January 25, 2024

 **COMMONWEALTH OF MASSACHUSETTS**

***Division of Administrative Law Appeals***

**Bureau of Special Education Appeals**

**DECISION**

**BSEA # 2309351**

**BEFORE**

**MARGUERITE M. MITCHELL**

**HEARING OFFICER**

**KELLY LaROE, ADVOCATE, PARENT, AND EDUCATIONAL DECISION-MAKER FOR STUDENT**

**ALISIA ST. FLORIAN AND MELINDA PHELPS, ATTORNEYS FOR DISTRICT**

**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In Re: Student**[[1]](#footnote-1) **and Springfield Public Schools BSEA# 2309351**

# DECISION

This decision is issued pursuant to the Individuals with Disabilities Education Act (IDEA) (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.

On March 31, 2023, Student and Parent filed a *Hearing Request* against the Springfield Public Schools (“SPS” or “District”) and other named parties. On April 18, 2023, a Sufficiency Challenge to the *Hearing Request* was allowed. An *Amended Hearing Request* was filed on May 2, 2023. Various procedural Motions were filed by the Parties[[2]](#footnote-2), and the Parties participated in Conference Calls on May 22, 2023, July 11, 2023, July 14, 2023, September 8, 2023, September 14, 2023, October 10, 2023, and October 31, 2023[[3]](#footnote-3). At the joint request of the Parties, a Pre-Hearing Conference was held on June 28, 2023. The Hearing was postponed for good cause three times, either at the joint request of the Parties or at the request of one of the Parties, but unopposed by the other Party.

A public hearing was held on November 14 and 28, 2023. The Hearing was held via a virtual platform, based upon the joint request of the Parties. At the conclusion of testimony on November 28, 2023, the Parties jointly requested that the Hearing be continued until January 8, 2024, to allow for oral closing arguments to be submitted. This was allowed for good cause.

The official record of the Hearing consists of documents submitted by Parent and Student and marked as Exhibits S-1 through and inclusive of S-10[[4]](#footnote-4); documents submitted by the District and marked as Exhibits D-2, D-6 through and inclusive of D-10, D-12 through and inclusive of D-31[[5]](#footnote-5); and approximately 10 hours of stenographically recorded oral testimony by three witnesses resulting in a 3-volume transcript.

Those present for all or part of the proceedings, all of whom agreed to participate virtually, were:

Kelly LaRoe Advocate, Parent & Educational Decision-Maker for Adult Student

Alisia St. Florian, Esquire Attorney for SPS

Melinda Phelps, Esquire Attorney for SPS

Andrea McGovern Prior Educational Advocate for Student; NAACP House Advocate

 for Northwestern Massachusetts for Families

Dr. Mary Anne Morris Executive Director of Special Education and Related Services-SPS

Chris Kennedy Regional Director – College Steps

Carol Kusinitz Court Reporter – Veritext Legal Solutions

Marguerite M. Mitchell Hearing Officer

On January 8, 2024, the Parties submitted their oral closing arguments, and the record closed.

# ISSUE IN DISPUTE:

The issues for hearing in this matter are as follows:

1. Whether Student was discriminated against or not provided with reasonable accommodations he was entitled to while attending the AIC College Steps program between May 2, 2021, and April 5, 2022, in violation of Section 504 of the Rehabilitation Act of 1973; and
2. Whether Student was entitled to and provided with a licensed biology and/or licensed special education teacher as a tutor to support Student in preparing to take the biology MCAS between May 2, 2021, and April 5, 2022.

# POSITIONS OF THE PARTIES:

**Student’s Position**

Student contends that he was discriminated against by SPS and its’ employees or agents on the basis of his special education disability in violation of Section 504 of the Rehabilitation Act of 1973 while attending the College Steps program on the American International College (AIC) campus between May 2, 2021 and April 5, 2022. The discrimination consisted of constant harassment by SPS staff, such as by Dr. Morris who rolled her eyes at him when he informed his Team that he had hurt his foot. This led to Student being unable to attend any Individual Educational Program (IEP) meetings during this timeframe. Additionally, Student contends that Team meetings held during this time period did not include any teachers, and Team decisions were made unilaterally. The District also allegedly, unilaterally, without Parent’s approval, adjusted Student’s College Steps schedule to provide more time for MCAS biology tutoring and failed to provide him with the agreed upon 2021 extended school year services at the Online Boot Camp offered by Landmark College, or with an alternative program when he was not accepted into that program. Further, Student was not provided with the reasonable accommodations required by his IEP during the relevant time period. Specifically, the District sought to provide Student with his special education services prior to the start of his College Steps program day, thereby requiring Student to walk through the College Steps campus (an area known for significant violence) on his own, without any supervision, or during his lunch period, thereby prohibiting him from eating his meal and engaging in the social opportunities the lunch period provided. Finally, Student’s graduation goals were changed from an expectation of receiving a diploma, to expecting Student to age out of special education services without a diploma (Parent referred to this as being a “life skills” student).

Student further contends he was entitled to but did not receive a licensed biology or special education tutor to prepare him for the February 2022 biology MCAS exam. This staffing failure, according to Student, kept him from passing the biology MCAS and, hence, from receiving his diploma before his twenty-second birthday.

**District’s Position**

The District asserts that Student has not met his burden of proof with regard to any of the allegations of either issue. Moreover, at all times, including during the relevant timeframe, it has not discriminated against Student on the basis of his disability in violation of Section 504 of the Rehabilitation Act of 1973 while he was attending the College Steps program on the AIC campus, nor has it denied Student any reasonable accommodations pursuant to any accepted IEPs during this period of time. Student’s then-advocate acknowledged that such denial of accommodations had not occurred. Student’s time at College Steps was successful, and he was provided with compensatory services to equal or overcompensate for any of the missed individual reading or speech and language services he was owed under his IEP. Although the District acknowledges that there were challenges scheduling the one-hour weekly speech and language services and the third of the three (3) weekly hour-long reading service sessions provided in his IEP, these services were ultimately provided virtually. They were not provided in the morning before his College Steps program, due to the safety concerns expressed by Parent for Student being on campus alone at that time, or during his lunch period, given the objections of Student and Parent to Student eating his lunch while participating in any services.

The District also asserts that Student was not entitled to nor required to be tutored by a licensed teacher certified in either biology or special education for the February 2022 biology MCAS retest. The District acknowledges that Student was tutored by a College Steps Mentor who was not licensed or certified in biology or special education. According to the District, all the preparation work for the biology MCAS retest involved reviewing material from the biology course Student had taken while attending SPS, for which he had received a passing grade. No new curriculum was taught or needed to be taught to Student in preparation for this test. Further, neither federal or state law, nor the Mediation Agreement signed by the Parties in late October 2021 (the first time Parent finally agreed to Student receiving MCAS retest support), legally obligated the District to provide Student with a licensed teacher to tutor Student for the biology MCAS retake. Student’s failure to pass the biology MCAS in February 2022 was more likely due to the short amount of preparation time available to him, given Parent’s refusal to agree to such tutoring prior to her execution of the Mediation Agreement, and not the certification status, or lack thereof, of the person working with him.

# FACTUAL FINDINGS[[6]](#footnote-6):

1. Student is a “humble”, “truthfully honest”, “well-liked” “friendly agreeable, patient and cooperative” 23-year-old adult who, during the relevant timeframe, was 21 years old and was receiving special education and related services to support his autism disability pursuant to an IEP dated April 13, 2021, to April 5, 2022 (IEP). (D-28; MacGovern, 71; Kennedy, 380).
2. Student passed the ELA MCAS retest in 2017 and the Math MCAS retest in 2018. He received 206 (warning) on the biology MCAS retest in 2018. As of May 2, 2021 (the start of the timeframe for this Hearing), Student had yet to pass the biology MCAS retest. (D-28).
3. At all times associated with the timeframe for this Hearing, Student was educated at the College Steps Program on the AIC campus. He also received individual tutoring in reading and written language and individual speech and language services beyond his program day. College Steps has been operating in Springfield, MA for 9 years. College Steps is an independent non-profit agency that provides an adult transition program on the campus of, and in partnership with, but not part of, AIC. It supports students still enrolled in their local high school, and adult students receiving developmental and vocational rehabilitation services. Students are supported through a team of Peer Mentors. Peer Mentors are AIC undergraduate or graduate college students that are supervised by a master’s level coordinator. Peer Mentors meet weekly with the students they support to review their goals in four areas – independent living, social, academic and vocational. They also support students to navigate classes, assist with homework, and improve organizational and social skills in small groups and at campus activity events. If the supported students are still enrolled in their high schools, College Steps also works on their transition goals in their IEP. College Steps students typically attend full time (27.5 hours per week, 5 days a week). (D-20; D-30; Kennedy 439-41)
4. During the 2020-2021 school year, MCAS preparation support was briefly included in Student’s College Steps program day schedule, as College Steps advised that even if he was not expected to retake the biology MCAS, he should work with College Steps to prepare for it, in case he does take it. However, at Parent’s request, this support was removed from his schedule. At no time during the 2020-2021 school year did Parent consent to Student being tutored or otherwise provided with any support to prepare to retake the biology MCAS, and thus no tutoring or other such supports occurred during this school year. On February 2, 2021, Christopher Kennedy, Regional Director for College Steps[[7]](#footnote-7), advised the parties in a series of emails, that if they were to agree that Student receive services to support him in re-taking the biology MCAS, College Steps could offer Mentors to do this, however,

“it is important to note that [M]entors are not content specific tutors so if they are to work with him on this it would take the form of supporting him in moving through the MCAS prep materials with executive functioning support, not content expertise. This is something that we’ve done with a number of students and have found success with, in the past.” (D-20; D-30; Kennedy, 400-01, 447-52).

1. The Team met on April 9, 2021, April 13, 2021, and May 4, 2021, to develop an IEP. Student “briefly” attended the May 4, 2021, meeting, and as noted in the Parent and/or Student Concerns portion of the IEP, “he greeted and was greeted by participants”. Mr. Kennedy also attended at least one of these meetings to discuss and finalize Student’s weekly College Steps schedule with the Team. He recalled that there was a lot of tension at the Team meetings he attended, and it seemed to him there were many other issues playing out between the Parties or in court that came into these meetings. Conversations frequently went off topic, and many people, including himself, had to refocus the Team to the agenda. (D-22; D-28; Kennedy 389-90, 430).
2. Shortly after the May 4, 2023 Team meeting, the Team proposed an IEP. Dr. Mary Anne Morris[[8]](#footnote-8) signed the IEP on behalf of the District and sent it to Parent for signature on May 11, 2021. The IEP includes goals in the areas of Reading, Written Expression, Communication Skills and Transition and provides for A grid services consisting of 4 hours per calendar year of Assistive Technology consultation by an Assistive Technology Specialist, B grid services consisting of 27.5 hours per 5-day cycle of College Steps-Transition services by Vocational/Transitional College Steps staff and C grid services consisting of 3 hours per 5-day cycle of Tutoring in Reading and Written Expression by a General Education Teacher or Paraprofessional, and 1 hour per 5-day cycle of Speech and Language services by a Speech and Language Pathologist or Assistant. For the summer of 2021, Student was also offered a month of 1 hour per 5-day cycle Speech and Language services by a Speech and Language Pathologist or Assistant.

The “Additional Information” Section of the IEP notes that Student’s graduation date was June 2019, and that he had met all credit requirements and had passed two of the three MCAS requirements necessary to obtain a high school diploma. It also notes that “the district continues to recommend [Student] review materials to prepare for a retest in the MCAS biology exam, to explore various ways to pass the MCAS biology test, and in June, 2021 retake the MCAS biology test, in order to obtain a high school diploma.”

In explaining the Service Delivery Grid, the “Additional Information” Section notes that “the District recommends [Student] participate in recommended tutoring services, and to continue participating in College Steps Program at [AIC], Fall semester 2021 and Spring Semester, 2022, up to his 22nd birthday (IEP end date 4/5/2022)”. Tutoring would be provided by the Pioneer Valley Tutoring Services, associated with AIC, and follow the SPS calendar. An additional tutoring service, beyond that set forth in the Service Delivery Grid was also included in this Section with the notation, “[i]n the spirit of collaboration, the district has agreed to parent’s request for additional tutoring in Reading and Written Expression. An additional 10 sessions will be scheduled by the tutor and begin in the Fall, 2021”. (D-28; Morris, 159-62).

1. The IEP proposed placement in a full inclusion program to be located at “College Steps Program at AIC, Speech and Language and Tutoring Services 4/13/21-4/5/22”. (D-28).
2. Twenty-eight (28) accommodations were proposed in PLEP-A of the IEP, ten (10) of which were also testing accommodations. Six (6) accommodations were proposed in PLEP-B. The non-testing accommodations included chunking assignments, reducing the number of tasks to show competence, use of visuals, graphic organizers and vocabulary mapping, copies of notes, access to word processing or speech-to-text software, vocabulary lists, extended time, frequent cueing to stay on task, ensuring eye contact is made before providing directions, use of verbal reinforcement and praise, repeat instructions, wait time to process information, assistive technology tools such as a reading pen, iPad, and calculator, and scheduled organization time in the morning and afternoon during academic intervention. Testing accommodations included a distraction free environment, small group testing, alternative test location, line readers, graphic organizers, checklists or supplemental reference sheet, read aloud of directions read aloud for Math and Science tests, and text-to-speech support. (D-28; D-29).
3. The Extended School Year (ESY) services in the IEP included one month of speech and language services set forth in the Service Delivery Grid, noted *supra*. Also “longer year” under the “Schedule Modification” section of the IEP was selected, with the following rationale: “Because of [Student’s] special needs, he is enrolled in the Extended School Year program. An explanation is given below.” Further, the “Additional Information” section of the IEP, provided that, “In the spirit of collaboration, and (sic) requested by parent, the district has agreed to pay the tuition for the 5 Day Online Boot Camp, July 26 – July 30, 2021, offered by Landmark College. Parent and/or [Student] will complete the application process for this course.”. (D-28).
4. Ms. Andrea MacGovern[[9]](#footnote-9) recalls attending at least one of the Team meetings for this IEP as Student’s Advocate and discussing Student’s attendance at the Landmark College Bootcamp. According to Ms. MacGovern, the District agreed to fund the Landmark College program, provided Student was accepted. It was Ms. MacGovern’s understanding that not only was the District’s funding contingent on Student’s acceptance in the Bootcamp, but also that such a contingency is typically “a condition of any program”. (MacGovern, 77-86).
5. On June 20, 2021, Parent[[10]](#footnote-10) signed the IEP accepting the placement in full and selecting the box for “I reject the following portions of the IEP with the understanding that any portion(s) that I do not reject will be considered accepted and implemented immediately”. Specifically, Parent noted that she rejected the following: “The MCAS N1 was done outside of the meeting, district was informed in May, 2021 [that] he [illegible] cohort [illegible] process. Goal 1, 2 Tutoring by Gen ed/Para is not what was agreed to. Speech needs to be added to A Grid. Evaluation summary is missing information”. The box providing for Parent to “request a meeting to discuss the rejected IEP or rejected portion(s)” was left blank. (D-28).
6. On June 20, 2021, Parent and Student completed the application for the Landmark 5-Day Online Bootcamp that was scheduled to be held between July 26, 2021 and July 30, 2021. On July 21, 2021, Landmark College informed Parent and Student in writing that Student was not accepted into this program. Of note, the rejection letter indicated the Bootcamp is a,

five-day intensive program for students that are going to college or university in the Fall or currently enrolled in college. The program’s goal is to help students reflect on their personal learning style while introducing strategies on being a more efficient learner inside the classroom…. Upon review of [Student’s] application file, we feel this intensive online program is not a good fit to meet [Student’s] needs at this time. (S-1).

1. In August 2021, the Parties communicated by email over an issue relating to Student not being provided with a lunch on Wednesdays while attending College Steps[[11]](#footnote-11). The Parties were able to resolve this issue between themselves with the District agreeing to provide Student with a lunch through Sodexo (the College Steps food provider), on Wednesdays. However, Student ultimately declined this offered lunch. (D-21; D-23; D-24; D-25; D-26; D-27; Kennedy, 481).
2. On Friday, August 27, 2021, the Parties and Mr. Kennedy emailed about Student’s College Steps and IEP services schedule for the 2021-2022 school year. The District informed Parent when transportation would be provided (7:45 a.m. each morning for arrival by 8:00 a.m. and returning home by 2:40 p.m.), and who the tutor and speech and language pathologist would be. Tutoring was scheduled for Tuesday and Thursday mornings from 8:00 a.m. to 9:00 a.m. and on Wednesdays from 2:34 p.m. to 3:40 p.m. Initially tutoring would be remote but would move to in-person services on Tuesday and Thursday mornings. Speech and language services were to be scheduled directly with the provider who had emailed Parent with her availability and was waiting to hear back from Parent.

Parent objected to this schedule and accused the District and College Steps of developing it “unilaterally” without regard to Student’s needs. She noted that Student worked from “3-10 on Wednesdays”, and was concerned that the proposed schedule required Student to be at College Steps or receiving services “5 days a week” from 7:45 a.m. to 4:00 p.m. Parent felt this was “to (sic) much of a load” with his work obligations. She requested an “emergency meeting with all parties to discuss the schedule.”

Mr. Kennedy responded to these emails to indicate that a draft schedule had been provided and discussed by the Team several months earlier (at the Team meeting he attended in the spring of 2021). At that time, it was agreed by the Team, including Parent that although typically the College Steps’ school day was 9:00 a.m. to 2:30 p.m., Student would take a course on Mondays, Wednesdays and Fridays starting at 8:30 a.m., as this was his “first choice”. In order to meet the 27.5-hour program day, the Team also agreed that Student would be “unsupported during lunch on M/W/F”, although natural supports during this time would take place. Mr. Kennedy further noted that the proposal of Tuesday and Thursday tutoring at 8:00 a.m. was also discussed at this Team meeting and he had “incorporated that into the draft schedule we shared and reviewed during that meeting”. Mr. Kennedy advised that while he was unable to stay for the entire 2-hour meeting, he had “specifically requested time during that meeting to collect these details, *and their approval by the team*, in order to start creating his schedule for the fall” (emphasis added). Mr. Kennedy offered to rearrange the schedule to stay within the program hours after the school year started but noted that classes had started on Monday and that scheduling is “incredibly complex and each student’s schedule is intertwined with the other students and our staffing availability in various ways”, so he could not guarantee immediate staffing if changes were made. (S-22).

1. On Monday, August 31, 2021, the first day of the 2021-2022 school year, Parent emailed the District about several concerns. Of relevance to this Hearing, Parent advised that she had learned there was no classroom set up for Student’s remote reading tutoring service when she drove him to College Steps that day, and noted her concern with the District’s ability to keep Student,

safe on [the College Steps] campus Tuesday, Wednesday and Thursday while the tutoring is virtual. Further I am again requesting the reading and speech occur during his school days, tutors, and other related service outside providers provide services during the school day in spfld (sic) schools and particularly AIC does service other students at AIC during the College Steps (sic) day. (S-6).

1. On September 7, 2021, the Team reconvened virtually to review Student’s schedule for the tutoring and speech and language services provided for in the IEP’s Service Delivery grid that were fully accepted by Parent. Student did not attend this Team meeting, but Ms. MacGovern attended as Student’s advocate. According to the N1 form for this meeting, of relevance to this Hearing, the District reiterated its prior proposal to provide the 3 hours of tutoring services in-person on the College Steps campus on Tuesdays and Thursdays from 8:00 a.m. to 9:00 a.m. and on Wednesdays from 2:45 p.m. to 3:45 p.m. (before and after his College Steps program day, respectively), and the weekly one-hour speech and language services remotely on either Tuesday or Thursday afternoon, at Parent’s option. Further, the N1 form indicates the District “continues to propose tutoring in Biology to help [Student] prepare for the MCAS biology test. See Additional Information in the 4/13/2021 – 4/5/2022 IEP.” Parent did not agree to any in-person tutoring, and explicitly objected to the morning tutoring from 8:00 a.m. to 9:00 a.m. as that would require Student to be unsupervised in an area with a substantial history of violence and gang activities. (S-3; S-10; D-20; D-22; MacGovern, 231, 324-27; Morris 194, 528).
2. On September 8, 2021, Parent emailed the Landmark College Bootcamp rejection letter to DESE and copied the District. At some point in time, Ms. MacGovern also recommended up to three other summer programs for Student to attend, but the District refused to fund said programs, and Ms. MacGovern “let it go”. According to Dr. Morris, a Team meeting was not convened upon learning of the Landmark College rejection, since this was only offered as a good faith offer “in the spirit of collaboration”, based upon information Parent brought to the Team meeting. Dr. Morris believed that the only summer services required by the IEP were speech and language services. These services were offered to Student, but he declined to attend any sessions. (S-1; D-28; MacGovern, 77-86, 332; Morris, 154, 162-64, 582, 593).
3. Parent also sent the District a letter dated September 8, 2021 entitled “September 7, 2021 IEP Meeting Reiteration”, noting her objections and her own summary of what took place at the September 7, 2021 Team meeting. Of relevance to this Hearing, Parent acknowledged Student did not attend this Team meeting, and alleged that Dr. Morris’ responses to her stated safety concerns were “insulting” and that she “rolled [her] eyes several times”. Parent also reiterated her request that the tutoring and speech and language services occur within the College Steps scheduled school day. However, Parent acknowledged that the Team also discussed providing Student tutoring services for 1.5 hours per week on Tuesdays and Thursdays from 8:00 a.m. to 9:30 a.m. and that Speech and Language services on Wednesday mornings from 8:00 a.m. to 9:00 a.m. According to the N1 form prepared by the District summarizing the September 7, 2021 Team meeting, the Parties ultimately agreed that remote tutoring would be provided on Tuesday and Thursday mornings from 8:00 a.m. to 9:00 a.m. with transportation arriving at 9:08 a.m. to take Student to College Steps. The NI also indicated that Parent informed the Team that Student was not available for any tutoring or speech and language services on any afternoon after 3:00 p.m.[[12]](#footnote-12). As such, as of September 8, 2021, the Parties were in agreement for Student’s College Steps school day and 2 of the 3 hours of remote tutoring. There was no agreement for the final hour of tutoring or for the hour of speech and language services. (S-3; D-20; D-22).
4. On October 15, 2021, the Parties participated in a mediation with the BSEA. Ms. MacGovern and Mr. Kennedy were also present for some or all of this mediation. The Parties reached a resolution. The resulting Mediation Agreement, signed by Dr. Morris on October 19, 2021, and by Parent on October 25, 2021, contained the following provision, relevant to the issues for hearing in this matter,

The Student will work with a College Step’s (sic) Mentor to provide executive functioning support as the Student works through MCAS Biology in preparation for Biology MCAS testing. This programming will occur during the Student’s College Steps daily programming hours. The Mentor will work with the Student to complete Biology MCAS prep materials for an MCAS Biology Portfolio; District staff will gather and collate the information for submission of the Portfolio. If the Portfolio is not accepted by DESE, the Student will take the Biology MCAS test[[13]](#footnote-13)…. The Parties to this Agreement agree that it shall remain confidential between them and they shall not disclose any terms of this Agreement to anyone, except as required by law or in response to a lawfully issued subpoena… The Parties also may, as they deem necessary or desirable, seek to introduce copies of this Mediated Agreement as an exhibit in administrative or judicial proceedings in furtherance of enforcing this Mediated Agreement. (D-19; MacGovern, 74; Morris, 205; Kennedy, 385).

1. According to Mr. Kennedy, and consistent with his February 2, 2021 email to the Parties, the term “executive functioning support” is specific to the type of support College Steps Mentors provide. This is different from “tutoring” in that College Steps Mentors are not content specialists[[14]](#footnote-14). Thus, while they can support students in reviewing and moving through curriculum that is already known to the student they cannot teach new curriculum. College Steps has successfully supported “a number of students” to review and prepare for MCAS in this way without the use of a licensed or certified teacher as a tutor, and without receiving any other supports or additional educational services from their home districts. (D-30; Kennedy, 393-94, 396-97).
2. On October 27, 2021, Mr. Kennedy engaged in a series of emails with Parent pertaining to College Steps beginning to mentor Student for the MCAS biology retest in accordance with the Mediation Agreement. Parent provided permission for College Steps to begin this work prior to it receiving a copy of the signed Mediation Agreement, and Mr. Kennedy advised it would start the following day. During this email exchange, Parent also advised that she was “… actually revising the agreement because Springfield may be responsible for providing a special education teacher during the day of the school day (sic) to work on that portfolio.” Mr. Kennedy responded to explain that his recollection of the Agreement was that the District’s staff would only be collecting information and submitting the portfolio. There was no discussion about District educators going to College Steps to work with Student during its day to prepare for the MCAS biology retake. (S-9; Kennedy, 462).
3. According to Mr. Kennedy, due to the short time available for the agreed-upon mentoring before the MCAS biology retest, he took care to select one of his best, strongest and most capable Mentors to work with Student. This Mentor, a college student, did not have a professional background in biology. (Kennedy, 384-85, 416-17).
4. On November 4, 2021, as a result of a finding of noncompliance by DESE’s Problem Resolution System (PRS) pertaining to scheduling of the remaining hour of tutoring and the hour of speech and language services, the District proposed to provide five hours each (of tutoring and speech and language services) during the College Steps winter semester break dates of December 20, 2021 to January 14, 2022. It also proposed that starting the week of November 8, 2021, Student would receive the remaining hour of tutoring remotely on Mondays from 12:00 p.m. to 1:00 p.m. and the hour of speech and language services remotely on Wednesdays from 12:00 p.m. to 1:00 p.m. in rooms to be identified on the College Steps campus. (D-18).
5. On November 10, 2021, Parent emailed Dr. Morris at 10:17 a.m. and asked whether the District had,

identified a teacher to go into college steps (sic) to work with my son and (sic) MCAS portfolio as agreed-upon in the mediation. Again I understand while a teacher wasn’t guaranteed in the mediation do we need (sic) MCAS Portfolio during the day was promised in the mediation and college steps (sic) has been very clear that their staff cannot do that curriculum, a teacher needs to go in and complete that. I am looking for a response today because if you have not identified somebody to begin the portfolio I will be going directly to court to enforce the mediation agreement[[15]](#footnote-15). (D-16; D-17).

1. Dr. Morris responded at 10:34 a.m. by advising that,

The mediation states very clearly that a mentor from college steps (sic) will review all materials with [Student] and send it to the district for compiling and submission. You signed this mediation agreement. There is no language or agreement about a teacher going to the campus for this purpose. (D-16; D-17; Morris 536-37).

1. Parent replied at 11:07 a.m. to explain that,

The MCAS Portfolio has a (sic) entire curriculum that must be completed, are you stating you submitted to college steps (sic) the portfolio curriculum materials??? I believe you sent MCAS testing prep materials not portfolio, please send me what you send (sic) the school so I can compare it to the MCAS Portfolio curriculum on DESE’s website. It is very specific work and [Mr. Kennedy] is correct that a mentor can’t do that he requires a teacher for science work. Did you check with college steps (sic) before committing them to the portfolio and MCAS prep?? … You will not just prep him for the test as that is a violation of the mediation agreement and I will file and enforce that he is give (sic) access to create a (sic) appropriate and meaningful portfolio. (D-16; D-17).

1. At 11:52 a.m. Parent sent a further email to Dr. Morris indicating, in relevant part, that,

Reviewing the Mediation agreement it appears we have a problem that must be resolved…. [The District] agreed that [Student] will be able to complete a (sic) MCAS portfolio to be submitted for approval and if not approved he will sit for the test…. I am requesting a Special education teacher be identified to do the Portfolio curriculum…. [N]ow we have a serious violation because while I know you do not want him to have any option other than to retake the test it is agree (sic) that he will do a portfolio…. I will expect a highly qualified teacher or a different acceptable idea to not further delay [Student] from starting the portfolio. (D-16; D-17).

1. Dr. Morris responded to these emails at 2:42 p.m. advising that,

We held a mediation in full accordance with the regulations. The agreement is clear that college steps (sic) will support review of the materials during the program. The portfolio will be assembled after review of the mcas (sic) biology prep materials which we have sent to college steps (sic) and can certainly send to you. The district will be responsible for assembling and submitting the portfolio once the work on the standards are (sic) completed…. (D-16; D-17).

1. Ms. MacGovern[[16]](#footnote-16), who was copied on some of the prior emails, replied to Dr. Morris at 3:35 p.m. to advise that,

So that clears things – so the college the program (sic) will review all the materials/standards with [Student] and will be responsible to preserve and save any materials that may need to go into the portfolio? [T]hen Springfield will oversee the final coordination of the portfolio if needed to submit to the state is that correct? Certainly, if that is the case then [Student] is covered … however if something does not happen then it will be another matter before the court. (D-16; D-17).

1. While Ms. MacGovern could not recall what “things” exactly she was referring to being “cleared”, she did recall that she added the final clause to this email due to the history between the parties of having things promised at meetings and getting “unraveled the minute the team was adjourned”. This, in turn, would result in argumentative interactions between the Parties, that Ms. MacGovern felt were “not to this young man’s betterment”. (MacGovern, 304-308, 318-319).
2. On November 18, 2023, the Parties again engaged in a series of emails that also included Mr. Kennedy. Of relevance to this Hearing, Dr. Morris advised that the MCAS biology retest would take place on February 1 and 2, 2022 and the MCAS biology Portfolio needed to be submitted by April 1, 2022. Additionally, Parent confirmed she did not agree to the District’s proposal to provide the additional hour of tutoring and the hour of speech and language services from 12:00 p.m. to 1:00 p.m. on Monday, Wednesday, or Friday as proposed on November 4, 2021 in response to the PRS finding of noncompliance. Parent raised significant concerns that providing services during this time would result in Student not being able to eat his lunch which he was both legally and humanitarianly entitled to do[[17]](#footnote-17). Finally, Mr. Kennedy confirmed that College Steps began working on mentoring Student with his biology MCAS test preparation materials “after we received the signed mediation agreement outlining that decision”, and the Mentor assigned to do this work with Student was “one of our most skilled mentors”. Additionally, Mr. Kennedy explained that College Steps was going to develop a plan with Student to both cover information already reviewed with the Mentor and identify additional work he can do on his own independently over the “lengthy break between semesters”. Further, Mr. Kennedy advised that College Steps was planning to provide all materials produced during this review to the District “so that they can be collated as a potential portfolio submission as our role in [the Mediation Agreement] was outlined”. (D-13; D-14; D-15, MacGovern, 324; Kennedy, 483).
3. At the conclusion of this email exchange, Dr. Morris asked Parent if Student was still unavailable starting at 3:00 p.m. every afternoon. She received no response. At no time prior to April 5, 2022, was the District informed that Student’s availability after 3:00 p.m. had changed. (D-14).
4. On November 29, 2021, the Team reconvened to discuss Student’s progress and to review Occupational Therapy and Autism observations that were planned to take place in the fall of 2021 when College Steps returned to in-person learning after the COVID-19 pandemic. During this Team meeting, among other discussions not relevant to this matter, the District rejected Parent’s request to schedule the third tutoring hour and the hour of speech and language services during the College Steps school day. It continued to recommend that these services be provided on either Monday, Wednesday or Friday from 12:00 p.m. to 1:00 p.m., which were unstructured times for Student while he was on the College Steps campus. The N-1 for this meeting also noted that Parent and Ms. MacGovern raised concerns with being provided with meaningful participation during the meeting, but the District did not agree as “[Parent] and her consultant, Ms. MacGovern collectively shared their thoughts and concerns regarding [Student]’s education from 1:25 PM until 2:02 PM.” (D-10).
5. The N1 for this meeting further advised that Student had a 30-minute lunch period during his one-hour of unstructured time at College Steps. This daily hour of unstructured time was in addition to the 27.5 hours of weekly programming that Student received at College Steps. Mr. Kennedy testified that he is not aware of any students who have ever received IEP speech and language services or private tutoring, such as from Pioneer Valley Tutoring, during the College Steps 27.5-hour school programming time. As such any IEP services that were in addition to the College Steps program should be scheduled before or after the program day or during the daily unstructured time. (D-10; D-22; Kennedy 430-31).
6. According to an email from Mr. Kennedy to the District and Parent on January 12, 2022, Student worked with his College Steps Mentor “reviewing the [MCAS Prep] material and focusing on studying any concepts that he was struggling with” until the December semester break. In total, Student had approximately five weeks from Parent’s provision of consent to work with the Mentor to prepare for the biology MCAS retake, with one of those weeks being the week before finals. As such, a “good part of his day for those weeks” was spent working on the MCAS preparation packet with his Mentor. (S-7; Kennedy, 463, 465-66).
7. Mr. Kennedy considered Student to be a bright student who already knew a lot of the biology content that was contained in the MCAS preparation packet he reviewed with his Mentor. Student and his Mentor only focused on those aspects of the review packet that Student still needed to know, making notes in a corresponding notebook about the topics and content in the packet that Student was not competent in, or that he could not sufficiently demonstrate to the Mentor that he understood, and then using those lists to guide study. Mr. Kennedy acknowledged that much of the packet was blank when Parent reviewed it, as this meant Student already knew the material and did not need to study it. Mr. Kennedy explained that the MCAS biology review packet “isn’t [], a bunch of worksheets and activities to do. It’s, [], a list of the content standards and an explanation of that content. So it’s like chapters in a book almost[. T]here were certain elements that he could fill out, but they were sparse. So, there’s not much for him to complete in there.” Dr. Morris concurred, explaining that the MCAS review packet reviewed the standards that students needed to master, as a preparation tool to take the MCAS test. (Morris, 394-95; Kennedy, 394-95, 469, 500-01, 504-06).
8. On January 4, 2022, Dr. Morris sent an email to Parent to advise that Student was registered for the biology MCAS retake on February 2 and 3, 2022 at Renaissance High School. Parent objected to the test site of Renaissance High School and it was ultimately changed to a different location[[18]](#footnote-18). (D-9; Morris, 546)
9. Student retook the biology MCAS on February 2 and 3, 2022 but did not pass the test. Prior to the biology MCAS retake, Student did not receive any biology MCAS preparation tutoring by a licensed biology or special education teacher. (D-19; Morris, 175; Kennedy 508).
10. On February 7, 2022, Parent emailed Dr. Morris that, in her opinion, having Student take the biology MCAS retest prior to the submission of the portfolio was in reverse order from what the Mediation Agreement provided[[19]](#footnote-19). According to Dr. Morris, the order of events occurred as it did because the only MCAS retest offered prior to Student turning 22 was in February 2022, while the portfolio deadline was April 1, 2022. (S-5; Morris, 187, 544, 546)
11. On March 25, 2022, the Team met for a Student Performance Summary and Exit Meeting in anticipation of Student turning 22 on April 6, 2022, and thus reaching the end of his eligibility for special education and related services under the IDEA. At the conclusion of the meeting the District proposed, as a compensatory service plan, to continue to fund Student’s tuition at the College Steps program until the end of the spring, 2022 semester, to continue to provide Student with two hours weekly of virtual tutoring to resolve all compensatory claims from January, 2022 until Student turned 22, and to continue to provide Student with district-issued assistive technology consisting of an iPad and a reading pen through the end of the spring, 2022 semester. On April 4, 2022, Parent accepted this proposal noting,

I accept the School District’s Proposal to fund [Student’s] Tuition through end of Spring, (sic) 2022 semester and two hours of Tutoring a week to resolve 13 missed tutoring services. I reject waiving my right to additional claims of compensatory (sic) that may be ordered. This does not supercede (sic) any of my claims to Stay Put for federal injunction (sic). (D-6; D-7).

1. Parent filed the underlying Amended Hearing Request on May 2, 2023. The District held a Resolution Meeting on May 23, 2023 that did not result in resolution of the matter. (D-2).
2. Student ultimately received all service hours provided for in his IEP either though agreed upon times, remotely prior to the start of the College Steps school day, in person during the College Steps school day, via compensatory services over the winter break, or after Student turned 22 until the end of the 2021-2022 College Steps school year. At no time did Student receive any services during lunch [[20]](#footnote-20). Nor did Student receive any services on the College Steps campus prior to the start of the school day. Rather, Parent’s safety concern[[21]](#footnote-21) was accommodated by providing services remotely. However, despite agreeing that all services owed to Student under the IEP were provided by the District, Ms. MacGovern explained she was still concerned that the scheduling proposals made by the District, although never implemented in their original form, failed to account for Student’s needs, including his need to eat his lunch, his need to ensure his safety on the College Steps campus and his work schedule after school. Ms. MacGovern “did not feel, as an Advocate for my client, that they were putting his best interests in the forefront. It was all about squeezing in time to fit people’s availability and schedule.” (MacGovern, 283-92, 331; Morris 192-95, 527-30, 558).
3. According to Ms. MacGovern, Student was legally entitled to a “highly qualified” tutor or teacher to help prepare him for the MCAS, because he was a student with a disability, and this was a “high stakes exam”. If not so legally entitled to a “highly qualified” tutor, Ms. MacGovern also felt he still should have been given one. As Ms. MacGovern explained, once Student began receiving MCAS preparation support,

“I found that there suddenly was resistance where there didn't need to be. I did not understand, …. So, I never could understand what the roadblock was, why they said that they don't have to provide a teacher or a qualified tutor. I didn't understand that, because they were providing tutoring to [other] students who were still in the high school programs in Springfield that I worked with personally. So, I didn't understand (sic) the roadblock was with [Student]….”

Ms. MacGovern suggested that either Student’s individual reading tutor or his speech and language therapist would have been appropriate people to tutor Student in preparation for the biology MCAS test, because they were employed by Pioneer Valley Tutoring who according to Ms. MacGovern, has very high standards with regard to the qualifications of their tutors. Additionally, she noted that Student progressed under their support, achieving multiple school years of growth in his reading skills in one year of work with the reading tutor, while simultaneously receiving support in his vocabulary development from the speech and language pathologist. This support was the type of support Ms. MacGovern believed Student needed to receive to prepare for the MCAS biology test[[22]](#footnote-22). (MacGovern, 111, 309-312, 342-344, 357-62).

1. According to Dr. Morris, Student was legally entitled to a licensed biology teacher when he took and passed[[23]](#footnote-23) his Biology course in 9th grade, but not for support to retake the biology MCAS. Dr. Morris explained that the support Student received to prepare him to retake the biology MCAS during the 2021-2022 school year consisted of reviewing material he had been taught in his Biology course, not learning any new curriculum. No teaching of curriculum occurred or was needed to prepare Student to retake the biology MCAS; his work consisted solely of reviewing the DESE created biology MCAS test preparation packet provided to Student by the District[[24]](#footnote-24).
2. Additionally, Student had previously taken an MCAS preparation course as a senior, in the spring of 2019. The only biology MCAS support services Parent ever agreed to after 2019 were those set forth in the Mediation Agreement at the end of October 2021. Given the limited days left to give Student this support between Parent’s late October 2021 agreement and the early February 2022 biology MCAS retake test days, Dr. Morris believed this limited preparation time was Student’s biggest obstacle to passing the biology MCAS retake test[[25]](#footnote-25). Had Student had at least six months or a year to prepare to retake the biology MCAS he would have had a greater chance of passing it. Even if Dr. Morris could go back in time, she would not have provided Student with a licensed biology or special education teacher because “it would not have made a difference. We didn’t have anywhere near the amount of time to work on what we needed to work on”. (D-19; Morris, 166- 174, 178-188, 210-214, 216-17, 534-36, 541-42, 562-64, 597-98; Kennedy 416-17).
3. Mr. Kennedy agreed that, as with any academic situation, the more support the better and if Student had been provided with a licensed teacher to support him in preparing to retake the biology MCAS, he would have had a better chance to pass it. He further believed that working with someone Student had a good relationship with to prepare for the biology MCAS retake, such as his individual reading tutor, or his College Steps Mentor, would be helpful. However, he explained that given limited preparation time, students often reach a “saturation point and fatigue”. Thus, Mr. Kennedy was not sure if there was “room for a ton more” to support Student in preparing to retake the biology MCAS beyond what he received once the Mediation Agreement was signed. (Kennedy, 432, 512-13, 517-18).
4. Student’s experience at College Steps was very positive. He had much success at the program and also with the individual tutoring support that he received. No complaints were ever made to the District regarding the individual tutoring, speech and language services or College Steps program services Student received during the timeframe at issue in this matter. According to Ms. MacGovern, Student’s reading skills improved more than four grade levels[[26]](#footnote-26) during the 2021-2022 school year. Student advised Ms. MacGovern that he thought his reading tutor was “one of his best teachers he ever had”. (MacGovern, 236, 279-82, 313-14; Morris 532-33).

# LEGAL ANALYSIS:

1. Free Appropriate Public Education and the Development of IEPs

The right to a free appropriate public education (FAPE) for all students with a disability is guaranteed by both federal and state law[[27]](#footnote-27). The services that comprise a FAPE must be provided in the "least restrictive environment”[[28]](#footnote-28). To constitute a FAPE, a student’s educational program must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances”[[29]](#footnote-29). The examination of effective progress shall be made in the context of the educational potential of the student[[30]](#footnote-30).

“The ‘primary vehicle’ for delivery of a FAPE is an IEP”[[31]](#footnote-31). An IEP, therefore, must be “custom tailored” and “individually designed” so as to be “reasonably calculated to confer a meaningful educational benefit” to a student[[32]](#footnote-32). “… [A]n IEP is designed as a package. It must target ‘*all* of a child’s special needs’, whether they be academic, physical, emotional or social”[[33]](#footnote-33). Evaluating an IEP requires viewing it as “… a snapshot, not a retrospective. In striving for 'appropriateness’, an IEP must take into account what was and was not objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated”[[34]](#footnote-34).

Parents are “active” members of the IEP Team with the right to participate fully in the IEP development process and to have their views considered[[35]](#footnote-35). This does not mean, though, that parents are able to dictate the contents of an IEP or the services to be provided[[36]](#footnote-36). IEP Teams are required to work “towards consensus” but when parents disagree, school districts are obligated to provide the parent’s with “prior written notice” of their proposals or refusals and notification of their due process hearing rights[[37]](#footnote-37). Moreover, when judicial review of an IEP occurs, “deference … based on the application of expertise and the exercise of judgment by school authorities” is due to the school staff[[38]](#footnote-38).

The IDEA does not place school systems under a compulsion to afford a disabled child an ideal or an optimal education”[[39]](#footnote-39). Provided the proposed educational program in an IEP is “reasonably calculated” to deliver “educational benefits”, and “to enable the child to make progress appropriate in light of the child’s circumstances”, school districts have met their IDEA obligation with respect to such IEP[[40]](#footnote-40). Although an IEP’s educational services need not be “the only appropriate choice or the choice of certain selected experts, or the child’s parents’ first choice, or even the best choice[[41]](#footnote-41)”, student progress must be “effective”, and a student must show “‘demonstrable improvement’ in the various ‘educational and personal skills identified as special needs’” to receive a FAPE[[42]](#footnote-42).

1. Disability Discrimination under Section 504 of the Rehabilitation Act of 1973[[43]](#footnote-43)

Section 504 of the Rehabilitation Act of 1973 (Section 504) 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…”[[44]](#footnote-44). The law confirms that “program or activity” means “all of the operations of … a local educational agency … or other school system …”[[45]](#footnote-45). To establish a prima facie case of discrimination under Section 504, parents and students must show, first, that a student is an “otherwise qualified individual with a disability” under the law; second, that the student is eligible to participate in the educational program; third, that the program receives federal funding; and fourth that the program discriminated against the student[[46]](#footnote-46).

Under Section 504, as with the IDEA, every school district is obligated to “provide a [FAPE] to each qualified handicapped person who is in the [school district’s] jurisdiction, regardless of the nature or severity of the person’s handicap”[[47]](#footnote-47). However, while both Section 504 and the IDEA, require qualified or eligible students to be given a FAPE, they differ in that Section 504 (as opposed to the IDEA), also provides protection for disability discrimination[[48]](#footnote-48). Thus, “a discrimination claim under [Section 504] … involving a denial of a FAPE is not coextensive with an IDEA claim”[[49]](#footnote-49). Something more, beyond merely a showing of a violation of the IDEA, is required in order to prevail on a Section 504 claim[[50]](#footnote-50). According to the First Circuit, this “additional showing” involves also establishing that the denial of a FAPE “resulted from a disability-based animus” or “intentional discrimination”[[51]](#footnote-51).

1. Extended School Year Services

The appropriateness of an IEP for the school year and the appropriateness of an IEP for the summer are judged by different standards[[52]](#footnote-52). Under the IDEA, extended school year services are required to the extent that they are “necessary to provide FAPE”, provided that “… a child’s IEP team determines, on an individual basis, in accordance with §§300.320-300.324, that the services are necessary for the provision of FAPE to the child”[[53]](#footnote-53). This standard has been interpreted by the federal courts in other Circuits to require that parents must show with particularity as to the specific services needed, that those ESY services are necessary to avoid “substantial regression” or are needed because “the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months”[[54]](#footnote-54). As the Sixth Circuit has held, “providing an ESY is the exception and not the rule under the regulatory scheme”[[55]](#footnote-55).

Similarly, in Massachusetts, to be entitled to receive an extended school year program, a student must “…ha[ve] demonstrated or is likely to demonstrate substantial regression in his or her learning skills and/or substantial difficulty in relearning such skills if an extended program is not provided”[[56]](#footnote-56). By comparison, rather than a regression standard, school year services are held to the FAPE standard of the IDEA, discussed *supra*. Moreover, the presence of regression, on its own, does not “mandate[] a summer placement and specifically placement at a particular school”[[57]](#footnote-57).

1. Highly Qualified Teachers

In Massachusetts, in order to be “eligible for employment as a teacher” or other identified support personnel or administrator, the educator must have “been granted by the commissioner a … certificate with respect to the type of position for which he seeks employment”[[58]](#footnote-58). These requirements were commonly referred to as being “highly qualified”. However, the reauthorization of the IDEA in 2015 under the Every Student Succeeds Act (ESSA) eliminated the definition of “highly qualified” from the IDEA[[59]](#footnote-59). Rather, ESSA delegated to the individual states the sole authority to determine teacher certification requirements[[60]](#footnote-60). Notwithstanding ESSA maintained the obligation that each State,

adopt a policy that includes a requirement that local educational agencies in the State take measurable steps to recruit, hire, train, and retain personnel who meet the applicable requirements described in this paragraph *to provide special education and related services* under this subchapter to children with disabilities[[61]](#footnote-61).

Thus, although the definition of “highly qualified” no longer exists in the IDEA, both federal and state law continue to require that eligible students with disabilities be provided with their special education and related services under the IDEA by properly licensed or certified teachers, related service providers and paraprofessionals[[62]](#footnote-62).

1. Burden of Persuasion.

In a special education due process proceeding, the burden of proof is on the moving party[[63]](#footnote-63) (here, Parent and Student). If the evidence is closely balanced, the moving party will not prevail[[64]](#footnote-64).

# DISCUSSION[[65]](#footnote-65):

Student’s eligibility for special education is not in dispute in this matter. Nor does either issue in this matter involve a dispute over the appropriateness of the IEP in existence during the relevant time period. Rather, this matter is limited to two specific issues – whether, between May 2, 2021 and April 5, 2022, was Student 1) discriminated against or not provided with reasonable accommodations to which he was entitled while attending College Steps, in violation of Section 504; or 2) entitled to and provided with a licensed biology and/or licensed special education teacher as a tutor to support him in preparing to retake the biology MCAS. Upon consideration of the documentary and testimonial evidence, the applicable law, and the Parties’ arguments, I find that Parent and Student have not met their burden to prove either issue, thus the District prevails on both.

A. Section 504 Discrimination Claim

The Section 504 discrimination allegations made by Parent and Student consist of five categories of claims[[66]](#footnote-66): 1) Student was discriminated at Team meetings as he was subjected to “constant harassment” by SPS staff, (such as Dr. Morris rolling her eyes at Student when he informed the Team that he had hurt his foot resulting in Student not attending any IEP meetings), Team meetings were convened without any teachers, and Team decisions were made unilaterally; 2) Student’s graduation goals were changed from planning for him to receive a diploma to being a “life skills” student. (i.e., expected to age out of special education services without a diploma); 3) Student’s College Steps’ schedule was adjusted unilaterally by the District without Parent approval so as to provide Student with time to receive tutoring for the biology MCAS; 4) the District failed to provide Student with the agreed upon ESY services at the Landmark College Online Bootcamp for the summer of 2021, or at an alternative program when he was not so accepted; and 5) the District improperly proposed to provide Student with his IEP services of individual tutoring and/or speech and language services prior to the start of his day at College Steps, thereby requiring him to walk through the College Steps campus on his own without any supervision (an area known for significant violence), or during his lunch period, thereby prohibiting him from eating his meal and engaging in social opportunities while having lunch.

As discussed below, with respect to the first threecategories of alleged discrimination, I find that Parent and Student failed to present sufficient evidence to support these claims, and thus did not meet their burden of proof. As discussed below, the evidence presented by Parent and Student at times contradicted the claims made. Further, many of these claims consist of nothing more than general allegations that were not fully supported by evidence sufficient to raise these allegations beyond conclusory statements[[67]](#footnote-67). As to the remaining two categories, while their claims do not fail for lack of evidence or contradictory evidence, as discussed below, I do not find any of the District’s actions to have resulted in a denial of a FAPE to Student, or to have been based upon a disability animus or other intentional act of discrimination because Student is disabled.

1. The Team Meeting Discrimination Allegations.

Parent and Student claim that Student was discriminated against at the Team meetings held during the relevant timeframe because he was subjected to constant harassment by SPS employees and agents at these meetings. Sufficient evidence to support this allegation was not presented. Parent and Student also claim that Team meetings improperly failed to include teachers. However, they failed to present any specific evidence in support of this claim. Finally, Parent and Student claim that Team decisions were made unilaterally, but the evidence, in fact, supports the opposite conclusion. As such, Parent and Student did not meet their burden of proof that the District improperly discriminated against Student at any of the Team meetings involved in this matter. I take each of these allegations in turn.

* 1. “Harassment” Allegations

With respect to the allegations of “harassment”, Parent and Student relied on the testimony of Ms. MacGovern and Mr. Kennedy[[68]](#footnote-68). Ms. MacGovern testified generally that Student was treated improperly at Team meetings and that this treatment made him uncomfortable or fearful to attend. However, the majority of Ms. MacGovern’s testimony on this point pertained to Team meetings that took place outside the relevant timeframe, not to any of the Team meetings that occurred during the relevant timeframe[[69]](#footnote-69). I found Ms. MacGovern to have testified truthfully and credibly to the best of her ability from her memory; however, she candidly acknowledged during her testimony that the matters she was testifying to had taken place over two years ago. She further explained that since she had represented Student as his advocate for many years, the meetings and information she was testifying to ran together in her memory and she was not able to confirm accurately that all of her testimony related to the time period in question in this matter. As such, where Ms. MacGovern’s testimony conflicts with admitted exhibits or was not otherwise verified by other evidence in the record, I do not credit it, as I was not able to confirm it related to the Team Meetings in this case.

Parent also questioned Mr. Kennedy about his knowledge of Student’s reasons for not attending the Team meeting. I consider Mr. Kennedy to be an extremely credible witness and attribute a great amount of weight to his testimony. He did not demonstrate any bias to either Party, and at all times testified with a focus on Student’s needs, goals and interests. I also consider his testimony about what occurred at the Team meetings he attended to be highly reliable, as he maintained an external, third-party role at these meetings, and sought to use his relationship with both parties to seek collaboration and cooperation to meet Student’s educational needs.

According to Mr. Kennedy, Parent told him that Student did not attend Team meetings because he was “afraid or had bad experiences”. However, Mr. Kennedy confirmed that his knowledge about this issue was solely based on what Parent told him, and that Student never related such information to him directly. Although Student was identified as a witness, Parent chose not to call him to testify. As such, direct evidence from Student was not presented as to why he did not attend Team meetings that took place during the relevant timeframe in this matter[[70]](#footnote-70).

Additionally, Student attended at least one Team meeting and was neither prohibited from participating in the other Team meetings involved in this matter, nor unable to present his statements and concerns. Student attended the May 4, 2021 Team meeting “briefly” and greeted and was greeted by the other participants. Further, Ms. MacGovern attended some of the Team meetings during this timeframe, on behalf of Student, as his “voice”[[71]](#footnote-71). Parent also attended every Team meeting as Student’s advocate, and at all times Student had also delegated her to be his educational decision maker. According to the N-1 for the November 29, 2021 Team meeting, Parent and Ms. MacGovern were both in attendance and raised concerns about not being provided with meaningful participation during that Team meeting; however, the District did not agree and noted that “[Parent] and her consultant, Ms. MacGovern collectively shared their thoughts and concerns regarding [Student]’s education from 1:25 PM until 2:02 PM.”

* 1. Missing Teachers Allegations

No evidence was presented with specificity in support of the allegation that no teachers attended the Team meetings. Parent did not present any attendance sheets for the Team meetings or other evidence to substantiate this allegation. Attendance sheets were not presented by the District, either, however, according to witness testimony, Ms. Laurie Malandrinos, (listed as the District contact person on the IEP) appears to have attended at least some of the Team meetings involved in this matter. Dr. Morris testified that Ms. Malandrinos is a certified special educator. Overall, I found Dr. Morris to be a credible witness who was knowledgeable about special education procedures and requirements. While it was clear to me from her testimony that Dr. Morris did not have a positive relationship with Parent, at no time did I find her to display any bias or dislike of Student. Further, Dr. Morris’s testimony was consistent with the documentary exhibits entered into evidence. Thus, I credit Dr. Morris’s testimony on all issues that do not involve her interactions with Parent, such as the licensure status of Ms. Malandrinos. Given this, the weight of the evidence fails to support Parent and Student’s claim.

* 1. Unilateral Team Decisions Allegations

Although Parent and Student claim Team decisions were made unilaterally and without their meaningful participation, the evidence is to the contrary. A review of the IEP and the N-1 forms from the Team meetings that took place in this matter contradict this claim. For instance, the IEP’s Additional Information section noted some agreements for services were reached “in the spirit of collaboration”. Additionally, as discussed above, the November 20, 2021 Team meeting’s N-1 form noted the District’s disagreement with Parent and Ms. MacGovern’s contention that they were not provided with meaningful participation.

It is clear from the record that there was significant disagreement and dispute during the Team meetings. Mr. Kennedy credibly testified to the substantial “tension” that existed in the Team meetings he attended. He explained that many people, including himself, often needed to refocus the Team to its agenda, as conversations were frequently “off topic”. Ms. MacGovern credibly supported this testimony with her own acknowledgment of the frequent argumentative interactions between the parties that she felt “were not to [Student’s] betterment”, and I agree with Ms. MacGovern’s assessment of the negative impact the Parties’ continuing disputes likely had on Student. However, disagreement is not evidence of unilateral Team decision-making or a violation of a FAPE[[72]](#footnote-72). As explained above, the IDEA does not mandate agreement; rather it provides a right to meaningful participation in Team meetings[[73]](#footnote-73). When agreement cannot be reached, the IDEA obligates school districts to provide prior written notice of its proposals or refusals, as was done here[[74]](#footnote-74). Such proposals or refusals do not amount to unilateral Team decisions, nor do they evidence a lack of meaningful participation by Parent or Student.

1. Alleged Changes to Student’s Graduation Goal[[75]](#footnote-75)

Parent and Student also claim the District discriminated against Student in violation of Section 504 by allegedly changing his expected graduation goal in his IEP from graduating to being a “life skills” student (in that he no longer had a goal of graduation at all, but rather or reaching the age of 22 without a diploma). However, relevant evidence to support this claim was not presented. Further, as with the evidence on the unilateral Team decision-making allegation, the evidence pertaining to the District’s position as to Student’s goals at the conclusion of his secondary education is actually to the contrary.

Student’s IEP contains several references to his goal of graduating. The Vision Statement notes Student has “stated that he would like to graduate from high school and attend college”. In Additional Information, it is also noted that Student’s “anticipated date of graduation was June, 2019[[76]](#footnote-76)”. Parent accepted both of these sections of the IEP. Nothing in the IEP refers to Student as a “life skills” student or implies that the District no longer supported Student meeting his graduation goal.

After 2019, the only impediment to Student graduating was not having met the biology MCAS requirement. Substantial evidence was presented, including the testimony of Mr. Kennedy and Dr. Morris, as to the various efforts undertaken by the District, College Steps, and, as of her consent to the October 2021 Mediation Agreement, Parent, to support Student in passing this MCAS requirement. I credit the testimony of both Mr. Kennedy and Dr. Morris on this for the reasons discussed above. No evidence was presented that demonstrated the District ever wavered in its position regarding assisting Student in reaching his goal of graduating, nor did it ever stop trying to support Student to meet the biology MCAS requirement.

Parent and Student point to Exhibit S-6 (and Exhibit S-8 which is a copy of the last 2 pages of Exhibit S-6), entitled “MCAS Portfolio, Modified CD, Appeal Internal Emails Between District Staff”, to support their claim. This exhibit consists of several internal emails dated between August 17, 2020 and September 21, 2021, amongst various District personnel and, at times, Dr. Morris relating primarily to Student’s SIMS data enrollment code submitted to DESE in 2020. Notwithstanding that many of these emails are outside the relevant timeframe in this matter[[77]](#footnote-77), they also address claims that have been dismissed and are therefore not relevant to the issues in this matter[[78]](#footnote-78). Moreover, the emails do not establish or even imply that the District wanted Student to be ineligible for the competency waiver or otherwise not to receive a diploma. Rather, these emails appear to indicate that Student’s ineligibility might have been due to a coding issue that inaccurately reflected both his actual educational status during the relevant timeframe and the Team’s goals for Student at that time, and that the District was trying to find ways to correct this issue given the contradiction with Student’s actual status and the District’s educational goals for him[[79]](#footnote-79).

1. Unilateral Changes to Student’s College Steps Schedule Allegations

Parent and Student also contend that, without Parent’s consent, and at the District’s request, College Steps changed Student’s schedule to provide Student time to receive biology MCAS support during the College Steps program day. Evidence with respect to this issue is directly to the contrary claim, and thus this claim fails for the same reasons stated above. According to the record, Student’s schedule at College Steps was changed twice to provide him with MCAS biology support. The first time was in the 2020-2021 school year which is outside the relevant timeframe[[80]](#footnote-80). The second time was after Parent signed the October 2021 Mediation Agreement. According to the email exchange between Parent and Mr. Kennedy on October 27, 2021, as well as Mr. Kennedy’s testimony about this email, College Steps did not make any changes to Student’s schedule until it received Parent’s explicit permission. Additionally, although Parent alleged that Student’s initial 2021-2022 school year College Steps schedule was developed “unilaterally” by the District, Mr. Kennedy clarified that it had been developed at the spring 2021 Team meeting he attended and was agreed to by the Team at that time, including Parent[[81]](#footnote-81).

1. The Remaining Discrimination Allegations

As to the remaining two categories of discrimination, Parent and Student contend that the District failed to provided Student with the Landmark College Online Bootcamp program, or a comparable program, when he was not accepted into that program in the summer of 2021. Second, they contend that the District engaged in unlawful disability discrimination in violation of Section 504 by proposing that Student’s final hour of reading and writing tutoring and his hour of speech and language services occur in the morning prior to the start of the College Steps school day, on the College Steps campus, without supervision, or during his unstructured hour in the middle of the College Steps school day, when he also ate lunch. Parent and Student acknowledge that Student never actually received these services as proposed, and that all missed hours of service time were compensated. They submit, however, that the proposals on their own were discriminatory as they were made without any regard to Student, his needs, schedule or safety, and solely to meet the scheduling needs of the providers[[82]](#footnote-82). Unlike the first three categories of claims discussed above, these two categories of claims do not fail for lack of evidence, thus, I now turn to examine that evidence under the legal analysis for Section 504 claims set forth above. As noted above, for Parent and Student to prevail on these claims, I must first find that they resulted in a violation of a FAPE to Student. If there was such a violation, I must also find that the District’s decisions and actions were made with discriminatory animus, intentionally, because of Student’s disabilities[[83]](#footnote-83).

1. Landmark College Bootcamp

It is undisputed that “in the spirit of collaboration” the District and Parent reached an agreement for the District to fund the Landmark College 5-Day Online Bootcamp program for the summer of 2021, and that Parent and Student were responsible for submitting an application to this program. Parent and Student argue that this agreement was binding on the District, and did not involve any other conditions, such as acceptance in the program. However, their own witness, Ms. MacGovern, agreed that acceptance was a typical and reasonable expectation and pre-requisite for the District to incur any obligation with regard to this summer program. Common sense as well as the totality of the evidence supports Ms. MacGovern’s testimony, and as Student was, unfortunately, not accepted into this program, the District was not bound to fund it.

I also agree with the District that the Landmark College program was not part of the extended school year program provided for in Student’s IEP. The IEP indicates that the extended school year program was intended to address Student’s communication skills regression. It consisted of weekly one-hour speech and language services, as noted on the Service Delivery Grid. Parent accepted this portion of the IEP, and Student was offered these speech and language services during the summer of 2021, however he declined to participate.

The Landmark College Bootcamp program, on the other hand, was a transition skill-building program, not a communication skill-building one. Landmark College describes it as a “five-day intensive program for students that are going to college or university in the Fall (sic) or currently enrolled in college”, with a goal “… to help students reflect on their personal learning style while introducing strategies on being a more efficient learner inside the classroom” (S-1). No evidence was presented to indicate that Student needed support with his transition skills through an extended school year program due to loss of such transition skills during breaks in learning. Student’s transition skills were wholly provided within the College Steps program, and the evidence about Student’s progress and success in that program (as well as with his speech and language and individual reading and writing tutoring) was overwhelming[[84]](#footnote-84). Student made “substantial progression” not “substantial regression” with all of the skills supported in his IEP – reading, written expression, transition, and communication. Ms. MacGovern put it best “And finally, I want to say near the end of this process, things did work well for [Student] for whatever reason. He completed the services. He got the services he was owed….”[[85]](#footnote-85).

Contrary to Parent’s claims in her closing argument, my conclusions do not mean that in every context, extended school year programming consists solely of services set forth in an IEP service delivery grid or that services set forth in the Additional Information section of an IEP are never binding on a school district. There is no one prescriptive way to draft an IEP, nor can there be, given the individual nature that underlies such a document. As an IEP is “designed as a package”, interpretations of IEPs must be done by looking at the document as a whole in light of what was known to the IEP Team at the time it was promulgated[[86]](#footnote-86). When I do that here, I find that the Parties’ agreement was specific to the Landmark College Bootcamp program. Thus, as no other evidence was presented to support that Student “…demonstrated or [was] likely to demonstrate substantial regression” or “substantial difficulty in relearning” his transition skills[[87]](#footnote-87), Parent and Student did not meet their burden of proving that the District’s failure to provide Student with a comparable college preparatory program resulted in a violation of a FAPE to Student.

Finally, Parent and Student challenged the District’s failure to convene a Team meeting when Student was not accepted into the Landmark College Bootcamp program in order to identify and provide a comparable service. However, it does not appear that Parent notified the District of Student’s rejection until September 8, 2021. This notice came after the conclusion of the summer, and the day after the Team had held an “emergency meeting” at Parent’s request to attempt to work out Student’s College Steps and service delivery schedule. Further, Parent’s request for that meeting did not indicate anything about summer programming.

1. Scheduling the IEP Tutoring and Speech and Language Services

In support of the final discrimination claim category, Parent and Student contend that the District not only failed to consider Student’s needs, obligations, and safety in its scheduling proposals for reading and writing tutoring and speech and language services, but that its indifference was “deliberate” and would have exposed Student to unsafe and inhumane circumstances. Recognizing that the scheduling proposals they objected to were never implemented, Parent and Student submit that the mere act of proposing these schedules amounted to disability discrimination. Given the evidence presented about these scheduling proposals, I disagree.

First, the evidence shows that the District provided several different scheduling options for the individual tutoring and speech and language services and adjusted its proposals in response to Parent’s concerns and Student’s availability. The District also provided compensatory services to cover all of the missed service hours, both in response to the PRS finding that such services were owed, and as part of their ultimate proposal in the spring of 2022 to extend Student’s education beyond his 22nd birthday, continuing his enrollment at the College Steps program and his two hours per week of remote tutoring through the end of the 2021-2022 school year, as well as provision of District-issued assistive technology devices for this timeframe.

The District acknowledges that it initially proposed scheduling the IEP tutoring on Tuesdays and Thursday mornings and scheduling the speech and language services on Wednesday afternoons in-person at the College Steps campus. Mr. Kennedy’s August 27, 2021 email confirmed that this initial scheduling proposal was consistent with the Team discussion in the spring of 2021. However, when Parent objected to in-person services, based upon safety concerns, the District agreed that all services would be provided remotely. The District respected Parent’s stated safety concern with its original proposal, and at no time did Student receive any in-person services outside the College Steps school day, while unsupervised.

Additionally, the District acknowledges that in November 2021, it proposed that Student receive the remaining unscheduled 2 hours of services remotely twice a week between 12:00 p.m. and 1:00 p.m. when he had unstructured time in his College Steps programming day. Parent again objected to this proposal on the grounds that this would cause Student to miss lunch. Although out of the one-hour total unstructured time, Student had 30 minutes a day allotted for lunch, Parent did not want any services provided during the entire hour timeslot, as she felt the entire time was necessary for Student to purchase and eat his lunch and socialize. Again, the District respected Parent’s objection and no services were ever provided during this time.

The evidence further demonstrates that the District explored other scheduling proposals. Services were offered to be scheduled after the conclusion of the school day, starting at 2:45 p.m. however Parent advised that Student was unavailable starting at 3:00 p.m. each weekday as he was working[[88]](#footnote-88). The District respected this unavailability, and no services were ever provided to Student after the end of the College Steps programming day, either.

The only option the District did not agree to, despite Parent’s continued insistence, was to provide these services during the College Steps programming day. Mr. Kennedy testified that he was not aware of any other College Steps student ever receiving additional IEP services during the College Steps programming day. Moreover, I find that it would have been improper for the District to agree to Parent’s request, as doing so would have conflicted with the IEP’s B-Grid service requirement that Student receive the College Steps-Transition program for 27.5 hours per week, a distinct service separate from the tutoring and speech and language services in the C-grid[[89]](#footnote-89). As Parent did not reject these B or C-Grid services in the IEP, had the District agreed to Parent’s request it would have resulted in a denial of a FAPE to Student with regard to his College Step program services.

Thus, I disagree that the District insisted on a schedule that failed to consider Student’s needs, rights, or safety. None of the service delivery proposals was unreasonable at the time it was made. Parent’s objections on the grounds of safety and the right for Student to have an uninterrupted lunch were legitimate and understandable. Had the District ignored Parent’s concerns and insisted on services being provided in a way that operated in a discriminatory, unsafe or “take it or leave it” manner, it would have been in violation of its FAPE obligations[[90]](#footnote-90). The District did not do this, however. No services were ever provided without Parent’s agreement; all services not agreed to were included in the calculation of compensatory services provided, and the evidence shows that the District adjusted its proposals based upon the input of Parent and Ms. MacGovern[[91]](#footnote-91). Therefore, the District’s scheduling proposals were not in violation of its FAPE obligations.

Further, I do not find the District’s proposals on their own to have been so egregious as to constitute discrimination based upon Student’s disability, as Parent and Student argue. At a Team meeting in the spring of 2021, attended by Mr. Kennedy, the Team agreed to a schedule involving Student getting services from 8:00 a.m. to 9:00 a.m. on Tuesday and Thursday mornings. Moreover, although there was credible evidence presented to support Parent’s safety concerns pertaining to the neighborhood wherein the College Steps program was located, I also credit Mr. Kennedy and Dr. Morris’s testimony that Student would have received transportation from his house directly to the campus and would not have needed to cross any streets to access these in-person services. He also regularly accessed College Steps campus without supervision to attend volleyball games at night. Further, no services were ever provided during unsupervised times, and remote services were agreed to at the September 7, 2021 Team meeting.

Similarly, I do not find the proposal to provide services during Student’s lunch time, to be discriminatory “on its face”. While I agree with Parent and Student, as well as Ms. MacGovern that Student should not have been obligated to eat his lunch while also receiving his IEP services, the evidence showed that Student had an hour of unstructured time within his College Steps program day, with only 30 minutes of this time allotted for lunch. Thus, there was 30 additional minutes that Student had available to receive services. Additionally, as noted earlier, it is unclear to me whether Student’s unavailability after school, due to his work schedule, ever actually changed.

Notwithstanding my determination that these scheduling proposals do not constitute a denial of a FAPE to Student, I also do not find the intent behind these proposals to have been to place Student in an unsafe situation, or keep him from eating his lunch, with disregard to his needs, schedule or disabilities. It does not appear that the District only offered scheduling options based upon service provider availability, although service provider availability is not an improper factor for a district to consider. As noted above, the initial schedule proposal was agreed to by the Team, including Parent. There was no evidence of disability-based discriminatory animus by the District or intentional desire to discriminate against Student based upon his disabilities, either. Rather, the evidence indicates that the intent behind all the scheduling proposals was to develop a plan to provide Student with his additional IEP services during times that he and service providers were available. Thus, with regard to the first issue for hearing in this matter, the District prevails in all respects.

B. Licensed Tutor Claim

I turn now to the second issue in this matter - whether Student was entitled to and provided with a licensed biology and/or a licensed special education teacher to tutor him in preparation for the biology MCAS retake test. As the Parties do not dispute that Student was not provided with such a qualified person to support him in preparing for the February 2, 2022 biology MCAS retake, Parent and Student only bear the burden of proving that he was entitled to such a licensed tutor. After a review of the evidence on this issue, as well as the applicable law, I find that no such obligation existed for these services.

I note at the outset that the first time Parent requested a licensed biology or special education teacher relating to meeting the biology MCAS competency requirement was with regard to assistance in preparing his MCAS Portfolio, not with regard to provision of services related to his retaking of the MCAS. Somewhere between Parent’s initial emails to Dr. Morris on November 10, 2021 and her filing of the *Hearing Request*, Parent and Student morphed their request into a request for a licensed biology or special education teacher to tutor Student in preparing for the biology MCAS retake. It is also clear from the November 10, 2021 email that Parent acknowledged that the terms she had agreed to in the October 2021 Mediation Agreement did not require such a qualified person to be Student’s biology MCAS retake tutor. Specifically, Parent wrote,

Again I understand *while a teacher wasn’t guaranteed in the mediation* do we need (sic) MCAS Portfolio during the day was promised in the mediation and college steps (sic) has been very clear that their staff cannot do that curriculum, a teacher needs to go in and complete that. I am looking for a response today because if you have not identified somebody to begin the portfolio I will be going directly to court to enforce the mediation agreement. (Emphasis added). (D-17).

My own examination of the relevant provisions of the October 2021 Mediation Agreement aligns with Parent’s initial conclusion– a licensed teacher was not mandated to be provided to Student as a tutor to support him in retaking the biology MCAS exam. The terms of that Agreement were explicit and required Student only had to be provided with,

… a College Step’s Mentor to provide executive functioning support as the Student works through MCAS Biology in preparation for Biology MCAS testing. This programming will occur during the Student’s College Steps daily programming hours. The Mentor will work with the Student to complete Biology MCAS prep materials…[[92]](#footnote-92). (D-19)

Further, no federal or state law requires that Student be provided with a licensed biology or special education teacher to tutor him in preparation for the biology MCAS retake. While the IDEA mandates that students receive all their required special education and related services from licensed or properly certified teachers (previously known as “highly qualified” teachers)[[93]](#footnote-93), the supports Student would receive to prepare him to retake the biology MCAS were not special education or related services, nor were they part of Student’s IEP. Additionally, Mr. Kennedy and Dr. Morris credibly testified that the work associated with completing the “biology MCAS prep materials” did not involve teaching Student any curriculum. Instead, it consisted of reviewing information Student had already been taught and making note of the areas he needed to review further. According to Mr. Kennedy, Student was familiar with a lot of the information in the packet, and this is why much of it was blank.

In her closing argument, Parent contends that even if Student was not entitled to a licensed tutor to prepare him to retake the biology MCAS exam, “in the interest of fairness in the interest of justice” he should have been provided with one. Ms. MacGovern similarly testified that she believed Student should have been given a licensed teacher as a tutor. While I agree that it may generally be preferrable to have licensed teachers assist students in preparing to take the MCAS exams, in this case, I do not fault the District for not doing so. Here, given the dispute-laden relationship between the Parties it is understandable that the District did not want to make any changes to the terms agreed to by the Parties in the October 2021 Mediation Agreement, as Parent had adamantly refused to agree to Student receiving any supports to prepare him to retake the biology MCAS test until that time. Further, Student’s successes at the College Steps program, his connection with his College Steps Mentor, College Steps’ prior successful history in supporting other students in preparing to retake MCAS exams in the same way it supported Student, and the short amount of preparation time left before the test was to take place, made it reasonable for the District to adhere to the October 2021 Mediation Agreement terms only, rather than risk Student getting fewer or possibly no services while revised terms were negotiated[[94]](#footnote-94).

Thus, I find there was no legal obligation requiring Student to have been tutored by a licensed biology or special education teacher prior to retaking the biology MCAS exam. Similarly, no other document or agreement created such an obligation. Moreover, in this case, I do not find that principles of fairness or justice, or other concepts of “best practice” established such an obligation for Student. As I conclude that Student was not entitled to be tutored by a licensed biology or special education teacher, it was not improper for Student to have been only supported to retake the biology MCAS exam by his non-licensed College Steps Mentor. As such, Parent and Student do not prevail with regard to the second issue for hearing.

# ORDER:

The District did not discriminate against Student or fail to provide him with the reasonable accommodations that he was entitled to while attending the AIC College Steps program between May 2, 2021, and April 5, 2022, in violation of Section 504. Student was not entitled to a licensed biology and/or licensed special education teacher as a tutor to support him in preparing to retake the biology MCAS between May 2, 2021, and April 5, 2022.

Respectfully submitted,

By the Hearing Officer,

/s/ Marguerite M. Mitchell

Marguerite M. Mitchell

January 25, 2024

COMMONWEALTH OF MASSACHUSETTS

BUREAU OF SPECIAL EDUCATION APPEALS

EFFECT OF FINAL BSEA ACTIONS AND RIGHTS OF APPEAL

Effect of BSEA Decision, Dismissal with Prejudice and Allowance of Motion for Summary Judgment

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. Similarly, a Ruling Dismissing a Matter with Prejudice and a Ruling Allowing a Motion for Summary Judgment are final agency actions. If a ruling orders Dismissal with Prejudice of some, but not all claims in the hearing request, or if a ruling orders Summary Judgment with respect to some but not all claims, the ruling of Dismissal with Prejudice or Summary Judgment is final with respect to those claims only.

Accordingly~~,~~ the Bureau cannot permit motions to reconsider or to re-open either a Bureau decision or the Rulings set forth above once they have issued. They are final subject only to judicial (court) 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. This means that the decision must be implemented immediately even if the other party files an appeal in court, and implementation cannot be delayed while the appeal is being decided. Rather, a party seeking to stay—that is, delay implementation of-- the decision of the Bureau must request and 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,” while a judicial appeal of the Bureau decision is pending, 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 while judicial proceedings are pending must ask the court having jurisdiction over the appeal to grant a preliminary injunction ordering such a change in placement. *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 of Special Education Appeals 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 Elementary and Secondary Education or other office for appropriate enforcement action. 603 CMR 28.08(6)(b).

Rights of Appeal

Any party aggrieved by a final agency action by the Bureau of Special Education Appeals may file a complaint for review in the state superior court of competent jurisdiction or in the District Court of the United States for Massachusetts. 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. Parent and Student requested the Hearing be open to the public and waived Student’s and Parent’s confidentiality. [↑](#footnote-ref-1)
2. Over the course of the proceedings in this matter, seven (7) published Rulings have been issued including a *Ruling on Challenge to Sufficiency of Hearing Request*, 29 MSER 95 (April 18, 2023), *Ruling on Defendants’ Motions to Dismiss,* 29 MSER 154(June 12, 2023), *Ruling on Request for Public to Attend Prehearing Conference*, 29 MSER 201 (June 26, 2023), *Ruling on Springfield Public Schools’ Motion to Recuse Hearing Officer*, 29 MSER 292 (August 29, 2023), *Ruling on Multiple Motions*, 29 MSER 297 (September 5, 2023), *Ruling on Parent’s and Student’s Request for a Public Hearing*, 29 MSER 302 (September 6, 2023), *Ruling on Defendants’ Motions for Protective Orders*, 29 MSER 326 (September 28, 2023). A detailed procedural history of the matter as well as the procedural history of the previous and on-going BSEA and state and federal court proceedings between these Parties is included in these *Rulings* and will not be repeated here except as necessary. [↑](#footnote-ref-2)
3. As a result of the *Rulings* on all procedural Motions, all claims in the *Amended Hearing Request* were dismissed save for the two (2) identified issues for Hearing addressed in this *Decision*. These issues were first identified in the *Ruling on Defendants’ Motions to Dismiss*. The specific wording was then revised on June 28, 2023, and was further revised (as to the first issue only) on September 5, 2023. Additionally, all named respondent Parties were dismissed other than the District. To the extent necessary, the analysis associated with these *Rulings*, particularly with regard to dismissal of claims, is incorporated into this *Decision*. [↑](#footnote-ref-3)
4. Exhibits S-6 and S-8 were admitted solely for the purposes of consideration of the issues for hearing in this matter, not for consideration of any other issues. Any portions of Exhibits S-6 and S-8 that are outside the time frame of the hearing, will be considered only for context purposes. Student also sought to admit six (6) additional documents as rebuttal exhibits, which request was denied for the reasons noted on the record. [↑](#footnote-ref-4)
5. Exhibits D-1, D-3, D-4 and D-5 were excluded at the objection of Parent and Student without prejudice. Exhibit D-11 was excluded at the objection of Parent and Student with prejudice. [↑](#footnote-ref-5)
6. I have carefully considered all the exhibits and testimony presented in this matter. I make findings of fact, however, only as necessary to resolve the two (2) identified issues for hearing in this matter. I note that a substantial amount of the documents and testimony involved information not related to the two issues for hearing, and thus, I make no findings and draw no conclusions with regard to them. Consequently, although considered, all evidence and all aspects of each witness’ testimony is not included if it was not necessary to resolve said issues. [↑](#footnote-ref-6)
7. Mr. Kennedy is the Co-Founder and Regional Director for College Steps. He holds a bachelor’s degree and a master’s degree in special education and child development. He taught at Vermont State University until 1998 when he transitioned full-time to working for College Steps (Kennedy, 376-77, 441). [↑](#footnote-ref-7)
8. Dr. Morris is the Executive Director of Special Education and Related Services for the District. She holds a bachelor’s degree in elementary and special education, a master’s degree in educational psychology, a certificate of advanced graduate studies in educational psychology and a doctoral degree in child and family studies. She has also worked as a General and Special Education Teacher, a School Counselor, an Evaluation Team Leader, a School Psychologist, and a Supervisor of Early Childhood, primarily for the District. (Morris, 125, 520-21). [↑](#footnote-ref-8)
9. Ms. MacGovern was Student’s Educational Advocate at all times relevant to these proceedings. She holds an associate’s degree from Holyoke Community College in social sciences and is currently enrolled in a continuing education program in pursuit of a bachelor’s degree at Westfield State College. She has engaged in “thousands of hours of training in other areas by the Courts and state”. She has worked as an Educational Advocate since 1993 and has known Student since he was in middle school. As his Educational Advocate she attended meetings on Student’s behalf and acted as a support person for Parent when Parent (who is employed as an Educational Advocate herself) was acting as Student’s Educational Advocate. [↑](#footnote-ref-9)
10. The Parties agree that Student delegated educational decision-making authority to Parent, as reflected by the IEP’s Administrative Data Sheet. [↑](#footnote-ref-10)
11. College Steps advised that its Commuter Meal Plan for Student, did not cover lunch 5 days a week, as it required full-time students on this plan to bring their own lunch from home on Wednesdays or to purchase a lunch from the school. [↑](#footnote-ref-11)
12. According to the application Parent and Student completed for the Landmark 5-Day Online Bootcamp, Student worked between 20-25 hours per week at Lowes as of June 20, 2021 (S-1). [↑](#footnote-ref-12)
13. While confusing, it appears from the exhibits and testimony that as of October 2021 there were four different “alternative routes” the Parties were discussing for Student to pursue as a way to meet the biology MCAS competency requirement necessary to receive his diploma – retaking the biology MCAS; submitting a biology portfolio; submitting a cohort appeal; and obtaining a modified competency determination. Only two of the four were addressed in the Mediation Agreement – supporting Student to prepare to retake the biology MCAS and completing an MCAS biology portfolio; and only one of these is related to the issues for hearing in this matter – the type of support Student was entitled to and received to prepare him to retake the biology MCAS. With regard to the remaining options, all claims relating to the submission of the biology portfolio were dismissed with prejudice for reasons of res judicata and issue preclusion. Further, according to the District, Student was not eligible for the cohort appeal option although the reason for this was not clear. Finally, all claims relating to the modified competency determination were dismissed as was a general education option DESE offered, as a result of the COVID-19 pandemic, to all students who met certain requirements, and thus was beyond the jurisdiction of the BSEA. As noted in Footnote 3, above, the analysis for previously dismissed claims is incorporated into this *Decision*. (S-3; Morris 177-78; see *Ruling on Defendants’ Motions to Dismiss, Part II and Part V*). [↑](#footnote-ref-13)
14. Mr. Kennedy acknowledged that these terms are often inadvertently interchanged by people, including himself on occasion. He recalled one email in which he used the term “tutoring” but he could not recall if that was in error and he actually meant to refer to executive functioning support, or if he was instead referring to the tutoring and speech and language supports Student’s IEP provides for beyond the College Steps day, as this was also was a topic of many emails he was copied on. (Kennedy 499-500). [↑](#footnote-ref-14)
15. Mr. Kennedy testified that he recalled Parent raising the need for a “highly qualified” MCAS tutor to himself prior to this timeframe, but he was not sure if that was ever presented to the District or even if Parent mentioned this in an email or verbally to him. (Kennedy, 402, 434). [↑](#footnote-ref-15)
16. It is unclear from Exhibit D-17 when Ms. MacGovern was first included in this email chain. [↑](#footnote-ref-16)
17. Dr. Morris clarified that the proposal was for Student to eat his lunch while receiving these services. Parent contended that there was too much time involved in the process of ordering and waiting for his food and finding a lunch seat, which would cut into any service time offered simultaneously. Further, Ms. MacGovern testified that, particularly with regard to speech and language services, she did not see how it was feasible to be eating and engaging in speech and language work at the same time. She also noted that Student used his lunch time as an opportunity to work on his “interactive social skills”. Ms. MacGovern recalls that eventually the parties were able to “work something else out”. (D-14; MacGovern 102-103, 114, 283-92). [↑](#footnote-ref-17)
18. The actual location was not provided during the Hearing and is not contained in any of the exhibits. [↑](#footnote-ref-18)
19. On February 3, 2022, the day after the MCAS retest, Mr. Kennedy emailed Parent and the District to advise that College Steps was willing to use the time it had been supporting Student for the MCAS retest to now provide Mentor support to Student to produce work for his biology Portfolio submission. However, Mr. Kennedy did not believe there should be communication between the Mentor and the District staff who would be putting this Portfolio together given the limited schedule that Mentors work and their duties for College Steps. Ultimately, it appears the Portfolio appeal was put together by two certified special education teachers, including Laurie Malandrino. (S-4; Morris, 175-76). [↑](#footnote-ref-19)
20. The District disputes that it ever sought to deny Student lunch in order to receive tutoring or speech and language services. (D-21; D-23; D-24; D-25; D-26; D-27; Morris, 215-16). [↑](#footnote-ref-20)
21. The District disputes that its proposal created an unsafe situation for Student. Although Student would have been unsupervised while crossing the campus, he would have had “door-to-door” transportation to the campus from his house and would not have needed to cross any streets. Student would only have needed to walk across the courtyard to the dining hall. Student attended volleyball games on campus at night without supervision, and Parent did not raise any safety concerns to Mr. Kennedy about this. (Morris, 194, 527-30; Kennedy, 384, 486). [↑](#footnote-ref-21)
22. She was not however, aware of whether either professional was licensed or certified as a special education teacher or biology teacher. [↑](#footnote-ref-22)
23. According to Student’s transcript from SPS, Student received a D in Biology in the 16-17 school year at the Springfield Renaissance School. (S-1). [↑](#footnote-ref-23)
24. According to Mr. Kennedy, College Steps typically has at least one student a year working on an MCAS review packet with one of its Mentors. Typically, the decision for College Steps Mentors to support students in moving through the MCAS review packet is made by the Team and, assuming parents provide their consent, is implemented, as was the case for Student. (Kennedy 455-58). [↑](#footnote-ref-24)
25. Dr. Morris also emphasized the District’s continued commitment to assist Student in getting his diploma. She recalls this being discussed at every Team meeting, being included in every IEP and being a “constant focus” for the District as that was always Student’s stated goal. Additionally, the District gave Parent information about the Springfield Student Success Academy for additional assistance to Student to get his diploma. (Morris 185-86, 533). [↑](#footnote-ref-25)
26. Ms. MacGovern relied on previous testing administered by a Claire Scibila as the basis for this conclusion. That testing was not entered into evidence in this matter but was not disputed by the District. [↑](#footnote-ref-26)
27. 20 USC 1400, *et seq*.; MGL. c. 71B; 34 CFR 300.000, *et seq*.; 603 CMR 28.00 *et seq*; see 20 U.S.C. §1400 (d)(1)(A) (The first purpose of the IDEA is "to ensure that all children with disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living"). [↑](#footnote-ref-27)
28. 20 USC § 1412(a)(5)(A); 34 CFR 300.114(a)(2)(i); MGL. c. 71 B, §§ 2, 3; 603 CMR 28.06(2)(c). [↑](#footnote-ref-28)
29. *Endrew F. ex. rel. Joseph F. v Douglas County Sch. Dist., RE-1*, 580 US 386, 399-403 (2017); see *Johnson v. Boston Pub. Schs.*, 906 F.3d 182, 194-95 (1st Cir. 2018) (holding that Massachusetts’ “meaningful educational benefit” standard adopted by the 1st Circuit in [*D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26(1st Cir. 2008)], comports with this standard in *Endrew F.*). [↑](#footnote-ref-29)
30. See *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.,* 518 F.3d 18, 29 (1st Cir. 2008). [↑](#footnote-ref-30)
31. *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012) quoting *Lessard,* 518 F.3d at 23. [↑](#footnote-ref-31)
32. Sebastian M. v. King Philip Reg'l Sch. Dist., 685 F.3d 79, 84 (1st Cir. 2012); *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1st Cir. 1993); *Esposito*, 675 F.3d at 34. [↑](#footnote-ref-32)
33. *Lenn,* 998 F.2d at 1089-90; quoting *Burlington v. Dept. of Ed.,* 736 F.2d 773, 788 (1st Cir. 1984) *aff’d* 471 US 359 (1985); see *Roland M. v. Concord School Committee*, 910 F.2d 983, 992 (1st Cir. 1990) (“… purely academic progress … is not the only indicia of educational benefit implicated either by the Act or by state law”). [↑](#footnote-ref-33)
34. *Roland M.*, 910 F.2d at 992. [↑](#footnote-ref-34)
35. 64 Fed. Reg. 12406-01, 12473 (1st Column), 1999 WL 128278 (March 12, 1999) (parents of a child with a disability are “expected to be equal participants along with school personnel in developing, reviewing and revising the IEP for this child”); see *Douglas W. v. Greenfield Public Schools*, 164 F.Supp.2d 157, 161 (Mass. 2001) (“Parental participation in the development of the IEP is essential to its validity”); see *Letter to Presto*, 213 IDELR 121 (OSEP, 1988). [↑](#footnote-ref-35)
36. See *T.B. v. Warwick Sch. Dep't*, No. CIV.A. 01-122T, 2003 WL 22069432, at \*14 (D.R.I. 2003), *aff'd sub nom. Lt. T.B. ex rel. N.B. v. Warwick Sch. Comm.*, 361 F.3d 80 (1st Cir. 2004) (“An obligation on the part of school officials to, at least, consider parental views is implicit in the requirement that parents have an opportunity to participate in the process of evaluating and placing their child…. However, the IDEA does not identify any specific matters that must be “discussed” at an IEP meeting.”). [↑](#footnote-ref-36)
37. 20 USC 1415(b)(3); 34 CFR 300.503; 71 Fed. Reg. at 46661 (1st column) (“The eligibility group should work toward consensus, but under § 300.306, the public agency has the ultimate responsibility to determine whether the child is a child with a disability. Parents and school personnel are encouraged to work together in making the eligibility determination. If the parent disagrees with the public agency's determination, under § 300.503, the public agency must provide the parent with prior written notice and the parent's right to seek resolution of any disagreement through an impartial due process hearing, consistent with the requirements in § 300.503 and section 615(b)(3) of the Act.”); see 64 Fed. Reg. at 12473-74 (3rd to 1st Column) (“The IEP team should work toward consensus, but the public agency has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive FAPE. It is not appropriate to make IEP decisions based upon a majority “vote.” If the team cannot reach consensus, the public agency must provide the parents with prior written notice of the agency’s proposals or refusals, or both, regarding the child’s educational program, and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing. . .”). [↑](#footnote-ref-37)
38. *Endrew F.*, 580 US at 404. [↑](#footnote-ref-38)
39. *C.G. and B.S. v. Five Town Cmty. Sch. Dist.*, 513 F.3d 279, 284 (1st Cir. 2008); see *Lenn*, 998 F.2d at 1086. [↑](#footnote-ref-39)
40. *C.G.,* 513 F.3d at 284,quoting *Bd. of Educ. of Hendrick Hudson Cent Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 207 (1982); see *Endrew F.*, 580 US at 399-403. [↑](#footnote-ref-40)
41. *G.D. v. Westmoreland School District*, 930 F.2d 942, 948 (1st Cir. 1991). [↑](#footnote-ref-41)
42. *Lenn,* 998 F.2d at 1089-90; see *Sebastian M.,* 685 F.3d 79, 84 (“… an IEP need not be designed to furnish a disabled child with the maximum educational benefit possible”). [↑](#footnote-ref-42)
43. The same issues raised in the *Hearing Request* in the context of disability discrimination under Section 504 of the Rehabilitation Act of 1973, were also raised as alleged violations of the Americans with Disabilities Act (ADA). 42 USC 12101 *et al.* The ADA claims were dismissed, however, as outside the jurisdiction of the BSEA. As noted in Footnote 3, above, the analysis for previously dismissed claims is incorporated into this *Decision*. *Ruling on Defendants’ Motions to Dismiss, Part VI*. Notwithstanding, however, I note that the First Circuit’s analysis of discrimination under Section 504 applies identically to claims under the ADA. *Katz v. City Metal Co.,* 87 F.3d 26, 31, n. 4 (1st Cir. 1996); see *Miller ex rel. S.M. v. Bd. of Educ of Alburquerque Pub. Sch.*, 565 F.3d 1232, 1245 (10th Cir. 2009) (for another Circuit Court decision that agrees with the First Circuit’s identicality of analysis for discrimination claims under both the ADA and Section 504). [↑](#footnote-ref-43)
44. 29 U.S.C. § 794(a) (*preempted on other grounds* by 49 U.S.C. § 44935; see *A. B. by C.B. v. Hawaii State Dep't of Educ.*, 386 F.Supp.3d 1352, 1356 (D. Haw. 2019)). [↑](#footnote-ref-44)
45. 29 U.S.C. § 794(b)(2)(B). [↑](#footnote-ref-45)
46. See *Esposito*, 675 F.3d at 40; *Miller*, 565 F.3d at 1246. [↑](#footnote-ref-46)
47. 34 CFR §104.33. Implementation of an IEP under the IDEA is deemed to be one means of meeting this requirement. 34 CFR §104.33(b)(2). [↑](#footnote-ref-47)
48. *Esposito*, 675 F.3d at 40 (quoting *Ellenberg v. N.M. Military Inst.*, 478 F.3d 1262, 1281 (10th Cir. 2007) for the proposition that the IDEA “is simply not an anti-discrimination statute”). [↑](#footnote-ref-48)
49. *Id.* citing *Miller*, 565 F.3d at 1245-46 (“However, the IDEA and § 504 differ, and a denial under the IDEA does not ineluctably establish a violation of § 504); *Mark H. v. Lemahieu,* 513 F.3d 922, 925 (9th Cir. 2008). [↑](#footnote-ref-49)
50. *Id.* see *S.W. v. Holbrook Public Schools*, 221 F.Supp.2d 222, 228 (D. Mass. 2002) citing *Monahan v. Nebraska*, 687 F.2d 1164, 1170 (8th Cir. 1982) (with regard to educationally related Section 504 claims, an action brought under this law against a school district for alleged discrimination of a child with a learning disability, must establish “something more than a mere failure to provide the ‘free appropriate education’” required by the IDEA). [↑](#footnote-ref-50)
51. *Esposito*, 675 F.3d at 40; *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*”) (emphasis added); see *Colin K. v. Schmidt*, 715 F.2d 1, 10 (1st Cir. 1983) (recognizing that for liability to exist under Section 504, the district or its individual staff members must be found to have a “particular animus towards learning disabled children” and citing and comparing *Monahan*, 687 F.2d at 1170 (“refusing to impose liability under [S]ection 504 for ‘a mere failure to prove the [FAPE] required by [the predecessor statute to the IDEA]’ but suggesting that ‘discrimination’ under [S]ection 504 might be found in ‘something more’ such as ‘bad faith or gross misjudgment’”)). [↑](#footnote-ref-51)
52. *In Re: Sudbury PS*,BSEA #05-4726 and #05-4827 11 MSER 260 (2005) (Decision, Crane, 2005). [↑](#footnote-ref-52)
53. 34 CFR 300.106(a). [↑](#footnote-ref-53)
54. *MM by DM and EM v. Sch. Dist. of Grenville Cnty.*, 303 F.3d 523, 538-39 (4th Cir. 2002); *Cordrey v. Euckert*, 917 F.2d 1460, 1473-74 (6th Cir. 1990); *Coleman v. Pottstown Sch. Dist.*, 983 F.Supp.2d 543, 566 (E.D. Penn. 2013) *aff’d*, 581 Fed. Appx. 141 (3rd Cir, 2014). [↑](#footnote-ref-54)
55. *Cordrey*, 917 F.2d at 1473. [↑](#footnote-ref-55)
56. 603 CMR 28.05(4)(d)(1). [↑](#footnote-ref-56)
57. *Wanham v. Everett Pub. Sch.*, 550 F.Supp.2d 152, 159 (D. Mass. 2008) (concluding that despite documented regression, summer services at the Landmark School were not warranted as none of Parent’s experts testified that services at Landmark were needed); see *In Re: Sudbury PS*,BSEA #05-4726 and #05-4827 11 MSER 260 (2005) (Decision, Crane, 2005) (finding that Parents failed to present sufficient credible evidence of what summer services were required under the state and federal regulatory standards, as the only evidence by Parents relating to summer services was brief testimony by parents experts that “did not provide sufficient basis for [the Hearing Officer] to understand what services would be necessary to satisfy the [] regulatory standards regarding summer services.”); see *Doucette v. Georgetown Pub. Sch.*, 936 F.3d 16, 19, n. 5 (1st Cir. 2019) (recognizing that “[a]n ESY program is a summer school program for students who require year-round schooling to minimize substantial regression and reduce substantial recoupment time”). [↑](#footnote-ref-57)
58. MGL. c. 71 §38G; see 603 CMR 7.00 et. seq. This licensure obligation did not change as a result of ESSA’s elimination of the definition of “highly qualified” from the IDEA. [↑](#footnote-ref-58)
59. See 20 USC 7801(23) *repealed by* Pub.L. 114-95, Title VIII, §§ 8001(a)(1), (b)(2), (3)(December 10, 2015) 129 Stat. 2088, 2089 (at that time defining ‘highly qualified’ to be teachers who had “obtained full State certification as a teacher … or passed the State teacher licensing examination and hold a license to teacher in such State … [and that] the teacher has not had certification or licensure requirements waived …”); *Memo of Commissioner Driscoll regarding Federal “Highly Qualified” Teacher June 30th Deadline* (June 8, 2006) found at: https://www.doe.mass.edu/news/news.aspx?id=2942; *Massachusetts Consolidated State Plan Under the Every Student Succeeds Act (ESSA)*, n. 11 (April 2017, updated 8/24/17) (recognizing that “[ESSA] eliminates the category of Highly Qualified from federal statute.”) found at: https://www.doe.mass.edu/bese/docs/fy2016/2016-03/item3-essa.pdf. [↑](#footnote-ref-59)
60. 20 USC 1412(a)(14) (Each fiscal year, in order to receive federal funding under the IDEA, a state must submit a play that provides assurances that it, among other things, “… has established and maintains qualifications to ensure that personnel necessary to carry out this subchapter are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities.”); see 34 CFR 300.156. [↑](#footnote-ref-60)
61. 20 USC 1412(a)(14). [↑](#footnote-ref-61)
62. 34 CFR 300.156; see 34 CFR 300.207 (“the LEA must ensure that all personnel necessary to carry out Part B of the Act are appropriately and adequately prepared, subject to the requirements of §300.156 (related to personnel qualifications) and section 2102(b) of [ESSA]”). In Massachusetts, the terminology and focus changed after ESSA to tracking teachers teaching “out of field” – i.e., outside their licensure area. See *Massachusetts Consolidated State Plan Under the Every Student Succeeds Act (ESSA)*, Section 5.3(A) p. 74 (April 2017, updated 8/24/17) (defining “out of field” to be “A core academic teacher who has not demonstrated an understanding of the content, and is therefore not Highly Qualified for the subject/s he or she teaches for more than 20 percent of his or her schedule” and noting at n. 10 that “MA regulations allow for a person holding a license to be employed for a maximum of 20 percent of his/her time in a role and/or at a grade level for which she/he does not hold a license”) found at: https://www.doe.mass.edu/bese/docs/fy2016/2016-03/item3-essa.pdf. [↑](#footnote-ref-62)
63. *Schaffer v. Weast*, 546 US 49, 56-57, 62 (2005). [↑](#footnote-ref-63)
64. *Id*. (placing the burden of proof in an administrative hearing on the party seeking relief). [↑](#footnote-ref-64)
65. In making my determinations, I rely on the facts set forth in the Findings of Facts, above, and incorporate them by reference to avoid restating them except where necessary. [↑](#footnote-ref-65)
66. Parent also raised allegations of retaliation in her closing argument. While she referenced “retaliation” in her opening argument twice, this term was used in relation to an allegation that occurred outside the timeframe involved in this hearing (while Student was at the Renaissance School), and an allegation not relevant to the issues for hearing (i.e., that Student did not get a diploma). Parent did not submit any specific evidence of retaliation or refer to it in her closing argument. Rather, she referred to this term in a conclusory fashion, alleging that the District “retaliated” against Parent and Student for “participating in protected activities”. Thus, I do not consider it here. [↑](#footnote-ref-66)
67. See *Lebron v. Commonwealth of Puerto Rico*, 770 F.3d 25, 29–32 (1st Cir. 2014) (upholding dismissal of claims of discrimination under Section 504 and the ADA due to “[t]he parents hav[ing] provided no factual allegations that would support any inference, let alone a reasonable one, that the [defendant] or any of its agents intentionally discriminated against the child because he was disabled” and holding that “[s]imply alleging in a conclusory fashion that the defendants engaged in ‘intentional discrimination,’ as does the complaint here, is not enough to satisfy the pleading standard.”) Citing *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 13–14 (1st Cir. 2011). [↑](#footnote-ref-67)
68. Parent also noted in her September 8, 2021 letter (Exhibit S-3) that Dr. Morris had at some unspecified time “‘roll[ed her] eyes when [she] learned [Student] was injured’ humiliating [Student] with comments about his autism”, however it was unclear from her wording when this alleged eye rolling occurred, and no other evidence was provided to confirm that this eye rolling occurred during a Team meeting involved in the matter before me. Parent’s letter also noted that during the September 7, 2021 Team meeting Dr. Morris allegedly “further rolled [her] eyes several times” during the Team’s conversation about the safety of the neighborhood surrounding the College Steps campus, however Parent then noted that Student was not present at this Team meeting. Parent’s only references to the alleged eye rolling when Student advised he had hurt his foot was made at times of argument during the hearing, not through evidence. She referenced it in her opening and closing statements and in response to an objection raised to a question she had asked a witness that was objected to by the District but did not provide independent evidence that it occurred. She never asked Dr. Morris any questions about this allegation when she cross-examined her, and no other witness, including Ms. MacGovern, ever testified about this. Further, even assuming this eye-rolling occurred at the September 7, 2021 Team meeting, this one instance of alleged mistreatment at a Team meeting where Student was not present, is not sufficient, on its own, to meet Parent’s and Student’s burden of proof that the District “harassed” Student at Team meetings, causing him not to attend them. [↑](#footnote-ref-68)
69. Many of these Team meetings were the subject of prior BSEA hearing requests between the Parties. [↑](#footnote-ref-69)
70. Although hearsay evidence is admissible at due process hearings before the BSEA, Mr. Kennedy’s testimony only provides reliable hearsay evidence of Parent’s beliefs. It is too tangential to provide reliable evidence of Student’s beliefs. I also recognize that at all relevant times, Student was a competent 21-year-old adult. [↑](#footnote-ref-70)
71. Ms. MacGovern stated generally that she was not allowed to share Student’s statements she had written down, but no further evidence or information as to this statement was provided, and it is not clear when Ms. MacGovern was so prohibited, if at all, from sharing Student’s statements at any of the Team Meetings involved in this matter. [↑](#footnote-ref-71)
72. Although one of the purposes of the elaborate set of procedural safeguards imposed by Congress on school districts is to ensure parents’ full participation in the IEP process, “the fact that a parent doesn’t agree with the final IEP does not mean that either parent participation or FAPE was denied”. *In Re: Anchorage School District*, 112 LRP 2275 (AK, 2011) citing *B.V. v. Department of Education, State of Hawaii*, 451 F.Supp.2d 1113, 1132 (D.Ha., 2005) *aff’d*, 514 F.3d. 1384 (9th Cir. 2008) (“although parent disagreed with the decisions, education officials discussed parent’s concerns and considered [their] views; the IDEA requires nothing more from a procedural standpoint”); see *Burlington*, 471 US at 379. [↑](#footnote-ref-72)
73. See 20 USC 1415(b)(3); 34 CFR 300.503; 71 Fed. Reg. at 46661 (1st column); 64 Fed. Reg. at 12473-74 (3rd to 1st Column). [↑](#footnote-ref-73)
74. *Id*. [↑](#footnote-ref-74)
75. I note that I consider this allegation solely to the extent that it pertains to the first issue in this matter. To the extent that this allegation encompasses claims about improperly changing SIMS data or other information reported to DESE, those allegations have been dismissed and I do not review any of the evidence with regard to those claims. As noted in Footnote 3, above, the analysis for previously dismissed claims is incorporated into this *Decision*. (*Ruling on Defendants’ Motions to Dismiss, Part II*). [↑](#footnote-ref-75)
76. After closing arguments were completed on January 8, 2024, Parent requested permission to file a page she claimed was “left out” from this IEP that she contended changed the graduation date from June 2019 to April 2022. The IEP (Exhibit D-28) was filed on November 3, 2023, and Parent did not object to it being admitted as filed at the start of the hearing on November 14, 2023, when she was provided with that opportunity. As such, her request was denied. However, even assuming the graduation date was so changed on the IEP, this does not demonstrate that the District improperly changed Student’s graduation goal. The goal of graduation remained, regardless of the changed date. Moreover, had Student passed the February 2022 biology MCAS retake, he would have graduated at that time. [↑](#footnote-ref-76)
77. See Footnote 4, *supra*. [↑](#footnote-ref-77)
78. As noted in Footnote 3, above, the analysis for previously dismissed claims is incorporated into this *Decision*. (*Ruling on Defendants’ Motions to Dismiss, Part II*). [↑](#footnote-ref-78)
79. The emails further indicate that the issues with the competency waiver are tied to Student’s SIMS data enrollment code, and they evidence that this waiver must be granted by DESE, not the District. While the issue of the competency waiver is outside my jurisdiction as noted in my *Ruling on Defendants’ Motions to Dismiss*, *supra*, I again take this opportunity to strongly encourage both the District and DESE to work together to review this issue to ensure Student receives any rights, privileges, benefits and waivers that he is otherwise entitled to, based upon what he actually did educationally, rather, than what a computer code (perhaps improperly) classified him as doing. [↑](#footnote-ref-79)
80. Notwithstanding that this is not admissible to support Parent and Student’s claim, it appears from Mr. Kennedy’s February 2, 2021 email, and Dr. Morris’s and Parent’s responses, as well as Mr. Kennedy’s corresponding testimony, that College Steps sought permission to make a schedule change from both Parties in February 2021, as he proposed that while “[i]t seems [the MCAS] matter is still being debated … would everyone be in agreement that it wouldn’t hurt to work toward this if it is something he will need to do at some point in the future, even if not in the spring?”. Although the District supported this request, Parent did not, and it was not done. (S-30). [↑](#footnote-ref-80)
81. Student’s schedule at that time did not involve any biology MCAS preparation time, so it is unclear if this alleged “unilateral” schedule development is part of this claim or not. [↑](#footnote-ref-81)
82. In her Closing argument Parent also claimed, for the first time, that providing Student compensatory services for not having had any speech and language services during the first semester of the 2021-2022 school year, although covering all missed services owed, was also evidence of disability discrimination in violation of Section 504, because providing compensatory speech and language services at a later time fails to address any potential “regression” Student may have experienced in not receiving these services for that semester of time. As this is a new argument that was not part of Parent and Student’s original claims, and no evidence in support of this argument was presented during the Hearing (including but not limited to any evidence of Student regressing in his speech and language skills during that school year), I do not consider it now. However, I note that compensatory services are equitable remedies “fashioned to fit an individual student’s needs”. If warranted, a district’s obligation is to provide those services that are “‘equal in time and scope’ with what a student would have received …”. *Dracut Sch. Comm. v. Bureau of Special Educ. Appeals of the Massachusetts Dep't of Elementary & Secondary Educ.*, 737 F.Supp.2d 35, 55 (D. Mass. 2010) quoting *Puffer v. Raynolds,* 761 F.Supp. 838, 853 (D. Mass. 1988); see *Arroyo-Delgado v Dep’t of Educ. of Puerto Rico*, 2018 WL 3491673, \*4 (setting forth the two approaches taken by the Circuit Courts of Appeals to calculate the “equitable amount of compensatory services owed pursuant to the IDEA” – the “day-for-day approach” of *Dracut Sch. Comm.* adopted by the Second, Third and Eighth Circuit Courts of Appeals, and a “totality of circumstances approach” that “evaluates whether the plaintiffs intentionally hindered the defendants from creating and implementing a proper IEP and FAPE” adopted by the Fourth and Ninth Circuit Court of Appeals and by the Federal District Court of Maine in *I.J. v. Portland Pub. Sch.*, 2016 WL 5940890, \*5 (D. Me., 2016) *adopted report and recomm.*, 2016 WL 7076995 (D. Me. 2016), and noting that the First Circuit Court of Appeals “has not adopted or rejected either method, and the district courts in the First Circuit have not decided on a singular approach”) (citations omitted). The District’s compensatory speech and language services were sufficient under either approach. [↑](#footnote-ref-82)
83. *Esposito*, 675 F.3d at 40; *Nieves-Marquez*, 353 F.3d at 126; see *Colin K.*, 715 F.2d at 10 citing and comparing *Monahan*, 687 F.2d at 1170. [↑](#footnote-ref-83)
84. Student’s substantial progress was a highlight in the hearing, and a credit to all those who supported him during this time on both sides of this matter. [↑](#footnote-ref-84)
85. (MacGovern, 293). [↑](#footnote-ref-85)
86. *Roland M.*, 910 F.2d at 992. [↑](#footnote-ref-86)
87. 603 CMR 28.05(4)(d)(1). [↑](#footnote-ref-87)
88. The evidence about Student’s work schedule was inconsistent. According to the Landmark College Bootcamp application completed by Parent, Student worked at Lowes between 20-25 hours per week. (S-1). However, Parent advised the District in August that he worked Wednesdays from 3:00 p.m. to 10:00 p.m. If Student worked 3:00 to 10:00 p.m. each weekday, this would amount to 35 hours of time, not accounting for any weekend shifts Student may have performed. Parent also inexplicably failed to respond to Dr. Morris’s question about any changes to Student’s availability after school as the school year progressed. [↑](#footnote-ref-88)
89. See *In Re: Adams 12 (CO) Five Star Schs.*, OCR #08-2301251, 124 LRP 555, (August, 2023) (identifying as an area of investigation into claims of disability discrimination, the district’s practice to “double count” the time that its social workers spent in classes as “both specialized instruction in behavior and mental health services because the students' IEPs, as written, clearly contemplate two distinct services being provided to students by listing them separately …”). [↑](#footnote-ref-89)
90. In the same way, if the District had failed to continue proposing a schedule for these IEP services, this would have been a denial of a FAPE to Student. See *Burlington*, 736 F.2d. at 795 (holding that “[t]he Town's IEP responsibilities were therefore not excused by the parents' refusal to make [Student] available and accordingly no advantage should accrue to the Town by dint of its failure to prepare IEPs during the subsequent years of this litigation”). [↑](#footnote-ref-90)
91. *C.D. ex. rel. M.D. v. Natick Pub. Sch. Dist.*, 2017 WL 3122654 \*n. 9 (2017) *aff’d* by *C.D. ex rel. M.D. v Natick Pub. Sch. Dist. and BSEA*, 942, F.3d. 621 (1st Cir. 2019) (holding that school districts that have unofficial policies of refusing certain programs or placements regardless of a student’s individual needs or making/ programing decisions purely on financial considerations or prohibiting parents from asking questions during IEP meetings engage in improper predetermination) citing *W.G. Bd. of Trus. of Target Range Sch. Dist. No. 23,* 960 F.2d 1479, 1484 (9th Cir. 1992) (finding predetermination where a district decided placement prior to the IEP meeting and "assumed a ‘take it or leave it’ position at the meeting") *superseded by statute on other grounds*; see *G.D. v. Westmoreland,* 930 F.2d. at 947-48 (there was no predetermination even though the district came to the team meeting with draft IEP); *K.D. v. Dep't of Educ.,* 665 F.3d 1110, 1123 (9th Cir. 2011) (finding no predetermination despite the district coming to the Team meeting with a placement in mind, as it considered alternatives). [↑](#footnote-ref-91)
92. Mr. Kennedy’s testimony and his contemporaneous emails sent to the parties between the end of October 2021 and February 2022 demonstrates that Student received this. [↑](#footnote-ref-92)
93. 34 CFR 300.156; see 34 CFR 300.207 (the LEA must ensure that all personnel necessary to carry out Part B of the Act are appropriately and adequately prepared, subject to the requirements of §300.156 (related to personnel qualifications) and section 2102(b) of [ESSA].”). [↑](#footnote-ref-93)
94. Given the historical interaction of the Parties, including the scheduling disputes between them in the underlying matter, it is reasonable to expect that if the District had agreed to Parent’s request for a licensed teacher to tutor Student to retake the biology MCAS exam, delays would have occurred while an agreeable teacher was located, and a schedule for these licensed tutoring services was developed. The District’s desire to ensure as minimal of a delay as possible in providing Student with support was also reasonable. [↑](#footnote-ref-94)