COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS

BUREAU OF SPECIAL EDUCATION APPEALS

In Re: Newton Public Schools BSEA #1607199, 1607761, 1608074; 1609518

DECISION

This decision is issued pursuant to the Individuals with Disabilities Education Act or IDEA (20 USC Sec. 1400 et seq.); Section 504 of the Rehabilitation Act of 1973 (29 USC Sec. 794); the Massachusetts special education statute or "Chapter 766" (MGL c. 71B), the Massachusetts Administrative Procedures Act (MGL c. 30A) and the regulations promulgated under these statutes.

By way of background, this is the second of two decisions issued in the past year concerning disputes between the same parties over events taking place during the 2014-2015 school year. On May 11, 2016 the first decision, BSEA No. 1602067 (hereafter "*Decision #1*"), was issued. Among other things, *Decision #1* addressed the scope of Parents' entitlement to view Newton's records pertaining to Student.

Upon reviewing documents that they obtained from the Newton Public Schools (hereafter "NPS", "Newton" or "School"), Parents allege that they uncovered information within those documents supporting additional claims against Newton. During March, April and May 2016, while litigation was pending in the first case, Parents filed three of the four requests that are the subject of the instant *Decision* (hereafter, *Decision #2*). Parents filed the fourth request a few days after *Decision #1* was issued. The BSEA originally assigned each of the four new hearing requests to different Hearing Officers. By orders issued on May 16 and 18, 2016 the four matters were consolidated and assigned to the undersigned Hearing Officer.

The current consolidated case is based on Parents' allegations that certain actions taken by Newton during the 2014-2015 school year violated Student's rights under federal and state special education statutes as well as §504 of the Rehabilitation Act of 1973. Parents explicitly seek no relief other than a declaration that Newton's actions violated applicable law and deprived Student and/or Parents of their rights thereunder. Newton filed timely responses in which it denied that any of its actions had violated Student's or Parents' rights under applicable law.

The parties requested and were granted several postponements of the original hearing date for good cause including discovery, clarification of issues, and telephonic pre-hearing conferences.

On December 9, 13, and 14, 2016, an evidentiary hearing was held at the offices of the BSEA in Boston, MA. One Parent appeared *pro se* on behalf of Student as well as the second Parent and himself. Newton was represented by counsel. Both parties had an

opportunity to examine and cross-examine witnesses as well as submit documentary evidence for consideration by the Hearing Officer. The parties requested and were granted a postponement until January 13, 2017 for submission of written closing arguments and the record closed on that day.

The record in this case consists of the Parents' exhibits P-1 through P- 251, excluding P-187, 188, 191, 244, and 248; School's exhibits S-1 through S-10, several hours of electronically-recorded testimony and argument and the transcript created by the court reporters.

Those present for all or part of the proceeding were:

Parent[1]	
Judith Levin-Charns	Former Assistant Supt. for Student Services, Newton Public Schools
Karen Shmukler	Current Assistant Supt. for Student Services, Newton Public Schools
Scott Heslin	Former Assistant Dept. Head for Special Education, Newton North High School
Victoria Vendola	Former Assistant Principal for Student Services, Day Middle School
Anne Cline-Scott	Director, Bridge Program, Day Middle School
Jill Murray, Esq.	Attorney for Newton Public Schools
Sara Berman	BSEA Hearing Officer
Alexander Loos	Court Reporter
Anne Bohan	Court Reporter
Carol Kusnitz	Court Reporter

ISSUES PRESENTED

1. Whether the Newton Public Schools (Newton, NPS or School) prevented or excluded Student from participating in "Step-Up Day" on June 12, 2015;

2. If Newton excluded Student from Step-Up Day, whether this action constituted disability-related discrimination in violation of §504 of the Rehabilitation Act.

3. Whether Newton violated Parents' and/or Student's rights under federal and state special education law during the 2014-2015 school year by;

[1] Parent presented his entire case on the first day of hearing, Decenber 9, 2016. He chose not to appear in person or by telephone on the subsequent two days of hearing and informed the Hearing Officer of his intentions at the close of the first day. The Hearing Officer advised Parent that by choosing not to appear, he was waiving important rights such as the right to hear and cross-examine the School's witnesses. Parent stated on the record and in writing that he understood these rights and was waiving them knowingly and voluntarily.

a. Placing Student in a therapeutic program (Bridge) at the Day Middle School without statutorily-required prior written notice to Parents, Parental consent, or Parent participation in the group that made that decision;
b. Failing to convene a Team meeting or develop an IEP at the time Student transitioned from the Middle School Stabilization Program (MSP) to the Day Middle School in approximately December 2014;
c. Changing Student's placement on or about January 30, 2015 without including the Parents in the group that determined placement;
d. Failing to implement Student's IEP(s) from approximately December 2, 2014 to June 2015;
e. Continuing to keep Student in a placement which Parents had refused from April 13, 2015 to June 2015.

4. Whether Newton violated Parents' rights by consulting with a psychologist regarding Student without prior notice to or consent of Parents. (Disposed of via Ruling on Motion for Partial Summary Judgment)

5. [Withdrawn by Parents on June 8, 2016]

6. What IEP constituted the "stay put" IEP for 2015-2016?

POSITION OF PARENTS

Parents assert that NPS repeatedly violated Parents' and Student's rights during the 2014-2015 school year by making unilateral decisions about Student's services and placement, without prior notice to Parents and without involving Parents in the decision-making process. Parents further argue that NPS failed to implement an accepted IEP and then failed to discontinue services after Parents refused them. Additionally, Newton unlawfully discriminated against Student on the basis of his disability by excluding him from "Step-Up Day" at Newton North High School in June 2015. Parents seek no relief other than a declaration that Newton's actions violated Student's rights under applicable law.

POSITION OF SCHOOL

NPS concedes admits that it inadvertently committed procedural violations during the periods at issue by: (1) failing to specify the "Bridge" program at Oak Hill Middle School on the placement page of Student's IEP for 2014-2015; and by (2) failing to identify the MSP on the placement page of the 2014-2015 IEP as Student's short-term placement at the start of the 2014-2015 school year; and (3) failing to convene a Team meeting to draft an IEP for Student's return to Day from the MSP. NPS asserts, however, that these procedural missteps neither deprived Student of any educational benefits nor denied Parents the opportunity for meaningful participation in Student's educational programming.

Newton contends that Parents consented to the MSP and Bridge placements, and accepted the 2014-2015 IEP in its entirety. NPS fully implemented this accepted 2014-2015 IEP. Finally, according to NPS, Student's exclusion from Step-Up day at Newton

North High School was not based on his disability. Rather, Student was given the same opportunity as non-disabled students to participate in Step-Up Day, at Newton South High School, which was his districted high school based on his address as well as the school where he would be able to receive appropriate special education services.

SUMMARY OF THE EVIDENCE

Decision #1 is incorporated herein in its entirety. If necessary to give context to matters addressed in the above-entitled, current *Decision*, specific findings of fact and rulings of law contained in *Decision #1* may be reiterated here.

1. Student is a tenth grader who resides with Parents in Newton. NPS is the Local Education Agency (LEA) responsible for providing special education services to Student pursuant to federal and state special education statutes and for providing reasonable accommodations to him pursuant to §504 of the Rehabilitation Act of 1973. On or about June 30, 2015, Parents withdrew consent for special education services for Student. (S-10) From that time forward, Student has attended Newton South High School as a general education student. The parties do not dispute, however, that at all relevant times prior to that date, Student was a child with disabilities who was eligible for, and received, special education services from NPS. Student's special education eligibility was based on health and emotional disabilities, including AHDH, mood disorder, and associated weaknesses with executive functioning and organization. (S-1)

2. The NPS is divided into "North" and "South" zones. With certain exceptions not relevant here, Newton students are assigned to schools located within their respective zones of residence. At all relevant times, Parents and Student have lived in the "South" zone. Based on residence, Student's "home" middle and high schools are, respectively, Oak Hill Middle School and Newton South High School. (*Decision #1*, Para. 2)

3. Student attended Oak Hill for sixth (2012-2013) and seventh grade (2013-2014). Student's accepted IEP for seventh grade called for a full inclusion placement together with counseling, accommodations, and approximately one class period per day of academic strategies/support. (P-1)

4. During the spring of 2014, Student was exhibiting disruptive and concerning behavior at school. In response, the Team met on May 29, 2014 and proposed that Student attend the Middle School Stabilization Program (MSP) to stabilize Student's behaviors and conduct additional evaluations, issuing an IEP to this effect. Parent attended the Team meeting and accepted the IEP and MSP placement. (S-3, S-4)

5. The MSP is an interim 45-day stabilization program that provides a small, therapeutic milieu for students who need an alternate educational setting for a variety of reasons, including pre- and post- hospitalization programming, extended evaluations, and respite from the traditional school setting pending completion of a functional behavioral assessment (FBA). Students placed at MSP access the general curriculum

and receive IEP services. (S-5, Cline-Scott, Tr. III, pp. 15-16; Vendola, Tr. II, pp. 21-24; Parent, Tr. I, p. 250).

6. On June 19, 2014, the Team convened to discuss the evaluation conducted at the MSP and develop an IEP for September 2014 to April 2015, corresponding to Student's eighth grade year. After discussion, the Team determined that for eighth grade Student's special educational needs could be better met at the Day Middle School, which is located in the North zone. A major reason for this recommendation was that Student had problematic relationships with many peers and some staff at Oak Hill, and Team members felt that a "fresh start" with a new cohort would be appropriate. (*Decision #1*, Para. 3)

7. On June 19, 2014 Newton issued an IEP proposing a placement in a full inclusion setting at the Day Middle School for the eighth grade (2014-2015 school year). Parents accepted this IEP and placement on June 24, 2014. (Ex P-75-91; S-4)

8. The service delivery grid in the IEP referred to above provided for the following: Grid A: (Consultation) Consultation to IEP Team from the school psychologist and special education teacher 2x15 minutes/cycle each; Grid B (Special education and related services in general education classroom): aide support 42x50 minutes/cycle; Grid C (Special education and related services in other locations): Counseling, 1x50 minutes/cycle; academic support, 4x50 minutes/cycle. (P-82) The program type was listed as "full inclusion." (P-87)

9. Student's IEPs for sixth and seventh grade at Oak Hill Middle School had provided for approximately four periods per six day cycle in an "academic support" or "academic strategies." Parents understood that the purpose of this class was to help special education students who were fully included in general education classes with academic help in areas of need. Student's academic support/strategies classes at Oak Hill did not provide a "different program which had a lot of other things to it in addition to academic support, behavioral modification plan, kids who would be in that plan." (Parent, Tr-I, p. 152).

10. Parents believed that the accepted IEP for 2014-2015 would replicate at Day what Student had received at Oak Hill: a full-inclusion program with 5x50 minutes per cycle of academic support in a separate classroom. (Parent, TR-I, p. 152, *Decision #1*, Para. 7)

11. During August 2014, Oak Hill and Day staff were communicating with each other (but not with Parents) via email regarding whether Student would be placed in "Neighborhood Inclusion" (also known as "Integrated") at Day (full-inclusion plus academic support/strategies, which was his placement at Oak Hill) or "Bridge," a therapeutic program described more fully below. (P-105-108; Parent, Tr-I, pp. 155-157)

12. Bridge is a city-wide program located at Day Middle School which provides therapeutic and behavioral support, as well as academic support, to students with

emotional and behavioral disabilities who are fully or partially included in general education classrooms. (P-118; Cline-Scott, Tr. III, pp. 8-12; Vendola, Tr. II., pp. 18-19). Services include weekly group counseling, a behavioral management system, close monitoring, crisis intervention, and coordination with outside providers. (P-118) Ms. Anne Cline-Scott was the director of the Bridge program and was Student's special education teacher and case manager. (Cline-Scott, Tr. III, p. 8)

13. In an email dated August 28, 2014 Victoria Vendola, who was then the Assistant Principal for Student Services at Day Middle School, informed another NPS staff member that "[Student] has been placed at Bridge, Grade 8." (P-110). Parents were not copied on any of the emails. (P-105-113)

14. The Team did not formally propose the Bridge program at the June 2014 Team meeting when the Team discussed Student's transfer to Day, although an Oak Hill administrator, Miriam Kornitzer, mentioned that an advantage of a transfer to Day was that Bridge would be available if needed. (Parent, Tr. I., p. 153)

15. The IEP that NPS issued after the June 2014 Team meeting, and that Parents accepted in full, did not designate the Bridge program as Student's placement on the placement page. (P-105 – 113)

16. Parents learned that Student had been placed at Bridge through an email from Anne Cline-Scott, the director of that program on September 2, 2014. (Parent, Tr. I, p. 156) The email stated: "Hello! Welcome to another school year! We had a great day here and will begin our daily emails next week…Thanks so much, Anne Cline-Scott, Bridge Program." (P-114)[2]

17. Parent responded to Ms. Cline-Scott in an email dated September 3, 2014 stating, among other things, "I am not aware what the "Bridge Program" is. I was unaware that either of my kids was enrolled in such a program. Could you please let me know about that as well?" (P-114)

18. On the same day, Parent also sent an email to Charles "Chase" Clarke, who was Student's school-based counselor from MSP, in which Parent stated, "My understanding from Miriam was that [Student] was going to be in "Integrated," not "Bridge." I recall Miriam saying that if Integrated didn't work, then…there was this other highly structured program (which I now understand to be "Bridge") …But she wasn't proposing to put him in Bridge to start the year…In the transition, he appears to have been put into Bridge right away." (P-115)

19. Later, also on September 3, 2014 Ms. Cline-Scott and Parent had a telephone conversation in response to Parent's email. In a subsequent email to Victoria Vendola and Charles Clarke, Ms. Cline-Scott stated: "I have just spoken with [Student's] dad and he was under the impressions [sic] from his conversations with Miriam over the summer it seems, that [Student] would be in the Integrated Program.

[2] Additionally, Student told Parent that when he went to his assigned homeroom on the first day, he was redirected to what Parent later learned was the Bridge classroom.

He understood that the Bridge Program could be a potential next step if he was unsuccessful in Integrated. I shared a bit about the program and let him know that [Mr. Clarke] and I had discussed interventions etc. that had worked for [Student] and agreed he would benefit from Bridge. While he didn't say that he wanted him placed out of Bridge, he did say that he would like to speak to you both…" (P-116)

20. On or about the second day of school in September 2014, Parent had a telephone conversation with Victoria Vendola and orally agreed to have Student attend the Bridge program. Parent explained that he understood that he could reject the placement but acquiesced because, at that time, Parents felt that they had a good relationship with NPS and trusted NPS judgment. (Parent, Tr. 1, p. 153)

21. In or about the second week of September 2014, after a crisis at home, Student was hospitalized briefly. On September 11, 2014, the Team convened and proposed an IEP for an interim placement at MSP. This IEP stated that it covered the period from September 12, 2014 to September 12, 2015. These dates stated on the IEP were erroneous, since MSP is an interim, 45-day program. The intended 45-day duration of the MSP placement was correctly reflected in the service delivery grid, however, which showed an end date of November 19, 2014. (S-3, 4, 5; Cline-Scott, Tr. III, pp. 15-16; Vendola, Tr. II, pp. 21-24).

22. The IEP proposing interim services and placement at MSP does not identify MSP on the placement page. The IEP, however, indicates the MSP placement in the "schedule modification" section and in the service delivery grid. Parent understood the nature and duration of the MSP placement and accepted the IEP and placement on September 15, 2014. (S-5; Parent, Tr. I, pp. 172-174).

23. During his tenure at MSP, Student received course work and materials from his teachers at Day Middle School. (Cline-Scott, Tr. III, pp. 18, 20; Vendola, Tr. II, p. 24) Ms. Cline-Scott from the Bridge program as well as Student's guidance counselor from Day visited Student at MSP and consulted with MSP staff and Parents regarding Student's needs as well as on plans for a gradual transition back to Day. (S-5, Cline-Scott, Tr. III., pp. 20-23; Parent, Tr. I, pp. 176-178).

24. Student fully transitioned back to Day Middle School in the Bridge program on or about December 2, 2014. (Parent, Tr. I, pp. 179-180; Cline-Scott, Tr. III, p. 23; S-5) The Team did not meet or draft a new or amended IEP upon his return. (Parent, Tr. I, pp. 115-116; Cline-Scott, Tr. III, p. 23; Vendola, Tr. II, pp. 25-26)

25. Upon Student's return to the Day Middle School, NPS implemented services within the Bridge program that he had received since September 2014, including 1:1 aide support in general education classes and small group instruction in the Bridge classroom. Initially, Student also received group counseling from Bridge until Student and Parent discontinued this service. (S-4; S-6; Parent, Tr. I, pp. 115-116; 181-187; Cline-Scott, Tr. III, pp. 24-26; Vendola, Tr. II, pp. 26-28).

26. While Student initially did well after returning to Day Middle School in December 2014, his behavior and relationships with other students in the Bridge program began

deteriorating in January 2015, after the winter break, to the point where parents of other students began complaining to NPS staff. In response, NPS changed Student's schedule so that he no longer attended the same general education classes as other Bridge program students. Student's general education subjects and teachers did not change, and his 1:1 aide accompanied him to his classes. Additionally, Student's academic support instruction was moved from the Bridge classroom to the school library, where he was taught individually by the special education teacher or the aide with teacher supervision. (S-6; Cline-Scott, Tr. III, pp. 33-34, 37-39; Vendola, Tr. II, pp. 29-30)

27. On March 18, 2015, Newton convened a "high school transition meeting" at the Day Middle School to discuss Student's transition to high school. Newton conducted such meetings for most or all eighth-grade special education students who would be moving on to one of the district's high schools for ninth grade. Representatives from the high school that eighth graders expect to attend generally appear at the transition meetings. For Student, the meeting on March 18th was also designated as an annual review of Student's IEP. (S-7; Cline-Scott, Tr. III, pp. 39-43; Vendola, Tr. II, pp. 29-30; Parent, Tr. I, pp. 189-202)

28. Student's residence is within the Newton South High School district. The Day Middle School feeds into Newton North High School. NPS considered Student to be an "out of assigned district" student at Day. As was their usual practice with such students, NPS sent representatives from both high schools to the meeting of March 18, 2015. (Vendola, Tr. II, pp. 36-38; Heslin, Tr.II, p. 52)

29. The NPS members of the Team recommended a high school program that was more intensive, smaller and more therapeutic than the inclusion setting of the Day Middle School. They based their opinion on Student's success at MSP and his struggles in the less restrictive Bridge program. (Cline-Scott, Tr. II, pp. 39-42) The NPS Team members determined that such a program was available in the Southside Program, at Student's districted high school, Newton South. (Vendola, Tr. II, pp. 36-38; Heslin, Tr. II, p. 53) According to NPS, there was no compelling reason for Student to attend Newton North because he had poor peer relations with the "fresh start" cohort, especially in the Bridge program. (Cline-Scott, Tr. III, pp. 39-44; Vendola, Tr. II, pp. 34-36; Heslin, Tr. II. Pp. 54-55) Parents wanted Student to attend North High School with his peer cohort from Day. (S-7)

30. On April 10, 2015, NPS proposed an IEP calling for Student's placement in the Southside Program at Newton South for the 2015-2016 school year. This also continued the services Student had been receiving at Day through the end of the eighth grade year. (S-7) Parents rejected this entire IEP and placement on April 11, 2015.

31. On May 28, 2015 the parties participated in a mediation through the BSEA and reached an agreement providing that Parents and Student would visit the "Pilot" program at Newton North, and that the Team would reconvene afterwards to discuss

placement issues. (S-8) NPS and Parents attempted to schedule a visit to Pilot. The record is unclear as to whether a visit actually took place. (S-9)

32. Meanwhile, Newton scheduled "Step-Up Day" for all NPS eighth graders for June 12, 2015. (S-9). Step-Up Day provides eighth graders with an opportunity to tour their prospective high schools, ask questions of staff, and learn about available activities. (S-9; Heslin, Tr. II, pp. 55-56)

33. Since Day is a feeder school for Newton North High School, most Day students would be attending Step-Up day at North. There was at least one other eighth grader at Day who was considered "out of district," and who lived in the Newton South District. That student would be attending Step-Up Day at Newton South. (*Id.*)

34. On or about June 10, 2015, Parent requested that Student attend Step-Up Day at Newton North High School, with most of the Day Middle School eighth graders. Student had been erroneously assigned a homeroom at North by the automated Student Information System; however, NPS removed his name from the homeroom list because NPS staff anticipated that he would be attending Newton South. (S-9; Heslin, Tr. II, pp. 58-60)

35. On or about June 11, 2015, the day before Step-Up Day, NPS informed Parent that Student could not attend the event at North because he likely would not be attending there and would receive a "mixed message." (S-9, Vendola, Tr. II, pp. 39-43)

36. Upon receiving Newton's decision that Student could not attend Step-Up Day at Newton North, Parent withdrew consent for him to attend Step-Up Day at South, which was to be held on the same day. (S-9)

37. On June 30, 2015, Parents withdrew Student from all special education programming at NPS. (S-10)

38. During August and September, 2015 Parents met with NPS administrators in an apparent attempt to enroll Student at Newton North with services pursuant to the last accepted IEP for 2014-2015. (P-241, 242) In September 2015, however, Student enrolled at Newton South High School. (P-236)

DISCUSSION

As was the case in *Decision #1*, Parents have substantive disagreements with Newton over the type and configuration of services that are appropriate for Student, but these disagreements are not the subject of the current *Decision*. Rather, the sole issues are procedural. Parents allege that Newton violated Parents' rights under federal and state special education law by depriving them of a meaningful opportunity to fully participate in Student's special education planning. They further allege that Newton both failed to implement a fully-accepted IEP and failed to discontinue services to which Parents no longer consented. Finally, Parents allege that Newton excluded Student from a school-sponsored program or activity (Step-Up Day) because of his disability, in violation of §504 of the Rehabilitation Act. As the moving party, Parents have the

burden of proving their claims by a preponderance of the evidence. *Schaffer v. Weast*, 126 S. Ct. 528, 441 IDELR 150 (2005). For purposes of clarity, this *Decision* will first address the claims arising under the IDEA and state special education statute, and, second the claim of discrimination in violation of §504.

Special Education Claims Under the IDEA, 20 USC §1400, and MGL c. 71B

a. Assignment of Student to Bridge Program

Parents' first claim involves alleged lack of meaningful participation in the educational decision-making process. Both federal and state special education law provide procedural protections for students with disabilities and their parents, designed to support the parent-school collaboration envisioned by these statutes. Parents are full members of the Team that develops IEPs for eligible students, 20 USC §1414(d)(1)(b)(i), and parental participation in the planning, developing, delivery, and monitoring of special education services is embedded throughout the IDEA, MGL c. 71B, and corresponding regulations. Courts have consistently emphasized the centrality of parental participation to the IDEA scheme. In *Board of Education of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, at 405-406 (1982), the Supreme Court stated "…Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every state of the administrative process…as it did upon the measurement of the resulting IEP against a substantive standard." See also: *In Re Framingham Public Schools and Quin*, 22 MSER 137 at 142 (Reichbach, 2016), and cases cited therein.

The concept of parental participation is intertwined with those of notice and informed consent; thus, the statute requires school districts to obtain "informed parental consent" at various stages of the process, including before it conducts an initial evaluation of a child, 20 USC §1414(a)(D)(i)(I), or a re-evaluation, 20 USC §1414(c)(3). The statute cautions that "[p]arental consent for evaluation shall not be construed as consent for placement for receipt of special education and related services." 20 USC §1414(a)(D)(i)(II). The pertinent Federal regulations at 34 CFR §300.9 define consent to mean the following:

> (a) The parent has been fully informed of all information relevant to the activity for which for which consent is sought…
>
> (b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity
>
> (c) The parent understands that the granting of consent is voluntary…and may be revoked at any time

Parents must be given notice describing any evaluation procedures that a school proposes to conduct. 20 USC §1414(b)(1). Schools must consider parental input

regarding a child's disability status and educational needs when conducting initial evaluations and re-evaluations. 20 USC §1414(c)(1)(B). The IDEA requires school districts to give parents "written prior notice" whenever the district "proposes to initiate or change" or "refuses to initiate or change" the "identification, evaluation, or educational placement of the child or the provision of a free, appropriate public education to the child." 20 USC §1415(b)(3)(A) and (B). Federal regulations implementing this portion of the IDEA elaborate on the consent and participation requirement and identify steps that districts must take to ensure parents' participation. 34 CFR§§300.300,

The corresponding state special education statute, MGL c. 71B, similarly provides for parental consent to evaluation and participation in the Team process. *Id.*, MGL c. 71B §3. The State regulations at 603 CMR 28.00, *et seq*., which implement the statute, spell out the parental notification, consent and participation requirements in more detail. Consent is defined as "agreement by a parent who has been fully informed of all information relevant to the activity for which consent is sought…understands and agrees in writing to the carrying out of the activity, and understands that the granting of consent is voluntary and may be revoked at any time." 603CMR 28.02(4)

Pursuant to 603 CMR 28.07, "each school district shall obtain informed parental consent" before conducting an initial evaluation, re-evaluation, or extended evaluation, and before placing a student in an initial or subsequent special education program. A parent may revoke consent at any time and may discontinue special education by notifying the district in writing that the parent has revoked consent to continued provision of special education services. Id. at 28.07(1)(a). Indeed, parental notice, informed consent and participation are deemed so important that the state regulation, consistent with federal provisions, requires school districts to make significant efforts to ensure parental participation, even when the "parent fails or refuses to participate." *Id.* at 28.07(1)(c).

According to the foregoing provisions, except in unusual circumstances not applicable here, school districts may not unilaterally change the placement or services provided to an eligible student, but, rather, must do so through the Team process, with due notice and opportunity to participate for the parents, unless the parent and school district agree otherwise. See *Honig v. Doe*, *supra*, at 484 U.S. 323; cited in *Quin*, *supra*, 22 MSER at 142, Note 32.

In the instant case, there is no dispute that in June 2014, Newton issued an IEP calling for a full inclusion placement for Student, supplemented with aide support in Grid B and approximately one period per day of "academic support" in Grid C. Parents fully accepted this IEP and placement, to be implemented at the Day Middle School.

Newton acknowledges that this fully accepted IEP does not identify the Bridge program on the placement page. Furthermore, the uncontroverted evidence at the hearing shows that the Team mentioned, but did not formally propose, the Bridge program to Parents when it developed the IEP in May 2014 or later, in June 2014. The record shows that NPS never sought to amend the IEP at a later time to designate Bridge as Student's

placement. Rather, Newton made a unilateral decision to place Student in Bridge, and obtained Parents' oral acquiescence to the placement after the fact.

Newton argues that it did not, in fact, make a unilateral change in Student's IEP or placement by placing him in the Bridge program, contending that it did not make the fundamental change in Student's IEP or services that is required to trigger the IDEA's "stay put" requirement. Newton points to the fact that the Bridge program comprised similar services (academic support and counseling in Grid C; aide support in Grid B, and inclusion) as the accepted IEP. Newton's argument cannot prevail in light of the facts in this case. The evidence supports a finding that Newton did, in fact, make a change in placement within the meaning of applicable law as discussed below.

In determining whether a change in placement has occurred courts have conducted a two-step inquiry. First, courts have looked for the "operative placement" or IEP that is "actually functioning at the time the dispute first arises." *Drinker v. Colonial School District*, 73 F.3d 859, at 864 (3d Cir. 1996). The next step of the inquiry is to determine whether there is a "fundamental change in…a basic element of the educational program…" *Sherri A.D. v. Kirby*, 975 F. 2d 193, 206 (5th Cir. 1992). While there appear to be no recent First Circuit cases that definitively address "stay put," more recent decisions in other circuits have elaborated on this standard to emphasize the impact on the student. For example, in *AW. v. Fairfax County School Board*, 41 IDELR 119 (4th Cir. 2004), the Fourth Circuit reviewed several "stay put" decisions and noted that important factors to be considered in deciding whether a change (in location, in that case) is a true "change in placement" are whether the change impacts FAPE by "diluting" the quality of services or increasing the restrictiveness of the student's program. The 8th Circuit decided similarly in *Hale ex rel. Hale v. Poplar Bluff R-1 School District*, 280 F.3d 831, 834 (8th Cir. 2002). In that case the court found that providing identical services in a different setting constituted a change in placement under the facts of that particular case because of the impact of the change on the student. The BSEA has applied these standards to various fact patterns to determine what constitutes "stay put" in particular circumstances. *See, e.g., In Re: Quin, supra*; *In Re: Agawam Public Schools and Melmark-New England (Ruling on Parents' Motion to Enforce "Stay Put,"* 21 MSER 81 (Berman 2015), and cases cited therein.

In the instant case, the record supports a conclusion that the "operative placement" or IEP at the beginning of the 2014-2015 school year was the IEP that Newton issued, and Parents accepted, on or about June 19, 2014. This accepted IEP provided for a full inclusion placement with aide support in the general education classroom together with an academic support/strategies class and counseling. The parties appeared to agree that except for the addition of the aide, this configuration of services replicated the model provided at Oak Hill for seventh grade, and would be delivered in a new location, that is, the Day Middle School. It is significant that NPS members of the Team that developed that IEP mentioned the Bridge program as a possibility for Student (if needed in the future), but did not mention Bridge anywhere in the IEP or placement that was offered to, and accepted by, Parents. This fact, together with the reported summertime conversations between Parent and Miriam Kornitzer about the Bridge option if "Integrated" proved unsuccessful, and the email correspondence among NPS staff and

with Parents, in which staff seemed anxious to obtain Parents' agreement to the placement, indicate that NPS itself viewed Bridge as significantly different from the "Integrated" program at Day Middle School above.)

The evidence supports an inference that there was a significant difference between a school-based inclusion program ("Integrated") at either Oak Hill or Day, and the Bridge program. The former is a program serving only students who are otherwise districted for that particular school. It offers full inclusion in general education classrooms supplemented with a daily class in academic strategies or support. This program is not designated as "therapeutic," nor does it contain the higher level of therapeutic interventions embedded in Bridge.

In contrast, Bridge is a city-wide, highly-structured, explicitly therapeutic program designed to serve students from all school zones in Newton with emotional disabilities. Students enrolled in Bridge participate in full inclusion classes, and may receive academic support services. Unlike "Integrated," Bridge has an explicit therapeutic focus with a group counseling component and a class-wide behavior plan for all of its students.

Given the above-described descriptions of the two programs, the evidence reasonably supports a conclusion that Integrated and Bridge are two distinct, separate programs, and, therefore, moving Student from the first type of program to the second would have a significant impact on Student's experience of school.[3] Even if Student would receive the same number of hours of service within and outside of the general education classroom in both programs and even if some of the services had the same labels, the fact that one program was therapeutic in nature and the other one was not is significant. In light of the aforementioned, placing Student in Bridge constituted a change in placement, and, therefore, Newton was responsible to convene a Team to discuss the new placement and issue an amended IEP reflecting Student's participation in Bridge.

The evidence shows that Newton did not merely neglect to designate the Bridge program on the placement page of the fully-accepted IEP for 2014-2015 as it argued. Rather, Newton unilaterally changed Student's placement outside of the Team process.

I next turn to the question of whether the Parents' oral agreement to the Bridge program, coupled with Student's attendance in the program during portions of the 2014-2015 school year, satisfied the consent requirements of the IDEA and 34 CFR 300.9, set forth above.

In the instant case, Parent learned about the unilateral placement in the Bridge program within a day or two of its occurrence, on or about the second or third day of the 2014-2015 school year. He had had some prior knowledge about Bridge and its potential appropriateness from discussions at the June 2014 Team meeting; in fact, he knew that the availability of Bridge was a factor supporting Student's move from Oak Hill to Day

[3] This impact can be inferred by Student's refusal to participate in group counseling, which was a new service, not offered in his prior IEP and placement and not mentioned in the accepted IEP.

Middle School. He had additional conversations regarding Bridge with NPS staff (Miriam Kornitzer) during the summer of 2014.

Immediately after learning of Student's placement in Bridge, Parent communicated with NPS special education staff, including Victoria Vendola, Anne Cline-Scott, and Student's counselor, Charles Clarke, to discuss the Bridge program. Based on these discussions, Parent decided that it made sense to allow Student to continue in the program. Parents testified that he was aware that he could refuse to consent to the Bridge placement, but felt that he had a longstanding working relationship with Newton and would rely on its recommendations.

Additionally, the record shows that Parent in the instant case has a years-long relationship with NPS, its special education department, and its personnel. According to Parent, until recently, that relationship was cordial and collaborative, with School professionals and Parents working together on behalf of a child with complex needs. The record contains multiple letters and emails reflecting a constant flow of communication back and forth between Parents and school personnel regarding large and small issues, reflecting a sophisticated understanding by Parents of Student's needs and willingness to advocate for Student, even if that meant disagreeing with School staff. Similarly, at hearing, Parent presented as a highly intelligent, knowledgeable, and articulate advocate for his child. It is reasonable to infer that if Parent felt that Student's best interests required Parent to remove him from the Bridge program, Parent would have known this and would have done so.

It is worth noting that Student attended Bridge for a portion of the 2014-2015 school year without parental objection. Parents were aware that they could have revoked consent for his attendance at any time, as evidenced by their revocation of consent for Student to attend the group counseling component of the program, and their immediate rejection, later that school year, of the placement proposed by NPS for high school. They did not do so. There is no dispute that Student received a full complement of educational services and derived educational benefit from the Bridge program.

Based on the foregoing, I conclude that two of the three criteria listed above for informed consent were met: Parent had information regarding NPS' proposal for Bridge, and was aware that his consent to the placement was voluntary and revocable. NPS did not, however, overcome the final hurdle, that is, the IDEA's requirement that consent be memorialized in writing and that the written document describes the activity for which consent is sought. Here, Parent's consent to place Student at Bridge was oral, and no document was created to memorialize that consent. NPS should have complied with the Team process, or, at the very least, NPS should have secured a parental waiver of the meeting and sent Parents an N-1 Form and proposed IEP amendment with a new placement page indicating Student's participation in Bridge in order to fully satisfy the informed consent requirements of the IDEA and corresponding regulations at 34 CFR §300.9.

Despite NPS' misstep in failing to obtain Parent's written consent, the parties do not dispute that Parent consented to the placement immediately after it had been made,

and never thereafter contested this decision, thereby curing the procedural defects. Under the particular facts of this case, the record shows that Parent's consent was informed and voluntary, despite the absence of a written document. Parent's consent, therefore, was valid. To hold otherwise would be to elevate form over substance.

b. Transition from MSP back to Day Middle School in December 2014

Newton admits that it neither convened a Team meeting nor drafted a new or amended IEP when Student completed his 45 day interim placement at MPS between September and November, 2014. While this may have constituted a procedural error, Newton argues correctly that the violation was *de minimis*. In contrast to the placement change that occurred in September 2014, described above, there was no placement change after Student returned to Day from MSP. He transitioned into the Bridge program that he had left with no significant change to his services. In addition, while Student was at MSP he was visited regularly by Bridge staff and received and completed work from his academic classes at Day. Moreover, there is no dispute that Parents participated fully in an ongoing, collaborative planning process involving NPS personnel from MPS and Day to support Student's transition back to Day in December **2014**. Student was not deprived of any educational benefit as a result of NPS' failure to draft a new or amended IEP upon his return from MPS. Rather, this was the type of "de minimis, technical procedural violation" that did not deprive Student of FAPE and, therefore, would not give rise to liability on the part of Newton. *Murphy v. Timberlane Regional School Dist*., 22 F.3d 1186, 1196 (1stCir. 1994), quoting *Roland M. v. Concord School Committee*, 910 F.2d 983, 994 (1st Cir. 1990).

c. Implementation of The MSP Interim IEP from September to November 2014 and Alleged change to Student's placement in January 2015

On or about September 11, 2014 Newton issued an IEP to reflect a short-term, 45 day placement at MSP. The intention of the Team—including both NPS personnel and Parents—was to return Student to his program at Day at the conclusion of his stay at MSP. Parents accepted the IEP for the MSP placement on September 15, 2014. The IEP cover page erroneously indicated that it covered the period from September 2014 to September 2015; however, the service delivery grid clearly indicated that the IEP would expire after 45 days, in mid-November 2014. The record shows that Parents fully understood that the MSP placement was intended to be short term, and that Student would resume services under his last accepted IEP from June 2014 upon his return to Day. This is, in fact, what occurred, without any objection from Parents. The erroneous dates on the IEP at issue appear to be a clerical error that was of no consequence to Parents or Student and which gives rise to no liability on the part of Newton. *Murphy*, *supra*.

Student returned to his prior placement at the Bridge program in or about December 2014. In January 2015 Student began having conflicts with peers in the Bridge program. In response, Newton changed Student's schedule so that he would not be in general education classes with other Bridge students. Student attended different

sections of the same courses, with the same teachers, as he had done previously. His aide accompanied him to general education classes per his IEP.

In addition to the change in Student's general education schedule, the location of Student's academic support instruction was moved to the school library in order to avoid peer conflicts. These adjustments, of which Parents were fully aware, and to which they did not object, do not constitute a significant change in Student's placement. There is no evidence in the record that the general education schedule change had any impact on Student's special education services or access to the general curriculum. The move to the library for academic support was a change in location for a service, which did not in itself, amount to a change in placement. (See *Gore v. District of Columbia*, 67 F. Supp. 3d 147, 153-154 (DDC, 2014). The change from group to individual instruction in academic support appears to be more significant. Parents were aware of this change, however, and there is no evidence on the record that they formally objected to it, or that Student lost educational benefits.

d. Failure to Discontinue Special Education Services Between April 13, 2015 and June 2015.

On or about April 10, 2015, NPS issued an IEP covering the period from March 18, 2015 to March 18, 2016. The portion of the IEP running from March 18 through mid-June 2015 covered the final months of eighth grade, and continued the same services that Student had been receiving since September 2014. The portion of the IEP running from September 2015 through April 2016 applied to Student's freshman year in high school. On April 13, 2015 Parent rejected this IEP. Parent's rejection of the IEP triggered their so-called "stay put" rights under 20 USC §1415(j) and 603 CMR 20.07, such that Student became entitled to the services and placement that he had been receiving pursuant to the last accepted IEP, *i.e*., the services and placement provided in the Bridge program at the Day Middle School, which placement, as stated above, Parent constructively accepted despite NPS' failure to designate the placement on the IEP. NPS could not legally discontinue any special education services to Student until June 30, 2015, when Parents explicitly withdrew such consent in writing pursuant to 603 CMR 28.07(1)(a)(4).

e. Identification of "Stay Put" IEP.

Parents fully accepted the IEP issued in June 2014 that covered the period from September 2, 2014 to April 13, 2015. Parent verbally agreed to the Bridge program in September 2014. This was Student's last accepted IEP. Parents rejected the subsequent IEP, which covered the period from March 18, 2015 to March 18, 2016, and withdrew consent for all special education services on June 30, 2015. Thus, Student's "stay put" rights are to the services set forth in the last accepted IEP issued in June 2014 with the verbal changes added in September 2014: full inclusion with aide support in the general education classroom, and counseling and academic support services outside of the general education setting. The parties are cautioned, however, that if Student seeks special education services in the future, his "stay put" IEP does not automatically go into

effect. Newton would be required to re-evaluate Student, convene a Team to re-determine eligibility, and issue a new IEP based on current needs if Student is eligible.

Discrimination Claims Under §504 of the Rehabilitation Act

Section 504 of the Rehabilitation Act of 1973, 29 USC §794(a), is an anti-discrimination statute that provides that "no 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." *Id*., 34 CFR §104.4(b)(1). The BSEA is authorized by MGL c. 71B §2A and 603 CMR 28.08(3)(a) to adjudicate any issue involving the denial of a free, appropriate public education guaranteed by §504 of the Rehabilitation Act. To prevail on a claim under §504 in the public education context (in which we can assume the receipt of Federal funding), a parent must show that the student has a qualifying "handicap," that he or she was denied access to, or the benefit of, a program or activity of the public entity for which he or she is "otherwise qualified," on an equal basis to a person without a disability, and that such denial was based on his or her disability. *Id*. See also *In Re: Lincoln-Sudbury R.S.D. & Wallis*, 22 MSER 47, 56 (Byrne, 2016)

In the instant case, Parents allege that Student was unlawfully denied the opportunity to attend Step-Up Day at Newton North High School with his peers at Day Middle School in June 2015. There is no dispute that Student is protected under §504 as a person with a disability. There also is no dispute that Student was "otherwise qualified" to participate in Step-Up Day in June 2015 as a soon-to-graduate eighth grader planning to enter high school in September 2015. Moreover, Student was not precluded by NPS from participating in this event; rather, he was directed to attend Step-up Day at Newton South High School rather than Newton North. At issue is whether Student was "otherwise qualified" to attend the Newton North Step-Up Day, and, if so, whether he was denied the opportunity to do so on the basis of his disability. Based on a review of the evidence, it is clear that even if he was "qualified" to attend Step-Up Day at North in particular, NPS's prohibiting him from doing so was not based on his disability. My reasoning follows.

The testimony at hearing established that according to custom and practice, rather than any hard and fast rules or policies, eighth graders attend Step-Up Day at the high school which they plan to attend the following year. For the most part, a Newton student is assigned to a middle school and high school on the basis of his or her residence. The middle school of residence then "feeds" into the corresponding high school. In the instant case, Student lives in the district for Oak Hill Middle School which then feeds into Newton South High School.

Via the Team process and pursuant to a fully-accepted IEP, Student attended Day Middle School for eighth grade. Day is a feeder school for Newton North High School. Student preferred and expected to attend North for ninth grade; however, his proposed IEP called for a placement at Newton South. Even apart from the IEP, however, which Parents rejected, Parents have presented no evidence or argument that Student was

entitled to attend anything other than his districted high school for ninth grade. In fact, the evidence shows that other students at Day who were considered "out of district" returned to their districted high schools for Step-Up Day. I conclude that while there may be no hard and fast rules as to whether a child may attend Step-Up Day at a high school for which he or she is not districted, the evidence suggests that this is not encouraged, and that Parents have not met their burden of proving that Student was "otherwise qualified."

Even if Student were "otherwise qualified," however, the record simply does not support a finding that Newton discriminated against Student on the basis of disability. The record simply contains no support for the conclusion that Student was sent to Newton South for Step-Up Day because of his disability, rather than because this was the high school that he would likely attend in the fall. Student's preference for attending the event at North with his peers from Day is understandable, and the timing of NPS' decision not to honor his preference was unfortunate to say the least. Parents have not demonstrated that these actions by Newton constituted discrimination in violation of §504, however.

CONCLUSION

For the reasons stated above, I conclude that Newton committed several procedural violations in this matter, but that these missteps did not deprive Student of FAPE. However, when Newton unilaterally changed Student's placement to the Bridge program, without advance notice to Parents and without their prior informed consent it indeed deprived Parents of their right to meaningful participation in the educational process. This error was cured, however, by Parents' subsequent agreement and Student's participation in Bridge.

Newton further erred by placing incorrect dates on the IEP calling for the MSP program and by failing to convene the Team after Student returned from the MSP program in December 2014; however, these errors were of no consequence to Student's educational programming or Parents' ability to participate. Newton may have committed a procedural error in January 2015 when it moved Student's academic support instruction from the Bridge classroom to the school library; however, Parents have not proven that they were unaware of this action, that they objected to it, or that Student lost educational benefits. Newton committed no errors when it continued to provide special education services between April and June 2015 pursuant to Student's "stay put" IEP issued in June 2014. Finally, Newton did not discriminate against Student when it did not allow him to attend Step-Up day at his preferred location rather than at his districted high school.

By the Hearing Officer,

_____ Dated: February 22, 2017

Sara Berman