

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

In Re: Student v.
Bay Path Regional Vocational Technical High School

BSEA# 1805746

DECISION

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

This matter involves a challenge to the District’s attendance policy which Parents allege discriminates against Student who presents with a qualifying disability. Parents’ Hearing Request was received on March 1, 2018. Thereafter, the Parties jointly requested a continuance of the case and the matter was scheduled for April 23 and 30, 2018 by agreement of the Parties.

The Hearing was held on April 23, 2018, at the Offices of Catuogno Court Reporting, 446 Main St., Worcester, Massachusetts, before Hearing Officer Rosa Figueroa. Those present for all or part of the proceedings were:

Parents

Jeffrey M. Sankey, Esq.	Attorney for Parents/Student
Katie Meinelt, Esq.	Co-counsel for Parents
Kerrie Castillo	Bay Path Regional Vocational Technical High School
Cherise Potenti	Bay Path Regional Vocational Technical High School
Jamie Ribaud	Bay Path Regional Vocational Technical High School
Daniel McGowan	Bay Path Regional Vocational Technical High School
Nancy Alpine	Bay Path Regional Vocational Technical High School
Tim D. Norris, Esq.	Attorney for Bay Path Regional Vocational Technical High School
Brenda Ginisi	Court Reporter, Catuogno Court Reporting

The official record of the hearing consists of documents submitted by Parent marked as exhibits PE-1 through PE-37, and Bay Path Regional Vocational Technical High School¹ (Bay Path) documents marked as exhibits SE-1 through SE-18; recorded oral testimony, and

¹ Southern Worcester County Regional Vocational Technical School District operates Bay Path Regional Vocational Technical High School. (School’s Closing Argument).

oral closing arguments. The record closed on June 4, 2018 upon receipt of the written closing arguments.

ISSUES FOR HEARING²:

1. Whether the Bay Path Attendance Policy, when applied to Student, a student with a documented disability that frequently and sporadically impacts his attendance in school, is discriminatory and therefore in violation of Section 504 of the Rehabilitation Act of 1973; and,
2. If the Bay Path Attendance Policy is discriminatory when applied to Student, what relief should be ordered to allow Student to have equal access to his education?

POSITIONS OF THE PARTIES:

Parents'/Student's Position:

Parents assert that Bay Path's Attendance Policy, as applied to Student, is discriminatory because of its failure to make reasonable modifications based on Student's disability and due to its requirement that Student make up missed instructional hours through attendance at Saturday school, regardless of whether he has completed all of his work.

Parents further allege that the denial of graduation credits due to missed instructional time (and not failure to complete assignments and/or failure to earn passing grades) when such missed instructional time is the result of his disability, is discriminatory and denies Student an educational benefit equal to that of his non-disabled peers.

As a result of Bay Path's alleged transgressions, Parents seek a finding that Bay Path violated Student's rights pursuant to Section 504 and the regulations promulgated under said statute, and Title II of the Americans with Disability Act of 1990 (Title II), 42 U.S.C. §12132 (and its implementing regulations) which also prohibit discrimination on the basis of a disability. Parents also seek addition of the following accommodations: that Bay Path deem all of Student's medically excused absences exempt from Bay Path's Attendance Policy (and not counted toward the maximum allowable limit); that Student not be required to attend Saturday School to make up medically excused absences; and that Student's IEP and/or his Section 504 plan be amended accordingly.

Parents further take issue with the portion of the Attendance Policy requiring that Student pass all of his ninth grade classes and when promoted to the tenth grade, also pass all his tenth grade classes *and* meet the maximum absence limit in order to receive credit for ninth and tenth grade. According to Parents, this policy is discriminatory because due to the unpredictability of Student's migraines (one of his identified areas of disability), it is plausible that Student will exceed the maximum limit of absences during tenth grade, which would result in his having spent three years at Bay Path, completed all the work, and yet,

² The issues herein were reproduced verbatim from Parents' letter to the Hearing Officer dated April 19, 2018, narrowing the original issues for Hearing set forth in the Hearing Request (SE-3).

receive no credit at all. As such, the Attendance Policy is discriminatory when applied to their disabled son. As a remedy, Parents request that the IEP and/or Section 504 plan specifically state that: “a) any future medically excused absences will not count towards the maximum absence limit; b) Student will not be penalized for any medically excused absences and will be allowed to make up any tests/quizzes and/or assignments missed because of such absences; and c) Student will be provided tutoring, including direct instruction, when necessary, due to medically excused absences.”

Parents acknowledge that school administrators worked cooperatively to arrange tutoring but were frustrated by the unpredictability of Student’s absences and availability to participate in tutoring because of Student’s migraines. Parents further acknowledge that the issue is not the location of Student’s tutoring as much as his availability to partake in it.

Bay Path’s Position:

Bay Path stresses the importance of adherence to its Attendance Policy and satisfactory work completion/ earning of passing marks for promotion, denying that it has in any way discriminated against Student on the basis of his disability, that is, migraines.

According to Bay Path, Student was denied promotion in 2017 because he had failed too many courses, not just because of his absences. Bay Path however, concedes that Student’s numerous absences combined with his lack of participation in tutoring led to his failing marks. Bay Path noted that most of Student’s absences for both the 2016-2017 and the 2017-2018 school years were during academic periods.

According to Bay Path, the academics and the vocational components of the program work together and the delivery of instruction must be face-to-face. It is not an online school. Absenteeism can be cured through credit restoration which is predicated on face-to-face instruction during Saturday School with licensed teachers. Bay Path asserts that as to Student, tutoring has been available during Saturday School. For the 2017-2018 school year, Student attended enough Saturday School sessions to have made up the time owed.

Bay Path further noted that some time after February 2018 Student also started to receive credit for the tutoring he attended during week days. According to Bay Path, Student could also restore credits through summer school and/ or other school vacation time.

Since Student was caught up and in good academic standing at the time of the Hearing, Bay Path questioned whether Parents’ controversy required adjudication and challenged the jurisdiction of the BSEA over Student’s claims.

Reasoning that it applies the same Attendance Policy to all students equally, Bay Path disputed that application of the Attendance Policy to Student was discriminatory. It argued that excused absences simply allowed a Student to make up work as opposed to an unexcused absence which is akin to a “cut” where students are subject to disciplinary action. Bay Path asserts that its system is fair.

FINDINGS OF FACT³:

1. Student is a sixteen year-old resident of Charlton who attends Bay Path. During the 2017-2018 school year he repeated ninth grade (Mother).
2. Student has been diagnosed with Asperger's Syndrome and Generalized Anxiety Disorder. He has experienced panic attacks. He has difficulty talking about things and tends to shut down when stressed (PE-2). At a young age, Parents noted that Student presented with symptoms associated with the aforementioned diagnoses, specifically: difficulties with social pragmatics, peer relationships, difficulties with transitions and constant worrying (PE-2; Mother). He has been described as a motivated individual who loves school, is eager to learn and believes that he is expected to perform perfectly in school (PE-7; Parent). His migraines are real and he does not use them to avoid schoolwork (PE-7).
3. On or about 2015, Student's migraines exacerbated and became debilitating enough to impact his ability to attend school, social skills groups, therapy and family events (PE-7). He has had a very difficult time accepting his disability and struggles with the limitations migraines place on him (Mother).
4. Between kindergarten and eighth grade Student has received special education services or accommodations pursuant to IEPs or Section 504 plans due to his Asperger's, anxiety and migraine disorders (Mother).
5. The parties agree that Student carries a medical diagnosis of chronic migraine headaches (Stipulation #1).
6. Parents note that Student began to evidence migraine symptoms when he was in kindergarten, although the official diagnosis was not made until he turned eight years old. Over the years Student's debilitating migraines intensified, causing him to miss school (PE-2; PE-10; Mother).
7. During a migraine episode Student experiences dizziness, nausea, vomiting, weakness and fatigue. If he has a migraine, he is unable to do anything physical and has to remain at home, in bed, in a dark room. Each episode can last hours or days (PE-2; PE-4; PE-5; PE-6; PE-7; PE-16, Mother).
8. Student's migraines have impacted his attendance in school. Between kindergarten and ninth grade he missed between 15 and 24 school days each year due to the migraines (Mother).

³ The Parties entered two stipulations into the record which are reflected in the Facts as Stipulation #1 and Stipulation #2)

9. School absences cause Student's anxiety to increase and the stress and worry of missing school make the migraines worse. His doctors have called these "cyclic migraines" because everything is intertwined and the cycle is hard to break (PE-2; PE-7).
10. During eighth grade Student was removed from school in February of 2016 and homeschooled for the rest of the school year when his absences, due to chronic migraines, threatened to jeopardize his ability to get credit for his courses. Parents' concerns were to focus on Student regaining his health and completing eighth grade (Mother).
11. Because of the unpredictability of the length and strength of the migraines it is difficult for Student to engage in school work or tutoring at home even when it is offered (Mother).
12. The Parties agree that Student's physicians have presented the district with letters causally relating his missed school days to his migraine headaches (Stipulation #2).
13. Student applied and was accepted to Bay Path for high school. As part of the application process, he participated in an interview. Jamie Ribaudo, Assistant Pupil Personnel Services Director at Bay Path, opined that the interview was unusual in that Mother attended the interview with Student (Ribaudo). During the interview, Mother discussed Student's difficulties with migraines, and the impact they have on Student's attendance. She discussed the reasons for which Student had been home-schooled during eighth grade (migraines/attendance) and requested that Student be allowed to do academic portions of his program at home and attend Bay Path for shop classes. This request was refused. Ms. Ribaudo did not discuss how Bay Path's Attendance Policy may impact Student (Ribaudo, Mother).
14. Bay Path is a regional vocational high school which is governed by M.G.L. chapter 71 and 74. M.G.L. c.74 §1 defines Vocational Technical Education as

...organized education programs offering sequences of courses designed to educate and prepare students for both employment and continuing academic and occupational preparation. Such programs shall integrate academic and vocational education and shall include competency based applied learning which contributes to an individual's academic knowledge, higher order reasoning, and problem solving skills, work attitudes, general employability skills and the occupational-specific skills necessary for economic independence as a productive and contributing member of society....
15. Bay Path follows the Massachusetts Department of Elementary and Secondary Education Curriculum Framework and the Massachusetts Vocational Technical Education Framework. Bay Path's role as a vocational school is not only to educate students, but

also to prepare them for the world of employment by teaching students employability skills and preparing them to be contributing members of society. These goals are fostered by regular school attendance. M.G.L. c. 74 §1.

16. Bay Path notes that in Massachusetts, public schools must be in session 180 days out of a 185-day school year calendar. 603 CMR 27.03.
17. During the school year, secondary school students must receive at least 990 hours of structured learning time. 603 CMR 27.04. Structured time is defined as

„time during which students are engaged in regularly scheduled instruction, learning activities, or learning assessments within the curriculum for study of the “core subjects” and “other subjects.” In addition to classroom time where both teachers and students are present, structured learning time may include directed study, independent study, technology–assisted learning, presentations by persons other than teachers, school–to–work programs, and statewide student performance assessments. 603 CMR 27.02.
18. Consistent with 603 CMR 27.02, Bay Path has an attendance policy designed to ensure that students are offered the structured learning time required by the applicable laws and regulations (PE-1; McGowan). Bay Path’s attendance policy limits absences to approximately 10% of the school year. That is, Bay Path allows absences up to 10 academic days or double periods per course (equivalent to 20 total course periods) and 8 shop days during a school year. After that, absences negatively impact a student’s ability to receive credit for courses. Unexcused absences cannot be made up (PE-1; SE-13; McGowan).
19. The attendance policy for freshman is more stringent once permanent shop placement has occurred. A maximum of five shop days and twelve related academic periods missed will result in credit loss (PE-1; SE-13).
20. Absences may be excused for medical or dental reasons as long as a medical note for the excused absences is received by Bay Path within three (3) days of the student’s return to school. All other absences, dismissals or tardiness may be excused at the discretion of the Dean of Students (PE-1; SE-13).
21. Bay Path firmly believes that regular daily attendance at school is an essential part of its program of instruction (PE-1; SE-13; SE-14; SE-15; SE-16; McGowan, Alpine).
22. Daniel McGowan, Bay Path Dean of Students, testified that students can make up missed work when they have excused absences. When they have exceeded the absence limits they may also restore credits by attending Saturday School (McGowan).

23. Bay Path's Policies and Procedures manual offers a description of Saturday School under the section providing "Discipline Terminology". The aforementioned defines Saturday School as follows:

The Saturday School Program is not for academic purposes necessarily; rather, it is used as a disciplinary action. Students may be placed in Saturday School for, though not limited to, excessive tardiness, truancy, class cutting, excessive detentions, smoking or possession of smoking materials, minor safety violations, minor bus incidents, etc.

Bay Path considers its discipline policy to be "progressive." The Saturday School program is used as a step between detention and suspension. It is the goal of Bay Path to keep students in school rather than suspend them for minor infractions. Students will be subject to outside suspension when detentions and Saturday School prove to be ineffective in correcting the student's behavior. If a student neglects to show up for his/her Saturday detention, he/she will be suspended from school during the following week (one day the first cut, 2 days the second cut, etc...). The student will also be scheduled for the next Saturday School (PE-1).

24. Saturday School at Bay Path is staffed by licensed teachers. During Saturday School "structured learning time" as defined by 603 CMR 27.2 is offered (McGowan, Alpine).
25. Pursuant to Bay Path attendance policy, excused medical illness is an excused absence that allows the student to make-up the work, and if applicable receive credit restoration. According to Mr. McGowan this could be achieved by attending Saturday School (McGowan).
26. Bay Path's credit loss/restoration policy states that courses are deemed completed for award of credits when the student has earned a passing grade and has met the school's attendance requirements (PE-1; SE-13).
27. If a student does not fulfill the attendance requirement or fails a course, he/she will not receive credit for said course and will be deemed not to have fulfilled the graduation credit requirements. The aforementioned is labeled "credit loss". However, credits lost may be restored at the discretion of the Dean of Students through a written agreement whereby the student agrees to and successfully completes the same or a similar course through summer school, the Evening Division, or other possible school day scheduling (PE-1; SE-13). The policy further provides that a student who has exceeded the absence limit, but has passed the course(s) will not receive credit for the class unless the student meets the four conditions for credit restoration during the subsequent school year (PE-1). The four conditions are:

- a. Keep absences below the maximum absence limit
- b. Pass all subjects
- c. Maintain a good discipline record (no suspensions)
- d. Be on time to school and classes

For a student meeting the four conditions, as confirmed by the Dean of Students, credit(s) lost due to excessive absences in the previous year will be restored (PE-1; SE-13).

28. For students seeking credit restoration, Bay Path has established a review process whereby the student and/or his/her parents/guardian may file a written request within 10 school days from the date of notification of the loss of the credits with the Dean of Students (Dean), to review the specific circumstances and restore the credit(s) lost. Some of the extenuating circumstances warranting review may include: incapacity due to illness or injury, chronic illness, emotional stress or extreme personal reasons. The Dean may request that the student submit third party substantiation of the specific circumstances (PE-1; SE-13). The circumstances are then reviewed by a Review Board comprised of: the Dean, the Assistant Vocational Director and the professional school counselor. Teachers are notified of the review but, they are not required to attend. The Review Board meets with the student and parent(s) to discuss the circumstances and determine whether credit(s) can be restored. The student and or parents may then appeal the Board's determination to the Principal (PE-1; SE-13).
29. Under "Other" policies, the student handbook notes that the administration may refer students who are absent for more than 20 school days for a special education evaluation (PE-1).
30. Students who have passing grades in their classes but who exceed the attendance policy limits on absences may be provisionally passed to the next year of school, with the credit for the year conditioned upon meeting the requirements of the attendance policy (no more than 10 absences in academics and 8 in shop) in the subsequent year (PE-1; SE-13; McGowan, Alpine).
31. Daniel McGowan, Dean of Students at Bay Path, testified that if a student has a medical condition that precludes him/her from attending school, those absences are counted toward the maximum absence limit. If a student missed more than 20 class periods (equivalent to 10 full school days) due to a medical condition, even if the absences were excused, that student would not receive any course credit and would be retained the following year (McGowan).
32. Student was accepted to Bay Path for ninth grade, the 2016-2017 school year (Mother). At the beginning of the school year, Ms. Cherise Potenti, Student's guidance counselor at Bay Path, requested information regarding Student. Mother responded via email describing Student's chronic migraine issues, his other diagnoses, and their impact on

Student's attendance (Mother). She also informed Ms. Potenti that Student was on a Section 504 Plan and a Medical Rescue Plan to address his migraines. Mother also requested to meet with Ms. Potenti to discuss Student's 504 Plan and how Bay Path could support Student (PE-15). Ms. Potenti did not discuss Bay Path's Attendance Policy or share any concerns regarding the impact of excessive absences (PE-15).

33. Bay Path's practice regarding drafting Section 504 Plans is to have the guidance counselor and the Parents meet. No other staff is invited to attend unless the parents specifically request it (Mother).
34. Mother and Cherise Potenti (formerly Cherise Price) met on or about September 6, 2016, to discuss Student's needs and he was found eligible for a Section 504 Plan. No other staff knowledgeable about Student was present. Student's previous Section 504 Plan, drafted by the sending district, was used as reference for determining which accommodations were appropriate for Student. One of the accommodations in the Section 504 Plan states that if Student is unable to attend a partial or full day because of a migraine headache, that absence would be counted as an excused medical illness (PE-3).
35. Ms. Potenti testified that at the Section 504 meeting with Mother she understood that Student's migraines could cause him to miss school. Ms. Potenti however, had no concerns that Student's migraine related absences could prevent him from complying with the school's Attendance Policy (Potenti).
36. Student adapted to Bay Path, enjoyed the vocational portion of his educational program and was able to make friends. The numerous transitions throughout the school day combined with the switching between the academic and the vocational classes every other week, and the fact that his vocational classes changed every few weeks, were challenging for Student given his diagnoses and he struggled with the changes. Student began having migraines and missing school. He tried to stay on top of his classes and make up the work but it was difficult for him (Mother).
37. Parent provided Bay Path with a note from Christy Stine, M.D., Ph.D., Student's Pediatric Neurologist, which explained how Student's migraines could cause him to be absent from school sporadically (PE-16; Mother). On or about October 4, 2016, Mother asked Ms. Potenti whether Student would need a doctor's note every time he was out due to migraines, and Ms. Potenti assured her that a note at the beginning of every school year would suffice (Id.). Neither Ms. Potenti nor anyone else from Bay Path raised concerns with Parents that Student's migraine related absenteeism may conflict with the school's Attendance Policy requirements or limits (Mother).
38. On February 10, 2017, Dr. Stine wrote a letter noting Student's continued struggles with migraines and stating that if Student were unable to attend school because of his migraines, his absences should be excused as medical illness. Dr. Stine further recommended a medical accommodation; specifically, that Student be allowed to rest for

20 minutes in the nurse's office after medication was administered, and then be asked if he were able to return to class (PE-4).

39. On March 30, 2017, Bay Path staff met with Parents over concerns that Student's absenteeism was causing Student to fall behind because he was missing a great deal of class time. Student's absenteeism was worse on weeks when academics were held versus those when vocational classes met. The participants recognized the connection between Student's migraines and anxiety, and their impact on attendance noting that they did not have sufficient information about Student's struggles. Parents had determined that Student should not attend the meetings involving his attendance because of his heightened anxiety (Parent, Potenti, Ribaudo).
40. At the March 30, 2017 meeting, Parent was notified for the first time of the allowable number of absences under the Attendance Policy and that Student was at risk of non-promotion to the next grade because of the number of absences he had (Mother). During meeting, Parents were advised that their calling in to report absences was insufficient and Student would be expected to produce a doctor's note every time he was absent due to migraines in order for the absence to be excused (Mother). After the meeting Parents submitted a doctor's note excusing all of Student's absences (PE-5).
41. Following the March 30, 2017 meeting, Ms. Ribaudo and Mother corresponded through email over a misunderstanding regarding the shortening of Student's school day. Ms. Ribaudo sought additional updated documentation of Student's other diagnoses (Autism Spectrum Disorder/Asperger's Syndrome, Generalized Anxiety and ADHD), listed Bay Path's expectations regarding Student's attendance to the full program (vocational and academic) explaining that half-day attendance was only when Student was symptomatic from his disabilities. Ms. Ribaudo explained the need for Student to be present in school in order to receive credit for his classes as he could not make-up everything at home, and noted that if Student's attendance issues persisted, the parties would have to meet to discuss placement (PE-19). Ms. Ribaudo testified that at the time she questioned whether Bay Path was the best setting for Student to be successful given his condition (Ribaudo).
42. Ms. Ribaudo testified that she had concerns that there may be factors, other than the migraines, impacting Student's attendance (Ribaudo). However, Student was not referred for a special education evaluation at the conclusion of the March 30, 2017 meeting Bay Path's Student Handbook specifically states that students may be referred for a special education evaluation when they are absent for more than 20 school days during a School year (PE-1; Mother).
43. On April 6, 2017, Dr. Stine wrote another letter outlining Student's migraine diagnosis and noting that his absences on September 12, 13, 15, 16, 26, 27 and 30, October 24, December 5, 19, 20, 21, 22 and 23, 2016, and January 11, 25, February 6, 8 and 10; March 7, 16, 17, 27, 28, 29, 30 and 31, and April 4, 2017 were all migraine-related and thus should be excused (PE-5). This letter was shared with Bay Path.

44. Email communications between Jamie Ribaldo and Parent between April 11 and April 12, 2017, discuss Parents' concerns regarding Student's issues and his absences, the Parties' understanding of their March 30, 2017 meeting and discussions regarding accommodations, and the Parties' temporary agreement to add diagnoses to Student's plan pending receipt of additional supporting documentation for those diagnoses (SE-18).
45. On April 13, 2017, Dr. Stine completed a Physician's Statement for Temporary Home or Hospital Education explaining Student's migraine diagnosis and the fact that his treatment was not curative. Dr. Stine explained that when Student had a migraine he could not concentrate or focus due to pain and fatigue. She recommended tutoring services to help Student catch up with the work missed but cautioned that if Student had a migraine he could not participate in tutoring at home or in school, thus, scheduling should be worked around his migraines (SE-6). This letter was forwarded to Bay Path.
46. Student returned to school on April 13, 2017, as a result of which the tutoring was not implemented (PE-6; Parent).
47. During the 2016-2017 school year, Student was absent approximately 57 times and was dismissed early 8 other times (SE-6). Most of his absences occurred during academic weeks. His attendance at school was more consistent during shop weeks. According to Parents, most of the absences were due to migraines (Parents).
48. On or about May 2, 2017, Parents requested a comprehensive special education evaluation of Student after he had missed over 30 school days due to his migraines (SE-7; PE-18).
49. On May 31, 2017, Fran Peterson M.Ed., C.A.G.S., LMHC, Student's therapist, wrote a letter at Parents' request, explaining Student's Autism Spectrum Disorder and Generalized Anxiety Disorder. Ms. Peterson had seen Student weekly or bi-weekly for the previous 12 years to address the aforementioned disabilities (PE-7). Parent forwarded Ms. Peterson's letter to Bay Path (PE-7; Parent).
50. Ms. Peterson described the impact that Student's disabilities have on him. She noted that his diagnosis of Autism Spectrum Disorder (ASD) had been overlooked, and further explained the interrelation of ASD with the migraines. She recommended a more individualized plan that included provision of a note taker, lesson notes, diminished work-load, shortened day through the adjustment period, frequent breaks, an organizer/checklist, homework in written form, chunking and simplifying work (PE-7). Lastly, she noted that Student

...is a kind and caring young teen who is very willing to complete all work given in a supportive environment. [Student] wants to please and wants to be successful in high school (PE-7).

51. Student's Team convened on June 21, 2017, to discuss the results of Student's school-based evaluations. The Team concluded that Student was not eligible for special education services (PE-8).
52. During the 2016-2017 school year Student did not make up his school work and did not access tutoring when it was offered (SE-6; Alpine). Student was not offered any credit restoration options. By the end of the 2016-2017 school year he had failed several classes. Parent explained that it was difficult for Student to schedule tutoring because his migraines were sporadic and he could not access tutoring on the days he had a migraine. The tutor would have to be scheduled for a different day making it difficult to coordinate. Therefore, Student's absences were counted toward the maximum absence limit⁴ because of his inability to participate in tutoring when absent due to migraines.
53. The June 21, 2017 Team determined that Student was a student with a disability given his diagnoses. The Team further determined that Student was not making progress because of his disability but did not agree that Student required specially designed instruction or related services (PE-8).
54. The Narrative Description of the School District Refusal to Act issued following the June 21, 2017 meeting specifically states that Student

...is able to make effective progress when he is in school in this current placement...his lack of progress in the academic setting is due to make up work not being completed and missing so many days of school. [Student] has shown over the past year a pattern of attending school on his shop week only. He missed 52 days on his academic weeks and 14 days on his shop weeks with two of those days being field trips...[Student] came into Bay Path with an Autism Spectrum Diagnosis, anxiety and migraines (PE-8).
55. At Hearing, Ms. Alpine testified that the reason Student had to repeat ninth grade was because he had failed several classes by a wide margin, not just because of his absences (PE-13; PE-14; Alpine; McGowan).
56. At the June 21, 2017 Team meeting, Parent was informed that Student would be retained for ninth grade. Parent testified that at the meeting she was told that even if Student were an honors student and had passed all of his classes, he would have been retained because of excessive absences (PE-8; PE-14; Mother). Parent testified that the Team had focused solely on Student's migraines and had overlooked his other diagnoses (Mother).

⁴As noted earlier in the Facts section of this Decision, Bay Path's Attendance Policy provides that students who are home-tutored were exempt from the attendance policy for the specific duration of the approved home tutoring (PE-1).

57. At the June 21, 2017 meeting Parent inquired whether there were other options for Student to be promoted but was given none.
58. Bay Path offers Summer School for credit restoration to students who fail up to two courses per year (McGowan). According to Mr. McGowan, there may be individual considerations given to students with disabilities, but this discretionary consideration was very rare (McGowan). Mr. McGowan testified that the “other such school day scheduling” provision in the Student Handbook was not an option for Bay Path’s students because “we have very little flexibility in our typical day scheduling so it’s very difficult.” According to Mr. McGowan, evening school (which ran concurrently with the school year) and summer school are the only options available at Bay Path, and neither was available to Student (McGowan).
59. Participation in summer school was not offered to Student because he had failed more than two courses in 2016-2017 (PE-13; PE-14; McGowan, Alpine).
60. During the summer of 2017, Student consulted with a new physician, Dr. Herbert Markley, for a second opinion regarding his migraines (PE-20; PE-21; Parent).
61. On or about July 24, 2017, Student underwent an independent neuropsychological evaluation with Rebecca Tubbs, Psy.D. (PE-10). After conducting a series of tests, reviewing records and interviewing Student and Mother, Dr. Tubbs provided a report containing a summary of her results and explanation of Student’s strengths and vulnerabilities. The report indicated that socially, Student has done well and has been able to develop a core group of friends. His intellectual abilities fall within the Average to High Average range with strengths in quantitative reasoning skills. His dexterity and fine motor speed are quite advanced. His ability to perceive abstract visual information is solid. Language formulation was found to be well developed although he generates responses at a slower rate (PE-10).
62. Regarding Student’s vulnerabilities Dr. Tubbs noted that

In the context of nicely developed intellectual capacities, [Student] presents with an extremely complex neuropsychological profile, the central feature of which is a pattern of executive deficits that substantially hinder his ability to be an effective problem-solver and to actualize his potential. These challenges have been hard to recognize over the past few years for several reasons: 1) [Student] is a people pleaser and wants to fit in, so he puts on a good game face at school, 2) [Student] has missed so much school over the past two years that his teachers have not been able to truly grasp who he is as a student, and 3) [Student’s] anxiety and migraine headaches are so intense that, naturally, they garner a great deal of focus, thereby diverting attention away from his underlying executive

and developmental vulnerabilities. This said, the breadth and depth of [Student's] executive deficits render him easily overwhelmed ... he has compensated for these challenges more effectively in the past by employing his intellect and through sheer effort...It was his transition to middle school – with its larger size, higher expectations for independence, increased level of complexity, and greater academic and social demands – that his compensatory strategies began to wear thin (PE-10).

According to Dr. Tubbs, by eighth grade, lacking the necessary supports in school, Student became overwhelmed, and his stress and anxiety increased, intensely exacerbating his migraines. She noted that Student became caught in a “strong feedback loop of worry about having a migraine and missing school”, Student then has a migraine and misses school (PE-10).

63. Dr. Tubbs offered insight as to the interrelation between Student's anxiety and his migraines noting that they have

...become so entrenched that he has become imprisoned by it. However, it is critical to understand that [Student's] migraines are not psychosomatic; they are real, palpable, and debilitating, rigorously medically documented, supported by family history and have been in place since early in his childhood. They are also significantly exacerbated by his anxiety...Individuals like [Student] who experience intractable migraines are even more susceptible to anxiety; they become so leery of having another migraine that they begin to fear/misinterpret normal sensations as an indicator of an impending migraine, which can lead to panic attacks, avoidance of certain places/foods/activities, and chronically heightened level of anxiety that easily spills – a pattern with which Student has many commonalities (PE-10)

64. Dr. Tubbs noted that Student's psychoneurological profile showed vulnerabilities in: “integrations and organization of information, attention regulation/cognitive efficiency, emotional functioning, adaptive functioning, and academic achievement” (PE-10). She diagnosed Student with Other Specified Neurodevelopmental Disorder (widespread executive dysfunction) (315.8), Autism Spectrum Disorder–Level I (299.00), Generalized Anxiety Disorder w/depressive features (300.02), Attention–Deficit /Hyperactivity Disorder by history (314.00), and Rule/Out Obsessive–Compulsive Disorder (300.3). Dr. Tubbs made numerous programmatic recommendations to address Student's deficits (PE-10).

65. In August of 2017, Parents filed a complaint with the DESE Problem Resolution System (PRS), challenging Bay Path's decision not to promote Student. After reviewing the school attendance policy, Student's Section 504 plan and considering that tutoring had been offered, PRS found Bay Path not to be in violation of federal or Massachusetts Special Education Laws, or in violation of Student's Section 504 plan (SE-6).
66. During the 2017-2018 school year Student repeated ninth grade including the exploratory vocational portion of the freshman year program and all academic courses (PE-13; Mother). Student had passed U.S. History I (75), Graphic Arts Shop I (83), Graphic Arts Related I (78) and Physical Education (86). His final grades were as follows: 65 in English I, 52 in Algebra I, 58 in Life Science and 35 in Health (PE-13). The final report card cited failure to make up work and excessive absences as the reasons for his low grades (PE-13; PE-14).
67. On September 5, 2017, anticipating that Student was reasonably likely to be absent for more than 14 days due to migraines, Parent submitted a Physician's Statement for Temporary Home or Hospital Education Form signed by Student's neurologist, Dr. Herbert Markley (PE-20; PE-21). In the Form Dr. Markley explained that Student's migraines lasted between 3 hours and 3 days, totally disabling Student because of "severe pain, nausea and sensitivity to light and sound" (PE-21). Dr. Markley further explained that
- During [a] headache he cannot concentrate or even read because of light sensitivity and pain. He should not be able to work even with a tutor (PE-21).
68. Student was absent with a migraine on September 6, 2017 (PE-22).
69. Dr. Markley wrote to Bay Path's School Nurse on September 7, 2017 explaining that Student was under his care for migraine treatment and management and noting that Student's migraines had increased in severity during the past year (PE-22). Similar notes were produced when Student was again absent on September 14, 25, 26, October 10, 23 and 24, November 13, 15, December 6 and 18, 2017 due to migraines (*Id.*). He also arrived late on December 15 and 20, 2017 because of the migraines. During this period Student also had absences due to a stomach bug, the flu and attending a doctor's appointment (PE-22)
70. On October 3, 2017, a Section 504 meeting was held to determine eligibility and review Student's Plan (PE-9). Since Student had not been successful the previous year, a full Team was convened. According to Ms. Potenti the accommodations in the previous year were clearly not enough to address Student's needs and he required additional accommodations such as extra time to complete work (PE-9; Mother, Potenti).

71. On October 5, 2017, Parent signed a Section 504 Plan for Student after revisions were made to address her concerns (SE-8; PE-9). The proposed Section 504 plan provided 20 accommodations including:

- ! Out of classroom breaks as needed.
- ! Test accommodation like quiet setting, extra time, etc.
- ! Daily and weekly check-ins and other aids to organize him and help him manage and keep up with work owed.
- ! Tutoring after 14 missed school days, including Saturday School.⁵
- ! Partial or full day absences due to chronic migraines will count as excused medical absences
- ! Teacher assistance for work owed due to medically excused absence.
- ! Additional time to complete tests, quizzes and projects.
- ! Teachers to provide a hard copy of notes when available or by the next day.
- ! Allowing Student two school days to complete missed work when absent from school.
- ! When absent for more than 3 days, teachers will provide class notes, assignments and materials either electronically to Student and Parents, or to the Guidance Office within 48 hours for her to notify Parents that materials are ready to be picked-up.
- ! Re-entry plans to be drafted by the adjustment and guidance counselors with Parents and Student after each three day absence (SE-8).

72. The Section 504 Plan did not offer Student tutoring to replace every absence from school as requested by Parents (SE-8; PE-34; Mother).

73. On October 24, 2017, Parent inquired via email communication as to Student receiving tutoring and making up work. That same day, Cherise Potenti emailed Parents noting that tutoring could initiate because Student had been absent a couple of days that week for a total of 12 absences and they did not want him to get too far behind. Ms. Potenti reminded Parent that Student could attend the 4-hour long session Saturday School to get assistance in making up the work and offered November 4 and 18, 2017 as options. Initially, Parent inquired as to who the tutor would be during Saturday School and expressed interest in starting tutoring at home, but on October 26, 2017, Parent emailed Ms. Alpine noting that it would “be too long of a day for [Student] to withstand” and would probably be detrimental (PE-23; PE-24).

⁵ This accommodation specifically states: “After 14 days of missed school days, a tutor will be assigned to [Student]. It will be at the parents’ discretion when/if the tutor comes. Tutoring is also available for [Student] on Saturdays at Bay Path for 3 ½ hours, if [Student’s] chronic migraines prevent the tutor from meeting with him. There are 20 Saturdays offered throughout the year. [Student’s] parent will contact the Pupil Personnel Director, at least 2 days in advance, to let her know that he will need to attend on a Saturday for tutoring services” (SE-8).

74. On October 31, 2017, Parents received a Letter of Concern For School Absences from Brian Dekker, School Counselor, noting that Student had missed 12 days of school (PE-25; SE-14).
75. On November 1, Student wrote to Ms. Alpine asking if he could stay after school the following day to finish his work given that he had missed school that day due to a stomach bug. Student had emailed several of his teachers asking if he could turn in his work for four of his classes since it had been completed as well as make up work (PE-26).
76. During the 2017-2018 school year, Student received some tutoring and attended afterschool sessions to receive extra help (PE-27; PE-28; PE-29; PE-35). These sessions however, did not count toward credit restoration, something, that according to Ms. Alpine⁶ was within the discretion of Mr. McGowan (PE-33).
77. On November 17, 2017 Parents received a Letter of Warning for School Absences issued by Mr. McGowan. The letter noted that Student had missed 18 school days (PE-30; SE-15). A few days earlier Parents had requested that Student's absences be recalculated as some of his migraine related absences had been counted toward the unexcused absences (PE-29).
78. When Student is unable to attend school due to migraine headaches, he is also unable to participate in tutoring. Therefore, tutoring that is provided to students confined to home or hospital under typical conditions cannot be delivered simultaneously because Student may not be available to participate when the tutoring is scheduled (Mother).
79. Student's Team convened on November 21, 2017 to review the results of Student's independent neuropsychological evaluation and to determine IDEA eligibility. Despite disagreeing with Dr. Tubbs's report, Student's Team found him eligible on the basis of an emotional and health disability (SE-7; PE-11; Mother). Student's IEP included accommodations similar to the ones appearing on his Section 504 Plan. The IEP covered the period from November 22, 2017 to November 21, 2018 and offered Student twice daily, twenty minutes support services by a paraprofessional, and counseling services with the adjustment counselor once per nine day cycle for 30 minutes. The IEP also offered ongoing consultation by the Team chairperson and the adjustment counselor (SE-7; PE-11).
80. The IEP includes two goals to address Student's Executive Functioning and Social/Emotional deficits. The IEP further notes that if Student is unable to attend school due to migraines the absences will be counted as "excused medical illness". Regarding how the disability affects Student's progress in the curriculum areas the IEP states that

⁶ See email communication between Parents and Ms. Alpine dated December 8, 2018, addressing offers for tutoring and noting that after school help generally does not qualify for credit restoration (PE-33).

[Student's] anxiety may affect him in the school setting with regards to academic performance, task avoidance and absences from school which come about in the form of migraines. Documentation states his migraines may stem from the anxiety [Student] experiences which affects academic performance which leads to anxiety then migraines. His executive functioning struggles can affect him planning, organizing, remembering and executing certain tasks such as classwork and homework (SE-7; PE-11).

81. Among other things, the list of accommodations in this IEP stresses that when Student is absent he is required to practice the skills learned through classroom work, long projects and homework in smaller quantity. In this regard, as long as the content is not compromised, assignments are reduced by 50% to show mastery. When the aforementioned applies, the teacher is responsible to mark the reduction on the particular assignment (SE-7; PE-11). The IEP also provides Student up to four school days to complete work per day missed. The accommodations in this IEP also call for teachers to provide Student with "class notes, assignments and materials either electronically to parent's and [Student's] email or to the Student Support Services Officer and tutor if applicable) within 48 hours" when Student is absent for 3 days (SE-7; PE-11).
82. The Additional Information section of the IEP specifically notes that homework, including during shop week, is a requirement, that MCAS preparation is emphasized in all instruction areas. This section of the IEP also states that Student

...is repeating his freshman year due to his absences from the 2016-2017 school year which caused him to miss about a third of his school year. [Student] experiences migraines that cause him to miss school... mostly on academic weeks with some vocational weeks as well. Although the absences were medically excused, he missed time on learning in the academic setting which caused him to stay back for his freshman year. For the 2017-2018 school year, [Student] is missing school both on academic and shop weeks. There are 20 Saturdays in the school year that [Student] can utilize for time to make up work missed due to absences. He is encouraged to stay after school with his teachers to make up tests and quizzes and receive extra help on subject matter he doesn't understand. Tutoring in the home has been discussed numerous times between the district and parents...when [Student] experiences his migraines, he is not able to have someone come to the house and it is not practical to have a tutor waiting for the migraine to end so he can receive tutoring. Communication is had consistently between the

parents and the district regarding tutoring for [Student] (SE-7; PE-11).

83. When discussing Student's absences at the Team meeting, Mr. McGowan stated his objection to promoting a student who had more than the allowable number of absences noting that he had some discretion regarding promotion (McGowan). When Father inquired further, he was referred to the Superintendent for an explanation of the policy (Father).
84. Father and the Superintendent spoke shortly after the November 2017 Team meeting (Father). The Superintendent explained that if Student passes all of his courses this year (2017-2018) he would be promoted to 10th grade. However, according to the Superintendent, Student would not get any credit for the 2017-2018 school year, unless he also passed all of his 10th grade courses and did not exceed the maximum limit of absences. Father questioned the fairness of the policy for students with serious illnesses. Father realized that the attendance policy would be applied to Student for all subsequent years making it extremely difficult for Student to receive credit unless he were able to: a) pass all of his courses every year, and b) comply with the attendance policy by not exceeding the number of allowable absences. Given the unpredictability of Student's migraines Father became concerned that despite Student's best efforts, it would be very difficult for him to receive credits at Bay Path (Father). Father was concerned that strict application of the attendance policy could result in Student completing three years at Bay Path and receiving no credits at all, despite passing many or all of his academic and vocational courses. Father testified that as long as he could remember, Student had not gone more than a week or two free of migraines (Father).
85. On November 30, 2017, Mr. McGowan forwarded a Letter of Critical Status to Parents noting that Student had missed 9 shop days and 10 academic days, and emphasizing the School's attendance policy that students who were absent during 8 shop days (with a caveat that 9th graders could not miss more than 5 shop days after shop placement occurred) and 10 academic days would lose credits and would be at risk for retention (PE-31; SE-16). Parents were given three days to submit a written professional excuse for each absence or risk the absence being treated as truancy (PE-31; SE-16).
86. On the Friday afternoon before a Saturday School is held Bay Path staff announces over the intercom the names of the students attending detention that Saturday. On the afternoon of December 1, 2017, Student's name was read along with other students having detention causing peers to make comments regarding his being in trouble. This caused Student anxiety, embarrassment and stress (PE-32).
87. Student attended Saturday School on December 2, 2017. He was confused as to whom his tutor was supposed to be, and while he worked on his assignments he did not know who to ask for help nor did he request permission to use the internet, something he is not allowed to do during school on week days (PE-34).

88. Parent wrote to Ms. Alpine on December 5, 2018, relating Student's experience the previous Saturday and noting that he had not actually received tutoring, something they had requested and understood would be provided on Saturdays (PE-34). Ms. Alpine responded on December 6, 2017, explaining the teacher's views and noting

Regarding the classroom, it is not for every kid attending Saturday Detention. The classroom is for credit recovery, detention and tutoring needs. [Student] has been given a chance to take advantage so he may get tutoring while restoring credit. I assure you if [Student] had told the teacher he needed her assistance, she would have tak[en] him out of the classroom... On another note, I met up with [Student] Monday morning and asked him if he met Ms. Goretti. He stated he did and that the Saturday session was productive, he did say he was not able to finish his electronics work but never told me due to the lack of internet (PE-34).

89. On December 22, 2017, Parents partially rejected Student's IEP and attached a letter detailing their concerns. Parents noted that the N1 did not provide an accurate reflection of the meeting or the events leading to it, omissions regarding Dr. Tubbs findings and descriptions of Student's present levels of performance, the frequency of counseling services (once per nine day cycle), language used, statements omitted, and other aspects of the IEP (SE-7; SE-11; SE-12). Most notably Parents rejected the following:

Present Levels of Educational Performance B- General Considerations

...the omission of Other: health disability. [Student] has Chronic Migraines Syndrome.

...the omission that allows [Student] to be given credit for days missed if he completes his assignments and turns in the work in conjunction with the accommodations listed in his IEP.

We reject the time-frame of the accommodations of "When absent for more than 3 days, teachers will provide class notes, assignments, etc." (page 13 of the IEP). [Student] should be provided class notes, assignments, and materials whenever he misses class (SE-7; SE-12).

90. Parents were also seriously concerned with the omission of the accommodation that allowed Student to be given credit for days missed due to migraine if he completed the classroom work (Father). By April 30, 2018, Student had been absent from school 24 days out of which 17 were due to migraines with a medical excuse, 3 due to bereavement for a family member and 4 due to non-migraine related illnesses (PE-22).

91. In an email from Nancy Alpine to Mother dated December 7, 2017, Ms. Alpine explained that Student could only receive credit restoration if he attended Saturday School (PE-35).

Offers to attend Saturday School are reflected in emails dated November 2017 between Parents and Ms. Alpine (PE-27; PE-28).

92. On or about December 2017, Parents were informed that by attending Saturday School Student could restore some of his credits and earn back the days he was absent. This was the first time this option was presented to them (Mother). By December 2017, Student had exceeded the maximum limit of absences and attending Saturday School was the only way he could restore his credits (PE-35; PE-36; Mother). On December 7, 2017, Parent was specifically informed by Ms. Alpine that Student could not restore his credits through tutoring or after school help⁷ (PE-35).

93. On December 7, 2017, Dan McGowan, Dean of Students at Bay Path, emailed Mother responding to her inquiries regarding credit restoration. In his email Mr. McGowan stated that

...The Saturday School credit restoration option is something that I created several years ago to help students who had surpassed the limit of acceptable absences. Credit restorations is only received through the Saturday School option as it is a program that is run out of my office and is easier to keep track that way. After school sessions are not offered for credit restoration. The only other options that have been considered for credit restoration is having students come in during February and April vacations to make up the days (PE-36).

94. Mother made additional inquiries on December 13, 2017, including whether Student would have a tutor assigned to him during Saturday School, whether the three hours long session on Saturdays constituted half or full day for purposes of credit restoration, whether tutoring offered at any other time counted toward credit restoration, the expectation for work completion during Saturday School and the interrelation between the Saturday session and missed instruction/attendance (PE-36). Mr. McGowan responded the same day explaining that credit restoration could only be accomplished through Saturday School because the tutoring sessions were run through a different office. One Saturday was equivalent to one school day. Mr. McGowan further noted that

...if he receives tutoring during those Saturdays then that is an excellent bonus and he will still get credit restoration at the same time, but only during Saturday School. Any additional tutoring he receives after school or otherwise, will not be part of the Credit Restoration program the Dean's Office set up (PE-36).

⁷Ms. Alpine's email specifically stated "No, credit restoration is for Saturday only. Extra school help and tutoring (except for Saturdays in the school), do not play into the credit restoration" (PE-35).

95. All students attending Saturday School were expected to bring something to read that was of interest to them in case they ran short of school work after completing their work (McGowan, Mother). Parents and Student agreed to participate in Saturday School to help Student recover his credits so that he could complete ninth grade. At Parents' request, a tutor was provided to Student so that he could get direct instruction during some Saturday School sessions (PE-34; PE-35).
96. Student was expected to bring work he needed to complete to Saturday School. If he was caught up with his work, he had to attend and sit in front of a teacher and read whatever he chose in order to earn back his absences (Mother).
97. On December 22, 2017, Student was placed on a new medication which has helped reduce Student's migraines significantly (Mother). Improvement was noticed by January 2018. Between January and April 2018 Student was not absent from school and he was in good academic standing.
98. In early February, 2018, the Parties participated in a mediation, but they were unable to reach an agreement (SE-4).
99. Correspondence between Parents' and Bay Path's counsel between February and April 2018 describe the Parties' negotiations regarding Student's absences and making up work/class time (SE-3; SE-4; SE-5). On March 1, 2018, Bay Path, through its attorney, offered to count tutoring done during the week as credit recovery (SE-5; PE-37).⁸
100. An email communication between Parent and Nancy Alpine dated April 24, 2018, confirms that as of that date Student was caught up with credit recovery through Saturday School and his credit restoration was complete. Parent however, inquired and it was confirmed for her by Ms. Alpine, that if Student's acceptable attendance levels were maintained he would be granted his credits at the end of his "freshman year", the 2017-2018 school year (PE-37).

⁸ At Hearing a controversy arose regarding whether the agreement to count after-school tutoring participation towards credit restoration had been the result of mediation. The confusion resulted from Bay Path's determination to grant this accommodation, which had been sought by Parents, near the time the mediation was held. According to Bay Path, implementation of this accommodation did not result in a change in services for Student but rather, an alteration of the accounting of days of absence for the purpose of credit restoration (See SE-17). At Hearing Parents argued that they were unaware that this exception was being implemented. Mr. McGowan, who was responsible for implementing the attendance policy, was also unaware of the policy until shortly before the Hearing. In their Closing Argument, Parents noted and compared the two versions of SE-11 one dated April 23, 2018 and the other April 24, 2018, the first stating that Student remained over the limit and needed to make up days through Saturday School and the second, offered at Hearing, noting that Student was in good standing because he had been given credit for attending after-school tutoring. Parents argued that offers made during a mediation which did not result in a mediation agreement, are confidential and hence inadmissible. Bay Path argued that clarification had been provided in counsel's response to Parents' attorney dated March 1, 2018 which stated that "In this case, [Student] is allowed to make up for missed instruction by attending tutoring during Saturday School and after school during the week. If necessary, [Student] may have additional opportunities to make up missed instruction during the summer" (SE-5).

101. As of the date of Hearing, April 30, 2018, Student had been absent 24 days during the 2017-2018 school year. Fifteen (15) absences were during academic days and nine (9) were during shop days. Two (2) of the absences occurring during shop days were related to Student attending a funeral, thus, excused. That placed Student one day shy of the eight (8) days maximum number of absences allowed during shop days pursuant to Bay Path's attendance policy. The absences occurring during academic days were five (5) over the ten (10) day limit. All of the absences occurred prior to January 11, 2018 (SE-9; McGowan).
102. If Student missed one more day of school during the 2017-2018 school year, he would once again be over the maximum allowable number of absences and risk receiving no credits for this school year, even if he is totally caught up with his work and passes MCAS. Additionally, Student may only receive credit for ninth grade if he also meets the maximum absence limit and passes all of his courses in tenth grade. If he fails one course in tenth grade, and/or exceeds the limit of absences he will receive no credit for his freshman or sophomore years (McGowan).
103. Excepting the first Saturday, Bay Path has provided Student one-to-one tutoring during Saturday School. His attendance during Saturday School has permitted him to recover some of the instructional time and credits he may have lost otherwise. Additionally, Student may make up missed instruction time during the summer. According to Mr. McGowan, these accommodations have been designed to offer Student an equal opportunity to receive his education (McGowan).
104. Bay Path awarded Student credit for the work completed in Saturday School. At the time of the Hearing, Student had attended five Saturday School sessions which placed him in good standing under the attendance policy (SE-11; McGowan). Since on or about March 2018, Student received credit for the work completed during tutoring time consistent with Bay Path's decision to count after school tutoring during the week as credit recovery (SE-5; PE-37).
105. As the Dean of Students, Mr. McGowan has authority to make individual determinations as to how a Bay Path policy applies to a particular student. He testified that no individual consideration was given to Student regarding credit restoration for the 2016-2017 school year. During the 2017-2018 school year, Student was offered participation in Saturday School to make up absences, and one week before the Hearing, Student was given credit for after school tutoring.

CONCLUSIONS OF LAW:

This matter solely involves alleged disability-based discrimination/ violations of Section 504 of the Rehabilitation Act of 1973. Parents assert that Bay Path's Attendance Policy discriminates against Student who has a qualifying disability that sporadically impacts

Student's ability to attend school. Parents' desired accommodation is to set aside or modify portions of the Attendance Policy so that Student may have equal access to his education.⁹

As the moving party, Parents carry the burden of persuasion in this matter and must prove their case by a preponderance of the evidence.

In rendering this decision, I rely on the facts recited in the Facts section of this decision and incorporate them by reference to avoid restating them except where necessary.

Upon consideration of the evidence, the applicable legal standards, and the arguments offered by the Parties, I find that Parents have met their burden of persuasion that Bay Path's Attendance Policy as applied to Student discriminates against him in violation of Section 504. My reasoning follows.

BSEA Jurisdiction:

In Massachusetts, the Bureau of Special Education Appeals has been granted authority to hold adjudicatory hearings and resolve disputes among parents, school districts, private schools and state agencies involving the rights of students pursuant to the IDEA, MGL c. 71B and Section 504 of the Rehabilitation Acts of 1973.¹⁰ M.G.L. c. 71B §2A(a). Pursuant to 603 CMR 28.08(3), the disputes resolved at the BSEA may address

...eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law, or procedural protection of state and federal law for students with disabilities. A parent of a student with a disability may also request a hearing on any issue involving the denial of the free appropriate public education guaranteed by Section 504 of the Rehabilitation Act of 1973 as set forth in 34 CFR §§104.31-104.39. [Emphasis supplied].

Within the context of Section 504, the BSEA may enter determinations involving discrimination against students that impact that student's educational rights, including discriminatory policies as they may impact an individual student. *In Re: Boston Public Schools and Albert, Ruling on Motion for Partial Summary Judgment*, 12 MSER 221 (Crane, August 11, 2006).

⁹ I note that this Decision is very fact and case specific regarding full implementation of reasonable accommodations for Student, and should not be interpreted as an indictment of Bay Path's Attendance Policy in general.

¹⁰ The BSEA is responsible to hold adjudicatory hearings to resolve "disputes between and among Parents, school districts, private schools and state agencies concerning: (i) any matter relating to the identification, evaluation, education program or educational placement of a child with a disability or provision of a free and appropriate public education to the child arising under this chapter and regulations promulgated hereunder or under the Individuals with Disabilities Education Act, 20 USC section 1400 et seq., and its regulations; or (ii) a student's rights under Section 504 of the Rehabilitation Act of 1973, 20 USC Section 794, and its regulations" consistent with MGL c. 71B §2A(a).

Here, the Parties agree that Student is an individual with a disability falling within the purview of the IDEA, MGL c. 71B and Section 504 of the Rehabilitation Act of 1973, and the regulations promulgated under those statutes. The Parties further agree that Student's absences are a result of his disability and that such disability-related absences are at the root of the Parties' dispute. As such, the BSEA has authority to adjudicate this matter.

Lastly, I note that Bay Path challenged the jurisdiction of the BSEA regarding the award of academic credits, credit restoration and promotion.¹¹ While I agree that these are typically general education issues over which the BSEA has declined to take jurisdiction, the central issue in the instant case is Parents' challenge to a facially neutral policy that as applied to this Student, denies him equal access and participation in Bay Path's general education program and therefore, results in discrimination against him on the basis of his disability.¹² This type of claim of discrimination is precisely what Section 504 was designed to address. The BSEA has statutory and regulatory authority to hear and remedy administrative claims of disability discrimination in educational settings. As such, this matter is properly before the BSEA.

Section 504 Legal Framework:

Section 504 of the Rehabilitation Act of 1973, 29 USC §794(a) provides that

No otherwise qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance. 34 CFR §104.4(b)(1).

The corresponding regulations mirror the statute.¹³

A parent seeking educational redress of a Section 504 claim must show that the student has a qualifying handicapping condition, that the student has been denied access to or has been deprived the benefit of a program or activity for which he or she is otherwise qualified on equal basis to a student without disabilities, by a public entity which receives federal funding, and that such denial was based on the student's disability.¹⁴ See *Doe v. Woodford Cnty. Bd. of Educ.*, 213 F.3rd 921, 925 (6th Cir. 2000); see also *G.C. v. Owensboro Pub. Sch.*, 711 F.3d 623, 635 (6th Cir. 2013); *Campbell v. Bd. of Educ. of the Centerline Sch. Dist.*, 58 F. App'x 162, 165-166 (6th Cir. 2003).

¹¹ See *Student v. Hampden-Wilbraham R.S.D.*, BSEA 17-10699 (2017), noting that the IDEA and Massachusetts special education laws and regulations are silent regarding a hearing officer's jurisdiction over general education issues, thus declining to take jurisdiction.

¹² See *Norfolk County Agricultural High School, Ruling on Motion to Dismiss of Norfolk County Agricultural School and Parents' Motion For Summary Judgment*, 11 MSER 233 (Berman, 12/28/2005).

¹³ "No qualified person with a disability shall, on the basis of the disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives Federal financial assistance." 34 C.F.R. §104.4(a)-(b)(1)(i)-(iv) and (vii).

¹⁴ 29 U.S.C. §794.

The Section 504 requirements addressing provision of a free appropriate public education found at 34 CFR §104 et seq., are similar to those offered disabled students under the IDEA.¹⁵

In the case at bar the Parties have stipulated that Student's migraines, a qualifying handicapping condition, render him eligible for Section 504 protections. The Parties also agree that Bay Path is a recipient of federal funds and therefore, subject to the requirements of Section 504.

Parents further assert that under the Americans with Disabilities Act (ADA),¹⁶ "an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active 28 C.F.R. Part 35.108(d)(1)(iv)". Access to a free and appropriate public education is a major life activity which is impacted by Student's migraines. As such, Bay Path must consider what accommodations are needed when Student's migraines, his qualifying disability, "is active."

Parents' sole claim is that the Attendance Policy, a facially neutral criterion, impermissibly and disparately affects Student. According to them, Student, a qualifying disabled individual, is entitled to a reasonable modification of policies, practices, or procedures (specifically the Attendance Policy) because the aforementioned discriminate against Student on the basis of his disability. The determination of whether the school district is obligated to make reasonable modifications to a specific policy is highly fact dependent and the analysis must be made on a case by case basis. See *In Re: Boston Public Schools, Ruling on Motion for Partial Summary Judgment*, 109 LRP 48225 (August 11, 2006).

The issue of reasonable accommodations for students disabled by migraines is not a novel one for the Office of Civil Rights (OCR), the agency responsible for providing guidance regarding Section 504.

The Office of Civil Rights addressed the issue of migraines in *Dickson County School District*, Office for Civil Rights, Southern Division, Atlanta Tennessee, 4-14-1742 (Floyd, 3/26/2015). In that case, a fourth grader with a traumatic brain injury suffered severe migraines and cyclic vomiting which caused the student to miss school frequently. In the *Dickson County School District* matter, the student was required to complete the work for the days missed during after school and Saturday detention. The district imposed the absence policy requiring the student to make up days exceeding nine absences after the parents submitted a physician's note excusing the absences. OCR found that pursuant to Section 504 and Title II of the ADA, school districts must provide students with disabilities with opportunities to participate and benefit from education that is equal to those afforded to students without disabilities, noting that students with disabilities may be entitled to reasonable modifications of policies, practices or procedures. The student in *Dickson County School District* had been keeping up with assignments, completing the work given

¹⁵ See *Zdrowski v. Rieck*, 119 F. Supp. 3d, 643-648 (E.D. Mich. 2015).

¹⁶ Title II of the *Americans with Disabilities Act of 1990*, 42 U.S.C. §12132 et seq.

him by his teachers and was earning passing marks. OCR found that the district did not account for the fact that the student was passing and making up his work. Spending time in Saturday detention and coming after school to make up missed hours could be construed as punitive in nature rather than for instructional purposes given that there was no need for him to make up lost instructional time.

The *Dickson County School District* opinion clearly contemplates a district's need to provide reasonable modification to its policies, practices and procedures when it is on notice that a student's absences are related to his disability. In such cases, failure by the district to provide reasonable accommodations, which may entail modifying a policy, may result in a discriminatory act that prevents the student from receiving educational benefit that is equal to that of his/her non-disabled peers.

Moreover, in developing a Section 504 plan, the Team (or group) must draw upon and carefully consider information available from a variety of sources to determine what accommodations are reasonable in a given case. Based on the available data, a Section 504 plan must be individualized to the needs of the particular qualifying individual. The Section 504 accommodations must respond to the needs of the student, not those of the school.¹⁷ However, Section 504 does not compel Bay Path either to disregard Student's disabilities or to make substantial modifications to its program in order to allow Student's participation.¹⁸

Applying the above criteria to the instant case, requires that the Hearing Officer address the reasonableness of the accommodation sought by Parents (i.e., modification of the Attendance Policy). As discussed later in this Decision, I find that the accommodation sought by Parents is reasonable, individually tailored to Student's documented needs, not unduly burdensome to the school administration, and it does not unreasonably interfere with Bay Path's academic and vocational instruction and advancement criteria.¹⁹ Therefore, Student is entitled to appropriate modification of the Attendance Policy.

In the instant case, Student attends a vocational program comprised of academic and vocational components. Students in such programs must be able to satisfy the requirements of both aspects of the program with or without accommodations. The type of accommodations granted must not alter the integrity of the student's program which according to Bay Path, includes successful completion of its academic and vocational components and a certain amount of face-to-face instruction in both academics and shop.

Here, Parents are not disputing Student's participation in the full program, or the benefits of face-to-face instruction. Rather, Parents seek accommodations that allow Student equal access to both aspects of his program, allowing him to progress from year to year. Bay Path

¹⁷ See *Ducal County (FL) Public Schools*, Office for Civil Rights, Southern Division, Atlanta (Florida) 04-14-1514, (Velez, 10/19/2015).

¹⁸ See *Southeastern Community College v. Davis*, 442 US 397 (1979), addressing the obligations of the educational institution pursuant to Section 504.

¹⁹ *Id.*

is responsible to offer Student accommodations necessary to provide him with meaningful access to his educational program.²⁰

The Supreme Judicial Court has explained the effect of an accommodation to a facially neutral policy so as to prevent exclusion of a qualified individual.²¹ The proposed accommodation must allow the student to meet the essential requirements of the educational program and be feasible for the school to implement. That is, it must not impose undue hardship, financial expense or administrative burden on the institution implementing the accommodation. Similarly, the accommodation must not cause a fundamental or substantial alteration of the educational program. Similarly the inquiry regarding what constitutes “fundamental alteration” must be fact specific with respect to considerations such as the type of program, size of the institution, etc.²²

Standard of Review- Ripeness/Mootness:

It is well established that matters that come before the BSEA must involve a live or current dispute between the Parties. *Student and Reading Public Schools*, BSEA 17-06923, (May19, 2017). Here, Bay Path argues that there is no controversy because Student demonstrated that he was able to meet the standards of the program with the substantial accommodations provided by Bay Path, and he was not failing his classes or at risk of losing credits because of his attendance. Bay Path asserts that, by the time of Hearing, Student had made up the lost time, Parents’ “fear [was] purely speculative and [did] not rise to the level of a live controversy as required under M.G.L. c. 71B and 603 CMR 28.00 et seq.” Bay Path argues that while Parents may have wanted additional accommodations to help Student succeed, they cannot claim that Student required those accommodations.

Parents however, assert that the matter is not moot despite Student’s current attendance status. Having attended six Saturday School sessions during the 2017-2018 school year, by April 2018 Student had brought his attendance below the maximum allowable limit. Parents persuasively argued that despite the tremendous reduction in migraines resulting from Student’s new medication, Student still carries diagnoses of migraines and anxiety disorder as recognized in his IEP and Section 504 Plan. His migraines are sporadic, unpredictable and can be frequent. Thus, Student remains vulnerable to improper and discriminatory application of Bay Path’s Attendance Policy.

The record supports Parents’ contention that given Student’s diagnoses it is very likely that he will continue to have migraines and that he will be absent, making it reasonably foreseeable that he will once again exceed the maximum limit for absences. If he exceeds the maximum limit of absences in tenth grade, he risks receiving no credits and will be forced to repeat tenth grade. There is also the question of whether Bay Path will require him to meet the attendance requirement for two consecutive years before credits are awarded. (I note that PE-37 appears to indicate that Student will be exempt from this portion of the

²⁰ See *Alexander v. Choate*, 469 US 287 (1985).

²¹ *Id.*

²² *Southeastern Community College v. Davis*, 442 US 397 (1979).

Attendance Policy for this year, but the record is unclear as to whether this will be the case during future years.) The likelihood that he will continue to have migraine-related absences requires Student to “make educational decision regarding his placement knowing that further absences may impact his ability to earn graduation credits”. As such, the controversy is capable of repeating itself until such time as Student is able to gain and keep sufficient credits to graduate.

It is a well-established principle of law that a controversy that is capable of repeating itself yet evading review may overcome dismissal on the basis of ripeness. *Southern Pacific Terminal Co. v. ICC*, 219 US 498 (1911). Bay Path’s policy requiring Student to pass all of his courses *and* meet the attendance requirements for two consecutive years before he receives his credits for the previous and consecutive years render this controversy live.

With this guidance I turn to the case at bar.

Discussion:

The instant case involves the reasonableness of accommodations requested by Parents for Student, a ninth grader, who since starting at Bay Path in September of 2016, has been on a Section 504 plan and more recently on an IEP. Under both, the Section 504 plan and the IEP, Student receives numerous accommodations for his multiple disabilities which include Autism Spectrum Disorder, Generalized Anxiety Disorder and most particularly, Chronic Migraine Disorder. Parents assert that Bay Path’s Attendance Policy, which applies to all enrolled students, discriminates against Student who is a child with a disability, and denies him equal access to his the Bay Path educational program.

The Parties here have stipulated to Student’s migraine diagnosis. There appears, however, to be a lack of agreement, and perhaps understanding, of how Student’s diagnoses (including his Anxiety Disorder and Autism Spectrum Disorder) impact him, and his ability to attend school; and, more importantly, how the Attendance Policy as applied to Student given the particular facts in this case, denies him equal access to his education.

Parents argue that Bay Path’s refusal to modify the Attendance Policy discriminates against Student because it prevents him from earning graduation credits toward promotion to the next grade, despite completion of the work requirements for each course.

The dispute between the Parties escalated in March 2017, when Parents learned, or perhaps understood for the first time, that Student’s excused absences due to migraines would be counted toward the maximum allowable limit thus preventing Student from being promoted. The record shows however, that there was a second bar to Student’s promotion during his first year at Bay Path. In addition to the absences, Student was at risk of failing multiple courses because he had not made up the assigned work he missed. Upon learning that the

absences would prevent him from being promoted, he lost his motivation to finish his course work. By the end of the year, Student had failed numerous courses (Alpine).

The situation worsened when, at the end of Student's first year at Bay Path, it was suggested to Parents that Student might not be appropriate for the Bay Path vocational program and that he may need an alternative placement (PE-19; Ribaudó).

Parents accepted Bay Path's spring of 2017 grade promotion decision. Student repeated ninth grade during the 2017-2018 school year, taking the same classes with many of the same instructors. I note that Student has been described as a hard-working, diligent, respectful student.

I note that, in requesting modification of the Attendance Policy, Parents are not seeking that the academic standards be lowered or that the integrity of the vocational program be undercut. They agree that Student needs to satisfy the academic and vocational components of his program satisfactorily, albeit with accommodations.

The evidence shows that Student was not promoted during the 2016-2017 school year because he failed several of his academic classes. Parents' procedural challenges²³ for the 2016-2017 school year are insufficient to overcome the fact that Student did not complete his work nor pass his classes during that school year. However, Parents are correct that the numerous absences caused by his disability during the 2016-2017 school year, combined with his inability to make effective progress, should have triggered the child find requirements pursuant to the IDEA. Student was however, not referred for an evaluation until Parent requested one toward the end of the school year. By then, it was too late for Student to recoup lost instruction and earn passing marks.

The 2017-2018 school year presented different challenges arising from Student's migraine related absences and strict implementation of the Attendance Policy.

Student repeated ninth grade during the 2017-2018 school year. He started the year with a Section 504 plan. He was found eligible for special education and placed on an IEP in November 2017. The accepted IEP addressed social/ emotional and executive functioning needs and addresses his documented health issues. The language in the IEP recognized the connection between Student's disabilities (migraines and anxiety) and his absences, that is, that anxiety had a tendency to trigger migraines which prevented Student from attending school and included numerous accommodations to address the migraines (PE-11).

²³ Parents have raised three procedural challenges: 1) the Section 504 Team (group) failed to include necessary members; 2) despite failing numerous classes Student was not referred for an IDEA evaluation; and 3) the school failed to provide home/hospital tutoring consistent with the Form presented by Parents until Student had been absent for 14 days.

By December 2017, Student had exceeded the maximum absence limit (eight total absences for shop and 20 absences for academic periods), placing his ability to be promoted in jeopardy pursuant to Bay Path's Attendance Policy. Once again, strict application of Bay Path's attendance policy could prevent Student from earning graduation credits even when his absences were excused for medical reasons (migraines).

Parents further asserted that the Attendance Policy prevented implementation of Student's IEP. The policy applied regardless of whether the absences were excused, and whether Student completed his course work satisfactorily and earned passing grades. Parents argued that in essence, Bay Path's message to Student was that

...we will restore your credits if you go to school next year and you don't get sick again; and unfortunately, [Student] has no control over that.

Bay Path asserts that Parents did not allege that it had failed to provide any of the accommodations or services offered Student under his Section 504 Plan or his IEP. Bay Path further argues that the IEP contained only two goals to address Student's executive functioning and social/emotional deficits, but did not include a goal or service to address Student's attendance as a behavior, nor did Parents request that such a goal be added.

Given the facts of this case, it would have been prudent to address modifications to the Attendance Policy in the IEP, but that claim is not before me.

Makeup work and Saturday School:

Parents' second contention is that, as applied to Student, requiring him to attend Saturday School, is discriminatory and akin to punishment.

While Student had caught up with the attendance requirements at the time of Hearing through attending Saturday School, were he to have any more absences due to migraines he would once again risk loss of promotion and would have to repeat ninth grade for the third time, despite his satisfactory work completion and good academic standing. Parents note that attendance at Saturday School for the purpose of making up excused absences related to his disability is discriminatory as to Student. I agree.

Parents further argue that required Saturday School participation is a punitive measure used to discipline other students for truancy or absenteeism, cutting class, excessive detentions, smoking, etc. (PE-1). By insisting that Student attend Saturday School Bay Path placed his medically excused absences in the same disciplinary category as willful truancy. Bay Path disputed the charge that Saturday School was solely for disciplinary reasons. It argued that it had been providing Student with tutoring each time he attended and that Parents had voiced

their preference at times that tutoring be provided on Saturdays over other offers to provide tutoring during weekdays.

Bay Path further argued that it offered one-to-one tutoring during Saturday School as an accommodation because Student was unable to participate in tutoring while he had a migraine, and his migraines may occur during week days. Therefore, Student would have to become available for tutoring at other times, such as on Saturdays. Bay Path also argued that as a result of Student's participation in Saturday School, he recovered some of the instructional time and credit he would have otherwise lost, has received credit for the work completed during tutoring and thus, was in good standing under the Attendance Policy at the time of the Hearing (SE-11; McGowan).

Bay Path argued that face-to-face instruction was an integral part of its program and that said instruction was beneficial for Student. Assuming that this is so, Bay Path should have given Student credit for the after-school tutoring attended since 2017 as opposed to crediting only the Saturday School sessions. It appears that the main reason for requiring Student's attendance at Saturday School was to make up "lost time", not for Student's instructional benefit. Thus, strict application of the Attendance Policy in this regard discriminates against Student punishing him because of his disability.

Parents are correct that the description of Saturday School appears under the Discipline section of the Student Handbook, suggesting that it is a disciplinary sanction designed to address truancy. It is also used as a means to allow students who exceed the maximum number of absences to make up the *time* missed (PE-1; PE-35; PE-36). Parents contention is that it is not "educationally motivated" and the "delivery of instruction is not the objective", but rather a way to make up the days missed from school, regardless of whether the student has completed his work or not; hence the requirement that Student bring something to read in case he finished his work (PE-1; Mother; McGowan). The purpose is to earn back the days lost, not to tutor Student to allow him equal access; that is a secondary gain.

While conceding that Saturday School was used for detention purposes Bay Path argued that an additional purpose of Saturday School was for credit restoration. The language in the Credit Loss/Restoration section of Bay Path's Attendance Policy would suggest that this policy was created to deter school truancy, not to address medically excused absences. This policy specifically states that "in a course where a student fails to receive credit due to failure or fulfillment of the attendance requirement, the graduation credit requirement will not be considered fulfilled (PE-1)". Said section also grants the Dean of Students discretion to enter into agreements for a student to restore credits through evening or summer schools, or at other times during the school day. Attendance at Saturday School is not listed as one of the options for addressing credit restoration. The Credit Loss/Restoration section also includes the requirement that for students who exceed the absence limit, credits will be awarded at the

end of the following school year if the student meets the four conditions²⁴ that following year (PE-1). Three of the four conditions address absenteeism, tardiness and school discipline. ■

“Disciplinary Terminology” is a subsection of the Attendance Policy, and it is here that the definition for Saturday School is found. The first sentence specifically states that Saturday School is not necessarily for academic purposes but rather, is used as a disciplinary action to address, among other things, “...excessive tardiness, truancy, class cutting, excessive detentions, smoking or possession of smoking materials, minor safety violations, minor bus incidents, etc.” (PE-1).

Every offense listed in this section may result in disciplinary action. “Credit restoration” is not included on this list. The policy goes on to state that Saturday School is used as a step between detention and suspension, and failure to attend a scheduled Saturday School session results in suspension. Moreover, students at Bay Path understood the purpose of Saturday School to be for disciplinary purposes, hence Student’s dismay when his name was mentioned on December 1, 2017 over the loud speaker as one of the students who had to attend Saturday detention (PE-32; Mother, Alpine). In an email from Ms. Alpine to Parents, she notes that the classroom where the students gathered on Saturdays was not for every student attending Saturday Detention but for credit recovery, detention and tutoring needs (PE-34). Mr. McGowan discussed Saturday School as a way for students to make up time missed (McGowan). Saturday School was only held on 20 Saturdays per school year because in order to hold it they “needed to have clients”, this usually occurred a few weeks into the start of school (McGowan). Mr. McGowan testified that after Student had served the first Saturday School, a tutor was provided at Parents’ request, and Student was allowed to be in a separate room (McGowan). The aforementioned would support a finding that the primary purpose of Saturday School is to deter negative behaviors such as absenteeism, class-cutting or smoking, and that making up work for purposes of credit restoration is secondary.

I find further guidance in concluding that Saturday School is intended as a punitive measure for students in the *Millis Public Schools v. M.P. & others*, (SJC-12384) (February 6, 2018), decision. In *Millis*, the Massachusetts Supreme Judicial Court defined truancy as a voluntary, intentional action, as opposed to one that is accidental or involuntary. The *Millis* Court explained that “truancy arises from reasons portending delinquent behavior”. The Court noted that a finding of truancy required exploration of the student’s purpose or reasons for being absent and concluded that

...a child “willfully fails to attend school” when he or she acts purposefully, such that his or her behavior arises from reasons portending delinquent behavior.

²⁴ The four conditions are: keep absences below maximum; receive passing marks in all courses; have no disciplinary suspensions; and have no tardiness for school or classes (PE-1).

The *Millis* Court stressed that a finding of willfulness required a “fact–based inquiry” that was dependent on the circumstances of the particular case. In the instant case, neither Party argued that Student’s absences portend delinquent behavior. The parties agree that Student is a respectful and motivated individual, who has initiated requests to meet with tutors, wants to be promoted and whose absences are caused by his migraines (his disability). He does not willfully or intentionally wants to miss school. Thus, it appears that measures designed for one category of absences were applied without individual consideration to an entirely different and protected category of absences. In this sense, Bay Path required Student to attend a setting that was both intended and generally perceived as disciplinary.

To be consistent with Section 504 mandates, the purpose of Student’s tutoring must be for his instructional benefit to help him with his course work when he is absent because of migraines so that he may have access to the vocational and academic curriculum equal to that of his peers. As such, if Student meets with his teachers and/or tutor after school during the week days, and he is caught up with his coursework, there is no educational reason for him to attend school on a Saturday as this would offer no educational benefit. If no work needs to be done, requiring Student to attend Saturday School simply “to make up time” appears punitive in nature and thus, unlawful discrimination on the basis of his disability.

Student however, may receive face–to–face instruction/tutoring on a Saturday morning if this is a time when he is available and not incapacitated by migraines. Instruction provided on a Saturday must offer Student an individually tailored educational benefit.

Credits after 2 years:

Parents also take issue with the School’s policy that even if Student passes all of his classes one year and is promoted to the next grade, he may not get any credit for the previous grade unless and until he passes all of the following grade’s courses *and* does not exceed the maximum absence limit. At that point, he would get all of his credits for both grades.

At the Hearing on April 30, 2018, Parents offered an email dated April 24, 2018, on which Ms. Alpine confirms that Student will be exempt from this portion of the Policy for the ninth and tenth grades (PE-37). However, nothing in the record shows that Bay Path will exempt Student from the aforementioned requirement for all subsequent years. As such, I will address it.

The section of Bay Path’s Student Handbook addressing Excused Absences does not include illness as a reason for excusing an absence. Moreover, even if the absence is excused, it still counts toward the “maximum absence limit” (PE-1). Under this criterion even if all of Student’s absences were excused due to documented illness, were he to exceed the limit he would not receive any course credit and would be retained for the following year. Generally,

Bay Path's Attendance Policy does not allow award of graduation course credits to students whose absences surpass the limit.

The Student Handbook also discusses ways in which students may restore credits. It notes in pertinent part that

i. A student who has exceeded the absence limit, but has passed the course(s) will receive no credit; however, in the subsequent school year, to restore credit(s), the student will be required to meet the following four (4) conditions:

1. keep absences below the maximum absence limit
2. pass all subjects
3. maintain a good discipline record (no suspensions)
4. be on time to school and classes

ii. For a student meeting the four conditions, as confirmed by the Dean of Students, credit(s) lost due to excessive absences in the previous year will be restored (PE-1).

Thus, under this policy, granting of credits/ credit restoration for a student who passes all his courses, but exceeds the absence limit, during one year is conditioned on that student's ability to maintain attendance limits and be on time to school and classes (in addition to passing his courses and maintaining a good discipline record) the following year. Since Bay Path has accepted that Student's absences are a result of his disability as noted in his IEP, Parents argue that this policy is discriminatory as to Student (PE-11; SE-7).

Parents reason that since Student's migraines are real, medically documented, unpredictable and unpreventable, it is likely that he will suffer migraines for the rest of his life. As such, it is reasonable to expect that Student will continue to be absent from school due to migraines despite his best efforts to the contrary, and that he will again exceed the maximum absence limit. Pursuant to the Attendance Policy, Student could potentially spend multiple years at Bay Path, pass all of his courses (academic and shop) and receive zero credits.²⁵ Parents assert that since Student's absences result from his disability, requiring him to adhere to an

²⁵ I note that Student and Parents are not seeking that Student be exempt from completing his work (academic or shop) or any other obligation or requirements for graduation such as MCAS. They are also not seeking that any non-medically excused absence be exempt from the Attendance Policy for him. Rather, Parents request that Student not be penalized for his medically excused absences and that he be provided tutoring and be allowed to make up any quizzes, tests or assignments he may miss due to being out of school because of his disability.

unmodified Attendance Policy is discriminatory and that Student is entitled to reasonable accommodations to rectify such effect. I agree.²⁶

Bay Path presented no evidence that modification of the Attendance Policy would cause the school undue hardship, or financial or administrative burden. Therefore, I find that individual modification in application of the Attendance Policy to accommodate Student's disability would not fundamentally alter Bay Path's educational program, or create undue hardship administratively, and it would provide Student reasonably equal access to Bay Path's curricula offerings.

Parents' request that Student be given credit for each year on which he completes his courses satisfactorily (and meets his modified Attendance Policy) without further contingencies is GRANTED.

Educational Services in the home or hospital:

Parents argued that Bay Path violated its own policies regarding medically excused absences which state that a student who is home-tutored s/he shall be exempt from the Attendance Policy during the specified duration of the approved home tutoring. They assert that Student's medically excused absences trigger approved tutoring consistent with Student's Physician's Statement for Home or Hospital Education²⁷, and that consistent with the Attendance Policy, those medically excused absences should be exempt. The record shows that Bay Path never challenged the Physician's Statements for Home or Hospital Education and thus, the Physician Statements were effective for the duration of the 2017-2018 school year (SE-12).

Pursuant to 603 CMR 28.03(3)(c) addressing educational services in home or hospital,

Upon receipt of a physician's written order verifying that any student enrolled in a public school or placed by the public school in a private setting must remain at home or in a hospital on a day or overnight basis, or any combination of both, for medical reasons and for a period of not less than fourteen school days in any school year, the principal *shall* arrange for provision of educational services in the home or hospital. Such services shall be provided with sufficient frequency to allow the student to continue his or her educational program, as long as such services do not interfere with the medical needs of the student. The principal shall coordinate such services with the

²⁶ I note that since the only issue raised by Parents involves excused absences due to illness, I limit my analysis to this issue, setting aside any other reasons under the Attendance Policy for excusing absences.

²⁷ Two Physician's Statements for Temporary Home or Hospital Education were presented to Bay Path (PE-6; SE-12; Mother).

Administrator of Special Education for eligible students. Such educational services shall not be considered special education unless the student has been determined eligible for such services, and the services include services on the student's IEP. [Emphasis supplied].

Nothing in 603 CMR 28.03(3)(c) requires that a student be absent for 14 days prior to receiving tutoring. Rather, anticipation of 14 days of absences due to medical reasons triggers initiation of tutoring. Similarly, the regulation leaves the school principal no discretion to delay provision of tutoring when a valid Physician's Statements for Temporary Home or Hospital Education Form is presented.

In the instant case Parents allege that Bay Path failed to offer Student tutoring consistent with the Physician Forms presented by Parents, and required that Student be absent for 14 days prior to initiating services. Bay Path included this requirement as an accommodation in Student's Section 504 Plan. Parents assert that this refusal to act prior to the 14 days constitutes a violation of the home-hospital education regulations, that it ignores the School's Section 504 obligations, and that it denied Student a FAPE.

Parents presented the first Physician's Statements for Temporary Home or Hospital Education Form on or about April 2017. Tutoring had been discussed in April 2017 but scheduling was difficult due to Student's unavailability when he had migraines. Tutoring was not initiated in April 2017 because Student returned to school on April 13, 2017, the same day Bay Path received the Physician's Statements for Temporary Home or Hospital Education Form.

Anticipating that Student would have over fourteen days of migraine related absences during the 2017-2018 school year, Parents presented the second Physician's Statement for Temporary Home or Hospital Education Form at the beginning of the 2017-2018 school year (SE-12). Bay Path wrote into Student's Section 504 Plan an accommodation requiring Student to be absent for 14 days prior to initiating tutoring (PE-9).²⁸ This accommodation is not listed among the accommodations offered Student under the IEP forwarded to Parents in December 2017. I note that by then Student was receiving tutoring after school and was attending Saturday School. Parents' partial rejection of the proposed IEP included omission of tutorial services for Student²⁹ but, it does not address provision of tutoring pursuant to the Physician's Statements for Temporary Home or Hospital Education Form (PE-12).

²⁸ "After 14 days of missed school days, a tutor will be assigned to [Student]. It will be at the parent's discretion when/if the tutor comes. Tutoring is also available for [Student] on Saturdays at Bay Path for 3 ½ hours, if [Student's] chronic migraines prevent the tutor from meeting with him. There are 20 Saturdays offered throughout the year. [Student's] parent will contact the Pupil Personnel Director, at least 2 days in advance, to let her know that he will need to attend on a Saturday for tutoring services" (PE-9).

²⁹ "Service Delivery- While we accept the service delivery grid, we reject the omission of direct support and instruction in his academic and shop classes that are impacted by his medical disability. [Student's] migraine disorder is very active yet unpredictable. Currently, [Student] is missing an average of 2 days per week of school. [Student] is not accessing the curriculum in a manner that would allow him to keep up with his peers without tutorial support. We reject the omission of tutorial support" (PE-12).

I find that in accepting Student's Section 504 Plans in 2016 and in 2017 (containing an accommodation that was contrary to the regulation), Parents waived any claims with respect to such alleged regulatory violation (SE-8; PE-9).

Composition of the Section 504 Group:

Consistent with 34 CFR 104.35(c), Section 504 requires that a group of knowledgeable people meet to review the student's evaluations and make decisions regarding the services and accommodations required. The group participants may include teachers, counselors, the school nurse, psychologists, social workers, school administrators and parents. The participants must be able to analyze and interpret the data collected from a variety of sources available to the group, be knowledgeable about the student, the placement options and must be able to make determinations regarding the student's needs for services.³⁰

The first meeting to determine Student's Section 504 accommodations/services included Parent and Student's Bay Path counselor (Potenti). Parents asserted that this group did not satisfy the requirements of 34 CFR 104.35(c) because it did not include a team of people knowledgeable about Student. For example, none of Student's then-current teachers attended the meeting. Instead, the guidance counselor and Parent met and adopted the previous year's Section 504 Plan. While Parents are technically correct, at the time of the first meeting (the beginning of the 2016-2017 school year), Student was new to Bay Path and it is doubtful that the teachers or other staff knew much about him. Instead, the two participants adopted the plan developed at Student's previous school by individuals with first-hand knowledge of his needs.

I find that Parents' current challenge to the 2016-2017 Section 504 Team is both factually unsupported and has been superseded by subsequent curative events.

Remaining Allegations:

Lastly, I turn to the issue surrounding the Parties' dispute regarding the two exhibits marked as SE-11, letters dated April 23 and April 24, 2018. Parents argued that these were two contradictory letters which supported Parents' allegation that they did not know that Student was receiving credit for missed instruction by attending after school tutoring in addition to Saturday School. Parents argued that they had made this request, but were unaware that Bay Path had subsequently started counting Student's after school tutoring toward credit restoration.

³⁰ "Placement procedures. In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with 104.34." 34 CFR 104.35(c).

Nothing prevents a school district from reconsidering a previous stance and instituting a practice that ultimately benefits the student, especially when that practice is favored by the parents. That was clearly the case here. ■

The Parties disagreed as to the point in time when Parents were first informed that Student would receive credit for after school tutoring. Parents alleged that Bay Path did not inform them that they were changing their stance regarding offering Student credit restoration for after school work. They stated that they received a letter on April 23, 2018 and another on April 24, 2018 noting in the former that Student owed time and in the latter that he was caught up for purposes of credit restoration. According to Parents, they became aware of this when they saw SE-11 at Hearing.

Relying on their counsel's letter to Parents' counsel, dated March 1, 2018, Bay Path disputed Parents' argument. Review of SE-5, the March 1, 2018 letter Bay Path noted that

[Student] is allowed to make up for missed instruction by attending tutoring during Saturday School and after school during the week (SE-5)

Until March 2018, Bay Path had required Student to attend Saturday School as the *only* means to restore his credits even though he was doing the exact type of work at other times. It would appear that in March of 2018, the district changed its position perhaps triggered by Bay Path's realization that its decision to deny Student credit for work completed after-school (but in school and/or through a tutorial) would not be persuasive at Hearing. Moving forward, Bay Path shall continue to allow Student credit restoration through tutoring at any time.

In sum, I find that Student is an individual with a qualifying disability who is entitled to the protections of Section 504 of the Rehabilitation Act of 1973 and that Bay Path, a Federal funds recipient, discriminated against Student in failing to make reasonable modifications to its facially neutral Attendance Policy to accommodate Student's known medically related disabilities.³¹ In doing so, Bay Path violated Section 504 and denied Student equal access to Bay Path's general education program. I note that by the time of Hearing Bay Path had voluntarily cured some of these violations.

ORDERS:

Parents have demonstrated that portions of Bay Paths' Attendance Policy, as applied to Student, are discriminatory. Therefore, Bay Path is Ordered to modify its policy as to Student as follows:

³¹ *Alexander v. Choate*, 469 US 287 (1985); *In Re: Boston Public Schools, Ruling on Motion for Partial Summary Judgment*, 109 LRP 48225 (August 11, 2006).

1. Student's medically excused absences due to migraines shall be deemed "exempt from the Attendance Policy" and not counted toward Bay Path's maximum attendance limit.
2. Student will not be required to attend Saturday School to make up time for medically excused absences. Student may however, receive face-to-face instruction/tutoring on a Saturday morning if this is a time when he is available and not incapacitated by migraines. The instruction provided must benefit Student.
3. Student's IEP and/or Section 504 Plan will be amended as follows:
 - a) Any further medically excused absences will not count toward the maximum absence limit.
 - b) Student will not be penalized for any medically excused absences and will be allowed to make up any tests/quizzes and/or assignments missed because of such absences.
 - c) Student will be provided tutoring, including direct instruction, when necessary, due to medically excused absences.
4. Student shall be exempt from the portion of the Attendance Policy requiring him to complete a second year of passing his courses satisfactorily and meeting the Attendance Policy before receiving credit for the previous year.

By the Hearing Officer,

Rosa I. Figueroa

Dated: August 30, 2018

August 30, 2018

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

**BAY PATH REGIONAL VOCATIONAL
TECHNICAL HIGH SCHOOL
BSEA # 1805746**

BEFORE

**ROSA I. FIGUEROA
HEARING OFFICER**

**JEFFREY M. SANKEY, ESQ., ATTORNEY FOR
STUDENT/PARENT
TIM NORRIS, ESQ., ATTORNEY FOR
BAY PATH REGIONAL VOCATIONAL
TECHNICAL HIGH SCHOOL**