 303 F.3d 1039, 1056 (9th Cir. 2002); *Paulone v. City of Frederick*, 787 F. Supp. 2d 360, 373 (D. Md. 2011). [↑](#footnote-ref-40)
41. *Duvall v. Cty. of Kitsap,* 260 F.3d 1124, 1139 (9th Cir. 2001). See also *Barber ex rel. Barber v. Colorado Dept. of Revenue*, 562 F.3d 1222, 1229 (10th Cir. 2009) (“test for deliberate indifference in the context of intentional discrimination comprises two prongs: (1) knowledge that a harm to a federally protected right is substantially likely, and (2) a failure to act upon that ... likelihood”); *Lovell v. Chandler*, 303 F.3d 1039, 1056 (9th Cir. 2002) (following standard in *Duvall*). [↑](#footnote-ref-41)
42. *Duvall v. Cty. of Kitsap,* 260 F.3d 1124, 1139-1140 (9th Cir. 2001). [↑](#footnote-ref-42)
43. See *Barber ex rel. Barber v. Colorado Dept. of Revenue*, 562 F.3d 1222, 1228 -1229 (10th Cir. 2009) (intentional discrimination does not require a showing of personal ill will or animosity toward the disabled person; rather, “intentional discrimination can be inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights.”); *Mark H. v. Lemahieu,* 513 F.3d 922, 938 (9th Cir. 2008) ("[A] public entity can be liable for damages under § 504 if it intentionally or with deliberate indifference fails to provide meaningful access or reasonable accommodation to disabled persons"); *Bartlett v. New York State Bd. of Law Examiners*, 156 F.3d 321, 331 (2d Cir. 1998) (a plaintiff can show intentional discrimination by acting with “at least deliberate indifference to the strong likelihood that a violation of federally protected rights [would] result”). Cf. *Wynne v. Tufts University School of Medicine*, 1990 WL 52715, \*5 (1st Cir. 1990) (“section 504 imposes a responsibility upon us to examine closely supposedly academic decisions to be certain that they do not mask even unintended discrimination against the handicapped. *See Alexander v. Choate,* 469 U.S. at 292-299, 105 S.Ct. at 715-19 (discriminatory animus not always required in § 504 case)”). [↑](#footnote-ref-43)
44. *Nieves–Marquez v. Puerto Rico,* 353 F.3d 108, 125 n. 17 (1st Cir. 2003). [↑](#footnote-ref-44)
45. *Sellers by Sellers v. School Bd. of City of Mannassas, Va*., 141 F.3d 524, 529 (4th Cir. 1998). [↑](#footnote-ref-45)
46. See *French v. New York State Dept. of Educ.*, 2011 WL 5222856, \*4 (2nd Cir. 2011); *D.A. ex rel. Latasha A. v. Houston Independent School Dist*., 629 F.3d 450, 455 (5th Cir. 2010); *Campbell v. Board of Education of Centerline School District*, 58 Fed.Appx. 162, 167, 2003 WL 344217, \*5 (6th Cir. 2003); *N.T. v. Balt. City Bd. of Sch. Com'rs*, 2011 WL 3747751, 8 (D.Md. 2011); *J.D. v. Georgetown Independent School Dist*., 2011 WL 2971284, 7 (W.D.Tex. 2011) (and cases cited therein); *Millay v. Surry School Dept*., 584 F.Supp.2d 219, 235 (D.Me. 2008) (and cases cited therein); *Walker v. District of Columbia*, 157 F.Supp.2d 11, 36 (D.D.C. 2001); *DL v. District of Columbia*, 2011 WL 5555877, \*20 (D.D.C. 2011); *W.C. ex rel. Sue C. v. Cobb Cnty. Sch. Dist.,* 407 F.Supp.2d 1351, 1363–64 (N.D.Ga. 2005) (and cases cited therein); *S.W. and Joanne W. v. Holbrook Public Schools*, 221 F,Supp.2d 222, 228 (D.Mass. 2001); *Scaggs v. New York Dept. of Educ*.,  2007 WL 1456221, \*15 (E.D.N.Y. 2007); *Brantley By and Through Brantley v. Independent School Dist. No. 625, St. Paul Public Schools*, 936 F.Supp. 649, 657 (D.Minn. 1996). [↑](#footnote-ref-46)
47. *Monahan v. Nebraska*, 687 F.2d 1164, 1170-1171 (8th Cir. 1982). [↑](#footnote-ref-47)
48. *M.Y., ex rel., J.Y. v. Special School Dist. No. 1*, 544 F.3d 885, 889 -890 (8th Cir. 2008) (internal quotations omitted). But see *Meagley v. City of Little Rock*, 639 F.3d 384, 389 (8th Cir. 2011) (indicating that the Eighth Circuit may be moving towards a deliberate indifference standard). [↑](#footnote-ref-48)
49. *Pineda v. Toomey*, 533 F.3d 50, 54 (1st Cir. 2008) (claim under 42 USC 1983). [↑](#footnote-ref-49)
50. *Fitzgerald* *v. Barnstable School Committee,* 504 F.3d 165, 171 (1st Cir. 2007) (internal quotations and citation omitted) (claim under Title IX). [↑](#footnote-ref-50)
51. *Coscia v. Town of Pembroke, Mass*., 659 F.3d 37, 39 (1st Cir. 2011) (claim under 42 USC 1983). [↑](#footnote-ref-51)
52. *Alsina-Ortiz v. Laboy*, 400 F.3d 77, 82 (1st Cir. 2005) (claim under 42 USC 1983). [↑](#footnote-ref-52)
53. See *M.P. ex rel. K. v. Independent School Dist. No. 721*, 326 F.3d 975, 982 (8th Cir. 2003) (“Whether Pexa acted with deliberate indifference to the confidentiality of M.P.'s disability is irrelevant if it can be shown that the District acted in bad faith or with gross misjudgment when it failed to take appropriate action to protect M.P.'s academic and safety interests after the disclosure, pursuant to the Rehabilitation Act.”); *Bishop v. Children's Center for Developmental Enrichment*, 2011 WL 4337088, \*12 (S.D.Ohio 2011) (defendants argued that bad faith or gross misjudgment must be shown before a § 504 violation can be made out in the context of education of handicapped children; plaintiffs contended that the proper standard was deliberate indifference; the Court found it “unnecessary to determine which standard applies because even under the more stringent ‘bad faith or gross misjudgment’ standard, Plaintiffs' claim survives summary judgment”); *Hough v. Shakopee Public Schools*, 608 F.Supp.2d 1087, 1116 (D.Minn. 2009) (“[d]eliberate indifference is a lesser degree of culpable intent than bad faith or gross misjudgment”). [↑](#footnote-ref-53)
54. The OSEP Memorandum is available at: http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep11-07rtimemo.pdf [↑](#footnote-ref-54)
55. *Harrison (CO) School District Two*, Office for Civil Rights, Western Division, Denver (Colorado) 08-10-1205, 57 IDELR 295, 111 LRP 62993 (July 20, 2011). [↑](#footnote-ref-55)
56. See *Mr. I. v. Maine School Administrative District No. 55,* 480 F.3d 1, 11 (1st Cir. 2007) (state may “calibrate its own educational standards, provided it does not set them below the minimum level prescribed by the [IDEA]”). [↑](#footnote-ref-56)
57. In support of its argument that I should rely on Massachusetts law, CBDE cites (at page 6 of its closing argument) to *A.P. v. Woodstock Bd. of Educ*., 370 Fed.Appx. 202, 2010 WL 1049297 (2nd Cir. 2010) for the proposition that it may be appropriate to provide a student with regular education to address his difficulties prior to referring the student to special education. However, the Second Circuit’s decision does not address this issue. Rather, the Court concludes that the school district’s “actions did not constitute a material failure of implementing” the student’s IEP, that “student made improvements in his grades and social and organizational skills throughout his sixth-grade year despite fact he did not have teacher's aide assigned in accordance with IEP”, and the “school made additional efforts to help student attain goals in his IEP.” The federal District Court’s decision, to which CBDE did not cite, makes clear that “all evidence suggests that in the fourth grade, A.P. did not need special education services” and “that it was far from clear that A.P. was suffering from a ‘qualifying disability’”. The District Court thus found no child find violation. *A.P. ex rel. Powers v. Woodstock Bd. of Educ*., 572 F.Supp.2d 221, 225-226 (D.Conn. 2008). This case is therefore easily distinguished on the basis of the facts, and CBDE points to no court decision, nor am I aware of any, that approximates the factual context of the instant dispute where Student was struggling in school notwithstanding the regular education accommodations and services provided by CBDE. [↑](#footnote-ref-57)
58. See *Gonzalez v. P.R. Dep't of Educ.,* 254 F.3d 350, 352 (1st Cir. 2001). See also *Rome Sch. Comm. v. Mrs. B.,* 247 F.3d 29, 33 n.3 (1st Cir.2001) (noting that, in determining adequacy of IEP for emotionally disturbed boy, "[t]he question is whether [his] behavioral disturbances interfered with the child's ability to learn"); *Lenn v. Portland Sch. Comm.,* 998 F.2d 1083, 1089 (1st Cir.1993) (IDEA entitles qualifying students to services that "target '*all* of [their] special needs,' whether they be academic, physical, emotional, or social") (quoting *Burlington,* 736 F.2d at 788). [↑](#footnote-ref-58)
59. I found Dr. Cassens to be a credible, careful and knowledgeable witness who demonstrated a solid understanding of Student and her emotional, behavioral and learning difficulties. She received her PhD in 1975 and has completed over 5,000 neuropsychological evaluations since then. Her teaching experience includes four years as the Director of Neuropsychological Training Program, Massachusetts Mental Health Center, Department of Psychiatry at Harvard Medical School. Testimony of Cassens; exhibit S-81. [↑](#footnote-ref-59)
60. Part of Dr. Cassens’ testimony on this issue was as follows:

Q: So are you suggesting that there were so many things going on together, substance abuse, family difficulties, the grief, that it would be difficult to really know, even let's say by January or February of 2009, whether the grief had essentially turned into a disability of acute PTSD?

Dr. Cassens: I think it is. It would be very hard to say that because, for example, when one abuses alcohol or abuses drugs, you get very dramatic depressions, anxiety disorders, panic attacks, I mean, and how do you separate that out from the grief? That's a tough one. You have to, sort of piecemeal, start addressing each of the subissues, hopefully comprehensively. But I would think it would have been very difficult to tease that out at that time.

[Transcript, 11/30/11 (pages 217-218).] [↑](#footnote-ref-60)
61. I found Dr. Bainbridge to be a credible, highly experienced, and generally persuasive witness. Dr. Bainbridge is Distinguished Research Professor at the University of Dayton, President and CEO of the SchoolMatch Institute at School Match at the University of Dayton, and president of William L. Bainbridge, Ph.D., FACFE and Associates, LLC (FACFE refers to Fellow of the Academy of Certified Forensic Examiners). The latter organization provides litigation support to parties. He has evaluated disputes (for both plaintiffs and defendants) involving cases involving standards and practices regarding sexual assaults occurring in schools or by school people off school property in 35 states. Many of the victims in these cases have had special education needs. His experience also includes conducting school evaluations in more than 1300 school districts across the country (a component of the reviews included special education). He has been a superintendent in three different school districts and has held other administrative positions in schools. Dr. Bainbridge’s expertise is in consultation to educational organizations and in educational management. He is not a clinician nor has he been clinically trained, but he has attended workshops with a leading expert on rapes in schools in the United States. Testimony of Bainbridge; exhibit P-Q (resume); transcript, 9/13/11 (pages 27-28, 36-38, 119). [↑](#footnote-ref-61)
62. The question from the Hearing Officer was “whether [CBDE] had any responsibility to evaluate [Student] prior to knowing about the rape in March 2009”. Dr. Bainbridge responded: “I think that is a little bit iffy in terms of -- I think they could have. I think there were plenty of tips in the disciplinary record that she might have a behavior disability. I think there was plenty of knowledge. I guess I could understand in terms of the standard of care prior to that that maybe they did not believe that it had risen to the level of an IEP, even though it was clear that she was having major behavioral problems.” Testimony of Bainbridge; transcript, 9/13/11 (page 95-96). He further explained: “I do not have enough information to know prior to the rape. I used the term iffy, in other words, maybe, maybe not. I don't know. I don't have enough information to reach that conclusion. I certainly have enough information to reach the conclusion on or after March 9 or March 11, 2009.” Testimony of Bainbridge; transcript, 9/13/11 (page 112) [note that the transcript indicates, incorrectly, that this is a question by Ms. Ehrens when it is actually Dr. Bainbridge’s response to a question from Ms. Ehrens]. [↑](#footnote-ref-62)
63. Although I did not always conclude that her testimony was persuasive, I found Dr. Berkowitz to be a candid, credible, knowledgeable and objective witness. She has extensive experience in providing expert testimony as a forensic psychologist and conducting forensic psychological evaluations since 1978. Many of her court evaluations have involved child protection cases that consider sexual abuse of children. She attained her PhD in clinical psychology in 1972. Her unwavering commitment to the interests and rights of children was self-evident from her testimony and resume. Testimony of Berkowitz; exhibit P-2. [↑](#footnote-ref-63)
64. See *J.S. v. Scarsdale Union Free School Dist*., 2011 WL 5925309, \*25 (S.D.N.Y. 2011) (distinguishing child find requirements where there school district should have suspected student had a disability as compared to a situation where a student “was merely going through a difficult time in her life”). [↑](#footnote-ref-64)
65. See, e.g., *U.S. v. Newman*, 1991 WL 63625, 3 (6th Cir. 1991) (“mental health professionals … have noted that rape victims often experience shock, sleeplessness, nightmares, fear, humiliation, and paranoia”). [↑](#footnote-ref-65)
66. In response to a question from Parents’ attorney (“Was it obvious that the event itself was traumatic to her?”), the School Adjustment Counselor responded: “Yes. I think it was traumatic and confusing to her.” Transcript, 10/25/11 (page 77). [↑](#footnote-ref-66)
67. Relevant portions of the School Adjustment Counselor’s testimony (in response to questions from Parents’ attorney, Ms. Adams) are as follows:

Q. You mentioned all of this was confusing to her. Can you describe what you mean by that?

A. She was very upset. I think she had this question as to why this whole thing was

happening, why it happened. Why [CBDE employee] was approaching her. I saw it as a break in the trust relationship and that's what I attributed it to that she found herself in this situation and was kind of confused as to how it all happened and why it happened.

Q. Was the trust relationship based on the fact that he was her [CBDE employee]?

A. Yes.

Q. And an employee of the school?

A. Correct….

Q. Did that make it more difficult for her that she had this trust relationship with him because of the fact he was an employee? Could you assess the impact of that on her?

A. Yes, that made it worse certainly I believe.

Q. What else did you glean from her disclosure in terms of her mental state and the fact that she was a victim of this assault? What clinical information did you get from that?

A. She had been traumatized, certainly. It was a traumatic experience.

[Transcript, 10/25/11 (pages 77-80).] [↑](#footnote-ref-67)
68. Dr. Bainbridge’s testimony in this regard is in contrast to his written report, which stated that “[CBDE] staff should have requested to evaluate [Student] after she failed to make progress in the Anger Management Program [from March to June 2009] and when her classroom grades continued to fall during the period from March through May, 2009, of that school year”. Exhibit P-P (page 3). In its closing argument (page 15), CBDE takes the position that this contradiction is one of several reasons why Dr. Bainbridge’s testimony should be disregarded. I do not agree. There is no explanation for Dr. Bainbridge’s different opinions since he was not asked about this during his testimony and did not otherwise address it. Without knowing the reasons for his differing opinion, I cannot determine what weight to give this apparent contradiction. In addition, at the time of his testimony (which was after his written report) Dr. Bainbridge left no doubt regarding the clarity and certainty of his opinion that CBDE should have sought an evaluation immediately after the rape disclosure, and his testimony on this point was more detailed and more comprehensive than his written report. Presumably, his more recent testimonial opinion was informed by information different than or in addition to what he relied upon when he wrote his report. I also note that his report’s (at page 10) discussion regarding the timing of a child find violation under Section 504 is consistent with his testimony. In sum, I do not have a basis for concluding that his written report diminishes the credibility or persuasiveness of Dr. Bainbridge’s testimony on this issue. Testimony of Bainbridge; exhibit P-P. [↑](#footnote-ref-68)
69. In her testimony, Dr. Cassens later explained that CBDE’s responsibility became even more apparent when Student began cutting herself and was hospitalized in January 2010. Dr. Cassens testified as follows:

I can't explain why testing wasn't done sooner. I can't explain it. I don't know. But I can say certainly when she started cutting and certainly when she had a hospital admission, absolutely, there should have been an evaluation without any question. [Transcript, 11/30/11 (page 248).] [↑](#footnote-ref-69)
70. See CBDE’s closing argument, page 16. [↑](#footnote-ref-70)
71. This is supported by the following testimony of the School Adjustment Counselor:

There is a whole cluster of symptoms that go with PTSD. Some people display them, some people don't. Some people have immediate reactions and the literature sometimes goes from six to 18 months out before sometimes that is expressed. It varies. It is not like a cut and dry this happened therefore you are going to see all of that. You have to be watchful monitoring that because those are potential things that can happen. [Transcript, 10/25/11 (pages 88-89).] [↑](#footnote-ref-71)
72. 34 CFR 104.3(j). [↑](#footnote-ref-72)
73. Cf. *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 26-27 (D.D.C. 2008) (“Court finds that DCPS violated the IDEA when it failed to evaluate N.G. in 2003 as potentially emotionally disturbed”). [↑](#footnote-ref-73)
74. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 518-519 (DC Cir. 2005) (internal quotations and citations omitted) (emphasis added). [↑](#footnote-ref-74)
75. *P.P. ex rel. Michael P. v. West Chester Area School Dist*., 585 F.3d 727, 738 (3rd Cir. 2009) (emphasis added). [↑](#footnote-ref-75)
76. *Forest Grove School Dist. v. T.A.,* 129 S.Ct. 2484, 2495 (2009). [↑](#footnote-ref-76)
77. The OSEP Memorandum is available at: http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep11-07rtimemo.pdf [↑](#footnote-ref-77)
78. I note, in particular, the following testimony by Dr. Bainbridge: “I think it's a black-and-white issue. I think there is no situation when a child is raped by a staff member that the special education staff should not jump in to the business of creating an IEP and a plan for this child that has been violated by the school district itself.” Transcript of 9/13/11 (page 91). [↑](#footnote-ref-78)
79. CBDE might also have tried to rely on (but did not) the testimony of the Former CBDE Special Education Director who testified that by February 2010, Student should have been referred for an evaluation, and the testimony of the Guidance Counselor who testified that by May 2009, Student likely had a disability that would warrant referral for an evaluation. See discussion later in the text, above, regarding their testimony. However, I decline to infer from their testimony that these witness would have testified that it would have been professionally acceptable to determine, immediately after the rape disclosure, that Student did not have a suspected disability requiring special education or related services; and, even if I were to draw this inference, I would then need to speculate as to the reasons that the Former CBDE Special Education Director and Guidance Counselor would proffer to support this position. For these reasons, I conclude that their testimony has no probative value regarding this issue. [↑](#footnote-ref-79)
80. I make this finding without guidance from any court decision in which the facts approximate those in the instant dispute. Compare, e.g., *D.A. ex rel. Latasha A. v. Houston Independent School Dist*., 629 F.3d 450, 455 (5th Cir. 2010) (“we … find no fact issue as to whether HISD officials ‘departed grossly from accepted standards among educational professionals.’ D.A.'s mere disagreement with the correctness of the educational services rendered to him does not state a claim for disability discrimination. That HISD authorized an evaluation for special education within two months after its initial denial further demonstrates at most misjudgment, not bad faith.”) (citation omitted); *Sellers v. Sch. Bd. of City of Mannassas, Va*., 141 F.3d 524, 529 (4th Cir. 1998) (“courts have been reluctant to find in mis-diagnoses the evidence of bad faith or gross misjudgment sufficient to support a discrimination claim under Section 504”); *Monahan v. Nebraska*, 687 F.2d 1164, 1170 (8th Cir. 1982) (“evaluation is not discriminatory [under Section 504] merely because a court would have evaluated the child differently”); *N.T. v. Balt. City Bd. of Sch. Com'rs*, 2011 WL 3747751, 8 (D.Md. 2011) (“jury could reasonably infer that the abrupt decisions to discontinue significant parts of N.T.'s educational program, without proper assessments and evaluations, were made in bad faith or were gross misjudgments”); *Scaggs v. New York Dept. of Educ*., 2007 WL 1456221, \*16 (E.D.N.Y. 2007) (plaintiffs sufficiently pled the requisite “gross misjudgment” violation where they asserted that defendants were aware of plaintiffs' disabilities, that plaintiffs' parents requested accommodation and programs to address such disabilities and that defendants intentionally refused to take any remedial or corrective action to remedy the problems); *Gabel ex rel. L.G. v. Board of Educ. of Hyde Park Central School Dist*., 368 F.Supp.2d 313, 335 (S.D.N.Y. 2005) (“District's many failures may rise to the level of gross negligence or reckless indifference sufficient to support a claim of discrimination under Section 504.”); *Walker v. District of Columbia*, 157 F.Supp.2d 11, 36 (D.D.C. 2001) (“weight of the expert testimony indicated that DCPS's psychologists exercised sound, reasoned professional judgment that in no way departed from the accepted standards of their profession”). [↑](#footnote-ref-80)
81. Cf. *Compton Unified School Dist. v. Addison*, 598 F.3d 1181, 1184 (9th Cir. 2010) (“School District's wilful [sic] inaction in the face of numerous ‘red flags’ is more than sufficient to demonstrate its unwillingness and refusal to evaluate [Student]”). [↑](#footnote-ref-81)
82. The question and response are as follows:

Hearing Officer: Just to play devil's advocate and I am not a clinician. I don't have any of the experience that you do but I don't understand how somebody can look at that discharge summary and say this kid should not at least be considered for eligibility under Section 504 and the IDEA when somebody has that level of psychiatric issues.

School Adjustment Counselor: I understand. [This was his entire response to the question.]

[Transcript, 10/25/11 (pages 69-70).] [↑](#footnote-ref-82)
83. The Guidance Counselor’s testimony in response to questions from Ms. Adams was as follows:

Q. Is it fair to say that by May 2009 her behaviors were in fact a result of an emotional disturbance for which she qualified for an evaluation and services under 504 and the IDEA?

A. Yes.

Q. And you knew this at that time, didn't you?

A. I knew that her grades were going down and that she had difficulties.

[Transcript 10/24/11 (page 151)]. [↑](#footnote-ref-83)
84. See 603 CMR 28.05(1) (“Within 45 school working days after receipt of a parent's written consent to an initial evaluation or reevaluation, the school district shall: provide an evaluation; convene a Team meeting to review the evaluation data, determine whether the student requires special education and, if required, develop an IEP in accordance with state and federal laws; and provide the parents with two copies of the proposed IEP and proposed placement, except that the proposal of placement may be delayed according to the provisions of 603 CMR 28.06(2)(e); ….”); 603 CMR 28.02(5) (defining “school day”). [↑](#footnote-ref-84)
85. 603 CMR 28.05(7)(b). [↑](#footnote-ref-85)
86. Theoretically, the Section 504 process could have been quicker because there are no specific timeframes within which evaluations, eligibility and services or accommodations must be determined. However, as a practical matter, it is highly unlikely that the Section 504 process would have moved ahead of the IDEA process. Within the context of this particular kind of case, a separate eligibility determination regarding Section 504 would likely only have occurred in the event that Student was determined ineligible for special education services. Testimony of Former CBDE Special Education Director. [↑](#footnote-ref-86)
87. For example, the services from the School Adjustment Counselor would likely have continued without change, but would have been categorized as a special education service; the general education accommodations would have been listed as special education accommodations on Student’s IEP but would not likely have more extensive than those she was receiving; under special education, Student and her family would likely have continued to receive the same outside therapy as they had been receiving; and Student would have continued to receive support and counseling as needed from the Guidance Counselor as a regular education service. Student might have been offered more individualized instruction, but CBDE was making individual teacher assistance available to Student after school, and, in any event, the crux of Student’s difficulties were not her learning deficits but her emotional and behavioral deficits that interfered with her accessing her education in a meaningful way and making effective academic progress. Testimony of Guidance Counselor, School Adjustment Counselor. [↑](#footnote-ref-87)
88. Dr. Berkowitz testified that because Student did well when she took her math course over the summer within a small class and at her own pace, special education services could have appropriately replicated this model for Student. I do not find this persuasive as evidence indicating what special education services likely would have assisted Student. The issue simply cannot be answered persuasively without looking more specifically at the actual program that Student would have attended and testimony regarding its appropriateness. [↑](#footnote-ref-88)
89. The School Psychologist testified that, depending on the particular student, CBDE would expect to know prior to eight to ten weeks whether general education accommodations were not working and that a referral to special education would be appropriate. Transcript, 11/28/11 (pages 168-169). This indicates that CBDE’s knowledge of Student’s continuing difficulties for one month in the 2009-2010 school year, together with CBDE’s knowledge of her difficulties during the previous school year, would be more than sufficient to determine that different or additional educational services were needed. [↑](#footnote-ref-89)
90. *Board of Education v. Rowley*, 458 U.S. 176, 205 (1982). [↑](#footnote-ref-90)
91. *Id.* [↑](#footnote-ref-91)
92. See 34 CFR §300.301 (“Each public agency must conduct a full and individual initial evaluation, in accordance with §§300.305 and 300.306, before the initial provision of special education and related services to a child with a disability under this part.”). See also MGL c. 71B, s. 3; 603 CMR 28.04(2). [↑](#footnote-ref-92)
93. See *Rowley,* 458 U.S. at 181 (FAPE must be "tailored to the unique needs of the handicapped child by means of an 'individualized educational program' (IEP)"). [↑](#footnote-ref-93)
94. 20 USC 1401(9)(D). [↑](#footnote-ref-94)
95. See *Winkelman ex rel. Winkelman v. Parma City School Dist*., 550 U.S. 516, 524, 127 S.Ct. 1994, 2000 (U.S. 2007) (“IDEA requires school districts to develop an IEP for each child with a disability … with parents playing a significant role in this process. Parents serve as members of the team that develops the IEP. The concerns parents have for enhancing the education of their child must be considered by the team.”) (internal quotations and citations omitted); *School Committee of Town of Burlington, Mass. v. Department of Educ. of Mass*., 471 U.S. 359, 368, 105 S.Ct. 1996, 2002 (1985) (“The IEP is to be developed jointly by a school official qualified in special education, the child's teacher, the parents or guardian, and, where appropriate, the child. In several places, the Act emphasizes the participation of the parents in developing the child's educational program and assessing its effectiveness.”). [↑](#footnote-ref-95)
96. See 34 CFR 300.502(b); 603 CMR 28.04(5); 603 CMR 28.08. [↑](#footnote-ref-96)
97. 20 U.S.C. § 1415(f)(3)(E)(ii). [↑](#footnote-ref-97)
98. CBDE’s substantive objections are answered generally within my April 28, 2011 ruling on CBDE’s Second Motion to Dismiss. Parents filed a response stating that they had no objections. [↑](#footnote-ref-98)
99. *See Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 125 n.17 (1st Cir. 2003) ("it may be that § 504 claims require some showing of deliberate indifference not required by IDEA"). *See also* Fitzgerald *v. Barnstable School Committee,* 504 F.3d 165, 171 (1st Cir. 2007) (in context of Title IX, “deliberate indifference” standard “requires a showing that the institution's response was clearly unreasonable in light of the known circumstances”) (internal quotations and citation omitted). [↑](#footnote-ref-99)
100. As used in this document, the term “educational harm” is intended to be broad enough to include social, emotional, behavioral and academic considerations, but only to the extent that they impacted Student’s learning. The term does not address "problems truly 'distinct' from learning problems." *Gonzalez v. P.R. Dep't of Educ.,* 254 F.3d 350, 352 (1st Cir.2001). See also *Rome Sch. Comm. v. Mrs. B.,* 247 F.3d 29, 33 n.3 (1st Cir.2001) (noting that, in determining adequacy of IEP for emotionally disturbed boy, "[t]he question is whether [his] behavioral disturbances interfered with the child's ability to learn"); *Lenn v. Portland Sch. Comm.,* 998 F.2d 1083, 1089 (1st Cir.1993) (IDEA entitles qualifying students to services that "target '*all* of [their] special needs,' whether they be academic, physical, emotional, or social") (quoting *Burlington,* 736 F.2d at 788). [↑](#footnote-ref-100)
101. This issue is intended to address any procedural violations. The issue is not intended to include any loss of consortium. [↑](#footnote-ref-101)