

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

In re: Nelson<sup>1</sup>

BSEA #2002950

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

A hearing was held at the Offices of Murphy, Hesse, Toomey & Lehane, LLP, in Quincy, on January 23, 2020 before Hearing Officer Amy Reichbach. Those present for all or part of the proceedings were:

Parent

Joanna Compitiello	Music Teacher, Quincy Public Schools
Dan Gilbert	Principal, Broad Meadows Middle School, Quincy Public Schools
Kevin Mulvey	Deputy Superintendent, Quincy Public Schools
Erin Perkins	Director of Special Education, Quincy Public Schools
Elsie Sieben	Family Friend
Garland “Buster” Sieben	Family Friend
Alisia St. Florian, Esq.	Attorney for Quincy Public Schools
Anne Bohan	Court Reporter

The official record of the hearing consists of documents submitted by the Parent and marked as Exhibits P-1 to P-5<sup>2</sup>; documents submitted by Quincy Public Schools and marked as Exhibits S-1 to S-5<sup>3</sup>; one day of oral testimony and argument; and a one-volume transcript produced by a court reporter. At the request of the parties the case was continued to January 30, 2020 and the record held open for telephonic closing arguments. Oral arguments were held and the record closed on that date.

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<sup>1</sup> “Nelson” is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

<sup>2</sup> Parent initially submitted Exhibits P-1 to P-4. On January 27, 2020, after the Hearing but before the record closed, he submitted an additional document. Quincy Public Schools (Quincy, or the District) did not object, and this document was admitted into evidence as Exhibit P-5.

<sup>3</sup> Quincy initially submitted Exhibits S-1 to S-4. Before the hearing, but after the deadline for submission of exhibits, the District submitted an additional document. Parent did not object, and this document was admitted into evidence as Exhibit S-5.

## INTRODUCTION

On September 4, 2019, Parents filed a *Hearing Request*<sup>4</sup> against Quincy Public Schools (Quincy or the District) alleging that Nelson, who was then twelve years old and has Attention Deficit Hyperactivity Disorder (ADHD), a learning disability, and a communication disorder, is entitled by way of his Individualized Education Program (IEP) to door-to-door transportation and a monitor at all times because of both his disabilities and his father's visual impairment. Parents contend that Quincy violated Nelson's IEP on at least two occasions. According to Parents, when Nelson first enrolled in Quincy, his father met with the principal to explain an incident Nelson had experienced previously at school in another district and asked that Nelson be monitored closely because of this. Yet Nelson was left unsupervised by a teacher one day and was touched sexually by a female student; when Father spoke with the principal and the Superintendent afterward, they apologized for their error, promised it would not happen again, and stated that they would hire someone to ensure that Nelson would not be unsupervised again. Despite Parents' request, Quincy refused to memorialize any of this in writing. Then, a few weeks later, Nelson performed at a chorus concert at another public school in Quincy, and he was left alone, unsupervised when the bus failed to pick him up and all teachers had left. Father alleges that these incidents constitute a violation of Nelson's IEP.

On September 25, 2019, Quincy filed a *Sufficiency Challenge* to Parents' *Hearing Request*, seeking clarification of the issues in dispute and the relief sought. The District also requested postponement of the hearing. Mindful of the First Circuit Court of Appeals' instruction that *pro se* complaints should be construed liberally,<sup>5</sup> I deferred my ruling until after the Conference Call, which was scheduled for October 2, 2019. In the interim, Quincy informed the BSEA that Parents had relocated to another town and requested that the *Hearing Request* be dismissed on this basis. Parents failed to appear for the Conference Call, which was then rescheduled to October 10, 2019. Parents again failed to appear. On October 10, 2019, I issued an Order denying Quincy's *Sufficiency Challenge* and providing parents with 10 days to show cause as to why the matter should not be dismissed for failure to prosecute. The hearing was scheduled for October 24, 2020.

On October 22, 2019, Parents requested additional time due to Father's visual impairment and medical health issues. They did not propose a particular length of time for the postponement, nor did they explain their failure to participate in Conference Calls. Out of an abundance of caution, I converted the hearing scheduled for October 24, 2019 to a Conference Call. During that call, the parties jointly requested a three month continuance. The District memorialized that request in writing and the matter was continued to January 23, 2020 for hearing.<sup>6</sup>

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<sup>4</sup> Father is visually impaired. Rather than file a written *Hearing Request*, he dictated his request to Bureau of Special Education Appeals (BSEA) Director Reece Erlichman over the telephone. This conversation was recorded, and a CD and transcript were transmitted to Quincy to initiate the proceeding. Because the *Hearing Request* had to be transcribed, the *Notice of Hearing* was dated September 16, 2019. The hearing was scheduled for October 18, 2019.

<sup>5</sup> See *Ahmed v. Rosenblatt*, 118 F.3d 886, 890 (1st Cir. 1997).

<sup>6</sup> The Scheduling Order initially specified January 24, 2020, but a Corrected Order followed.

The issue for hearing was delineated as follows: Whether the accepted, expired IEP developed by Quincy for Nelson for the period from October 2, 2018 to October 1, 2019, was implemented fully. If not, what is the appropriate remedy?

For the reasons below, I find that although Quincy erred in failing to monitor Nelson carefully and closely on two occasions, Parents did not prove that these events, taken together, constituted a material failure to implement his IEP.

### **FINDINGS OF FACT**

1. Nelson is thirteen years old. At all times relevant to this proceeding, he resided in Quincy with his mother and father. (S-4)
2. Nelson enjoys school, sports, and playing video games. Family, friends, and school staff describe him as talkative, sweet, gullible, caring, immature, impulsive, impressionable, encouraging, empathetic, comfortable around his peers, and a positive role model. (S-4; ES:<sup>7</sup> 37; GS: 74, 79; Father: 102; Gilbert: 130, 138)
3. Nelson has a health disability, specifically Attention Deficit Hyperactivity Disorder (ADHD), and a communication disability. These disabilities impact his ability to attend and process social interaction, and they also impact reading and math skills development and handwritten responses. He functions well below age and grade level expectations across academic areas. In order to make progress, Nelson requires a highly structured small group learning environment, curriculum modifications, and classroom accommodations, including modeling, scaffolding, and repetition. (S-4)
4. Nelson moved to Quincy in September 2018, after attending school in Brockton for a year and a half. He was in the sixth grade. When he first arrived in Quincy, his father met with Dan Gilbert, Principal of Broad Meadows Middle School, to provide some background and history regarding his son. Father shared that Nelson was a sensitive child who had experienced some things in his past that had impacted him negatively, including bullying and sexual trauma. He explained that Nelson needs to be watched closely and requested that his teacher “keep an eye on him.” Following the meeting, Mr. Gilbert developed a close relationship with Nelson. (S-4; Father: 95-96; Gilbert: 119-20, 140-41; Perkins: 177)
5. Nelson’s Team convened on September 26, 2018 for an IEP Amendment meeting. At that time, the Team used Brockton’s most recent IEP as the basis for its own.<sup>8</sup> (S-4; Perkins: 157-58)
6. On or about October 13, 2018, Parent fully accepted an IEP for Nelson for the period from October 2, 2018 to October 1, 2019, placing him in the Special Needs Learning Center III at

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<sup>7</sup> ES refers to the testimony of Elsie Sieben; GS refers to testimony of Garland “Buster” Sieben.

<sup>8</sup> Both Principal Dan Gilbert and Director of Special Education Erin Perkins referred to Nelson’s previous school district as Boston, but the evidence shows that Nelson attended Brockton Public Schools, not Boston Public Schools. (S-4; Gilbert: 119; Perkins: 157)

Broad Meadows (2018-2019 IEP). Although the IEP is dated through October 1, 2019, and goals, benchmarks, and objectives are consistent with that date, school year services are proposed only through 4/29/2019, with summer services proposed for 7/1/19 through 8/1/19. The IEP contemplates annual and three-year reevaluation meetings on 4/29/19 and 4/28/19 respectively.<sup>9</sup> According to Quincy Director of Special Education Erin Perkins, the District was in the process of scheduling a Team meeting in the fall of 2019 when the family moved out of Quincy. (S-4; Perkins: 158)

7. Nelson's 2018-2019 IEP included goals in Reading, Writing, Math, and Communication and provides for C-grid services in Academics (5 x 55 minutes per 5-day cycle) and Speech (1 x 30 minutes per cycle). It contemplated that he would attend music, lunch, assemblies, field trips, and other grade level events with his general education peers. Nelson's IEP grid also included extended school year services (ESY) in Academics (4 x 30 minutes per 4-day cycle). The ESY program is described further under "Schedule Modification," which provides for three hours a day, four days a week of services, to include Speech and Language (1 x 30 per week), Daily Living (4 x 45 minutes) and Academics (12 x 45 minutes). (S-4)
8. Nelson's IEP provided for transportation to and from school each day on a regular transportation vehicle. Because Quincy's buses would be unable to drive down his narrow street, the District contracted with Mass Quality Ride. Although Nelson did not require transportation or an aide because of his disabilities, a monitor assigned to another child on the vehicle walked Nelson between the van and the door to his house. As school officials testified, this arrangement was made in part as an accommodation for Father's visual impairment. The District also contracted with Mass Quality Ride to provide transportation to and from certain school-related activities, including chorus concerts. (S-1, S-4; Perkins: 156-59) Generally, when Nelson stayed after school for chorus, the school secretary would watch for Nelson's van. When she saw it arrive, she would call down to the teacher to let her know the van had arrived. Nelson would then walk from the classroom to the front of the school and board the van. (Gilbert: 136; Compitiello:194-95)
9. The Present Levels of Educational Performance (PLEP A) section of Nelson's IEP states specifically that his "social interaction skills and decision making are impacted by his need to seek attention, inability to recognize personal space, requires him to be carefully and closely monitored throughout the school day (*sic*)." (S-4) During the day, Nelson was able to navigate the school building without any issues; he would go to the bathroom by himself and go to electives either by himself or with other students. (Gilbert: 136)
10. According to Father, Nelson was receiving text messages on his telephone from a female classmate ("C") that seemed inappropriate to him, and this classmate was telling Nelson to "touch her in a sexual way." Father reached out to C's mother and informed the school about his concerns. (Father: 97; Perkins: 174) Nelson never mentioned anything about this to the principal. (Gilbert: 120-21)

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<sup>9</sup>There is no indication that Quincy initiated a three-year reevaluation at any time during the 2018-2019 school year or that the District convened an annual review meeting in or about April 2019. This issue is not, however, before me, and Nelson no longer attends Quincy Public Schools.

11. In or around mid-April of 2019, an incident occurred while Nelson was in the computer lab (“touching incident”). At the time of the touching incident, the classroom teacher was walking back and forth between a classroom and the computer lab next door. Due to the layout of the rooms, she was unable to see all students at once. Nelson was in the computer lab with some other students, seated next to C. No paraprofessionals were with the class and as a result, at times no adult was present in the computer lab. At some point while the students were alone in the computer lab, one of three things happened: (1) Nelson and C placed their hands on each other’s laps; (2) Nelson placed his hand on C’s lap; or (3) C placed Nelson’s hand on her lap.<sup>10</sup> When the teacher entered the room, she told Nelson and C to stop touching each other. She then reported the incident to Mr. Gilbert, and the parents of both students were informed. According to the teacher, the entire incident occurred in less than 30 seconds. (S-5; P-1; GS: 61; Gilbert: 122-25)
12. Father was, and is, concerned that this incident was sexual in nature, that the touching took place under C’s skirt and/or that the two students had their hands in each other’s pants, and that this was not the only time Nelson was left unsupervised in the classroom. The only evidence in support of these contentions is Father’s testimony and that of family friends, who reported what Father told them. (ES: 28, 40, 42-43; Perkins: 160, 164, 182) Father was also concerned that the principal had spoken about this incident in front of Nelson’s peers. (Father: 97-98)
13. Father requested a meeting with Mr. Gilbert after they spoke on the phone about the touching incident. A meeting took place at some point in April between Father, Mr. Gilbert, Ms. Perkins, and Quincy Director of Student Support Services Maura Papile. Father expressed his concern that something like this would happen again, and District officials discussed safeguards they had put into place to prevent that. Either during the telephone call on the day of the incident, or during the meeting that took place afterward, Mr. Gilbert told Father that Nelson would no longer sit next to C in the computer lab, and that he would ensure that Nelson’s teacher would no longer utilize the computer lab when both of her paraprofessionals were otherwise engaged, such that one adult would not be expected to supervise both the classroom and the computer lab at the same time. At this time, Father requested to have the incident formally written up. Mr. Gilbert explained that he would not be doing that. Father then called Mr. Gilbert and requested another meeting. (Gilbert: 126-29; Perkins: 160-62)
14. Parents’ close family friends, Buster and Elsie Sieben, attended a meeting with Parents, Mr. Gilbert, Ms. Perkins, Deputy Superintendent Kevin Mulvey, and Nelson’s classroom teacher on or about May 6, 2019 to discuss the touching incident. Father was seeking an apology from Nelson’s teacher and wanted her to take ownership of the mistakes he felt she had made. At that meeting, Mr. Gilbert told Nelson’s teacher that standing in the doorway does not amount to adequate supervision, and she acknowledged that she should have done things differently. School officials accepted responsibility for leaving Nelson alone briefly and

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<sup>10</sup> The meeting summary written by Nelson’s Team states that the students placed their hands on each other’s laps, but according to Mr. Gilbert’s testimony, only Nelson’s hand was on the female student (C)’s lap. Nelson reported to Mr. Gilbert that C had taken his hand and placed it in her lap, whereas C reported to him that Nelson had placed his hand in her lap himself. (S-5; Gilbert: 124-25)

communicated that they did not believe Nelson instigated the touching. Parents asked for assurance that Nelson would not be left alone again, and Mr. Gilbert and others gave them that assurance. They told Father that the District would supervise Nelson more closely going forward, and that they would make sure that if Nelson were working in the computer lab again, there would be a paraprofessional or teacher with him. Father again requested a written incident report, but never received one. Instead, he received a short account of the meeting that was held. (P-2; S-5; ES: 27, 30, 45; GS: 61-62; Gilbert: 126-28, 130-31, 141-42; Perkins: 161-65, 175)

15. Although Mr. Gilbert conducted an investigation after the teacher reported the touching incident to him, which consisted of interviews of the teacher and the two students involved, he did not keep his notes from these meetings. He discussed the matter with Mr. Mulvey, Mrs. Perkins, and Ms. Papile, but wrote no formal report. Quincy officials considered whether to file a 51A report on the District, but determined that nothing rose to that level of concern. Ultimately, they did not believe it was necessary to generate an incident report regarding the touching incident. (GS: 63; Father: 99; Gilbert: 150-53; Perkins: 160-61, 165, 175)
16. During the 2018-2019 school year, Nelson participated in both the General and Select Choruses at Broad Meadows. The select chorus was comprised of fifteen to twenty-five students, depending on who attended each week. Select chorus met after school on Mondays with Joanna Compitiello, who has been teaching elementary, middle, and high school chorus and general music in Quincy for five years. During chorus, Nelson was a wonderful student who had no trouble following directions or interacting with Ms. Compitiello and his peers. (Compitiello: 189-91)
17. On May 16, 2019,<sup>11</sup> Broad Meadows' Select Chorus participated in Quincy's Chorus Festival at Central Middle School, along with choruses from the other four middle schools and the high school. Approximately 250 to 300 students participated in the festival. (S-1; P-1; Compitiello: 192)
18. Nelson had participated in the Chorus Festival dress rehearsal at Central two days earlier, on May 14, 2019. On that date, he had ridden to rehearsal on the bus with his classmates, but had returned home on the Mass Quality Ride van. After rehearsal, while Ms. Compitiello was cleaning up in the auditorium with the students, Nelson had approached her, said that he saw his van driver, and asked for permission to go. He then walked to the van driver in the lobby, who collected all of the students he would be bringing home that evening. Ms. Compitiello testified at hearing that the van driver came into the building and walked Nelson out. (S-1; P-3; Gilbert: 132-33; Compitiello: 192-94)
19. On May 16, 2019, the Mass Quality Ride vehicle arrived at Nelson's house at 4:50 PM and Nelson boarded the van at 5:10 PM.<sup>12</sup> At 5:25 PM the vehicle dropped Nelson off at the St.

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<sup>11</sup> Father reported to the Massachusetts Department of Elementary and Secondary Education (DESE) that this incident occurred on May 10, 2019. (P-1)

<sup>12</sup> Earlier that day, Father had informed the principal that the family would not need transportation for Nelson that evening, as his parents were going to attend the concert. At some point, Parents decided that Father's vision was too

Ann's Road entrance to Central Middle School, as cars are unable to park in front of the school. Students had been instructed to arrive at 5:30 PM. When Nelson was dropped off, the chorus and music teacher from Broad Meadows were not yet at the school. He waited in the foyer area off the side parking lot, then opened the door to let them in when they arrived. As such, Nelson was unsupervised for some period of time, which Ms. Compitiello estimated to be two to three minutes. (S-1, S-2, S-3; P-2, P-3; ES: 31; Compitiello: 196, 210-11)

20. At the time he was dropped off, Nelson reported to the driver that he would be finished at approximately 8:30 PM and said pick-up would be the same as drop-off. (S-1, S-2, S-3) Ms. Compitiello testified that the concert was scheduled to end at approximately 8:00 PM but actually ended between 8:15 and 8:30 PM. (Compitiello: 198)
21. Ms. Compitiello spoke with her students before the chorus performance, when they arrived at Central, about the dismissal procedure. She asked that each student look her in the eyes and tell her exactly when they were leaving and with whom. (Compitiello: 197)
22. At the end of the concert, Nelson approached Ms. Compitiello, told her that he saw his van driver, motioned in the direction of the lobby, and asked if he could leave. Ms. Compitiello did not go to the lobby or see the van driver, but she gave him permission to leave. (Compitiello: 197-98)
23. The Mass Quality Ride driver returned to Central Middle School at 8:09 PM. The vehicle idled at the same location until 9:00 PM, then drove around the school until 9:11 PM. Nelson did not board the vehicle. (S-1, S-2)
24. The driver reported that people exited the school at 8:45 PM, and that she called her supervisor at 9:05 PM to notify her that Nelson had not returned for pick-up. Although the driver reported that she was given permission to leave the pick-up location at 9:20 PM, records show that she, in fact, left the school between 9:11 and 9:13 PM. Neither the bus driver nor the transportation company called Parents that night. (S-3; P-2, P-3)
25. According to Parents, Nelson reported that he asked his teacher if he could go outside to check if the van was there, and was told he could. He went to the same door where he had been dropped off, but there was no van. Nelson told Parents that when he came back in, everyone had left except one other boy who was waiting for his mother. Nelson used the other boy's telephone to call parents and tell them that the van had never picked him up and all of the teachers were gone. Parents were unable to reach both the transportation company and Central Middle School. Father called the Quincy Police to file a missing persons report, though he had already spoken to Nelson, because he was concerned that Nelson was at the school by himself with another child, with no adults around. (P-2; ES: 31-33; Father: 108-10; Gilbert: 135; Perkins: 168)
26. In the meantime, the other boy's mother arrived at the school to pick him up. She spoke with Father on the telephone and offered to drive Nelson home. Although Father felt uneasy about

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bad, and they called the transportation company and the school to request that Nelson be transported for the concert. (Father: 106-08; Gilbert: 132; Compitiello: 195)

the situation, as he did not know her, he agreed, and she drove Nelson home. Father believes Nelson arrived home at approximately 10:00 PM. (S-1; P-2)

27. According to school district officials, the director of Quincy's music program and Ms. Compitiello remained at Central Middle School until approximately 9:30 PM with students who were waiting to be picked up. Nelson never reentered the building after he left, telling his teacher that he was going to get on his vehicle. At the time Ms. Compitiello left, there were still families "circling around the school . . . having conversation," but she did not see Nelson specifically. She testified that she believed that if Nelson had been scared because he had not seen the van, he would have returned to her, or at least asked someone to help him find it. (Perkins: 168; Compitiello: 198-200)
28. Around midnight or 1:00 AM, Father emailed Mr. Gilbert about the incident ("van incident"). When he arrived at the school the next morning, Mr. Gilbert called Father, and Father explained what had happened. Mr. Gilbert told Father that the music teacher should have put Nelson on the van. (Gilbert: 134, 149)
29. The same day, Father contacted Ms. Perkins about the van incident. Ms. Perkins immediately offered the services of a 1:1 paraprofessional to support Nelson at any future extracurricular after school or evening events for supervision purposes. (S-1; Perkins: 166, 177, 186-87)
30. At some point Father also spoke with Ms. Compitiello about the van incident. She told him she felt terrible and reassured him that it would not happen again. For the rest of the school year, Ms. Compitiello walked Nelson out to his van after Select Chorus. (Compitiello: 201-02)
31. Parents contacted the Department of Children and Families (DCF) to file a report of neglect against Quincy in connection with the two incidents described above. The DCF social worker listened to recordings of Parents' meetings with school officials and, in or about June 2019, interviewed Ms. Perkins, Mr. Gilbert, and Ms. Compitiello. She wrote a letter to Quincy to explain that DCF was not going to pursue the matter. In September 2019, the social worker emailed Father. She told him that her investigation supported Parents' contention that several school staff members had made certain promises to them about supervision of Nelson that they had not kept, and that she had "serious concerns with regard to the school and Transportation Company's supervision of [Nelson] during the two reported incidents." She concluded, however, that her concerns did not rise to the level of neglect, as defined by DCF, and "no clear impact to [Nelson]'s safety could be identified." (P-4; ES: 54-55; Perkins: 171-72)
32. In the immediate aftermath of the van incident, Nelson continued to attend school. At some point afterward, though, Parents began keeping Nelson home from school because they were concerned about Quincy's ability to keep him safe, specifically to ensure that he was supervised at all times and that his van picked him up and dropped him off at the right time and location. Quincy explained to Father that if he did not send Nelson to school, the District would have to file a report with DCF, and ultimately, Quincy contacted DCF regarding Nelson's attendance. Nelson returned to school before the end of the school year, and,

nothing in the record suggests that DCF took formal action against the family. Nelson also attended Quincy's summer program. According to family friends, DCF ultimately communicated to the Parents that their concerns about sending Nelson to school were justified, but that they needed to work with supports provided by DCF and/or the Department of Mental Health to ensure that his attendance improved. (P-4; ES: 35, 56; Father: 99-100; Perkins: 168-69, 172-73)

33. Parents were, and remain, concerned about what happened the night of the concert, particularly given Nelson's trusting demeanor and his communication disability.<sup>13</sup> Specifically, Parents question how the transportation company could rely on a student's report of the end time of an event; why Nelson was left outside of Central Middle School without an adult before the concert and remained unsupervised until his teacher arrived; and how he was not met by the transportation company afterward and no one waited with him until the van arrived. (P-2; Father: 101-02)
34. Following this incident, Quincy conducted an investigation into what had happened, particularly why Mass Quality Ride had left Central without taking Nelson home. Father asked that no one speak with Nelson regarding the incident. Following the investigation, several District representatives met with Parents. These included Erin Perkins, Dan Gilbert,<sup>14</sup> Transportation Secretary Ann Marie Larsen, and Kevin Mulvey. Parent requested, and received, a written copy of the incident report from the transportation company. (S-1; Gilbert: 134; Perkins: 167)
35. On May 28, 2019, the District developed an N-1 summarizing a meeting that had taken place, at some point before that date, due to Father's concerns regarding the touching incident. Father was also concerned that staff had repeatedly asked Nelson to eat breakfast, and told the Team that Nelson was feeling bullied by these requests. The Team agreed that the principal would be the only staff member to ask Nelson to have breakfast, and agreed that "the lack of supervision would not occur again." Moreover, the Team agreed to communicate any concerns with Father as soon as possible and avoid discussing them in Nelson's presence. (S-5)
36. Around the same time, Parent filed a complaint with the Massachusetts Department of Elementary and Secondary Education (DESE, or the Department) regarding the touching incident and the van incident. DESE advised Parent that it would not investigate the touching incident, as it is outside of the Department's authority. DESE requested that Quincy report on Parent's concern that the District violated Nelson's IEP, which provides for transportation, by failing to transport him home following an afterschool event and instead leaving him outside a locked school building past 8:00 PM. (P-1)

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<sup>13</sup> Family friend Elsie Sieben described Nelson as a sweet boy who would have obeyed the instructions of anyone who may have been "up to no good," and as such, "he was definitely in harm's way" that night. (ES, I: 31)

<sup>14</sup> Mr. Gilbert testified that he did not participate in any meetings with Parents following the transportation issue. (Gilbert, I: 139-40) This testimony is contradicted by a report written by Ms. Perkins on June 25, 2019. (S-1)

37. In its response to DESE’s investigation, Quincy “offered the services of a paraprofessional assigned to support [the student] at any future after school or evening events for supervision purposes.”<sup>15</sup> (P-3; Perkins: 169-70)
38. Following its investigation, DESE issued a Closure Letter. The Department noted that Nelson’s IEP specifically states, in PLEP A, that his social interaction skills and decision-making require that he “be carefully and closely monitored throughout the school day.” After reviewing all of the documentation submitted by both parties, DESE concluded that although Quincy met its obligation to provide transportation for Nelson, he “was not carefully and closely monitored at a school district event on May 16, 2019.” As such, “the District did not implement [Nelson]’s IEP and did not fully comply with 603 CMR 28.05(7)(b).” (P-3)
39. In its Closure Letter, DESE endorsed Quincy’s offer of a paraprofessional to support and supervise Nelson at any future after school or evening activities, stating that this Corrective Action “will reasonably prevent further incidents from occurring at any future extracurricular or evening activities.” The Department noted that Parent may wish to continue working with the District to determine how best to “carefully and closely monitor” Nelson throughout his school day, as the IEP does not require a 1:1 paraprofessional in that context. (P-3; Perkins: 169-70)
40. Quincy did not have the opportunity to implement the services of the 1:1 paraprofessional during extracurricular activities at Broad Meadows before the end of the 2018-2019 school year. For the 2019-2020 school year, Nelson’s program moved to South West Middle School. There, Nelson participated in an afterschool drama program, where he was accompanied by a 1:1 paraprofessional. (Perkins: 166, 179-80)

## DISCUSSION

It is not disputed that Nelson is a student with a disability who is entitled to special education services under state and federal law. In order to determine whether Parents are entitled to a decision in their favor, I must consider legal standards relevant to their claim. As the moving party in this matter, Parents bear the burden of proof.<sup>16</sup> To prevail, they must prove – by a preponderance of the evidence – that the District failed to implement Nelson’s 2018-2019 IEP.

### I. Standard for Failure to Implement an IEP

The IDEA was enacted “to ensure that all children with disabilities have available to them a free appropriate public education.”<sup>17</sup> FAPE is delivered primarily through a child’s IEP, which must be tailored to meet a child’s unique needs after careful consideration of the child’s

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<sup>15</sup> Internal quotation marks omitted.

<sup>16</sup> See *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2008).

<sup>17</sup> 20 U.S.C. § 1400 (d)(1)(A).

present levels of achievement, disability, and potential for growth.<sup>18</sup> “To meet its substantive obligation under the IDEA, a [district] must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”<sup>19</sup> Similarly, Massachusetts FAPE standards require that an IEP be “reasonably calculated to confer a meaningful educational benefit in light of the child’s circumstances,”<sup>20</sup> and designed to permit the student to make “effective progress.”<sup>21</sup> “To provide a free and appropriate public education to a student with disabilities, the school district must not only develop the IEP, but it also must implement the IEP in accordance with its requirements.”<sup>22</sup> Where, as here, Parents challenge a fully accepted, expired IEP, the proper inquiry is not whether the IEP provides a FAPE, but whether the District implemented that IEP.

Although the U.S. Court of Appeals for the First Circuit has not elaborated on what constitutes implementation of an IEP, several lower courts within the First Circuit have done so. The most recent published case from the U.S. District Court for the District of Massachusetts, decided in 2010, linked the failure to implement an IEP to the failure to permit a student to benefit educationally – or in other words, to provide a FAPE.<sup>23</sup> Citing its own 1999 decision, the court outlined the test it would use to determine whether an IEP has been implemented as follows:

- (1) the “failure” to implement must not be a “complete” failure;
- (2) the variance from the special education and related services specified in the IEP must not deprive the student of a FAPE; and
- (3) the provision of special education and related services must make “progress” toward the achievement of the goals stated in the IEP.<sup>24</sup>

As this analysis is difficult to apply, I look to other relevant jurisdictions for guidance. In 2014, the U.S. District Court for the District of Puerto Rico observed that the First Circuit had not addressed the question whether failure to provide all services outlined in an IEP constitutes a per-se violation of the IDEA.<sup>25</sup> As such, it surveyed federal courts across multiple jurisdictions

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<sup>18</sup> *Andrew F. v. Douglas Cty. Reg’l Sch. Dist.*, 137 S. Ct. 988, 999 (2017); *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012).

<sup>19</sup> *Andrew F.*, 137 S. Ct. at 999.

<sup>20</sup> *C.D. v. Natick Pub. Sch. Dist.*, 924 F.3d 621, 624-25 (1st Cir. 2019).

<sup>21</sup> 603 CMR 28.05(4)(b) (IEP must be “designed to enable the student to progress effectively in the content areas of the general curriculum”).

<sup>22</sup> *Colón-Vazquez v. Dep’t of Educ.*, 46 F. Supp. 3d 132, 144 (D. P.R. 2014) (citing 20 U.S.C. § 1401(9)(D)).

<sup>23</sup> See *Doe v. Hampden-Wilbraham Reg’l Sch. Dist.*, 715 F. Supp. 2d 185, 198 (D. Mass. 2010) (noting that plaintiffs had “not met their burden of proof to convince me that these services provided to [Student] did not permit him to benefit educationally”); *id.* (“Finally, under *Ross*, I must determine whether these services allowed [Student] to make progress toward the achievement of the goals in his IEPs”). See also *Ross v. Framingham Sch. Comm.*, 44 F. Supp. 2d 104, 118 (D. Mass. 1999) (“when presented with a claim that a school district failed to implement a student’s IEP, a district court must determine whether the alleged failure to implement the IEP deprived the student of her entitlement to a ‘free appropriate public education,’ as defined under the applicable federal and state prescriptions”).

<sup>24</sup> *Doe*, 715 F. Supp. 2d at 198 (citing *Ross*, 44 F. Supp. 2d at 119).

<sup>25</sup> *Colón-Vazquez*, 46 F. Supp. 3d at 143-44.

and concluded that they had “generally adopted the standard articulated by the Fifth Circuit in *Houston Independent School District v. Bobby R.*,” requiring “more than a *de minimis* failure” in order prevail on an implementation claim under the IDEA.<sup>26</sup> The court summarized the analysis as follows:

... a court reviewing failure-to-implement claims under the IDEA must ascertain whether the aspects of the IEP that were not followed were “substantial or significant,” or, in other words, whether the deviations from the IEP’s stated requirements were “material.” A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP. This standard does not require that the child suffer demonstrable educational harm in order to prevail; rather, courts applying the materiality standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.<sup>27</sup>

Persuaded by the approach of the U.S. District Court for the District of Puerto Rico, which adopts the approaches endorsed by the U.S. Courts of Appeals for the Fifth, Eighth, and Ninth Circuits as well as the U.S. District Court for the District of Columbia, I apply this analysis to the case before me.<sup>28</sup>

## II. Quincy Erred in Failing to Monitor Nelson Closely, But the District’s Errors Do Not Constitute a Material Failure to Implement His IEP

For Parents to prevail, they must prove both that the District failed to follow aspects of Nelson’s IEP, and that such failure was “material.”

### A. *Quincy Failed to Monitor Nelson Adequately on Two Occasions*

Parents have established that Nelson’s 2018-2019 IEP reflected the Team’s concern that his disabilities impacted his social interaction and decision-making skills. Accordingly, Nelson’s IEP explicitly directed his teachers and others working with him that he was to be “carefully and

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<sup>26</sup> See *id.* at 143 (Under *Houston Indep. Sch. Dist. v. Bobby R.*, “to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP”) (citing 200 F.3d 341, 349) (5th Cir. 2000), *cert denied*, 531 U.S. 817 (2000)).  
<sup>27</sup> *Id.* at 143-44 (citing and quoting *Van Duyn v. Baker Sch. Dist.*, 502 F.3d 811, 822 (9th Cir. 2007) and *Garmany v. District of Columbia*, 935 F. Supp. 2d 177, 181 (D. D.C. 2013) (internal citations and quotation marks omitted)); see *Van Duyn*, 502 F.3d at 815 (“We hold that when a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child’s IEP”).

<sup>28</sup> See *Van Duyn*, 502 F.3d at 815; *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 n.3 (8th Cir. 2003) (noting that courts cannot conclude that an IEP is reasonably calculated to provide a free appropriate public education where “there is evidence that the school actually failed to implement an essential element of the IEP that was necessary for the child to receive an educational benefit”); *Bobby R.*, 200 F.3d at 349; *Garmany*, 935 F. Supp. 2d at 181.

closely monitored throughout the school day.” No service (i.e., a 1:1 aide) or accommodation (i.e., regular check-ins) was attached to this instruction, which appeared only in PLEP-A.

Parents have also established that Nelson was not carefully and closely monitored at all times during the school day. On the day of the touching incident, one adult was responsible for students in both the classroom and the computer lab, and could not possibly see all students at the same time. Quincy acknowledged that it had not adequately supervised Nelson when this occurred, and agreed that going forward, a second adult would be present whenever Nelson’s class would be in this configuration.

The van incident occurred after the school day, but during a school-sponsored activity. Nelson was left unsupervised twice: first, when the van driver (who transported him from home to school by arrangement of Quincy) left him at Central Middle School without ensuring that he had been met by a teacher, and second, when he was allowed to leave the auditorium at some point between 8:15 and 8:30 that night, and no adult ensured that he had actually located and boarded his van.<sup>29</sup> After the concert, Nelson either reported to Ms. Compitiello that he saw his van, or asked permission to see whether it had arrived, and then left. Nelson’s teacher did not see Nelson meet the driver, or verify that the van had actually arrived. As recognized by his Team in drafting Nelson’s IEP, and as evidenced by the events of that night, Nelson required closer and more careful monitoring.

Following this incident, Quincy acknowledged that it had erred in failing to ensure that Nelson boarded his van. To prevent further lapses in supervision, the District offered the services of a paraprofessional to support and monitor Nelson at future after school and evening events. This service was implemented, and no further incidents occurred.

*B. These Monitoring Failures Do Not Constitute a Material Failure to Implement Nelson’s IEP*

To determine whether the failures outlined above were “material,” I must ascertain whether the provisions of Nelson’s IEP that Quincy did not follow were “substantial or significant.”<sup>30</sup> In other words, was there “more than a minor discrepancy” between the services Nelson was provided and the services required by his IEP?<sup>31</sup>

PLEP-A is the only place in Nelson’s 2018-2019 IEP that the information regarding the need for careful and close monitoring appeared. The IEP did not include a social/emotional or behavioral goal targeting social skills or self-regulation, nor did it include the services of a paraprofessional to supervise Nelson. As such, based on the evidence before me I cannot conclude that Quincy failed to follow substantial or significant provisions of Nelson’s IEP when

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<sup>29</sup> Although Nelson was able to navigate Broad Meadows on his own, generally he was not responsible for determining when to leave the building; the school secretary would see Nelson’s van and alert his teacher, who would then dismiss him. Similarly, on the evening of the dress rehearsal at Central Middle School, the van driver had come into the school and walked Nelson out.

<sup>30</sup> See *Colón-Vazquez*, 46 F. Supp. 3d at 143-44.

<sup>31</sup> See *id.*; *Van Duyn*, 502 F.3d at 815.

it did not carefully and closely monitor him on the two occasions described above.<sup>32</sup> Moreover, there was no discrepancy between the actual services Nelson was provided and those required by his IEP.<sup>33</sup> Quincy's failure to carefully and closely monitor Nelson did not constitute a material failure to implement his IEP.<sup>34</sup>

### **CONCLUSION**

Based upon the record before me, I conclude that parents have not met their burden to prove that Quincy failed to implement Nelson's accepted, expired IEP for the period from October 2, 2018 to October 1, 2019.

### **ORDER**

*So ordered.*

By the Hearing Officer:

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Amy M. Reichbach  
Dated: February 28, 2020

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<sup>32</sup> See *Colón-Vazquez*, 46 F. Supp. 3d at 143-44.

<sup>33</sup> See *Colón-Vazquez*, 46 F. Supp. 3d at 143-44; *Van Duyn*, 502 F.3d at 815.

<sup>34</sup> See *Colón-Vazquez*, 46 F. Supp. 3d at 143-44.