

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

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

**BSEA No. 2004105**

**DECISION**

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

The Student in the instant case is a now nine-year-old boy with diagnoses of neurological disabilities resulting from a traumatic brain injury (TBI), autism, and an intellectual disability, which, in combination affect many areas of his functioning, including cognition, communication, behavior, and ability to safely and independently navigate his community. Student currently is a third-grader at the Beebe Elementary School (Beebe) in Malden, MA. On October 21, 2019, Parents filed a hearing request with the Bureau of Special Education Appeals (BSEA) alleging that the Malden Public Schools (Malden, MPS, or School) had failed to provide a sufficient number handicap-accessible (HP) parking spaces in the school lot, and had failed to provide accessible passenger drop-off and pick up spaces adjacent to the school building; as a result, Student had difficulty safely accessing the school building. Parents further alleged that Malden had deprived Student of a free, appropriate public education (FAPE) by failing to include pool and classroom-based water safety instruction as one of his special education services.

Parents sought an order directing MPS to include in his IEP that Student receive water safety/swimming instruction as part of his physical education curriculum, to increase the number of code-compliant, fully accessible handicap (HP) parking spaces in the school parking lot to accommodate the disabled population of the school, to cease from blocking the parking lot with cones and chains, and to provide handicap-accessible passenger drop-off and pickup spaces for buses and cars carrying children with disabilities.

Upon receipt of Parents’ hearing request, the BSEA scheduled an initial hearing date of November 26, 2019. At the request of the parties, the hearing was postponed several times for good cause, for reasons such as completion of discovery and attempts at settlement. Two pre-hearing conferences took place, on December 11, 2019 and February 26, 2020. There were multiple telephone conference calls among the parties and the hearing officer between the second pre-hearing conference and the hearing, which took place on August 18, 20, 21 and October 6, 2020.

Because the BSEA has not conducted in-person proceedings since March 2020 owing to the COVID pandemic, the hearing was conducted via Zoom, with the consent of both parties. Parents represented Student and themselves *pro se* and the School was represented by counsel. Both parties had an opportunity to examine and cross-examine witnesses as well as to submit documentary evidence for consideration by the hearing officer. The parties requested and were granted a postponement until November 13, 2020 to submit written closing arguments. The BSEA received the parties' written arguments and closed the record on that date.

The record in this case consists of Parents' Exhibits P-1 to P-4, P-6 to P-10, P-12 to P-17, P-20, P-22, P-24 to P-27, P-29 to P-39, P-42 to P-49, P-53 to P-55, P-59 to P-73; and School's Exhibits S-1 to S-6, and S-10 to S-23, as well as four volumes of stenographically-recorded witness testimony.

Those present for all or part of the proceeding were the following:

Mother

Father

Elizabeth Brennan	Special Education Teacher, Beebe Elementary School, Malden Public Schools
Elizabeth Cushinsky	Former Special Education Program Manager, MPS
Kate Greco	Assistant Principal, Beebe Elementary School
Ronald Hogan	Director of Parking, City of Malden
Pamela MacDonald	Current Asst. Supt. for Special Education, MPS
Nelson Miller	Building Commissioner, Zoning Officer, Director of Inspectional Services, City of Malden
Kari-Ann Murphy	Principal, Beebe Elementary School
Michael Wood	Former Asst. Supt. for Special Education, MPS
Alisia St. Florian, Esq.	Counsel for Malden Public Schools
Kathryn Fallon, Esq.	City Solicitor, City of Malden
Sara Berman	BSEA Hearing Officer
Alexander K. Loos	Court Reporter
Jane Williamson	Court Reporter

### **ISSUES PRESENTED**

1. Whether MPS has failed to provide Student with safe and consistent physical access to his school building from the beginning of the 2018-2019 school year until the time of school closure due to the COVID emergency in March 2020.
2. If MPS has failed to provide such access, what is the appropriate relief?
3. Whether Student requires classroom and pool- based instruction in water safety in order to receive FAPE.

## **POSITION OF PARENTS**

Malden has failed to ensure safe and consistent physical access to the Beebe School from the beginning of the 2018-2019 school year to the date of the COVID-related school closure in March 2020. MPS provided neither a sufficient number of handicap-accessible parking spaces in its parking lot, nor safe and accessible pick-up and drop-off points near accessible school entrances, to meet the needs of parents of disabled students such as Student. Further, MPS failed to ensure that the specialized bus transportation that it offered to Student was safe and reliable. As a result, when Parents transported Student to and from school, they lacked safe and accessible places to park, so that Student and Parents were forced to deal with dangerous traffic situations when dropping Student off and picking him up at school. Although Malden offered specialized bus transportation to Student, the bus was nearly always late both to pick Student up in the morning and drop him off in the afternoon, which caused him to be late for school and was generally disruptive to his routine. On at least one occasion, Parents observed the bus being operated in an unsafe manner. Parents made many attempts to collaborate with Malden on addressing these access issues, but Malden has not resolved them satisfactorily.

Parents base their request for water safety instruction for Student on research showing that children who, like Student, have autism, have an increased likelihood of drowning. In fact, drowning accidents contribute significantly to the generally shortened life expectancy of persons with autism. For this reason, water safety instruction is an essential component of FAPE for Student. By failing to include such instruction in Student's IEP, Malden has denied him FAPE.

## **POSITION OF SCHOOL**

Malden acknowledges that the location of the Beebe School in a congested and heavily traveled area gives rise to traffic and parking challenges for all users of the building, including Parents. Contrary to Parents' assertions, however, MPS has taken their concerns seriously and has made many efforts to rectify the parking issue, including adding HP parking spaces, expanding the available drop off/pick up space, and ensuring Parents' access to the Beebe parking lot. Because parking is not entirely under MPS control, MPS staff has enlisted the aid and collaboration of the City of Malden Parking Department in an attempt to rectify parking issues at the Beebe School. As a result of MPS' efforts, the traffic and parking situation has improved. Moreover, parking challenges have not caused Student to miss a significant amount of school or be in a dangerous situation. Finally, MPS has provided Student with the option of specialized, door-to-door bus transportation, which would obviate the need for Parents to drive him to school. Student used the bus successfully for several weeks. MPS acknowledges that the bus was late on occasion, but Student did not miss learning time. Since Student stopped using the bus, MPS has worked with the vendor, and lateness and other problems have improved. Specialized bus transportation has always been available as a means to ensure Student's safe access to the school building.

With respect to water safety instruction, Parents have not produced evaluations or other evidence particular to Student that suggests that he needs such instruction to access the curriculum and receive a FAPE. In the absence of such evidence, Parents cannot meet their burden on this issue.

## **SUMMARY OF THE EVIDENCE**

### **Student Profile**

1. Student is a nine-year-old child with disabilities who is a resident of Malden. His eligibility for special education and related services from the Malden Public Schools pursuant to the IDEA and MGL c. 71B is not in dispute. Student has attended the Beebe Elementary School in Malden since summer 2017, when he entered kindergarten. He currently is a third grader in the PACE program, which is a substantially separate grade K-8 program serving approximately 20 children with autism and related developmental challenges. Although PACE is located at Beebe, it is a citywide program, open to any resident child whose IEP calls for the services provided by PACE regardless of whether Beebe is their neighborhood school. Student's last accepted IEP, which designates the PACE program as Student's placement, covered the period from January 2019 to January 2020. An amendment to that IEP, issued on September 24, 2019, was partially rejected due to certain omissions relating to transportation safety and water safety instruction; these issues will be addressed below. For purposes of this hearing, Parents are generally satisfied with Student's progress in the PACE program, and do not seek a change in his placement.
2. The parties agree on Student's profile as a friendly, kind, and curious boy who enjoys many activities including music, computer games, books, and toy vehicles. Student developed typically until the age of 2, when he suffered a severe traumatic brain injury after a fall. After a lengthy and complex recovery, Student was diagnosed with several impairments, including autism spectrum disorder (ASD) and intellectual disability, as well as difficulties with language and gross and fine motor skills. (Parents, S-17-22, P-45)
3. Student's disabilities affect many areas of his functioning, including cognition, learning, communication, attention, behavior, and adaptive skills. Although Student's language and communication skills have progressed, they remain significantly reduced, such that his teacher, Elizabeth Brennan, described him as "primarily non-verbal." (Brennan) Regarding mobility, Student has some difficulties with strength and coordination, but has made much progress. As of January 2020, the date of the most recently-proposed IEP, he was able to ambulate in the school environment; however, he requires supervision for safety and reminders to focus on the task because he can be easily distracted by things he sees which interest him. (Parents, Brennan, S-4) Parents use a Convoid adaptive stroller for Student when walking long

distances or in busy traffic in the community, primarily because of his distractibility. (Parents)

4. Behaviorally, while Student is pleasant, friendly, and generally well-behaved, he can be oppositional, especially when transitioning from one activity to another, or when he is asked to do something he does not want to do. (S-18, Parents) When he is interrupted or distracted in the middle of an activity, he often wants to return to the starting point and start the activity over again. This behavior has occurred when Student has been crossing the street. (Parents) When traveling with his class outside of the classroom, Student imitates group behaviors to transition from inside or outside the classroom or vice versa, and will ask the group to wait for him if he lags behind. However, he needs an adult to be in close proximity because he will stop attending to the group if distracted by something in the environment. (S-4) Student's distractibility, oppositionality when an adult tries to control where he is going, his resistance to having his hand held and his size (he now weighs over 100 pounds) impact Student's safety in moving about the community. (Parents)
5. Parents testified that during the times at issue in this hearing, Student required much parental prompting and attention to get ready for school in the morning. If his routine were disrupted, *e.g.*, by a late bus, Student would try to return to his room and would resist getting on the bus when it did arrive. When Student refuses to follow a directive (such as to get out of the car, which has been an issue with Student), Parents and others can persuade him to comply by reflecting Student's statement of refusal as a question (*e.g.*, "don't get in the car?"), but not by simply repeating the instruction or insisting on compliance. (Parents, Brennan) Student generally needs two people (both Parents) to travel to and from school by car. (Father)
6. In December 2017, when Student was 6 years old and attending the PACE program as a kindergartner, MPS conducted a three-year re-evaluation consisting of educational, psychological, speech/language, functional behavioral, physical therapy (PT) and occupational therapy (OT) assessments. The educational assessment indicated that at that time (kindergarten), Student inconsistently had skills at a pre-K level, had fluctuating attention, and required prompting and modeling to follow classroom routines. (S-17).
7. The psychological evaluation report noted that Student had strengths in fine motor skills, working with adults, and following directions with modeling, but challenges in separating from Parents in the morning and stopping a preferred activity. During standardized testing, Student required repeated prompting to stay on task and remain at the table. Testing with the Differential Ability Scales (DAS) yielded "very low" verbal ability scores and "low" scores in tasks of non-verbal reasoning. (S-18)
8. The functional behavioral assessment (FBA) targeted the following behaviors that interfered with learning: non-compliance, verbal protest, tantrums, environmental

destruction, physical aggression, and out of seat behavior, and recommended consultative ABA services to address these behaviors. (S-19) According to the speech-language evaluation, Student communicated with scripted two and three-word phrases, physical actions, and gestures. He required consistent prompting to attend to tasks that were not motivating. (S-20)

9. The occupational therapy (OT) assessment revealed that Student had deficits in self-care, transition management, graphomotor and sensory processing skills, and muscle tone and attentiveness. (S-21) The physical therapy (PT) evaluation indicated that Student could ambulate through the school building, but needed close supervision and prompting to stay with teachers and peers in the hallways, and had decreased coordination, strength, and safety awareness. (S-22)
10. On January 2, 2018, MPS issued an IEP covering January 2018 to January 2019 (mid-kindergarten to mid-first grade) which contained goals in communication, classroom functioning, PT, reading/language arts, math, ADL/self-help skills, behavior, and adaptive physical education (APE). Malden proposed continuing Student's placement in the substantially separate PACE program at the Beebe School, as well as transportation on a special education vehicle with a monitor. Parents accepted the IEP and placement in full on January 29, 2018. (S-6)
11. At an annual review of the IEP in January 2019, the Team noted that Student had made steady progress in speech/language and academics. For example, he had increased his use of complete sentences and could engage in short conversations, could rote count to 100, identify all letters of the alphabet, identify 12 sight words, and demonstrate pre-reading skills. Behaviorally, he had fewer tantrums but increased defiance and continued to struggle with transitions and resistance to non-preferred activities. The proposed IEP covered the period from January 2019 to January 2020 (mid-first to mid-second grades) and proposed continued placement in the PACE program. Like its predecessor, this IEP offered specialized transportation with a monitor. Parents accepted this IEP and placement in full on January 23, 2019. (S-5) This January 2019-January 2020 IEP is Student's last fully accepted IEP. Subsequent proposed IEPs will be addressed in context, below.

### **The Beebe Elementary School**

12. As stated above, Student has attended the substantially separate PACE program at the Beebe School since kindergarten, and Parents are generally satisfied with this placement, but for the discrete issues addressed in their hearing request. (Parents)
13. The Beebe School serves approximately 950 children in grades K through 8. Most of the children attending Beebe live in the neighborhood and walk to school or are driven by their parents. MPS does not provide bus transportation for these children. Buses are provided for children in the PACE program as well as for other students

whose IEPs call for special transportation. Additionally, at the end of the school day, several regular-sized buses pick up children for various after-school programs around the city. (Greco)

14. The Beebe School building is flanked on one side by Pleasant Street, and on the other side by Elm Street, which runs roughly parallel to Pleasant Street. Pleasant Street, also designated as Route 60, is a two-lane, two-way, major residential and commercial thoroughfare that is usually heavily trafficked during the day, especially during school drop-off and pickup hours. Elm Street is one-way in the section bordering the Beebe. On the opposite side of Elm Street is a fire lane and a synagogue. There are residential streets intersecting Elm Street opposite the school. Like Pleasant Street, Elm Street is subject to traffic for much of the day, especially during the before-school and after-school time periods, although it is somewhat less busy than Pleasant Street. (Parents, Greco, Murphy, Brennan, Hogan, Miller, P-54)
15. The main entrance to the school is on the side of the building that is perpendicular to Pleasant and Elm Streets. This entryway opens onto a plaza abutting the school parking lot. The parking lot is fenced and spans the distance from Pleasant to Elm Street. (The parking lot will be further described below). There is a second entrance to the building directly facing Pleasant Street (“Pleasant Street entrance”). (P-54) The doors at the Pleasant Street entrance have no exterior handles and can only be opened from inside the school building, by staff members. A third entrance is on Elm Street (hereafter, “Elm Street entrance”). The special education buses drop off and pick up students in front of the Elm Street entrance. (Parents, Greco, P- 54)
16. The fenced parking lot, referred to above, is immediately adjacent to the school building, with entry and exit openings on Elm Street. Inside the parking lot is a one-way, U-shaped lane running from the entry to the exit that provides access to the parking spaces. (P-54) The City of Malden leases the parking lot from a church that is adjacent to the Beebe School. Under the terms of the lease, the City has the right to use the lot when the Beebe School is in session and is exclusively responsible for maintaining the lot. (P-59)
17. As between the City of Malden and Malden Public Schools, the City has general responsibility for the lot, is responsible for ensuring that it contains the minimum required number of HP spots and that those spaces are compliant with relevant regulations, but consults with MPS over day-to-day operation of the lot. MPS could create as many additional HP spaces in its lots as it chooses, but the Building Commissioner, Nelson Miller<sup>1</sup>, would have to ensure that the spaces are compliant. (Murphy, Greco, Hogan, Miller)

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<sup>1</sup> Mr. Miller is responsible for ensuring that HP spaces on public ways and in city-owned or operated parking lots comply with relevant regulations of the Architectural Access Board (AAB). (Miller)

18. The parking lot contains approximately 54 spaces. Additionally, there is space for a bus or van immediately in front of the plaza which leads to the main school entryway. Of the spaces in the parking lot, two are reserved for visitors, two are HP spaces, and the remainder are reserved for teachers and administrators. (Greco, P-27) In July or August 2019, at least partially in response to concerns that Parents expressed to the Parking Department, a third HP space was added; however, it was removed shortly after Parents alerted the Parking Department that the space was non-compliant with regulations governing accessible parking spaces. (Hogan, Greco, Murphy, Parents, P-54)
19. On Pleasant Street, in front of the Beebe School entrance door, there is a cutout for school buses to pull over and drop off or pick up students. The signage and permitted use of this space changed during the course of the period at issue in this hearing. Beginning in the fall of 2019, the cutout was designated as being for buses only, and parking was no longer permissible. (Parents, Greco, Hogan)
20. On the portion of Elm Street in front of the school building, there is a space along the curb for special education buses as well as several parking spaces reserved for teachers and staff. During the 2019-2020 school year, at the suggestion of Kate Greco, the Assistant Principal of the Beebe School, as well as Parents, the City of Malden added an HP space at the end of this area, close to the entry to the parking lot. Because the HP space is on a public way, it is available to any vehicle with an HP placard, and is not reserved for use by Beebe students, staff, or parents. (Hogan) As with Pleasant Street, the signage and designation of space on Elm Street has changed during the period covered by this hearing. (Greco)
21. Authority to control traffic and parking on Elm Street and Pleasant Street lies with the Traffic Commission and Parking Department of the City of Malden. (Hogan) Parking Department officials frequently consult with administrators of Malden schools, including the Beebe School, and attempt to reach workable solutions to parking and traffic problems, but MPS does not have ultimate authority over regulating parking on public ways. (Greco, Murphy, Hogan, Miller)
22. Parking and traffic at drop-off and pickup times are problematic at all the elementary schools in Malden. According to Ron Hogan, the Director of Malden's Parking Department and a member of the Traffic Commission, the scene at these times can be described as "chaotic." Mr. Hogan testified that the situation at the Beebe School is probably the most challenging; because the school is located in a densely-populated area, in close proximity to the MBTA station and Malden Center, there is a heavy volume of traffic. Mr. Hogan further testified that parents attempting to drop off and pick up their children frequently park illegally around all the schools in the city, including Beebe. Mr. Hogan receives complaints both that his department issues too many tickets and that they don't ticket enough. (Hogan) The Parking Department attempts to balance the needs of all constituents, including parents, children, and

school employees, on the one hand, and general users of the roads and local residents on the other. This means that parking enforcement officers may use their discretion when ticketing, because if they ticketed for every violation committed in proximity to a school, parents would be unable to get their children in and out of the building. There have been no perfect solutions. (Hogan, Miller)

### **Transportation Issues**

23. During Student's kindergarten year, (2017-2018 school year), his family lived within the Beebe neighborhood, and Parents were able to walk Student and his older sibling to school, usually using a Convoid stroller. (Parents) In or about August 2018, Parents moved to a different section of Malden, and Beebe was no longer their neighborhood school. Because Student was enrolled in the city-wide PACE program, however, he continued to attend Beebe after the move, and his IEP offered door-to-door bus transportation. Because Student was attending Beebe, his sibling was also able to continue attending there. (Parents, Greco, S-3)
24. At the start of the 2018-2019 school year (first grade), Parents elected to drive Student to school themselves for a variety of reasons, one of which was that by doing so they could also accommodate the schedule of Student's older sibling, who had an earlier start time. (Parents)
25. Initially, Parents were instructed to drop Student off and pick him up on Pleasant Street as they had during the prior year. If Parents arrived at the school early they generally could park at the end of the bus cutout. They would park and walk Student to the Pleasant Street entrance where he would be met by a teacher or paraprofessional. (Parents, Brennan)
26. Later on in the year, because Student had difficulty separating from whichever Parent brought him to the school building, Student's teacher, Elizabeth Brennan, suggested that the transition might be easier for Student if a teacher or aide came to the car, helped Student get out, and walked him to the school building while Parents remained in the car. Student often resisted this process. Approximately twice weekly, a Parent had to exit the car to help the teacher coax Student out of the vehicle. There were times when Student would stand on the sidewalk, crying and refusing to proceed to the school building while Parent pulled the car away, or would start towards the building, then turn around and run back on the sidewalk towards the car. On several occasions, the teacher had to call for help from a BCBA or other staff member to get Student safely into the building. Staff members would position themselves between Student and the street so that he could not run into the street. (Father, Brennan) There was no testimony that Student ever attempted to run into the road.
27. At some point, Student's sibling began riding a bus to and from school, so that Parents were no longer transporting him. Parents continued to drive Student to and

from Beebe. They found that if they did not arrive early enough, the bus cutout on Pleasant Street would be occupied by cars belonging to other parents dropping off their children, despite signage that said “bus lane” or something similar. The same situation occurred at pickup time at the end of the school day; if Parents did not arrive early, the bus cutout lane would be full. (Parents, Greco)

28. On a nearly daily basis, one Parent would have to leave the vehicle and ask other parents who were live parking in the bus cutout to move if they were not picking up a disabled student. Sometimes, other parents would park in the bus cutout and would leave their cars parked there while they left the area to drop off or pick up their children. (Parents, Greco)
29. On occasion, a parking enforcement officer or crossing guard asked Parents to leave the cutout. Parents raised this issue with Beebe administrators, who told the officers and crossing guards that Parents were entitled to park in the cutout because they had HP plates on their car. School personnel proposed devising a placard for Parents so that they could park in the bus cutout, but never provided the placard. (Father, Greco)
30. Parents contacted Beebe administration as well as the MPS Superintendent’s office and the City of Malden Parking Department, by email and in person, to alert them of the parking issues. Among other things, Parents sought to have the City increase its enforcement/ticketing of parents who were parking illegally during drop-off and pickup times. (Parents, Hogan, Graco, P-10, P-11) Beebe School administrators attempted to address the situation by allowing Parents to park in the bus cutout but other cars continued to park in the cutout, blocking access, and were not regularly ticketed. Father observed the officer speaking to other drivers and observed approximately 12 tickets being issued during the course of the year. (Parents, Hogan)
31. Kate Greco, Assistant Principal of the Beebe School, testified that she and other administrators had been dealing with traffic and parking problems for some time. Administrators were in frequent contact with the Parking Department to discuss parking issues and attempted to collaborate to develop solutions. (Greco, Hogan) As stated above, virtually all Malden schools, including the Beebe, experienced similar issues stemming from high population density and traffic volume around the buildings. Ron Hogan of the Parking Department testified that the City did not have enough parking enforcement officers to cover all of the schools at the same time, and that his Department had to walk a fine line between ticketing all cars that were violating parking rules (*e.g.*, all cars parked in the Pleasant Street bus lane) and allowing parents of Beebe students a reasonable amount of time to drop off or pick up their children, even if they were technically in violation of a rule. (Hogan)
32. On occasion during 2018-2019 (about 10% of the time) Parents used the Beebe parking lot for drop off and pickup, either because there was no space available on

Pleasant Street or because Student had an appointment and was arriving late or leaving early. (Parents) At that time, the entry to the lot was open during the school day, and despite a sign stating that the lot was reserved for staff and buses only, parents would use the lot to drop off and pick up their children. Consequently, Parents found that their movement within the lot was blocked either by parents who were live parking to wait for their children or by empty vehicles belonging to parents who had left them in the lot so that they could enter the school building. These cars blocked the single traffic lane inside the parking lot. The two designated HP spaces in the lot usually were occupied, but even if one were available, it would frequently be blocked by other cars so that Parents could not use it. (Parents, Greco)

33. During the spring and summer of 2019, Beebe School and Parking Department personnel discussed potential solutions to the parking issue, including conversion of the Pleasant Street bus cutout to a site for live drop off/pickup for all Beebe parents. Parents felt this change would exacerbate their difficulties by opening the bus space for additional vehicles. (Greco, Hogan, Parents)
34. In or about July 2019, Dr. Kari-Ann Murphy became the new principal at the Beebe School after the previous principal retired. In August 2019, Parents met with Dr. Murphy to discuss the parking situation. Parents reported the difficulties they had experienced and expressed their concern about Student's safety getting in and out of the building, both on Pleasant Street, which is very busy and lacks a ramp, and the parking lot, which Parents believed had an insufficient number of HP spaces. (Murphy)
35. After meeting with Parents, Dr. Murphy initiated meetings with the MPS facilities manager and Assistant Principal Kate Greco, and also reached out to Michael Wood, the then Assistant Superintendent for Special Education, in order to gather information and try to resolve the problem. As a result of these meetings, the School changed the drop-off point for the special education buses from Pleasant Street to the cutout in front of the school building on Elm Street, which is somewhat quieter than Pleasant Street, and, unlike Pleasant Street, is not a route for city buses. (Murphy)
36. Other changes to Elm Street, made through collaboration with the Parking Department, included creating live parking spaces for parents along the curb in front of the school building as well as in a fire lane located across the street from the school building.<sup>2</sup> (Murphy, Parents)
37. In addition to these changes, during July or August 2019, Dr. Murphy reached out to the Parking Department and the special education department to request the addition of a third HP parking space in the Beebe lot "as close to the building as possible," (Murphy, Tr. IV, p. 245) even though according to the City of Malden, which had

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<sup>2</sup> According to Nelson Miller, the Inspectional Services Department, in consultation with the Fire Chief, has discretion to allow such use of a fire lane under certain circumstances. (Miller)

reached out to the Architectural Access Board (AAB) at the request of Father, the lot was already compliant with relevant regulations with only two HP spaces. (Hogan, Miller)

38. A teacher's space was subsequently designated as an HP space. Parents observed the space and noted that it appeared not to be ADA compliant because, among other things, it was too narrow and did not have enough access space on the sides. Dr. Murphy reported this information to the Parking Department and asked what could be done to make the space ADA compliant. The Parking Department informed Dr. Murphy that the City (which would be ultimately responsible for making the change) would not incur the expense of making the space compliant, since the lot already was ADA compliant with two spaces. Subsequently, the HP designation was removed from the space at issue. (Murphy, Hogan, Parents)
39. At the beginning of the 2019-2020 school year (Student's second grade), the drop off/pickup point for the PACE program, and, therefore, for Student, was changed from Pleasant Street to Elm Street. Parents were not informed of this change until after the first few days of school and were confused as a result. (Parents, Greco, Hogan)
40. As stated above, Student's IEP provided for door-to-door transportation in a special education bus with a monitor. In September 2019, Parents decided, after consulting with the School, to have Student ride the bus to and from school, believing that this would support increased independence. (Parents, Brennan, Greco) Student began bus transportation on or about September 9, 2019 and continued for about 8 weeks, until approximately November 12, 2019. (Parents, Brennan, Greco, Murphy)
41. Student's bus, like all the special education buses, would drop off and pick up students in the bus cutout on Elm Street. The procedure was for teachers and or paraprofessionals to board the bus after it stopped and escort the children, including Student, off the bus and into the building. The process was reversed at the end of the day. The arrival and departure times of the PACE students and the sixth graders, who were the only other Beebe students using the Elm Street entry, were staggered, so that the two groups did not overlap and the PACE students did not have to contend with crowding from other classes. (Murphy)
42. Student appeared to have an easier time transitioning into school from the bus than from Parents' vehicle. Neither Parents nor the School received reports of any significant difficulties on the bus. (Murphy)
43. Student was the first child to be picked up on the bus route. He generally was seated towards the front of the bus, immediately behind the monitor. While Student generally adjusted well to riding the bus, there were problems with inconsistency in the pickup and dropoff times. In the mornings, Parents found that the bus would

often arrive late, sometimes as much 25 minutes. This was problematic because if the bus did not arrive on time, Student would try to return to his room, and Parents would have to struggle with him to get him on the bus when it did arrive. In the afternoon, the drop off time could vary by as much as 45 minutes. (Father)

44. Elizabeth Brennan, Student's classroom teacher, also testified that "we had a lot of problems with [Student's] bus being late in the morning and in the afternoon....I think we had a problem with the driver. He was not that reliable..." (Brennan, Tr. III, p. 153) Ms. Brennan further testified that the bus arrived approximately 15 minutes late, 2 to 3 days per week, every week from the beginning of school in September 2019 until the COVID shutdown in mid-March 2020. Ms. Brennan and other affected teachers would "rush [the late-arriving students] through" their early morning goals and activities so that they could cover all the material that was scheduled for the day. (Brennan)
45. The driver of Student's bus was also 10 to 15 minutes late to pick up children at the end of the school day, usually about twice per week. Ms. Brennan and a second PACE teacher whose students used this bus would send a paraprofessional into the hallway to await the bus and keep the children in the classroom until the paraprofessional had informed them that it had arrived. Student generally would be given an iPad to keep him occupied while he waited. (Brennan)
46. Ms. Brennan, other affected teachers, and the Team chair communicated regularly regarding the late buses with the special education office, which in turn was tasked with communicating with the bus company. (Brennan, Wood)
47. On the morning of November 12, 2019, the bus arrived later than expected at Student's home. Student was resistant to getting on the bus, and Mother had to physically maneuver him out of the house and onto the bus. Student was upset and crying loudly. Parents observed the bus operator start driving the bus away while Student was still standing inside the bus, at the top of the steps near the front. Parents immediately got in their car and drove to the school where they met the bus. Student was upset and crying when he arrived at school but eventually was able to calm down. Parents did not see the monitor on the bus, although GPS data indicated that the monitor had signed onto the bus. (Parents)
48. Upon Parents' arrival at the Beebe, Father met with Principal Murphy to report that Student had arrived at school upset, and that there had been no monitor on the bus. Father asked for video footage from the bus ride. Immediately after meeting with Father, Dr. Murphy reached out to Michael Wood, who handled special education transportation issues; Dr. Murphy generally had no direct contact with the transportation department. In email exchanges with Mr. Wood, Dr. Murphy communicated Parents' concerns about the alleged absence of a monitor on that day (November 12, 2019) and Parents' requests for video coverage. Mr. Wood told Dr.

Murphy that there was no video available but there was GPS data, which he immediately sent to Dr. Murphy.<sup>3</sup> Dr. Murphy immediately forwarded this GPS data to Parents. (Murphy)

49. Parents' inability to obtain or view the video was the catalyst for their decision to resume driving Student to and from school. They believed that without reliable access to video recording of Student's time on the bus, they could not be assured that he was safe on the bus, since, because of his disabilities, he would be unable to report any difficulties or inappropriate conduct by others. (Parents)
50. Meanwhile, Dr. Murphy and the special education department had worked with the bus company and testified that the situation with timely arrival and departure was much improved, although, as stated above, Ms Brennan found that the lateness problem with Student's bus persisted until the COVID closure. (Murphy)
51. After the incident of November 12, Parents resumed driving Student to and from school. They attempted to use the Elm Street drop off point, but found that this was not workable because Elm Street, which is a one-way street, is too narrow to accommodate the number of moving and parked vehicles in the vicinity of the school during drop off and pickup times. (Parents)
52. Specifically, Parents found that at the start and end of the school day, Beebe School parents would double- and triple-park their cars on Elm Street in front of the school (including in the fire lane referred to above) and would either live-park or leave their parked vehicles while they dropped off or picked up their children. There remained a narrow space parallel to the parked cars that could be used as a travel lane. Parents would attempt to navigate this lane to reach a drop-off point, but because of the traffic, would often have to circle the block multiple times before they could do so. When Student was in the car, his response to passing the school building when he expected to get out of the car was to conclude that he did not have to attend school that day, and would then struggle with Parents trying to get him ready to leave the car to enter the building. (Father)
53. If both Parents were in the car, they would sometimes stop in the lane of moving traffic, both Parents exit the car with Student, and escort him "through multiple layers of cars, in between cars and come up on the sidewalk..." (Father, Tr. 4, p. 53) This action, which Parents felt was unsafe with both Parents, would be impossible if only one Parent was in the car. (Father)

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<sup>3</sup> During the hearing, Mr. Wood and Ms. Cushinsky testified that on or shortly after November 12, 2019, the bus company had made video coverage purporting to be of Student's bus on the date at issue available on a school computer, that Mr. Wood had viewed the video, and that Ms. Cushinsky had either viewed it or was in the room while Mr. Wood was looking at it. Mr. Wood testified that the images on the video were unclear. (Wood, Cushinsky) Parents had not requested this video in discovery because they had been told that it did not exist. A request by Parents to suspend the hearing was denied, and Parents maintained a standing objection to this ruling.

54. Notwithstanding the difficulties experienced by Parents, School personnel testified that they always ensured a safe hand-off for Student by waiting near the Elm Street entrance, and when they saw Parents walking towards the entrance from the direction of the parking lot, meeting them and escorting Student into the building. (Greco)
55. Dr. Murphy testified that she had multiple conversations with Parents regarding the parking issue and attempted to address their concerns. For example, she met with the Parking Department and negotiated the addition of a handicapped-accessible parking space on Elm Street at the beginning of 2019-2020. At one point, in an effort to determine what would constitute a satisfactory solution for Parents, Dr. Murphy asked Father “if they had one spot that I kept open for them, if that would make it better. And the answer was no; that it wouldn’t. That this wasn’t just about them; this was about all the...students who attended the school who might have needs of transport in and out.” (Murphy, Tr. IV, p. 21) Ms. Murphy testified that this was a hypothetical question and not a formal offer; however, if Parents had been interested, she would have pursued the matter further. (Murphy)
56. After Student stopped using the bus, Parents would attempt to park in the Beebe lot so that they could then walk Student to the Elm Street entrance. They found parking to be difficult because, as stated above, the HP spaces generally either were full or blocked by other vehicles. In the fall of 2019, the Beebe parking lot entrance was closed off with chains and a traffic cone. Parents would have to exit their vehicle to remove the obstacle to enter the lot. On more than one occasion, Mother had to exit her vehicle to move these items, leaving Student sitting alone in the car with the engine running, and the rear of the car protruding into the street. On one occasion in November 2019, Parent’s car was nearly hit by a passing vehicle. (Mother)
57. Parent emailed Dr. Murphy about this incident, and shortly thereafter, the Beebe administration stationed a custodian at the entry to the parking lot at the beginning and end of the school day with instructions to allow entry to parents, including Parents in this case, who had cars with HP plates. Parents were informed that they would be allowed to park behind teachers’ cars, if necessary, to assist Student out of the car and into the building, or in the area directly in front of the plaza. Parents noted that if they arrived after the designated time for the custodian to be present (because, for example, Student had a morning appointment and was arriving late), they would still have to remove the chain and cone barrier themselves. (Parents, Greco, Murphy)
58. In approximately January or February 2020, while Parents were parked with Student in the Beebe lot, Student insisted on exiting the car without Parents and proceeding, independently, to the main school entrance that abutted the parking lot. Watching carefully, Parents allowed him to do so, and Father followed him into the building to make sure he got to class. Student repeated this behavior on subsequent days. After

discussion, Parents, Ms. Brennan, and other members of Student’s educational team determined that they would support Student’s efforts to independently enter and leave the school building, and the School agreed to have a teacher or aide meet Student at the doorway to ensure that he entered and exited safely and got to his classroom. (Parents, Brennan, Murphy) This arrangement—Parents parking in the Beebe lot and Student exiting the car on his own and proceeding to the main entrance where he was met by staff—continued until the school closed owing the COVID pandemic. (Parents, Brennan) Parents did not feel that this solved the access problem, however, because they still did not have a consistent space to park in the lot. If they could not park close to the entryway, Student would not have a safe route through the parking lot to the door. (Parents)

### **Water Safety Instruction**

59. In or about 2018, after Student received his autism diagnosis, Parents learned of scientific studies to the effect that one of the reasons for a significantly reduced lifespan for people with autism is accidental drowning, and that children with ASD are at heightened risk for drowning-related injuries and deaths. (Parents)
60. Based on this information, Parents decided that Student needed appropriate instruction in basic water safety, and that such instruction should take place both in the classroom and at a pool or body of water.<sup>4</sup>
61. MPS does not include swimming or water safety instruction for any students prior to high school. Swimming is offered as an elective for ninth graders. (Wood)
62. On September 24, 2019, the Team convened to discuss Parents’ request for water safety instruction for Student as well as their concerns regarding the allegedly insufficient HP spaces in the Beebe School parking lot. Parents also put forward their hope that Student could start to take the bus to and from school. (P-46)
63. On October 10, 2019 MPS issued a proposed amendment to the IEP. The N-1 form accompanying this amendment reported that the district would add a health and safety goal to Student’s IEP, and that “[f]ollowing a discussion of swimming lessons the school district is proposing water safety as part of the classroom curriculum,” The N-1 form further stated that the School would propose a mobility assessment to address Parents’ concerns. Regarding the HP parking issue, the N-1 form stated “[a]s per the principal, the school has made all reasonable efforts with respect to handicapped parking within the limits of school property.” (Administrative Record, N-1 Form attached to hearing request.)

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<sup>4</sup> Parents have attempted to enroll Student in specialized swimming and water safety classes and are on multiple waiting lists, but as of the hearing dates, no such classes have been available or had an opening for Student.(Parents)

64. The proposed IEP amendment, covering September 2019 to January 2020, added a goal entitled “safety” which addressed Student’s distractibility and resistance to following and staying with his group during group activities outside the classroom and on community walks. One of the three benchmarks associated with this goal was for Student to “correctly identify water safety signs in 4/5 opportunities.” (S-4)
65. Parents partially rejected the proposed amendment on or about October 21, 2019. The reasons for the partial rejection were set forth in the “proposed resolution of the problem” section of the hearing request form, referenced above.
66. Subsequent to the filing of the hearing request, MPS staff explored possible venues for in-pool swimming/water safety instruction for Student and other children in the PACE program, but were unable to locate an appropriate setting. (Wood, Cushinsky)

## DISCUSSION

There is no dispute that Student is a school-aged child with a disability who at all relevant times was eligible for special education and related services pursuant to the IDEA, 20 USC Section 1400, *et seq.*, and the Massachusetts special education statute, M.G.L. c. 71B (“Chapter 766”). Student was and is entitled, therefore, to a free appropriate public education (FAPE), which “comprises ‘special education and related services’--both ‘instruction’ tailored to meet a child’s ‘unique needs’ and sufficient ‘supportive services’ to permit the child to benefit from that instruction.” *C.D. v. Natick Public School District, et al.*, No. 18-1794, at 4 (1<sup>st</sup> Cir. 2019), quoting *Fry v. Napoleon Community Schools*, 137 S. Ct. 743, 748-749 (2017); and 20 USC§1401 (9), (26), (29).<sup>5</sup> Student’s IEP, which is “the primary vehicle for delivery of FAPE, *C.D. v. Natick*, 18-1794 at 4, quoting *D. B. v. Esposito*, 675 F. 3d 26, 34 (1<sup>st</sup> Cir. 2012), must be “reasonably calculated to enable [him] to make progress appropriate in light of [his] circumstances.” *C.D. v. Natick*, 18-1794 at 4, quoting *Andrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988, 1001 (2017).

While Student is not entitled to an educational program that maximizes his potential, he is entitled to one which is capable of providing not merely trivial benefit, but “meaningful” educational benefit. *C.D. v. Natick*, 18-1794 at 12-13; *D.B. v. Esposito*, 675 F.3d at 34-35; *Johnson v. Boston Public Schools*, 906 F.3d 182 (1<sup>st</sup> Cir. 2018). See also, *Bd. of Education of the Hendrick Hudson Central School District v. Rowley*, 458 US 176, 201 (1982); *Town of Burlington v. Dept. of Education (“Burlington II”)*, 736 F.2d 773, 789 (1<sup>st</sup> Cir. 1984). Whether educational benefit is “meaningful” must be determined in the context of a student’s potential to learn. *Andrew F.* 137 S. Ct. at 1000, *Rowley*, 458 US at 202; *Lessard v. Wilton Lyndeborough Cooperative School District*,

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<sup>5</sup> In *C.D.*, the First Circuit reiterated its formulation of FAPE set forth in earlier cases, *i.e.*, educational programming that is tailored to a child’s unique needs and potential, and designed to provide “‘effective results’ and ‘demonstrable improvement’ in the educational and personal skills identified as special needs.” 34 C.F.R. 300.300(3)(ii); *Burlington II*, *supra*; *Lenn v. Portland School Committee*, 998 F.2d 1083 (1<sup>st</sup> Cir. 1993); *D.B. v. Esposito*, 675 F.3d 26, 34 (1<sup>st</sup> Cir. 2012)

518 F.3d 18, 29 (1<sup>st</sup> Cir. 2008); *D.B. v. Esposito*, 675 F.3d at 34-35. Within the context of each child's unique profile, a disabled child's goals should be "appropriately ambitious in light of [the child's] circumstances, *Andrew F.* 137 S. Ct. at 1001; *C.D. v. Natick*, 18-1794 at 14.

Eligible children must be educated in the least restrictive environment (LRE) consistent with an appropriate program; that is, students should be placed in more restrictive environments, such as private day or residential schools, only when the nature or severity of the child's disability is such that the child cannot receive FAPE in a less restrictive setting. On the other hand, "the desirability of mainstreaming must be weighed in concert with the Act's mandate for educational improvement." *C.D. v. Natick*, 18-1794 at 5-6, quoting *Roland M. v. Concord School Committee*, 910 F.2d 983 (1st Cir. 1990).

In a due process proceeding to determine whether a school district has offered or provided FAPE to an eligible child, the burden of proof is on the party seeking to challenge the *status quo*. In the instant case, as the moving party, Parents bear this burden. That is, in order to prevail, Parents must prove each of their claims as set forth in their hearing request and further articulated in *Issues Presented*, above, by a preponderance of credible evidence. *Schaffer v. Weast*, 546 U.S. 49 (2005).

In the instant case, the parties agree on Student's profile as a child with a neurological disability and developmental delays resulting from a traumatic brain injury at the age of 2. In 2018, Student also received diagnoses of autism spectrum disorder (ASD) and intellectual disability from Boston Children's Hospital. With the exception of the issues that are the subject of the hearing, namely, the ability of Student to safely enter and leave the school building and the need for water safety instruction, the parties agree that Student's IEP contains appropriate goals and benchmarks and that he is appropriately placed in the substantially-separate PACE program at the Beebe Elementary School. Finally, there is no dispute that although Student has made significant progress in most domains since he entered kindergarten in 2017, he continues to have substantially reduced skills in the areas of communication, academics, socialization, self-help, and self-regulation. Behaviorally, Student can be rigid and oppositional, particularly during transitions, *e.g.*, from home to school. Student's oppositionality, coupled with distractibility and reduced safety awareness, make him particularly vulnerable when transitioning from a vehicle to his school building and vice versa. In light of this background, I will address each of the issues for hearing in turn.

**Issues 1, 2. Whether MPS has failed to provide Student with safe and consistent physical access to his school building from the beginning of the 2018-2019 school year until the time of school closure due to the COVID emergency in March 2020. If MPS has failed to provide such access, what is the appropriate relief?**

It is axiomatic that Student is entitled to safe and consistent physical access to his school building. After careful review of the evidence on the record, I find that Parents have not met their burden of showing that MPS failed to provide such access. My reasoning follows.

The record is replete with undisputed evidence that Parents encountered multiple challenges when driving Student to and from school between the beginning of the 2018-2019 school year (first grade) to school closure in March 2020. This is not surprising, given that the Beebe School serves over 900 children, as well as teachers, service providers, administrators, and support staff, and is located in a densely populated, heavily trafficked urban area with limited parking space. I credit the Parents' testimony that driving Student to school in the mornings, and picking him up after school, was made very difficult by the combination of heavy traffic, double- and triple-parked cars, and the small number of designated HP spaces that often were blocked by illegally parked vehicles. Malden's witnesses, whether employed by MPS or by the City of Malden, disputed neither Parents' experience nor the generally challenging traffic and parking conditions around the Beebe School. Indeed, Ron Hogan, Director of the Malden Parking Department, described those conditions as "chaotic." (Hogan) I also credit the testimony of Parents, corroborated by evaluations and IEPs in the record and the testimony of Student's teacher, Elizabeth Brennan, that Student's distractibility and tendency to resist transitions and changes to his routine exacerbated an already difficult process.

The record also shows, however, that MPS was highly responsive to Parents' expressed concerns about traffic and parking conditions, and the challenges they posed to getting Student safely from their car to the school building in the morning, and from the building to their car in the afternoon. Specifically, during the 2018-2019 school year, when a parking enforcement officer told Parents that they could not park in their customary spot at the end of the Pleasant Street cutout, Assistant Principal Kate Greco intervened with the City so that Parents could continue to live park there.

In August 2019, shortly after beginning employment as the new principal of the Beebe School, Dr. Murphy responded immediately to Parents' expressed concerns about traffic and parking, reaching out to the MPS special education department as well as to the City Parking Department in an effort to address those concerns. The record is clear that from July or August 2019 forward, Dr. Murphy and others from the MPS spent much time and effort working with the City of Malden to improve the safety and efficiency of the drop-off and pick-up process, by, for example, moving the designated drop-off point for PACE students to Elm Street, adding an HP space to the Beebe parking lot, and, when that space proved to be non-compliant with ADA requirements, getting the City to add a HP space near the parking lot entry on Elm Street. School administrators also increased the safety and utility of the Beebe lot by making it available only to parents who, like Parents, had HP plates on their vehicles. When Parents alerted the School that the entry to the lot was blocked, administrators stationed a custodian in the lot to move the chains and cones blocking the entryway when Parents or others with HP plates sought to enter the lot. Additionally, MPS informed Parents that they could park behind parked cars in the lot if no HP spaces were available, so that they could get Student in and out of the building safely. Throughout the time in question, teachers and paraprofessionals routinely met Student and Parent either at their vehicle or on the sidewalk on either Pleasant and Elm Street and assisted Parents with getting Student out of the car and into the building.

When, shortly before the COVID shutdown, Student decided he wanted get out of the car on his own and proceed towards the main school entrance abutting the parking lot, staff supported this move towards independence and agreed to have a staff member meet Student at the door of the building to ensure his safe entry

None of these adjustments constituted a perfect solution. One such solution--changing Student's entry point to Elm Street—proved to be problematic for Parents, because of the sheer volume of traffic in the area, coupled with limited available parking on Elm Street or nearby side streets. MPS is neither able nor required to overhaul the traffic and parking situation surrounding the Beebe School, however. What it is required to do is ensure that Student has a way to get in and out of his school building safely and consistently. A review of the record leads to the conclusion that MPS has done so.

During first grade (2018-2019), Parents were able to park at the end of a bus cutout on Pleasant Street. If Parents did not arrive early, they might find the space blocked, and on occasion had to ask other vehicles to move. However, they did not establish that they were unable to get Student into or out of the building, or that Student was in a dangerous situation. When Student was resistant to Parents bringing him to the Pleasant Street entry, Ms. Brennan or a paraprofessional came to the car to assist with the process. The following year, Parents clearly had difficulty navigating the Elm Street entrance. Eventually, however, they were able to access the Beebe parking lot. This solution was less than perfect. Parents at times had to remove the barrier in front of the lot entrance if the custodian was not there, and there was not always a HP space available. However, Beebe staff allowed Parents to park behind parked cars if necessary to get Student into the building. Ultimately, in a quest for more independence, Student began to insist on leaving Parents' car on his own and proceeding to the main door of the school building. The School responded supportively by providing staff to meet him at the door (even though this was not the designated entry for PACE students) and escort him to his classroom.

None of the School's interventions led to a perfect solution. The sheer volume of traffic and the layout of Malden streets is beyond the control of MPS, and, to a great extent, the City of Malden. Decisions regarding directionality of traffic, placement of HP spaces on public ways such as Elm Street and Pleasant Street, and enforcement of parking violations on public ways are not within the control of MPS. MPS also does not have absolute control over the Beebe parking lot. Nonetheless, Dr. Murphy advocated on behalf of the Beebe School community, not only with Mr. Wood from the MPS special education department, but also with the City of Malden, and was able to secure changes and adjustments, such as placement of an HP space on Elm Street and availability of a fire lane for live parking. Regarding the parking lot, MPS improved access for Parents and similarly-situated others by limiting entry to vehicles with HP plates and allowing Parents to park behind already-parked cars if necessary to get Student safely out of their vehicle.

In sum, the record establishes that when Parents transported Student to and from school, the process was difficult and challenging for them, but was not clearly dangerous and did not constitute a barrier to his receipt of a FAPE. Moreover, the School was

responsive to Parents' concerns, and attempted to do what it could, within its capacity and authority, to rectify problems, in collaboration with other departments of the City of Malden.

It is critical to note, however, that parentally provided transportation was not Student's only means of access to his school building; at all relevant times, his IEP provided for door-to-door specialized bus transportation, with a monitor.

As was the case with transportation by Parents, there were issues with the bus transportation. The bus was often late to pick Student up at home in the morning, and, as a result of this disruption in routine, Student would try to return to his bedroom and resist getting on the bus when it did arrive. Approximately 2 to 3 times per week, Student's bus arrived late to school, such that his teacher had to "rush through" early morning activities. And the bus also was frequently late at the end of the day, so that teachers had to keep Student and his classmates occupied in the classroom until it arrived.

Dr. Murphy addressed these issues with the central special education administration, which, in turn, contacted the bus company. I credit the testimony of Ms. Brennan, however, that despite their intervention, the bus that transported Student from September to November 2019 continued to be unreliable and frequently delayed until the COVID shutdown in March 2020. I also credit the uncontroverted testimony of Parents that on November 12, 2020, they observed the bus driver start the bus and drive away from their home while Student was standing at the top of the interior steps of the bus. This was potentially unsafe, and contrary to the statute governing operation of school buses, MGL c. 90, sec. 7B(2), which states that "the operator shall [not] drive said bus until each pupil is seated," except in limited circumstances that do not apply here. Whether or not there was a monitor on the vehicle on that day--and the evidence here is inconclusive--it is clear that on this occasion, there was an unsafe situation on the bus for at least some portion of Student's trip to school. Finally, Parents' inability to access video coverage of the bus ride of November 12, 2019 is troubling. As Father testified, Student has limited expressive language skills at this time, and would be unable to report to adults if anything untoward or upsetting were to take place on the bus. If the buses maintain video surveillance of the interior of the bus, then it should be available to the School, and, if Student is depicted, to Parents.

Viewing the record in its entirety, I conclude that Parents have not met their burden of proving that Malden failed to provide Student safe and consistent access to the Beebe School building. As stated above, regarding parking and traffic, School officials were responsive to Parents' concerns, as well as to general safety and access issues, taking into account the many challenges posed by the layout and traffic burden around the Beebe School as well as the limits on the District's authority.<sup>6</sup> As for bus transportation, by including such transportation in Student's IEP, MPS has provided for Student's access to the school building. However, in light of the difficulties with the bus as outlined in this Decision, going forward, the School should make best efforts to ensure

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<sup>6</sup>The issues raised by Parents in this forum might properly be addressed by the Office for Civil Rights (OCR) of the US Department of Education and/or other agencies.

that transportation is reliable, safe, and timely so that this portion of Student's IEP can be fully implemented. Additionally, the record shows that Student has longstanding difficulties with transitioning from home to the school bus, and from Parents' vehicle to the school building. The School should consider offering a functional behavioral assessment (FBA) or other appropriate evaluation of this issue (such as the mobility assessment suggested by the School in or about September 2019). Such evaluation could inform the Team on strategies to support Student's ability to navigate the process of getting into and out of school.

**Issue 3. Whether Student requires classroom and pool- based instruction in water safety in order to receive FAPE.**

Parents assert that because Student's ASD diagnosis makes him particularly vulnerable to injury or death by drowning, he is entitled to receive pool and classroom based water safety instruction to receive FAPE, just as he is entitled to receive instruction on other safety issues. Other than a brief letter from Student's pediatrician endorsing aquatic safety as part of Student's IEP, however (P- 43), Parents have presented no evaluations or other evidence pertaining to Student in particular, as opposed to children with autism in general, that supports their contention. There is no other evidence on the record that Student needs this particular type of instruction—which is not part of the MPS general curriculum prior to ninth grade--in order to access the curriculum or make effective educational progress. I find that Parents have not met their burden of persuasion on this issue.

**CONCLUSION AND ORDER**

Based on the foregoing, I conclude that Parents have not met their burden of persuasion on the issues presented for hearing. However, as noted above, the Malden Public Schools is urged, going forward, to make best efforts to ensure that to the extent possible, Student's bus transportation is consistent and reliable so that his IEP is fully implemented. The School is further urged to consider, and Parents to consent to, a functional behavioral assessment and/or other evaluation of Student's ability to manage transitions from home to school and vice versa, so that the Team may propose strategies to support his growth in this area.

By the Hearing Officer,

*/s/ Sara Berman*

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Sara Berman  
December 23, 2020



