

**COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
BUREAU OF SPECIAL EDUCATION APPEALS**

In re: Adam¹

BSEA #1708888

CORRECTED DECISION

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

A hearing was held on May 15, 16, 17, and 18, 2018 before Hearing Officer Amy Reichbach. Those present for all or part of the proceedings were:

Student	
Student's Mother	
David Anderson	Major, Director of Taunton High School Junior ROTC
Paul Bochman	Guidance Counselor, Taunton High School (THS)
Daniel Fagan	Out-of-District Coordinator, Taunton Public Schools (TPS)
Melissa Grimes	Special Education Teacher, THS
Kristen Keenan	Associate Headmaster, ² THS
Eric LeFaivre	Assistant Headmaster, ³ THS
Stephanie Littlefield	Social Worker, Taunton High School
Matthew Mattos	Headmaster, THS
Amy Moynihan	Special Education Coordinator, Grades 7-12, TPS
Judith Mulrooney	Director of Special Education, TPS
Peter Parcellin	Assistant Headmaster, THS
Andrea Shepard	Special Education Teacher, THS
Denise Taylor	Juvenile Probation Officer, Bristol County
Brian Trendell	Adolescent Social Worker, Massachusetts Department of Children and Families
Marguerite Mitchell, Esq.	Attorney for TPS
Anne Bohan	Court Reporter

¹“Adam” is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

²At the time of many of the events addressed in this hearing, Kristen Keenan was employed in the position Eric LeFaivre now holds. This position, which was referred to then as “Associate Headmaster,” is now known as “Assistant Headmaster.” Ms. Keenan currently holds the title “Associate Headmaster,” in a position that was then referred to as “Assistant Headmaster.” (Keenan, III: 273-76)

³At the time of the expedited hearing, and many of the events addressed in this hearing, Mr. LeFaivre’s title was “Associate Headmaster.” Although his title has changed, his position has not. (LeFaivre, III: 7-8)

Jane Williamson
Jocelyn Simpson

Court Reporter
Intern, BSEA

The official record of the hearing consists of documents submitted by the Parent and marked as Exhibits P-1(old) to P-19(old);⁴ P-1 to P-26⁵ and P-28 to P-36; documents submitted by the Taunton Public Schools and marked as Exhibits S-1 to S-49 and S-51 to S-74;⁶ a three volume transcript produced by a court reporter in May 2017 following approximately three days of testimony and oral argument; and a four volume transcript produced by a court reporter in May 2018 following approximately three and a half days of testimony and oral argument. As agreed to by the parties the record was held open until June 22, 2018 for submission of closing arguments. Closing arguments were received and the record closed on that date.

INTRODUCTION

Parent⁷ filed a Hearing Request against Taunton Public Schools (“Taunton” or “District”) on April 19, 2017 raising several claims. One claim involved school discipline and was resolved by way of an expedited hearing that took place in May 2017. This decision addresses the remaining claims.

For the reasons below, I conclude that Taunton’s failure to conduct manifestation determination reviews in connection with multiple suspensions of Adam beyond ten (10) days during the 2014-2015 school year and again during the 2015-2016 school year constitutes both a deprivation of a free appropriate public education under the Individuals with Disabilities Education Act and a violation Section 504 of the Rehabilitation Act of 1973.

PROCEDURAL HISTORY

By Order dated May 1, 2017, the undersigned Hearing Officer clarified that the expedited hearing would address only Parent’s claims that required expedited status: specifically, her claim that Taunton had failed for over a year to convene a manifestation determination review (MDR) following an incident involving her son Adam on or about March 10, 2016, leading him to receive out-of-school tutoring from March 2016 to the date of the hearing. A decision as to Parent’s claims that Taunton High School (THS) failed to offer, implement, or make available

⁴ Exhibits P-1 (old) to P-19 (old), along with exhibits S-1 to S-25, were initially admitted in connection with the expedited hearing that took place in May 2017.

⁵ Exhibit P-5 was admitted for information contained in the document, but not for consideration as a proposed Individualized Education Program (IEP). Exhibit P-6 was admitted, without two pages that had been attached accidentally. Exhibits P-7 and P-8 were admitted with corrections as agreed to and noted in the record.

⁶ Exhibits S-53, S-54, S-55, S-57, S-60, and S-61 were admitted with the following limitations: all information regarding or referring to events prior to September 2014 were redacted; information regarding the period from September 2014 to September 2017 is only admitted to the extent the District can establish it was aware of such information and/or for the limited purpose of rebutting specific witness testimony.

⁷ Where documents were submitted on behalf of, and signed by, both Parent and Adam’s grandmother, his former co-guardian, this Decision refers to them as “Parent.” Both the original *Hearing Request* and the *Amended Hearing Request* were filed by Adam’s Parent and his former co-guardian.

the accommodations necessary for Adam to make effective progress, per his Individualized Education Program (IEP), and instead engaged in a practice of excluding him from school through suspensions, was expressly reserved for a later proceeding.

On May 18, 2017, I issued a decision [“2017 Decision”] holding that Parent had met her burden to prove that Taunton had failed to convene a timely MDR for Adam, and that as a result of the District’s procedural error, Adam had been deprived of FAPE. I found that he was entitled to return to his last accepted placement, a full inclusion program at THS, immediately, and was entitled to compensatory services for the months during which he received home tutoring rather than the program and services to which his IEP entitled him. I also ordered Taunton to conduct a Functional Behavioral Assessment and develop a Behavior Intervention Plan as soon as practicable following Adam’s return to school; recommended that Taunton secure training for its staff with respect to discipline of students with disabilities; and referred the matter to the Massachusetts Department of Elementary and Secondary Education for follow-up as appropriate.⁸

After several Pre-Hearing Conferences to discuss the District’s compliance with the Order associated with my 2017 Decision, as modified July 20, 2017, and clarify the issues remaining for hearing, on October 2, 2017 I issued an Order delineating the issues that remained for the hearing, which was scheduled to begin December 19, 2017. On September 26, 2017, with the permission of the undersigned Hearing Officer and in an attempt to further elucidate her allegations, Parent filed an *Amended Request for Hearing*. On October 6, 2017 Taunton filed its *Response to Parent’s Amended Hearing Request*, which included a *Motion to Dismiss, or in the Alternative, Dismiss Certain Claims as Beyond the Statute of Limitations* [*Motion*]. At a Pre-Hearing Conference on November 2, 2017, the parties argued the *Motion*. On December 5, 2017 I issued an Order [December Order] allowing the District’s *Motion* as to FAPE allegations presented for the first time in Parent’s *Amended Hearing Request* that arose prior to September 26, 2015 and as to FAPE allegations presented in the original *Hearing Request* that arose prior to April 19, 2015, but denying the *Motion* as to the remainder of Parent’s *Amended Hearing Request*. Specifically, I concluded that the issues remaining for hearing were as follows:

- A. Whether Taunton discriminated against [Adam] in violation of § 504 of the Rehabilitation Act of 1973, through
 1. a pattern of suspensions without manifestation determination meetings between April 19, 2015 and April 19, 2017, inclusive of beginning and end dates;
 2. changes in [Adam]’s classes (removal from Junior ROTC, change from general education computer course to special education course), without parental consent between September 26, 2015 and September 26, 2017, inclusive of beginning and end dates;⁹
 3. involvement of other systems (i.e. the Department of Children and Families; the

⁸ By way of the May 18, 2017 decision [2017 Decision], I established certain timelines for Taunton to conduct three-year reevaluations of Adam and present a compensatory services plan. These timelines were extended several times by agreement and/or the request of the District due to the unavailability of the Student and/or his family. Ultimately, by way of an Order dated October 2, 2017, I concluded that Taunton had complied with the Order associated with my 2017 Decision, as modified July 20, 2017.

- courts/police (filing charges, No Trespass Order)) between September 26, 2014 and September 26, 2017, inclusive of beginning and end dates;
4. comments made by staff members between September 26, 2014 and September 26, 2017, inclusive of beginning and end dates; and/or
 5. punishments disproportionately severe for offenses between September 26, 2014 and September 26, 2017, inclusive of beginning and end dates

- B. Whether Taunton violated the Individuals with Disabilities Education Act, by
1. failing to implement accepted, expired Individualized Education Programs through
 - a. failure to conduct manifestation determination meetings when required between April 19, 2015 and April 19, 2017, inclusive of beginning and end dates;
 - b. alteration of IEPs without the consent of his parent/guardian (i.e. Junior ROTC, computer classes) between September 26, 2015 and September 26, 2017, inclusive of beginning and end dates; and/or
 - c. failure to provide required accommodations between April 19, 2015 and April 19, 2017, inclusive of beginning and end dates; and/or
 2. changing [Adam]'s placement one or more times without the consent of his parent/guardian by suspending him beyond ten (10) days in a given school year at any time between April 19, 2015 and his suspension on March 10, 2016.

- C. If the answer to (A) or (B) is yes, what is the appropriate remedy?

The Hearing was then continued to February pursuant to the assented-to request of the Parent, due to the unavailability of a key witness, and again to April pursuant to the parties' joint request to resolve questions regarding the positions of Adam's former co-guardians. On February 2, 2018, Taunton filed a *Motion for Reconsideration* of the December Order and of an Order dated May 1, 2017 denying Taunton's *Motion for Partial Dismissal With Prejudice*. On that day the District also requested the issuance of a *Decorum Order*, given events that had taken place on January 31, 2018 following a Pre-Hearing Conference. The basis of its *Request for Reconsideration* was unsworn statements made by Adam's former co-guardians (his grandmother and uncle) during the January 31, 2018 Pre-Hearing and to Counsel for Taunton prior to that date. After multiple submissions by each party, several conference calls, and the issuance of at least one Order, Taunton's *Request for Reconsideration* was ultimately denied and the December Order reflected the final statement of issues for hearing. A *Decorum Order* issued on February 26, 2018.

Adam turned eighteen (18) during February 2018, and shortly thereafter became substantially unavailable to participate in BSEA proceedings. At this point he had expressed his intent to either delegate educational decision-making to Parent or share it with her, but had not yet documented this desire in front of school district witnesses in accordance with Massachusetts law.¹⁰ Multiple motions were filed by each party in March, including Parent's request to stay the hearing scheduled to begin April 3, 2018 in order to obtain clarification as to whether she was authorized by Adam to proceed on his behalf in his absence, as well as documentation of shared

⁹As clarified in an Order dated March 12, 2018, for Parent to prevail on this claim, she must prove that ROTC and/or computer classes were part of Adam's IEP such that changing them required parental consent, and that changes were made absent consent during the delineated timeframe.

or delegated educational decision-making. By Order dated March 22, 2018, in light of Adam's continued unavailability to indicate his wishes and the possibility that he was not in a position to return forms so indicating before exhibits and witness lists were due, the matter was continued – over Taunton's objection¹¹ – to May 15, 2018 for hearing.

FINDINGS OF FACT

1. Adam is an eighteen-year-old resident of Taunton, Massachusetts. (P-3) School officials have described him as intelligent and noted that he has potential. (Parcellin, II: 167; Fagan, II: 193) His probation officer described him as “an intelligent young man [whose] nature was to be argumentative,” who had experienced a lot of trauma in his life and had a lot of anger “associated with that trauma.” (Taylor, III: 369-70)
2. Adam is eligible for special education under the category of emotional impairment. Adam has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), Post-Traumatic Stress Disorder (PTSD), and Reactive Attachment Disorder (RAD). (S-1, S-2, S-3) Psychological evaluations from 2006 and 2009 note that Adam witnessed severe domestic violence and that his PTSD is related to childhood trauma. (S-6) Although they are not included in his most recent IEP, the record reflects that Adam has a possible communication disability (S-3) and a diagnosis of Oppositional Defiant Disorder (ODD). (S-6)
3. The version of Adam's IEP in effect during the 2015-2016 school year provided the following information regarding the impact of Adam's disabilities on his progress: “In the past, [Adam]'s difficulties with behavior and social/emotional issues negatively impact (*sic*) his ability to express his ideas, wants, and feelings in an appropriate manner. This impacts his ability to relate to others, to problem-solve, to engage in play with peers and to interact with children and adults in an appropriate manner. He also had difficulty focusing on the task at hand and requires reminders of what is expected. Significant amount of consistency is needed for [Adam] to make effective progress with his social emotional issues . . . Deficits in pragmatic/social communication can affect [Adam]'s ability to communicate effectively with peers and adults for academic problem solving and social acceptance.” This IEP, which was effective from 10/29/15 to 10/28/16, was fully accepted by Adam's grandmother, who was then his guardian, on November 16, 2015. (S-2)
4. Adam's grandmother fully accepted Adam's previous IEP, for the period from 10/27/14 to 10/26/15, on January 26, 2015. (S-1)

¹⁰A student who turns eighteen “may choose to share decision-making with his or her parent (or other willing adult), including allowing the parent to co-sign the IEP,” or “may choose to delegate continued decision-making to his or her parent, or other willing adult.” In either case, the Team (for shared decision-making) or at least one representative of the school district and one witness (for delegated decision-making) must be present at the time of the choice, which must be documented in written form. See 603 CMR 28.07(5).

¹¹The District reiterated its objection by letter filed May 15, 2018. For the reasons described above, that objection was overruled.

5. Taunton Public Schools staff members who either worked directly with, or were responsible for, Adam acknowledge that PTSD symptoms may include depression, anxiety, mood-related disorders, behavior problems, and responses to triggers. (Moynihan, II: 349) TPS staff who either worked directly with, or were responsible for, Adam acknowledge that ADHD symptoms may include inattention, hyperactivity, and issues with impulse control. (Moynihan, II: 350) TPS staff who either worked directly with, or were responsible for, Adam acknowledge that symptoms of RAD may include behavioral issues, depression, anxiety, and inattentiveness. Ms. Moynihan testified, however, that 2013 evaluations of Adam did not provide sufficient information for his Team to understand how his diagnoses impact him in the school environment. (Moynihan, II: 359-61)
6. Adam's IEPs, and information regarding his diagnoses, were readily available to the staff working with him through Taunton's data system, "SchoolBrains." (Mulrooney, IV: 67)
7. Adam was in the guardianship of his grandmother and his uncle from approximately March 3, 2014 to February 2017, when custody was returned to Parent. (S-40; Grandmother, I: 86, 87, 89) During this period of time, Adam's grandmother and uncle had educational decision-making authority, but they included Parent in discussions and decisions regarding Adam and she remained involved in his education. (Grandmother, I: 89)
8. Adam began attending THS in ninth grade, in the fall of 2014. (P-3) At this time, Adam was in therapy and the family was involved with the Department of Children and Families (DCF). (S-34; S-51; Grandmother, I: 101, 105) Faced with a claim that it had discriminatorily involved DCF in its dealings with Adam between September 26, 2014 and September 26, 2017, Taunton Public Schools submitted into evidence decades worth of DCF records regarding Adam and his family. Many of these records consist of embarrassing, potentially prejudicial information that is irrelevant to, or beyond the scope of, this proceeding. Parent objected, and the undersigned Hearing Officer requested that Taunton redact or otherwise limit its submission to information the school would have known. Although Taunton acknowledged that it was not aware of much of the information contained in the DCF files, the District indicated that it had obtained this documentation in response to Parent's allegations, and stated that it aimed to "give a picture of the family's response to supports and services that they have had throughout their life." After entertaining arguments on the issue, the undersigned Hearing Officer redacted much of the information and limited these exhibits as described in Note 6, above.
9. At this time, Adam hoped to join the military and was very interested in participating in Taunton's Junior Reserve Officers Training Program (Junior ROTC or JROTC). This program was extremely important to Adam, so much so that his participation in the program was included in the vision statement on his IEP. Specifically, the IEP stated that Adam would participate in the ROTC program and participate in 80% of ROTC activities outside of school. (P-3; Grandmother, I: 174; Littlefield, III: 25; Mulrooney, IV: 67-68)

School personnel were aware of the importance of ROTC for Adam and understood it had been a “major drive” in transitioning him from a previous out-of-district placement to the high school. Some staff members working with him used participation in the program to motivate him in an attempt to improve his behavior. (LeFaivre, III: 44, 49, 70)

10. Adam was assigned to Assistant Headmaster¹² Eric LeFaivre. In this capacity, Mr. LeFaivre is one of four administrators who work “second in command” to Headmaster Matthew Mattos, dealing predominantly with discipline and attendance issues for the students assigned to him. (Keenan, 274-76)
11. During his ninth grade year and the first couple of months of tenth grade, Adam was assigned to adjustment counselor Stephanie Littlefield for weekly meetings. Ms. Littlefield is licensed as a social worker, adjustment counselor, and school social worker. She has a Master’s degree in social work, as well as a considerable experience working with adolescents and their families. Adam was resistant to meeting with Ms. Littlefield and felt as though he did not need to be on an IEP. (S-1; S-30; Littlefield, III: 221-25, 253-54)
12. Adam’s classes during his first semester at THS included Computer Concepts, taught by Melissa Grimes. (Grimes, III: 143-44) Although Ms. Grimes is currently a special education teacher, she was not working in that capacity during the first semester of the 2014-2015 school year. She was employed as a business teacher at that time. Although Computer Concepts was not a special education class, all of the students enrolled that semester were on IEPs. (Grimes, III: 146, 164) At the beginning of the semester, when Ms. Grimes reviewed with students how the course would run, Adam told her he thought the class was too easy for him. Ms. Grimes told him to talk to his guidance counselor about changing classes. Later in the semester, when he made similar complaints to Ms. Grimes, she explained that it was too late in the semester to switch out. (P-12; P-32; Grimes, III: 158-59)
13. Ms. Grimes reviewed Adam’s IEP, and implemented the accommodations it included. (Grimes, III: 146-47) Even so, he acted out, ignoring her, refusing to do work, declaring that he would leave the room, and saying the class was too easy for him. He would state that he should not be in it because “it was a SPED class.” Adam was disrespectful to Ms. Grimes and “a little rude to some of the other students that were in the room, because there were a variety of kids . . . in terms of ability.” He had “a good amount of absences,” and had to leave the room on more than one occasion because of his actions and/or behavior. (Grimes, III: 147-49, 154-56)
14. School discipline for all students at THS is guided by the school handbook, though administrators may exercise discretion either beyond or below these “basic guidelines.” (LeFaivre, 72-73)

¹² See note 3, *supra*.

15. Adam was suspended for the first time during the 2014-2015 school year on September 19, 2014. He received a five (5) day suspension for possession of marijuana. (P-7; S-74; Grandmother, I: 98, 105-07)
16. By October 2014, Taunton was aware that Adam was experiencing difficulty with the transition to THS, as demonstrated by “several write ups and suspensions,” and his frequent need for “redirection to stay on task and not engage in inappropriate behavior.” Adam’s Team noted that “[w]hen given the chance to demonstrate his proficiency, he is often unable to or refuses;” that “even with proper notes, including clearly defined steps and examples of problems, [he] often has difficulty completing homework;” and that he still needs improvement in “owning up to his behavior, effort. . . difficulty transitioning from one activity to the next, and his frequent and deliberate instances of mild acting out, swearing, arguing with teacher and other offensive and disrespectful remarks.” (S-1)
17. At this time, Adam remained in therapy and the District had consent to speak with his therapist. (Grandmother, I: 97, 101)
18. During the first semester of ninth grade Adam received Bs and Cs in his classes. He “was doing okay in classes . . . his teachers weren’t really reaching out saying there were issues . . . his grades were okay, his attendance was okay.” (S-28; Grandmother, I: 99-101; Littlefield, III: 228)
19. Adam enrolled in Junior ROTC for the spring semester of the 2014-2015 school year. (Anderson, IV: 105)
20. JROTC at THS is run by Major David Anderson, a retired United States Air Force Major employed as the senior aerospace sciences instructor for the Massachusetts Junior ROTC Unit 20001. The mission of Junior ROTC is “to develop citizens of character for our nation and community” through classes on various topics. Junior ROTC programming also aims to help children with their self-confidence and self-discipline “to become good citizens through learning the joy of doing things for other people.” (Anderson, IV: 97-99)
21. Ninth graders at THS can join Junior ROTC by requesting Aerospace Sciences I as their elective. The class focuses on both the history of flight and leadership skills, and students are also required to complete community service. Junior ROTC is open to students on IEPs, but is not considered a service, accommodation, or support. Junior ROTC instructors review and follow students’ IEPs. (Anderson, IV: 99-101)
22. Students must meet certain requirements in order to enroll and continue in ROTC. They must ask their guidance counselor for permission, and they must volunteer to take the course; it cannot be automatically assigned to them. Students must follow required grooming standards, wear the uniform once a week, and behave in a way that exemplifies the program’s three values: integrity first, service before self, and excellence in all we do. Students may be asked not to continue with Junior ROTC if they fail to meet the program’s requirements by, for example, failing to do the work (including homework); refusing to follow grooming standards; or being disrespectful to teachers, students, or

staff on a frequent basis, which “reflects poorly upon the Junior ROTC.” If students are asked to leave Junior ROTC for discipline reasons, they may be able to return to the program at a later date if instructors determine that they have matured and “become able to follow the rules and do what they needed to do to be a good cadet.” According to the contract that Junior ROTC has with Taunton High School, Major Anderson makes decisions as to whether enrolled students are able to continue in Junior ROTC. (Anderson, IV: 101-105)

23. Upon Adam’s enrollment in Junior ROTC, Major Anderson reviewed his IEP, focusing on his goals and accommodations. He noted that Adam had PTSD, something common among people in the military, Reactive Attachment Disorder, which he researched in order to learn more, and ADHD. Major Anderson implemented the accommodations contained in Adam’s IEP by giving him constant reminders and clear, concise rules with consequences for infractions, but this did not require him to treat Adam differently from other JROTC students. (Anderson, IV: 105-08, 116)
24. Adam participated actively in Junior ROTC. He was very respectful to Major Anderson and Sergeant LaPlant, who co-taught the class. Sometimes he would get upset and walk out of class, but generally he did his work. Sometimes when he was upset Major Anderson would bring him to the office to talk and most of the time he would cool down. While in Junior ROTC, Adam completed community service through participation in activities outside the school day. He was very proud to wear the uniform. Adam earned a B each quarter he was enrolled. (Anderson, IV: 105-08, 116-17)
25. Major Anderson met with Adam individually quite often when he was in the program. They talked about strategies for Adam to be able to relax and calm down so he could be more productive and a more positive part of class. Adam shared information regarding his family, his struggles to control himself, and his goal to join the military. (Anderson, IV: 108-110)
26. In January 2015, Adam’s grandmother signed an IEP for Adam dated October 27, 2014 to October 26, 2015 that provided for a full-inclusion program at Taunton High School. (S-1; Grandmother, I: 91) The IEP included Social/Emotional and Mathematics goals, and provided for one fifteen (15) minute counseling session a week as well as direct instruction in math (84x6). The IEP also identified accommodations for Adam including frequent breaks, small groups, familiar test administrators, clarification of directions, organizer or checklist, calculation devices, counseling, positive reinforcement, clear and consistent limits, expectations and consequences, and reminders of school rules. (P-3)
27. Although she signed this IEP and subsequent versions, Adam’s grandmother was confused about what was offered to her by the school district and what she signed or agreed to. As she testified, she “really didn’t understand a lot of the IEP . . . I felt I was under pressure trying to do my best for [Adam] with the school. . . So a lot of this I did sign hoping that this would help him with the school.” (Grandmother I: 94-95; 171)

28. On or about February 2, 2015, Adam's mother moved into an apartment on the second floor of the house where Adam lived (on the first floor) with his grandmother and uncle. Adam's mother had become sober and "was straightening out her own life." (Grandmother, I: 107, 116, 168) Taunton school administrators believe Adam's behavior began declining around this time, or within the next several months. (Lefavre, III: 116, 120; Littlefield, III: 228))
29. On March 19, 2015, Adam was suspended for one (1) day for harassing a fellow student. (P-7; S-43)
30. On April 6, 2015, Adam was suspended for three (3) days for smoking an electronic cigarette. (P-7; S-43)
31. On April 17, 2015 Adam was suspended for three (3) days for excessive class cuts, causing a hallway disruption, evading security, and being in a restricted area without a pass. (S-43) After the first day of this suspension, Adam had been suspended for ten (10) cumulative days during the 2014-2015 school year. (S-74; LeFaivre, III: 37) As such, an MDR should have taken place in connection with the suspension of April 17, 2015.
32. On June 12, 2015, Adam was suspended for one (1) day for possession of a laser light and being disrespectful. (P-7; S-43) As Adam had already been suspended for ten (10) cumulative days, an MDR should have taken place in connection with this suspension.
33. According to Kristen Keenan, a former THS Associate Headmaster, associate headmasters at the time sometimes held a manifestation determination review with the guidance counselor and/or the school psychologist, with the parents(s) or guardian(s) participating over the telephone via a conference call. Standard procedure entailed the group going through a checklist and making a decision, supported by documentation, as to whether a student's particular behavior was a manifestation of his disability. She does not recall ever conducting an MDR that did not include documentation. (Keenan, III: 274-75; 286-92; 309)
34. According to Taunton Public Schools Director of Special Education Judith Mulrooney, during the 2014-2015 school year, associate headmasters and/or guidance counselors, rather than the special education department, would have been responsible for offering manifestation determination reviews where appropriate. (Mulrooney, IV: 39-40)
35. Adam's grandmother received frequent telephone calls from Mr. LeFaivre regarding Adam's behavior. (Grandmother, I: 80, 94-95) Although she was Adam's co-guardian and was aware that Adam had been suspended many times, she did not understand, nor was she informed, that ten (10) cumulative days of suspension comprised a change in placement. (Grandmother, I: 169) Taunton never offered her a manifestation determination review in connection with any of Adam's suspensions. (Grandmother, I: 170)

36. Adam’s uncle observed that Adam was suspended often during his guardianship. He did not understand, nor was he informed, that ten (10) cumulative days of suspension comprised a change in placement. (Uncle, I: 187-88) Taunton never offered him a manifestation determination review in connection with any of Adam’s suspensions. (Uncle, I: 186-87)
37. During the 2014-2015 school year, Assistant (then Associate) Headmaster Eric LeFaivre’s practice was that where students were entitled to a manifestation determination review (MDR), parents or guardians would receive a telephone call to inform them that an MDR would be taking place. (LeFaivre, III: 138) In the event that no parent or guardian could be reached, the MDR would proceed without one. Typically, the MDR would include the headmaster, guidance counselor, school psychologist, and any other individuals who may have been directly involved in the incident. “[I]n a perfect world, it would be the parent, guardian and student as well.” (LeFaivre, III: 140; Mulrooney, IV: 35) Documentation regarding outcomes of manifestation determination reviews was not maintained by the housemaster; it is unclear where that documentation, if created, would have been maintained. (LeFaivre, III: 139-40)
38. Mr. LeFaivre testified at hearing that he recalled conducting manifestation determination meetings for Adam during the 2014-2015 school year, although there is no documentation that these meetings occurred. Moreover, his testimony on this point varied regarding how many MDRs were held, how they were held, and who attended, among other things. Specifically, Mr. LeFaivre testified as follows:
- ! There has always been a procedure in place for manifestation determination reviews; he does not recall there being any set procedure in place for MDRs during the 2014-2015 school year; and the Team required then for an MDR to take place “wasn’t a team the way we understand it now;” (III: 18, 20)
 - ! The practice for MDRs then, and now, is to “reach out to guardians, invite them to a hearing [,] offer them options to the effect of in-person, phone participation, et cetera . . . After several reach outs in that regard, if they’re unreachable, we do have to go and have the hearing at some point;” (III: 10, 23)
 - ! In Adam’s case, he remembers “making the attempts [to reach guardians by telephone], and we ended up holding [the MDRs] and then communicating the result;” (III: 10)
 - ! He could not remember whether he made more than one phone call, noting, “I couldn’t answer comfortably. But in saying so, I can’t imagine we would not have – or I would not have;” (III: 37)
 - ! There is no documentation that any attempts were made to reach Adam’s guardians to invite them to participate in an MDR, and nothing was sent to them in writing; (III: 10, 127)
 - ! There were two MDRs for Adam during the 2014-2015 school year, and both times the guardians were informed by phone and invited to participate, but he cannot recall when either of them took place; (III: 12-13, 14, 123-24)
 - ! He has “a memory of doing a couple [of manifestation reviews] for Adam” by phone during the 2014-2015 school year; (III: 10)

- ! He does not “remember the sit-down” in connection with any of Adam’s MDRs during the 2014-2015 school year, only the phone calls, “but that phone call doesn’t happen without that meeting following it. So I guess that’s where I’m drawing from;” (III: 19, 126)
- ! Asked who was present for Adam’s telephonic MDRs, he testified that his “best guess” is that guidance counselor Maureen McCarthy and school psychologist Virginia Martin were in attendance, in addition to him (III: 11-12), although upon further reflection, perhaps Ms. Martin “wasn’t the third;” (III: 15-16)
- ! He does not remember any “specific conversation around” any of Adam’s MDRs, only “sitting down briefly,” and “as always, it would have been around. . . we review the IEP, the documented disability, does it relate, and then we made a determination;” (III: 21)
- ! He does not recall the offense that prompted any MDR, just a phone call, but he does recollect that they concluded “it was not a manifestation” (III: 23)
- ! Pressed on the issue, he admitted that he does not remember actually holding a meeting; (III: 127)
- ! The determination was “apparently not” put in writing; (III: 21-22)
- ! Adam’s guardians were not informed of the decision following the MDR (III: 14)
- ! No documentation exists as to any MDRs being held regarding Adam in the 2014-2015 school year; (III: 10)
- ! There was a “recordkeeping blunder” (III: 14) because, “Common sense says there should be some paper trail regarding those meetings, but there obviously aren’t any;” (III: 126)
- ! Although he is legally obligated to do so, he cannot answer as to why he did not document any hearing or MDR because he is “not the records keeper,” and he “assume(s) guidance did that; (III: 10-11. 22)
- ! There is no chance the MDRs were not held properly, despite the failure to document (III:12)

39. Asked what he believes now about what transpired then, Mr. LeFaivre responded that what occurred was a manifestation determination review, albeit a “poorly done one,” because “the spirit of it was you sit down – again, we discussed the disability. . . Because we had that dialogue, and I think that’s the spirit of it [although] I think in retrospect, obviously the paperwork is wanting.” (III: 20, 28) “At the time, it was done and done, again, to our satisfaction at the time.” (III: 30)

40. Mr. LeFaivre does not recall any discussion of supports that could be added to Adam’s IEP to address the discipline issues at any of the manifestation determination reviews that he believes occurred. (LeFaivre, III: 31)

41. Adam’s grades during the second semester of his ninth grade year included two Bs, a D and an F. (S-28)

42. Pursuant to Taunton High School policy, if a student accumulates seven unexcused absences in a particular class, he is at risk for losing credit for that course. Suspensions are considered unexcused absences. Specifically, the Taunton High School Handbook

states that students should not exceed seven (7) unexcused absences per semester; that out-of-school suspensions are not considered excused absences; and that a student who does not adhere to the attendance policy will lose academic credit for the courses missed. Subsequent to seven (7) unexcused absences, students must meet with the Associate Headmaster and Guidance Counselor to sign an attendance contract. If the provisions of the contract (which may include attendance at Saturday school) are followed, the student can receive credit for the courses passed during the semester. The meeting to sign the attendance contract must be scheduled within five (5) days of the end of the semester. (P-30; Bochman, II: 107-08; LeFaivre, III: 103-04)

43. There is no evidence of a meeting to discuss Adam's attendance and/or an attendance contract during the 2014-2015 school year, or at any time thereafter.
44. There is no evidence that Taunton attempted to convene a Team meeting during the second semester to discuss Adam's decline in grades and attendance or increase in suspensions. No Functional Behavioral Assessment was conducted.
45. In either June or September 2015, Mr. LeFaivre attended a meeting with Adam that he believes was convened by Mr. Rooney, the former out-of-district coordinator for Taunton Public Schools, and possibly additional people,¹³ at which it was made clear that Adam "was being threatened with being kicked out of . . . ROTC," or at the very least, he "was going to lose [the] privilege" of participating in ROTC." Mr. LeFaivre recalled Adam asking to be removed from special education at that meeting and he left the meeting with the impression that Adam "had essentially been dismissed" from special education. (LeFaivre, III: 42-45; 52, 56) As of the date of this BSEA hearing, Mr. LeFaivre believed a student could be discharged from special education in this manner, by indicating at a Team meeting that he no longer wished to receive services. (LeFaivre, II: 56-57)
46. Sometime in March or April 2015, Adam had disclosed to Major Anderson that he was using marijuana. Major Anderson asked him to cease, among other reasons because use of controlled substances precluded continuation with Junior ROTC. By the end of the year, Adam "still had not stopped with the drug use, and [Major Anderson] told him that based on that and the problems he was having discipline-wise with so many other teachers, not showing respect," it was best for him to take a year off and not take any Junior ROTC classes the next year "until he could handle his self-discipline a little bit better and self-restraint." Although he was opposed to this decision, Adam was respectful and listened carefully to Major Anderson. (Anderson, IV: 110-112)
47. When Major Anderson informed Taunton of his decision to ask Adam to leave Junior ROTC, school officials were in agreement due to his infractions of the school's disciplinary code. (Anderson, IV: 137-39)

¹³At one point, Mr. LeFaivre testified that this meeting occurred between Mr. Rooney, Adam, and himself (III: 42-45); he later testified that the entire Team was present but could not recall who the Team members were (III: 52); that it was an IEP meeting (III:54-55); and that he could not recall whether Adam's guardians were present. (III: 55)

48. Mr. LeFaivre understood that removing Adam from the program was an ROTC determination based on internal guidelines, as school personnel do not make decisions about whether or not students continue in the program. (LeFaivre, III: 47-48, 113) Adam's grandmother believes Adam went downhill when he was taken out of JROTC. (Grandmother, I: 157-58, I: 170) Adam's school adjustment counselor acknowledged that his removal from JROTC could have adversely affected his 2015-2016 school year. (Littlefield, III: 262)
49. During the summer of 2015, Adam, his grandmother, his uncle, and his mother all attended a JROTC event at the Taunton Airport. Adam had asked Major Anderson if he could attend, even though he would not be continuing with the program. At this event, Adam's grandmother approached Major Anderson to ask him to reconsider allowing Adam to return to Junior ROTC the following year. Major Anderson told her he would consider her request and discuss it with school officials, then make a final decision as to whether Adam could return in the spring after examining whether he had "shown some kind of positive changes over the summer or maybe in the fall semester." Adam's grandmother also provided some background information regarding Adam's family and said she was concerned that sometimes he was "rather explosive and violent," but he had been better while in Junior ROTC. (Anderson, IV: 113-15)
50. Adam's grandmother testified that she does not recall discussing her concerns about Adam's behavior with Major Anderson at the time "because I thought he did very well [and] didn't really think he was bad at home." (Grandmother I: 110-12) Pressed for specifics regarding his behavior, Adam's grandmother stated that "once in a while he swore and said the 'F' word," but he would always apologize and give her a hug by the end of the night. She also acknowledged that sometimes he wanted to go out but she told him he could not, because she was disciplining him for "[s]mall house things," like not picking up his shoes or throwing dirty socks on the floor. (Grandmother, I: 112-13)
51. At the time of the ROTC event, Adam was no longer in counseling. (Grandmother, I: 110) Although Adam's behaviors at school and home were better when he was in counseling (Uncle, I: 204), his grandmother let him stop therapy because he was bored and doing well at home. (Grandmother, I: 98)
52. By the beginning of the 2015-2016 school year, Adam was spending time with kids his grandmother believed influenced him negatively. She testified, however, that she never saw him smoking marijuana. (Grandmother, I: 113)
53. Around the same time, difficulties were occurring in Adam's home, with arguments between his mother and his uncle over how to properly discipline Adam. (Grandmother, I: 115-16) Adam's grandmother acknowledged that Adam could be "hard to handle at times . . . [w]ith his disabilities." (Grandmother, I: 157) She testified, however, that Adam did not get involved in these conflicts between his mother and his uncle. (Grandmother, I: 181)

54. On or about October 18, 2015, Adam's uncle and grandmother approached the school for assistance with Adam. (P-17; Littlefield, III: 237, 254) Adam's uncle discussed Adam's behavior with Mr. LeFaivre, including his unwillingness to follow rules at home and at school and his refusal, at times, to go to school.¹⁴ (Uncle, I: 212-18, 234-35; LeFaivre, III: 116-17) Among other things, they talked about different ways to approach Adam that could help with his school behavior, including arrangements to decrease problems at lunch time. (Uncle, I: 222-23) At this time, Mr. LeFaivre was under the impression that Adam was not on an IEP. (LeFaivre, III: 45) There is no evidence that Mr. LeFaivre discussed special education with Adam's uncle during this meeting, though he believed Adam had become "more erratic, a little more volatile." (LeFaivre, III: 120) He did, however, contact Adam's adjustment counselor to request that she meet with them that day. (Littlefield, III: 237-38, 240)
55. Had Mr. LeFaivre referred to the school district's data system, "SchoolBrains," he would have seen that Adam was on an IEP. (Mulrooney, IV: 47-48) According to Director of Special Education Judith Mulrooney, this is information Mr. LeFaivre should have known. (Mulrooney, IV: 49-50)
56. On that same day, Adam's grandmother and uncle met with his adjustment counselor, Ms. Littlefield, to discuss their concerns about his behavior, including the boys he was spending time with, possible use of substances, and failure to complete school work. (Grandmother, I: 118-20, 122-23; Littlefield, III: 237-39) Although Adam was supposed to be working with Ms. Littlefield, according to his grandmother, "he was always suspended outside of school, so he never made it to counseling half the time." (Grandmother, I: 117, 123)
57. Ms. Littlefield recommended that Adam see an outside therapist, and she and Adam's grandmother filled out a referral form for Community Counseling of Bristol County (CCBC) (S-32; Grandmother, I: 118-20, 122-23; Littlefield, III: 238-40) Ms. Littlefield made this recommendation because she believed it would be helpful for the family to have an ongoing relationship with a therapist outside of school, particularly in light of the fact that there seemed to be "some sort of mistrust" of the school system. She faxed the referral form to the agency on or about October 23, 2015. (Littlefield, III: 239-40)
58. Adam was enrolled in College Prep Algebra I during the first semester of the 2015-2016 school year, and College Prep Algebra II during the second semester, both taught by Andrea Shepard (then known as Andrea Mota). Ms. Shepard is a licensed special education teacher, with a Master's degree in moderate disabilities. At the time she was teaching inclusion math. (Shepard, III: 167-168) Ms. Shepard reviewed Adam's IEPs in connection with teaching him, developed an understanding of his disabilities and how they impacted him in school, and implemented his accommodations, including frequent breaks, familiar test administrators, small group teaching, and positive reinforcement. (Shepard, III: 172-75, 196-202; Mota, II (old): 69-71) During the first half of first

¹⁴To the extent Mr. LeFaivre spoke with Adam's grandmother, he got the impression that she felt helpless regarding Adam's behavior and at times bullied by Adam's mother into making or not making decisions. (LeFaivre, III: 117-18)

semester, Adam would bring some of his work home because he had difficulties completing it in class; he would return most of it to her. As the school year progressed, Adam was in class less frequently, produced less work, and his performance declined. (Shepard, III: 169-70, 178) At times he came into class “late and explosive,” was unable to focus, and/or interacted with other students poorly. Ms. Shepard would try to speak with him quietly, and when that did not work, she had to ask him to leave class. (Shepard, III: 177-78)

59. During the fall semester, Adam stopped by to see Major Anderson several times. He asked to be readmitted to Junior ROTC, but was unable to tell Major Anderson that he had discontinued his marijuana use. As such, Major Anderson explained that he was unable to take Adam back for the spring semester. (Anderson, IV: 137)
60. Adam was first suspended during the 2015-2016 school year on September 8, 2015. He was suspended for one (1) day for violating the electronic device policy. (P-8; S-74)
61. Adam was suspended on September 17, 2015 for one (1) day for major insubordination. (P-8; S-74)
62. Adam was suspended on October 16, 2015 for two (2) days for vandalism, excessive class cuts, and leaving the building without permission. (P-8; S-74)
63. Adam was suspended on November 4, 2015 for five (5) days for assault on a fellow student. (P-8; S-74) Adam had left the building “in a bit of a rage again [and] was suspended for his assault on the way out.” (LeFaivre, III: 96) Initially the district believed he had assaulted another student before leaving. According to screenshots contained in an email sent by Parent to Mr. LeFavire on November 12, 2015, however, it appears that a female student may have hit Adam in school on that day before he left the building. (P-18; LeFaivre, III: 96-100)
64. Adam was suspended on November 13, 2015 for one (1) day for use of vulgar language. At this point he had received ten (10) cumulative days of suspension during the 2015-16 school year. (P-8; S-44; S-74)
65. Adam was suspended on November 18, 2015 for two (2) days for excessive class cuts and failure to complete day in the remediation room. At this point, he had received twelve (12) cumulative days of suspension during the 2015-16 school year. Although he was entitled to an MDR, no MDR occurred. (P-8; S-44; S-74; LeFaivre, III: 61, 64-65)
66. Adam was suspended on November 23, 2015 for two (2) days for use of vulgar language and excessive office referrals. At this point, less than three months into the 2015-2016 school year, Adam had received fourteen (14) cumulative days of suspension, several for similar offenses including cutting class, leaving the building, and using vulgar language. Although he was entitled to an MDR, no MDR occurred. (P-8; S-44; S-74; LeFaivre, III: 61, 65)

67. Adam was suspended on December 7, 2015 for two days for excessive office referrals, leaving the building without permission, and being disrespectful and insubordinate. At this point, he had received sixteen (16) cumulative days of suspension during the 2015-2016 school year. Although he was entitled to an MDR, no MDR occurred. (P-8; S-44; S-74; LeFaivre, III: 61)
68. Adam was suspended on December 21, 2015 for three days for the use of vulgar and obscene language, causing a classroom disruption, violation of electronic device policy, class cuts, being in a restricted area without a pass and being insubordinate. At this point, he had received nineteen (19) cumulative days of suspension during the 2015-2016 school year. Although he was entitled to an MDR, no MDR occurred. (P-8; S-44; S-74; LeFaivre, III: 61)
69. The same day, Mr. LeFaivre spoke with a Taunton High School School Resource Officer (SRO) regarding Adam and his discipline problems, specifically behavior that had occurred on December 18, 2015 including swearing at a teacher, that had, in the SRO's words, "escalated to a behavior that can't be tolerated in a school environment." Based on this behavior, Adam was charged criminally with disturbing school assembly. (S-46; LeFaivre, III: 133-34)
70. Generally, disturbing school assembly charges begin with an SRO either being involved directly in an incident, or a receiving a report of an incident from a school official. The SRO then makes a determination as to whether to charge the student for any particular behavior(s). (LeFaivre, III: 114-15, 122; Keenan, III: 282-84; Taylor, III: 48-49)
71. On or about December 23, 2015, a letter was sent to THS from CCBC stating that the family had not followed through with counseling for Adam, though the family did subsequently complete an intake and Adam engaged in counseling in February 2016. (S-33, S-34; Grandmother, I: 120-21; Trendell, II: 267-68; Littlefield, III: 242-43)
72. Adam was suspended on January 14, 2016 for one (1) day for use of vulgar language and being disrespectful. At this point, he had received twenty (20) cumulative days of suspension during the 2015-2016 school year. Although he was entitled to an MDR, no MDR occurred. (P-8; S-44; S-74; LeFaivre, III: 61)
73. Adam was suspended on February 2, 2016 for three (3) days for major insubordination, use of vulgar language, and being disrespectful to staff and disruptive in the house office. At this point, he had received twenty-three (23) cumulative days of suspension during the 2015-2016 school year, mostly for similar offenses. Although he was entitled to an MDR, no MDR occurred. (P-8; S-44; S-74; LeFaivre, III: 61)
74. On or about February 10, 2016, Adam's grandmother appeared with him in Taunton Juvenile Court, where she had filed a Stubborn Child Requiring Assistance (CRA) petition regarding Adam [February CRA]. (S-51; S-49; Grandmother, I: 125) On that date, Adam's grandmother met with Bristol County Juvenile Probation Officer Denise Taylor, along with Adam and his mother, to complete an intake. Adam's grandmother

wavered initially as to whether to file, particularly because Adam's mother and Adam were strongly opposed, though ultimately she told the judge she wanted to proceed. Adam was very upset. Adam's grandmother also met with DCF Social Worker Brian Trendell, who served as the court liaison for CRAs between DCF and the Taunton Juvenile Court. (Trendell, II: 248; Taylor, III: 330-34, 341-46) She told Mr. Trendell that "she was filing it because [Adam] was disrespectful, verbally abusive, using marijuana [and] she was having a difficult time managing his behavior." (Trendell, II: 249-51) Although Adam's uncle recalls that Adam's grandmother was told that if she did not file a CRA, there would be one anyway (Uncle, I: 242-43), and Adam's grandmother testified that the school took her to court and told her that if she did not file for family services the school was going to do it (Grandmother, I: 95-96), no school official ever appeared in court for this CRA, nor did Adam's grandmother report to DCF on that day or any time thereafter that she felt that she was being forced to file. (Trendell, I: 250-52) Adam's mother, who was also at court, appeared to be very upset that his grandmother had filed the CRA. (Trendell, II: 253-54) Mr. Trendell recommended that the family participate in counseling services. They agreed to it and walked over to complete an intake with CCBC right after court. (Trendell, II: 260-61, 267)

75. Adam was also arraigned on the disturbing school assembly charge in Taunton Juvenile Court on February 10, 2016. (S-48; Taylor, III: 327-29) The case was scheduled for pre-trial on March 14, 2016, at which point Adam pled out to the disturbing school assembly charge and was placed on pretrial probation. (S-48; Taylor, III: 330-34)
76. Adam was suspended on February 24, 2016 for three (3) days for a verbal altercation, inappropriate behavior, misuse of technology, electronic device violation, and use of vulgar language. At this point, he had received twenty-six (26) cumulative days of suspension during the 2015-2016 school year, mostly for similar offenses. Although he was entitled to an MDR, no MDR occurred. (S-44; S-74; LeFaivre, III: 61)
77. As of February 26, 2016, Adam was attending therapy. Although he was "tough to engage, . . . he was making efforts and he was cooperative." His mother was also engaging in sessions with him. (Trendell, II: 268)
78. On March 11, 2016, Adam was suspended from Taunton High School for three (3) days for inappropriate behavior, electronic device violation, causing an office disruption, major insubordination, and use of vulgar language. Adam was prevented from returning to THS unless and until he was able to complete a safety evaluation and 40-day placement and evaluation at South Coast Educational Collaborative. No manifestation determination occurred in connection with this suspension for approximately a year. A detailed discussion of these circumstances is beyond the scope of this decision, but in *Adam v. Taunton Public Schools*, 23 MSER 67 (Reichbach 2017) I found that Taunton Public Schools had violated Adam's right to FAPE by refusing to allow him to return to school through the date of issuance of that decision, May 18, 2017. Adam remained out of school from March 2016 until June 2017.

79. Although she acknowledges that it is her responsibility, as Taunton's Director of Education, "to collect information about students in the District," Taunton's Director of Special Education, Judith Mulrooney, relies on others to bring a student who is struggling to her attention. It was not until Adam's indefinite suspension pending the completion of a safety evaluation that she became aware that Adam had received so many suspensions. At the time, she was new to the position, having left her previous post as Coordinator of Special Education, Grades 7-12, and neither she (in that position) nor the previous Director of Special Education had been collecting suspension data. (Mulrooney, IV: 51-54; 57-58)
80. In addition to out of school suspensions, at times Adam was sent to the remediation room. When things do not go well in that environment, or "if a student is having a particularly bad day and it's only getting worse," "in order to diffuse situations in the moment, [THS] will typically ask a parent to pick them up; or if they walk home, they walk home." (LeFaivre, III: 63-64, 67)
81. As the Assistant (then called Associate) Headmaster, Mr. LeFaivre was responsible for Adam's discipline. He testified that he was able to make appropriate decisions regarding Adam despite not knowing he was on an IEP, because students are given latitude and "manage[d]. . . differently" depending on who they are. For example, Adam was given "extra understanding" because Mr. LeFaivre was aware that "he had a tough time sort of self-regulating at times [and] would often walk out of class." As such, Mr. LeFaivre does not believe knowing Adam was on an IEP would have changed his "treatment of [Adam] or the behaviors themselves." (LeFaivre, III: 73-75)
82. Mr. LeFaivre does not believe all of Adam's behaviors that led to his suspensions were manifestations of his disabilities. Although he acknowledges that MDRs would have prompted dialogue that could have resulted in changes to Adam's IEP, he does not believe the MDRs would have changed the outcome for Adam. (LeFaivre, III: 79-80, 82-83) Specifically, he stated, "I feel like it's hard to predict how the dominos would fallen had things [i.e. the required MDRs] happened." (LeFaivre, III: 132)
83. On May 9, 2017 and again on May 17, 2018, Mr. LeFavire testified that until the safety evaluation, he was not aware during the 2015-2016 school year that Adam was on an IEP. However, later in the day on May 17, 2018, Mr. LeFaivre testified, "Looking back at his IEP now, I'm aware it was there and I was able to look at it. I think I did. But to answer specifically your question at the time, was I following them specifically? Probably not. . . . But . . . we talked about positive reinforcement, consistency with school rules, things of that nature. So those are things I do every day and did specifically with him. So in a sense, I followed it by accident, just out of common sense. But, again, to speak to your question, did I follow his IEP? I could not have in that moment." (LeFaivre, III: 77-78)
84. Amy Moynihan, special education coordinator for Taunton Public Schools Grades 7-12, who began in that position during March 2016, became aware of the excessive number of suspensions Adam had received when she became involved with his safety evaluation

meeting on or about April 6, 2016. Although her role entails chairing manifestation determination meetings, she never chaired one for Adam. (S-12; Moynihan, II: 313, 315-16, 318-19)

85. School psychologist Virginia Martin conducted a records review in connection with the threat assessment she conducted of Adam in preparation for the safety evaluation meeting. She noted that he had exceeded ten days of suspension and discussed with the special education department “the challenge of recreating multiple meetings that would have taken place beyond the tenth day of suspension.” (Martin, III (old): 157-58)
86. Ms. Mulrooney testified that she it is her understanding that no manifestation determination was held for Adam at any point prior to March 2017. (Mulrooney, IV: 59-60)
87. Ms. Mulrooney acknowledged that it is important for schools to follow laws concerning discipline of students with IEPs, and that when a school fails to do so, such failure could negatively affect a student’s progress. She also acknowledged that accumulating over twenty (20) suspensions in one year could negatively impact a student’s ability to be educated. (Mulrooney, IV: 70-71)
88. According to Ms. Mulrooney, had the District followed procedures mandated by the IDEA, for example by pursuing substitute consent for an extended evaluation of Adam an/or a change in placement, rather than refusing to allow him back to school for over a year, the District may not have been able to obtain any additional information regarding Adam to help it provide what he needed. (Mulrooney, IV: 84-86) This testimony echoes Taunton’s argument at the time of the expedited hearing in May 2017: “no harm, no foul.”
89. On May 20, 2016, the February CRA was dismissed by the Juvenile Court as Adam’s grandmother reported to the court that Adam “had stabilized his behavior [,]. . . his attitude had improved at home, and she reported he was continuing with therapy at the time.” (S-54; Trendell, II: 257; Grandmother, I: 126; Taylor, III: 353-55) At this time, DCF determined that there was no further need for services and closed the case. (Trendell, II: 268; Taylor, III: 353-55)
90. On or about June 23, 2016, DCF received an anonymous report alleging neglect of Adam. The reporter was not a school official. DCF opened an investigation. (S-53; Trendell, II: 271)
91. On or about July 25, 2016, an incident occurred between Adam and his grandmother, where Adam became upset when his grandmother refused to give him a cigarette. At the time, she contacted DCF to report that Adam was swearing and spit on her, and further, that he was smoking marijuana regularly. DCF suggested that she file a CRA petition. (S-54; Grandmother, I: 135; Trendell, II: 280-81)

92. Adam's grandmother did, in fact, go to court to file a CRA on July 25, 2016 [July CRA]. (S-54; Grandmother, I: 136; Trendell, II: 282; Taylor, III: 357-58) At the hearing on the CRA petition, she testified that Adam was "pretty upset" and threw a glass, but she denied that he spit on her and stated that that after five minutes the argument was over. (Grandmother, I: 133)
93. During the BSEA hearing, Adam's grandmother testified that she did not remember how Adam behaved in the courthouse. (Grandmother, I; 139-140) According to other witnesses, Adam exhibited significant behaviors, including yelling, banging, and threatening court staff, and was taken by ambulance to Morton Hospital after custody was given to DCF. (S-54; Trendell, II: 283) He was then transferred to Westwood Lodge. (S-51; Grandmother, I: 140; Taylor, III: 361-62) When Adam was discharged after a few weeks, recommendations included family counseling and resuming individual counseling, which had lapsed. Adam subsequently began seeing a counselor at Northeast Counseling. (S-51; Grandmother, I; 140, 142; Trendell, II: 289, 291-92)
94. During a visit with DCF Social Worker Brian Trendell on or about August 10, 2016, Adam's grandmother refused to sign the service plan offered, and at some point asked Mr. Trendell to take Adam out of the house because he was being verbally abusive. (S-51; Grandmother, I: 143-45; Trendell, II: 294) Adam was then placed by DCF at a STARR placement, where he remained for about one month before his grandmother dropped the July CRA in September. (Grandmother, I; 145)
95. In September 2016, when Adam remained in the STARR Program and had been out of school for approximately six (6) months, Taunton Out-of-District Coordinator Daniel Fagan emailed Mr. Trendell, requesting that Mr. Trendell "try to facilitate [Adam] into attending South Coast," and asking, "Any chance that DCF would file a care and protection if [Adam] continues to refuse?" (P-15 (old); Fagan, II: 185-86; Trendell, II: 299)
96. Many students on Mr. Fagan's caseload are involved with DCF. He regularly speaks with DCF caseworkers about these students by email or telephone, as they "collaborate to make sure. . . the kids are not only safe but getting what they need in terms of going to school and stuff like that." (Fagan, II: 225) Asked about his request to Mr. Trendell regarding Adam, Mr. Fagan testified that "when kids don't go to school and I know they're involved in DCF, we often work together to try to get the kids back into school, whether that's care and protection or through a [CRA] process." (Fagan, II: 221) This kind of collaboration between schools and DCF is not atypical in cases where school personnel suspect a student may have been abused or neglected, or where a school district files a CRA. (Trendell, II: 304-07; Keenan, III: 283-85, 300-302) Moreover associate headmasters might talk with families about the filing of CRAs as part of their collaborative efforts to support students. (Keenan, III: 315-16)
97. When Adam returned to school on or about June 1, 2017, following the issuance of the 2017 Decision, he was assigned to Guidance Counselor Paul Bochman and Assistant Headmaster Peter Parcellin to help him get a fresh start. (Bochman, II: 43-44; Parcellin,

II: 132, 135) At this time Adam “seemed excited to be back,” and was talking about the classes he could take and his interest in joining the military. (Bochman, II: 43, 105)

98. Mr. Parcellin’s approach to Adam was influenced by his belief that Adam’s disabilities might impact his reactions to challenges; for example, Adam left a classroom where someone was observing him as part of his evaluation, upset and using inappropriate language. Rather than apply a disciplinary consequence, Mr. Parcellin “pulled the adjustment counselor in and tried to make an informed play on how best to support him and kind of help him figure out what was wrong.” In other scenarios, Adam was not penalized for saying things where other students might have been. Instead, Mr. Parcellin “worked with him . . . and had conversations with him . . . and . . . just let him have space sometimes.” (Parcellin, II: 162-63, 166) At times, this approach appeared to work, as Mr. Parcellin and Adam had many “perfectly wonderful interactions,” and Adam was able to avoid escalating on occasion by leaving class to speak with Mr. Parcellin (Parcellin, II: 167; Bochman, II: 115-16)

99. Even so, Adam’s return to school was a “tough transition,” with few successful days because of his absences and premature departures from classes. (Parcellin, II: 133, 167)

100. During this period the District aimed to help Adam transition back to class and conduct evaluations of him before the last day of school on June 22, 2017. (Bochman, II: 44-45) The District was unable to “glean a lot of information from the reports, because of [Adam]’s interactions with the testers [,] in terms of how to address anything new for [Adam] going forward in terms of the IEP.” (Bochman, II: 47, 52; Parcellin, II: 157-58) The District attempted to conduct a Functional Behavioral Assessment, but the observations were not completed because Adam became upset when he realized the observer was in the room collecting data and was unable to focus on his academics. (S-70; Moynihan, II: 333-34, 339)

101. Parent indicated to the District, following these evaluations, that she would pursue an independent evaluation for Adam. The District gave her the names of potential evaluators but heard nothing further from Parent on this subject. (Moynihan, II: 331-32)

102. Taunton offered Adam algebra tutoring over the summer with a teacher familiar with him, in order to assist him in credit recovery and help him “to establish some positive relationships with staff in the building, have some success.” Adam, who had some surgery earlier in the summer, did not attend, nor did Adam’s family contact the District to explain why. (Bochman, II: 53-54, 56-57) Mr. Bochman reached out to Parent several times to schedule a meeting where Adam could look at course options and review his credit and MCAS requirements. Each time, the family either cancelled or failed to appear. (Bochman, II: 57)

103. Mr. Bochman reached out to Adam’s family again toward the end of August, hoping to meet with Adam to choose his electives, review where he needed to go in the building and how to get there most directly (to promote his behavior goal to be in appropriate parts of the building), and show how to get to his adjustment counselor’s office in the event he

needed to leave class. This meeting never took place because neither Parent nor Adam responded. (Bochman, II: 59-60; Parcellin, II: 158)

104. The District also offered after-school math tutoring for Adam, to begin in September, with a special education teacher. Adam never accessed this service. (Moynihan, II: 328)
105. Adam returned to school on the first day of the 2017-2018 school year, August 30, 2017, and reported to Mr. Bochman's office. Mr. Bochman had him sit with his adjustment counselor to fill out the paperwork other students would be completing in home room. Adam refused to do the paperwork. He then went to his math class, where an incident occurred. According to Adam's teacher, when another student, "B," entered the classroom at the beginning of class, Adam made a racist comment to him.¹⁵ Believing it to be a potentially heated situation, the teacher separated Adam from the class and brought him downstairs to the guidance office. As she was walking him down, Adam saw some other African American students and made the same comment. The teacher brought him to the conference room in the guidance office, where he met with the teacher and the adjustment counselor. Adam, who was holding a copy of Mein Kampf, shared some of his "racial concerns" with school staff. At some point during this time, Adam also made a "heil" gesture toward Mr. LeFaivre and told his previous guidance counselor that he was going to get her fired. (P-31.11; P-31.12; Bochman, II: 9-10; 62-66, 69; Keenan, III: 294-98)
106. With Parent's consent, Adam was permitted to leave school that day, as he requested. He was suspended for four (4) days initially, which was subsequently reduced to a two-day suspension for vulgar and obscene language and harassment of a fellow student. Due to the Labor Day holiday, the suspension was for August 31 and September 5, 2017. (P-31.1; P-31.2; Bochman, II: 69-71; Parcellin, II: 158-59)
107. Following this incident, Parent provided Mr. Bochman with an email containing a text exchange between Adam and B. These texts included "aggressive overtones" and a level of threat by B directed toward Adam, though Adam also engaged in inappropriate, aggressive communications. (P-31.4; P-31.5; P-31.6; P-31.7; P-31.8; P-31.9; P-31.10; Bochman, II: 10-13; Parcellin, II: 140-41) Parent also submitted to the school a copy of a police report dated September 5, 2017 regarding an incident that had occurred over the summer of 2017. According to Parent, B had punched Adam, Adam called his mother (Parent), and when Parent arrived at the scene to confront B, she was surrounded by ten (10) to twelve (12) African American individuals, and one pushed her telephone out of her hand. (Bochman, II: 22-28)
108. Upon receiving this email from Parent an hour or two after the classroom incident occurred, Mr. Bochman reported it to school administrators. (Bochman, II: 33-35) He and Mr. Parcellin developed a plan whereby Adam and B would not have any further contact

¹⁵ Parent believes that B walked into the classroom using racially charged language and making a gesture with his hand in the shape of a gun pointed at Adam, but this version of events conflicts with accounts given by school witnesses. (Bochman, II: 86-87) Moreover at the time of the incident, Adam reported to Mr. Bochman that B had smiled at him before Adam made the racist comment. (P-31.11, Bochman, II: 114)

in the building. B was removed from the shared math classes, and paths were mapped for each student to each of his classes. (Bochman, II: 112-13; Parcellin, II: 143-44, 148)

109. Adam did not return to Taunton High School for his re-entry meeting, which was initially scheduled for September 6, 2017 and subsequently rescheduled at Parent's request for the following day. Adam did not return to school again before September 27, 2017 (the end date of the relevant period for purposes of this decision), although several staff members reached out to the family to inform them that he was able to return. (Bochman, II: 73-74; Parcellin, II: 146, 159-60)
110. The Team was unable to propose a fully developed IEP prior to September 27, 2017, as several Team meetings ended early and/or ended up focusing on other concerns held by Parent. (Bochman, II: 116-17) To date, Taunton does not have sufficient evaluative data regarding Adam to fully understand how his disabilities impact him presently and the degree to which they interfere with his current ability to access the curriculum. (Moynihan, II: 332-34)
111. Following the issuance of the undersigned Hearing Officer's decision on the expedited hearing in this matter, Taunton Public Schools revamped its manifestation determination process and engaged in professional development on the subject. (Mattos, I: 323-23; Bochman, II: 79-81; Mulrooney, IV: 81-83) Guidance counselors are now responsible for "information-gathering and people-gathering" at manifestation determination meetings, using a more formalized process whereby guidance counselors identify the appropriate staff to be invited and create the attendance sheets. Meeting attendees include a school psychologist, possibly the associate headmaster, a teacher, if possible, the guidance counselor, as well as the student's special education liaison and the school adjustment counselor, if the student is involved with her. (Bochman, II: 80, 111; Parcellin, II: 173-74) Special education coordinators are now involved in the process. (Mulrooney, IV: 81)
112. During a manifestation determination meeting, guided by a form containing the relevant questions, Team members review aspects of a student's IEP and determine clearly whether the behavior at issue is a manifestation of any of that student's disabilities. They also ensure that the District is providing the accommodations listed on the IEP. (Bochman, II: 110-11; Mulrooney, IV: 81-82) Guidance counselors work with the Director of Special Education to ensure that they identify students who receive, or may be being tested for, services. Additionally, the District now reviews students informally and/or conducts a formal MDR at the eighth day of suspension (rather than waiting for the tenth) to determine whether the Team needs to review a student's services and/or examine patterns of behavior, "because that may be a point of discussion if we need to do something different for a student, such as an FBA, some type of additional evaluation, a behavior plan, even potentially a change in placement." (Mulrooney, IV: 39, 82-83; Bochman, II: 81-83) Monthly suspension reports are sent to the special education department for tracking, identifying students with disabilities, students on 504 plans, and students in the process of being evaluated. Moreover appropriate school officials at each level (elementary, middle, and high school) call the special education office when a student with a disability is suspended "to make sure we're not at the 10 day." All of this

information is then documented, to ensure accountability to students and to the state. (Mulrooney, IV: 39; 82-83)

113. Several school officials who worked directly with Adam following this professional development, which must have occurred at some point between May and September 2017, testified about the importance of the manifestation determination process and its relationship to a safety evaluation. (Bochman, II: 82-83, 117-18; Parcellin, II: 161-65)
114. Despite this training, the testimony of key individuals at Taunton High School and in district-wide position reveals that they are still unclear as to laws regarding the discipline of students with disabilities. For example, THS Headmaster¹⁶ (equivalent to Principal) Matthew Mattos, whose responsibilities include administering expulsions from school and overseeing associate headmasters who mete out suspensions (Mattos, I: 268-69; Bochman, II: 118-19), testified that a student with disabilities may be excluded from school for failing to complete a risk assessment or threat assessment that is reviewed and accepted by the high school administration team. (Mattos, I: 308, 314-16) In fact, he testified that should a student who is disruptive in school fail to successfully complete such an assessment, when asked to do so, issuance of a No Trespassing Order that is in effect until a student completes the assessment, is neither improper nor an exclusion from school. (Mattos, I: 316-17) That student's status, should he fail to complete a threat assessment, would be "suspended pending return." According to Mr. Mattos, the circumstances that occurred in March 2016, where Adam was suspended and prevented from attending school until he completed a threat assessment, could occur again. Mr. Mattos does not view this as an exclusion from school, because the student would be able to return to school if and when he were to undergo the assessment and the person conducting it found that the child was safe to return.¹⁷ (Mattos, I: 330-35, 341-42)

Assistant Headmaster LeFaivre, whose responsibilities include school discipline, testified that it is acceptable to reach out to guardians by telephone several times to inform them of the need for a manifestation determination review and, if unsuccessful in reaching them, to hold the MDR nevertheless. He testified that he presently believes there is no need for a formal written invitation, that "ultimately there is documentation that comes, but it's not timely enough to have that manifestation, typically," because there is "immediacy to the manifestation that needs to be done." (LeFaivre, III: 23-25)

Ms. Mulrooney, who as Director of Special Education oversees special education for the district, including the implementation of federal and state regulations and the conduct of manifestation determination reviews, testified that "ten cumulative days of suspension is not necessarily a change in placement." From approximately 2009 through January 2016, Ms. Mulrooney was Coordinator of Special Education, grades 7-12, for TPS. In this role,

¹⁶According to Guidance Counselor Paul Bochman, Headmaster Mattos does not attend manifestation determination meetings. (Bochman, II: 83-84)

¹⁷Pressed on this statement, Headmaster Mattos acknowledge that if a manifestation determination review had been held and the issues for which the suspension was being considered were found to be a manifestation of the student's disability, the safety evaluation process would not be triggered and the suspension "would be lifted." (Mattos, I: 323)

her responsibilities included attending Team meetings, initial meetings, and three-year reevaluation meetings; reading IEPs and making sure they were being implemented appropriately; ensuring that teachers were following federal and state regulations; delivering professional development trainings; assigning and meeting with teachers; and working on scheduling. (Mulrooney, IV: 28-30, 63-64) At hearing she testified that a change of placement would be “a student going from a full inclusion classroom to a sub-separate classroom [or] an out-of-district placement that a student goes to,” and stated, in direct contravention of the 2017 Decision addressing Taunton’s actions and inactions regarding Adam during Ms. Mulrooney’s tenure as Director of Special Education, an out-of-school suspension for more than ten days that leads to home tutoring “is not a change in placement” requiring parental consent, if the student returns to school. (Mulrooney, IV: 63-66)

115. In this vein, at the hearing on the present matter in May 2018, Ms. Mulrooney testified that prior to March 2016, Adam’s placement had not been changed by Taunton, despite suspensions of more than ten days for similar behaviors. (Mulrooney, 88-89) She also testified that had a manifestation determination review been held when required, the outcome for Adam would have been the same. (Mulrooney, IV: 96)

DISCUSSION

A. Parent Bears the Burden of Proof

In order to determine whether Parent is entitled to a decision in her favor, I must consider legal standards governing special education, disability-based discrimination, school discipline, changes in placement, and procedural violations. As the moving party in this matter, Parent bears the burden of proof.¹⁸ To prevail, she must prove – by a preponderance of the evidence – that the District violated the Individuals with Disabilities Education Act (IDEA) by failing to implement accepted, expired IEPs or through procedural inadequacies in connection with school discipline that amounted to a violation of his right to a free appropriate public education (FAPE), or that Taunton violated Section 504 of the Rehabilitation Act of 1973 (§ 504) by discriminating against Adam on the basis of his disability.¹⁹

B. Claims Under the IDEA

The Parties do not dispute that Adam qualifies as an individual with a disability under the IDEA. The IDEA was enacted "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services

¹⁸ See *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2008).

¹⁹ See *Schaffer*, 546 U.S. at 62; *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990) (Districts are liable for procedural violations if parents prove both that a violation occurred and that the “procedural inadequacies compromised the pupil’s right to an appropriate education, seriously hampered the parents’ opportunity to participate in the formulation process, or caused a deprivation of educational benefits”); *S.W. v. Holbrook Pub. Sch.*, 221 F. Supp. 2d 222, 228 (D. Mass. 2002) (describing elements of discrimination claim under Section 504 of the Rehabilitation Act of 1973 (§ 504) in the school setting).

designed to meet their unique needs and prepare them for further education, employment, and independent living."²⁰ A student's "IEP is the means by which special education and related services are tailored to the unique needs of a particular child."²¹

Parent claims that Taunton failed to implement Adam's IEPs by failing to conduct manifestation determination reviews between April 19, 2015 and April 19, 2017, inclusive of beginning and end dates, altered his IEPs by removing a computer class and JROTC without parental consent where such consent was required between September 26, 2015 and September 26, 2017, inclusive of beginning and end dates, and failing to provide required accommodations between April 19, 2015 and April 19, 2017, inclusive of beginning and end dates. She also alleges that Taunton changed Adam's placement without parental consent by suspending him beyond ten days in a given year between April 19, 2015 and his suspension on March 10, 2016.²²

1. *Implementation of Accepted, Expired IEPs*

Adam's guardians fully accepted IEPs for the 2014-2015 and 2015-2016 school years. Both IEPs expired without being challenged. Parent may not now claim that these expired IEPs were inappropriate for Adam, but she may argue that Taunton failed to implement them as written.²³ In order to successfully demonstrate that the failure to properly implement an IEP constitutes a violation of FAPE, Parent must show the failure is greater than a *de minimis* violation.²⁴ To prevail on this claim, she must show that the District "failed to implement substantial or significant provisions of the IEP."²⁵

a. Failure to Conduct Manifestation Determination Reviews

Although Parent proved that Taunton failed to conduct required MDRs during the relevant timeframe, as discussed in Section B(2), below, she did not establish that manifestation determinations were a provision of Adam's accepted, expired IEPs. As such, her claim fails.

b. Alteration of IEPs Without Consent

²⁰ 20 U.S.C. § 1400(d)(1)(A). See 20 U.S.C. 1412(a)(1)(A); *Mr. I. ex rel. L.I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1, 12 (1st Cir. 2007) (discussing broad purpose of IDEA).

²¹ *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988, 994 (2017); see *Honig v. Doe*, 484 U.S. 305, 311-12 (1988) (IEP is "the centerpiece of the statute's education delivery system for disabled children").

²² These beginning and end dates were determined by way of a ruling issued on December 5, 2017, which clarified statutes of limitations on various claims in the initial and amended complaints.

²³ See *Indep. Sch. Dist. No. 432, Mahnomon Sch. v. J.H.*, 8 F. Supp. 2d 1166, 1174 (finding that by signing IEP, parent or guardian grants the school permission to implement the IEP as proposed).

²⁴ See *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000); *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 68 (D.D.C. 2008).

²⁵ *Bobby R.*, 200 F.3d at 349; see *Shank*, 585 F. Supp. 2d at 68 (internal punctuation and citation omitted) (material failure is "more than a minor discrepancy between the services a school provides to a disabled child and those required by the child's IEP.")

Similarly, Parent has not met her burden to prove that any alteration by Taunton of Adam's schedule, specifically his removal from a computer class and from JROTC, constitutes a denial of FAPE under the IDEA. Although Parent is correct in her assertion that substantive changes to a child's IEP require parental consent,²⁶ she has not established that Taunton made any changes to Adam's IEP.

Parent argued that Adam's placement in the Computer Concepts class during the 2014-2015 school year, and his removal from Junior ROTC at the end of that school year, constituted a substantial failure to properly implement his IEP. However, in order for a class adjustment to impact the implementation of an IEP, the class must have been a component of the IEP itself.²⁷ Evidence at hearing demonstrated that Computer Concepts was a general education course, and that neither Computer Concepts nor Junior ROTC was a component of Adam's IEP. Consequently to the extent any changes to Adam's schedule may have been made, they did not affect the implementation of his IEP and did not constitute a denial of FAPE.²⁸

c. Failure to Provide Required Accommodations

To prevail on this claim, Parent must prove that Taunton failed to provide Adam with the accommodations required by his IEPs and that this constituted more than a *de minimis* violation.²⁹ Parent's claim is not supported by the evidence.

Testimony revealed that Adam's teachers were, in fact, thoughtful about their implementation of Adam's IEP. For example, Ms. Shepard provided Adam with frequent breaks, familiar test administrators, small group teaching, and positive reinforcement throughout her class period. Major Anderson conducted outside research on Adam's disabilities and provided him with constant and clear reminders of rules and strategies that Adam could use to calm himself down if he was upset. Adam was offered the opportunity to attend weekly counseling sessions, though he was resistant to them.

To the extent Taunton failed to provide required accommodations (and services) for Adam while he was out of school for over a year following the March 2016 suspension, I addressed this failure in the 2017 Decision. Taunton developed a compensatory services plan, in accordance with my prior Order. As to the time period that Adam was, in fact, in school, Parent did not meet her burden to prove that Taunton failed to provide Adam with the accommodations required by his IEPs.

²⁶Cf. 20 U.S.C. § 1415(f)(3)(E)(ii) (procedural violation may constitute deprivation of FAPE where such violation significantly impedes parent's opportunity to participate in decision-making regarding the provision of FAPE); 34 C.F.R. § 300.309 (defining consent).

²⁷See *Zdrowski v. Rieck*, 119 F. Supp. 3d, 643 668 (E.D. Mich. 2015) (finding no denial of FAPE in District's failure to replace classroom aide, where aide was not required under student's IEP).

²⁸See *id.*

²⁹See *Bobby R.*, 200 F.3d at 349.

Parent was unable to meet her burden to prove that Taunton failed to implement Adam's accepted, expired IEPs in any of the ways she alleged. As such, this claim fails in its entirety.

2. *Taunton's Procedural Errors Deprived Adam of a FAPE Under the IDEA*

a. Legal Standards: Procedural Errors and Discipline of Students with Disabilities

The IDEA recognizes that procedural errors may amount to a deprivation of FAPE: "In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies – (I) impeded the child's right to a free appropriate public education; (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or (III) caused a deprivation of educational benefits."³⁰

Pursuant to the IDEA and its implementing regulations, school districts may not change the placement of a student with a disability for disciplinary purposes (i.e. via suspension or expulsion) if the conduct triggering the discipline is a manifestation of the student's disability.³¹ In other words, if the student's conduct was caused by or has a direct and substantial relationship to his disability or disabilities, the school district may not change his placement because of that conduct.

Federal law defines a change in placement for purposes of removal of a child with a disability from the child's educational placement as occurring if: (1) the removal is for more than ten (10) consecutive school days; or (2) the child has been subjected to a series of removals that constitutes a pattern because: (i) the series of removals total more than ten (10) school days in a school year; (ii) the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and (iii) because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.³²

Within ten (10) days of a decision to change the placement of a child with a disability because of a violation of a code of student conduct, as described above, the school district, the parent, and relevant members of the IEP Team (as determined by the parent and the school district) "shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine – (I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (II) if the conduct in question was the direct result of the [school district]'s failure to implement the IEP."³³ If the district, the parent, and the relevant members of the Team

³⁰20 U.S.C. §1415(f)(3)(E)(ii).

³¹See 20 U.S.C. §1415(k)(1)(E)(i); 34 C.F.R. §300.530(e).

³²34 C.F.R. §300.536(a).

³³20 U.S.C. §1415(k)(1)(E)(i); 34 C.F.R. §300.530(e)(2).

determine that either of these factors is applicable to the child, “the conduct shall be determined to be a manifestation of the child’s disability.”³⁴

If the student’s conduct is determined to be a manifestation of his disability, the Team is required to conduct a functional behavioral assessment (FBA) and implement a behavioral intervention plan (BIP) for the child, provided that one has not already been conducted; review any BIP that has been developed and modify it as necessary to address the behavior, and, with exceptions in cases involving weapon, drugs, or serious bodily injury,³⁵ “return the child to the placement from which the child was removed, unless the parent and the local educational agency [school district] agree to a change of placement as part of the modification of the behavioral intervention plan.”³⁶

If the student’s conduct is determined not to be a manifestation of his disability, the relevant disciplinary procedures applicable to children without disabilities may be applied in the same manner and for the same duration in which the procedures would be applied to children without disabilities.³⁷ The school district, however, must still provide the student with FAPE, though this may occur in an interim alternative educational setting (IAES).³⁸

The IDEA provides that the “parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others,” may request an expedited hearing.³⁹ In these circumstances, a hearing officer may either return the child to the placement from which he was removed or order a change in placement to an IAES if she “determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.”⁴⁰

b. Taunton Failed Repeatedly To Abide By Adam’s Procedural Protections As a Student with a Disability Facing Suspension

³⁴ 20 U.S.C. §1415(k)(1)(E)(ii); 34 C.F.R. §300.530(e)(2).

³⁵ Regardless of whether the behavior is determined to be a manifestation of the child’s disability, a student may be removed to an interim alternative educational setting (IAES) for not more than forty-five (45) school days in limited circumstances involving possession of weapons or drugs on school grounds or at school functions, or the infliction of serious bodily injury upon another person on school premises. See 20 U.S.C. §1415(k)(1)(G); 34 C.F.R. §300.530(g).

³⁶ See 20 U.S.C. §1415(k)(1)(F); 34 C.F.R. §300.530(f).

³⁷ 20 U.S.C. §§ 1415(k)(1)(C); 34 C.F.R. §300.530(c).

³⁸ 20 U.S.C. §§ 1415(k)(1)(C), 1412 (a)(1)(A); 34 C.F.R. §300.530(c).

³⁹ 20 U.S.C §1415(k)(3)(A).

⁴⁰ *Id.* at §1415(k)(3)(B).

Parent's claim that Taunton violated Adam's right to FAPE runs from April 19, 2015 to March 10, 2016. As such, it spans the 2014-2015 and 2015-2016 school years. I examine each in turn.

On April 17, 2015 Adam was suspended for three days for excessive class cuts, causing a hallway disruption, evading security, and being in a restricted area without a pass. He had already been suspended for nine days during that school year for possession of marijuana, harassing a fellow student, and smoking an electronic cigarette. As of April 19, 2015, Adam had been suspended for more than ten cumulative days in the 2014-2015 school year. On June 12, 2015, he was suspended for one day for possession of a laser light and being disrespectful. At this point, he had been suspended for possessing prohibited implements and being disrespectful and/or disruptive. Viewed in the context of Adam's behavior, described by teachers and administrators, this appears to constitute a change in placement, as these suspensions consisted of more than ten days in a school year for behavior substantially similar to behavior in previous incidents that resulted in the series of removals, and "because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another."⁴¹ As such, Taunton was required to conduct manifestation determination reviews (MDRs) in conjunction with the April and June suspensions.

Under the IDEA, an MDR should have taken place within ten days of the decision to change Adam's placement by suspending him beyond ten days. It should have involved a review by relevant members of Adam's Team, including a parent or guardian. Moreover the process specifically contemplates that parents will provide relevant information to assist in the determination as to whether "the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability," or if such conduct "was the direct result of the [school district]'s failure to implement the IEP."⁴²

Eric LeFaivre, the headmaster responsible for Adam's discipline, testified that he held one or two MDRs for Adam during the 2014-2015 school year, that he tried to reach Adam's guardians by telephone to inform them that the MDR would occur, that he could not wait for them to respond because of the immediacy of MDRs and as such they did not participate, that he could not recall who did participate, what they discussed, or even whether they had a meeting at all, and that there is no documentation that any of this occurred. I find his testimony regarding MDRs held for Adam during the 2014-2015 school year not to be credible. Moreover, even if MDRs were conducted as described, these "meetings" were replete with procedural errors.

By November 2015, Taunton had suspended Adam for more than ten cumulative days, for similar offenses, on one school year. On November 18, 2015, Adam was suspended for excessive class cuts and failure to complete a day in the remediation room. He had already been suspended that year for violating the electronic device policy, major insubordination, vandalism, excessive class cuts, leaving the building without permission, assault, and vulgar language. Under the IDEA, an MDR should have taken place within ten days of the decision to change Adam's placement, which occurred when he was suspended for the eleventh and twelfth days of

⁴¹ See 34 C.F.R. § 300.536(a).

⁴² See 20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(2).

the school year on November 18, 2015. Had an MDR occurred, Adam's parent and/or guardians could have brought to the school's attention information that may have assisted the District in determining whether Adam's conduct was a manifestation of his disabilities. Moreover an MDR could have resulted in an FBA and the development of a BIP to assist Adam, who was clearly struggling. No MDR occurred.

On November 23, 2015 Adam was suspended for vulgar language and excessive office referrals, bringing his suspension total for November alone to ten. At this point, even if he was not aware that Adam was on an IEP (a fact readily available to him on the school's data system), Mr. LeFaivre should have at least considered whether Adam was receiving the services he needed. Had he consulted with special education, or any of Adam's teachers, at this time, Mr. LeFaivre would have learned that Adam did, in fact, have an IEP. This should have led him to recognize that Adam was entitled to an MDR. No MDR occurred. Adam's guardians did not have the opportunity to provide information to the Team that could have been helpful. No FBA was conducted and no BIP was developed.

On December 7, 2015 Adam was suspended, again for excessive office referrals, leaving the building without permission, and being disrespectful and insubordinate. On December 21, 2015, he was suspended for the use of vulgar and obscene language, causing a classroom disruption, violation of electronic device policy, class cuts, being in a restricted area without a pass, and being insubordinate. At this point Taunton had suspended Adam for nineteen days in the school year for similar offenses, including insubordination, cutting class, being where he was not supposed to be, and leaving the building without permission. No MDR occurred. Adam's guardians did not have the opportunity to provide information to the Team that could have been helpful. No FBA was conducted and no BIP was developed.

Before the suspension on March 11, 2016 that was the subject of the expedited decision in this matter, Adam was suspended again on January 14, February 2, and February 24, 2016 for behaviors similar to those involved in his prior suspensions. Taunton argues that at least some of Adam's suspensions were based on behaviors that were not manifestations of his disabilities, such that Adam would still have been suspended for upwards of twenty-five (25) days in the 2015-2016 school year had the MDRs occurred. To the extent any of the similar behaviors that led to Adam's multiple suspensions beyond ten days in a school year were in fact manifestations of his disabilities, Taunton changed Adam's placement without parental consent.

Although it is impossible to speculate as to whether Taunton would have found that any of Adam's behaviors were manifestations of his disabilities, holding MDRs would have led, at the very least, to an MDR Team (including his parent and/or guardians) examining Adam's behaviors and asking questions about whether his IEP was appropriate given his needs. It may well have led to an FBA, a BIP, or changes to his IEP. If the behaviors leading to any of Adam's days out of school beyond the first ten (three in 2014-2015 and at least sixteen in 2015-2016 prior to the March 2016 suspension) were found to be manifestations of his disabilities, Adam would have been in school on those days. As such, I find that Taunton's repeated failure to conduct MDRs impeded his right to a FAPE; significantly impeded his parent's and/or guardians' opportunity to participate in the decisionmaking process regarding the provision of FAPE; and caused a deprivation of educational benefits. The procedural errors committed by

Taunton between April 19, 2015 and Adam’s suspension on March 11, 2016 constitute a deprivation of FAPE.

C. Section 504 Claims: Analytical Framework

Section 504 of the Rehabilitation Act of 1973 (§ 504) was developed in response to discrimination against individuals with disabilities, and calls for all federally funded programs to treat all individuals equally.⁴³ Pursuant to § 504, “no otherwise qualified individual with a disability...shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...”⁴⁴ Section 504 does not define eligibility under the Act; that task is left to the regulations implementing the statute. To prevail on a § 504 claim, Parent must prove that Adam is an otherwise qualified individual with a disability under § 504, that he was excluded or denied benefits on the basis of his disability, and that TPS receives federal funding.

1. *Student with a Disability*

To prevail on a § 504 claim in a school setting, the moving party must prove that he has a disability under § 504.⁴⁵ Eligibility for § 504 protections and accommodations requires that a student: (1) have a mental or physical impairment that substantially limits a major life activity; (2) have a record of such impairment; or (3) be regarded as having such impairment.⁴⁶ For the purposes of § 504, a mental or physical impairment is defined to include, in pertinent part, mental or psychological disorders such as emotional or mental illness and specific learning disabilities.⁴⁷ Major life activities include, but are not limited to, functions such as caring for oneself, learning, and working.⁴⁸ Implementing regulations do not define “substantially limit.”

Due to the broad coverage of § 504, courts typically do not spill much ink dissecting whether a disability is covered under § 504, unless insufficient evidence exists to establish the

⁴³29 U.S.C. § 794; 34 C.F.R. § 104.1

⁴⁴29 U.S.C. § 794.

⁴⁵See 34 C.F.R. § 104.3(j)(1).

⁴⁶34 C.F.R. § 104.3(j)(1).

⁴⁷34 C.F.R. § 104.3(j)(2)(i).

⁴⁸34 C.F.R. § 104.3(j)(2)(ii). When determining the impact of the impairment on a major life activity, a school district may not consider the ameliorative effects of mitigating measures. 42 U.S.C. § 12102(4)(E)(i).

existence of an impairment.⁴⁹ Instead, courts examine whether the identified disability substantially limits a major life activity by assessing the individual facts of the case.⁵⁰

A student may also meet the § 504 definition of disability if the student has a record of or is regarded as having a disability.⁵¹ This may include having a history of, or being misclassified as having, a mental or physical impairment that substantially limit a major life activity, or having a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment.⁵²

2. *Otherwise Qualified*

In addition to proving he has a disability that substantially limits a major life activity, the moving party must establish that he is otherwise qualified for the program in question.⁵³ An “otherwise qualified person with disabilities,” for the purposes of elementary and secondary education, is defined as, “a person (i) of an age during which non-handicapped persons are provided such services; (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons; or (iii) to whom a state is required to provide a free appropriate public education under the IDEA⁵⁴

2. *Exclusion or Denial of Benefits Based Solely Upon Disability*

The requirement that a school district provide disabled students with reasonable access to an education similar to that of their non-disabled peers is essentially a requirement to provide a

⁴⁹ See, e.g., *Zdrowski*, 119 F. Supp. 3d at 666 (assuming, rather than applying analysis to determine, disability under § 504); *Campbell v. Bd. of Educ. of the Centerline Sch. Dist.*, 58 F. App’x 162, 165-66 (6th Cir. 2003) (analyzing every prong of discrimination test except existence of applicable impairment); *Doe v. Pleasant Valley Sch. Dist.*, 2017 WL 8792704 1, 3 (S.D. Iowa 2017) (skipping analysis as to sufficiency of student’s impairment in relation to § 504).

⁵⁰ See *Ellenberg v. New Mexico Military Inst.*, 572 F.3d 815, 821 (10th Cir. 2009) (individualized evidence required to prove impairment affects major life activity) In its *Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools*, the U.S. Department of Education Office for Civil Rights indicated that the determination as to whether a substantial limitation exists should be made in the first instance by a “group of knowledgeable persons” (such as a student’s Section 504 Team) drawing upon information from a variety of sources. U.S. DEP’T OF EDUC., OFFICE FOR CIV. R. 1, 6 (Dec. 2016)

⁵¹ See 34 C.F.R. § 104.3(j)(2)(iii).

⁵² See 34 C.F.R. § 104.3(j)(2)(iii)-(iv).

⁵³ See *Doe v. Woodford Cnty Bd. of Educ.*, 213 F.3d 921, 925 (6th Cir. 2000) (to be otherwise qualified under § 504, “the plaintiff must simply show that he or she is qualified to perform the function with or without reasonable accommodation by the defendant”); see also *G.C. v. Owensboro Pub. Sch.*, 711 F.3d 623, 635 (6th Cir. 2013) (establishing that prong two of discrimination test under § 504 is to determine whether student was otherwise qualified for participation in program); *Campbell*, 58 F. App’x at 165-66 (analyzing discrimination under § 504).

⁵⁴ See 34 C.F.R. § 104.3(l)(2); *Campbell*, 58 F. App’x at 165-67 (quoting *Woodford Cnty. Bd. of Educ.*, 213 F.3d at 925); *Dear Colleague Letter*, OFFICE FOR CIV. R. & U.S. DEP’T OF EDUC. found at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.html> (Jan. 25, 2016).

free appropriate public education (FAPE).⁵⁵ However, proving discrimination under § 504 “requires something more than a mere failure to provide the free appropriate education required by the IDEA.”⁵⁶ To prevail on a § 504 claim, the moving party also must prove that he was excluded from or denied the benefits of the educational program at issue based solely upon his disability.⁵⁷ In other words, the student must prove that “but for” the existence of the disability, the denial or exclusion would not have occurred.⁵⁸

Generally, case law on the applicability of § 504 in the context of the provision of special education is not well developed. The First Circuit has yet to delineate what is required to prove a denial of rights based solely upon disability in the educational context⁵⁹, and federal court cases addressing the interplay of § 504 and the disciplinary protections afforded to an IDEA eligible student are sparse. The federal courts that have addressed the issue have recognized that the § 504 analysis in an IDEA case is unique.⁶⁰ The U.S. District Court for the District of Columbia, for example, noted that § 504:

seems an odd fit for a setting in which local governments are charged with providing specialized education for disabled students. Recognizing this incongruity, courts have determined that in order to show a violation of the Rehabilitation Act, something more than a mere failure to provide the free appropriate education . . . must be shown. Specifically, plaintiffs must show either bad faith or gross misjudgment on the part of the governmental defendants.⁶¹

⁵⁵ See *Zdrowski*, 119 F. Supp. 3d at 666 (moving party must show that school district failed to provide him with FAPE, which led to denial of access to same educational opportunities provided to non-disabled students); see also *Campbell*, 58 F. App’x at 166 (noting that § 504 requires that student with a disability have a “publicly-sponsored education functionally equal to that offered by the defendant to its mainstream pupil”); see also *Nat’l Ass’n of the Deaf of Harvard Univ.*, 2016 WL 3561622 at *5 (D. Mass. 2016) (quoting *Alexander v. Choate*, 469 U.S. 287, 301 (1985) (“The Supreme Court has interpreted Section 504’s antidiscrimination rule as requiring that ‘otherwise qualified handicapped individual[s] – be provided with meaningful access to the benefit that the grantee offers”).

⁵⁶ *Bess v. Kanawha Cnty. Bd. of Educ.*, 2009 WL 3062974 at *10 (S.D.W. Va. 2009).

⁵⁷ See *Campbell*, 58 F. App’x at 165 (explaining elements of prima facie case for § 504 discrimination claim).

⁵⁸ See *Bess*, 2009 WL 3062974 at *10.

⁵⁹ Although the First Circuit did address discrimination claims under the Rehabilitation Act involving a denial of FAPE in *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26 (1st Cir. 2012), the case, which does not involve school discipline, does not explain what is meant by “a showing of disability based animus.” In addition, the cases cited in *Esposito* to support the conclusion that the plaintiff must show disability based animus to prove discrimination under § 504, fail to mention the requirement of animus. (See *Miller ex rel. S.M. v. Bd. of Educ. of Albuquerque Pub. Sch.*, 565 F.3d 1232 (10th Cir. 2009); *Lesley v. Hee Man Chie*, 250 F.3d 47 (1st Cir. 2001); *Parker v. Universidad de P.R.*, 225 F.3d 1 (1st Cir. 2000)). For these reasons, the more supported analysis, which requires a showing of bad faith or gross misjudgment by the school, was applied in the instant case.

⁶⁰ See, e.g., *N.L. ex rel. Mrs. C. v. Knox Cnty. Sch.*, 315 F.3d 688, 695 (6th Cir. 2003); *Sellers v. Sch. Bd. of Manassas*, 141 F.3d 524, 528-29 (4th Cir. 1998); *Monahan v. State*, 687 F. 2d 1164, 1171 (8th Cir. 1982); *Robinson ex rel. D.R. v. District of Columbia*, 535 F. Supp. 2nd 38, 41-42 (D.D.C. 2008) (internal quotation marks and citations omitted).

⁶¹ *Robinson*, 535 F. Supp. 2nd at 41-42 (internal quotation marks and citations omitted).

In the context of special education cases, courts have not adopted the familiar burden-shifting analysis used to evaluate employment or public accommodation discrimination claims. Federal courts in the Fourth, Sixth, and Eighth Circuits have not required a showing of differential treatment of students with and without disabilities, instead assuming – without much discussion – that a failure to provide FAPE, in itself, establishes disparate treatment.⁶² Failure to provide a FAPE to a disabled student is, essentially, failure to provide him with reasonable access to an education similar to that of his non-disabled peers.⁶³ The second part of the analysis, a convincing showing of bad faith or gross misjudgment, appears to have garnered the bulk of the courts’ attention.⁶⁴ A judge in the U.S. District Court for the Northern District of Georgia has suggested that a showing of bad faith or gross misjudgment, and a showing of differential treatment, might be alternative ways a plaintiff might meet her burden, such that “in the educational context, a plaintiff asserting claims under . . . section 504 must show more than an IDEA violation based upon a failure to provide a FAPE. The plaintiff must also demonstrate intentional discrimination *or* some bad faith or gross misjudgment by the school” (emphasis added).⁶⁵ A judge in the U.S. District Court for the District of Columbia adopted this analysis in 2011.⁶⁶

⁶² See, e.g., *B.M. ex rel. Miller v. South Callaway R-11 Sch. Dist.*, 732 F.3d 882, 887 (8th Cir. 2013); *Knox County Sch.*, 315 F.3d at 695; *Sellers*, 141 F.3d at 528-29. Courts in other jurisdictions are less clear about the relationship between the elements and whether a plaintiff must demonstrate separately that he was subject to discrimination solely because of his disability; cases do not explain how such a showing might be made. See *Alex G. ex rel. Dr. Steven G. v. Bd. of Trustees of Davis J. Unified Sch. Dist.*, 387 F. Supp. 2d 1119, 1124 (E.D. Cal. 2005) (internal citation omitted) (“To establish a prima facie case of discrimination under § 504, plaintiff must show that: (1) [student] is disabled; (2) he is otherwise qualified to participate in the District’s program; (3) he has been subject to discrimination by defendants solely because of his disability; and (4) defendants are recipients of federal funding. *Additionally*, plaintiffs bringing § 504 claims in the special education context must show that the educational decisions relating to the student were so inappropriate as to constitute either bad faith or gross misjudgment”) (emphasis added); *Anderson v. Arlington Heights Sch. Dist.*, 2017 WL 6327572 at *4, *9 (M.D. Pa. 2017) (containing no discussion of bad faith or gross misjudgment standard, and concluding that where student with a § 504 plan but no IEP was expelled from school without a manifestation determination, student was deprived of procedural safeguards but parents had failed to prove that he was deprived of one or more services at the school *solely* due to his disability”) (emphasis in original).

⁶³ See *Zdrowski*, 119 F. Supp. 3d at 666 (moving party must show that school district failed to provide him with FAPE, which led to denial of access to same educational opportunities provided to non-disabled students); *Campbell*, 58 F. App’x at 166 (noting that § 504 requires that student with a disability have a “publicly-sponsored education functionally equal to that offered by the defendant to its mainstream pupil”).

⁶⁴ See *Monahan*, 687 F. 2d at 1171 (“either bad faith or gross misjudgment should be found before a § 504 violation can be made out, at least in the context of education of handicapped children); *Zdrowski*, 119 F. Supp. 3d at 666 (explaining that § 504 claimant must prove that defendant school system failed to supply him with public education “sufficiently appropriate to his . . . personal learning requisites to enable his . . . reasonable access to an education similar, relative to his . . . individual academic potential and cognitive abilities, to that available, to the average fellow student;” that the defendant’s failure to provide him with a free appropriate public education was discriminatory; and that the school system acted with bad faith or gross misjudgment); *K.D. ex rel. J.D. v. Starr*, 55 F. Supp. 3d 782, 788 (D. Md. 2014) (in context of education of handicapped children, “a finding of discrimination based on disability requires a showing of bad faith or gross misjudgment by the school system”).

⁶⁵ *J.D.P. v. Cherokee Cnty. Ga. Sch. Dist.*, 735 F. Supp. 2d 1348, 1364 (N.D. Ga. 2010) (internal quotation marks and citations omitted) (adopting “intentional discrimination” requirement from damages analysis).

In order to prove bad faith or gross misjudgment, the moving party must establish that the school's actions "depart[ed] substantially from accepted professional judgment, practice or standards [so] as to demonstrate that the person[s] responsible did not base the decision on such judgment."⁶⁷ Such a showing requires evidence as to what "accepted professional judgment" is, in the circumstances of the case.⁶⁸ Moreover "statutory noncompliance alone does not constitute bad faith or gross misjudgment;"⁶⁹ it is a high standard to meet.⁷⁰ For example, parents' claim that a student's removal from honors classes and the removal of a writing fluency goal from his IEP constituted gross misjudgment failed, in part because they had provided no evidence regarding what an "acceptable professional judgment" would have been in this situation.⁷¹ Similarly, parents' § 504 claim failed where they provided only "possible instances of statutory noncompliance" rather than evidence of what the accepted professional judgment would have been under the circumstances.⁷² On the other hand, in a non-discipline case, a judge in the U.S. District Court for the Southern District of West Virginia held that the exclusion of a child from school and other educational activities because of his disability, if proven, would constitute a violation of § 504.⁷³ A school district may rebut the allegation of discrimination by providing a reasonable explanation for the action or inaction that the moving party is alleging to be discrimination.⁷⁴

66 See *Alston v. District of Columbia*, 770 F. Supp. 2d 289, 298 (D.D.C. 2011); *id.* at 303 ("to survive summary judgment, the plaintiffs must offer evidence from which a reasonable juror could conclude either that [student]'s disability played a determining role in the defendants' actions or the defendants' actions amounted to bad faith or gross misjudgment").

67 *Miller*, 732 F.3d at 887 (internal citations omitted) see *Monahan*, 687 F.2d at 1171 (stating that there is no discrimination under Section 504 "[s]o long as the state officials involved have exercised professional judgment, in such a way as not to depart grossly from accepted standards among educational professionals").

68 *Miller*, 732 F.3d at 888.

69 See *id.*

70 See *D.N. ex rel. Christina Nolen v. Louisa Cnty. Public Sch.*, 156 F. Supp. 3d 767, 776 (W.D. Va. 2016).

71 See *Doe*, 2017 WL 8792704 at 4 (plaintiff's argument that school failed to implement recommendations from independent educational evaluation, and therefore discriminated against student, failed because plaintiff did not present any expert opinion that accepted professional judgment would have been to implement the recommendations).

72 See *Miller*, 732 F.3d at 887 (reasoning that allegations of statutory noncompliance, without evidence of a substantial departure from accepted professional judgment, will not amount to discrimination under Section 504).

73 See *Bess*, 2009 WL 3062974 at *10. Cf. *Louisa Cnty. Public Sch.*, 156 F. Supp. 3d at 777 (discussing unpublished ruling by judge in the U.S. District Court for the District of Maryland denying school district's motion to dismiss where "complaint contained allegations that the student was suspended multiple times based on questionable, if not nonexistent, evidence of wrongdoing, and without evidence that these important decisions were based upon reason, one could infer that [the student] has been denied educational benefits solely based on his disability" (internal quotation marks and citation omitted)).

74 See *Zdrowski*, 119 F.Supp.3d at 667-68 (finding no discrimination where teacher pulled student down hallway a single time in a "transport hold" because the teacher explained the action was taken in an effort to prevent additional stress and harm to student). The court also held that the removal of a classroom aide did not exemplify bad faith or gross misjudgment because no aide was required under the student's IEP. See *id.* at 668.

3. *Federally Funded Under Section 504*

The final requirement to prove discrimination under § 504 is that the program in question must receive federal funding.⁷⁵ Proving that a program or school district receives federal funding is not an exhaustive task, with many courts simply acknowledging that all public school systems are federally funded.⁷⁶

D. Taunton Violated Section 504 by Changing Adam's Placement

To prevail on her claims under § 504, Parent must prove that Adam has a disability under § 504; that he is “otherwise qualified” for the program in question; that he was denied a benefit or excluded due solely to the existence of a disability; and that Taunton receives federal funding.⁷⁷ In the instant matter, parties are in agreement that Adam's diagnoses of ADHD, PTSD, and Reactive Attachment Disorder qualify him for the protections afforded under Section 504.^{78,79} Additionally, there is no disagreement about whether Taunton Public Schools is federally funded, nor is there a question as to whether Adam is “otherwise qualified” to attend public high school.⁸⁰ Therefore, the analysis is limited to whether the actions and inactions of Taunton High School constitute discrimination against Adam based solely upon his disability.

1. *Taunton's Failure to Conduct MDRs, Resulting in Changes of Adam's Placement Between April 19, 2015 and April 19, 2017, Constitutes Discrimination Under Section 504*

As discussed above, the First Circuit has not enumerated the elements of a successful § 504 claim in an IDEA case⁸¹, much less one involving school discipline. I must begin by

⁷⁵ See, e.g., *G.C.*, 711 F.3d at 635; *Campbell*, 58 F. App'x at 165.

⁷⁶ See, e.g., *Mark H. v. Hamamoto*, 620 F.3d 1090, 1097 (9th Cir. 2010) (stating, without analysis, that § 504 applies to Hawaii Department of Education because it is a public school system); *Lyons v. Smith*, 829 F. Supp. 414, 418-19 (D.D.C. 1993) (observing that regulations implementing § 504 apply to “all federal subsidized public elementary or secondary education programs and proceeding without further analysis regarding this element); *Campbell*, 58 F. App'x at 165 (noting lack of dispute among parties as to whether school district qualifies as federally funded entity).

⁷⁷ See 29 U.S.C. § 794(a).

⁷⁸ 34 C.F.R. § 104.3-4 (listing impairments that qualify an individual for the protections afforded by § 504).

⁷⁹ Federal law regarding rehabilitation services, which has been recognized in the § 504 context by the Office of Civil Rights, excludes from the definition of an individual with a disability an individual “currently engaging in the illegal use of drugs, when a covered agency acts on the basis of such use.” See 29 U.S.C. § 705(20)(c)(i) (narrowing definition of individuals with a disability to exclude those currently engaging in the use of illegal drugs); *Portland Pub. Sch.*, 25 IDELR 1247 (Maine SEA, 1997) (recognizing inapplicability of § 504 protections during the period of time in which student is using illegal drugs). In the instant matter, except as to JROTC (addressed below), there is no evidence that Taunton Public Schools took any actions on the basis of drug use by Adam.

⁸⁰ See 29 U.S.C. § 794(a); 34 C.F.R. § 104.3(1)(2).

⁸¹ See note 59 supra.

determining whether Taunton deprived Adam of a FAPE. For the reasons above, and those contained in the 2017 Decision, I conclude that Taunton's failure to conduct manifestation determinations in connection with Adam's suspensions between April 19, 2015 and April 19, 2017, leading to changes in placement and, in March 2016, exclusion from school for over a year, constitutes a deprivation of FAPE for the purposes of § 504.⁸²

Next I must determine whether Taunton deprived Adam of a FAPE due solely to his disability. The Fourth, Sixth, and Eighth Circuit Courts of Appeals would allow Parent to meet this burden by showing that Taunton acted out of bad faith or gross misjudgment. This approach is particularly useful for situations such as this which involve discipline, as students with disabilities have unique protections not available to students without disabilities. As a result of the IDEA's special disciplinary procedures students with disabilities are not likely to be able to demonstrate that a school district's failure to comply with these procedures constitutes treatment that differs, in a negative sense, from that of their peers.⁸³ Thus, without permitting a finding – at least in the discipline context – that the failure to provide FAPE in itself constitutes discrimination on the basis of disability, an IDEA-eligible student would be effectively barred from pursuing § 504 claims involving disciplinary exclusions.

A school is required to conduct a manifestation determination, in pertinent part, to ensure that a student with a disability is not excluded from school for behavior that is caused by, or has a direct and substantial relationship to, the student's disability.⁸⁴ Exclusion from school or other educational activities of a student for behavior that arises from his disabilities may constitute discrimination against that student on the basis of his disabilities. In Adam's case, rather than convene an MDR to make this determination, Taunton repeatedly suspended him from school for behavior that arguably had a direct and substantial relationship to his disability. It is precisely Taunton's failure to hold the required MDRs that has prevented Adam from showing that he was being excluded from his public education based on conduct arising from and connected to his disability. As such, to the extent a finding of disability-based discrimination is required, I conclude that on at least several occasions between April 19, 2015 and April 19, 2017, Adam was excluded from school by way of a change in placement and/or because he was prevented from returning to school until he had successfully completed a safety evaluation at a collaborative, for behavior that was caused by, or had a direct and substantial relationship to, his disability. As such, Taunton failed to provide Adam reasonable access to an education similar to that of his non-disabled peers by suspending him for conduct that was a manifestation of his disability.⁸⁵

⁸² Like the IDEA, § 504 provides for procedural protections, such as notice and the opportunity to be heard. See 34 C.F.R. § 104.36. Because courts have viewed the failure to provide FAPE under the IDEA as sufficient to establish the first prong of a § 504 violation, I need not address this further.

⁸³ See *Anderson*, 2017 WL 6327572 at *7.

⁸⁴ See 20 U.S.C. § 1415(k)(1)(E)(i); See also 34 C.F.R. § 300.530(h) (requiring school districts to notify parents of a change in placement due to the 10 cumulative days of suspension); 34 C.F.R. § 300.530(e) (stating that within 10 days of the removal constituting a change in placement, districts must conduct a manifestation determination review).

⁸⁵ See, e.g., *Sellers*, 141 F.3d at 528-29; *Monahan*, 687 F. 2d at 1171; *Campbell*, 58 F. App'x at 165.

In addition to demonstrating that Adam was deprived of reasonable access to an education similar to that of his non-disabled peers, to prevail on her § 504 claim Parent must prove that Taunton acted in bad faith or with gross misjudgment by failing to conduct MDRs.⁸⁶ In order to demonstrate gross misjudgment, Adam must show that Taunton's failure to conduct manifestation determination reviews substantially departed from the acceptable professional practice.⁸⁷ I review Taunton's actions and inactions during the relevant time period, then compare these with acceptable practice.

Over the course of the 2014-2015 school year, Adam was suspended for a total of thirteen (13) days. As of April 27, 2015, Taunton was required, by law, to conduct a manifestation determination review.⁸⁸ Despite inconsistent testimony from Mr. LeFaivre to the effect that some kind of meeting took place at some point in the year that included Adam's guidance counselor, himself, and possibly the school psychologist, there is no evidence that any meeting actually occurred. Moreover to the extent a meeting took place, no evidence was presented as to its content, no parent or guardian was present to participate, and no documentation of a manifestation determination was created or shared with Adam's guardians. As such, any meeting that did occur was not a manifestation determination review.

I find Mr. LeFaivre not to be credible on this point and as such, conclude explicitly that Taunton did not hold any MDRs in connection with Adam's suspensions during the 2014-2015 school year.

Before the three-day suspension on or about March 11, 2016 that triggered the expedited hearing in this matter, Adam was suspended for a total of 26 days for similar behaviors. Adam reached his tenth cumulative day of suspension on November 13, 2015. Taunton did not conduct an MDR because, Mr. LeFaivre testified, the person responsible for discipline of Adam did not know Adam was on an IEP, believing he had voluntarily withdrawn himself from special education. A quick check of the school's data system would have revealed that this was not, in fact, the case. As Adam continued to accumulate suspensions (10 days suspended in November alone), Mr. LeFaivre did not contact the special education department to inquire as to Adam's status or to suggest that he be evaluated for special education again. Taunton did not conduct an FBA. Taunton did not create a BIP. Instead, the District continued to suspend Adam for the same offenses: being disrespectful, disruptive, and/or insubordinate, cutting class, leaving the building without permission, using vulgar language, excessive office referrals, and the like.

⁸⁶ See *Campbell*, 58 F. App'x at 165 (explaining burden of proof for prima facie case of discrimination under § 504); *Zdrowski*, 119 F. Supp. 3d at 666 (noting that even if moving party is able to show denial of access to an educational benefit that non-disabled peers receive, she has additional burden of proving school acted with bad faith or gross misjudgment).

⁸⁷ See *Monahan*, 687 F.2d at 1170 (noting the requirement that the moving party prove with substantial evidence that the school district did not exercise professional judgment); *Miller*, 732 F.3d at 887 (moving party must present evidence regarding "what an acceptable professional judgment would have been under the circumstances [as well as] how the District's conduct substantially deviated from such judgment." has the burden to prove what a reasonable qualified professional would have done under the circumstances).

⁸⁸ See 34 C.F.R. § 300.530(b)(2).

Several school officials testified about Taunton practices regarding special education and school discipline. Kristen Keenan, who held the same position as Mr. LeFaivre did during the relevant time frame and as such was responsible for school discipline for students at THS, testified about how she conducted MDRs before the process was updated. According to Ms. Keenan, when an MDR took place, the associate headmaster and the guidance counselor or school psychologist, with parents or guardians at times participating by telephone, would go through a checklist and reach a decision, supported by documentation, as to whether a particular behavior was a manifestation of a student's disability. She testified that she does not recall ever conducting an MDR that did not include documentation. Similarly, upon becoming involved with Adam's case at the time of the safety evaluation, school psychologist Virginia Martin flagged the fact that Adam had received an excessive number of suspensions and no MDR had been conducted. Ms. Keenan's and Ms. Martin's practices demonstrate acceptable professional judgment.

Many of Taunton's protocols were altered following the issuance of a decision in this matter in May 2017 in which the undersigned Hearing Officer held that Taunton had committed significant procedural violations in this area with respect to Adam. For example, guidance counselors presently work with the Director of Special Education to ensure that they identify students subject to possible school discipline who are receiving, or may be tested for, services. Guidance counselors are now tasked with information-gathering; meeting attendees include a school psychologist, the student's special education liaison, and others staff members who provide services to the student; special education coordinators are now involved in the process. Forms have been created to document the questions reviewed by the Team as well as their findings. Suspensions are tracked by the special education department. These practices and procedures represent accepted, and – if implemented – exemplary professional practice.

Adam's teachers, including his JROTC instructor, all testified that they reviewed his IEP, which was easily accessible via the school district's data system, in preparation for working with him. This is acceptable professional practice.

District administrators, particularly those whose job responsibilities include school discipline and ensuring that the District meets federal and state regulations with respect to special education, should be familiar with the IDEA's requirements regarding manifestation determinations. Adam was deprived of a FAPE when Mr. LeFaivre, who was responsible for school discipline, failed to initiate a proper MDR following Adam's tenth cumulative day of suspension for the 2014-2015 school year. He was deprived of a FAPE during the 2015-2016 school year when his associate headmaster suspended him over and over, ten days in one month alone and twenty-nine days before he was illegally excluded pending a safety evaluation, for similar behaviors. Adam's associate headmaster did not check the data system, at least not during the 2015-2016 school year, even as Adam continued to accumulate suspensions for similar behaviors. Furthermore, Mr. LeFaivre appeared to believe that a ninth grade student could remove himself from special education simply by communicating to school officials that he wished to do so. According to Director of Special Education Judith Mulrooney, Mr. LeFaivre should have known that Adam was on an IEP. Even as Adam continued to struggle through the school year to meet behavioral expectations, Mr. LeFaivre did not reach out to the special

education department to inquire as to whether he was still on an IEP, or to ask for an FBA or a BIP. Nor did Adam's guidance counselor or school adjustment counselor request these assessments and plans. It appears that neither the special education department nor, in Adam's case, the associate headmaster, was tracking suspensions of students with IEPs.

It is evident that Taunton's failure to conduct a single MDR for Adam between April 27, 2015 and his exclusion from school on March 11, 2016 "depart[ed] substantially from accepted professional judgment, practice or standards [so] as to demonstrate that the person[s] responsible did not base the decision on such judgment."⁸⁹ Taunton's errors constitute gross misjudgment that resulted in the deprivation of FAPE. Therefore, Taunton's failures to conduct MDRs over the course of this time period, leading to Adam's changes in placement, amount to discrimination based solely upon Adam's disability.

2. *Parent Failed to Prove That Adam Was Removed From a Computer Class or That His Removal From ROTC Constitutes Discrimination Under Section 504*

a. General Education Computer Class

Parent failed to prove that Adam was removed from a particular computer course, much less that such constituted discrimination under § 504. Despite Parent's claim that Adam was improperly placed in a special education computer class, Ms. Grimes testified that even though many students in the class were on IEPs, Computer Concepts was not a special education course. Moreover Ms. Grimes informed Adam he could transfer from the class by speaking with his guidance counselor, which he failed to do. Due to Parent's lack of evidence regarding removal from a general education class and Taunton's explanation for Adam's placement in his particular computer class, this claim fails.⁹⁰

b. ROTC

Parent failed to prove that Adam's removal from Junior ROTC amounted to discrimination under § 504 for several reasons. First, Parent did not establish that Taunton was responsible for Adam's removal from ROTC.⁹¹ Second, although it is not disputed that Adam is an "otherwise qualified" general education student, there remains a question of whether he is an "otherwise qualified" ROTC cadet.⁹²

⁸⁹ *Miller*, 732 F.3d at 887 (internal citations omitted). Cf. *Monahan*, 687 F.2d at 1171 (stating that there is no discrimination under Section 504 "[s]o long as the state officials involved have exercised professional judgment, in such a way as not to depart grossly from accepted standards among educational professionals").

⁹⁰ See *Zdrowski*, 119 F. Supp. 3d at 667-68 (finding school district's reasonable explanation sufficient to override discrimination claim).

⁹¹ On the contrary, Major Anderson testified that he made the decision to discontinue Adam's affiliation with ROTC, and Parent provided no evidence that Major Anderson is a TPS employee.

⁹² See 29 U.S.C. § 794(a); *Campbell*, 58 F. App'x at 165 (otherwise qualified means that but for the individual's disability, he would meet the requirements to participate in the program).

Even if Taunton were partially responsible for the decision to remove Adam from ROTC, Parent's § 504 claim fails. Whereas public schools have a broad duty to educate individuals who reside within their boundaries and are of school age (extended in the case of students with disabilities), the Reserve Officers Training Program has no such duty.⁹³ Major Anderson explained that Adam's conduct, including frequent violations of the school code of conduct and his statement that he was smoking marijuana, in fact disqualified him from continuing in the Junior ROTC. As such, Adam was not "otherwise qualified" for the purposes of § 504.⁹⁴

3. *Parent Failed to Prove that Taunton's Involvement of Other Systems (DCF, Courts, and/or Police) in its Dealings With Adam Constitutes Discrimination under Section 504*

Parent failed to prove her claim that Taunton's involvement of outside organizations in its dealings with Adam and his family between September 26, 2014 and September 26, 2017 constitutes disability-based discrimination under Section 504.

Although Parent argued that Taunton discriminated against Adam based on his disability by forcing his family to involve the Juvenile Court in his life, the only evidence she presented is Adam's grandmother's testimony that she felt forced by the school to file a child requiring assistance petition, Adam's uncle's testimony regarding the situation, and the actual CRA petition. The District, in turn, presented evidence through school officials, documents, DCF social worker Brian Trendell, and Probation Officer Denise Taylor that Adam's Grandmother initiated the CRA petitions because she felt overwhelmed by Adam's behavior and wanted assistance. Moreover no Taunton representative attended any of Adam's CRA hearings or court dates. In light of inconsistencies between Adam's grandmother's testimony at the hearing and her contemporaneous statements to collaterals, I discount her testimony regarding her motivations. As such, there is no basis to this claim.

Parent also alleged that Mr. Fagan's request that DCF consider filing a care and protection petition regarding Adam if he continued to refuse to undergo a safety evaluation constitutes discrimination based on his disability. At hearing, Mr. Fagan testified that he contacted DCF in an effort to get Adam back into school, and that he is frequently in touch with DCF caseworkers regarding students on his caseload. Although Mr. Fagan's students are all placed out of district, and are presumably students with disabilities, Ms. Keenan testified that such collaboration occurs with respect to many students at THS who are or may be experiencing abuse or neglect or are otherwise involved with DCF. As such, Parent has not demonstrated that Taunton took any actions on the basis of Adam's disability, and there is no basis to this claim.

Finally, Parent alleged that Taunton's filing of a "No Trespass" Order ["Order"] and/or charges against Adam constitute disability-based discrimination. Although the "no trespass"

⁹³ Compare 34 C.F.R. § 104.3(l)(2) (defining "otherwise qualified" in school context) with 10 U.S.C. § 2031(b)(4) (requiring the institution hosting JROTC to agree to "limit membership in the unit to students who maintain acceptable standards of academic achievement and conduct, as prescribed by the Secretary of the military department concerned").

⁹⁴ See *Woodford Cnty. Bd. of Educ.*, 213 F.3d at 925 (moving party must show that but for disability, he would have met qualifications to perform in relevant program).

order may well have been unwarranted in light of the 2017 Decision that Adam should not have been excluded from school at the time it was issued, Parent presented no evidence that the Order itself constituted disability-based discrimination. To the extent the Order further reflects Taunton's exclusion of Adam from school, this issue is addressed above with respect to Taunton's failure to convene MDRs. As to charges Parent alleges were filed by Taunton in connection with the incident that occurred in December 2015, testimony demonstrated that the decision to charge Adam with disturbing school assembly was made by an SRO, not by THS. As such, there is no basis to this claim.

4. *Parent Failed to Prove That Comments Made by Taunton Staff Members Between September 26, 2014 and September 26, 2017 Constitute Discrimination under Section 504*

Although Parent alleged in her *Hearing Request* and in her arguments that Taunton staff members, particularly Mr. LeFavre, made discriminatory comments regarding Adam's disabilities, she produced no evidence to support this claim. As such, it fails.

5. *Parent Failed to Prove that Taunton Discriminated Against Adam in Violation of Section 504 by Administering Punishments Disproportionately Severe for His Offenses.*

Although Parent alleged that Adam was punished more severely than other students for similar conduct, she produced no evidence of this claim. As such, it fails.

CONCLUSION

After a careful review of the testimony and documents in the record, I conclude that Parent has met her burden to prove that Taunton violated Adam's right to FAPE under the IDEA through its repeated failure to conduct manifestation determination reviews between April 19, 2015 and April 19, 2017, leading to changes in placement in the absence of parental consent. I further conclude that through these same failures, Taunton discriminated against Adam by excluding him from school on the basis of his disability in violation of § 504. As a result, Adam was excluded from school on at least twenty-nine (29) days during the 2014-2015 and 2015-2016 schools years, before the incident on March 10, 2016 that was the basis of the 2017 Decision. Parent has not met her burden to prove her additional claims.

I will also be referring this matter once again to the Massachusetts Department of Elementary and Secondary Education, so that DESE may follow up as it deems appropriate.

ORDER

Taunton Public Schools is hereby directed to convene Adam's Team as soon as practicable to develop a plan of services to compensate for the twenty-nine (29) days for which Adam was improperly excluded from school.

By the Hearing Officer:⁹⁵

Amy M. Reichbach
Dated: July 26, 2018

⁹⁵The Hearing Officer gratefully acknowledges the diligent assistance of legal intern Jocelyn Simpson in the preparation of this Decision.