COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

SPECIAL EDUCATION APPEALS

**Student v. Worcester Public Schools BSEA # 2409119A**

**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 ch. 71B), the state Administrative Procedure Act (MGL ch. 30A), and the regulations promulgated under these statutes.

**RELEVANT PROCEDURAL HISTORY**

Student’s Parent (hereinafter, Parent or Mother) requested a hearing in the above matter on March 5, 2024 April 9, 2024[[1]](#footnote-1). Parent filed an Amended Hearing Request on April 5, 2024 and the BSEA issued an Amended Notice of Hearing with a Hearing date of May 10, 2024. On April 29, 2024, the charter school requested a postponement of the May 10, 2024 Hearing, which request was allowed. The Hearing was re-scheduled to June 7 and 14, 2024. Worcester filed a Motion to Dismiss on April 30, 2024. Worcester and Parent filed multiple responses, oppositions, and objections to the Motion to Dismiss between May 14 and May 16, 2024. On May 17, 2024, the Hearing Officer converted the Motion to Dismiss to a Motion for Summary Judgment because both parties had submitted exhibits with their motions and responses. The Parties were permitted to file additional exhibits by May 24, 2024. Worcester submitted additional exhibits on May 24, 2024. On May 31, 2024 the Ruling on the Motion for Summary Judgment was issued and issues pre-dating the two-year statute of limitations were dismissed. On June 6, 2024, Parent requested a postponement of the Hearing, which request was allowed. A Pre-Hearing Conference was scheduled for June 7, 2024 and the Hearing was to begin on what would have been the second day of hearing, June 14, 2024. The Pre-Hearing Conference was held on June 7, 2024, and the Hearing was held on June 14 and 18, 2024. Parent requested a postponement of the closing of the record to submit a closing argument. The request was allowed and the due date for submission of the closing argument was July 1, 2024. Worcester and Parent submitted their closing argument on July 1, 2024 and the record closed on that date.

Those present for all or part of the hearing were:

Mother

Father

Deborah Waber Parent’s neuropsychologist

Jordon Orcutt School psychologist, Worcester Public Schools

Danielle Jodrey Speech and language therapist, Worcester Public Schools

Hillary Waugh Special education teacher, Worcester Public Schools

Julie Almstrom Special education teacher, Worcester Public Schools

Jessica Rentsch School adjustment counselor, Worcester Public Schools

Kara Scichilone Assistant principal, Worcester Public Schools

Karrie Allen Principal, Worcester Public Schools

Melissa Moran Evaluation team leader, Worcester Public Schools

Kathy Napierata Special Education Director of Compliance, Worcester Public Schools

Tammy Murray Worcester Public Schools

Olivia Stevens Legal intern, BSEA

Paige Tobin Attorney, Worcester Public Schools

Ellen Muir Court Reporter

Catherine Putney-Yaceshyn Hearing Officer

The official record of this hearing consists of: Parent’s exhibits marked P-1 through P-50; Worcester Public Schools’ exhibits marked S-1 through S-29; and approximately 7.5 hours of recorded oral testimony.

# ISSUES

1. Whether the team decision in June 2023 finding Student ineligible for special education was appropriate or not?
2. If it was not appropriate, whether Student is entitled to compensatory services.
3. Whether Worcester failed to investigate bullying and harassment claims that resulted in a denial of FAPE to Student from April 5, 2022 through June 2023.
4. Whether Student was denied a FAPE under section 504 when Student received a rescission letter from Goddard Elementary School on June 5, 2023.

**SUMMARY OF THE EVIDENCE**

1. The student (hereinafter, “Student”) is a 10-year-old rising fifth grade student residing in Worcester. During the 2021-2022 and 2022-2023 school years Student was enrolled at the Goddard School of Science and Technology (hereinafter, Goddard) within the Worcester Public Schools. (hereinafter, Worcester) Prior to the start of the 2023-2024 school year, Student was enrolled in a public charter school. (Allen, P-47)
2. Student was on a Section 504 plan during the 2021-2022 and 2022-2023 school years. It identified his disability as Attention Deficit Hyperactivity Disorder and noted his area of difficulty as “Sustaining attention and concentration during instruction independent work, and testing.” The plan contained a number of accommodations, including accommodations for quizzes, testing, and standardized testing. (P-6, P-18, S-17)
3. Melissa Moran, an evaluation team chairperson in Worcester, sent an evaluation consent form to Parent on August 31, 2022. Parent did not sign it. (P-17, S-21, Moran) She revised the form and resent it in October, and Parent did not sign it. (S-29, Moran) In December, upon receiving a referral from a doctor, Ms. Moran sent another consent form to Parent. Parent signed the consent, accepting the proposed evaluation in full, on December 14, 2022. (S-1) On January 5, 2023, Parent requested that the evaluations be paused. (S-2, Moran) Ms. Moran issued a new consent form on May 2, 2023. Parent did not respond. On May 10, Ms. Moran sent another consent form which Parent signed on May 12, 2023. Upon receipt of the signed consent Worcester expedited the testing to allow the Team to convene before the end of the school year. (Moran, P-35)
4. As part of the initial evaluation, Jessica Rentsch, MSW, LCSW, completed a home assessment report after meeting with Parent on May 17, 2023. (S-4, Rentsch) The report indicates Student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) by Howard Ziman, M.D. on June 4, 2019. Mother reported a family history of learning struggles on both sides of the family, including ADHD and dyslexia. Mother noted that Student’s relationship with school had changed over the past several years in that Student had previously loved the social and academic aspects of school, but as he got older struggled with peer interactions. Mother reported that mornings were difficult for Student and he sometimes did not want to go to school. She noted that getting up, and getting to school on time can be challenging. Mother further noted that Student liked being able to earn behavioral incentives and did not like reading because he found it difficult. Student’s family was displaced by a fire in September 2021 and spent several months moving between different living situations before moving into permanent housing in early 2022. (S-4, Rentsch)
5. During Student’s second and third grades Ms. Rentsch consulted with the classroom teacher and Mother to develop a behavior chart and the targeted goals. The purpose of the behavior log for the 2022-2023 school year was to give Student a visual reminder of what goals he was working on and to provide positive feedback for him when he was meeting those goals in the classroom. Mother was provided with copies of the daily behavior log by the classroom teacher via the Remind app every Friday. At the beginning of third grade Student’s behavior goal focused on impulsivity. As the year progressed and he made progress, in consultation with Mother, the classroom teacher adapted the goals to add regulating his voice level. Ms. Rentsch found the behavior log to be an appropriate accommodation for Student. He was very invested in it. He was very motivated and when he had a good day he wanted to show the log to trusted adults. (Rentsch, P-11)
6. Jordan Orcutt, M.Ed., Ed.S., school psychologist for Worcester, conducted a psychological evaluation of Student on May 18, 2023 and wrote a report dated June 3, 2023[[2]](#footnote-2). As part of her evaluation she reviewed Student’s report cards and noted that his highest grades were in math and English language arts. Additionally, she noted disciplinary reports which she ascribed to his ADHD. She noted that Student had missed a significant amount of school due to absences and tardies during the 2022-2023 school year as well as in prior years. She opined that when a student is missing school, they are missing instruction, they are not accessing the curriculum and he/she might have difficulty doing the work. (Orcutt, S-5)

Based upon Student’s WISC-V scores, Orcutt concluded that Student demonstrated an
overall strength in the Visual Spatial domain, with a score in the average range. His Working Memory, Verbal Comprehension and Fluid Reasoning scores also fell within the average range. An overall weakness was identified on Processing Speed Index in which Student scored within the very low limits. (S-5, Orcutt)

Student and his general education teacher each completed a Connors scale. Student’s self-report reflected a very high overall ADHD Index. His responses resulted in a very elevated hyperactivity score, which would suggest restlessness and difficulty sitting still. His impulsivity score was also very elevated, which might result in acting without thinking; interrupting, or blurting out.

Based upon her findings, Ms. Orcutt made several recommendations to address Student’s areas of need. She recommended allowing Student extended time on assessments in response to his slow processing speed, as well as the following recommendations to address his attention difficulties: providing quiet place to work away from other students; “motor breaks” every fifteen to twenty minutes during tasks requiring cognitive effort; She recommended using a chart and timer to track on and off task behavior and extending the intervals as Student’s ability to attend to tasks improves. Additionally, she recommended that Student be encouraged to proofread his work before being graded. Ms. Orcutt also recommended reinforcing Student’s appropriate behaviors by using a token system in which tokens can be redeemed for desired activities and/or possessions. (S-5, Orcutt)

1. Julie Almstrom is a special education teacher in the Worcester Public Schools[[3]](#footnote-3). She became acquainted with Student during the 2022-2023 school year while providing inclusionary services to other students in the classroom. She described Student as a “fun kid” who was “goofy at times”, but a hard worker. Ms. Almstrom noted that he requires redirection and prompting, but is able to access the curriculum, ask questions, and participate in class. She observed him reading aloud and did not have any concerns. She observed him writing in class and noted that he was using strategies which she described as “his own approach.” She testified that he was able to write highly effectively. His initial drafts usually contained errors, but he was able to make revisions when given the opportunity. Student had his own space within the classroom where he could sit at his desk or stand as needed. When there were whole class activities, he engaged. He sat on the rug with his peers during whole class instruction and had the option to return to his desk if needed. She observed that Student was able to fully participate in the classroom, with occasional redirecting and prompting and the use of accommodations from his 504 plan. Ms. Almstrom further testified that he loves to share stories and add anything that he can to what the class is learning. She noted that Student was friendly with his peers and interacted with them. The class rotated partners for work each week and she did not observe him to have any issues working with any partners. Ms. Almstrom noted that Student benefitted from his behavior plan, as it helped him focus and also helped address his impulsivity. (Almstrom)

Ms. Almstrom completed an academic assessment of Student in conjunction with Hillary Waugh[[4]](#footnote-4) as part of his initial evaluation. She reviewed Student’s file, consulted with his teacher, and administered the Kaufman Test of Educational Achievement 3d Edition (KTEA-3)[[5]](#footnote-5) She noted that Student scored in the low range in the nonsense word decoding subtest, but explained that his other subtests demonstrated that Student could read real words in isolation and when timed. Some impulsivity was noted when he was reading words. He would see the beginning and guess at what the word was going to be instead of reading the actual word. She further noted that his written expression subtest was in the low range. After consulting with Student’s teacher, Ms. Spadafore, and reviewing work samples, Ms. Almstrom concluded that Student’s KTEA written language score did not parallel his abilities within the classroom. Further, according to this witness /or to the report? Student’s results on the benchmark assessment system (BAS) using the Fountas and Pinnell program showed growth throughout the year. In the fall he was reading at the end of second grade level (level M); in the winter he was reading at the middle of third grade level (level O); and in the spring he was reading at the end of third grade level (level P). His accuracy at level P was 95% and his comprehension was 9/9. On the reading STAR assessment Student progressed from a score of 914 (grade equivalent 2.3) to a 963 (grade equivalent 3.4), which represented a 59% growth, which percentile is categorized as “high growth.” On the math STAR assessment Student scored a 909 (2.9 grade equivalent) in the fall of third grade and a 956 (3.7 grade equivalent) at the end of third grade, representing a 37% growth. (Almstrom, S-9) Based on her testing, her classroom observations, and her review of Student’s BAS and STAR testing, Ms. Almstrom concluded that, when reviewed in the context of his classroom performance and performance on other testing measures[[6]](#footnote-6), Student was making effective progress in some of the areas that were identified as areas of weakness on standardized testing. (Almstrom, S-6, S-9)

Ms. Almstrom explained that it is important for a Team to review the totality of the information about a student, particularly the teacher’s feedback, and not rely on one specific subtest. Here, Student’s teacher opined that he was making effective progress in the classroom with his accommodations, despite his disability She continued that although some of his subtest scores were low, that is just reflective of one piece of Student’s overall performance. (Almstrom)

Ms. Waugh administered the CUBED Narrative Language Measure Reading Screener[[7]](#footnote-7). Student read 72 words in one minute with 100% accuracy. Student met the benchmarks for the Reading Retell and Decoding Fluency, therefore no further screening subtests were administered. Ms. Waugh also observed him during a reader’s workshop in his classroom. He was working with his teacher and a few other students, reading appropriately, using appropriate skills and strategies, and participating nicely. He had some attentional issues and his teacher provided him with various accommodations. Ms. Waugh, who has experience working with students with a diagnosis of dyslexia and specific language disability in reading testified? wrote? that based on her screening of Student, she was not of the opinion that he would require rules-based reading instruction. (Waugh)

1. Rebecca Spadafore, Student’s third grade teacher, completed an Educational Assessment Part A and Part B regarding dated June 5, 2023. She noted that Student is on a 504 Plan that includes accommodations due to a diagnosis of Attention Deficit Hyperactivity Disorder. His plan indicates that his area of difficulty is sustaining attention and concentration during instruction, independent work, and testing. She noted that Student is making progress in the general curriculum that is similar to his peers and has been consistent over his school history. She reported that Student was able to summarize grade level text, determine the author’s message, and make inferences. She reported his strengths as making insightful comments daily; having strong comprehension of grade level text; and being able to answer text dependent questions. She noted that he had good decoding skills when reading independently. However, Student had weaknesses in fluency when reading independently and his difficulty sustaining attention impacted his fluency. She noted strengths in good fact fluency with multiplication and division within 100 and with addition and subtraction within 20. She further indicated that he is able to solve single step word problems using the four math operations but struggles with making sense of multistep word problems. (S-9)

 Educational Assessments A and B further noted that Student could write narrative stories with a strong beginning, middle and end. He was able to craft informational texts and wrote many opinion pieces, including a review of McDonalds, in which he was able to think of many reasons why McDonalds is the best restaurant. He was working on remembering to start every sentence with a capital letter and end every sentence with punctuation. Ms. Spadafore reported that Student was a strong participant in learning activities, but struggled with impulse control, such as raising a quiet hand and waiting to be called on. He also struggled to sustain attention to tasks. His behavior chart helped him focus on his goals for the day and to be successful within the classroom. (S-9)

1. Danielle Jodrey, M.S. CCC-SLP, is a speech language pathologist in Worcester. Ms. Jodrey conducted a speech language evaluation and classroom observation of Student as part of his initial evaluation on May 31, June 7, and June 8, 2023[[8]](#footnote-8). She reviewed records and noted that Student was previously listed as an English language learner and had tested out. Ms. Jodrey indicated that Student’s core language index was solidly within the average range at the 77th percentile. She concluded that Student had average language skills and was ineligible for speech services. She made some recommendations for accommodations such as chunking information, gaining his attention prior to presenting information, redirection to task, and preferential seating. (S-7, Jodrey)
2. Kara Scichilone is the Assistant Principal at the Goddard School. She is the 504 coordinator and designated investigator for bullying. She investigated Mother’s bullying complaint regarding Student’s interactions with another same-grade student. (S-23) She was able to find two incidents between the two students. The first incident was on May 11, 2022 and happened during recess. The students were playing a game called “fishy fishy cross my ocean”. Another student tagged Student and Student became frustrated. The other student grabbed Student and dug his fingernails into Student’s arms, leaving a mark. Student was sent to the nurse and his family was notified. Consequences were implemented for the other student and an alternative recess plan was put in place to ensure that the students were separated. Both families were notified of the incident. A week later there was another incident involving the same students and the same game during gym class. Student had walked up the other student and commented that he was a sore loser. The other student grabbed Student’s arms and pushed him. Student had then pushed the other student away from him. The gym teacher separated the boys and the boys agreed that they had each done something wrong.

Ms. Scicholone interviewed both Student and the other student as part of her investigation of these two incidents. She asked Student about his relationship with the other student and Student stated that it was good, but Student sometimes did not understand why the student would get mad. He said he was not afraid of the other student or afraid to come to school. Ms. Scicholone interviewed the other student and discussed the consequences of putting his hands on another student. Ms. Scicholone determined that rather than bullying, there had been two instances in which two second grade students were struggling with how to interact and play together. There were no further incidents or complaints involving Student and the other student during the 2021-2022.[[9]](#footnote-9) Student did not miss any time from the classroom or school due to the incidents. Ms. Scicholone did not receive any complaints from Student, his teacher, Parent, or anyone else regarding bullying concerns during the 2022-2023 school year. She was never informed that Student was not attending school due to concerns about bullying. (S-23, Scicholone)

1. Ms. Scicholone recalled receiving an email from Mother on November 10, 2022 requesting a “reasonable accommodation to the tardy policy” that would allow Student to have an additional four minutes before he is marked tardy. (P-21) She stated that although it was not added to Student’s 504 plan, was allowed additional time before being marked tardy. (Scicholone)
2. Karrie Allen is the principal of the Goddard[[10]](#footnote-10). Other than the complaints raised regarding bullying of Student in March and May 2022, Worcester did not receive any complaints from Parent or anybody else about Student being bullied during the 2022 or 2023 school years. She did not see any reports of bullying in the Remind log that Student’s teacher sent home each week to communicate with Parent. (S-25)

Ms. Allen was not aware that Ms. Scicholane had provided Student with four additional minutes before being marked tardy each morning. Ms. Allen stands in the lobby each morning during arrival time to greet students and ensure building security. She greeted Student most mornings when he arrived late. Student was more than four minutes late for all of his 36 tardies during the 2022-2023 school year. Ms. Allen estimated that each time he was tardy he was fifteen or more minutes late. She understood that Student was tardy because he lived some distance from Goddard and parent had to drive him. (Allen) Ms. Allen explained that Worcester has a neighborhood school policy whereby students typically go to school within their neighborhood. Goddard was not Student’s neighborhood school and Ms. Allen was not sure how it was that Student attended the school.[[11]](#footnote-11) Because students primarily attend neighborhood schools there are no buses. If Student attended his neighborhood school, he could walk to school.

Ms. Allen was aware that Student’s family was displaced by a house fire at the beginning of the 2021-2022 school year. During that school year Student was absent 5 times in the first quarter, 1 time in the second quarter, 6 times in the third quarter and 3 times in the fourth quarter for a total of 15 days absent. He was tardy 3 times during the first quarter, 1 time during the second quarter, 5 times during the third quarter and 14 times during the fourth quarter, for a total of 23 days tardy. His attendance patterns worsened during the 2022-2023 school year. (Allen) During the 2022-2023 school year, Student was absent 4 times in quarter 1, 5 times in quarter 2, 5 times in quarter 3, and 3 times in quarter 4 for a total of 17 absences. He was tardy 7 times in quarter 1, 5 times in quarter 2, 12 times in quarter 3 and 12 times in quarter 4 for a total of 36 days tardy. (P-37, S-26)

Ms. Allen described Worcester’s rescission policy, whereby a student’s permission to attend a school other than his/her neighborhood school may be rescinded, that was in effect during the 2022-2023 school year. The policy states that a student may be “rescinded” “If a student is chronically absent and/or chronically tardy. When rescinding due to chronic absences an/or chronic tardiness, this criterion should be as a result of transportation issues where the student is having difficulty accessing school and might be able to access their homeschool much easier.” (S-27, Allen) Ms. Allen looks for patterns of improvement when deciding whether to rescind a student. She noted that Student’s attendance worsened during the 2022-2023 school year. MS. Allen indicated that the decision to rescind is not taken lightly. During the 2021-2022 and 2022-2023 school years she sought to have between two and four students per year, including Student, rescinded. Mother was sent a letter dated June 5, 2023 from Worcester stating that the Administration of Goddard rescinds permission for him to attend the school due to “absentees”[sic] and “tardy days”. The letter stated that Student would be enrolled in his neighborhood school for the 2023-2024 school year. (S-28) Student was able to finish the then-current school year at Goddard. He was thereafter withdrawn from Worcester and enrolled in a charter school. (Allen)

1. The Team convened on June 14, 2023. Each evaluator reviewed her report. The Team listened to input from Mother and the classroom teacher and then went through the eligibility flow chart. (S-12, Moran, Orcutt, Waugh, Rentsch, Jodrey) The Team engaged in a lengthy discussion of the information presented. There was some discrepancy between test scores and what Student was doing in the classroom. Mother attended the meeting with the support of a family friend and participated fully. (S-15) The Team concluded that Student was making good gains in the general education classroom with the accommodations in his 504 plan. (Orcutt, Waugh, Rentsch, Jodrey, Moran) Mother disagreed with the Team’s finding. (Jodrey, Waugh) Ms. Moran issued an N1 regarding the Team’s determination of no eligibility on June 14, 2023. (S-15)
2. Deborah Waber, Ph.D. is the Director of the Learning Disabilities program at Boston Children’s Hospital. She was the lead clinician in an evaluation of Student conducted by Children’s Hospital on December 7, 2023, over three months after Student left Worcester. As lead clinician, Dr. Waber led the meeting during which the evaluation results were reviewed, integrated the findings of the evaluators, and wrote a report which she described as an executive summary of the group’s findings. She later met with Mother to describe the clinicians’ findings. Dr. Waber did not evaluate Student herself. She did not observe Student at Worcester and did not speak to any of his Worcester teachers. She reviewed some of Student’s records, but was not able to specify which she reviewed. Dr. Waber expressed the opinion that Student should have been found eligible by Worcester, based on Worcester’s own testing, because most of his reading scores were below average. Her opinion about Student’s eligibility was not based on her own personal knowledge, but on reviewing what other people in the department found when they evaluated Student in December 2023. (Waber, P-47)

**FINDINGS AND CONCLUSION:**

 Student is an individual with a disability falling within the purview of Section 504 of the Rehabilitation Act of 1973. His entitlement to accommodations under section 504 is not in dispute. The Parties, however, disagree as to whether Student is eligible for services pursuant to the IDEA.

 Legal Standard: Eligibility for Special Education.

The right to a FAPE for all students with a disability is guaranteed by both federal and state law through the IDEA, M.G.L. c. 71B, and their corresponding regulations[[12]](#footnote-12). If a student is found eligible to receive special education, the Team must then develop an IEP setting forth the special education and related services that meet the special education needs of the student[[13]](#footnote-13). An IEP is a “a snapshot, not a retrospective. In striving for ‘appropriateness,’ an IEP must take into account what was and was not objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated”[[14]](#footnote-14). The IDEA defines a “child with a disability” as a student having specifically identified disabilities “who, *by reason thereof, needs* special education and related services”. 20 USC 1401(3)(A) and (B)[[15]](#footnote-15) (emphasis added). “Special education” is defined as “specially designed instruction[[16]](#footnote-16), at no cost to the parents, to meet the unique needs of a child with a disability, … [inclusive of] speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards”[[17]](#footnote-17).

Similarly, Massachusetts defines a “school age child with a disability” as a child “… who, because of [specifically identified disabilities] … is unable to progress effectively in regular education and requires special education services, including … only a related service … [if they] are required to ensure access of the child with a disability to the general education curriculum[[18]](#footnote-18). The regulations define “eligible student” as “… a person aged three through 21 … who has been determined by a Team *to have a disability(ies), and as a consequence* is unable to progress effectively in the general education program without specially designed instruction or is unable to access the general curriculum without a related service”. 603 CMR 28.02(9) (emphasis added). To “[P]rogress effectively in the general education program*”*, means to make documented growth in the acquisition of knowledge and skills, including social/emotional development, within the general education program, with or without accommodations, according to chronological age and developmental expectations, the individual educational potential of the student, and the learning standards set forth in the Massachusetts Curriculum Frameworks and the curriculum of the district.[[19]](#footnote-19)

Thus, both federal and state law utilize a 2-pronged approach in determining a student’s eligibility for special education[[20]](#footnote-20). The first prong involves identifying whether the student has one or more of the disabilities enumerated in the law[[21]](#footnote-21). The second prong involves determining if, by reason of that disability, the child is unable to progress effectively in the general education program (i.e., make documented growth in the acquisition of knowledge and skills, including social/emotional development, with or without accommodations) without specially designed instruction or is unable to access the general curriculum without a related service[[22]](#footnote-22)

“[I]n determining eligibility, the school district must thoroughly evaluate and provide a narrative description of the student’s educational and developmental potential”[[23]](#footnote-23). In Massachusetts, the evaluation is to be conducted within 30 school days of receiving parental consent, by “appropriately credentialed and trained specialists” and adapted to the age of the student.[[24]](#footnote-24) Initial evaluation assessments must include, “an assessment in all areas related to the suspected disability” and an “educational assessment by a representative of the school district”[[25]](#footnote-25). Just as the appropriateness of an IEP is not to be viewed in hindsight, so too must a review of a Team’s eligibility determination be made by looking at the information available to the Team at the time of its determination[[26]](#footnote-26).

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.”[[27]](#footnote-27) Such programs include public elementary and secondary education programs.[[28]](#footnote-28) 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.”[[29]](#footnote-29)  However, Section 504 does not obligate a school district to provide an education that “maximize[s] the potential of a disabled student.”[[30]](#footnote-30) The procedures schools are required to follow in designing a plan to provide a FAPE under Section 504 are far less specific than the IDEA’s precisely outlined IEP process, and therefore are more flexible.[[31]](#footnote-31)  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.”[[32]](#footnote-32)

The burden of persuasion in an administrative hearing is placed upon the party seeking relief. *Schaffer v. Weast, 546 U.S. 49,* 126 S. Ct. 528, 534, 537 (2005) In this case, Parent is the party seeking relief, and as such has the burden of persuading the Hearing Officer of her position by a preponderance of the evidence.

It is in the context of the foregoing legal framework that I now turn to the issues before me in the instant matter. I address first whether the Team decision in June 2023 finding Student ineligible for special education was appropriate or not.

Procedurally, Worcester responded appropriately upon receipt of Mother’s consent to evaluate Student. It expedited the evaluations to ensure that Student’s evaluations were completed prior to the end of the school year. The evaluations included all necessary participants, were conducted by appropriately credentialed staff and were comprehensive and thorough. (S-5, S-6, S-7, S-11) The Team reviewed all available information . Evaluators presented their reports and Team members were able to ask questions. Parent had the opportunity to ask questions, and to express her opinion (that she believed Student required support for writing and executive functioning skills) as well as her concerns about Student’s future academic performance. (S-15) Mother did not provide the Team with any documents or records to support her position, such as reports from clinicians or outside evaluators. The Team ultimately concluded that Student was not eligible for special education services. As discussed below, this finding is supported by the record.

Ms. Almstrom’s testimony demonstrated that she was familiar with Student’s classroom performance. She had observed him in the classroom completing work and interacting with peers. She had reviewed samples of his work and his writing process. Further, she was familiar with the STAR testing that showed Student had made high growth in the area of reading and growth in math. (S-9) She agreed with Worcester’s conclusion that Student was not eligible for special education services as she observed the effectiveness of his 504 accommodations in the classroom. I found her testimony to be credible and rely on it. Similarly, Ms. Waugh credibly testified that she has experience working with students diagnosed with dyslexia and specific language disability in reading, and she was not concerned by the results Student obtained on the CUBED assessment. Additionally, she observed him during a reader’s workshop in his classroom and saw him reading appropriately, using appropriate skills and strategies and participating. (Waugh) Ms. Waugh was also a credible witness and I rely on her testimony.

Mother did not provide the Team with any documents or records to support her position, such as reports from clinicians or outside evaluators. Similarly, she did not provide any evidence at the Hearing to counter Worcester’s ineligibility determination. Although she participated in the Hearing, she did not testify. The only witness she presented at the hearing was Dr. Waber, a neuropsychologist who coordinated the group of clinicians who evaluated Student on December 7, 2023, several months after Student withdrew from Worcester. Dr. Waber was not able to provide relevant testimony in this matter since she had not been part of the Team that made the e eligibility determination. Further, she never evaluated Student and had not observed him in his Worcester classroom or spoken with any Worcester teachers who worked with Student. Thus, she was not able to speak to his academic functioning outside of the testing environment.

Based on the uncontroverted evidence presented by Worcester, I find that Worcester’s determination that Student was not eligible for special education services in June 2023 was appropriate and supported by the information that the Team then had. Since I have found that Worcester’s determination was appropriate, there is no basis for an award of compensatory education.

The next issue before me is whether Worcester failed to investigate the bullying and harassment claims raised by Mother between April 5, 2022 and June 2023 and whether Student was denied FAPE.

Ms. Scicholone, Assistant Principal, provided uncontroverted testimony that she conducted an investigation after Mother made a complaint regarding Student’s interactions with a same-grade peer on two occasions in May 2022. (See above) The record contains a report of her conclusion that the incidents did not constitute bullying. (S-23) Neither Ms. Scicholone nor Principal Allen received any other reports of bullying during the rest of the 2021-2022 school year or the 2022-2023 school year. Based on the uncontroverted testimony that Worcester did conduct an investigation of Mother’s complaint regarding bullying, and the lack of any evidence to support a finding that Student was a victim of bullying or that he was denied FAPE, I find that Worcester did not fail to investigate the bullying and harassment claims raised by Mother and that Student was not denied FAPE.

The final issue before me is whether Student was denied a FAPE under section 504 when Student received a rescission letter from Goddard Elementary School on June 5, 2023. Dr. Allen provided uncontroverted testimony regarding her issuance of a rescission letter to Mother. She explained that her reason for issuing the rescission was that Student had accumulated a large number of absences and tardies over the course of the last two school years. In response to Mother’s questions on cross-examination, Dr. Allen indicated that the days on which Student was tardy he was tardy by more than fifteen minutes. Thus, even considering the informal accommodation (of an extra four minutes before he was marked tardy) that Ms. Scicholone had provided him, he had accumulated excessive tardies and absences over the course of two school years. Further, Student’s attendance had become worse during the year after Student’s family had been displaced by a fire. Mother did not provide any evidence as to how the issuance of the rescission letter denied Student a FAPE, especially in light of the fact that he was able to finish the year at Goddard and that Mother withdrew him from Worcester and placed him in a charter school prior to the 2023-2024 school year. 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.” Parent has not presented any evidence that as a result of Worcester issuing the rescission letter, Student’s individual educational needs were not met as adequately as the needs of nonhandicapped persons.

Based on the foregoing, I find that Parent has not met her burden with respect to any of the issues before me. Therefore:

**ORDER**

1. I find that the June 2023 Team decision that Student was not eligible for special education was appropriate.
2. Student is not entitled to compensatory services.
3. Worcester did not fail to investigate claims of bullying and harassment and Student was not denied FAPE due to alleged bullying and harassment.
4. Student was not denied FAPE under Section 504 when he received a rescission letter from Goddard Elementary School on June 5, 2023.



Dated: August 9, 2024

COMMONWEALTH OF MASSACHUSETTS

BUREAU OF SPECIAL EDUCATION APPEALS

EFFECT OF FINAL BSEA ACTIONS AND RIGHTS OF APPEAL

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

20 U.S.C. s. 1415(i)(1)(B) requires that a decision of the Bureau of Special Education Appeals be final and subject to no further agency review. Similarly, a Ruling Dismissing a Matter with Prejudice and a Ruling Allowing a Motion for Summary Judgment are final agency actions. If a ruling orders Dismissal with Prejudice of some, but not all claims in the hearing request, or if a ruling orders Summary Judgment with respect to some but not all claims, the ruling of Dismissal with Prejudice or Summary Judgment is final with respect to those claims only.

Accordingly~~,~~ the Bureau cannot permit motions to reconsider or to re-open either a Bureau decision or the Rulings set forth above once they have issued. They are final subject only to judicial (court) review.

Except as set forth below, the final decision of the Bureau must be implemented immediately. Pursuant to M.G.L. c. 30A, s. 14(3), appeal of the decision does not operate as a stay. This means that the decision must be implemented immediately even if the other party files an appeal in court, and implementation cannot be delayed while the appeal is being decided. Rather, a party seeking to stay—that is, delay implementation of-- the decision of the Bureau must request and obtain such stay from the court having jurisdiction over the party’s appeal.

Under the provisions of 20 U.S.C. s. 1415(j), “unless the State or local education agency and the parents otherwise agree, the child shall remain in the then-current educational placement,” while a judicial appeal of the Bureau decision is pending, unless the child is seeking initial admission to a public school, in which case “with the consent of the parents, the child shall be placed in the public school program.”

Therefore, where the Bureau has ordered the public school to place the child in a new placement, and the parents or guardian agree with that order, the public school shall immediately implement the placement ordered by the Bureau. *School Committee of Burlington v. Massachusetts Department of Education*, 471 U.S. 359 (1985). Otherwise, a party seeking to change the child’s placement while judicial proceedings are pending must ask the court having jurisdiction over the appeal to grant a preliminary injunction ordering such a change in placement. *Honig v. Doe*, 484 U.S. 305 (1988); *Doe v. Brookline*, 722 F.2d 910 (1st Cir. 1983).

# Compliance

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

# Rights of Appeal

Any party aggrieved by a final agency action by the Bureau of Special Education Appeals may file a complaint 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. The Hearing Request was against both Worcester and a charter school. The cases against Worcester and the charter school were later bifurcated and proceeded separately. [↑](#footnote-ref-1)
2. Ms. Orcutt conducted a record review, observations, and administered the Wechsler Intelligence Scale for Children, Fifth Edition (WISC V); Conners, Fourth Edition: Self Report (Conners, IVC); and Conners, Fourth Edition: Teacher Rating Scale (Conners, IV). She noted that Student required several movement breaks during testing and she allowed him to test while seated, sanding, moving around, and while using a fidget. (Orcutt) [↑](#footnote-ref-2)
3. Ms. Almstrom has a master’s degree in special education: moderate disabilities. She is licensed in elementary education, middle school mathematics, special education: moderate disabilities K-8 and 5-12. (S-16) [↑](#footnote-ref-3)
4. Ms. Waugh has a master’s degree in education and has professional licensure in moderate disabilities Pre-K-8, initial licensure in moderate disabilities 5-12, and a sheltered English Immersion Endorsement. She has a Wilson level 1 certification as well. (Waugh, S-16) [↑](#footnote-ref-4)
5. Student scored in the below average range in the Reading Composite; in the average range on the reading understanding composite; in the below average range on the decoding composite; in the below average range on the reading fluency composite; and in the average range on the sound symbol composite. He scored in the low range on the written language composite, in the below average range on the math composite; in the average range on the oral language composite and in the above average range on the oral fluency composite. [↑](#footnote-ref-5)
6. His BAS scores and STAR scores showed growth. [↑](#footnote-ref-6)
7. When Mother signed the consent for evaluation she checked the box marked “other assessments” and wrote “DIBELS 8th Edition to screen for dyslexia.” (P-35, Waugh) Ms. Waugh was advised by her supervisor to use the CUBED. The DIBELS was not used in the district. (Waugh) [↑](#footnote-ref-7)
8. Ms. Jodrey administered the Clinical Evaluation of Language Fundamentals-fifth edition (CELF-5), Dog Comes Home School-Aged Language Assessment Measures (SLAM) story; SLP Toolkit #d-5th Grade Present Level Assessment, Form A. She also observed Student and consulted with his teacher. (S-7) [↑](#footnote-ref-8)
9. There had been a prior investigation involving the same two students in March 2022. This investigation also resulted in a conclusion that there had been no bullying. It occurred prior to the statute of limitations period and is thus not relevant to the issues before me in this Hearing. (P-39) [↑](#footnote-ref-9)
10. Dr. Allen holds a bachelor’s degree in history, a master’s degree in education, a master’s degree in education administration and a doctorate in education administration. (Allen, S-16) [↑](#footnote-ref-10)
11. Student in fact lives in close proximity to his neighborhood school. [↑](#footnote-ref-11)
12. 20 USC 1400, *et seq*.; M.G.L. c. 71B; 34 CFR 300.000, *et seq*.; 603 CMR 28.00 *et seq*. [↑](#footnote-ref-12)
13. 603 CMR 28.02(11); 603 CMR 28.05(3). [↑](#footnote-ref-13)
14. *Roland M. v. Concord School Committee*, 910 F.2d 983, 992 (1st Cir. 1990). [↑](#footnote-ref-14)
15. The identified disabilities in the IDEA include “other health impairments” and for students ages 3 through 9, “developmental delays defined by the state”. [↑](#footnote-ref-15)
16. “Specially designed instruction”, is defined as “adapting, as appropriate to the needs of an *eligible* child under this part, the content, methodology, or delivery of instruction— (i) To address the unique needs of the child *that result from the child’s disability; and* (ii) To ensure access of the child to the general curriculum ….” 34 CFR 300.39(a)(3) (emphasis added). [↑](#footnote-ref-16)
17. 20 USC 1401(29); 34 CFR 300.39(a). Massachusetts defines “special education” as “specially designed instruction to meet the unique needs of the eligible student or related services necessary to access the general curriculum and shall include the programs and services set forth in state and federal special education law.” 603 CMR 28.02(20). [↑](#footnote-ref-17)
18. M.G.L. c. 71B §1. Relevant to this proceeding, the disabilities recognized in the Massachusetts laws and regulations include developmental delay for children ages 3 through 9 (provided supra), and “other health impairment”, including health impairments “due to … [ADD] or [ADHD] …”. 603 CMR 28.02(7)(b) and (i). [↑](#footnote-ref-18)
19. 603 CMR 28.02(17). [↑](#footnote-ref-19)
20. *Mr. I. ex rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1, 13-14 (1st Cir. 2007); *In Re: Lynnfield PS*, BSEA # 12-1425, 18 MSER 247 (Berman, 2012); *In Re: Agawam PS*, BSEA # 08-2564/08-4033, 14 MSER 53 (Byrne, 2008); *In Re: New Bedford PS*, BSEA # 01-3505, 7 MSER 261 (Crane, 2001); *In Re: Berlin-Boylston RSD*, BSEA # 00-1711, 6 MSER 247 (Byrne, 2000); *In Re: Canton PS*, BSEA # 00-2912, 6 MSER 239 (Erlichman, 2000);see *In Re: Stoughton PS*, BSEA # 99-0807, 5 MSER 1 (Oliver, 1999). [↑](#footnote-ref-20)
21. *Id.* [↑](#footnote-ref-21)
22. *Id.; see*M.G.L. c. 71B §1; 603 CMR 28.02(17). [↑](#footnote-ref-22)
23. 603 CMR 28.02(9); see34 CFR 300.8(a). [↑](#footnote-ref-23)
24. 603 CMR 28.05(2). [↑](#footnote-ref-24)
25. 603 CMR 28.05(2)(a). [↑](#footnote-ref-25)
26. See*Roland M.*910 F.2d at 992; *In Re: Littleton PS*, BSEA #15-04613, 22 MSER 102 (Putney-Yaceshyn, 2016); *In Re: Newton PS*, BSEA #14-08637, 23 MSER 104, (Figueroa, 2015) (“In determining the appropriateness of a Team’s determination of eligibility …, one must objectively look at the information available to the Team at the time the determination is made … (citations omitted)). [↑](#footnote-ref-26)
27. 34 CFR §104.4(b)(1). [↑](#footnote-ref-27)
28. See 29 USC § 794(a) [↑](#footnote-ref-28)
29. 34 CFR § 104.33(b)(1). [↑](#footnote-ref-29)
30. *Molly L. v. Lower Merion Sch. Dist*., 194 F. Supp. 2d 422, 436 (E.D. Pa. 2002). [↑](#footnote-ref-30)
31. 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-31)
32. 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-32)