**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

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 **DECISION**

**STUDENT v. DRACUT PUBLIC SCHOOLS**

**BSEA # 2312210**

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**BEFORE**

**HEARING OFFICER**

**ALINA KANTOR NIR**

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**PARENT, *PRO SE***

**CRAIG KOWALSKI, ATTORNEY FOR THE SCHOOL**

**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In Re: Student v. Dracut Public Schools BSEA No. 2312210**

**DECISION**

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

A hearing was held on August 16-17, 25, 26, and September 21 and 22, 2023 before Hearing Officer Alina Kantor Nir. Those present for all or part of the proceeding agreed to participate via a remote videoconferencing platform. The following were in attendance and participated for some or all of the proceeding:

Parent

Craig Kowalski Attorney for Dracut Public Schools (Dracut)

Kimberly Lawrence Director of Student Services, Dracut

Beth Drohan Principal, George H. Englesby Elementary School (Englesby), Dracut

Johanna Garneau Assistant Director of Student Services and Title IX Coordinator, Dracut

Jessica Wojcik Assistant Principal, Englesby, Dracut

Alissa Ceurvels Teacher, Dracut

Mary Bowie Information Systems Data Specialist, Dracut

Melissa Lupo Court Stenographer

Julianne Ryan Court Stenographer

Hannah Saleeba Court Stenographer

Alina Kantor Nir Hearing Officer

The official record of the hearing consists of documents submitted by the Parent and marked as Exhibits P-A to P-Z, P-AA to P-EE; three recordings, labeled P-R-1 to P-R-3; documents submitted by Dracut Public Schools (Dracut or the District) and marked as Exhibits S-1 to S-18[[1]](#footnote-1); and a 6-volume stenographic transcript. Parent and the District made their oral closing arguments on September 22, 2023, and the record closed on that date.

**ISSUES IN DISPUTE:**

The issues in this matter are as follows:

1. Whether Dracut’s proposed 504 Plan is appropriate;
2. Whether the District failed to meet with Parent to amend Student’s 504 Plan in violation of the procedural requirements of Section 504;
3. Whether the District retaliated against Parent by ‘taking back’ the 504 Plan and insisting that Parent provide additional documentation of Student’s diagnosis;
4. Whether the District failed to implement accepted portions of Student’s 504 Plan;
5. Whether Dracut failed to investigate the March 2023 sexual assault incident, and, if so, whether such failure denied Student a FAPE;
6. Whether the District retaliated and discriminated against Parent in violation of Section 504 of the Rehabilitation Act following her due process filing by seeking to extend the timeline for investigation of the sexual assault incident;
7. Whether, in violation of Section 504 of the Rehabilitation Act of 1973, the District discriminated and retaliated against Parent for requesting a 504 Plan and advocating for Student:
	* 1. By deleting “accounts and private emails in the Class Dojo App after [Parent] requested them in Discovery and before a ruling was [issued] on the matter” and failing to abide by Parent’s ADA accommodations of “need[ing] to have printed copies [of documents] in order to be sure [she] didn't miss important information”; and/or
		2. By “[t]ransfer[ing] the [investigation of Student’s alleged sexual assault] from Title IX investigator Joanna Garneau to Vice Principal Wojcik knowing the parent had an open Bullying report against her”, “intimidat[ing] [Student],” and “forg[ing] documents” relative to this investigation.
8. Whether the District failed to provide Student a FAPE due to the limitations of the ASPEN system by proposing a 504 Plan with incorrect names and an incomplete list of attendees;
9. Whether the District was negligent in using the ASPEN system as such use “caus[es] a violation of 504 amongst many other violations”; and
10. If the answer is affirmative to any of the above, what is the appropriate remedy?

**FINDINGS OF FACT:**

1. Student is a 5th grade student attending Englesby within the Dracut Public Schools. She is a confident, happy, social, and high achieving student with “fairly good” attendance. (Drohan, Wojcik, Ceurvels, S-1, S-2, S-3, S-4)
2. Beth Drohan is the principal of Englesby. The 2022-2023 school year was Ms. Drohan’s first year at Dracut. She has an extensive background in education and counseling and holds several licenses from the Department of Elementary and Secondary Education (DESE). Ms. Drohan’s duties as principal include ensuring the safety and education of all students. (Drohan)
3. Jessica Wojcik is the assistance principal of Englesby. She has served in this role for two years. Ms. Wojcik has 16 years of experience working in education, and she holds multiple licenses from the DESE. (Wojcik)
4. On March 6, 2023, Parent emailed Ms. Drohan and requested a meeting to develop a 504 Plan for Student. (Parent, Drohan, P-B) Parent reported that Student was experiencing anxiety due to bullying. Parent had filed multiple bullying reports. (Parent, Drohan)
5. Parent testified that Student was showing “signs of trauma” and did not want to go to school. She was seeing a therapist. Both Student’s pediatrician and therapist suggested that Parent pursue a 504 Plan for Student. (Parent)
6. On March 7, 2023, Ms. Drohan offered Parent several dates for a 504 meeting, and the parties agreed to convene the 504 Team on March 14, 2023. (Drohan, P-B)
7. Kimberly Lawrence is the Director of Student Services for Dracut. She has served in this role for 5 years. Ms. Lawrence has 26 years of experience in education and holds multiple licenses from DESE. (Lawrence)
8. Ms. Drohan requested that Ms. Lawrence attend the 504 meeting because this was her first year as principal at Dracut, and, in her experience, it was not uncommon to have the Director of Student Services attend 504 meetings. (Drohan) Ms. Lawrence too testified that it is not uncommon for her to participate in 504 Team meetings. (Lawrence)
9. On March 14, 2023, a 504 Team convened via a virtual platform. The meeting was recorded by both Parent and Dracut. In attendance were Parent; Yuki Asada, Student’s private therapist; Alissa Ceurvels, Student’s then-teacher; Alexis Dowling, School Counselor, Ms. Drohan, and Ms. Lawrence. (Drohan, Lawrence, P-A, P-R-1, S-5, S-18)
10. Ms. Ceurvels has worked as a teacher at Dracut for 11 years. She was Student’s fourth grade teacher. (Ceurvels)
11. At the 504 Team meeting, Parent informed the Team that Student had been diagnosed with Post Traumatic Stress Disorder (PTSD) and generalized anxiety. According to Ms. Asada, Student was having difficulty concentrating due to the presence of an alleged bullying aggressor in her classroom. Student’s anxiety manifested internally, and she had expressed to Ms. Asada that she would like “a transfer of schools.” (Parent, Drohan, Lawrence, P-A, P-R-1, S-5, S-18)
12. Ms. Ceurvels testified that she did not observe any symptoms of anxiety impacting Student in class or in school. (Ceurvels) At the meeting, Ms. Ceurvels reported that Student was doing very well and was confident in class. Other than moving Student’s seat closer to the board, she had no recommendations. (Drohan, Lawrence, P-A, P-R-1, S-5, S-18)
13. At the 504 Team meeting, Parent expressed concern regarding the “out of control" bullying in school and the recent “hacking” of Dracut’s email server. She requested that Student’s email and passwords be changed and “firewalls” be put in place. Parent also did not want Student brought to the office or “behind closed doors with one adult” and requested that if staff needed to speak with Student, they do so in an area other than the office. (Parent, Drohan, Lawrence, P-A, P-R-1, S-5, S-18)
14. During the meeting, Parent asked what was required “from the therapist for a 504 Plan.” Ms. Lawrence indicated that “it would be helpful if Ms. Asada could forward [them] a letter indicating what [Student’s] diagnostic categories are,” and the District would “keep that on file.” (Parent, Drohan, Lawrence, P-A, P-R-1, S-5, S-18)
15. When asked about accommodations, Ms. Asada indicated that although the alleged perpetrator’s seat had been changed, Student also wanted a classroom change. Parent requested that the alleged perpetrator, rather than Student, change a classroom. (P-A, P-R-1, S-5, S-18)
16. The District proposed that Student have access to both a safe place and a safe person. Although Parent initially stated that there were “no safe people in the school,” she ultimately agreed that Ms. Ceurvels serve in that capacity but not the school counselor. Parent requested that all teachers be made aware of the “situation.” (Parent, P-A, P-R-1, S-5, S-18) Parent also asked that a “safe person” be identified for Student for recess, and Dracut proposed that either Ms. Wocjik could act in such role or that Ms. Ceurvels would work with Student to identify a safe person for recess. (Drohan, Lawrence, Ceurvels, P-1, P-R-1, S-18)
17. Parent inquired how she could “add accommodations in the future.” Ms. Lawrence responded that she could email or call and they “could have another meeting.” A meeting was “not necessary,” but it would be “helpful” so that everyone could offer input. (Parent, Lawrence, P-A, P-R-1, S-5, S-18)
18. At the 504 meeting, Student’s disability and disability-related needs were discussed, and the Team agreed to “move forward with a 504.” (Parent, Drohan, Lawrence, P-1, P-R-1, S-18)
19. Ms. Drohan testified that it was her responsibility to draft and send Parent the 504 Plan proposal. (Drohan) Ms. Wojcik did not participate in Student’s 504 meeting but was aware that a plan was being developed. (Wojcik)
20. On March 16, 2023, Ms. Drohan emailed Parent reminding her that Dracut “need[ed] the diagnosis paperwork from Ms. Asada to proceed with the 504.” On March 17, 2023, Parent provided a computer snapshot which included Student’s diagnosis. (Drohan, P-C)
21. Both Ms. Drohan and Ms. Lawrence testified that the District requires documentation of a diagnosis for a 504 Plan, but Dracut does not (nor did it in this case) condition the proposal or implementation of a 504 Plan on receipt of a diagnosis letter. As such, even without a diagnosis letter, Dracut offered a 504 Plan for Parent to accept. (Drohan, Lawrence)
22. Ms. Drohan sent Parent the 504 Plan dated March 20, 2023 (March 20 Plan) along with the Notice of Procedural Safeguards. Ms. Drohan asked that Parent sign it and return it so she could “change it in [their] system from ‘draft’ to ‘active.’” (Drohan, P-C)
23. The March 20 Plan listed Parent’s name and the names of three additional individuals in the administrative data portion of the Plan. Ms. Asada’s name was written by hand into the list of attendees. The March 20 Plan noted that the Team “relied on the private therapist’s diagnosis of PTSD which was provided to Dracut on 3/17/23.” (P-A, P-C, S-5) The March 20 Plan provided the following accommodations:

“1. Student will have access to a safe person at school, currently Mrs. Ceurvels, teacher and Mrs. Wojcik, Assistant Principal.

 2. Use common area like classroom, conference room to meet with student for any reason with safe person present.

 3. Student is able to contact parent when anxious or on request (phone or zoom).

 4. Preferential seating.

 5. Specialists and necessary staff (Lunch and playground staff) to be informed about bullying incident(s).” (P-A, S-5)

1. Ms. Ceurvels testified that the 504 Plan was appropriate to meet Student’s disability-related needs. Whereas a change in schools would have likely made Student and her family happy, it was not necessary to address her disability. (Ceurvels)
2. Parent did not sign the March 20 Plan. (Parent, Drohan, P-A, S-5)
3. On March 21, 2023, Parent informed Ms. Drohan that she could not sign “this plan as there [were] multiple errors.” The Plan included “the wrong parent’s name.” One of the individuals listed was a former husband against whom there was a restraining order. Parent’s concerns were “inaccurate” and should “be written in [her] words”; the disability listed was “only partially correct and it need[ed] to be fully correct” as it failed to include that Student’s anxiety was due to the email hacking; recess was “still an issue” and needed to be addressed. Moreover, the 504 Plan should indicate that staff interviews with Student be conducted via Zoom and that Parent and Student be provided with advance notice of the topics for any interviews. Parent also requested that Student be allowed to call Parent if “she ha[d] a problem or [felt] uncomfortable.” In addition, a “safe adult” needed to be identified in the 504 Plan. Parent asked that all past bullying complaints be attached to the 504 Plan and noted that Ms. Asada recommended a change in “school district [which should] not to be mistaken with another school in Dracut”; specifically, if the District could not “keep [Student’s] rights, privacy, and person protected which [was] affecting her getting an education then the possibility of [Student] attending school outside the district need[ed] to be made an option.” (Parent, P-C)
4. Ms. Drohan and Ms. Lawrence testified that ASPEN system, the program utilized by the District for student information, “pulls” information from a student record to populate the top portion of the 504 Plan. The names included in the March 20 Plan were contact names listed on Student’s account in ASPEN. (P-DD, Drohan, Lawrence) Student’s contacts are inputted into the ASPEN system at the “building level.” (Drohan, Bowie) The 2022-2023 school year was the first year in which Dracut utilized ASPEN for 504 Plans and Individualized Education Programs (IEPs). (Lawrence)
5. Mary Bowie is Dracut’s Information Systems Data Specialist. She has worked for the District for 13 years and holds multiple certifications. Dracut has utilized the ASPEN system for 6 years. Ms. Bowie testified that when an ASPEN issue is special education related, school administrators reach out to the Student Services Department rather than to her. Ms. Bowie could not recall whether or when she was made aware of Parent’s “issues” with the 504 Plan. (Bowie)
6. Although Ms. Drohan was responsible for revising Student’s 504 Plan, Ms. Lawrence became involved in the matter because of the issue with ASPEN. (Lawrence)
7. On March 22, 2023, Ms. Drohan emailed Parent that due to her concerns, the 504 Team should reconvene. (Drohan, P-C) Parent questioned the need for another meeting as “all” Ms. Drohan had to do was “fix the errors and explain the mistakes.” (Drohan, P-D)
8. On March 24, 2023, Ms. Drohan responded that the meeting was “offered to discuss [Parent’s] concerns.” Ms. Drohan testified that a 504 Plan is a Team decision; she wanted the Team’s input; and, it is her practice to offer a meeting when a parent responds to a 504 Plan with concerns. (Drohan, P-D)
9. Without another 504 Team meeting, Ms. Drohan revised the March 20 Plan by removing the “additional contact[s],” amending the section on how the disability impacted Student, amending the parent/student concerns, and adding an accommodation for recess. (Drohan, P-D) She then issued a second 504 Plan dated March 24, 2023 (March 24 Plan). (Drohan, P-A, P-D, S-6) The March 24 Plan listed Parent’s name and included the names of two additional individuals. Ms. Asada’s name was not included in the list of attendees, but the Plan stated that Parent “and therapist, Ms. Asada, requested a 504 Plan be implemented to support [Student] as she ha[d] been diagnosed with PTSD and generalized anxiety. Therapist, Ms. Asada, … also mentioned that a transfer of schools [was] a desirable option.” The March 24 Plan stated that Student was “experiencing exacerbated symptoms of social anxiety across all school settings impacting her ability to access curriculum and social settings.” (P-A, S-6) The amended concerns section stated that Parent and Student

“[were] concerned with bullying in school and described it as ‘out of control’. Both [Parent] and [Student] [were] concerned about email and Internet safety. Both [Student] and [Parent] requested that student email and passwords be changed and firewalls be put in place. [Parent] [did] not want student brought to the office or behind closed doors with staff.”

The following accommodations were provided:

“1. Student will have access to a safe person at school, currently Mrs.

Ceurvels, teacher.

2. Use common area like classroom, conference room to meet with student for any reason with safe person present.

3. Student is able to contact parent when anxious or on request (phone or zoom).

 4. Preferential seating.

 5. Specialists and necessary staff (Lunch and playground staff) to be informed about bullying incident(s),

6. Student will have access to an identified point person at recess when she is feeling anxious.” (P-A, S-6)

1. According to District staff testimony, Ms. Asada’s name was not included as a participant because ASPEN does not allow such “add-ins.” (Drohan, Lawrence)
2. Parent did not sign the March 24 Plan. (Parent, Drohan, P-A, S-6)
3. On March 26, 2023, Parent informed Ms. Drohan that the 504 Plan was still incorrect. Ms. Asada’s concerns should not be included with Parent’s concerns because “she is NOT the parent or student.” The “recess accommodations [were] not good enough [as] there [was] no safe adult identified that is on duty at recess.” The student-aggressor should have either “permanent indoor recess or recess over at the other end of the school” and she should be removed from Chorus as “Chorus is a privilege.” Parent requested “an explanation of where [the wrong parent’s name] came from.” In addition, according to Parent, she did “not decline” to have another meeting but rather said that “it was not necessary and it isn’t.” Parent asserted that she was “being bullied to have additional meetings to get a plan” and that the District was making Parent “jump through hoops.” According to Parent, Dracut was “taking back the 504 plan that [Dracut] offered because [Parent] want[ed] it correct and truthful.” (Parent, Drohan, P-D)
4. According to Ms. Drohan, no “point person” was ever identified for Student for recess because Parent had not signed the 504 Plan. Had Parent signed the Plan, Student would have been consulted regarding a point person for recess, as had been discussed at the March 14 Team meeting. (Drohan)
5. Ms. Drohan and Ms. Lawrence testified that they did not “take back” the 504 Plan; at all times, Dracut offered Parent a 504 Plan to accept. (Drohan, Lawrence)
6. On March 27, 2023, Parent again informed Ms. Drohan that the 504 Plan had not been corrected. She inquired about meeting availability and requested that all questions be sent to her in advance so that she knew “precisely what [they were going] to discuss.” (P-E)
7. Ms. Drohan did not schedule another 504 meeting with Parent. (Parent, Drohan)
8. Ms. Lawrence testified that the March 20 and March 24 Plans were appropriate to address Student’s needs. The “issue with the names needed to be addressed and [she] did that.” Although Ms. Asada’s name was not included in the list of attendees on the March 24 Plan, it was clear from the document that Student’s private therapist had participated in the meeting. Student did not (and does not) require an outside school setting as her needs were being met in the general education setting. (Lawrence)
9. Ms. Cereuvles testified that, on March 27, 2023, after recess Student informed her that another student had tried to grab her vagina, and she had pushed her away. The aggressing student told her she would “turn [her] vagina inside out.” Student was upset by the incident. (Cereuvles, P-AA)
10. Ms. Cereuvles had Student write down the account[[2]](#footnote-2) so that Ms. Cereuvles could report it accurately to the Ms. Drohan. According to Ms. Cereuvles, based on her bullying training, it is her responsibility to report such allegations to the administration, which she did during the next period; specifically, she handed the account to Patty Tobin, who, at that time, was an acting assistant principal. (Cereuvles, P-AA)
11. Student did not ask to see the nurse or school counselor. She did not ask to be excused from her next class, did not complain of any pain, and did not ask to call Parent. Ms. Cereuvles did not call Parent. (Cereuvles)
12. Ms. Drohan testified that, on March 27, 2023, she was informed[[3]](#footnote-3) of the alleged sexual assault incident. According to Ms. Drohan, she typically begins an investigation by speaking with the alleged victim and the alleged perpetrator, but, in this case, she and Ms. Wojcik “pulled” the video of the playground first to see if they could observe the incident. Ms. Drohan did not speak to Parent or to Student[[4]](#footnote-4) regarding the incident. She testified that she intended to call Parent later that day, but Parent “beat [her] to it” and contacted her via email first. Ms. Drohan did not seek medical attention for Student nor did she contact the police, and Student participated in her remaining classes. She did not offer Student an opportunity to call Parent because the 504 Plan which included this accommodation had not been signed.[[5]](#footnote-5) According to Ms. Drohan, the Team had agreed to propose the accommodations, but implementation required that Parent sign the Plan. (Drohan)
13. Ms. Drohan assigned a second staff member to be present at recess to monitor any interactions or “proximity” between the two students. The students were not in the same grade and did not cross paths other than during recess. According to Ms. Drohan, the additional staff member at recess was not Student’s “point person” but rather was there to supervise the children in response to the sexual assault allegation. (Drohan, Wojcik)
14. Parent testified that she picked up Student from school at 2:45PM, and Student was crying. She waited for an administrator to contact her, but none did. (Parent) In the evening of March 27, 2023 Parent emailed Ms. Drohan, stating:

“As you are well aware [Student] was sexually assaulted today during recess ….You were alerted of this situation and yet you didn't even call me. No one did anything…You didn't honor the ADA accomodations [sic] she requested. Not even the most simple of call [sic] her mother. This is also the law that you did not follow.” (P-N, S-8)

1. On March 28, 2023, Ms. Drohan informed Parent that Johanna Garneau, Dracut’s Assistant Director of Student Services and Title IX and Civil Rights Coordinator, would be “reaching out to discuss the incident from yesterday and the next steps.” (P-N, S-8) Ms. Garneau has served in her current role for 2 years. She has worked in the District in multiple capacities for 23 years. Ms. Garneau holds a master’s degree in education and multiple licenses from the DESE. As the Title IX and Civil Rights Coordinator, Ms. Garneau does not typically conduct investigations; rather, she coordinates them. (Garneau)
2. On March 28, 2023, Ms. Garneau contacted Parent via both phone and email. (Garneau, S-9)
3. Also on March 28, 2023, Parent contacted Ms. Lawrence , informing her that Ms. Drohan did not contact her about the alleged sexual assault incident and asked that Ms. Lawrence attach “the plan” for Student, detailing “what steps [were taken following Student’s] report.” In response, Ms. Lawrence informed Parent that she would “coordinate with Ms. Drohan in regard to the protective measures enacted [] and Ms. Garneau [would] elaborate on the process when [they] communicate[d].” (Lawrence, P-N)
4. Ms. Lawrence testified that Ms. Drohan had informed her of the incident and that, based on the sexual nature of the allegations, she advised Ms. Drohan to contact Ms. Garneau.[[6]](#footnote-6) (Lawrence)
5. According to Ms. Garneau, typically if a student does not feel safe in school, the school would offer access to the school counselor. Here, Parent made it clear during the 504 meeting that she declined such a service. Following the March 27, 2023 incident, Ms. Drohan did not extend the offer to either Parent or Student. (Drohan)
6. On March 28, 2023, Ms. Garneau reached out to Parent to inform her she would be “initiating an investigation.” Parent asked that all contact be via email. (Garneau, P-P)
7. On March 29, 2023, Parent sent Ms. Drohan a Bullying Incident Report Form regarding the March 27, 2023 incident, circling “sexual” on the form. (Drohan, P-O)
8. Also on March 29, 2023, Ms. Garneau contacted Parent to inform her that the “next step [in the process would be] a meeting in which [she] review[ed] the process with [P]arent.” As Parent indicated that she preferred to communicate via email, Ms. Garneau attached “the document [Parent needed] to complete if [she] wish[ed] to have a formal investigation.” Ms. Garneau offered Parent a meeting “to answer any questions.” She also referred Parent to the Dracut Public Schools’ website for additional information. (Garneau, P-P) Parent responded asking that the forms be mailed to her. She asked that Ms. Garneau answer her questions which, she alleged, “Dracut seem[ed] to avoid answering”:

“1. What is the Principal[’s] obligations when a sexual assault is reported in school while the child is still in school during the day. What is the protocol that is to be followed and/or law.

2. Where are the protective measures?

3. Is this report different [from] a bullying incident report?” (Garneau, P-P)

1. On March 30, 2023, Ms. Garneau emailed Parent to inform her that she had mailed the form per Parent’s request. She offered to meet to review the paperwork. She also answered Parent’s questions as follows:[[7]](#footnote-7)

“1. What is the Principal[’s] obligations when a sexual assault is reported in school while the child is still in school during the day. What is the protocol that is to be followed and/or law? **Any District employee who receives a report of sexual harassment shall respond by promptly informing the Principal or Title IX Coordinator of the report. Any District employee who observes sexual harassment of a student should intervene or stop the conduct and shall promptly inform the Principal or Title IX Coordinator of the incident.**

2. Where are the protective measures? **Do you mean supportive measures?**

3. Is this report different [than] a bullying incident report? **Bullying and Title IX are not the same. Please review the information I have attached [].**” (Garneau, P-Q)

1. Student was absent from school on March 28, 29 and 30. Parent testified that she took Student to the pediatrician and to see her therapist. Student was upset and reported feeling unsafe and scared to go to school. (Parent)
2. On March 31, 2023, Parent responded to Ms. Garneau that she had

“requested ADA accommodations that you please answer these questions in this link. You sent an email in a [separate] link that is confusing me and not what I asked…. Please resend your answers in this link….” (P-P)

1. Ms. Garneau testified that she did her best to respond to Parent in the manner Parent requested. (Garneau)
2. On March 31, 2023, Ms. Garneau responded to Parent and included the District’s Title IX Sexual Harassment Grievance Procedures. She also wrote:[[8]](#footnote-8)

“l. *Any District employee who receives a report of sexual harassment shall respond by promptly informing the Principal or Title IX Coordinator of the report. Any District employee who observes sexual harassment of a student should intravene [sic] to stop the conduct and shall promptly inform the Principal or Title IX Coordinator of the incident.*

2. As The Title IX Coordinator I can provide you with the definition of Supportive Measures, I do not provide Supportive Measures to students myself.

*Supportive Measures: Individualized services reasonably available that are non-punitive, non disciplinary, and not unreasonably burdensome to the Complainant or Respondent, while designed to ensure equal educational access, protect safety, and/or deter sexual harassment.*

*Supportive Measures may be offered before or after the filing of a Formal Complaint or where no Formal Complaint has been filed. Supportive measures are individualized services reasonably available that are non-punitive, non­ disciplinary, and not unreasonably burdensome to the other party, while designed to ensure equal educational access, protect safety, and/or deter sexual harassment.*

3. Bullying and Title IX are not the same. Please review the information I have attached below.

I have mailed you the form that you requested. If you would like to schedule a meeting, so that we can discuss any of your questions or concerns please do not hesitate to reach out.” (S-10)

1. On April 3, 2023, Ms. Garneau again “recommend[ed to Parent that they] set[] up a meeting to discuss [Parent’s] concerns.” (P-P) Neither she nor Ms. Drohan forward Parent any “safety plans” in place for Student. (Garneau, Drohan)
2. On April 4, 2023, in response to a request from Parent that Student be transferred to another elementary school, Ms. Lawrence wrote to Parent denying the request on the grounds that the requested elementary school was not in Parent’s residence zone.[[9]](#footnote-9) (Lawrence, P-F) Ms. Lawrence testified that in order to include a transfer of schools as a 504 accommodation, the Team would need to agree that such accommodation was necessary. (Lawrence)
3. On April 5, 2023, Parent emailed Ms. Drohan requesting “corrections” to the 504 Plan. She asked that the following language be included:

“[Student] is not comfortable meeting with any staff at anytime [sic] in a common are[a] or behind door[s]. ADA accommodations are requested that any contact with staff other than regular teacher be done via zoom [sic] with [Student] with her parent separated physically from staff whether the safe person is present or not.”

According to Parent, Student “require[d] the physical distance.” She also requested that Ms. Asada’s comments be removed from the section including Parent’s concerns, that an accommodation be added for recess, and that Student’s school be changed as an accommodation. (Drohan, P-G, P-H)

1. On Saturday, April 8, 2023, Parent informed Ms. Garneau via email that she still had not received the form necessary for the Title IX complaint and asked Ms. Garneau to scan and email it to her. On Monday, April 10, 2023, Ms. Garneau emailed Parent the form and again offered Parent a meeting. (P-Q) Parent responded that she preferred “it be done in email.” (P-Q)
2. Also on April 10, 2023, Ms. Drohan emailed Ms. Asada, copying Parent, and reminded her about the diagnosis letter. Parent responded, “All that is needed for a 504 plan is the diagnosis. I sent that. There is nothing further being provided at this time.” According to Parent, she was being asked “to provide above and beyond what the law states.” (Drohan, Parent, P-C) Parent testified that she felt “brushed off” and “disregarded.” She believed that Dracut intentionally delayed the issuance of the revised 504 Plan. (Parent)
3. Ms. Drohan testified that in asking for the supervisor’s letter she was following up on Ms. Asada’s statement during the 504 meeting that she would provide a letter from her supervisor. Even without the letter, Ms. Drohan proposed multiple versions of the 504 Plan for Parent to accept. (Drohan)
4. On April 10, 2010, Ms. Drohan issued another 504 Plan (April 10 Plan). Only Parent’s name was now listed under “Parents”. The April 10 Plan included the following accommodations:

“1. Student will have access to a safe person at school, currently Mrs.

Ceurvels, teacher.

2. Use common area like classroom, conference room to meet with

student for any reason with safe person present.

3. Student is able to contact parent when anxious or on request (phone or zoom).

4. Preferential seating.

5. Specialists and necessary staff (Lunch and playground staff) to be informed about bullying incident(s).

6. Student will have access to an identified point person at recess when she is feeling anxious.” (Drohan, P-A, S-7)

1. Parent did not sign the April 10 Plan. (Parent, Drohan, P-A, S-7)
2. Ms. Ceurvels testified that she was aware that there was “back and forth” between Parent and Ms. Drohan regarding the 504 Plan, but she never received a signed copy to implement. (Ceurvels)
3. Ms. Lawrence testified that she was not sure why it took longer to propose the April 10 Plan than the previous plans. She opined that the special education department at Dracut was new to the ASPEN “platform,” and they were “trying to fix” the issue with the contact names. (Lawrence)
4. It was Ms. Drohan’s “understanding” that Parent had not consented to any portion of any of the 504 Plans. Parent “kept coming back with things that needed to be changed,” and these were “not just clerical changes.” The 504 was not a “legal document until it was signed.” The implementation of the Plan was conditioned on Parent’s acceptance of the Plan, not on receipt of the letter from Ms. Asada’s supervisor. (Drohan)
5. Parent testified that it was her “understanding” that the parts of the 504 Plan that were “agreed to” at the meeting were to be implemented immediately after the meeting. According to Parent, the school was, in fact, implementing many of the accommodations. For example, Ms. Ceurvels was Student’s “safe person.”[[10]](#footnote-10) (Parent)
6. Ms. Drohan testified that all versions of the 504 Plan were appropriate to meet Student’s needs. She was not “instructed on decisions” nor was there anyone else involved in developing Student’s 504 Plan. She could not recall why she forwarded emails pertaining to the 504 Plan to the Superintendent. (Drohan)
7. On April 11, 2023, Parent asked for “ADA accommodations [for herself] for extra time” to complete the paperwork [for the Title IX complaint].” Ms. Garneau responded that there was “no timeframe,” and Parent may have additional time. (P-Q)
8. In response to an email from Parent, on April 14, 2023, Ms. Lawrence agreed to “have a meeting with [Parent] to discuss the proposed 504 plans.” She offered Parent some dates for a meeting, and, on April 18, 2023, Parent responded with her availability. On April 19, 2023, Ms. Lawrence cancelled the meeting due to a family emergency but added that they could meet after school break. (Lawrence, P-I) Ms. Lawrence did not reach out to Parent to reschedule this meeting. (Lawrence)
9. Parent testified that it was Ms. Lawrence’s duty to reach out to her to reschedule the meeting. Parent also testified that she was not seeking a meeting with Ms. Lawrence as an attempt to reconvene the 504 Team but rather because Ms. Drohan was not being responsive. (Parent)
10. On April 27, 2023, Parent provided Ms. Drohan with a letter from Student’s pediatrician indicating that Student was diagnosed with anxiety. (Drohan, P-J) She also asked that Accommodation #2 be rewritten to indicate that Student would not meet with anyone unless Parent was present and that all meetings take place via a virtual format. Parent also requested to “add in the 504 plan that [Student’s] teachers be picked ahead of time” and that Student be assigned a female teacher. (P-K) On May 2, 2023, Ms. Drohan responded to Parent that she would “consider [Parent’s] request for next year’s teacher” but noted that “this [was] not a 504 accommodation.” Parent responded that her “request[] [for a] specific teacher [was] an ADA accommodation for communication not for the 504 plan accommodation.” (P-K)
11. Also on May 2, 2023, Parent signed and submitted a Title IX complaint. Ms. Garneau responded that she would “initiate an investigation.” (Garneau, P-Q, S-11)
12. Parent testified that “they [i.e., the District] made [her] file the sexual assault.” (Parent)
13. Ms. Drohan testified that “due to the nature” of Parent’s bullying report and “the sexual assault verbiage,” the complaint did not “qualify as bullying,” and it was determined that it “should be investigated as Title IX.” She typically “send[s] home her findings,” but because Student’s complaint “turned into a civil rights investigation,” Ms. Drohan “did not send any paperwork home.” (Drohan, P-O)
14. On May 3, 2023, Parent requested that Ms. Drohan “answer” if she would add the requested accommodations “into [Student’s] 504 plans or if [she was] refusing.” She noted that these accommodations were “necessary” for Student to “feel comfortable communicating and prior notice [would] help[] diminish [Student’s] anxiety.” Parent renewed this request via two successive emails on May 5, 2023. (P-L, P-M) On May 5, 2023, Ms. Drohan responded that “504 accommodations [were put] in place to ensure students can access the curriculum.” In contrast, the accommodations requested by Parent were “not reasonable accommodations for student learning.” (K-L)
15. On May 18, 2023, Ms. Wojcik sent Parent a Notice of Title IX Sexual Harassment Formal Grievance Procedures scheduling an investigative interview on May 22, 2023 with Jessica Wojcik.[[11]](#footnote-11) Ms. Wojcik is the Title IX investigator for Englesby. Ms. Drohan is the decision-maker for such investigations. (Drohan, Wojcik, Garneau)
16. Parent requested that Ms. Drohan conduct the investigation instead; she found it “extremely inappropriate and a conflict of interest that [Ms. Wojcik] conduct any investigations or have any involvement with [Student]” as Parent had “filed a bullying report on [her] and [Student did not] feel safe with [her].”[[12]](#footnote-12) (Drohan, Wojcik, P-R)
17. Parent testified that Student is a “Christian girl” and the experience of having to speak about the alleged assault was “horrifying and scary.” Student did not want to interview with Ms. Wojcik, as “she’s on the no-no list.” She was upset and went to see her therapist and to church “because it was so traumatizing.” She did not want to go to school and felt “attacked spiritually.” (Parent)
18. Ms. Garneau is not Ms. Wojcik’s supervisor nor was she aware that Parent had filed a bullying complaint against her. (Garneau)
19. On May 19, 2023, Ms. Garneau informed Parent that her “request for a new investigator [was] being reviewed. Until a decision [was] rendered, the interview scheduled for Monday [was] [] on hold.” (P-R) Subsequently, Ms. Garneau agreed to act as investigator in lieu of Ms. Wojcik. (Wojcik, Drohan, Garneau)
20. On May 24, 2023, Ms. Garneau issued a Mandatory Dismissal of Formal Complaint- Notice to the Parties which stated, in part:

“The District is writing to inform you that the formal complaint has been dismissed.

Under Title IX, the school district is required to dismiss a complaint if the allegations, even if true, would not constitute sexual harassment under Title IX. In this case, the formal complaint has been dismissed because the allegations as described above, even if true, would not constitute sexual harassment as defined by Title IX.”

 The Notice included an explanation of Parent’s appeal rights. (Garneau, P-S, S-12)

1. Parent testified that if Ms. Garneau knew the matter would result in a mandatory dismissal, she should not have “made” Parent open the complaint and “waste[] all this time.” (Parent)
2. Also on May 24, 2023, in a letter titled “RE: Civil Rights Investigation,” Ms. Garneau notified Parent that the District had “opened an investigation in regard to an incident involving your daughter on March 27, 2023 in which your daughter was the alleged victim.” (Garneau, P-T, S-13)
3. Ms. Garneau testified that when Parent filed the Title IX complaint on May 2, 2023, the bullying complaint closed, having been converted into a Title IX investigation. When Ms. Garneau concluded that the incident did not rise to the level of a Title IX incident, she dismissed the Title IX complaint but opened a civil rights sexual harassment investigation as she had an “obligation” to do so. She testified that Parent’s “permission” was not required to open the investigation, but she informed Parent that she could dismiss her initial complaint if she did not wish the matter to be investigated. Parent did not respond. (Garneau)
4. On May 31, 2023, Ms. Garneau emailed Parent informing her that she would be “interviewing [Student] regarding the Civil Rights investigation on June 2nd at 12:30. You may be present if you wish.” Parent responded that Student does not “wish to be interviewed in person as she does not feel safe or comfortable in that forum.” (Garneau, P-U, S-14)
5. On June 1, 2023, Parent filed a Hearing Request with the BSEA seeking “a hearing and an investigation on all [her] claims.”
6. On June 1, 2023, Ms. Garneau emailed Parent a “Google link” for Student’s interview. (S-15)
7. Ms. Garneau interviewed Student on June 2, 2023. She also reviewed the video of the playground and conducted interviews with witnesses. She testified that due to summer vacation, she did not complete all of her interviews. (Garneau, P-W)
8. On June 6, 2023, Parent emailed Ms. Garneau regarding the Civil Rights investigation, stating that she

“did not fill out a form or sign for this …[nor] given permission from me [and] you also have not given me the information regarding what [the investigation is]. I did not want this.

This was supposed to be a bullying investigation which I file[d] and you never investigated …[the] sexual harassment [complaint]. You made me go through that process only to dismiss it.

You then turned it into and opened on your own a Civil Rights investigation. You have not sent me the information regarding this process although I requested it several times and you have not sent as you promised.

I asked you twice at the recorded meeting. You denied me and blew me off. This is a violation of my rights and I feel bullied. You interviewed my daughter and still did the interview. I brought it up again and you promised to send it that day and you didn’t.

This is an official notice to cease the investigation as you do not have my permission nor did you ever have it.

Please send me an immediate dismissal as I do not want Dracut Public Schools doing any Civil Rights investigation.

As you are aware I filed permission and claims with the BSEA prior to your call and feel they are more fit to conduct and handle any investigation.” (P-V)

1. According to Parent, the District opened the Civil Rights investigation as a delay tactic. She believed that the District encouraged her to file the Title IX complaint to delay the bullying investigation, and, by opening a Civil Rights investigation, Dracut again sought to delay the initial investigation. Parent was dismayed that she had yet to receive any findings regarding the initial bullying complaint. (Parent)
2. On June 6, 2023, Ms. Garneau emailed Parent:

“I did check on the recess questions that you and [Student] posed in our meeting. There have been additional staff assigned to that recess. Staff have been instructed to keep eyes on the student in question. I also asked Ms. Drohan to speak to the staff at that recess regarding [Student’s] observation that teachers are standing together and talking and not watching students. Ms. Drohan will speak to those teachers today and address this concern.” (Garneau, P-W, S-16)

1. On June 6, 2023, Parent again emailed Ms. Garneau reiterating that she never filed a Civil Rights investigation. She asked Ms. Garneau to “pause [the] investigation” and “send [her] [] information” about “what the Civil Rights investigation entails and all of the process.” (P-W) Ms. Garneau emailed Parent the information noting that it was also mailed to Parent’s home. (Garneau, P-X) Via two successive emails, Parent reiterated that she had not given permission for the investigation and asked that it “cease [] immediately.” (P-X)
2. On June 30, 2023, Ms. Garneau issued a letter to Parent (titled “Re: Request Extension of Investigation”), stating:

“I am writing to notify you that the Dracut Public Schools District [] will be extending the timeline to complete its harassment investigation into the allegations raised by you and your daughter, [Student]. The District has made reasonable efforts to complete the investigation, but is extending the investigation period to account for the summer vacation period.” (Garneau, P-Y, S-17)

Ms. Garneau testified that the extension was needed to allow for additional interviews, not because she wanted to “run down the statute of limitations.” (Garneau)

1. Ms. Lawrence testified that although Ms. Garneau is the Assistant Director of Student Services, and she is aware of the ongoing investigation, she is not aware of the “contents of the investigation.” (Lawrence)
2. Student’s attendance and grades did not deteriorate following the March 23 incident. Ms. Ceurvels did not observe any changes in Student’s behavior in April, May and June 2023. (Drohan, Ceurvels, S-1 to S-4)
3. Ms. Ceurvels testified that at the end of the school year, she archived her Class Dojo. In response to Parent’s discovery request, she “unarchived” and reviewed it but found no messages relating to the 504 Plan or the March 27 incident. (Ceurvels)

**LEGAL STANDARDS:**

1. Legal Standard for a Free and Appropriate Public Education (FAPE) Pursuant to Section 504 of the Rehabilitation Act of 1973.

Section 504 of the Rehabilitation Act of 1973, 29 USC §794(a) provides that “[n]o otherwise qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.”[[13]](#footnote-13) Such programs include public elementary and secondary education programs.[[14]](#footnote-14)

Section 504 requires that students with disabilities be given equal access to public schools, and that they receive a free and appropriate public education (FAPE) by way of “the provision of regular or special education and related aids and services.”[[15]](#footnote-15) The statutory language is framed as a negative prohibition on discrimination, but the regulations clarify that a school district has an affirmative duty to identify, locate, and evaluate all children with disabilities in order to ensure that they receive a FAPE.[[16]](#footnote-16) However, Section 504 does not obligate a school district to provide an education that “maximize[s] the potential of a disabled student.”[[17]](#footnote-17)

Pursuant to 34 CFR §104.33(b), an appropriate education is provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of Sections 104.34, 104.35, and 104.36. These requirements include, in part, placing the student in the least restrictive environment[[18]](#footnote-18) (LRE), conducting an evaluation before taking any action with respect to the initial placement and any subsequent significant change in placement[[19]](#footnote-19), and establishing “a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure.”[[20]](#footnote-20) The procedures schools are required to follow in designing a plan to provide a FAPE under Section 504 are far more vague than the IDEA's precisely outlined IEP process, and therefore are more flexible.[[21]](#footnote-21) Under 34 CFR §104.33(b)(1), a school district satisfies the FAPE requirement when it provides services “designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met.”[[22]](#footnote-22)

2. Reasonable Accommodations.

34 CFR §104.33(b) requires a school district to provide a qualified student with appropriate individualized accommodations that permit her to access the general education curriculum to the same extend as her non-disabled peers.[[23]](#footnote-23) A parent may establish prohibited discrimination under section 504 by showing that the school district denied a student a “reasonable accommodation” necessary to achieve meaningful access to her education.[[24]](#footnote-24) Whether a requested accommodation is reasonable is a highly fact-specific inquiry and requires balancing the needs of the parties.[[25]](#footnote-25) Nevertheless, “far from requiring that accommodations serve to assist [the student] to perform to [her] highest potential, as an equal opportunity statute, § 504 requires accessibility and uses the general population as a basis for comparison. Therefore, the inquiry must be conducted by comparing [the student] to the average [student in her grade].”[[26]](#footnote-26)

3. Retaliation Pursuant to Section 504.

To make out a prima facie case of retaliation, a parent must show that (1) she engaged in protected conduct, (2) she was subjected to an adverse action by the defendant, and (3) there was a causal connection between the protected conduct and the adverse action.[[27]](#footnote-27) Parent must demonstrate an adverse decision or action rather than merely an undesirable school outcome.[[28]](#footnote-28) Once a parent makes such a showing, the burden shifts to the school to articulate a legitimate, non-retaliatory explanation for the adverse action.[[29]](#footnote-29)  If the school does so, the burden shifts back to the parent to show that the proffered legitimate explanation is pretextual, meaning that the school was motivated by a retaliatory animus.[[30]](#footnote-30)

4. Burden of Persuasion

In a due process proceeding, the burden of proof is on the moving party.[[31]](#footnote-31) If the evidence is closely balanced, the moving party will not prevail.[[32]](#footnote-32) In the instant matter, Parent is the moving party and bears the burden of persuasion.

**DISCUSSION:**

In making my determinations, I rely on the facts I have found as set forth in the **FINDINGS OF FACTS**, *supra*, and incorporate them by reference to avoid restating them except where necessary.

I note at the outset that a Hearing Officer is responsible for assessing the credibility of witnesses.[[33]](#footnote-33) Based on my observations at Hearing, I found the testimony of District staff credible and persuasive. District staff were thoughtful, detailed, factual, and consistent. Where any inconsistencies did exist, they were minor and not outcome determinative.[[34]](#footnote-34) Parent demonstrated her love for her daughter and her desire “to do everything in her power to protect her,” but I found her testimony confusing, conclusory, and argumentative and, as such, less credible. Parent projected intentions onto Dracut’s actions but presented no persuasive testimony challenging the testimony of District staff. Nor did the documentary evidence challenge staff testimony.

The Parties agree that Student is an individual with a disability falling within the purview of Section 504 of the Rehabilitation Act of 1973, and the regulations promulgated under this statute. The fundamental issues in dispute are listed under **ISSUES IN DISPUTE**, *supra*. Upon consideration of the documentary evidence and testimony as well as the thoughtful arguments of Counsel and Parent, I find that Parent has failed to meet her burden of proof as to any and all of her claims. Thus, they are denied. My reasoning follows.

1. Appropriateness of Dracut’s Proposed 504 Plan.

a. Failure to Provide Reasonable Accommodations. (Issue #1)[[35]](#footnote-35)

There was no evidence presented to demonstrate that the proposed 504 Plan, as revised twice in response to Parent’s requests for “corrections”, was inappropriate. Parent appears to confuse the need for a reasonable accommodation with the desire for a certain accommodation.[[36]](#footnote-36) Although “refusal to make an accommodation is the type of harm that Section 504 protects,”[[37]](#footnote-37) the statute does “not permit a parent to request particular accommodations without regard to whether those accommodations constitute a FAPE; rather, the Section 504 process requires a school district to design a plan whose overall effect meets [the student’s] FAPE obligations under those statutes.”[[38]](#footnote-38) In other words, a school is not required to provide every requested accommodation because the main objective of Section 504 is for qualified individuals with disabilities to be “provided with meaningful access to the benefit that the grantee offers.”[[39]](#footnote-39)  “It naturally follows that when an individual already has ‘meaningful access’ to a benefit to which he or she is entitled, no additional accommodation, ‘reasonable’ or not, need be provided by the grantee. Accordingly, before even reaching ‘the ultimate question,’ any requested accommodation must first be deemed necessary to ensure an individual with disabilities has ‘meaningful access’ to the benefit in question.”[[40]](#footnote-40) Reasonable accommodations are not the same as optimal accommodations.[[41]](#footnote-41) Where alternative reasonable accommodations allow for “meaningful access” and are offered or are already in place, a Section 504 reasonable accommodations claim fails.[[42]](#footnote-42)

Here, the District developed Student’s Section 504 Plan based on the input of a variety of sources, including a knowledgeable group of people, and provided Parent with notice of her procedural safeguards; as such, the District developed Student's Section 504 plan in a manner consistent with the requirements of Section 504.[[43]](#footnote-43)  In addition, there is no evidence that Student required any accommodation not included in the 504 Plan.[[44]](#footnote-44) The 504 Plan’s failure to indicate a specific safe (or point) person for recess did not render it inadequate; although a 504 Plan that lacks specificity may be found to be inappropriate, it is only deemed so when the 504 Plan does “not provide clear guidance as to how the required services will be implemented.”[[45]](#footnote-45) Here, the Team agreed that a person would be identified with Student once Parent accepted the Plan.

Moreover, there is no evidence to show that Student required a transfer of schools[[46]](#footnote-46) or a change in email usernames and/or passwords in order to achieve meaningful access to her education. Short of changing schools, the District included all of Ms. Asada’s recommendations in the 504 Plan. Moreover, Ms. Asada did not recommend a change of schools per se, but rather noted that this is what Student desired; Ms. Asada seemed satisfied that Student’s seat had been moved.[[47]](#footnote-47)

Even if, *arguendo*, Ms. Asada had recommended a change in schools for Student, the District was not obligated to offer such an accommodation[[48]](#footnote-48), as Parent had not demonstrated that this accommodation (or the requested change in Student’s email and passwords) was necessary to accommodate Student’s disability.[[49]](#footnote-49) Instead, Ms. Ceurvels credibly testified that a change in schools might have made the family happy but was not “necessary” to accommodate Student’s disability-related needs. In fact, Ms. Ceurvels had no concerns regarding Student’s social or academic functioning in school.

As such, I find that the District offered Student all the “reasonable accommodations” necessary to achieve meaningful access to her education[[50]](#footnote-50) and that both the initial 504 Plan and the revised versions were appropriate. Parent has not met her burden on this claim.[[51]](#footnote-51)

b. Limitations of ASPEN Resulting in Incorrect Names and Incomplete List of Attendees. (Issue #8)

Parent argues that the District failed to provide Student a FAPE due to the limitations of the District’s ASPEN system, proposing a 504 Plan with incorrect names in the Parents’ Names Section and an incomplete list of attendees. Specifically, Parent argues that because ASPEN cannot input Ms. Asada’s name into the list of attendees, and as Parent refuses to sign an incorrect document, Student cannot receive a FAPE at Dracut. Parent’s argument is unpersuasive.

The errors referenced by Parent (i.e., error in including names other than that of Parent and absence of Ms. Asada’s name in the list of attendees on the 504 Plan) do not render the 504 Plan inappropriate.[[52]](#footnote-52) None has any substantive impact on the proposed 504 Plans or renders the proposals ambiguous in any way.[[53]](#footnote-53) That the additional name listed on the 504 Plan was Parent’s former husband against whom she has an active restraining order is both uncomfortable and unfortunate, but in no way renders the Plan inappropriate.[[54]](#footnote-54) Ms. Asada’s name, although not on the list of attendees in all but the first 504 Plan proposed, was clearly referenced throughout the Plan, and her recommendations were included in the Plan. Moreover, a list of attendees is not a requirement for 504 Plans. [[55]](#footnote-55) Despite Parent’s assertion that the 504 Plan failed to include her concerns as she stated them, the evidence shows that the 504 Plan incorporated the essence of Parent’s concerns. Even if, *arguendo*, the 504 Plan inaccurately reflected Parent’s concerns, such inaccuracy is harmless, as the accommodations reflected in the 504 Plan were appropriate.[[56]](#footnote-56) Nor do any of the inaccuracies created by ASPEN suggest discriminatory or retaliatory behavior on the part of Dracut. [[57]](#footnote-57) Therefore, I find that Parent did not meet her burden on this claim.

 c. The District’s Negligence In Using The ASPEN System As Such Use

“Caus[es] A Violation Of 504 Amongst Many Other Violations.” (Issue #9)

Parent asserts that the District was negligent in using the Aspen system as such use “caus[es] a violation of 504 amongst many other violations.” Parent argues that a system that produces inaccurate documents is “broken,” and, therefore, the District was negligent in utilizing it.

Here, Parent failed to identify the relief she sought for her claim of negligence until her closing argument, during which time she indicated that Student would like to attend a school that can give her a “correct 504 Plan,” that is, one without inaccuracies. To the extent that Parent’s claim is based on the District’s procedural and substantive responsibilities under Section 504 of the Rehabilitation Act of 1973,[[58]](#footnote-58) I have already determined, *supra*, that Dracut’s proposed 504 Plan, as revised, was appropriate, and that ASPEN’s limitations, if any, had no impact on the provision of a FAPE to Student. Parent has failed to meet her burden on this claim.

1. Failure To Meet With Parent To Amend Student’s 504 Plan. (Issue # 2)

Unlike the IDEA, Section 504 does not provide for regular, or annual meetings.[[59]](#footnote-59) In addition, parent participation and decision-making is not an entitlement under Section 504; rather, a Section 504 meeting must be attended by “a group of persons, including persons knowledgeable about the child, [the child's evaluative data], and the placement options.”[[60]](#footnote-60) Of course, parents are “knowledgeable” about their child and are generally invited to participate in their students’ 504 meetings. Nevertheless, Section 504 regulations “do not require parents[’] presence during a §504 meeting.”[[61]](#footnote-61)

Here, I find no evidence that the District refused to meet with Parent to develop Student’s 504 Plan. To the contrary, different staff members offered to meet with Parent repeatedly.[[62]](#footnote-62) Following the initial 504 Team meeting, Parent refused Ms. Drohan’s offer to reconvene the Team and did not, herself, request a reconvene. Even if, *arguendo*, the District had failed to meet with Parent, and such failure constituted a procedural violation of Section 504, Parent still would not meet her burden because such procedural violation resulted in no educational harm or impact to Student.[[63]](#footnote-63) Since the 504 Plan as proposed was appropriate, even if the Team had failed to reconvene and consider the additional accommodations and revisions sought by Parent, such failure was harmless error. Moreover, it is indisputable that Parent was provided with notice of procedural safeguards in compliance with Section 504.[[64]](#footnote-64) If Parent was dissatisfied with the 504 Plan developed and proposed by the Team, she could have exercised her rights in accordance with procedural safeguards available to her. This she did not do. Parent has not met her burden on this claim.

1. Retaliation Claims.

a. Development of 504 Plan. (Issue # 3)

Parent asserts that when she sought corrections of the 504 Plan, the District “took [it] back” and asked for additional documentation. According to Section 504 regulations, school districts need to consider a range of sources, including doctor's notes, when interpreting evaluation data and making placement decisions, and the evaluation determines what accommodations a student will receive.[[65]](#footnote-65) If a district suspects that a student may have a disability, it should initiate the evaluation process even if does not yet have an official medical diagnosis of a disability.[[66]](#footnote-66) Policies and procedures requiring parents to provide medical documentation of a disability before a student may be evaluated for Section 504 eligibility do not comply with the Section 504 regulations, which require a school district to conduct an evaluation of a student suspected of having a disability at no cost to the student's parents or guardians to determine whether the student has a disability and needs special education and/or related services.[[67]](#footnote-67)

Here, at no point did Dracut condition either the proposal or the implementation of the 504 Plan on receipt of specific documentation. In fact, the District proposed all three 504 Plans at issue before Parent provided the requested documentation. Even, *arguendo*, had I found that District inappropriately required Parent to provide additional medical documentation, I would not be able to find that this was retaliatory behavior. Specifically, retaliation requires adverse[[68]](#footnote-68) action by the school district. Here, the District kept amending (and reproposing) the 504 Plan in accordance with Parent’s requests and remained ready to implement any accepted Plan. [[69]](#footnote-69)

Parent’s argument that the District retaliated against her by “delaying” the proposal of the April 10 Plan is unsupported by the evidence. In contrast to the proposal of an IEP[[70]](#footnote-70), the federal regulations do not mandate a timeline for Section 504 Plans; as such, the standard is one of reasonableness.[[71]](#footnote-71) Although it took Ms. Drohan 10 business days to issue the April 10 Plan (as compared to the 4 days within which she issued the March 24 Plan), I cannot find that this is constitutes a delay, much less an unreasonable delay. Parent presented no evidence that Dracut delayed the process unnecessarily or with any intent to “drag out” the process. Moreover, Parent refused to accept the 504 Plan, and as such, even had a delay occurred, it did not result in substantive harm to Student. As such, I find that Parent failed to meet her burden relative to this retaliation claim.

b. Extending Timeline for Investigation. (Issue # 6)

Parent filed a Hearing Request with the BSEA on June 6, 2023. On June 30, 2023, Parent received a letter from Dracut seeking to extend the timeline for the Civil Rights Investigation. Parent argues that by extending the timeline for the investigation, the District was retaliating against her for filing the due process complaint.

Section 504's anti-retaliation provision broadly prohibits acts that "intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any [rights he has under Section 504]."[[72]](#footnote-72) The anti-retaliation provision extends protection to those who advocate on behalf of individuals with disabilities,[[73]](#footnote-73) in response to which the school acts in a manner that is "materially adverse."[[74]](#footnote-74)

Based on the evidence, the District clearly failed to explain to Parent in a manner that was clear to her the distinction between the bullying, Title IX and Civil Rights complaints. Neither Ms. Drohan nor Ms. Garneau clarified to Parent that the bullying complaint which Parent had filed on March 29, 2023 had “closed” when on May 2, 2023 Parent filed the Title IX complaint, and that, subsequently, when Ms. Garneau found that the matter did not rise to the level of a Title IX incident, she was “obligated” to open the Civil Rights investigation due to information gathered during the Title IX investigation process. Parent was understandably confused and frustrated. She was awaiting a letter of findings relative to the bullying complaint which she filed after the March 27, 2023 incident, unaware that none would come since the complaint had been “changed” into a Title IX investigation. When the Title IX complaint was dismissed by Ms. Garneau, it was not made clear to Parent that the District did not require a separate complaint to open a civil rights investigation. Although District staff testified that they explained the process to Parent, her emails to them demonstrate her ongoing confusion. In this context, Parent’s perception of the District’s extension of the timeline for the investigation as retaliatory (particularly in light of her then-recent filing with the BSEA) can be understood.

Although the District should have ensured better communication with Parent, Parent failed to show that the District acted in an adverse manner in response to her advocacy. Nor did she demonstrate that Student suffered any harm from the District’s launch of the Civil Rights investigation. On the contrary, the District appears to have been acting in Student’s interest in seeking to protect Student’s rights. Nor was the District’s action a deterrent to further protected activity.[[75]](#footnote-75) Ms. Garneau testified that she informed Parent that if Parent did not want the District to pursue the civil rights investigation, she could withdraw the initial complaint. Parent did not do so.

Parent’s argument that the District “drew out” the investigation is unpersuasive. Specifically, the evidence shows that Parent was not forced to open the Title IX complaint; rather Ms. Garneau informed Parent about it based on the contents of Parents’ bullying complaint, which was “sexual” in nature. Nor did Ms. Garneau pressure Parent to submit the forms for the Title IX complaint; she sent the form in response to Parent’s inquiry. Ms. Garneau also testified that she was obligated to pursue the Civil Rights investigation since, despite the dismissal of the Title IX investigation (which, by law, did not rise to the level of a Title IX claim), the initial complaint still implicated Student’s civil rights, and opening such an investigation did not, unlike the Title IX investigation, necessitate the filing of a new complaint.[[76]](#footnote-76) Parent offered no evidence to dispute the District’s testimony on this issue and failed to demonstrate that the District retaliated against her.

Even, *arguendo*, had Parent demonstrated that the District’s actions were in some way adverse to her or to Student, she produced no evidence to show causation such that an inference could be drawn that the adverse action (i.e., opening the complaint) would not have been taken in the absence of the protected conduct (i.e. Parent’s advocacy).[[77]](#footnote-77) The Title IX complaint closed on May 24, 2023, and the Civil Rights investigation opened on the same day. Parent did not file her due process complaint until June 6, 2023. I have no reason to doubt the credibility of Ms. Garneau’s testimony that the request for extension on June 30 was due to the summer vacation, rather than an attempt to prolong the process.[[78]](#footnote-78) Therefore, Parent has not met her burden on this claim.

c. Deletion of Accounts. (Issue # 7a)

Parent argues that the District discriminated and retaliated against her for requesting a 504 Plan and advocating for Student by deleting “accounts and private emails in the Class Dojo App after [Parent] requested them in Discovery and before a ruling was [issued] on the matter” and failing to abide by Parent’s ADA accommodations of “need[ing] to have printed copies [of documents] in order to be sure [she] didn't miss important information.” This argument is not supported by the evidence.

Ms. Ceurvels testified that at the end of each school year, she archives her Class Dojo messages. Here, she later “unarchived” them for the purpose of reviewing her messages for documents responsive to discovery. Ms. Ceurvels testified, and I have no reason to doubt her credibility, that in reviewing the archived information in accordance with the undersigned Hearing Officer’s Order[[79]](#footnote-79) for messages relevant to the issues identified in this matter, no such messages existed. As such, no accounts were deleted. Presumably, Parent had access to her own messages and could have printed them, as needed. Therefore, Parent has failed to meet her burden on this claim.

d. Choice of Investigator. (Issue #7b)

Parent asserts that the District discriminated and retaliated against Parent for requesting a 504 Plan and advocating for Student by “[t]ransfer[ing] the [investigation of Student’s alleged sexual assault] from Title IX investigator Joanna Garneau to Vice Principal Wojcik knowing the parent had an open Bullying report against her”, “intimidat[ing] [Student],” and “forg[ing] documents” relative to this investigation. Her argument is groundless.

First, the investigation was never “transferred” from Ms. Garneau to Ms. Wojcik. Ms. Garneau testified that, as the Title IX Coordinator, she does not typically conduct investigations. Each school has an assigned investigator, and Ms. Wojcik is the Title IX investigator for Englesby. Although reasonable in light of her job responsibilities at Englesby, the choice of Ms. Wojcik as investigator was not optimal in light of Parent’s history with her. Pursuant to Parent’s request, Ms. Garneau promptly reassigned the investigation to herself. Ms. Wojcik’s involvement in the investigation was minimal, as she only sent a letter inviting Student for an interview. Nor did Parent present any evidence of intimidation. Parent requested to be present during Student’s interview and to have it conducted via a remote format, and the District accommodated this request. Moreover, there was no evidence to substantiate the allegation of forged documents. As such, Parent did not meet her burden to show that the District discriminated and/or retaliated against Student and Parent.

4. Failure To Implement the 504 Plan. (Issue #4)

Parent asserts that pursuant to Student’s 504 Plan, Student should have been allowed to call Parent following the alleged sexual assault on March 27, 2023. Parent argues that although she had not signed any of the 504 Plans, the Team agreed on March 14, 2023 to implement the accommodations discussed. Parent’s argument is meritless.

Unlike the provision in IDEA which requires that a parent accept the IEP prior to its implementation,[[80]](#footnote-80) there is no such explicit requirement in Section 504. However, when faced with an unsigned 504 Plan, the Office of Civil Rights (OCR) “suggest[ed] that the 504 team ensure that the parent of the student sign the 504 plan or otherwise indicate awareness of the plan and receipt of his or her procedural safeguards.”[[81]](#footnote-81) Moreover, at least one court has held that where a school district convenes a Section 504 meeting and proposes a 504 Plan, and parent refuses to accept it, parent cannot hold the school district liable for failing to provide accommodations that she rejected as part of the 504 plan.[[82]](#footnote-82) Similarly, in *Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities (Question #44)*, 67 IDELR 189 (OCR 2016), OCR stated that “Section 504 neither prohibits nor requires a school district to initiate a due process hearing to override a parental refusal to consent with respect to the initial provision of special education and related services.”

OCR has concluded in at least one case that where parents “declined to sign the 504 Plan that was eventually developed, there is no requirement that the [parents] do so under Section 504 in order for the District to adopt and implement such a plan addressing the Student's health and safety concerns.”[[83]](#footnote-83)Notably, however, in that case, OCR indicated that health and safety concerns informed its approval of the school’s implementation of the unsigned 504 Plan. In contrast to *Bradley County (TN) Schools*, 04-04-1247, 43 IDELR 44 (OCR D.C., 2004), the District here had no concerns as to Student’s safety or health. Therefore, the District did not abrogate its duty by failing to implement an unsigned 504 Plan.

At no point in the instant mater did Parent accept any version of the 504 Plan. Parent’s repeated requests for modifications belie her argument that she accepted portions thereof.[[84]](#footnote-84) In fact, she was aware that the District required her signature for acceptance, as she asserts that she could not sign a legal document that contained any errors. Moreover, in communicating with Parent, Ms. Drohan clarified that until Parent signed the 504 Plan, it was merely a “draft” and was not “active.”

Even if, *arguendo*, the District should have implemented the unsigned 504 Plan, I would find such error to be harmless.[[85]](#footnote-85) Although “[a]ll aspects of a § 504 eligible student's plan must be implemented to assist the student to maintain progress in school,”[[86]](#footnote-86) not all implementation failures result in a denial of a FAPE.[[87]](#footnote-87) Moreover, because Section 504 FAPE focuses on whether a student with a disability has meaningful access to public school programs, failure to implement a Section 504 plan does not amount to disability discrimination unless that deviation is so significant that it effectively denies the child the benefit of a public education.[[88]](#footnote-88) Here, there was no evidence that Ms. Drohan’s failure to have Student call Parent after the March 27 incident (where Student did not even request to call Parent) denied Student meaningful participation in learning activities or prevented her from accessing her education.[[89]](#footnote-89) To the contrary, Student continued to participate in her classes and in all social aspects of school for the reminder of the school year. As such, I find that Parent did not meet her burden on this claim.

5. Denial of a FAPE Relative to March 2023 Sexual Assault Incident. (Issue #5)

Parent contends that the District failed to investigate her daughter’s sexual assault, thereby depriving her of a FAPE. In Davis v. Monroe County Board of Education, the Supreme Court held that recipients of federal funding may be held liable under Title IX of the Education Amendments of 1972only where they are deliberately indifferent to harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.[[90]](#footnote-90) Deliberate indifference requires a finding that the school had actual knowledge of the harassment and failed to respond adequately.[[91]](#footnote-91) The deliberate indifference of the school must cause the student to be harassed or make her more vulnerable to such conduct.[[92]](#footnote-92)

Here, the evidence does not support Parent’s assertion that the actions or inactions taken by the District in response to Student’s March 2023 allegation of sexual assault impacted Student’s ability to receive a FAPE.[[93]](#footnote-93) Parent was understandably upset and frustrated by the District’s failure to contact her regarding the incident on the date it occurred. However, Dracut did take immediate steps to ensure Student’s safety and stationed additional staff at recess to monitor the children’s proximity.[[94]](#footnote-94) The matter was subsequently investigated, and a finding was reached relative to Title IX.[[95]](#footnote-95) There is no evidence that “school personnel [were] deliberately indifferent to, or failed to take reasonable steps” in response to the incident or that the Dracut’s response to the incident “substantially restricted [Student] in her educational opportunities.”[[96]](#footnote-96) In fact, even assuming *arguendo*, that Dracut’s actions failed to comport with the Title IX procedural requirements (which is not an issue in this matter, and which I do not have jurisdiction to decide), Parent presented no evidence that there was educational harm to Student as a result.[[97]](#footnote-97) Student continued to excel in school. Although she was absent immediately following the incident, her attendance, in general, remained consistent with her attendance prior to March 27.[[98]](#footnote-98) Therefore, I find that the District’s actions in response to the Title IX incident did not result in a denial of a FAPE to Student. Parent has not met her burden on this claim.

**CONCLUSION:**

Based upon the record before me, I conclude that Parent has not met her burden on any of the claims.

**ORDER:**

Parent’s claims in this matter are DENIED.

So Ordered by the Hearing Officer,

*/s/ Alina Kantor Nir*

Alina Kantor Nir, Hearing Officer

Dated: September 29, 2023

**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 in the state superior court of competent jurisdiction or in the District Court of the United States for Massachusetts, for review. 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. S-18 is a recording. [↑](#footnote-ref-1)
2. Student’s account of the incident on March 27, 2023 states, in part, that at recess, a fifth grade student said to her, “Do you want me to rip your vagina out and turn it inside out,” and “then the student “reached for [Student’s] vagina and [Student] hit her hand in self defense.” (P-AA) [↑](#footnote-ref-2)
3. Ms. Drohan testified it was Ms. Cereuvles who informed her of the incident that day. (Drohan) According to Ms. Cereuvles, she informed another administrator of the incident and spoke to Ms. Drohan after school that day. (Cereuvles) [↑](#footnote-ref-3)
4. Ms. Drohan testified that she and Ms. Wocjik were “trying to coordinate” how they would speak to Student in light of the “parameters” Parent had put in place limiting their ability to speak to or to interview Student. (Drohan) [↑](#footnote-ref-4)
5. Ms. Drohan also testified that she did not know whether Student requested to call Parent following the incident. (Drohan) [↑](#footnote-ref-5)
6. Ms. Lawrence testified that she helped to draft the bullying policy for Dracut, but, at Hearing, she could not recall the “protocol” for responding to a bullying complaint. (Lawrence) [↑](#footnote-ref-6)
7. The communication is included verbatim. [↑](#footnote-ref-7)
8. The communication is included verbatim. [↑](#footnote-ref-8)
9. On April 4, 2023, during a 504 Team meeting for Parent’s son, Ms. Lawrence informed Parent that the Superintendent makes decisions regarding school transfers and that she had informed him of Parent’s request relative to Student. (P-R-3) At Hearing, Ms. Lawrence testified that it was she who denied Parent’s request for a change in schools. At a later time, she testified that Superintendent Stephen Stone denied Parent’s request. (Lawrence) [↑](#footnote-ref-9)
10. Ms. Ceurvels testified that the Team had agreed on March 14, 2023 that she would be Student’s safe person. (Ceurvels) [↑](#footnote-ref-10)
11. In error, the email to which the letter was attached refers to the “scheduled investigative interview pertaining to the Title IV complaint the District received on 5-2-23.” (Wojcik, P-R) Parent testified that the document appeared “forged” or “altered” and “misleading.” (Parent) [↑](#footnote-ref-11)
12. In March 2023, Parent filed a bullying incident report against Ms. Wojcik accusing her of “gaslighting.” (Wojcik, P-R) [↑](#footnote-ref-12)
13. 34 CFR §104.4(b)(1). [↑](#footnote-ref-13)
14. See 29 USC § 794(a). [↑](#footnote-ref-14)
15. 34 CFR § 104.33(b)(1). [↑](#footnote-ref-15)
16. 34 CFR §§ 104.32, 104.35; see *W.B. v. Matula,* 67 F. 3d 484, 492-93 (3rd Cir. 1995). [↑](#footnote-ref-16)
17. *Molly L. v. Lower Merion Sch. Dist*., 194 F. Supp. 2d 422, 436 (E.D. Pa. 2002). [↑](#footnote-ref-17)
18. See 34 CFR § 104.34(a). [↑](#footnote-ref-18)
19. See 34 CFR §104.35(a). [↑](#footnote-ref-19)
20. 34 CFR §104.36. A local educational agency (LEA) can meet this standard by following the procedural safeguards of IDEA. See *id*. While the substantive content of Section 504 as applied to education is similar to that of the IDEA, Section 504 has a wider scope. See *Kimble v. Douglas Cnty. Sch. Dist. RE-1*, 925 F. Supp. 2d 1176, 1181 (D. Colo. 2013). [↑](#footnote-ref-20)
21. See *Weber v. Cranston Pub. Sch. Comm.*, 245 F.Supp.2d 401, 406 (D.R.I. 2003) (“[Section 504] is a bludgeon to the IDEA's stiletto, protecting a broader swath of the population without describing a precise manner of compliance”); *Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369, 1376 (8th Cir. 1996) (“Both [Section] 504 and IDEA have been interpreted as requiring states to provide a [FAPE] to qualified handicapped persons, but only IDEA requires development of an IEP”). [↑](#footnote-ref-21)
22. See 34 CFR § 104.33(b)(2) (“Implementation of an [IEP under the IDEA] is *one* means of meeting” the substantive portion of the § 504 regulations' definition of FAPE) (emphasis added); see also *Mark H. v. Lemahieu*, 513 F.3d 922, 933 (9th Cir.2008) (a FAPE under Section 504 requires “the provision of regular or special education and related aids and services that ... are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met”). [↑](#footnote-ref-22)
23. See *In Re: Sharon Pub. Sch.*, BSEA # 98-4579 (Byrne, 1998) (“the accommodations must be designed to

“‘level the playing field’ so that students with and without disabilities have roughly equivalent access to educational programming”); see also *In Re: Hampden-Wilbraham Regional Sch. Dist.*, BSEA # 07-5701 (Putney-Yaceshyn, 2007) (Section 504 is designed to "combat discrimination" by "safeguarding equal access to school programs" in contrast with "the IDEA which focuses on the content of a student's educational program"). [↑](#footnote-ref-23)
24. *A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1206 (9th Cir. 2016). [↑](#footnote-ref-24)
25. Oconomowoc Residential Programs v. Milwaukee, 300 F.3d 775, 784 (7th Cir. 2002); see *North East Indep. Sch. Dist.*, 06-15-1452, 117 LRP 7678 (OCR, 2016) (school should have “assess[ed] individually” what aids and services the student required in order to receive FAPE rather than deferring its “blanket policies”); *Boston Pub. Sch.*, 01-06-1213, 49 IDELR 48 (OCR 2007) (“In assuring students a FAPE pursuant to § 504, the individual needs of the child are to be considered and districts cannot implement a ‘one size fits all’ approach”). [↑](#footnote-ref-25)
26. *In re: Student v. Bedford Pub. Sch.*, BSEA # 09-5853 (Figueroa, 2009); see *A.G.,* 815 F.3d at 1206 (quoting E.R.K. ex rel. R.K. v. Haw. Dep't of Educ., 728 F.3d 982, 992 (9th Cir. 2013)). [↑](#footnote-ref-26)
27. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801–03, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); see also *Carreras v. Sajo, García & Partners*, 596 F.3d 25, 35 (1st Cir.2010); *D.B. v. Esposito,* 675 F.3d 26, 41 (1st Cir. 2012); *Lauren W. v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007); Barker v. Riverside Cnty. Office of Educ., 584 F.3d 821, 826 (9th Cir. 2009) (holding that advocacy on behalf of disabled students on issues related to their civil rights is protected activity under the Rehabilitation Act and the ADA); Weixel v. Bd. of Educ. of New York, 287 F.3d 138, 149 (2d Cir. 2002) (seeking reasonable accommodation for disabled student's disability is protected activity under the Rehabilitation Act); A*.M. v. NYC Dep't of Educ*., 840 F. Supp. 2d 660, 687 (E.D.N.Y. 2012), *aff'd sub nom. Moody v. NYC Dep't of Educ*., 513 F. App'x 95 (2d Cir. 2013) (seeking reasonable accommodation of disability “constitutes protected activity under Section 504/ADA”). [↑](#footnote-ref-27)
28. *D.B.,* 675 F.3d at 42 (“In the face of a school system's compliance with the IDEA, as in this case, a plaintiff who asserts that the content of an IEP or the conduct of an IEP process was retaliatory must show evidence of something more than a disappointing IEP or the predictable back-and-forth associated with the IEP process in order to survive summary judgment”). [↑](#footnote-ref-28)
29. SeeCarreras, 596 F.3d at 36. [↑](#footnote-ref-29)
30. See id. [↑](#footnote-ref-30)
31. *Schaffer v. Weast*, 546 U.S. 49, 62 (2008). [↑](#footnote-ref-31)
32. *Id*. (places the burden of proof in an administrative hearing on the party seeking relief). [↑](#footnote-ref-32)
33. See *Shore Regional High School Bd. of Educ. v. P.S.*, 381 F.3d 194 (3rd Cir. 2004). [↑](#footnote-ref-33)
34. I note, for example, the inconsistency in Ms. Lawrence’s testimony regarding her authority to change Student’s school. However, I place little weight on such inconsistency as no evidence was presented that Student required a change in educational setting. [↑](#footnote-ref-34)
35. Rather than address the issues in the order delineated in the **ISSUES IN DISPUTE** section, *supra*, where issues involve the same legal standards, I address them together to avoid repetition. [↑](#footnote-ref-35)
36. See *T.F. v. Fox Chapel Area Sch. Dist*., 589 F. App'x 594, 600 (3d Cir. 2014) (finding “no merit in Appellants' contentions that Fox Chapel's failure to adopt all of their requested accommodations resulted in their inability to access procedural safeguards”); see also A*.G. v. Paradise Valley Unified Sch. Dist*. *No. 69*, 815 F.3d 1195, 1206 (9th Cir. 2016) (whether meaningful access has been improperly denied is an issue “that requires specialized expertise a parent cannot be expected to have”). [↑](#footnote-ref-36)
37. *Doe v. Dennis-Yarmouth Reg'l Sch. Dist.,* 578 F. Supp. 3d 164, 180 (D. Mass. 2022) (internal citations omitted). [↑](#footnote-ref-37)
38. *Kimble v. Douglas Cnty. Sch. Dist. RE-*1, 925 F. Supp. 2d 1176, 1185 (D. Colo. 2013). [↑](#footnote-ref-38)
39. See Alexander v. Choate, 469 U.S. 287, 300 n. 19 (1985). [↑](#footnote-ref-39)
40. *A.M. v. NYC Dep't of Educ*., 840 F. Supp. 2d 660, 679–80 (E.D.N.Y. 2012), *aff'd sub nom. Moody J.M. v. NYC Dep't of Educ*., 513 F. App'x 95 (2d Cir. 2013); J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 71 (2d Cir. 2000) (rejecting Section 504 claim where plaintiff “failed to show that [proposed accommodation] was necessary ”) (emphasis added); see *G.B.L. v. Bellevue Sch. Dist. No. 405*, No. C12-427 TSZ, 2013 WL 594289, at \*14 (W.D. Wash. Feb. 15, 2013) (because allowing the two-hour limitation on homework each night was not a reasonable accommodation, school did not deny student a FAPE under Section 504 by refusing to implement the requested homework limitation accommodation); see also *In re: Student with a Disability*, 09-6047, 57 IDELR 236 (SEA FL, 2011) (because the child was performing well without a service dog the ALJ agreed that the dog's presence was unnecessary). [↑](#footnote-ref-40)
41. See *Choate*, 469 U.S. at 304 (“The Act does not ... guarantee the handicapped equal results....”) (internal citations omitted); see also *J.D.,* 224 F.3d at 71; *Felix v. New York City Transit Auth*., 324 F.3d 102, 107 (2d Cir. 2003) (“[The ADA] does not authorize a preference for disabled people generally”). [↑](#footnote-ref-41)
42. See, e.g., *Henrietta D. v. Bloomberg*, 331 F.3d 261, 282 (2d Cir. 2003) (“There would be no need for injunctive relief if the plaintiffs were already being reasonably accommodated”); *Cave v. East Meadow Union Free Sch. Dist.*, 480 F.Supp.2d 610, 641 (E.D.N.Y. 2007) (finding no violation where school district denied hearing impaired student the ability to bring a service dog to school where student was afforded other “apparently successful accommodations,” which allowed him meaningful access to school); *Wheaton Community Unit School District No. 200*, 002109, 35 IDELR 50 (SEA IL, 2001) (where student was tardy only ten days out of the 126 days he attended school during the 2000-2001 school year, a flexible start time was an unnecessary accommodation); *North St. Francois County R-I School District,* 59 IDELR 179 (SEA MO, 2012 ) (“There was no evidence, however, that the Student had any difficulties with reading the non-enlarged font. He also did not wear glasses in the 2011-2012 school year so this may well have been an unnecessary accommodation that was carried over”). [↑](#footnote-ref-42)
43. See 34 CFR § 104.35 (c)(1) and 34 CFR §104.36; see also *Pleasanton (CA) Unified School District*, 09-03-1158, 103 LRP 47185 (OCR CA, 2003) (“[a]lthough the parent did not sign the Section 504 plan because she wanted it to contain additional modifications, the District developed it based upon an appropriate evaluation […and] provided the parent with written notice of its Section 504 procedural safeguards informing the parent of the process to follow if she disagreed with any action taken by the District regarding identification, evaluation and placement….”). [↑](#footnote-ref-43)
44. See *Ridley Sch. Dist. v. M.R.,* No. CIV.A. 09-2503, 2011 WL 499966, at \*17 (E.D. Pa. Feb. 14, 2011), *aff'd,* 680 F.3d 260 (3d Cir. 2012) (“the record in no way reflects that E.R. was deprived of a learning opportunity due to her disability. Parents have not established that E.R. was prevented from meaningful participation in these activities”); see also *Zukle v. Regents of Univ. of California*, 166 F.3d 1041, 1050 (9th Cir. 1999) (“The reasonableness of Zukle's request must be evaluated in light of Zukle's particular circumstances”). I also note that in response to Student’s anxiety, the District offered Student access to the school counselor, which Parent declined. [↑](#footnote-ref-44)
45. *San Dieguito (CA) Union School District*, 09-08-1259, 53 IDELR 242 (OCR CA 2009); see *Wayne (NY) Cent. Sch. Dist.*, 43 IDELR 257 (OCR 2005) (lack of specificity in a written Section 504 plan is excusable where the district required flexibility to enable it to modify the student's services according to her needs during the course of the year). [↑](#footnote-ref-45)
46. See *Urb. v. Jefferson Cnty. Sch. Dist. R-1*, 870 F. Supp. 1558, 1569 (D. Colo. 1994), aff'd, 89 F.3d 720 (10th Cir. 1996) (neither IDEA nor ADA entitles parents to have their children’s special education programs carried out at the location of their choice); see also *Letter to Fisher*, 21 IDELR 992 (OSEP 1994) (citing policy letter indicating that assignment of a particular location is an administrative decision). In contrast, see *Doe v. Sumner Cnty. Bd. of Sch*., 3:19-cv-01172, 77 IDELR 123 (M.D. Tenn. 2020) (“the Court may draw the reasonable inference that providing constant protection for [the student] or allowing her to transfer schools would have been a reasonable accommodation" following the repeated sexual assault of the student by her classmate). [↑](#footnote-ref-46)
47. The alleged aggressor’s classroom was also changed subsequent to the meeting. [↑](#footnote-ref-47)
48. See *Beth B. v. Van Clay*, 211 F. Supp. 2d 1020, 1028 (N.D. Ill. 2001), *aff'd*, 282 F.3d 493 (7th Cir. 2002) (the “district is not obliged to follow any particular [] advice. School officials do not relinquish their ultimate authority to make educational policy decisions by agreeing to consider an independent consultant's opinion”). [↑](#footnote-ref-48)
49. E.R.K. v. Hawaii Dep't of Educ., 728 F.3d 982, 992 (9th Cir.2013). [↑](#footnote-ref-49)
50. See *Student v. Bedford Public Schools*, BSEA # 09-5853 (Figueroa, 2009) (Bedford was not required to provide Student with additional accommodations in the 504 plan where the accommodations implemented allowed him to perform in the above-average range when compared to other sixth graders). [↑](#footnote-ref-50)
51. Parent also argued that the District’s delay in issuing the April 10 Plan was unreasonable. However, Section 504 does not include a deadline by which a plan need be proposed. As Parent did not accept the April 10 Plan, there was no substantive harm (i.e. delay in implementation) to Student. [↑](#footnote-ref-51)
52. See, e.g., *Mr. P v. W. Hartford Bd. of Educ*., 885 F.3d 735, 754 (2d Cir. 2018) (agreeing with the ALJ that even if the District drafted an inaccurate and incomplete IEP, this “violation[] [did not] operate[] to deny [M.P.] an educational benefit or deny Parents a meaningful opportunity to participate"); *S.H. v. New York City Dep't of Educ.*, No. 10 CIV. 1041 PKC, 2011 WL 666098, at \*5 (S.D.N.Y. Feb. 15, 2011) (finding that the school’s error in listing the wrong program’s name on the IEP “was inconsequential” as the parents clearly understood which program was being proposed); *M.H. v. New York City Dep't of Educ.*, 56 IDELR 69 (S.D.N.Y. 2011) (although a school failed to describe a student’s counseling services in the related services section of her IEP, it described the counseling services in the minutes of the IEP meeting, and therefore, the error was harmless). [↑](#footnote-ref-52)
53. See *In re: Student with a Disability*, IHRS 2012 #441, 119 LRP 36999 (SEA NY 2012) (“the IEP uses an incorrect name for the Student in some places. This was not a serious issue that affected the Student's opportunity to receive a FAPE”). *Cf*. *Montgomery County Public Schools*, MSDE-MONT-OT-20000004, 102 LRP 3881 (SEA MD, 2000) (“Even assuming MCPS has misdiagnosed the Student's problem, i.e. given her problems an incorrect name, the program offered might still appropriately address the Student's needs”); *Battle Ground School District*, 05-2022-0SPI-01602, 2022-SE-007, 123 LRP 6463 (SEA WA, 2022) (where Student was referenced by an incorrect name in the reevaluation report, the Hearing Officer concluded that “errors that are harmless do not invalidate the results of assessments or the ultimate conclusion that is reached based on those assessments. The minor clerical errors pointed out by the Parents do not affect the content of the reevaluation or render it inappropriate in any way.”) (internal citations omitted); see also *Douglas County School District*, 106 LRP 38968 (SEA NE 2004) (“While the incorrect name was used, [this] does not lead to a conclusion that the School Psychologist did not consider the individual needs of the Petitioner with regard to the 11/4 IEP. People make mistakes”); *School District of Philadelphia,* 13352-1213KE, 113 LRP 23889 (SEA PA 2013) (where the notation on all of the Student's IEPs that the Student is receiving a supplemental level of special education was inaccurate due to a software error, this procedural error did not result in a substantive denial of FAPE); *Lewiston-Porter Central School District*, 18-088, 118 LRP 37605 (SEA NY 2018) (where IEP described the student's services incorrectly, this was a software error and there was no confusion at the meeting regarding the service); *U.S. Virgin Islands (VI) Department of Education*, 02-11-1097, 11 LRP 65108 (OCR 2011) (although Student's IEP included an incorrect provision, OCR determined that a clerical error resulted in this provision appearing the Student's IEP, and it was later corrected). In contrast, see *Houston Independent School District*, 038-SE-1012, 61 IDELR 268 (SEA TX 2013) (where due to a “software glitch” the student:teacher ratios did not appear in student's IEP, such failure affected student's behavioral and academic progress, causing a deprivation of educational benefit and impeding the student's right to FAPE); *In Carmel Clay Schools*, 112 LRP 33923 (SEA IN 2012) (where an “electronic IEP” checked a box that merely stated that the child would receive adult support as a direct service, parent interpreted the IEP as providing for full-time adult services, which was at odds with what the district actually intended in the IEP, the hearing officer concluded that the electronic IEP was too vague and, therefore, deficient). [↑](#footnote-ref-53)
54. See *In Rockdale County School District*, 122 LRP 41381 (SEA GA 2022) (where an IEP software was pulling progress monitoring data from the district's computer system and automatically updating that section of the student's IEP resulting in a change in the student’s IEP, the unintentional amendment had no impact on the substance of the student's IEP or on the instruction and related services that the district provided). [↑](#footnote-ref-54)
55. Unlike an IEP, a Section 504 Plan need not include specific components, nor does it necessarily need to be in writing, although a written plan is encouraged to avoid ambiguity. See *A.J. v. Canastota Cent. Sch. Dist*., 214 A.D.3d 67, 73, 184 N.Y.S.3d 433, 438 (2023) (“a 504 plan is not explicitly required by federal law, although school districts will often carry out their obligations under the foregoing federal laws by the creation of such a written plan”). But see *Mansfield (AR) Pub. Schs*., 59 IDELR 265 (OCR 2012) (“failure of the MPS to thoroughly document its 504 process may have contributed to the MPS's failure to provide the Student a FAPE”); *CTL v. Ashland Sch. Dist*., 743 F.3d 524, 529 (7th Cir. 2014) (“Schools … often create individualized plans describing the special services that will be provided to students to accommodate their disabilities….The blueprints for these plans come from [the IDEA] which also requires states to provide a free, appropriate public education”). [↑](#footnote-ref-55)
56. *Cf.* *Capistrano Unified Sch. Dist. v. S.W.,* 21 F.4th 1125, 1134 (9th Cir. 2021), *cert. denied sub nom. S.W. v. Capistrano Unified Sch. Dist.,* 143 S. Ct. 98, 214 L. Ed. 2d 20 (2022) (Parents’ participation [did] not require school authorities automatically to defer to their concerns”). [↑](#footnote-ref-56)
57. See *In Re: Oxford Public Schools*, BSEA # 15-06886 (Berman, 2015) (“[i]mperfection is not equivalent to retaliation or even to “adverse action’”); see also *Ocean Springs (MS) Sch. Dist*., 120 LRP 8349 (OCR 2019) (without establishing an adverse action, parent couldn't demonstrate that the district engaged in retaliation that violated Section 504). [↑](#footnote-ref-57)
58. The BSEA does not have jurisdiction over tort claims, but to the extent that Parent’s claim of negligence is based on the District’s obligation to provide Student a FAPE pursuant to Section 504, the BSEA may make findings on this claim. See *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 29 (2006). [↑](#footnote-ref-58)
59. See *In re: Student v. Bedford Public Schools*, BSEA # 09-5853 (Figueroa, 2009) (“The regulations further call for periodic re-evaluations to be conducted no more than once per year or less than once every three years. The regulations contain no specific provision addressing review and duration of a §504 plan. Borrowing from the IDEA, a yearly review may be advisable”). [↑](#footnote-ref-59)
60. 34 C.F.R. § 104.35(c)(3). [↑](#footnote-ref-60)
61. *In re: Student v. Bedford Public Schools*, BSEA # 09-5853 (Figueroa, 2009) (“nothing in §504 specifically requires that a parent be present during the meeting to determine placement, although in general, parents are individuals knowledgeable about their children and it would be best practice to include them. Parents' exclusion during the October meeting, however, does not result in a violation of parental rights as Parents claim”). [↑](#footnote-ref-61)
62. Although Ms. Lawrence failed to reschedule her meeting with Parent, this meeting was not a 504 Team meeting; it was a meeting to discuss Ms. Drohan’s alleged non-responsiveness to Parent’s requests for revisions of the 504 Plan. [↑](#footnote-ref-62)
63. See *Student v. Winchester Public Schools*, BSEA #1804106 (Berman, 2018) (de minimis procedural errors that do not interfere with parent’s or student’s abilities to participate in Team process or deprive student of FAPE not compensable); see also *T.F.,* 589 F. App'x at 600 (“Fox Chapel did not significantly impede parental participation in the decision-making process. Fox Chapel began working with T.S.F. on developing a 504 Plan weeks before the school year started. And, it is undisputed that Fox Chapel proposed four different 504 Plans and met with T.S.F. on multiple occasions to discuss the proposed Plans and potential modification”). [↑](#footnote-ref-63)
64. 34 CFR § 104.36. [↑](#footnote-ref-64)
65. 34 CFR §104.35. [↑](#footnote-ref-65)
66. See, e.g., *Yadkin County (NC) Sch*., 76 IDELR 132 (OCR, 2019) (determining that the district may have violated Section 504 and Title II when it decided to wait until it received an official medical diagnosis to evaluate a grade schooler with an undisclosed disability); *Pine Forest Charter School (AZ),* 116 LRP 19095 (OCR, 2016) (OCR explained that although the student did not have a medically diagnosed disability, it was ultimately the school's responsibility, not the parent's, to evaluate the student and determine whether he required services due to an emotional or behavioral disability); *Gaston County (NC) Schs.,* 74 IDELR 110 (OCR, 2018) (finding that because the district had reason to suspect that a sixth-grader with post-traumatic stress disorder (PTSD) may be a student with a disability entitled to a 504 plan, its delay in evaluating the student until after the student received a medical diagnosis likely violated Section 504). [↑](#footnote-ref-66)
67. If a district requires a medical diagnosis to determine eligibility, the school district must ensure that this evaluation is conducted at no cost to the parents. See *Letter to Veir*, 20 IDELR 864 (OCR, 1993); see also *Dysart (AZ)* *Unified Sch. Dist*., 114 LRP 51789 (OCR, 2014) (finding that because a district improperly required a student's parents to pay for her medical assessments out of their own pocket, it was obligated to reimburse them for the costs of the assessments); *Upper Rio Grande (CO) Sch. Dist*., 80 IDELR 84 (OCR, 2021) (finding that a district may have violated Section 504 and Title II when it failed to offer to conduct a medical evaluation at no cost or reimburse the parents for a private medical evaluation, which was necessary to determine the student's 504 eligibility based on a traumatic brain injury). [↑](#footnote-ref-67)
68. See *D.B.*, 675 F.3d at 41–42. [↑](#footnote-ref-68)
69. See *T.F.*, 589 F. App'x at 601 (where the school “worked diligently with [] parents to ensure [] meaningful participation in educational activities and meaningful access to educational benefits [and] met with T.F.'s parents on multiple occasions and offered four proposed 504 Plans [making] numerous revisions to its proposed 504 Plans in an attempt to address the concerns of T.F.'s parents …[, the] fact that Fox Chapel did not include every accommodation that T.F.'s parents requested does not constitute a failure to act” pursuant to Section 504). [↑](#footnote-ref-69)
70. See 603 CMR 28.05(7) (“Immediately following the development of the IEP, and within 45 school working days after receipt of the parent's written consent to an initial evaluation or reevaluation, the district shall provide the parents with two copies of the proposed IEP and proposed placement along with the required notice, except that the proposal of placement may be delayed according to the provisions of 603 CMR 28.06(2)(e) in a limited number of cases”). [↑](#footnote-ref-70)
71. *Cf*. *Walled Lake (MI) Consolidated Schools*, 15-08-1038, 52 IDELR 81 (OCR 2008) (“Although Section 504 does not impose a specific timeline for evaluating students with disabilities, districts must conduct evaluations within a reasonable time”); *Indian Prairie (IL) School District #204*, 05-08-1046, 51 IDELR 255 (OCR 2008) (while Section 504 regulations are silent with regard to timing, districts must provide timely access to relevant records pursuant to the Act’s procedural safeguards). [↑](#footnote-ref-71)
72. 34 CFR 100.7(e). [↑](#footnote-ref-72)
73. See *Weber v. Cranston Sch. Comm.*, 212 F.3d 41, 51 (1st Cir. 2000) (“Weber's claim of retaliation is literally “related” to the “identification, evaluation, or educational placement of [her] child,” and to her efforts to gain for him “the provision of a free appropriate public education”)*.* [↑](#footnote-ref-73)
74. *Hampton (VA) City Schs*., 68 IDELR 232 (OCR 2016). [↑](#footnote-ref-74)
75. *Cf*. *Marion County (FL) Pub. Sch*., 67 IDELR 128 (OCR 2015) (delaying a student's enrollment constituted an adverse action as it significantly disadvantaged the student's ability to gain the benefits of the district's program); *Seminole County (FL) Sch. Dist*., 68 IDELR 257 (OCR 2016) (finding that a series of questions posed by a teacher in math class was an adverse action because it caused the student to shut down due to feeling frustrated and embarrassed). [↑](#footnote-ref-75)
76. In light of Parent’s confusion and the District’s failure to clarify the process in a meaningful way for her, I recommend that the District review processes to avoid similarly confusing and frustrating situations for parents. [↑](#footnote-ref-76)
77. See *Kirilenko-Ison*, 974 F.3d at 664. [↑](#footnote-ref-77)
78. See *S.B. v. Bd. of Educ. of Harford Cnty*., No. CV JFM-13-1068, 2015 WL 13103543, at \*1 (D. Md. Apr. 17, 2015), *aff'd sub nom. S.B. v. Bd. of Educ. of Harford Cnty.,* 819 F.3d 69 (4th Cir. 2016) (“The school attempted to address acts of harassment directed to S.B., and the [statute] does not entitle this court to second guess the school administration on every decision that it makes concerning bullying. T.L.'s claim of retaliation fails because there is no evidence whatsoever that there was any causal connection between anything done by the Board and T.L.'s advocacy of S.B.'s rights”). [↑](#footnote-ref-78)
79. See *Ruling on* *Parent’s Motion to Compel*, BSEA # 2312210 (Kantor Nir, August 14, 2023). [↑](#footnote-ref-79)
80. See 34 CFR § 300.300(b) and 603 CMR 28.05(7)(a). [↑](#footnote-ref-80)
81. *Richland County (SC) School District Two*, 11-07-1076, 108 LRP 63017 (OCR SC, 2007). [↑](#footnote-ref-81)
82. *Kimble*, 925 F. Supp. 2d at 1184–85. [↑](#footnote-ref-82)
83. *Bradley County (TN) Schools*, 04-04-1247, 43 IDELR 44 (OCR D.C., 2004). [↑](#footnote-ref-83)
84. See *K.E. v. N. Highlands Reg'l Bd. of Educ.,* 840 F. App'x 705, 714 (3d Cir. 2020) (where parent did not check off that she accepted the 504 plan, “the additional requests for accommodations [that parent] handwrote on that version of the 504 Plan, and the fact Northern Highlands proceeded to offer a revised 504 Plan [demonstrated that] parent did not accept the 504 Plan”). [↑](#footnote-ref-84)
85. See *Coppell (TX) Indep. Sch. Dist.,* 46 IDELR 196 (OCR, Dallas (TX) 2006) (the inconsistent application of a Section 504 plan did not in itself amount to a denial of FAPE but rather the question is “whether the student's educational performance suffered any adverse effects as a result of the inconsistent provision of some instructional modifications"). [↑](#footnote-ref-85)
86. *In re: Student v. Bedford Public Schools*, BSEA # 09-5853 (Figueroa, 2009); see *Great Falls (MT) Public School District,* 10-06-1058, 48 IDELR 200 (OCR 2006). [↑](#footnote-ref-86)
87. See *Wiles v. Dep't of Educ*., 593 F. Supp. 2d 1176, 1180 (D. Haw. 2008) (“if failures to implement services in an IEP are not automatically considered violations of the IDEA, it follows that similar failures would not give rise to per se liability under Section 504”); see also *Gardner v. Uniondale Pub. Sch. Dist*., No. 08-CV-847 (JFB)(AKT), 2008 WL 4682442, at \*10 (E.D.N.Y. Oct. 21, 2008) (“a singular failure to comply with a provision of an individualized plan is not a failure to implement within the meaning of the futility exception”). [↑](#footnote-ref-87)
88. See *K.U. v. Alvin Indep. Sch. Dist*., 166 F.3d 341, 1998 WL 912198 (5th Cir. 1998) (“a number of alleged incidents where K.U.'s teachers did not fully comply with the plan did not suggest that the school district acted in bad faith or with gross misjudgment”) (internal quotations omitted). [↑](#footnote-ref-88)
89. See *Ridley Sch. Dist.,* 2011 WL 499966, at \*18 (“… even if Mrs. Cenname knowingly disregarded [the 504] plan on a few occasions, the fact remains that there is no evidence that E.R. was ever separated or isolated from her classmates in any way, or denied meaningful participation in learning activities. Nor is there any evidence … that E.R.'s education was undermined. Therefore, I find that … the evidence does not rise to the level of discrimination”); see also *Loch v. Bd. of Educ. of Edwardsville Cmty. Sch. Dist. No. 7*, 573 F. Supp. 2d 1072, 1087 (S.D. Ill. 2008), *aff'd sub nom. Loch v. Edwardsville Sch. Dist. No. 7*, 327 F. App'x 647 (7th Cir. 2009), *and aff'd sub nom. Loch v. Edwardsville Sch. Dist. No. 7*, 327 F. App'x 647 (7th Cir. 2009) (Court found that “over a two-year period, the instances in which the District failed to follow Kayla's 504 plan were infrequent and that the staff made every effort to follow her plan. Indeed, in reviewing Kayla's testimony, the Court observes that Kayla was very able to speak up for herself and to take appropriate action when any problems arose. As found by the HO, Kayla's medical records do not reflect that any of her difficulties in June, 2003, were caused by a failure to follow her 504 plan”); *A.C. v. Owen J. Roberts Sch. Dist.*, 554 F. Supp. 3d 620, 628 (E.D. Pa. 2021) (“While the Section 504 Plan is unquestionably important, Student successfully completed the school year without it, and the record does not support Parents arguments relating to social or emotional deficits. Parents have not shown that there was a connection between the lack of the Section 504 Plan and specific impairments of Student's educational progress or with Student's absences from school”). [↑](#footnote-ref-89)
90. 526 U.S. 629 (1999). [↑](#footnote-ref-90)
91. See Hayut v. State Univ. of N.Y., 352 F.3d 733, 750 (2d Cir.2003) (“[Plaintiff] must also provide evidence that one or more of the individual defendants, who admittedly are vested with authority to address the alleged discrimination and to institute corrective measures on [plaintiff's] behalf had actual knowledge of the discrimination and failed adequately to respond”) (internal quotations and citations omitted); D.T. v. Somers Cent. Sch. Dist., 348 Fed.Appx. 697, 700 (2d Cir. 2009) (quoting Davis,526 U.S. at 648) (in applying Davis, the Court of Appeals for the Second Circuit has stated that a school's failure to respond to sexual harassment must be “clearly unreasonable in light of known circumstances”).  [↑](#footnote-ref-91)
92. D.T., 348 Fed.Appx. at 700. [↑](#footnote-ref-92)
93. Title IX provides, in part, that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a). When a school district receives a formal complaint of sexual harassment, it must follow an appropriate grievance process to investigate the alleged harassment. See 34 CFR 106.45(a). A "formal complaint" is a document filed by a complainant alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment. 34 C.F.R. § 106.30(a) (definition of formal complaint). It may be a hard copy document or an electronic document submitted via email or an online portal, and it must contain the complainant's physical or digital signature or otherwise indicate that the complainant is the person filing the formal complaint. *Id.* A parent or guardian who has a legal right to act on behalf of an individual may also file a formal complaint on that individual's behalf. 34 C.F.R. § 106.6(g); 85 Fed. Reg. at 30,453. When a school has actual knowledge of sexual harassment in any of its programs or activities that take place in the United States, it must "respond promptly in a manner that is not deliberately indifferent." 34 C.F.R. § 106.44(a). The district must offer supportive measures to a student who is alleged to be the victim of sexual harassment and to the student or individual who allegedly perpetrated the sexual harassment. *Id.* A school is deliberately indifferent "only if its response to sexual harassment is clearly unreasonable in light of the known circumstances." *Id.* [↑](#footnote-ref-93)
94. Parent presented no evidence to suggest that Student required additional or different supportive measures. [↑](#footnote-ref-94)
95. Where the decision-maker dismisses an allegation as not rising to the level of Title IX, no hearing must be scheduled in the matter nor does a report need to be issued. See 34 C.F.R. § 106.45(b)(3)(i); 34 C.F.R. § 106.45(b)(5). Notably, I have no authority to undermine the conclusion reached by the District that the allegation did not rise to the level of Title IX, as the BSEA does not have jurisdiction over allegations of violations of Title IX, except to the extent that the allegations involve impact on a student’s ability to receive a FAPE. See *Poteet Indep. Sch. Dist.,* 29 IDELR 423 (SEA TX 1998) (the grant of jurisdiction to an IDEA hearing officer does not include appeal of matters properly raised and decided under the school district’s regular education student code of conduct). I note, however, that the District could have communicated better with Parent to ensure that she understood the interplay between the bullying, Title IX, and Civil Rights complaints and the process for each. [↑](#footnote-ref-95)
96. *S.S. v. D.C.,* 68 F. Supp. 3d 1, 13–14 (D.D.C. 2014). [↑](#footnote-ref-96)
97. In contrast, see *Doe v. Sumner Cnty. Bd. of Sch*., 3:19-cv-01172, 77 IDELR 123 (M.D. Tenn. 2020) (the district's failure to arrange a transfer to an elementary school in another attendance zone following the repeated sexual assault of the student by her classmate raised questions as to whether the district discriminated against the student because of her PTSD as student’s fear of her classmate and inability to attend school may have substantially limited her ability to learn). In the present matter, Student and her alleged aggressor did not share time other than at recess, and the school managed to supervise their interactions with additional staff at recess. [↑](#footnote-ref-97)
98. Student’s absences were consistent during the 2021-2022 and 2022-2023 school years. [↑](#footnote-ref-98)