

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

In re: Stewart¹

BSEA #2101061

**RULING ON ACTON-BOXBOROUGH REGIONAL SCHOOL DISTRICT'S MOTION
FOR DIRECTED VERDICT**

This matter comes before the Hearing Officer on the *Motion for Directed Judgment (Motion)* filed by Acton-Boxborough Regional School District (ABRSD, or the District) at the close of Parent's case on May 13, 2021. Parent filed her *Opposition to the District's Motion for Directed Verdict* on May 13, 2021. The *Motion Session* was held remotely via Zoom on March 14, 2021, during which the parties supplemented their written submissions with oral arguments.

For the reasons set forth below, the District's Motion for Directed Verdict is ALLOWED in part and DENIED in part.

I. FACTUAL BACKGROUND AND RELEVANT PROCEDURAL HISTORY

A detailed procedural history appears in prior rulings on this matter, particularly the ruling on *District's Partial Motion to Dismiss* issued on March 16, 2021. Following two days of hearing, at the close of Parent's case-in-chief, the District moved for a directed verdict on the following claims:²

- A. Whether Acton-Boxborough discriminated against Stewart in violation of §504 of the Rehabilitation Act of 1973, through:
- (1) failure to follow policies and procedures to investigate and address bullying concerns beginning on or about October 22, 2019 through January 2020;
 - (3) involvement of the SRO in responding to Stewart's dysregulation in January 2020; and/or
 - (4) imposition of inappropriate consequences and punishment (i.e., cleaning the classroom, removal from classroom, disallowing bathroom use, preventing access to mother) for manifestations of Stewart's disability (i.e., behavioral dysregulation) between December 2019 and January 2020.

¹ "Stewart" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

² Those claims on which Acton-Boxborough Regional School District (ABRSD or the District) did not move for directed verdict are not listed here.

- B. Whether Acton-Boxborough denied Stewart a free appropriate public education (FAPE) in violation of the Individuals with Disabilities Education Act (IDEA) by
- (1) failing to implement an accepted, expired IEP dated March 28, 2019 to March 27, 2020 through
 - (a) use of the SRO in response to Stewart’s dysregulation in January 2020;
 - (c) failure to utilize positive behavior interventions and instead imposing inappropriate consequences and punishment (i.e., cleaning the classroom, removal from classroom, disallowing bathroom use, preventing access to mother) on Stewart between December 2019 and January 2020.
 - (2) failing to follow policies and procedures to investigate bullying concerns between October 2019 and January 2020; and/or
 - (3) failing to address bullying concerns by convening an IEP meeting and reviewing the IEP and changes that were needed, if any, thereto between October 2019 and January 2020.
- C. Whether Parent rejected the IEP dated March 28, 2019 to March 27, 2020.

II. DISCUSSION

Parent’s claims largely fall into four categories that will be discussed as follows: the “bullying claims” (A(1), B(2), and B(3)); the “SRO claims” (A(3) and B(1)(a)); the “inappropriate consequences and punishment claims” (A(4) and B(1)(c)), and the “constructive rejection of the IEP” claim (C). To determine whether Parent’s claims survive the District’s Motion, I shall apply the directed verdict standard to the relevant substantive law.

A. *Legal Standards*

1. Motion for Directed Verdict³

A motion for a directed verdict may be granted “only where, construing the evidence most favorably to the plaintiff, it is still insufficient to support a verdict in his favor.”⁴ In viewing the

³ Although ABRSD did not supply a basis for its *Motion for Directed Verdict (Motion)*, 801 CMR 1.01(g)(7)(1), applicable to Bureau of Special Education (BSEA) proceedings, permits a Respondent to move to dismiss a case, upon completion of the presentation of the Petitioner’s evidence, on the ground that upon the evidence, or the law, or both, the Petitioner has not established her case. For guidance in interpreting and applying this standard, I turn to the Rules of Civil Procedure. Mass. R. Civ. P. 50(a) provides that “a party may move for directed verdict at the close of the evidence offered by an opponent.” The language in Fed. R. Civ. P. 50(a) has been updated from “directed verdict” to “judgment as a matter of law,” but essentially permits entry of judgment against a party that has been fully heard on an issue if the finder of fact “would not have a legally sufficient basis to find for the party on that issue.”

⁴ *Alholm v. Wareham*, 371 Mass. 621, 627 (1976) (citing *DiMarzo v. S. & P. Realty Corp.*, 364 Mass. 510, 514 (1974)); see *Grant v. Carlisle*, 328 Mass. 25, 27 (1951).

evidence, the finder of fact must also consider reasonable inferences that may be drawn therefrom. The standard, as articulated by the Supreme Judicial Court of Massachusetts in *Raunela v. Hertz Corporation*, is whether "anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff."⁵ For inferences to be considered reasonable, they must be based on "probabilities rather than possibilities," and not the result of "mere speculation and conjecture."⁶ As a case before the Bureau of Special Education Appeals (BSEA) requires proof by a preponderance of the evidence,⁷ a Hearing Officer articulated and applied the standard in this context as follows: "whether, at the conclusion of Parent's case, the evidence, construed most favorably to Parent, is insufficient to support a conclusion that the preponderance of the evidence favored Parent's position."⁸ To determine whether to enter a directed verdict as to any of Parent's claims, I must consider the relevant substantive law.

2. §504

Pursuant to §504 of the Rehabilitation Act of 1973, "no otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency . . ."⁹ To prevail on her claims under §504, Parent must establish that (1) Stewart is a "handicapped individual"; (2) Stewart is "otherwise qualified" for participation in the program; (3) the program receives "federal financial assistance"; and (4) Stewart was "denied the benefits of" or "subjected to discrimination" under the program.¹⁰ Only the fourth element is at issue in this matter – whether Stewart was denied "the benefits of" or "subjected to discrimination" in his education.¹¹

In the context of special education, a violation of §504 is "something more than a mere violation of IDEA."¹² According to the United States District Court for the District of Massachusetts, to prevail on an educational disability claim under §504, a parent "must demonstrate that a school district acted with bad faith or gross misjudgment."¹³ I explored this subject in detail in my 2018 decision, *In Re Adam and Taunton Public Schools*, where I

⁵ 361 Mass. 341, 343 (1972) (internal citations omitted).

⁶ *Alholm*, 371 Mass. at 627, 628 (internal citations omitted).

⁷ See *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

⁸ *Elizabeth R.L and Worcester Public Schools*, BSEA # 06-2557 (Sherwood 2006); see *Student and Worcester Public Schools*, BSEA # 09-4367 (Figueroa 2009) (decision-maker may grant a motion for directed verdict "only if the evidence, viewed in the light most favorable to the non-moving party, points so 'strongly and overwhelmingly' in favor of the moving party, that a reasonable person could conclude only in favor of that moving party" (internal citations omitted)).

⁹ Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794.

¹⁰ *Darian v. University of Mass.*, 980 F. Supp. 77, 84-85 (D. Mass. 1997) (internal citations omitted).

¹¹ *Id* at 85.

¹² *Wenger v. Canastota Cent. Sch. Dist.*, 979 F. Supp. 147, 152 (N.D.N.Y. 1997) (internal citations omitted).

¹³ *Nickerson-Reti v. Lexington Pub. Sch.*, 893 F. Supp. 2d 276, 300 (D. Mass. 2012) (internal citations omitted); see *Monahan v. Nebraska*, 687 F.2d 1164, 1171 (8th Cir. 1982) ("either bad faith or gross misjudgment should be found before a §504 violation can be made out, at least in the context of education of handicapped children"); *K.D.v. Starr*, 55 F. Supp. 3d 782, 788 (D. Md. 2014) (in context of education of handicapped children, "a finding of discrimination based on disability requires a showing of bad faith or gross misjudgment by the school system").

concluded that “in order to prove bad faith or gross misjudgment, the moving party must establish that the school’s actions ‘depart[ed] substantially from accepted professional judgment, practice or standards [so] as to demonstrate that the person[s] responsible did not base the decision on such judgment.’”¹⁴ “[S]tatutory noncompliance alone does not constitute bad faith or gross misjudgment;”¹⁵ it is a high standard to meet.¹⁶ For example, parents’ claim that the district removed student from honors classes, removed a writing fluency goal from his IEP, and failed to incorporate recommendations from an independent educational evaluation necessary for the student to receive a FAPE, in violation of §504, was dismissed on summary judgment for failure to demonstrate gross misjudgment.¹⁷ Similarly, parents’ §504 claim regarding, among other things, a district’s failure to comply with certain regulations implementing §504 and the ADA did not survive summary judgment because the facts, even construed in the light most favorable to parents, did not suggest that the district “deviate[d] so substantially from accepted professional judgment, practice, or standards as to demonstrate that the defendant acted with wrongful intent.”¹⁸ On the other hand, the exclusion of a child from school and other educational activities because of his disability, if proven, would constitute a violation of §504,¹⁹ and allegations that a school district discriminated against a student with mobility issues in violation of §504 by failing to maintain physical accessibility of programs, facilities, and activities were sufficient to survive a motion to dismiss.²⁰ A school district may rebut the allegation of discrimination by providing a reasonable explanation for the action or inaction that the moving party is alleging to be discrimination.²¹

3. FAPE

The IDEA was enacted “to ensure that all children with disabilities have available to them a free appropriate public education [FAPE].”²² 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 present levels of academic achievement and functional performance, disability, and potential for growth.²³ As summarized by the United States Supreme Court in *Endrew F. v.*

¹⁴ BSEA #170888 (Reichbach 2017), quoting *B.M. ex rel. Miller v. S. Callaway R-II Sch. Dist.*, 732 F.3d 882, 887 (8th Cir. 2013) (internal citations omitted); see *Monahan*, 687 F.2d at 1171 (stating that there is no discrimination under Section 504 “[s]o long as the state officials involved have exercised professional judgment, in such a way as not to depart grossly from accepted standards among educational professionals”).

¹⁵ *Miller*, 732 F.3d at 887-88.

¹⁶ See *D.N. ex rel. Christina Nolen v. Louisa Cnty. Public Sch.*, 156 F. Supp. 3d 767, 776 (W.D. Va. 2016).

¹⁷ See *Doe v. Pleasant Valley Sch. Dist.*, 2017 WL 8792704 at * 4 (S.D. IA 2017) (unpublished).

¹⁸ See *Miller*, 732 F.3d at 887-88.

¹⁹ See *Bess v. Kanawha*, 2009 WL 3062974 at *10 (S.D. W.V. 2009).

²⁰ See *McKay v. Winthrop Bd. of Educ.*, Civil No. 96-131-B, 1997 U.S. Dist. LEXIS 23372, at *4, *5 (D. Me. 1997) (unpublished).

²¹ See *Zdrowski v. Rieck*, 119 F.Supp.3d 643, 667-68 (E.D. MI 2015) (granting district’s motion for summary judgment because even in light most favorable to parents, a teacher dragging a student down the hallway a single time using a hold other than the one recommended for struggling students did not constitute a violation of §504 where teacher explained she took such action to prevent additional stress and harm to student). The court also held that the failure to replace a classroom aide did not exemplify bad faith or gross misjudgment where, among other things, no aide was required under the student’s IEP. See *id.* at 668.

²² 20 U.S.C. §1400 (d)(1)(A).

²³ *Endrew F. v. Douglas Cty. Reg’l Sch. Dist.*, 137 S. Ct. 988, 999 (2017); *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012).

Douglas County School District, the IEP must “describe how the child’s disability affects the child’s involvement and progress in the general education curriculum, and set out measurable annual goals, including academic and functional goals, along with a description of how the child’s progress toward meeting those goals will be gauged.”²⁴ “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.”²⁵ The goals of all students should be “appropriately ambitious . . . just as advancement from grade to grade is appropriately ambitious for most students in a regular classroom.”²⁶

Similarly, Massachusetts FAPE standards require that an IEP be “reasonably calculated to confer a meaningful educational benefit in light of the child’s circumstances,”²⁷ and designed to permit the student to make “effective progress.”²⁸ Evaluating an IEP requires viewing it as a “a snapshot, not a retrospective. In striving for ‘appropriateness, an IEP must take into account what was . . . objectively reasonable . . . at the time the IEP was promulgated.”²⁹

Under state and federal special education law, a school district has an obligation to provide the services that comprise FAPE in the least restrictive environment that will “accommodate the child’s legitimate needs.”³⁰

Where an IEP has been accepted, the analysis shifts to implementation. “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.”³¹ The United States Court of Appeals for the First Circuit has not elaborated on what constitutes implementation of an IEP, but several courts within the First Circuit have done so. The United States District Court for the District of Massachusetts has 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.³² In a subsequent case, the United States District Court for the District of Puerto Rico relied on the generally adopted standard articulated by the Fifth Circuit in *Houston Independent*

²⁴ 137 S. Ct. at 994 (internal quotation marks omitted), citing 20 U.S.C. §§1414(d)(1)(A)(i)(I)-(III).

²⁵ *Andrew F.*, 137 S. Ct. at 999.

²⁶ *Id.* at 1000.

²⁷ *C.D. v. Natick Pub. Sch. Dist.*, 924 F.3d 621, 624-25 (1st Cir. 2019) (cert denied).

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

²⁹ *Roland M.*, 910 F.2d at 992 (internal quotations and citations omitted).

³⁰ *C.G. ex rel. A.S. v. Five Town Comty. Sch. Dist.*, 513 F.3d 279, 285 (1st Cir. 2008); see 20 USC §1412(a)(5)(A); 34 CFR 300.114(a)(2)(i); MGL c 71 B, §§ 2, 3; 603 CMR 28.06(2)(c).

³¹ *Colón-Vazquez v. Dep’t of Educ.*, 46 F. Supp. 3d 132, 144 (D. P.R. 2014).

³² See *Doe v. Hampden-Wilbraham Reg’l Sch. Dist.*, 715 F. Supp. 2d 185, 198 (D. Mass. 2010); 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”).

School District v. Bobby R., requiring “more than a *de minimis* failure” to prevail on an implementation claim under the IDEA.³³ 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.³⁴

The approach of the U.S. District Court for the District of Puerto Rico, adopts the approaches endorsed by the U.S. Courts of Appeals for the Fifth, Eighth, Ninth, and Eleventh Circuits, as well as the U.S. District Court for the District of Columbia and is appropriate to follow here as the First Circuit has yet to address this question.³⁵

B. *Analysis*

To determine whether each of the challenged claims survives the District’s *Motion*, I must determine whether the evidence and reasonable inference that may be drawn therefrom, construed in the light most favorable to Parent, is sufficient for me to find for Parent by a preponderance of the evidence on each required element of that claim.

1. Bullying Claims

Parent alleges that ABRSD failed to follow policies and procedures to investigate and address bullying concerns between October 2019 and January 2020, and failed to address bullying concerns by convening a Team meeting to review Stewart’s IEP and make changes,

³³ *Colón-Vazquez*, 46 F. Supp. 3d at 143-44 (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)).

³⁴ *Id.* (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”).

³⁵ 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. See also *L.J. by N.N.J., v. Sch. Bd. of Broward County*, 927 F.3d 1203, 1211 (11th Cir. 2019) (“[W]e conclude that to prevail in a failure-to-implement case, a plaintiff must demonstrate that the school has materially failed to implement a child’s IEP. And to do that, the plaintiff must prove more than a minor or technical gap between the plan and reality; *de minimis* shortfalls are not enough. A material implementation failure occurs only when a school has failed to implement substantial or significant provisions of a child’s IEP.”)

which resulted in a denial of Stewart’s right to a FAPE and constituted discrimination against him in violation of § 504. To determine whether Parent has presented sufficient evidence from which I could find in her favor by a preponderance of the evidence, I must first determine whether Parent has established, by this standard, that bullying occurred. Consistent with the legal definition of bullying under M.G.L. c. 71 § 37O, the District’s Bullying Prevention and Intervention Policy (Policy)³⁶ defines bullying as:

“ the repeated use by one or more students or by a member of a school staff including, but not limited to, an educator, administrator, school nurse, cafeteria worker, custodian, bus driver, athletic coach, advisor to an extracurricular activity or paraprofessional of a written, verbal or electronic expression or a physical act or gesture or any combination thereof, directed at a victim that: (i) causes physical or emotional harm to the victim or damage to the victim's property; (ii) places the victim in reasonable fear of harm to himself or of damage to his property; (iii) creates a hostile environment at school for the victim; (iv) infringes on the rights of the victim at school; or (v) materially and substantially disrupts the education process or the orderly operation of a school.”³⁷

Although as Parent argued during the *Motion Session*, neither the law nor the policy requires the victim to hear or witness the aggressor’s misconduct first-hand, a required element of bullying under both the law and the policy is that the expressions, acts, or gestures complained of be repeated.³⁸ The testimony provided and the documentary evidence admitted in this matter demonstrate that the District was notified by the Parent about only one instance of a verbal comment, when Parent emailed school psychologist Carolyn Imperato on October 23, 2019 to report that another student had called her son “fat.”³⁹ Parent acknowledged in her testimony that Dr. Imperato promptly responded to her email, within an hour of receiving it.⁴⁰ Although discussions of that one inappropriate comment made by another student about Stewart occurred between Parent and the District several times over next few months, no evidence was presented, through testimony or documents, that the District was notified of any other *separate* instance of name-calling by any student or inappropriate action by the alleged aggressor towards Stewart.⁴¹ Although Parent testified that in January, after Stewart was hospitalized, she learned that he had been called “fat” eleven times, she also acknowledged on cross-examination that she never notified the school of these repeated instances of name-calling.⁴² Moreover, in her sworn response to Interrogatories, prepared with the assistance of counsel, Parent described notifying the school of only one instance of Stewart being called “fat.”⁴³

³⁶ Exh. P-4.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Exh. P-84.

⁴⁰ Tr. Vol. 1, 185:6-17.

⁴¹ Parent submitted an email she wrote to the school on October 29, 2019 advising that Stewart did not want to take the bus one morning because “some kids said something to him,” however, this email was sent within one week of the reported bullying incident and it is not clear whether Parent and Stewart are referring to that incident or whether it involved the same student; ultimately, Stewart did take the bus home that day. (P-87)

⁴² Tr. Vol 1, 227:1-24, 228:1-16.

⁴³ Exh. S-58; Tr. Vol 1, 236-243.

The uncontroverted evidence also shows that the District conducted a timely investigation in October 2019.⁴⁴ Dr. Imperato spoke with Stewart about the name-calling incident on October 23, 2019 after she received Parent’s email. Dr. Imperato’s report states that Stewart was still new to the school and that she was building rapport and did not want to push him; however, Stewart did ultimately tell her that he heard that a fourth grader told a second grader he was “big.”⁴⁵ An official incident report was filed in January, at which time the Assistant Principal Bryant Amitrano interviewed Stewart regarding the incident and Stewart said he did not remember someone calling him “fat,” but that he may have heard someone call him “big.”⁴⁶ The investigation concluded that there was no finding of bullying.⁴⁷

Taken together and viewed in the light most favorable to Parent, the record cannot support a finding, by a preponderance of the evidence, that bullying as defined by the Policy occurred. To the extent Parent’s report of one incident triggered the District’s obligations under the Policy, the evidence shows that the school investigated the allegations on that day and again in January. Thus, viewing the evidence, and any reasonable inferences I may draw therefrom, in the light most favorable to Parent, I find it insufficient for her to establish, by a preponderance of the evidence, that the District had (or even should have had) knowledge of bullying under the legal threshold that would have triggered its obligations under the Policy.⁴⁸ Consequently, I do not reach the question of whether the District discriminated against Stewart in violation of § 504 or denied him a FAPE, by failing to follow policies and procedures to investigate and address bullying concerns or convene a Team meeting to review the IEP and propose changes, between October 2019 and January 2020. The District is entitled to a directed verdict on the bullying claims, A(1), B(2), and B(3).

2. School Resource Officer Claims

Parent claims that by involving the school resource officer (SRO) in responding to Stewart’s dysregulation in January 2020, ABRSD discriminated against him in violation of §504 and failed to implement the IEP then in place, dated March 28, 2019 to March 27, 2020 (2019-2020 IEP). To grant the District’s *Motion* as to these claims, I must construe the evidence in the light most favorable to Parent, including all reasonable inference that must be drawn therefrom, and determine that it is insufficient to support a verdict in her favor on these claims, by a preponderance of the evidence.⁴⁹

Parents entered into evidence a Memorandum of Understanding (MOU) developed between ABRSD and the Acton Police Department, under which SROs are established to foster “positive relationships with student, faculty, staff and parents.”⁵⁰ Pursuant to the MOU, SROs are not to interfere in “non-violent infractions of school rules and policies not amounting to criminal or delinquent conduct such as tardiness, dress code violations, and disruptive or

⁴⁴ Exh. P-34, P-84.

⁴⁵ Exh. P-60.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ M.G.L. c. 71 §370.

⁴⁹ See *Alholm* 371 Mass. at 627; *Elizabeth R.L.*, *supra*.

⁵⁰ Exh. P-8.

disrespectful behaviors . . . except, as asked or needed, to support school staff in maintaining a safe school environment.”⁵¹

Parent contends that on January 7, 8 and 9, 2020, the SRO, Detective Tyler Russell, was called to assist with Stewart’s dysregulation in violation of §504, because of Stewart’s disability. Additionally, Parent claims that the use of the SRO by ABRSD in response to Stewart’s dysregulation denied Stewart a FAPE. In particular, Parent alleges that ABRSD failed to follow Stewart’s IEP because the use of the SRO was incongruous with the “positive behavior support plan” called for in his IEP. Parent did not specify which portions of the IEP she believed were not being implemented, instead relying on general claims of failure to implement both the IEP as a whole and Stewart’s behavior support plan (BSP).

For Parent’s FAPE claim, as it relates to the use of the SRO, to survive a directed verdict, I must construe all the evidence, and any inferences that may be drawn therefrom, in her favor, and determine that she could establish, by a preponderance of the evidence, that the involvement of the SRO constituted a material failure to implement Stewart’s IEP.⁵² For Parent’s claim under §504 to survive the District’s *Motion*, I must view the evidence in the same way and determine whether that evidence is sufficient for me to determine, by a preponderance of the evidence, that ABRSD acted with bad faith or gross misjudgment in involving the SRO in Stewart’s dysregulation during January 2020.⁵³

Parent’s allegations focus on events that occurred on three separate dates in January 2020. I examine each in turn, based on the evidence viewed in the light most favorable to Parent.

a. January 7th

On January 7, 2020, Parent drove Stewart to school He refused to leave the car to enter the school building for over two hours. Parent alleges that the SRO was called to the scene to intimidate Stewart. She framed the situation as a tardiness issue; under the MOU, without more, SRO involvement would not be proper.

The evidence, however, relays a different story, even viewed in the light most favorable to Parent. When Stewart would not exit Parent’s care, she requested help from Mr. Amitrano.⁵⁴ The involvement of Mr. Amitrano, a “preferred” person when Stewart experiences difficulty, is one strategy used by ABRSD on January 7, 2020.⁵⁵ Neither he nor Ms. Turner, the school

⁵¹ *Id.*

⁵² See *Alholm* 371 Mass. at 627; *Colón-Vazquez*, 46 F. Supp. 3d at 143-44; *Van Duyn v. Baker Sch. Dist.*, 502 F.3d at 815.

⁵³ See, e.g., *Monahan*, 687 F.2d at 1171; *K.D.*, 55 F. Supp. 3d at 788; *Nickerson-Reti*, 893 F. Supp. 2d at 300. I note here that at ABRSD’s request, and over Parent’s objection, I excluded from the evidence a report regarding a student other than Stewart. Parent argued that this report was evidence of other options available to ABRSD to manage dysregulation. As Parent could not provide any information regarding the student involved, including whether he had a disability, the document was irrelevant. Moreover, it would not have been relevant to establishing accepted professional judgment, practice, or standards for the purposes of determining whether the District violated § 504 by involving the School Resource Officer (SRO) in managing Stewart’s dysregulation. Tr. Vol 1, 35-39.

⁵⁴ Tr. Vol 1, 196:12-15.

⁵⁵ Exh. P-83; Tr. Vol 2, 127:120-24.

counselor, succeeded in getting Stewart to leave the car. According to a report in evidence, Stewart told Mr. Amitrano that he did not want to go into school because of the kids playing in the front circle. Parent moved her car to a different location and Stewart still refused to exit. While the testimony diverges as to whether Stewart had Parent's car keys, and/or Mother had a second set of keys, the school operated under the belief that at one point Stewart took his mother's keys and locked himself in the car.⁵⁶ Parent acknowledged at Hearing that Stewart was pushing, hitting, and kicking her,⁵⁷ but she testified that she did not remember whether he hit ABRSD staff members.⁵⁸ In a document submitted by Parent, Mr. Amitrano reported that Stewart was throwing objects out of the car and kicking him, as well as Ms. Turner and Stewart's special education teacher, Chelsea Medvedeff, who attempted to prompt Stewart by tapping on the car window; tapping is another neutral prompting and communication method ABRSD would use with Stewart.⁵⁹ Ms. Medvedeff testified that Stewart unlocked the door, kicked her, and then locked the door again.⁶⁰ She attempted to prompt him neutrally to unlock the door for 15 minutes, but was unsuccessful; he was ultimately in the car outside of the school for over two hours.⁶¹ As staff members' prompting strategies failed to convince Stewart to exit the car, Mr. Amitrano told Parent that in similar situations, District personnel usually call the SRO, and he understood at the time that mother agreed with this course of action.⁶² Eventually Mr. Amitrano contacted Detective Russell, as Stewart was continuing to aggress toward staff, who were concerned that Stewart was locked in the car. Detective Russell was also unsuccessful in getting Stewart out of the car. Ultimately, Stewart exited the car to go to the bathroom and spent the remainder of the day in school.⁶³

Viewed in the light most favorable to Parent, the evidence and inferences that may be drawn therefore establish that Stewart spent two hours inside Parent's car in front of the school, refusing to exit, though he was not locked in. Parent requested assistance from school staff, who were unable to get him to leave the car; instead, he kicked them, pushed and hit his mother, and slammed the door shut repeatedly. All of this occurred before ABRSD contacted the SRO for what they viewed as an acceptable reason: to "support school staff in maintaining a safe school environment."⁶⁴ Parent's assertion that the SRO was called to intimidate Stewart is nothing more than "mere speculation and conjecture," which is insufficient to defeat the District's *Motion*.⁶⁵ Together, this evidence and the reasonable inferences to be drawn from, construed most favorably to Parent, is insufficient for her to establish, by a preponderance of the evidence, that ABRSD's involvement of the SRO when Stewart was dysregulated on January 7, 2020 was tied to his disability or was motivated by bad faith or gross misconduct.⁶⁶

⁵⁶ Exh. P-46.

⁵⁷ Tr. Vol 1, 196:16-24, 197:1-10.

⁵⁸ Tr. Vol 1, 197:15-23.

⁵⁹ Exh. P-46; Tr. Vol 2, 151:9-20.

⁶⁰ Tr. Vol 2, 151:4-20.

⁶¹ Exh. P-57.

⁶² Exh. P-46.

⁶³ Tr. Vol 2, 152:3-11 (Medvedeff).

⁶⁴ Exh. P-8.

⁶⁵ See *Alholm*, 371 Mass. at 628; *Raunela*, 361 Mass. at 28.

⁶⁶ *Nickerson-Reti*, 893 F. Supp. 2d at 299.

Furthermore, this evidence, viewed in the light most favorable to Parent, does not support a finding, by the preponderance of the evidence, that the District's involvement of the SRO on this date constituted a material failure to implement Stewart's IEP.⁶⁷ Parent provided no evidence as to how ABRD's involvement of Detective Russell on January 7, 2020 constituted a violation of any specific provision of Stewart's IEP, much less a material one. In fact, Ms. Medvedeff demonstrated that the District utilized positive behavior intervention strategies, as called for by his IEP and BSP, in attempting to coax Stewart to exit Parent's car.⁶⁸

b. January 8th

Parent alleges that Detective Russell's involvement in Stewart's dysregulation on January 8, 2020 constituted a violation of § 504 and a failure to implement his IEP. The evidence before me as to this date demonstrates that at the time Stewart became dysregulated, Detective Russell was at the Merriam School teaching a class to sixth graders.⁶⁹ After Stewart failed to respond to a requested prompt to either ask for more breakfast time or transition to class, he began engaging in non-compliance, self-injurious behaviors, and property destruction (flipping a table and throwing chairs).⁷⁰ Stewart also eloped outside of the building at one point before returning of his own volition.⁷¹ Detective Russell was contacted after Stewart had returned to the building into Mr. Amitrano's office. Detective Russell testified that he did not enter the room in which the dysregulation was occurring, nor did he help the support team outside during Stewart's elopement. Mother offered no evidence to contradict this testimony and evidence, which suggests that Detective Russell was not involved in the events that transpired on January 8, 2020. For these reasons, I find that even viewing the evidence in the light most favorable to Parent and drawing all reasonable inferences therefrom, Parent cannot, by a preponderance of the evidence, establish that the involvement of Detective Russell in Stewart's dysregulation on this date was due to Stewart's disability, or that ABRSD discriminated against Stewart by calling the SRO. As above, Parent points to no provision of Stewart's IEP that the District failed to follow by calling Detective Russell, who did not engage with Stewart on this date. As such, the evidence, viewed in the light most favorable to Parent, does not support a finding that the District's actions in contacting Detective Russell on this date constituted a material failure to implement Stewart's IEP.⁷²

c. January 9th

Parent and ABRSD have offered conflicting accounts of the events of January 9, 2020. Among other things, Parent contends – and has offered some evidence to support her contentions – that Detective Russell was contacted by District staff to assist in managing Stewart's dysregulation; that Detective Russell participated in a Safety Care restraint, despite not being trained in Safety Care; and that Stewart was impacted negatively by this restraint. Viewing the evidence in the light most favorable to Parent, and drawing all reasonable inferences therefrom, I

⁶⁷ See *Colón-Vazquez*, 46 F. Supp. 3d at 143-44.

⁶⁸ Exh. S-13, S-19.

⁶⁹ Tr. Vol 3, 118-119.

⁷⁰ Ex. P-122.

⁷¹ *Id.*

⁷² *Colón-Vazquez*, 46 F. Supp. 3d at 143-44.

cannot determine at this stage that Parent will be unable to establish, by a preponderance of the evidence, that ABRSD's involvement of the SRO in managing Stewart's dysregulation on January 9, 2020 constituted a violation of §504 or a material failure to implement Stewart's IEP.

Therefore the District's *Motion* is denied as to the SRO claims, A(3) and B(1)(a), but only as to the events of January 9, 2020. The District is entitled to directed verdict on these claims as to the events of January 7 and 8, 2020.

3. Inappropriate Consequence Claims

Parent contends that between December 2019 and January 2020, ABRSD discriminated against Stewart in violation of §504, and failed to implement his 2019-2020 IEP, by failing to utilize positive behavior interventions and instead imposing inappropriate consequences for manifestations of Stewart's disability.

Parent testified that as a result of his behavior, which arises from his disability, Stewart was removed from the classroom, prevented from accessing her, prevented from using the bathroom, and required to clean the classroom. Much of this testimony has been refuted by the District's witnesses and Exhibits. I cannot conclude, however, that the evidence and the reasonable inferences that may be drawn therefrom, construed favorably to Parent, is insufficient for me to find, by a preponderance of the evidence at the completion of the case, that ABRSD's actions in responding to Stewart's behavioral dysregulation constituted a violation of §504 or a failure to implement his 2020-2021 IEP. Therefore, the District is not entitled to a directed verdict for the inappropriate consequences claims, A(4) and B(1)(c).

4. Construction Rejection Claim

Although Parent acknowledges that she initially accepted the 2019-2020 IEP and never explicitly rejected it, Parent contends that requesting a Team meeting, providing notes from a doctor excusing Stewart from school, and reporting to a police officer who came to her home that she intended to move Stewart to a different school, together, constitute constructive rejection of Stewart's 2019-2020 IEP.⁷³ As such, she should be able to challenge the contents of that IEP, not just its implementation. The evidence before me establishes that a Team meeting was held in November 2019, at Parent's request, and another was held in March 2020. No evidence was presented that Parent informed the Team either verbally, at these meetings, or in writing, that she was rescinding her acceptance of, and/or rejecting, the 2019-2020 IEP. Moreover, the evidence offered in connection with Parent's choice to keep Stewart out of school (i.e., the letters and testimony from the pediatrician) do not reference Stewart's IEP goals or services as the rationale for keeping Stewart home, nor did Parent appear to report to the Acton police officer that she would not send Stewart back to the Merriam School because of his IEP or his special education needs.⁷⁴

Generally, to express discontent with an IEP, parents may reject the IEP in whole or in part; request a meeting to discuss the rejected portions of the IEP or its overall adequacy; or, if

⁷³ Exh. P-42, P-67, P-68.

⁷⁴ Exh. P-42.

mutually agreed upon, accepted an amended proposal.⁷⁵ This may occur at any time prior to the expiration of the IEP. BSEA Hearing Officers have concluded that in particular instances explicit rejection of an IEP is not required. This inquiry is fact-intensive. Constructive rejection has been found where parents notified a district of their intent to enroll their child at an alternative placement and hold the district financially responsible for such placement, and the subsequent enrollment of the student in another school.⁷⁶ Alternatively, constructive rejection was not found where parents raised concerns about the student's IEP and ultimately decided to home school the student, in the absence of formally withdrawing the student from school.⁷⁷

The evidence before me and the inferences I may draw therefrom, viewed in the light most favorable to Parent, demonstrates that the District was aware, prior to the expiration of the 2019-2020 IEP, that Parent wanted Stewart to change schools, and that Stewart was missing school. Parent did not communicate to the District that either of these actions was linked to Stewart's special education or related services. It would not be reasonable to infer that these actions constituted a rejection of the IEP. As such, the evidence is insufficient to me to find, by a preponderance of the evidence, that Parent rejected the IEP constructively during its term. The District is entitled to a directed verdict on claim (C).

IV. CONCLUSION

1. For the reasons above, the District's *Motion for Directed Verdict* is GRANTED as to "the bullying claims" (A(1), B(2), B(3)), and for claim C "the constructive rejection claim."
2. The District's *Motion for Directed Verdict* is entered IN PART for the "SRO claims" A(3) and B(1)(A), as to the incidents on January 7, 2020 and January 8, 2020, but not as to claims regarding January 9, 2020.
3. The District's *Motion for Directed Verdict* is DENIED with regard to claims A(4) and B(1)(c), "the inappropriate consequences claims."

ORDER

This matter is continued to June 7, 2021 for Hearing on the following claims:

- A. Whether Acton-Boxborough discriminated against Stewart in violation of §504 of the Rehabilitation Act of 1973, through:

⁷⁵ See 603 CMR §28.05(7)(a).

⁷⁶ See *In Re: Westport Community Schools and Jed*, BSEA #1302922 (Oliver 2013); see also *In Re: Wachusett Regional School District*, BSEA # 01-2301 (Putney-Yaceshyn 2002) (noting that where the IEP process had been "suspended" pending the results of an independent evaluation which would enable parents to accept or reject an IEP, and parents did not reject the IEP on the IEP form, a letter they sent, along with their private placement of the student, was "akin to constructive rejection of the IEP in the context of the facts of this case").

⁷⁷ *In Re: Natick and Framingham Schools*, BSEA #1707648 (Berman, 2017).

- (2) changes in Stewart's IEP services (addition of 1:1 aide, removal from general education classes) without parental consent between January and March 2020;
 - (3) involvement of the SRO in responding to Stewart's dysregulation on January 9, 2020; and/or
 - (4) imposition of inappropriate consequences and punishment (i.e., cleaning the classroom, removal from classroom, disallowing bathroom use, preventing access to mother) for manifestations of Stewart's disability (i.e., behavioral dysregulation) between December 2019 and January 2020;
- B. Whether Acton-Boxborough denied Stewart a FAPE in violation of the Individuals with Disabilities Education Act by
- (1) failing to implement an accepted, expired IEP dated March 28, 2019 to March 27, 2020 through
 - (a) use of the SRO in response to Stewart's dysregulation on January 9, 2020;
 - (b) alteration of IEP services without the consent of his parent/guardian (i.e., assignment of 1:1 aide, pull-out from general education classes) between December 2019 and March 2020;
 - (c) failure to utilize positive behavior interventions and instead imposing inappropriate consequences and punishment (i.e. cleaning the classroom, removal from classroom, disallowing bathroom use, preventing access to mother) on Stewart between December 2019 and January 2020
- D. If the answer to (A) or (B) is yes, what is the appropriate remedy?

By the Hearing Officer:⁷⁸

/s/ Amy M. Reichbach

Dated: June 7, 2021

⁷⁸ The Hearing Officer gratefully acknowledges the diligent assistance of legal intern Marion Schulz in the preparation of this Ruling.