

**COMMONWEALTH OF MASSACHUSETTS  
SPECIAL EDUCATION APPEALS**

**In Re:** Student v.  
Bedford Public Schools

**BSEA # 09-5853**

**DECISION**

This decision is issued pursuant to Section 504 of the Rehabilitation Act of 1973 (29 USC §794) (§504), the state Administrative Procedure Act (MGL ch. 30A), and the regulations promulgated under these statutes.

On March 30, 2009, Parents requested a Hearing in the above-referenced matter. The case was administratively re-assigned to Hearing Officer Rosa Figueroa on May 5, 2009, and the hearing was held on May 7 and 8, 2009, at the Bureau of Special Education Appeals, 75 Pleasant St., Malden, Massachusetts. Those present for all or part of the proceedings were:

Student's Father

George F. Mulgrew

Anita Pliner, J.D., Ph.D.

Brendan Desilets

Jennifer Fillingame

Nadine Coletta Hill

Jeffrey LoPresti

Marie Mallot

Mary Koert

Colby C. Brunt, Esq.

Student's/Parents' Attorney.

Neuropsychologist, Hallowell Center.

Sixth grade English Teacher, Bedford Public Schools.

John Glenn Middle School §504 Coordinator and  
Study Skills Center Teacher, Bedford Public Schools.

Sixth grade Science Teacher, Bedford Public Schools.

Sixth grade Math Teacher, Bedford Public Schools.

Sixth grade Social Studies Teacher, Bedford Public  
Schools.

Director of Special Education, Bedford Public Schools.

Attorney for Bedford Public Schools.

The official record of the hearing consists of documents submitted by Parents and marked as PE-1 through PE-13, the portions of Parents' exhibits 17 and 18 containing information regarding Student's fourth and fifth grades, and PE-19 through PE-22; Bedford Public Schools (Bedford) and marked as exhibits SE-1 through SE-16; recorded oral testimony and written closing arguments received on June 8, 2009. The record closed on June 8, 2009. At Parents' request, witnesses were sequestered<sup>1</sup>. Bedford did not object to this request.

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<sup>1</sup> It is unusual in the context of BSEA hearings for witnesses to be sequestered. When this occurs, witnesses who provide services to students are deprived of hearing information, such as insight as to particular disabilities, explanations on how a disability may impact a student, or recommendations not explicitly stated in reports. Often, this information is offered by school and independent evaluators, and the information may assist staff in the provision of services to the particular student. For this reason, I caution

## **HEARING ISSUES:**

1. Did Bedford follow the requirements of §504<sup>2</sup>?
  - a. Whether Bedford was responsible to implement Carlisle Public Schools' (Carlisle) §504 plan for Student until Bedford Public Schools had developed a §504 plan that was consistent with and in accord with Carlisle Public Schools' §504 plan?
  - b. Whether Bedford followed the requirements of §504 when it developed its §504 plan?
  
2. Did Bedford provide Student with a Free Appropriate Public Education (FAPE) within the meaning of §504 in light of Student's disabilities?

## **POSITIONS OF THE PARTIES:**

### **Parents' Position:**

According to Parents, the §504 plan developed by Carlisle in 2008, which resulted from multiple meetings and incorporated input from Carlisle's staff, Parents and their specialist, was appropriate and met Student's needs. Parents state that until Bedford developed a plan that was agreeable to Parents, it was responsible to implement Carlisle's plan which Bedford did not do.

Parents allege that Student's §504 plan in Bedford does not reflect any of his needs and is therefore a de facto violation of Student's substantive and procedural rights under §504.

They seek incorporation of the results of the evaluations of a neuropsychologist, occupational therapist, reading and writing specialists, as well as Parents' input. Parents further seek that Student be provided typing lessons so that he can access the desktop computer.

Parents also state that Bedford failed to draft and implement a grievance process, and did not create procedures to resolve §504 disputes in district as required under federal law. They also seek a copy of the procedures before the next §504 plan is drafted. Lastly, they seek compensatory education for any transgression committed by Bedford resulting in Student's loss of an effective education.

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parties in general to weigh the advantages and disadvantages of sequestering witness in the context of BSEA hearings.

<sup>2</sup> Parents mention the ADA as part of their general claims but make no arguments under ADA not related to Parents' §504 claims. The ADA claims are essentially the same as the §504 claims and are therefore, not addressed separately. Lastly, Parent offers no argument to support the jurisdiction of the BSEA over ADA claims separate from §504.

### **Bedford's Position:**

Bedford agrees that Student is entitled to accommodations under §504. It denies that it violated Parents'/Student's procedural rights in any manner. Bedford asserts that once its team developed its §504 plan, it was not bound by the Carlisle plan, since there is no Stay-Put provision under §504. It states that several of the accommodations included in Carlisle's plan simply constitute good teaching techniques which are implemented by all teachers in Bedford, and the approaches are offered to all students through the District Curriculum Accommodation Plan and the Blue Team's Best Practices.

Bedford states that a §504 plan need only list accommodations which go beyond what is already available to the general education population so that the student may access the general education curriculum. It asserts that it provided Student appropriate accommodations which allowed him to access the general education curriculum in Bedford and hence, is not responsible to offer Student compensatory services.

### **FINDINGS OF FACT:**

1. Student is a sixth grade, twelve-year-old boy. He resides in the Bedford School District and attends the John Glenn Middle School (PE-3). He has identified deficits in the areas of Attention Deficit Hyperactivity Disorder (ADHD), combined, and Executive Functioning (PE-1; SE-7).
2. While in the first grade in Carlisle Public Schools (Carlisle), Student was placed on an Individualized Accommodation Plan (ICAP) for occupational therapy to address writing and number formation issues. He remained on this plan through third grade (PE-7; PE-8). Issues with organization, attention, poor finger strength and losing his thought in mid-sentence, were noted by Student's teachers during that time period (PE-8). Student was taken off the ICAP at the conclusion of third grade.
3. Parents requested an initial special education evaluation while Student was in the fourth grade in Carlisle but failed to provide the written consent to conduct the evaluation (PE-8). While Student was in fifth grade, Parents had him privately evaluated at the Hallowell Center in Sudbury, MA. Again, an initial evaluation was sought from Carlisle, but this time Parents consented to the evaluation on March 3, 2008 (*Id.*). Student's fifth grade teachers were reporting similar issues as those noted when Student was in third grade.
4. At Parents' request, Anita J. Pliner, PhD, JD, (PE-22) conducted the private neuropsychological evaluation at the Hallowell Center on December 18 and 27, 2007 (PE-1; SE-7). At the time, Student was 10 years 11 months old, and in the fifth grade. Dr. Pliner administered the Wechsler Intelligence Scale for Children IV, Wechsler Intelligence Scale for Children Integrated (selected

subtests), California Verbal Learning test-Children's Version, Rey Osterrieth Complex Figure, Wide Range Assessment of Memory and Learning II- Selected subtests, Delis Kaplan Executive Function System, Tower of London II, Conners' Continuous Performance Test II, Behavior Rating Inventory of Executive Functions (the parent and teacher forms) Wechsler Individual Achievement Test II (selected subtests), Test of Written Language III, Gates MacGinite Reading Tests IV, Diagnostic Interview, and reviewed Student's record (PE-1; PE-22). Dr. Pliner found Student to be cooperative during the evaluation, and the results were therefore deemed to be valid. (PE-1; SE-7). She also noted that in the one-to-one setting Student's behavior was indicative of attentional issues as he showed a tendency to be fidgety and required redirection due to distractibility (Id.).

5. The evaluation showed that Student's global cognitive skills fell in the high average range. It however, suggested weakness with executive functioning. Dr. Pliner explained that executive functioning were the skills that "allowed an individual to inhibit impulsive behaviors, sustain attention, flexibly shift from one task to another, plan and carry out tasks, generate efficient learning and memory strategies and self-monitor performance when necessary." She explained that Student was impacted by an inability to sustain attention especially when asked to work independently, to process information in an efficient manner, and to plan and organize less meaningful information. He also showed a weakness in his ability to inhibit impulsive responses and to generate efficient learning and memory strategies. Student also had difficulty self-monitoring his performance (PE-1; SE-7). Processing speed was found to be a significant area of weakness as the evaluator found that only when given extended time to perform a task was Student able to work to his level of ability. Dr. Pliner concluded that Student presented with a diagnosis of ADHD Combined, and an Executive Functioning Deficit (PE-1; SE-7).
6. Dr. Pliner recommended numerous accommodations, including extended time for tests and exams; use of memory retrieval strategies; preferential seating; use of a "secret" cue to ensure Student's attention and to alert him in advance of being called; use of positive reinforcement; assistance with self-monitoring and with understanding what it means to have executive functioning issues; consistency, structure and explicit reminders; participation in an after-school homework club; assistance with homework reminders and monitoring (especially with long term assignments); thematic teaching using subjects of interest; and a process-oriented written approach to address Student's weakness with written expression. She stressed that it would be important to monitor Student's frustration levels and self-esteem, and explained that children with executive functioning deficits may sometimes appear unmotivated. Regular exercise such as participation in martial arts was recommended as was parental consultation with Student's pediatrician to discuss the possible use of ADHD medication (PE-1; SE-7).

7. The results of the Hallowell Center evaluation were discussed at a Team meeting on March 27, 2008 (PE-8). Carlisle recommended additional testing in occupational therapy and reading comprehension, and a review of Student's written work. Accepting the results of the psychological evaluation performed at the Hallowell Center, Carlisle deemed further testing in this area unnecessary (PE-8).
8. Susan L. Ross, MA, OTR/L, of Carlisle, conducted an Occupational Therapy evaluation on March 13 and 14, 2008, at the request of Parents (PE-7; SE-9). As part of the evaluation Student was observed during writing activities as well as during use of the computer keyboard. Ms. Ross had also observed Student while in the fourth grade as he was introduced to the keyboarding program. Student was noted to struggle with the laptop especially with the "lack of anterior tilt to the keyboard the reduced key elevation on the keypads as opposed to the separate keyboards, and the higher level of environmental stimulation when using the laptop in a clustered desk group as opposed to the more isolated computer monitor desks in the classroom" (PE-7; SE-9). Student expressed his preference for a larger computer placed in a quieter area as he was able to type for longer periods. The evaluator noted that Student slouched at his desk as opposed to maintaining an upright posture. She found that Student presented "strengths in the area of visual motor integration but that he was slow when trying to develop organized ideas coupled with legible and timely output." Ms. Ross further noted that Student could write legibly but that the process was slow to produce written material independently. His keyboard skills were found to be too rudimentary to be effective as a tool for processing writing (PE-7; SE-9).
9. Ms. Ross recommended a medical follow-up to evaluate muscular concerns. She also recommended: continued development of keyboarding skills; brief entry writing opportunities to provide immediate positive feedback; preferential seating; provision of class notes as well as skeleton notes for note-taking; teaching access to grade level websites to check homework assignments as well as provision of a flash drive to transfer school work to the home to assist with homework; and organizational strategies for ready access to schoolwork. Ms. Ross also suggested that Student be given positive feedback when he completed assignments (PE-7; SE-9).
10. On March 31, 2008, Student underwent an initial educational assessment in Carlisle (PE-8; SE-10). Kathryn Garcia, the evaluator reviewed private evaluation results, performed informal assessments, conducted classroom observations and administered the Gray Oral Reading Test-4 (GORT-4). The evaluator observed that during the reading test, Student hurried through the questions, attempting to respond before hearing all the options read aloud by the evaluator. Ms Garcia also noted that when Student was provided with additional time, he was able to identify his errors and self-correct mistakes

when these were reviewed. Student demonstrated strategies during the reading assessments like using his finger as a guide to maintaining his place on the text, or re-reading a section for clarity when encountering an unfamiliar word. He demonstrated strong reasoning skills and use of multiple choice response strategies, and also requested to use other strategies that would have allowed him to enhance comprehension. Ms. Garcia recommended numerous accommodations, to wit:

- \* Provide a clear statement of the focus of lesson before beginning to assist [Student] in organizing himself to accept the information and to assist him in making connections;
- \* Cue when about to be called upon or provide a prompt which will let him know ahead of time which questions/problems he will be expected to respond to;
- \* Encourage [Student] to use his reading materials to “look back” for more information or to validate his response;
- \* Provide opportunity to revisit written responses to edit in writing or recheck calculations in math;
- \* Allow extra time to formulate both written and verbal responses.
- \* Provide structure within the lesson which is listed on the board to guide [Student] as to where to focus his attention and thought and assist in the organization of his process;
- \* Use of posted daily schedule with times listed;
- \* Teach an organized method to maintain materials, paper, for school and home - (possible color system or single binder with multiple pockets);
- \* Embed “think time” in lessons and discussions.
- \* Use of spiraling and scaffolding;
- \* Use guided questions to assist [Student] in “seeing next steps” (for example: Read the room, where can you look to find out what is next...) (PE-8; SE-10).

11. Student’s Carlisle Team met on April 11, 2008 to review the results of Carlisle’s evaluations (PE-8). Student was not found eligible to receive special education services, but accommodations through a §504 plan were deemed appropriate. A §504 plan was drafted effective through June 2008 (testimony of Parent). Progress reports of April 2008 show that Student was cooperative, involved, and performed well with the accommodations (PE-6; SE-8).
12. Student’s fourth grade MCAS, administered with accommodations, resulted in a Proficient score for English Language Arts, and with a score of 220 (on the cusp between warning and needs improvement), he obtained a needs improvement for Mathematics (PE-19). In the previous MCAS administered

during Student's third grade, he obtained a proficient score in Reading and a needs improvement in Math (Id.).

13. Carlisle reconvened Student's team on June 5, 2008 and drafted another §504 plan (PE-2). Both Father and his attorney were present at the meeting (testimony of Parent). The §504 plan developed by Carlisle contained 30 accommodations<sup>3</sup> in addition to three more accommodations specifically for

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- <sup>3</sup> “ 1. [Student's] teachers will be alert to how a student with Executive Functioning deficits and ADHD may appear “unmotivated”. [Student's] teachers will be sensitive that this appearance may actually be how the executive deficits compromise [Student's] ability to coordinate and use his skills.
2. [Student's] teachers will be sensitive to the fact that [Student's] frustration may put him at risk for motivational and other emotional problems unless his weaker areas of functioning are understood and they are given appropriate support.
  3. [Student's] teachers' will understand that even though he “knows” a word or a skill at one minute and he may nevertheless miss it the next minute.
  4. [Student's] teachers and service providers should have access to a competent mental health specialist to consult about Executive Functioning and ADHD, how they are manifested in [Student], and how accommodations are to be implemented.
  5. All teachers shall allow extra time for all work completion, including testing situations, in the classroom.
  6. [Student] may need opportunities to be physically active during the school day. He should be allowed to move and stretch in order to be more productive when he returns to his seat.
  7. The Occupational Therapist should consult with the team regarding handwriting, muscle tone issues, and classroom tools (for example, a computer with monitor versus a laptop; firm seating surface, etc.) as noted in the OT evaluation.
  8. On writing assignments, the teacher shall employ pre-writing strategies such as webbing or mapping in order to help [Student] organize and sequence his thoughts.
  9. To address [Student's] relatively weak written expression, in particular his difficulty integrating appropriate contextual conventions into his writing, a process oriented writing approach will be used. A sample grammar/spelling notebook may help [Student] edit his work.
  10. [Student] will be allowed to compose written expression assignments on a desktop computer and to use word processing to edit and revise written assignments in school.
  11. In order to minimize careless errors, [Student] should be directed by the teacher to proof read his written work and to recheck his math problems including use of reverse math for computation and use of a calculator.
  12. Occasionally [Student's] teachers shall substitute multiple choice tests and/or oral responses in lieu of essay exams in order to assess more accurately [Student's] understanding of the material presented.
  13. [Student] should be given specific instruction in study and organizational skills including taking notes, studying for exams, planning and allotting time for assignments, creating outlines and graphic organizers.
  14. Teachers will provide skeleton notes.
  15. Student will be taught an organized method to maintain materials and papers for school and home.
  16. Student will check in with someone at the end of the day who will make sure he has the material (tests, papers) necessary for homework assignments. Homework assignments will be posted on line or provided to Student via email.
  17. Student should be encouraged to continue his participation in the homework club if one is available.
  18. Student's teachers shall provide preferential seating near the teacher where the teacher can provide redirection and encouragement when Student gets off task. He should receive frequent and immediate positive reinforcement for on-task behavior.
  19. When sitting in a group, Student should be seated near students who are organized and able to model on-task behavior.

MCAS. These last ones were consistent with accommodations number 3 and 23, to wit: alternate, small group setting; use of a desktop computer for any essay part of an exam; and additional time (PE-2). The plan called for quarterly reviews and review/reassessment by June 5, 2009. In addition to describing Student's disabilities and the impact they have on his performance, the plan stated that Student was making effective progress. This plan was accepted by Parents on June 12, 2008 (PE-2).

14. According to Carlisle, the following strategies worked well for Student:  
“preferential seating- [facing the] teacher, minimize peer distractions, frequent teacher check-ins to ensure that he stays on task and understands directions, additional time to complete work, option of using the computer or Alpha Smart to speed production” (SE-8).
15. During the summer 2008, Student's family moved to Bedford. (Testimony of Parent). Student was enrolled in Bedford and assigned to the sixth grade Blue Team. Prior to the start of the school year, Ms. Jennifer Fillingame<sup>4</sup>, Bedford's §504 coordinator, received Student's §504 plan and disseminated the plan among Student's Blue Team teachers. This plan was implemented by Bedford until Bedford convened its §504 meeting (testimony of Fillingame, LoPresti, Coletta, Mallot, Desilets).

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20. Student should be taught how and reminded to self-monitor his attention to tasks with time constraints. Beginning and ending time expectations will be provided to assist Student in his self-monitoring.
  21. Thematic teaching whereby a topic of interest is selected as a medium for teaching and promoting reading and written language will be used.
  22. Student's teachers will employ the needed structural consistency and explicit reminders and cues to be used for Student.
  23. A secret cue should be devised to ensure Student's attention. The teacher should use the cue in advance to alert Student when he is going to be called on in class.
  24. Student's teachers shall incorporate memory and retrieval strategies into the learning of new information, including mnemonics, work banks and word lists.
  25. [Teachers] may need to repeat directions for Student. When directions are being given, Student should be directed to be physically ready with appropriate eye contact and still body. His workspace should include only those materials needed for task completion. Use key words when directions are starting as a cue to tune in.
  26. Student's teachers should have Student restate the purpose of an assignment and the individual steps on which he should be working.
  27. Student's teachers shall encourage the use of “chunking” techniques for multi-step tasks.
  28. Student's teachers shall provide Student with a specific plan on how to complete an assignment, breaking down the tasks into smaller, more manageable parts. Reasonable time limits should be imposed to help Student see how he is progressing towards completing the task. This will be particularly important for long-term assignments. He should be instructed not to begin a new step until the previous step has been completed.
  29. Teachers will provide adequate wait time before asking for a response.
  30. Teachers will use guided questions to assist Student to “see the next steps” (for example, read the room where can you look to find out what is next...)” (PE-2).

<sup>4</sup> Ms. Fillingame holds a bachelors degree in psychology and a masters in social work. She has participated in trainings regarding §504 (testimony of Fillingame).

16. Student participated in Bedford's sixth grade regular education "Student Owned Strategies" class which focuses on teaching students how to learn material through reading (SE-3).
17. Communications exchanged between Nadine Coletta and Jennifer Fillingame of Bedford and Parent dated September 18 and 23, 2008, document Student's difficulties completing his homework assignments even though he worked past 9:30 p.m. (PE-9; SE-11). According to Ms. Coletta, homework should not take more than 25 to 30 minutes per subject. Parent was encouraged to communicate with Ms. Coletta and other teachers from the Blue Team to discuss individual expectations regarding homework. Student's schedule included Study Skills Center participation. Parent was encouraged to attend the open house scheduled for September 25, 2008. Also, Parent, Ms. Coletta and Ms. Fillingame agreed to meet on or about September 29, 2008, to discuss Parental concerns regarding Student's transition into Bedford, his then current programming, and other parental concerns (PE-9; SE-11).
18. Ms. Coletta wrote to Parents following the late September 2008 meeting confirming the steps to be taken to assist Student with study management and homework completion (PE-10; SE-12). Ms. Coletta agreed to check Student's agenda at the end of each day, after sixth period, to ensure that he had written down all of his assignments and that they were in his homework folder. This way Student and Ms. Coletta would ascertain whether all of the assignments had been packed in Student's bag ready to go home. One of Student's parents was expected to sign off on Student's agenda after Student had completed his homework each day. Ms. Coletta would review the agenda the next day to communicate any information written by Parents to the other staff members. Student's teachers also reviewed the agenda daily. According to Ms. Coletta this arrangement worked during the first months of school but Student stopped checking with her sometime before Thanksgiving in November 2008 (PE-13; testimony of Coletta). During the September meeting it was further agreed that long term planning would be addressed by Ms. Fillingame during study skills time once per week. Additionally, Student would begin a typing program either on a laptop during enrichment time with Ms. Coletta or in the computer laboratory (PE-10; SE-12).
19. On October 6, 2008, Parent forwarded to Bedford Student's independent neuropsychological evaluation of December 2007. In his email to Bedford, Parent shared additional concerns regarding Student and his §504 plan and conceded "that a number of [the accommodations in Carlisle's plan] simply called for Student's teachers to be aware of issues" (SE-13). Parent further inquired whether the teachers were indeed aware of Student's issues and whether they had received training in those areas (Id.).

20. The Blue Team met on October 30, 2008 to discuss Student's eligibility for a §504 plan (PE-21). Jennifer Fillingame (§504 coordinator and Study Skills Center teacher), Nadine Coletta (Team leader and science teacher), Marie Mallot (social studies teacher), Jeff LoPresti (math teacher), Brandon Desilets (English teacher) and Diana Siegenthaker (guidance counselor) were in attendance. Ms. Fillingame was responsible for presenting the result of the Hallowell neuropsychological evaluation and the Carlisle occupational therapy report to the team. Most team members, with the exception of Ms. Colleta, did not read the full reports but rather relied on Ms. Fillingame's summary, the results of the evaluations conducted while Student was in Carlisle, and their own experiences and observations of Student (testimony of Fillingame, Desilets, Coletta). The Team found Student eligible to receive §504 accommodations, especially to address substantial difficulties in test taking situations (PE-21; testimony of Fillingame, Coletta, Desilets, LoPresti).
21. On October 31, 2008 Ms. Fillingame invited Parents via email to meet with Bedford's Team to discuss the §504 plan developed for Student (PE-11; SE-14). On November 3, 2008, Parents confirmed their availability (SE-14).
22. Parent and the Bedford Team met on November 13, 2008 to discuss the §504 plan (PE-11).
23. During the Team meeting in November 2008, it was explained that many of the accommodations that appeared in Carlisle's §504 plan did not need to be included in Bedford's plan because these were best teaching practices which the members of the Blue Team used as a matter of course. Parent requested a copy of the Best Teaching Practices written policy used by the Blue Team but was later informed that the superintendent of schools had not authorized its release (PE-13; SE-16). Following numerous requests, the policy was received by Parents as part of Bedford' Hearing Exhibit book, on May 1, 2009 (PE- 13; testimony of Parent, Coletta).
24. The John Glenn Middle School, Blue Team Best Teaching Practices for the 2008-2009 school year included the following:
  - Prompt and cue to redirect as needed.
  - Clarify Directions as needed.
  - Visuals provided as needed.
  - Use of familiar graphic organizers for writing assignments as needed.
  - Untimed testing at teacher discretion. Use of highlighters and Post-its.
  - Link new information with prior knowledge.
  - Summation of multi-step directions.
  - Use of study guides when appropriate.

Allow students to repeat directions or ask clarifying questions on directions.

Positive, specific verbal praise and feedback.

Use of editing checklist.

Data driven instruction.

Encouragement to slow down and review work.

Teacher check-ins to assure understanding.

Team color-coded binder system used for organizational instruction.

Direct instruction on organization of binders.

Agenda for the day (including homework) is posted on the board daily.

Instruction given on basic study skill strategies:

Examples: Chunking information, mnemonic devices.

Frequent review of material (PE-3).

25. On November 21, 2008, Ms. Fillingame emailed Parent notifying him that Bedford would forward another copy of the §504 plan as well as the Parents' Rights brochure (PE-12; SE-15). She further clarified that Student had been using the Mavis Beacon typing program during second period, on day six, of a six day cycle since November 19, 2008. The program was monitored by Joan Collins and offered at the library computer lab. She also provided a website where Parents could obtain additional information regarding the Alpha Smart (PE-12; SE-15).

26. Ms. Fillingame forwarded to Parents Bedford's § 504 plan as well as a copy of the Notice of Parent and Student's rights on November 24, 2008 (SE-1). This plan offered classroom and test taking accommodations to assist Student to access the curriculum as follows:

Classroom Accommodations:

Allow extra time on assessments completed in the classroom, including tests and quizzes, as needed.

Allow use of a word processor or Alpha Smart to write, edit, and revise written work for assignments over one page in length.

Cueing and redirection will be used to help [Student] remain on task. (Student's classroom teachers were responsible for implementation of these accommodations.)

Test Accommodations:

Use of a word processor or Alpha Smart.

Use of graphic organizer/outlines.

Extended time.

Small group, as needed (SE-1).

27. Bedford's teachers testified that they offer Student preferential seating, teacher check-ins to ensure that Student is on task and understands the directions imparted by the teacher, provision of additional time to complete work, and redirection (by placing a hand on Student's desk.) Ms. Coletta testified that she had discussed the technique of placing the palm of her hand on Student's desk to offer redirection and that Student preferred this technique. According to the Bedford teachers, Student does not require a great deal of cueing or redirection to stay on task in the classroom. During class time, Student also has access to a computer and/or an Alpha Smart (testimony of Coletta, Mallot, Desilets, LoPresti). According to Student's teachers, he does well in class, participates and contributes to the discussions, appears to understand the curriculum and has not showed any signs of emotional distress. The Bedford teachers testified that they implemented the accommodations in Bedford's §504 plan (testimony of Coletta, Mallot, Desilets, LoPresti).
28. All of the teachers testified that they post homework on the board and provide students reminders to write the homework in their agendas; that they provide a handout with the homework listed; and that some of them also post the homework on-line (testimony of Coletta, Desilets, Mallot, LoPresti).
29. Bedford has also developed a District Curriculum Accommodation Plan which was in draft form in October 2008. Ms. Coletta offered to review this plan orally with Parent in October 2008, but Parent instead preferred to be provided the plan in its written form (testimony of Coletta). The written District Curriculum Accommodation Plan was unavailable until December 2008, although it is dated October 1, 2008 (SE-2; testimony of Fillingame). According to Ms. Fillingame, this document was forwarded to Parents on December 9, 2008 (testimony of Fillingame). Before any consideration is given to a referral for Special Education, Bedford encourages exploration of the programs and services outlined in the District Curriculum Accommodation Plan which were designed to meet the diverse learning needs of the student population (SE-2).
30. Bedford's District Curriculum Accommodation Plan offers teachers and staff a wide variety of training opportunities and professional development. Bedford is a member of the Harvard University Teachers as Scholars Program as well as the EDCO and the CASE Collaboratives which also offer a variety of special education and regular education programs (SE-2).
31. Student met with Ms. Fillingame one time per six day cycle in the Study Skills Center. This is a general education program available to any regular or special education student who requires assistance with study skills. During their meetings, M. Fillingame helps Student with organizational issues, long term planning, agenda usage, and homework completion, and she provides general study skills (SE-12; SE-15; testimony of Fillingame).

32. Ms. Coletta testified that during Enrichment block, Student worked with her on the Mavis Beacon Typing program, which is offered as part of the general education curriculum (testimony of Coletta).

33. Student's grades for the first three quarters of sixth grades were as follow:

<b>SUBJECT</b>	<b>Quarter 1</b>	<b>Quarter 2</b>	<b>Quarter 3</b>
English	73	80	84
S.O.S.	83	83	77
Social Studies	78	81	81
Math	79	76	70
Science	92	84	89
Spanish	97	97	91

Daily homework, homework corrections and class participation will play a key role in success for the fourth quarter.

Art	100	97	93
Music	96	98	100
Band	90	86	86
PE	88	69	89
Life Skills	93	79	82

(PE-4;SE-5).

34. The interim progress reports for the first three quarters of the 2008-2009 school-year reflected that Student had improved in work habits and overall was doing well. The math progress report reflected that Student's performance was inconsistent; he received a low grade on one quiz. Homework assignments had been an issue at the beginning of the year but were no longer identified as a problem (PE-5).

35. As part of the District Curriculum Accommodation Plan, after school homework club is offered in Bedford (SE-2). Despite the teachers recommendation that Student participate to assist him with homework completion, Student only attended once or twice during the 2008-2009 school year (testimony of LoPresti). Parent testified that Student has never availed himself of this option/accommodation.

36. Parent testified that Student takes several hours to complete his homework at home (testimony of Parent). Student's teachers testified that a student was not expected to spend more than a half hour per subject of homework per night and, that if it took them longer than that to complete, Parents could sign off letting the teacher know that Student had worked for the expected amount of time but had been unable to complete his homework (testimony of Mallot, LoPresti, Parent).

37. Neither Dr. Pliner nor Parents observed Student in Bedford during the 2008-2009 school year (testimony of Parent, Dr. Pliner). Dr. Pliner did not speak to any of Student's teachers in Bedford. Throughout the year, Parents have had access to all of Student's teachers in person or via email to discuss any concerns.

38. Bedford is a recipient of federal money for purposes of §504.

### **CONCLUSIONS OF LAW:**

The Parties do not dispute that Student is an individual with a disability falling within the purview of Section 504 of the Rehabilitation Act of 1973 (§504). He is a disabled individual who is otherwise qualified to participate in school activities and the school receives federal financial assistance. *Hampden-Wilbraham Regional School District* 14 MSER 115 (Putney-Yaceshyn, 5/15/2008) citing, *A.S. and W.S. Trumbull Board of Education*, 414 F.Supp. 2d. 152 (D.C. Conn. 2006)<sup>5</sup>. As such, Student is entitled to accommodations that allow him to access the curriculum. The dispute between the Parties is centered on whether the §504 plan developed by Bedford fails to offer Student a FAPE and should incorporate the accommodations contained in Carlisle's §504 plan. Parents also allege procedural violations on Bedford's part regarding notice of the §504 meeting, parental participation in the development of the §504 plan and "stay-put" rights. Bedford denies any allegation that it has denied Student participation in or otherwise denied him the benefit of any school activity, or that it has discriminated against Student in any way. In rendering my decision, I rely on the facts recited in the Facts section of this decision and incorporate them by reference to avoid restating them except where necessary.

Generally, §504 entitles students to accommodations that allow them equal access to the general education curriculum to the same extent as non-disabled peers. Equal access in the context of this case constitutes an appropriate education for Student. §504 is designed to "combat discrimination" by "safeguarding equal access to school programs" in contrast with "the IDEA which focuses on the content of a student's educational program." *Hampden-Wilbraham Regional School District* 14 MSER 115, at 123. Pursuant to 34 CFR 104.33(b), appropriate education is defined as

The provision of regular or special education and related aids and services designed to meet the student's individual needs as adequately as the needs of a non-disabled person's are met....

Section 34 CFR 104.33(b) requires Bedford to provide Student with appropriate individualized accommodations that permit Student to access the general education

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<sup>5</sup> (Citing *Gabel ex rel. L.G. v. Board of Educ. of Hyde Park Central School Dist.*, 368 F. Supp. 2d 313, 334 (S.D.N.Y. 2005) (citing *D'Amico v. City of New York*, 132 F.3d 145 (2d Cir. 1998)).

curriculum to the same extent as his non-disabled peers. See also 29 U.S.C. 794. As explained by the Hearing Officer in *In Re: Sharon Public Schools*, 4 MSER 133 (9/2/1998), the accommodations must be designed to “level the playing field” so as to allow Student access to his education:

The federal statute, commonly known as Section 504 of the Rehabilitation Act of 1973, or simply Section 504, is an anti-discrimination statute. In the school context it functions to “level the playing field” so that students with and without disabilities have roughly equivalent access to educational programming. [Emphasis supplied.] Through a section 504 plan students with disabilities are provided modifications to the regular education environment that are designed to make the regular course work more accessible to them. These modifications may be as straightforward as the use of an elevator key for a mobility impaired student to prevent tardiness to class; they may be as elastic as an individualized disciplinary program for a behavior-impaired student.

In the context of §504, FAPE means that a student must receive regular or special education and related aids and services which meet the needs of students with disabilities *as adequately as the needs of students without disabilities are met.* (Emphasis supplied). In assuring students a FAPE pursuant to §504, the individual needs of the child are to be considered and districts cannot implement a “one size fits all” approach. *Boston (MA) Public Schools, Office for Civil Rights, Eastern Division, Boston* (Massachusetts), 01-06-1213, 49 IDELR 48, 36 NDLR 52, 107 LRP 59940 (January 29, 2007).

The language in §504 provides little guidance regarding the specific meaning of FAPE. This term seems to have been borrowed from the Individuals with Disabilities Education Act (IDEA), but while IDEA establishes affirmative duties regarding eligible students, §504 establishes negative prohibitions against discrimination of eligible students using the average non-disabled student as the basis for comparison. See *W.B. Matula*, 67 F. 3d 484, 492-93 (3<sup>rd</sup> Cir. 1995). All aspects of a §504 eligible student’s plan must be implemented to assist the student to maintain progress in school.<sup>6</sup> Similarly, as the plan must be individualized, appropriate steps must be taken to ascertain what services are required to allow the student to access the curriculum as adequately as his non-disabled counterparts. In this sense, far from requiring that accommodations serve to assist Student to perform to his highest potential, as an equal opportunity statute, §504 requires accessibility and uses the general population as a basis for comparison. Therefore the inquiry must be conducted by comparing Student to the *average* sixth grader.<sup>7</sup>

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<sup>6</sup> See *Great Falls (MT) Public School District, Office for Civil Rights, Western Division, Seattle* (Montana), 10-06-1058, 48 IDELR 200, 107 LRP 41411 (November 28, 2006).

<sup>7</sup> See *In Re: Hopkinton Public Schools*, 11 MSER 127, 136 (Crane, 2005).

It is in the light of the analysis *supra* that I evaluate each of Parents' contentions.

**I Did Bedford follow the requirements of §504?**

- A. Whether Bedford was responsible to implement Carlisle Public Schools' (Carlisle) §504 plan for Student until Bedford Public Schools had developed a §504 plan that was consistent with and in accord with Carlisle Public Schools' §504 plan?

Parents argue that Student's "federally granted rights to have his disabilities accommodated" travelled with him when he moved from one school district to another. In their closing argument, Parents state that they "do not ask that the exact §504 [plan] attaches" but that the right to accommodations for the identified disabilities remain intact and that these be addressed by the new school system. Bedford concedes that Student is eligible to receive accommodations under §504. Importing the "Stay Put" provision of the IDEA, Parents further argue that Bedford was responsible to implement Carlisle's §504 plan when Student entered Bedford until Bedford developed its own §504 plan, and the new plan was accepted by Parents. Parents further argue that in not implementing Carlisle's plan, Bedford violated Student's rights. Bedford takes issue with Parents position asserting that there are no Stay-Put rights under §504 and stating further that Bedford implemented Carlisle's plan until its team met in October 2008.

In invoking Stay-Put rights, Parents point to nothing in the §504 statute or regulations that confers upon Student a Stay-Put or analogous right. Bedford responds that "§504 does not contemplate a traditional IDEA like Stay-Put right because the determination for accommodations is both individual and location specific." To illustrate this position, Bedford explained that if in school district A the §504 plan of a student who presents with a noise sensitivity disability required that tennis balls be placed on his chair to stop the noise from the chair on a tile floor, and the student moved to school district B where all of the floors were carpeted, the tennis balls would be unnecessary and therefore, district B would not be required to include the tennis ball accommodation. According to Bedford, under a Stay-Put theory, an unnecessary accommodation would have to be included in district B's plan simply because it was part of district A's plan.

Bedford takes the position that there is no right to Stay-Put under §504. I agree. Contrary to the IDEA which explicitly establishes Stay-Put rights, there is nothing in §504 that confers Stay-Put rights upon a student. In fact, this is one of the distinguishing factors between the two statutes. As such, there is no basis for Parents' contention that Student is entitled to any Stay-Put rights under the Carlisle §504 plan.

Notwithstanding the inapplicability of Stay-Put to §504 claims, the evidence shows that Bedford implemented all relevant accommodations consistent with those

delineated under Carlisle's plan (testimony of Coletta, Fillingame, LoPresti, Mallot, Desilets; Fact # 15, 19).

**B. Whether Bedford followed the requirements of §504 when it developed Student's §504 plan?**

Parents assert that Bedford violated Student's procedural rights in failing to invite them when teachers first met to discuss Student's needs for accommodations; and that they were not provided with a copy of the District Wide Accommodations Plan or the Blue Team's Best Practices guidelines. Similarly, Parents state that they were not provided with the plan in writing.

Bedford denies Parents' allegations of procedural misconduct and states that it complied with all procedural requirements under §504. It argues that it was not required to include Parents when the team first met in October 2008. Bedford states that at that meeting, it drew upon information from a variety of sources, such as teacher reports, evaluation and achievement testing results presented by Ms. Fillingame who understood the testing information, and took into account parental concerns. Bedford states that the decisions regarding Student's accommodations were made by a group of people knowledgeable about Student, the evaluations and the process consistent with the §504 regulations. Bedford also states that it provided Parent a notice and a copy of the procedural safeguards consistent with 34 C.F.R. §104.36 addressing the internal grievance process.<sup>8</sup>

Student's entitlement to §504 is not an issue. Once a student is identified as having a disability, he remains eligible until a school district conducts a re-evaluation of said student in accordance with 34 C.F.R. 104.35. The regulations further call for periodic re-evaluations to be conducted no more than once per year or less than once every three years. The regulations contain no specific provision addressing review and duration of a §504 plan. Borrowing from the IDEA, a yearly review may be advisable. An annual review would offer the team an opportunity to consider a student's ability to access the curriculum from year to year in order to ascertain whether s/he may need different, additional, or no accommodations to access the curriculum.

Furthermore, §504 requires that an evaluation be conducted before an eligible student's placement is changed. One can surmise from Parents' position that Parents believe that a change in placement occurred when Bedford excluded most of the

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<sup>8</sup> "A recipient that operates a public elementary or secondary education program or activity shall establish and implement with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need, or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure."

accommodations delineated in Carlisle's plan. However, while some of Carlisle's accommodations do not appear in Bedford's plan, examination of the accommodations that were excluded show that their exclusion does not per se result in a change in placement.

The question here is what Bedford's responsibility is regarding an eligible student. Guidance regarding a school district's responsibility toward a transferring student may be found at question #38 of the *Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, Protecting Students With Disabilities publication published by the U.S. Department of Education, 3/27/2009

If a student with a disability transfers to a district from another school district with a Section 504 plan, the receiving district should review the plan and supporting documentation. If a group of persons at the receiving school district, including persons knowledgeable about the meaning of the evaluation data and knowledgeable about the placement options determines that the plan is appropriate, the district is required to implement the plan. If the district determines that the plan is inappropriate, the district is to evaluate the student consistent with the Section 504 procedures at 34 C.F.R. 104.35 and determine which educational program is appropriate for the student. There is no section 504 bar to the receiving school district honoring the previous [plan] during the interim period.

Regarding Parents' first allegation that Bedford improperly excluded them from the October meeting when Bedford's team first met to discuss Student's §504 plan, this allegation is without foundation as the §504 regulations do not require parents presence during a §504 meeting. Rather, the regulations require that people knowledgeable about the student be present. While it is true that Parents were not present during the October 30, 2008 meeting, their concerns and input (shared with Ms. Fillingame and Ms. Coletta at the beginning of the school year), were communicated to the team. Bedford is correct that nothing in §504 specifically requires that a parent be present during the meeting to determine placement, although in general, parents are individuals knowledgeable about their children and it would be best practice to include them. Parents' exclusion during the October meeting, however, does not result in a violation of parental rights as Parents claim.

Bedford states that upon receiving Carlisle's plan, its staff implemented said plan until Bedford's team had an opportunity to meet. The language at 34 C.F.R. 104.35 as explained *supra*, places no bar to a district implementing another district's plan when a student moves into its district. This is consistent with Bedford's actions and nothing barred Bedford from implementing Carlisle's accommodations. Next, the evidence shows that approximately two months into Student's first semester in Bedford, the Blue Team met to review the §504 plan promulgated by Carlisle, and assess Student's needs. They also discussed the results of the evaluations available to

Bedford at the time, including Dr. Pliner's, and the teachers' assessment and information regarding Student's functioning up to that point regarding his ability to access the sixth grade curriculum. The Blue Team teachers also took into account Bedford's District Wide Accommodations Plan, Student's performance, the Best Practices implemented by Bedford's teachers and Parents' concerns. The participants understood the information presented by Ms. Fillingame and agreed with the reports of the evaluations and the teachers' own assessments (testimony of Fillingame, Coletta, Desilets, LoPresti, Mallott). The evidence further shows that Ms. Mallot and Mr. LoPresti have a background in special education and Mr. Desilets has been a teacher for over 30 years. Therefore, consistent with the regulations, those present at the meeting in October were knowledgeable in accordance with §504 regulations.

Parents take issue with the weight given to, interpretation of, and understanding that Bedford's team had of Dr. Pliner's evaluation. Under §504, the results of an outside independent evaluation is only one of the sources from which a team derives information about a student. Information derived from outside independent evaluations in and of themselves cannot be used as the *sole* source of information regarding a particular student. The multi-disciplinary team must consider all significant factors related to the student and his learning process by drawing from a variety of sources, including the teachers and service providers' own experience and observations of Student.<sup>9</sup> The ultimate determination of what a student needs is to be made by the team.<sup>10</sup>

The plan developed by the Blue Team in late October was discussed with Parents on November 13, 2008 at which time Parents were also provided with a copy of the procedural safeguards entitled *Notice of Parent and Student Rights Under Section 504, The Rehabilitation Act of 1973* (SE-1; SE-14; SE-15). Bedford forwarded a copy of the new §504 plan and another copy of the procedural safeguards on November 24, 2008 (SE-1). The new §504 plan contained significantly fewer accommodations than the plan developed by Carlisle.

Parents also argued that Bedford's personnel did not understand Student's learning profile and educational needs. While Parent is correct that no one on the team possessed the same depth of knowledge regarding Student's specific disability as Dr. Pliner, the teachers had had an opportunity to work with, observe and assess Student's performance in the classroom for two months. Bedford teachers testified that they understood the presentation of the neuropsychological evaluation and did not have any questions. These teachers had previous experience (some of them extensive experience) reading evaluations and/or discussing them in the context of § 504 or IEP meetings. Ms. Fillingame testified that if she or anyone in the team had questions,

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<sup>9</sup> See, question # 26 of the *Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, Protecting Students With Disabilities publication published by the U.S. Department of Education, 3/27/2009.

<sup>10</sup> *Id.* at question # 28.

there was qualified personnel in Bedford with whom she could have discussed the concerns. Even though there was no statistician or neuropsychologist present at the meeting, Ms. Pliner's thorough evaluation and recommendations were well written, and easy to follow and understand. Nothing in the §504 regulations requires the level of expertise contemplated by Parents in their use of the term "knowledgeable".

Additionally, Parents take issue with the fact that Bedford did not provide them with written notice that Student's §504 plan would be reviewed in November 2008. According to Parents, Bedford treated the November meeting as an initial eligibility determination. Parents argued that letting Father know at the November 2008 meeting that the team was reconsidering the accommodations listed by Carlisle constitutes insufficient notice. §504 regulations contain no requirement regarding notice once a student's eligibility has been assessed, except where consent for evaluations is sought. Student's eligibility had been assessed by Carlisle and Bedford never disputed Student's eligibility. Therefore, the notice requirement alleged by Parents is not applicable. Under 34 C.F.R. 104.32(b)<sup>11</sup>, Bedford is required to keep Parents apprised of its responsibilities towards Student, which it did in November 2008 when it invited Parents to the meeting to present the §504 plan and then provided Parents with its §504 plan and the procedural safeguards (SE-1).

Parents also state that during the beginning of the 2008-2009 school year, they were working from the Carlisle plan, which called for a quarterly meeting to review Student's progress. This was the reason why Parents inquired about a meeting with Bedford teachers in October 2008. As explained earlier, there is no "Stay-Put" provision contained in §504, and although Bedford was implementing the accommodations contained in Carlisle's plan for Student, Bedford was not obligated to convene a meeting pursuant to Carlisle's plan. Nevertheless, when Parents requested the meeting, Bedford acquiesced, and convened a meeting with Parents a few weeks later.

Regarding Parents' claim that they were not provided with a copy of the District Wide Accommodations Plan or the Blue Team's Best Practices guidelines in a timely manner, preventing them from ascertaining which accommodations were being implemented by the Blue Team for all students, the evidence supports Parents' claim. Since many of the accommodations in Carlisle's plan were "good teaching practices", they did not need to be included in a §504 plan but Parents had a right to know which ones were being implemented. Bedford did not provide either the District Wide Accommodations Plan or the Blue Team's Best Practices guidelines until months after Parents' initial request. Bedford responds by stating that nothing in the §504 regulations require that an accommodation plan be in writing. 34 CFR 104.31 *et al.* While Bedford is correct that no provision can be found in §504 specifically requiring

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<sup>11</sup> "take appropriate steps to notify handicapped persons and their parents or guardian's of the recipient's duty under this subpart."

that the accommodations be in writing, logic dictates that reducing accommodations to written form is best practice, and offers those responsible to implement the accommodations a guideline that informs them what a student needs and what they are responsible to provide. An example would be a substitute teacher who may not otherwise know what accommodations to implement for a particular student. A written document is the best way to ensure that the plan is implemented uniformly by all those responsible to implement the accommodations.

Parents also argued that they were not provided with the §504 plan in writing. This assertion however, is inconsistent with the evidence as Bedford forwarded its §504 plan and the Notice of Parent and Student Rights to Parents on November 24, 2008 (SE-1).

## **II Did Bedford provide Student with a FAPE in light of Student's disabilities?**

Student has been described as an enthusiastic, intelligent, polite, cooperative, and engaged individual (PE-5; SE-6). He enjoys talking, socializing and working with peers (PE-6). As a result of his disability, he is distractible and his work is inconsistent (PE-5; SE-6). Student's written production speed is slow and at times he has difficulty making inferences and summarizing effectively although he does enjoy reading and is able to make good connections and observations regarding the material (PE-6; SE-8). In school, Student seems interested in most topics, participates often and possesses a fund of knowledge which adds to classroom discussions (PE-6; SE-8; testimony of Coletta).

The evidence shows that most of Student's difficulties during the 2008-2009 schoolyear involved incomplete homework, or homework that Student failed to turn in (PE-9; SE-11). According to Father, Student spent too much time at home trying to complete homework (Id.). Father attributed the length of time spent on homework, and related difficulties, to Student's issues with organization and attention which stem from Student's ADHD and executive functioning issues. Father seeks to have the Carlisle accommodations (which were excluded from Bedford's plan) re-instated (testimony of Parent). Parent asserts that exclusion of the Carlisle's accommodations resulted in a denial of FAPE to Student.

As explained in the first part of the Conclusions section of this decision, in the context of §504, in order for Student to receive a FAPE he is entitled to receive regular or special education and related aids and services which meet the needs of students with disabilities as adequately as the needs of students without disabilities are met. In assuring him a FAPE pursuant to §504, Student's individual needs must be considered. Bedford is prohibited from discriminating against Student and must provide him with reasonable accommodations that he requires, and all aspects of his

§504 plan must be implemented to assist him to maintain progress in school,<sup>12</sup> using the average non-disabled student as the basis for comparison. See *W.B. Matula*, 67 F. 3d 484, 492-93 (3<sup>rd</sup> Cir. 1995). Since the plan must be individualized, appropriate steps must be taken to ascertain what services are required to allow him to access the curriculum as adequately as his non-disabled peers, that is, the *average* sixth grader.<sup>13</sup> (Emphasis supplied).

Ms. Fillingame testified that Bedford's teachers were acquainted with Carlisle's accommodation plan and stated that Carlisle's plan was used as guidance between September and October 2008. She, as well as other Bedford teachers, opined that many of the accommodations in Carlisle's plan were simply best teaching practices that all teachers in Bedford implement daily (testimony of Fillingame). Ms. Fillingame explained that this is one of the reasons why the §504 plan developed by Bedford's Blue Team in October 2008 and discussed with Parent on November 13, 2008, listed fewer accommodations than the one developed by Carlisle. Nevertheless, Bedford's personnel was unequivocal that Bedford's plan offered Student access to the curriculum consistent with the mandates under §504. By teacher report, Student's overall performance with implementation of his §504 accommodations improved during the second semester of sixth grade.

The evidence shows that Bedford's District Wide Accommodation Plan<sup>14</sup> and the Best Practices used by the Blue Team<sup>15</sup> contained many of the accommodations listed in Carlisle's plan (SE-2; SE-4). The District Curriculum Accommodation Plan implemented in Bedford, is designed to offer resources, structures and services which meet the diverse learning needs of students at the John Glenn Middle School. Bedford's teachers routinely use multiple strategies to address the academic, instructional, behavioral, social and emotional needs of all students. They also use wait time and remind students to think before answering, and also use metacognitive strategies which promote thinking about the thinking process (SE-2).

Bedford asserts that in order for Student to receive a FAPE, its §504 plan must allow Student to access the general education curriculum to the same extent as non-disabled students and therefore, it is not obligated to include in the §504 plan accommodations that the district already offers as part of its District Curriculum Accommodation Plan, available to all students, disabled and non-disabled alike (SE-2).

Parent points out that the problem with Bedford's argument is that the District Curriculum Accommodation Plan was under development at the time Bedford claimed to be relying on it, and its written form was not forwarded to Parent upon

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<sup>12</sup> See *Great Falls (MT) Public School District, Office for Civil Rights, Western Division, Seattle* (Montana), 10-06-1058, 48 IDELR 200, 107 LRP 41411 (November 28, 2006).

<sup>13</sup> See *In Re: Hopkinton Public Schools*, 11 MSER 127, 136 (Crane, 2005).

<sup>14</sup> This document specifically contains Carlisle's accommodations number 6, 17, 18, 19, 20, 26 and 29.

<sup>15</sup> Accommodations number 8, 9, 11, 13, 14, 15, 21, 22, 23, 24, 25 listed in Carlisle's §504 plan are part of the Best Practices used by the Blue Team in Bedford.

request. Rather, several months lapsed before Parent was provided a copy of the document (testimony of Parent). Parent argues that said plan was being developed during the 2008-2009 school year and that it has not yet been adopted by Bedford. Parents' position however, was not supported by the testimony of Bedford's teachers who were unanimous in the implementation of the strategies and approaches delineated in the District Curriculum Accommodation Plan (SE-2) and the Blue Team's Best Practices (SE-4) even if these had not been reduced to writing (Coletta, Deselets, LoPresti, Mallott). The aforementioned Plan and Practices provided many of the accommodations the Carlisle §504 plan delineated. These include that: teachers be "sensitive"(in Bedford all teachers are expected to be sensitive to the learning and developmental needs of all students); and teachers have access to school psychologists in their home school and throughout the district (testimony of Fillingame, Mallott, LoPresti, Desilets; Coletta). I note that Bedford's teachers presented as skillful teachers committed to the individual needs of the students they served, including Student. It is clear that they communicated with each other and that effective techniques, such as placing a hand on Student's desk to draw his attention back to task, were implemented across the board. It is also noteworthy that this re-direction approach was initiated after Ms. Coletta had a discussion with Student as to what would work best for him while attempting to be discrete. As such, I found Ms. Mallott, Mr. LoPresti, Mr. Desilets and Ms. Coletta to be credible witnesses and persuasive that individually and as a group, they implement the Best Practices developed by the Blue Team to service Student.

Dr. Pliner testified that while the District Curriculum Accommodation Plan and the Best Practices contained a great deal of "excellent teaching practices", if those practices were not individualized so that they are delivered with regularity and frequency, they would not be sufficient for Student. While Dr. Pliner was persuasive regarding the need for implementation of the teaching practices and accommodations described in Bedford's documents, Parents offered no evidence to rebut the district's assertion that they were implemented by the Blue Team's teachers. Dr. Pliner did not observe Student in Bedford, she had no knowledge as to what best practices or accommodations were being provided, she had no first hand knowledge of the teachers, and she did not know how Student was actually performing in school. The weight of the evidence shows that the best practices and accommodations, which Dr. Pliner found appropriate, were implemented regularly and consistently by Bedford teachers for Student.

Regarding Student's brief meeting with Ms. Coletta at the end of the day (to ensure that Student had his homework/agenda and materials), this was a general education accommodation available to all students. Ms. Coletta testified that while she waited for Student every afternoon, by November 2008, Student had stopped checking in with her (testimony of Fillingame and Coletta). Dr. Pliner opined that Student was not ready for such a check-in system. She explained that Student was a very bright young man with executive functioning issues (impacting his organizational skills, working memory, planning and self-monitoring) even though he carried a diagnosis

of ADHD combined (testimony of Dr. Pliner). Dr. Pliner further testified that Student must be taught planning and organization skills to address his executive function issues. At hearing, Parents however, were only looking for the Carlisle accommodations to be implemented and one of the accommodations, #16, specifically provided for the type of check-in at the end of the day, which Dr. Pliner did not support. According to Ms. Fillingame, Student's organizational issues were being addressed in her study-skills class, a class offered within the context of regular education to all students who present organizational difficulties. Student met with Ms. Fillingame and two other students for part of the school year, and individually the remainder of the school year, during the period when other students were in study-hall (testimony of Fillingame). Consistent with Dr. Pliner's recommendations, Ms. Fillingame taught Student general study skills and helped him work on long term planning for assignment completion, agenda usage, and homework completion (testimony of Fillingame).

In terms of Occupational Therapy accommodations, Bedford contends that the Carlisle OT evaluation conducted in March 2008 did not recommend an OT consultation (S-9). Review of PE-7, the Occupational Therapy Evaluation, supports Bedford's contention. In light of this and since Bedford did not find that Student's handwriting or muscle tone was an issue that required an OT accommodation in order for Student to access the curriculum, an occupational therapy consultation was not recommended (testimony of Fillingame, Mallott, LoPresti, Desilets; Coletta). Similarly, none of Student's teachers opined that Student required substitution of multiple choice tests and/or oral responses in lieu of essay exams as necessary so as to enable him to access the general education curriculum, or that he needed guided questions to assist him to see what the "next steps" were (SE-6; SE-8; SE-10; testimony of Mallott, LoPresti, Desilets; Coletta).

Two other accommodations contained in the Carlisle §504 plan are found in Bedford's §504 plan, namely extra time, and use of a word processor (S-1). Bedford's teachers testified that Student accessed the accommodation related to extended time to complete homework and tests regularly (testimony of Mallott, LoPresti, Desilets, Coletta). Moreover, Bedford asserts that in contrast to *In Re: Hopkinton Public Schools*, 11 MSER 127, 136 (Crane, 7/19/2005)<sup>16</sup> (a case addressing eligibility under §504), the Bedford District Curriculum Accommodation Plan applies to all teachers in all classrooms throughout Bedford, and teachers are expected to provide these accommodations to all students district wide. In this regard, Student's teachers testified that they were implementing these accommodations in their classrooms regularly (testimony of Mallott, LoPresti, Desilets; Coletta). Bedford argued that the record contains no information regarding

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<sup>16</sup> "Rather, the inquiry must consider the nature and implications of the impairment in a broader and more general context- for example, the ability to perform "a broad range of jobs in various classes", or the ability "to learn as a whole", or to learn "generally", and the inquiry includes a comparison to most people or the average person in the general population." Citing *Sutton v. United Air lines, Inc.*, 527 U.S. 471, 491 (1999); *Toyota Motor, Mfg., KY. Inc. v. Williams*, 534 U.S. 184, 200-201 (2002); et al.

what District Curriculum Accommodations were available and implemented in Carlisle while Student attended school there.

Regarding homework, Bedford explained that it provides homework transmission via email, posting it on a website, providing students with handouts, or having students copy the homework in their agenda books. As explained earlier in this decision, in response to Parents' concern, Ms. Coletta offered to assist Student with ensuring that he knew what his homework was and brought it home by checking with him at the end of the day (testimony of Coletta, Fillingame). Bedford also offered Student participation in its after-school homework club available to all students. Bedford takes the position that Student did not take advantage of the after-school homework club and did not meet with Ms. Coletta after November 2008 at the end of the day to check his agenda, which were two accommodations offered to the general education population (testimony of Coletta). Parents dispute Bedford's arguments explaining that Student's organizational difficulties, in failing to complete or turn-in homework, are a result of his disabilities and self-esteem issues. Parents state that when Bedford teachers notified them that Student's grades were suffering as a result of missed homework, this was an indication that they did not understand Student's disabilities and therefore, did not provide appropriate accommodations. The evidence however, does not support this position. Accommodations were in place whether through regular education, special education or individual arrangement which Student chose not to access. As a sixth grader in middle school, there is a fine line between accommodating disabilities, teaching responsibility, and helping students become more independent. Bedford also explained that since Student was a transfer student in middle school, they also recognized that there was a period of adaptation, and testified that Student did better during the second semester of the 2008-2009 school year. The record shows that even without accessing some of the accommodations available to all students, by the end of the year Student obtained average and above-average grades in all of his classes (SE-5).

Ultimately, the question is whether Bedford denied Student a FAPE under §504 by not delineating all of the accommodations in Carlisle's plan in its plan, by not implementing accommodations needed by Student, and whether as a result, Student did not fully access his education or have an opportunity to progress in a manner comparable to the average sixth grader without disabilities. According to his teachers, Student comprehended the material, was an active participant in class and passed all of his courses. Student was also able to complete his assignments with the accommodations in place. The evidence is unequivocal that with the accommodations implemented by Bedford during the 2008-2008 school year, Student obtained grades of A, B and C (see Fact # 33). Clearly, he was able to fully access the curriculum and he progressed as adequately, if not better than, the average sixth grader without disabilities. The fact that Student may have worked long hours on his homework in order to complete it, was neither required by Bedford's teachers, nor is a *per se* indication that Student was denied a FAPE in the context of §504.

Also, there is no evidence that at this time Student's self-esteem has been impacted negatively as a result of the Bedford §504 plan. On the contrary, Student was described as an engaged individual who was comfortable in participating voluntarily in class (testimony of Coletta, Desilets, Mallot). Also, at this time there is insufficient evidence to support Parents' request that an occupational therapist, and a reading and writing specialist be included as part of Student's team as Parent did not demonstrate that Student has difficulties that prevent him from fully accessing the curriculum in these areas.

Parent is correct that a §504 plan cannot be limited to three, four or any specific number of accommodations. The number of accommodations in a §504 plan is dictated by the student's individual needs and what he reasonably requires in order to access the curriculum. Bedford contends that unless Student requires something greater than that which is already available to the general education population so as to "level the playing field" in accessing the general education curriculum, it does not need to be reflected in the §504 plan. This brings us to the question of whether the reduction in the number of accommodations appearing in Bedford's plan constitutes a change in placement in the context of §504. Guidance in this regard may be found in *Puyallup (WA) School District No. 3, Office for Civil Rights, Western Division, Seattle (Washington)* 46 IDELR 260, July 12, 2006 explaining that a change in placement triggers certain procedural protections under §504:

4 CFR 104.35(a) provides that an individual evaluation is required before a school district takes any action with respect to a disabled student's initial placement or any subsequent significant change in placement. A significant change in the type or amount of regular or special education or related aids or services provided to a disabled student, such as adding or eliminating a program or service, or substantially increasing or decreasing the amount of time a program or service is provided, constitutes a significant change in placement. 34 CFR 104.35(c) requires that when a school district makes a placement decision for a student with disabilities, it must adhere to Section 504 placement procedures, including drawing upon information from a variety of sources, ensuring that information obtained from all of its sources is documented and carefully considered, and having the placement decision made by a group of persons who are knowledgeable about the student, the meaning of the student's evaluation data, and placement options.

In looking at the accommodations, most of the accommodations which did not make it into Bedford's §504 plan were simply good teacher practices which were *de facto* implemented by the teachers as explained earlier. These in no manner changed the type or amount of regular, special education or related aids or service provided to Student. Similarly, they did not change Student's program. Therefore, elimination of some of Carlisle's accommodations did not rise to the level of a "change in

placement” and as such, Bedford’s obligation to re-evaluate Student was not triggered.

The evidence supports a finding that Bedford offered Student a FAPE under §504, that it implemented the accommodations required by Student under the plan, and that the accommodations implemented during the 2008-2009 school year in fact allowed him to perform above-average when compared to other sixth graders.

**ORDERS:**

1. At this time, Bedford is not responsible to provide additional accommodations to Student through a §504 plan.
2. Student is not entitled to compensatory education as Bedford has not been found to have deprived Student of a FAPE.

By the Hearing Officer,

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Rosa I. Figueroa

Dated: September 14, 2009

September 14, 2009

**COMMONWEALTH OF MASSACHUSETTS  
BUREAU OF SPECIAL EDUCATION APPEALS**

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**BEDFORD PUBLIC SCHOOLS**

**BSEA # 09-5853**

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**BEFORE**

**ROSA I. FIGUEROA  
HEARING OFFICER**

**GEORGE MULGREW, ESQ., ATTORNEY FOR PARENTS  
COLBY BRUNT, ESQ., ATTORNEY FOR BEDFORD  
PUBLIC SCHOOLS**