

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

In Re: Student v.
Acton-Boxborough Regional School District.

BSEA# 2103253

DECISION

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

On October 30th, 2020, Parent filed a 20-page Hearing Request raising 29 claims under multiple statutes and seeking 9 procedural, substantive and declaratory judgement remedies. Most of Parent's claims were dismissed via a Ruling on Acton-Boxborough Regional School District's Motion to Dismiss.¹ The surviving claims proceeded to a Hearing held remotely via Zoom on June 2 and 21, 2021, before Hearing Officer Rosa Figueroa.

The Hearing was postponed several times at the request of both Parties, most often to accommodate the Parties' requests to conduct discovery, hold a pre-hearing conference and hear and dispose of additional motions to wit: a Motion for Joinder and a Motion to Sequester Witnesses filed by Parent; and Motions for Directed Verdict filed by both Parties at the conclusion of the first day of Hearing. Lengthy rulings on all the aforementioned were issued.

Those present for all or part of the proceedings were:

Parent

Paul J. Klehm, Esq.	Attorney for Parent/Student
Cristina F. Freitas, Esq.	Attorney for Parent/Student
Debbie F. Freitas, Esq.	Attorney for Parent/Student
Colby C. Brunt, Esq.	Attorney for Acton-Boxborough Regional School District
Thomas Costello, Esq.	Attorney for Acton-Boxborough Regional School District
Dawn Bentley	Assistant Superintendent for Diversity, Equity & Inclusion
Deborah Dixon	Interim Special Education Director
Nina Pickering-Cook	Attorney for Detective Eracleo
Michael Eracleo	Police Officer, Acton Police Department
Jane M. Werner	Stenographer, Doris O. Wong Associates, Inc.
Marguerite Mitchell	Hearing Officer, BSEA (observer)
Hector Pagan	Legal Intern, BSEA (observer)

¹ Via Ruling issued on March 16, 2021, Parent's claims involving procedural and substantive violations pursuant to the IDEA, M.G.L. c.71B and Section 504 of the Rehabilitation Acts of 1973 were allowed to proceed. All other claims over which the BSEA lacked jurisdiction were dismissed.

The official record of the hearing consists of documents submitted by the Parent and marked as Exhibits PE-4, PE-5, PE-6, PE-10, and PE-12 to PE-41², and documents submitted by Acton-Boxborough Regional Schools District (AB or District) marked as exhibits SE-1 to SE-23. On June 21, 2021, the Parties' requested continuance of the Hearing to submit written closing arguments. This request was granted via Order issued the same date. Closing arguments were received on July 19, 2021, and the record closed on that date.

I note that following filing of the Hearing Request, and as recently as the Hearing, Parent verbally modified the remedies sought, as Parent's attorneys came to understand that they could not prevail on some of their claims. However, despite Parent's constant change of position, she never filed an Amendment to her original Hearing Request. Thus, this Decision addresses the substantive and procedural claims surviving the District's Motion to Dismiss, as follows:

ISSUES FOR HEARING

1. Whether AB violated Student's procedural due process rights pursuant to the IDEA and Section 504;
2. Whether AB violated Parent's procedural due process rights by denying her an opportunity for meaningful participation consistent with the IDEA and Section 504;
3. Whether Student failed to make effective progress as a result of AB's denial of FAPE;
4. Whether Student is entitled to compensatory education services.

PARTIES' POSITIONS

Parent's Position:

Parent asserts that AB failed to conduct Student's three-year re-evaluation in a timely fashion, and also failed to convene Student's annual IEP review meeting prior to expiration of the IEP, that is, prior to January 6, 2020.

Parent concedes that AB convened the annual review IEP meeting on February 14, 2020 and later forwarded the proposed IEP on March 4, 2020. Parent questions the basis for the District's new IEP and notes that this IEP offered Student fewer pull-out services.

Parent argues that although she did not respond to the proposed IEP, AB should have known that her silence/ inaction constituted rejection of the IEP. She further argues that since Student received services per his stay-put IEP, which was more restrictive than the IEP offered on March 4, 2020, Student was deprived of opportunities for inclusion; therefore, Student was denied a FAPE.

Parent also argues that when AB did not convene a meeting when she requested one later in March of 2020, said failure to convene deprived her of the opportunity for meaningful participation in the decision-making process regarding the provision of FAPE to Student.

² Parent's Exhibits 1, 2, and 3 were excluded and Parent withdrew Parent's Exhibits 7, 8 and 9.

Moreover, Parent argues that AB was aware that Student's needs changed after a school incident (involving Student's sibling and herself) occurring on January 9, 2020. According to Parent, the aforementioned resulted in a denial of FAPE to Student entitling him to compensatory services.

Lastly, Parent seeks declaratory judgment regarding AB's procedural violations.

AB's Position:

AB concedes that it failed to convene Student's Team prior to its expiration on January 6, 2020. The District also concedes that it did not seek parental consent to proceed with Student's three-year re-evaluation in a timely manner. At Hearing AB stipulated to the aforementioned procedural violations but, argued that they were *de minimis* and had no substantive impact on Student's access to a FAPE.

AB asserts that it was responsive to Parent's request for a change of schools following the January 9, 2020 incident (which did not involve Student directly), noting that Parent was pleased with Student's transfer to the Luther Conant School on January 28, 2020, and asserting that Student was doing well in that school.

AB asserts that Student has had access to FAPE at all times and that he has made effective progress consistent with his educational potential. AB states that after it convened Student's Team in mid-February of 2020, it proposed an IEP appropriate to meet Student's then current needs. When Parent failed to respond to the IEP, AB continued to deliver services per the stay-put IEP which AB asserted offered Student even more services than he required. AB thus asserted that since Student's IEP was expired for a limited period of time before the new IEP was offered, and as services continued to be provided pursuant to the stay-put IEP, Student's right to a FAPE was not violated

AB further asserts that it has never denied Student a FAPE because it offered him services via remote instruction during the COVID-19 State health emergency (through the end of the academic year)³. AB asserts that it also implemented Student's stay-put IEP when he returned from Alabama, until Parent fully accepted the March 2021 IEP on March 23, 2021.

In addition, AB asserts that the IEP proposed in March of 2020 (which Parent did not accept), much like the one proposed in March of 2021, offered Student fewer pull-out services and many more opportunities for inclusion consistent with his mastery of IEP goals and objectives by January of 2020 and Parent's stated preferences. As such, AB denies any denial of FAPE to Student.

Lastly, AB disputes that it significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of FAPE to Student, that it caused any deprivation of educational benefit to him, or that it was unresponsive to Parent's requests to meet.

³ According to AB, Student did not participate in remote learning through the end of the school year.

FINDINGS OF FACT

1. Student is a thirteen-year-old resident of the Acton who, at the time of the Hearing, was enrolled at the C.T. Douglas Elementary School in AB. He is described as a funny, smart, happy, energetic, and friendly individual who enjoys playing games, engaging in physical activities, and using the iPad (SE-1; SE-13; Mother).
2. In 2014 Student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). He has been taking medications to manage his behavioral difficulties and ADHD since 2016. The medication reduces his appetite (SE-13).
3. Student is eligible to receive special education services under the categories of a Health Disability (ADHD), Specific Learning Disability (Reading), Physical Impairment (OT), and Communication (PE-32; SE-1).
4. During early childhood Student received speech and language therapy through early intervention to address articulation and language needs. He was first found eligible to receive special education services at three years of age, to address language, attention and concentration issues (SE-14).
5. A cognitive assessment performed in 2013 (WPSSI-IV), when Student was in preschool, revealed that Student possessed average verbal comprehension and fluid reasoning skills. Scores in visual spatial, working memory, and processing speed abilities fell within the low average range (SE-13).
6. Student struggled with academic progress early on. His IEPs have consistently required goals to address reading, writing and math challenges, as well as communication and social skills, although the goals have evolved as Student demonstrated progress (SE-13; SE-14).
7. In 2016 Student participated in a three-year re-evaluation. Per the WISC-V Student's scores in verbal comprehension and visual spatial skills fell in the average range, in the high average range on the fluid reasoning index, and in the low average range on the working memory and processing speed indices. Additionally, Student's cognitive assessment indicated clinically significant levels in all areas of executive functioning (SE-13). Results of academic assessments demonstrated significant weaknesses with basic reading, writing, and spelling skills (SE-1).
8. A speech and language evaluation was also performed in 2016. In this evaluation Student demonstrated average receptive vocabulary skills and below average receptive language ability (SE-14). He demonstrated significant difficulty with tasks that required following verbal directions of increasing length and complexity, listening to discrete information, and selecting the correct response to both concrete and inferential questions (SE-1). The occupational therapy assessment completed in December of 2016 noted that Student appeared to be easily distracted by his immediate surroundings and that he was

capable of working for 15 to 20 minutes. Student benefited from frequent breaks and provision of concise directions (SE-14).

9. On the social-emotional and behavioral functioning assessments conducted as part of the 2016 three-year re-evaluation, Student demonstrated a range of behavioral difficulties associated with ADHD. Student's behavioral issues included aggressive behaviors, defiance, and running away from teachers (SE-13).
10. An Annual Review IEP meeting was held on January 7, 2019 (SE-1). Student's progress in basic reading, written expression, math reasoning, attention and social skills was noted. The Team proposed an in-district (Merriam School) partial inclusion program for the period from January 7, 2019 to January 6, 2020 (*Id.*).
11. The January 7, 2019 to January 6, 2020 IEP contained goals, in the areas of basic reading, social skills, written expression, mathematics, and communication, as well as nineteen accommodations. The Service Delivery Grid offered consultation (1 x 15 minutes/weekly) and in class support (1 x 120 minutes/daily) under Grids A and B. Under Grid C, it provided for direct services in math (1 x 45 minutes/daily); writing (1 x 45 minutes/daily); reading (2 x 30 minutes/weekly); school psychological services (1 x 30 minutes/weekly); speech and language services (2 x 30 minutes/weekly); and occupational therapy services (1 x 30 minutes/weekly) (SE-1).
12. On January 23, 2019, Parent fully accepted the 2019-2020 IEP and placement (SE-1).
13. Student was due for his three-year re-evaluation on December 9, 2019 (PE-28). On December 17, 2019, AB forwarded Parent a consent form to proceed with Student's re-evaluation (SE-3). Parent did not sign this consent form until February 14, 2020 (Dixon). Parent testified that she and her family spent a few days out of state during the holidays (Mother).
14. Student's Team did not convene before the expiration of the January 2019-January 6, 2020 IEP. AB stipulated to this fact. Student continued to receive services per this IEP until a subsequent IEP was proffered and accepted in March of 2021.
15. The Parties stipulated that an incident occurring in school at the end of the day on January 9, 2020, resulted in Student's brother being taken to the hospital and Parent being arrested for disorderly conduct. At the time of the incident, Student was on the school bus on his way home from school and did not witness the incident or his mother's arrest (PE-6; Mother).
16. According to Parent, Student was informed of her arrest when a police officer came to the house (Mother). Parent testified that she later showed Student (and the rest of her children) a video taken by her of the January 9, 2020 incident from her Facebook Live recording (Mother).

17. Student did not attend school following the incident on January 9, 2020 (involving Parent and the sibling) until January 27, 2020.
18. On or about January 13, 2020, Parent met with AB's Superintendent, Peter Light, and other school officials and discussed un-enrolling Student and his brother from the Merriam School (Dixon). This meeting was not an IEP discussion meeting (Dixon).
19. Email correspondence between Jennifer Washburn (special educator, AB) and Juliana Schneider (Merriam School, Principal) on January 13, 2020, discusses the need to convene Student's Team for the annual review. Ms. Schneider inquired about waiting until the end of that week to forward the paperwork/invitations, based on the assumption that by then they would have more information regarding what school Student would be attending (SE-21).
20. On January 16, 2020, Student was seen by his pediatrician, Dr. Jeffrey Ristaino for a well visit previously scheduled on December 5, 2019 (PE-32). The clinical notes indicate that Student, then in sixth grade, had been getting good grades, that he got along with parents, siblings and friends and that his appetite was good. Student was sleeping 8 to 10 hours per night, had no trouble falling asleep, and was not waking at night for significant periods of time. He engaged in regular exercise and spent time playing video games and watching TV. Student was described as "alert, well appearing, cooperative and comfortable" during the exam, which was normal/ unremarkable. There were no safety concerns noted (PE-32).
21. Dr. Dawn Bentley, AB's Assistant Superintendent for Diversity, Equity and Inclusion, emailed Parent on January 16, 2020, to advise her that an Invitation to a Team Meeting the next day had been emailed to her (PE-14; PE-15). Parent responded that she was unable to meet on January 17, 2020.
22. The Parties continued corresponding via email on January 19 and 21, 2020 regarding convening a meeting to discuss Student and his sibling's return to school and attendance at a different school (Gates) as Parent noted that Student would not be returning to the Merriam School (PE-18; PE-19; PE-20; Bentley).
23. When Parent's telephone was shut off on January 16, 2020, Detective Eracleo, Family Services, Acton Police Department, went to Parent's home to conduct a wellness check at Dr. Bentley's request. According to Dr. Bentley, she engaged Detective Eracleo to assist her in the process of scheduling a meeting with Parent to help get Student back to school (Bentley). Detective Eracleo noted that the children were happy and that per Parent, they would not return to the Merriam School (PE-16).
24. On January 21, 2020, Deborah Dixon, AB's Interim Special Education Director, spoke with Parent over the phone. Parent indicated that she did not want Student to attend Merriam and that Student, himself, did not want to return to that school because of the incident on January 9, 2020 (Dixon). Ms. Dixon also discussed Student's re-evaluation and reconvening of the Team. A Team meeting was initially scheduled for January 28,

2020, at the Merriam School and later rescheduled for February 6, 2020 at Student's new school, the Luther Conant School (Conant) (Dixson).

25. On or about January 23, 2020, Parent engaged Attorney Steve Ballard to represent her, and Attorney Ballard began communicating with AB's Attorney, Nancy Nevils (Dixson).

26. On January 23, 2020, Parent telephoned Dr. Ristaino to request that he write a letter. Parent visited his office the next day. A clinical note taken by Amie Webb, LPN, states

Mother came into office states patient has been having issues at school, the school has DCF and the police involved. Mom's lawyer recommended obtaining a letter from PCP stating he has been suffering from effect of witnessing his mom's arrest and to be excused from school and transferred to a new school. Letter created for review and approval... (PE-32).

27. On January 24, 2020, Parent provided AB with a note from Dr. Ristaino stating that Student should be excused from school indefinitely and that he should transfer to another school as he recuperated from the traumatic experience of witnessing his mother's arrest. He further noted that Mother was in the process of seeking therapy for Student (PE-21; PE-32).

28. According to Parent, Student was terrified and experienced irritability, trouble concentrating and anxiety resulting from the January 9, 2020 incident involving his sibling and Mother. She testified that Student was "mentally crazy because of the [Sibling] incident" noting that it had affected Student very severely (Mother). Parent testified that

For weeks, he stayed in the room, not getting up. The kids made fun of him. The police told him that his mother was arrested. He could not believe it. The moment he saw the video, he cried. [Student] cried. [Student] cries every day. [Student] hates school. [Student] hates education. [Student's] life was changed on January 9th forever. I don't know how I will bring my child back to being a normal child again. We are not in a good place because of the incident. They move from school to school because each school lied, each school lied" (Mother).

29. Parent and her attorney met with Superintendent Light and a police officer on January 24, 2020 to discuss Student's placement at a different school (Parent).

30. On January 28, 2020, Student transferred to Conant with Parent's agreement (Dixson).

31. Progress Reports for the period ending on January 31, 2020, indicate that Student had mastered the basic reading, written expression, mathematics and social skills goals and

objectives in his IEP and that he was partially proficient in meeting his communication benchmarks (SE-8).

32. On February 4, 2020, AB forwarded Parent a Team meeting invitation for a Team meeting on February 6, 2020 to discuss Student's IEP (Dixson).
33. On February 6, 2020, Parent and her attorney went to the school for Student's IEP meeting. However, the meeting was cancelled because AB was unaware that Attorney Ballard would be attending and it is AB's policy that if a parent's attorney attends a Team meeting, the District's counsel must also participate (Dixson). The Team meeting was rescheduled for February 14, 2020 (*Id.*).
34. Student's Team convened on Friday, February 14, 2020 (PE-24). During the meeting, Parent stated that she was very happy with Student's placement at Conant. She requested that Student not be pulled out of class for services and the Team agreed that he required fewer pull-out services than what had been offered in his 2019-2020 IEP (SE-6; SE-10; Dixson). A new IEP consistent with the Team's discussion, was proposed on February 14, 2020 and later forwarded to Parent on March 4, 2020 (Dixson). The week following the Team meeting, February 17 to February 21, 2020, was school vacation week (Administrative Notice of the 2020 school calendar).
35. Parent signed the consent form for Student's re-evaluation on February 14, 2020 (Parent; Dixson).
36. The proposed IEP, forwarded on March 4, 2020, covered the period from February 14, 2020 to February 13, 2021, and offered Student participation in a full inclusion program with inclusion support for ELA, mathematics and other academics. Pull out services were offered for reading and counseling. This IEP contained 20 accommodations, identical to those in the previous IEP, and 5 goals to address basic reading, English language arts, mathematics, social emotional issues, and executive functioning (SE-4). A behavior support plan was added to the new IEP, through which reinforcing contingencies would be used to increase appropriate behaviors in class and attention to task (SE-5; Dixson).
37. Parent did not respond to this IEP. Thus, AB considered the IEP rejected and Student continued receiving services pursuant to his stay-put IEP, the January 2019-2020 IEP, through the end of the school year (Dixson).
38. Parent testified that on or about March 6, 2020, Student learned from his brother and observation that his brother had a one-to-one staff assigned in school. She testified that Student was terrified that he would also be assigned a one-to-one staff (Parent).
39. On March 6, 2020, Student had a follow-up visit with Dr. Ristaino to address ADD symptoms and medication. Student and Parent noted that while medication may have helped in the past, it was no longer effective in helping Student manage attention, frustration and impulsive behavior. Parent noted that Student's school performance was

slightly improved, but that previously challenging behaviors at home were slightly worse. No change from baseline prior to starting medication was noted with sleep and Student's appetite remained normal. Dr. Ristaino concluded that Student's ADD symptoms were not adequately controlled and suggested that the medication be changed (PE-32).

40. On March 8, 2020, Parent requested a meeting with AB to discuss both of her children (PE-29; Dixson).⁴
41. Student had another office visit with Dr. Ristaino on March 9, 2020, owing to complaints of headaches due to school stress (PE-32). As with all previous doctor visits, he was accompanied by Mother. The medical notes recorded complaints of anxiety, panic attacks and headaches, which Student had been experiencing for several weeks due to stress stemming from the January 9 events. The pediatrician notes indicate that Student presented with

...the following psychiatric symptoms: irritability, trouble concentrating and he states that he does not trust people in authority because of what happened to his brother [-] and mother. He is anxious about going to school and he expressed to me that he feels that the school and town that they currently reside in is 'ruining our life', referring to his family. He denies hopelessness (PE-32).

This medical note further states that Student is frequently having trouble falling asleep, that his sleep is restless and that he often wakes up at night. Student's appetite is described as fair. This note states that Student is actively seeing a therapist, Heidi Johnson, from JRI⁵. Student's medical examination revealed an alert, responsive, cooperative child who was oriented times 3 with no pallor and no diaphoresis. He made good eye contact, his speech was developmentally appropriate and fluent. While Student's medical diagnosis remained as ADD, Dr. Ristaino noted that per his assessment that day, Student presented with "anxiety-panic disorder and post-traumatic stress" (PE-32). Parent stated to Dr. Ristaino that she was seeking Student's move to a school in another town (*Id.*). (Later, on April 20, 2020, Parent called Dr. Ristaino and reported that the sleep and ADD medications were not working.)

42. Parent immediately forwarded AB a letter from Dr. Ristaino, dated March 9, 2020, recommending Student's transfer to a school in a different district because of symptoms Student developed following the January 9, 2020 incident (PE-30; Parent). In his letter, the pediatrician noted that Student had experienced severe anxiety, flashbacks, sleep deprivation and panic episodes consistent with a diagnosis of Post-Traumatic Stress Disorder (PTSD). Dr. Ristaino also noted his medical recommendation that Student attend school in a different district stating that AB's "anticipated approval of this request

⁴ This request was made in an email exchange addressing Student's sibling, which made reference to a regular and a Team meeting for the sibling. Parent's request for a meeting on both children does not specifically state that she was requesting a "Team" meeting.

⁵ This is the only entry in the record relative to this individual and Student participating in therapy sessions.

is appreciated” (PE-30). Via a separate note the same date, Dr. Ristaino requested that Student be excused from school for the following week because of “illness” (PE-31).

43. Student stopped attending school on March 9, 2020.
44. Due to the COVID-19 state health emergency, school closed on March 13, 2020. When schools reopened several weeks later, instruction was provided remotely through the end of the school year.
45. On April 23, 2020, AB forwarded Parent a Distance Learning Plan for Student which offered the following services: weekly interactive occupational therapy with a Google form and consultation as needed; small group speech and language observation and consultation with ongoing email communication; social emotional connection with the school psychologist including 30 minutes per week/ Zoom classroom morning meeting and weekly additional opportunities to meet and/or for consult with Parent as needed; two twenty minute one-to-one academic support sessions weekly (Monday and Wednesday), with ongoing communication via email, monitoring and feedback; and twice per week, thirty minute Zoom class sessions on Tuesday and Thursday (SE-7).
46. Ms. Dixon testified that Student’s general education and special education team reported that he rarely, if at all, participated in remote learning from March 23, 2020 through the end of the school year in June 2020 (Dixon). Mother testified that she could not remember if Student participated in any of the remote learning instruction between March and June 2020 (Mother).
47. Student’s IEP Progress Reports for the period from April to June of 2020 note that Student participated in zero of the 10 individual Zoom sessions from April 17 to June 1, 2020 (SE-8). Shannon Worcester, Student’s teacher, reached out to Parent and Student in an attempt to engage Student in remote learning on April 6, 17, 22, 27 and 29, and on May 4, 11, 2020, all to no avail. On May 12, 2020, Ms. Worcester emailed Parent inquiring if Parent wanted Student to participate in the individual Zoom sessions. Neither Student nor Parent responded to any of the inquiries (SE-8).
48. The last entries for Student’s medical visits with Dr. Ristaino cover a tele-visit on April 30, 2020 and telephone calls from Parent on May 11 and June 1, 2020, solely seeking medication re-fills. Regarding the April 30, 2020 tele-visit, Parent and Student reported that at that time the medication dosage was adequate and was helping Student address attention issues. Student reported experiencing no headaches, stomachaches, irritability, mood swings, depressive symptoms, tics, or sleep disturbances. Academic performance was described as markedly improved and previously challenging behaviors in the home as moderately improved (PE-32).
49. While noting Student’s absenteeism from remote learning, the June 2020 Progress Reports indicate that for the period until school closed in mid-March 2020, Student had continued to demonstrate maintenance of his basic reading, mathematics and written expression goals and objectives previously mastered (SE-8). Despite having

demonstrated previous mastery of his social skills goal, by June of 2020 the school psychologist noted Student's partial regression in meeting this goal owing to his lack of participation in online classes. Student also failed to master his communication benchmarks in which he had demonstrated partial proficiency prior to the school closure (SE-8). (Direct communication services changed to asynchronous work following the school closure due to COVID-19). However, testing conducted in early 2021 would confirm that Student did not need speech and language services.

50. Between March and June 2020, AB did not reconvene Student's Team. AB held IEP meetings for other students during this time (Dixson).
51. Student did not return to AB at the beginning of the 2020-2021 school year. Parent testified that she moved the family to Alabama. Sometime in October of 2020, following Student's unenrollment from AB, the District received a request for transfer of records to a school in Alabama and AB forwarded Student's records (Dixson). (The Hearing record lacks information as to whether Student attended school in Alabama, received any instruction, underwent any assessments, or whether an IEP was implemented.)
52. Sometime after Thanksgiving of 2020 Student returned to Acton. In December 2020 Parent re-enrolled him in AB, where he was assigned to the Douglas Elementary School at Parent's request, the fourth elementary school Student has attended in AB (Dixson; Parent).
53. Student made a smooth transition back into AB. The December 2020 Progress Reports note that he continued to demonstrate mastery of skills and objectives relative to his mathematics, basic reading, and written expression goals. The school psychologist and the speech and language pathologist noted that they lacked sufficient information to determine whether Student had met his social skills and communication goals (SE-8).
54. On or about January 18, 2021, Dr. Ristaino drafted a letter recommending that Student's educational accommodations allow a 4-day per week, in-class instruction to address Student's difficulties focusing during remote learning (SE-18).
55. Between December of 2020 and early February of 2021, AB conducted Student's three-year re-evaluation inclusive of educational, psychological, speech and language, occupational therapy evaluations and in-class observation of Student (SE-10; SE-11; SE-12; SE-13; SE-14; SE-15). Part A of Student's Educational Assessment conducted in December of 2020 notes that Student is not demonstrating progress accessing the general education curriculum. Part B of this Assessment states that Student is capable of grade level work in math, but he was not participating in class activities. His communication skills were not age appropriate (SE-11).
56. Katherine Simmons, MS CCC-SLP conducted the speech and language evaluation. She found that Student had demonstrated significant improvement in all measures of receptive and expressive language skills as compared to previous testing in 2016. While overall language skills were found to be age appropriate, he struggled somewhat with

higher language organization tasks which were managed with repetition of information and extra time. Accommodations inclusive of extra time, graphic organizers and opportunities for Student to process his thinking verbally were recommended but not direct services (SE-14).

57. Charlene Eckl, M.S., OTR/L, performed the occupational therapy evaluation. Student's upper body motor skills, handwriting and keyboarding skills tested as age appropriate and within functional limits, and standardized testing results revealed average fine motor skills. Accommodations were recommended but no direct occupational therapy services were so recommended (SE-15).

58. Alison Martins, special education teacher, performed Student's educational evaluation on January 21, 2021, and also observed Student during ELA and math classes (SE-12).

59. With respect to the observations, Ms. Martin noted that in math, Student was able to sustain his attention through 10 minutes of direct instruction. After that, he required redirection to refocus on the lesson. She further noted that during a 30-minute work time, Student completed two problems while his classmates completed six. In ELA, Student exhibited inflexible moments where he was unable to move on from a task or he chose to engage in a preferred task over the one assigned. In general, she opined that while Student possessed the necessary academic abilities to be successful with grade level curriculum, many of his behaviors and ADHD tendencies hindered his progress (SE-12).

60. Ms. Martins administered the Woodcock-Johnson IV- Tests of Achievement, Form A & Extended, to evaluate Student's academic skills. Student scored in the average range for letter-word identification, sentence reading fluency, word attack, and on the broad reading cluster. In passage comprehension Student scored in the low average range. The Broad Written Language Cluster (BWLC) measures showed Student's skills to be typical of his age group level, despite struggling with some tasks. (He scored in the low average range for spelling, writing samples, sentence and writing fluency.) On the Broad Math assessment Student scored in the superior classification on the Applied Problems subtest, average range in the Math Facts Fluency subtest, and his scores fell in the high average range in the Broad Math Cluster. Student's scores on all measures of the Brief Achievement and Broad Achievement assessments (which measures performance in overall reading writing and math) fell solidly in the average range for Academic Skills, Academic Fluency, Academic Applications, Broad Achievements, and Brief Achievements.

Ms. Martins made numerous recommendations to be implemented in the general education setting, (consistent with best teaching practices and Student's presentation), as well as support from the school counselor/ psychologist and development of an "academic success plan to encourage academic performance" (SE-12).

61. On February 7th, 2021, Carmen Calderon-Lopez, M.S., AB School Psychologist, administered the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V).

Results indicated that Student's cognitive abilities range between the low average range to the high average range. Student scored within the low average range on the working memory index which, according to the evaluator, is typical for children who present with ADHD symptoms. His overall Full Scale IQ fell within the average range. Student's pattern of performance over the years indicated solid skills development in vocabulary development, crystallized intelligence, and ability to use previously acquired knowledge to verbally express his knowledge of words. The social emotional measures revealed Student's executive functioning and behavioral difficulties associated with his ADHD diagnosis (SE-13).

62. Ms. Calderon-Lopez noted that Student struggles with emotional control and at times can be emotionally vulnerable. She noted that the stressful/ traumatic experiences of 2020 could affect his "mood, comfort level, and emotional state at school", however, Student was not then reporting anxiety. He did, however, express frustration with school expectations and schoolwork (SE-13). Ms. Calderon-Lopez opined that Student would benefit from support to access positive coping strategies and become more accepting of adult guidance and supports in school. She recommended working with Student around these issues as well as provision of in-class accommodations inclusive of frequent breaks, check-ins by teachers, implementation of a behavioral contract and support for addressing executive functioning skills (SE-13).
63. Student's Team convened on February 10, 2021, to discuss the results of Student's evaluation and propose a new IEP. The resulting IEP, covering the period from February 10, 2021 to February 9, 2022, proposed full inclusion programming and included 20 accommodations and four goals: executive functioning; social emotional; academic/ work completion; and written expression. The Service Delivery Grid in this IEP offered: a ten minute weekly consultation among the school psychologist, the special education and the general education teachers in Grid A, in-class academic support in ELA and Math (225 minutes weekly each), and a thirty-minute weekly school psychological service session in Grid B. The only direct service outside the general education classroom offered in Grid C of the IEP was a ten-minute, twice per day special education support session with the special education teacher or support staff (SE-16; SE-17).
64. Parent fully accepted the February 10, 2021 to February 9, 2022 IEP on March 23, 2021 (SE-16). AB implemented this IEP immediately (Dixson). Student's social skills Progress Report for the period ending on March 26, 2021, noted that new goals to support Student in the classroom had been developed since Student had refused to leave the classroom to participate in individual counseling (SE-8).
65. On April 27, 2021, Student stopped attending school (Parent). According to Parent Student was afraid of being in school (*Id.*).
66. On or about May 6, 2021, Dr. Ristaino authored another letter reflecting his conversation with Parent, Student and a sibling, noting Parent's intention to move to another town in June 2021, and noting Parent's position that given the impending Hearings, "it would not be in the best interest of her family to have further communication with the Acton school

system” (SE-19). Dr. Ristaino found that Student and the sibling appeared well cared for and healthy. According to Dr. Ristaino they expressed significant feelings of anxiety about school and did not want to go back to AB. Dr. Ristaino did not provide a timeframe for Student’s return to school (*Id.*).

67. Dr. Ristaino never completed a *Physician’s Affirmation of Need for Temporary Home or Hospital Education for Medically Necessary Reasons* Form as prescribed by the Massachusetts Department of Elementary and Secondary Education (DESE) and his letters did not meet the necessary criteria required per this Form. Also, his January 24 and March 9, 2020 letters did not excuse Student’s medical absences for a period greater than 60 school days.

CONCLUSIONS OF LAW:

I begin by noting that in her Hearing Request, Parent raised 29 claims under multiple statutes, most of which were dismissed on jurisdictional grounds. Pursuant to my Ruling on the District’s Motion to Dismiss, only the IDEA and Section 504 procedural and substantive claims were permitted to proceed. Parent however did not establish any Section 504 claim separate from her IDEA claims. Indeed, the factual basis of Parent’s Section 504 and IDEA claims are identical, and the procedural protections under the IDEA greater. In *In Re: Bentley & Grafton Public Schools*, BSEA #1806824 (2018), Hearing Officer Byrne noted that “a school district’s compliance with an IEP developed in accordance with IDEA procedures generally satisfies an entity’s Section 504 obligations with respect to that individual student”. Hearing Officer Byrne thus found it unnecessary to revisit the analysis under the separate statutes where the district had met its obligations pursuant to the IDEA. In the instant case, as Parent has failed to raise separate IDEA and Section 504 claims (falling within the jurisdiction of the BSEA), I find it unnecessary to duplicate treatment/analysis of her claims under the separate statutes, and thus proceed with analysis under the IDEA.⁶

The Parties agree that Student is an IDEA eligible individual, consistent with the Individuals with Disabilities Education Act⁷ (IDEA) and Massachusetts special education law.⁸ Their disagreement centers on procedural and substantive violations and their impact, if any, on Parent and Student.

The IDEA and the Massachusetts special education law and pertinent regulations mandate that school districts offer eligible students a FAPE. A FAPE requires that a student’s individualized education program (IEP) be tailored to address the student’s unique needs⁹ in

⁶ See, *In Re: Ipswich Public Schools*, BSEA #1602849 (2016); and *In re: Gail and Danvers Public Schools*, BSEA #10-1721 (2010).

⁷ 20 USC §1400 *et seq.*

⁸ MGL c. 71B.

⁹ E.g., 20 USC 1400(d)(1)(A) (purpose of the federal law is to ensure that children with disabilities have FAPE that “emphasizes special education and related services designed to meet their unique needs”); 20 USC 1401(29) (“special education” defined to mean “specially designed instruction . . . to meet the unique needs of a child with a disability . . .”); *Honig v. DOE*, 484 U.S. 305, 311 (1988) (FAPE must be tailored “to each child's unique needs”).

a way “reasonably calculated to confer a meaningful educational benefit”¹⁰ to the student.¹¹ Additionally, the program and services offered to the student must be delivered in the least restrictive environment appropriate to meet the student’s needs.¹²

The above standard is aligned with the Supreme Court’s decision in *Endrew F. v. Douglas County Sch. Distr.*, 137 S. Ct. 988 (March 22, 2017) requiring that a student’s program and placement be “reasonably calculated to enable [the student] to make progress appropriate in light of the child’s circumstances.” *Endrew F. v. Douglas County Sch. Distr.*, 137 S. Ct. 988 (March 22, 2017); *D.B. ex rel. Elizabeth B.*, 675 F.3d at 34. Pursuant to the standard in *Endrew F.*, public schools must offer eligible students a special education program and services specifically designed for each student so as to develop that particular individual’s educational potential.¹³ Educational progress is then measured in relation to the potential of

¹⁰ See *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012) where the court explicitly adopted the meaningful benefit standard.

¹¹ *Sebastian M. v. King Philip Regional School Dist.*, 685 F.3d 79, 84 (1st Cir. 2012) (“the IEP must be custom-tailored to suit a particular child”); *Mr. I. ex rel L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1, 4-5, 20 (1st Dir. 2007) (stating that FAPE must include “specially designed instruction ...[t]o address the unique needs of the child that result from the child’s disability”) (quoting 34 C.F.R. 300.39(b)(3)). See also *Lenn v. Portland School Committee*, 998 F.2d 1083 (1st Cir. 1993) (program must be “reasonably calculated to provide ‘effective results’ and ‘demonstrable improvement’ in the various ‘educational and personal skills identified as special needs’”); *Roland v. Concord School Committee*, 910 F.2d 983 (1st Cir. 1990) (“Congress indubitably desired ‘effective results’ and ‘demonstrable improvement’ for the Act’s beneficiaries”); *Burlington v. Department of Education*, 736 F.2d 773, 788 (1st Cir. 1984) (“objective of the federal floor, then, is the achievement of effective results--demonstrable improvement in the educational and personal skills identified as special needs--as a consequence of implementing the proposed IEP”); 603 CMR 28.05(4)(b) (Student’s IEP must be “designed to enable the student to progress effectively in the content areas of the general curriculum”); 603 CMR 28.02(18) (“*Progress effectively in the general education program* shall mean to make documented growth in the acquisition of knowledge and skills, including social/emotional development, within the general education program, with or without accommodations, according to chronological age and developmental expectations, the individual educational potential of the child, and the learning standards set forth in the Massachusetts Curriculum Frameworks and the curriculum of the district.”).

¹² 20 USC 1412 (a)(5)(A).

¹³ MGL c. 69, s. 1 (“paramount goal of the commonwealth is to provide a public education system of sufficient quality to extend to all children the opportunity to reach their full potential... ”); MGL c. 71B, s. 1 (“special education” defined to mean “...educational programs and assignments . . . designed to develop the educational potential of children with disabilities”); 603 CMR 28.01(3) (identifying the purpose of the state special education regulations as “to ensure that eligible Massachusetts students receive special education services designed to develop the student’s individual educational potential...”). See also Mass. Department of Education’s Administrative Advisory SPED 2002-1: [Guidance on the change in special education standard of service] from “maximum possible development” to “free appropriate public education” (“FAPE”), effective January 1, 2002, 7 MSER Quarterly Reports 1 (2001) (appearing at www.doe.mass.edu/sped) (Massachusetts Education Reform Act “underscores the Commonwealth’s commitment to assist all students to reach their full educational potential”).

the particular student.¹⁴ At the same time, the IDEA does not require that school districts provide what is best for the student.¹⁵

The United States Supreme Court has noted the importance Congress attaches to procedural safeguards in the IDEA cannot be gainsaid. *Rowley*, 458 U.S. at 205 (1982). States and local education agencies must assure that students with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of FAPE. *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 987 (1st Cir. 1990). Where a party alleges procedural violations, the Hearing Officer may find that the student did not receive a FAPE only if the procedural violations: (1) impeded the child’s right to a FAPE (2) significantly impeded the parents’ opportunity to participate in the decision-making process; or (3) the procedural violation caused a deprivation of educational benefits. *Doe ex rel. Doe v. Attleboro Public Schools*, 960 F. Supp. 2d 295 (2013).

Consequently, before an IEP can be set aside there must be some rational basis to believe that procedural inadequacies compromised the student’s right to an appropriate education, seriously interfered with the parents’ right to participate in the IEP process, or caused a deprivation of educational benefits. *Roland M.* 910 F.2d at 983.

In determining whether procedural violations amount to a deprivation of FAPE, courts focus on the degree to which school districts offered parents the opportunity to play an important participatory role.¹⁶ The fact that a school may have committed a procedural error does not automatically render an IEP legally defective and therefore, does not automatically constitute a violation of the IDEA. *Gonzalez v. Puerto Rico Dep’t of Educ.*, 969 F. Supp. 801, 804 (D.P.R. 1997). Delays in meeting IEP deadlines do not deny a student a FAPE where they do not deprive a student of any educational benefit. *A.M. v. Monrovia*, 627 F.3d 773, 779 (9th Cir. 2010). However, flagrant procedural violations that cause a negative impact on an IEP’s ability to adequately deliver an appropriate education are considered a denial of a student’s right to a FAPE. *Id.* at 801.

Certainly, failures to meet procedural requirements may be adequate grounds by themselves for holding that a school failed to provide a FAPE. *Gonzalez*, 969 F. Supp. at 811. For instance, there are situations where the failure to convene a Team meeting or propose a new IEP constitutes a sufficiently significant procedural violation to result in a per se denial of FAPE even in the absence of demonstrable educational harm to the student. See *C. D. v. Natick Pub. Sch. Dist.*, No. CV 19-12427, 2020 WL 7632260 (D. Mass. Dec. 22, 2020).

¹⁴ *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 199, 202 (court declined to set out a bright-line rule for what satisfies a FAPE, noting that children have different abilities and are therefore capable of different achievements; court adopted an approach that takes into account the potential of the disabled student). See also *Lessard v. Wilton Lyndeborough Cooperative School Dist.*, 518 F.3d 18, 29 (1st Cir. 2008), and *D.B. v. Esposito*, 675 F.3d at 36 (“In most cases, an assessment of a child’s potential will be a useful tool for evaluating the adequacy of his or her IEP.”).

¹⁵ E.g. *Lt. T.B. ex rel. N.B. v. Warwick Sch. Com.*, 361 F. 3d 80, 83 (1st Cir. 2004) (“IDEA does not require a public school to provide what is best for a special needs child, only that it provides an IEP that is ‘reasonably calculated’ to provide an ‘appropriate’ education as defined in federal and state law.”)

¹⁶ *Quinelle v. Nashoba Regional School District* (BSEA #2009112).

Cases, however, cannot be decided in a vacuum. Rather, the fact finder is called to consider the totality of the circumstances in rendering a determination. Thus, the question here is whether the unique circumstances in the instant case support the findings Parent seeks.

Parent, as the moving party in this matter, carries the burden of persuasion and thus, must prove her case by a preponderance of the evidence, pursuant to *Shaffer v. Weast*, 126 S.Ct. 528 (2005).

Guided by these legal standards, in rendering my determination I rely on the facts recited in the Facts section of this Decision and incorporate them by reference to avoid restating them except where necessary.

After reviewing the evidence, the applicable law, and the arguments offered by the Parties, I conclude that Parent met her burden of persuasion regarding certain procedural violations, but did not meet her burden to show that such violations deprived Student access to a FAPE, prevented him from progressing effectively or entitled him to any compensatory services. My reasoning follows.

Parent's allegations of procedural due process violations comprise: AB's failure to convene Student's Team before the 2019-2020 IEP expired on January 6, 2020; AB's failure to conduct Student's evaluations in a timely manner in the spring of 2020; and AB's failure to convene a meeting when she requested one on March 8, 2020, which at Hearing, Parent argued, was a request for a Team meeting. The surviving substantive claims in Parent's Hearing Request seek compensatory relief and relief through declaratory judgment (the latter something the BSEA is not authorized to grant) for the alleged procedural violations, and for the District's alleged failure to address Student's resulting trauma after the incidents that took place regarding Parent and Student's sibling on January 9, 2020.

AB conceded, in part, to the procedural errors noted above, but argued that such violations did not impact Student's ability to access FAPE or make effective progress.

The relevant facts in this matter begin on December 17, 2019 when AB sought Parent's consent to proceed with Student's three-year re-evaluation, two days before this re-evaluation was due to be completed. Parent did not sign the consent before Student's IEP expired on January 6, 2020, only ultimately signing consent on February 14, 2020. AB made no attempt to convene Student's Team prior to expiration of the 2019-2020 IEP.

Following an incident at school on January 9, 2020 involving Parent and Student's sibling, Student stopped attending school. Motivated by a desire to have Student return to school after the January 9, 2020 incident, AB representatives made numerous attempts to communicate with Parent between January 13 and January 28, 2020. They emailed, telephoned and met with Parent first on January 13, 2020, and again on Friday January 24, 2020 (two weeks following the incident), this time with Parent and her attorney. During this time AB also made numerous attempts to convene Student's Team to conduct the annual review (Dixson).

At the meeting on January 24, 2020, AB acquiesced to Parent's request to transfer Student to a different school, Conant. Student began attending Conant the following Tuesday, January 28, 2020. The Parties then agreed to hold Student's Team meeting at the new school, on February 6, 2020, which was a month following expiration of Student's IEP.

The Team meeting on February 6, 2020 was again delayed when unbeknownst to the District, Parent brought her attorney. Consistent with internal District policy, the District therefore declined to meet without its attorney present. As a result, Student's Team meeting was postponed until February 14, 2020, five weeks following expiration of his prior IEP. When the Team convened on that day, Parent's and AB's attorneys were present. Because Parent had still not yet consented to the three-year re-evaluation (now approximately 2 months since the District had sought consent in mid-December 2019), the Team lacked the benefit of the evaluative data, and thus considered the information available to it at that time, to wit: Student's classroom performance, teacher observation, IEP progress reports and Parent's and service providers' input. Parent signed the consent for Student's three-year re-evaluation at this Team meeting.

Team meeting notes recorded at that meeting reveal that Parent was pleased with Student's placement at Conant and that he was doing well there. The notes further indicate Parent's request that Student no longer be pulled-out for special education services. Progress reports and teacher/ service provider input reflect that Student had mastered his IEP goals and objectives, thus supporting his placement in a less restrictive environment. The Team recommended that Student participate in a full inclusion program, with inclusion support for academics, and pull-out services for reading and counseling, along with the same accommodations provided in his previous IEP. A behavior support plan to support appropriate in-class behaviors and attention to task was added (SE-4; SE-5).

The IEP resulting from the February 14, 2020 Team meeting was forwarded to Parent on March 4, 2020. As noted above, it offered Student increased opportunities for inclusion and fewer pull-out services, consistent with Parent's preferences as stated during the Team meeting. The evidence is convincing that Parent was offered a meaningful opportunity to participate at this Team meeting, her input was considered and ultimately incorporated into the resulting IEP. Parent never responded to this IEP. Thus, Student continued to receive services pursuant his stay-put IEP (2019-2020 IEP) through the end of the school year; an IEP which offered more services than those then recommended in the successor IEP.

Given Parent's lack of action on a proposed IEP reflecting her input, I find disingenuous her argument that Student was deprived of participation in the general education program to which he was entitled, and instead was made to receive services he no longer needed per the stay-put IEP. Having been presented with the option for Student's immediate placement in a full inclusion program, albeit five weeks late, Parent chose not to act.

The week following the Team meeting was AB's February school vacation. Student returned to school for 2 weeks after the February vacation, and then again stopped attending school on

March 9, 2020, pursuant to a letter written by Dr. Ristaino recommending Student's transfer to a different district (PE-30; PE-31; PE-32).

Although Parent signed the consent for Student's three-year re-evaluation at the February 2020 Team meeting, owing to the COVID-19 health emergency school closures, AB failed to complete the evaluations within 30 school-working days (that is, by late April 2020) and convene Student's Team within 45 school-working days from the date of receipt of Parent's consent (that is, May 2020), consistent with 603 CMR 28.05.

In an email communication with Jennifer O'Brien on March 8, 2020, Parent requested to meet with AB, to discuss both of her children (SE-29). At Hearing Parent testified that she intended to request a "Team" meeting and that AB understood that to be the case, even though her request was made as part of an email exchange involving both Team and non-Team meetings regarding Student's sibling and did not specifically mention that she was seeking a "Team" meeting for Student. I am not persuaded that Parent's March 8, 2020 email constituted a request for a Team meeting triggering any legal obligation on the part of the District to schedule one. Furthermore, nothing prevented Parent from reaching back to AB to schedule a meeting after her initial request on March 8, 2020. There is no evidence that Parent communicated in any way with AB regarding Student after March 9, 2020. School closed on March 13, 2020, owing to the COVID-19 State health emergency and reopened in April of 2020 via remote instruction, which AB offered through June 1, 2020 (SE-8). On April 23, 2020, Student was provided a Distance Learning Plan for remote instruction which addressed his speech and language, social/emotional and academic needs (SE-7). Student never accessed any remote instruction and Parent offered no persuasive explanation as to why she did not monitor, facilitate or support Student's engagement with remote learning. AB's staff's attempts to communicate with Student and Parent on April 6, 17, 22, 27, 29, and May 4, 11 and 12, 2020, were ignored (SE-8).

Parent also did not directly inform AB of her move to Alabama. The District learned of this move when, in the early fall of 2020, it received a request for transfer of Student's records from a school in that state (Dixson). Parent presented no evidence whatsoever as to what happened with Student's education while he lived in Alabama, and there is no evidence that any records were transferred back to AB when Mother re-enrolled Student in AB in December of 2020.

It is remarkable that despite Student's intermittent and later total disengagement from education between January and June 2020, he maintained the academic gains made through March of 2020, as reflected in his June and December 2020 IEP Progress Reports. The June 2020 Reports note, however, that he had partially regressed with respect to the social skills goal (previously mastered) and demonstrated only partial proficiency with respect to his communication benchmarks (SE-8), which would have required continuous participation in school if he was to master them.

Student's three year re-evaluation, performed between December of 2020 and January 2021 further supported the District's conclusions that Student had mastered previous goals and

objectives in multiple areas, and that he was ready for more inclusion (SE-16; SE-17). The IEP resulting from that meeting, calling for inclusion programming similar to that proffered in the February 2020 IEP, was accepted by Parent on March 23, 2021. Student then began participating in a full inclusion program with supports, something which he had been offered, and was ready for, a year prior.

I thus find as follows with respect to the 3 discrete procedural violations alleged by Parent:

First, AB's failure to convene Student's Team before the 2019-2020 IEP expired on January 6, 2020 did constitute a procedural violation; however, it did not result in a deprivation of FAPE to Student.

Next, I find that while the District did in fact commit a procedural violation in failing to timely evaluate and convene a Team meeting in December 2019 and again, after receiving Parent's consent, in May 2020, the delay was influenced by multiple mitigating circumstances, including parent's actions/inaction. Because consent was only finally given for the re-evaluations on February 14, 2020, Student's evaluations needed to be completed during the extraordinary circumstances created by the COVID-19 pandemic; a situation that resulted in an unprecedented need for Massachusetts schools to close temporarily and revamp instruction and services when they reopened (remotely) in April of 2020. The record shows that Student never attended school after March 9, 2020 and that he did not participate in any of the remote learning instruction offered by AB between April and June of 2020. Parent also ceased all communication with AB after March 9, 2020 and did not even inform AB that she had moved her family out of state in the fall of 2020. AB's attempts to engage and communicate with the family during this period were ignored. Parent's obstruction and lack of cooperation with the District impeded the District's ability to fulfill its obligations pursuant to the IDEA and M.G.L. c.71B. See *C.G. and B.S. v. Five Town Community School District, et al.*, 513 F. 3d 279 (1st Cir. 2008), citing *Roland M. v. Concord School Committee*, 910 F.2d 983 at 987 (1st Cir. 1993); *Murphy*, 22 F.3d at 1197; *In Re: Andover and Quincy Public Schools, BSEA #1602494 (Berman 2017)*.

In addition, I find that no FAPE deprivation occurred owing to the delay, given that the IEP proffered in February 2020 called for the same less restrictive programming proffered in the IEP accepted in 2021, and it was only Parent's failure to accept the 2020 IEP that resulted in reversion to Student's more restrictive stay-put IEP. Parent presented no evidence regarding her reasons for not responding to the 2020 IEP and she never challenged substantive insufficiencies in this IEP.

Finally, there was no procedural violation in the District's failure to convene a Team meeting subsequent to Parent's March 8, 2020 email. Said email, which was coincidentally sent a few days before the temporary school closures, did not specifically request a Team meeting, nor was it Student specific (as it referenced both Student and his sibling). Moreover, when considering Parent's statements and requests to Dr. Ristaino on March 9, 2020, it would appear that the reason for requesting the meeting related to her desire to move Student to a school in another district, rather than issues regarding his IEP.

In her Hearing Request Parent sought compensatory relief for the District's procedural violations. While hearing officers are authorized to grant compensatory relief when appropriate¹⁷, compensatory relief is an equitable remedy and as such principles of equity and fairness guide the determination of whether this form of relief should be awarded. *Diaz-Fonseca v. Comm. of Puerto Rico*, 451 F.3d 13 (1st Cir. 1993). Such an award requires balancing of the equities and consideration of the reasonableness of the parties' conduct by assessing the totality of the circumstances. Moreover, purely procedural violations of the IDEA may not be amenable to this form of relief if the student was not deprived a FAPE or the violation was *de minimis*. See generally *Maine Sch. Admin. Dist. v. Mr. R.*, 321 F.3d 9, 19 (1st Cir. 2003); see also, *Shawsheen Valley Reg'l Vocational Tech. Sch. Dist. Sch. Comm. v. Commonwealth of Massachusetts Bureau of Special Educ. Appeals*, 367 F. Supp. 2d 44, 57 (D. Mass. 2005). Here, while Parent has met her burden of persuasion regarding the fact of procedural violations, she failed to demonstrate that the violations impeded Student's access to a FAPE or his ability to progress effectively and as such, Student is not entitled to compensatory services.¹⁸

The IDEA places great emphasis on a parent's participatory role in the determination of his/her child's education, and when the denial of such right is egregious it will constitute a *per se* violation of FAPE. School officials, however, cannot be faulted if they have in good faith attempted to engage parent in the decision-making process by inviting them to participate and consider their input, but the parent fails to attend the meeting or otherwise participate in the process. *Blackmon v. Springfield R-XII School District*, 198 F.3d 648 (8th Cir. 1999).

While AB's technical procedural violations regarding failure to timely proffer a successor IEP and delay in completing evaluations/convening a Team meeting are clear, AB's violations cannot be viewed in a vacuum and Parent's conduct must be considered as a mitigating factor to the District's violations as it conceded its errors and struggled to cure the defects.

It is a maxim of equity that he who seeks equity must do equity. *Spadea v. Stewart*, 214 N.E.2d 72 (Mass. 1966). Access to an equitable remedy requires that the petitioner comes to the forum with clean hands. *In Re: Medford Public Schools*, BSEA #2002451 (January 27, 2020). Although the doctrine of clean hands is not absolute, its purpose is to promote public policy, integrity of the courts, and to prevent a party benefitting from dishonest actions. *Walsh v. Atlantic Research Associates, Inc.*, 71 N.E.2d 580 (Mass. 1947); *Fisher v. Fisher*, 212 N.E.2d 222 (Mass. 1965). The evidence in this matter raises questions about Parent's intentions and makes it difficult for her to show that Student is entitled to compensatory services, particularly where, as here, despite the missteps on the part of both the District and the Parent, Student was able to progress educationally.

¹⁷ 34 CFR 300.516(C)(3).

¹⁸ Parent is, however, persuasive that the District may benefit from training regarding its procedural due process responsibilities.

I next address Parent's claim that the District failed to address Student's trauma resulting from the aftermath of the January 9, 2020 incident involving Parent and Student's sibling. According to Parent this trauma caused Student's absenteeism from school. In this regard, Parent relied on Dr. Ristaino's notes to support her claim. I find that Parent's reliance on Dr. Ristaino for this purpose is misplaced and her trauma claim is not supported by the credible evidence.

I note that none of Dr. Ristaino's letters met the necessary criteria required for provision of educational services in home or hospital pursuant to 603 CMR 28.03(3)(c). Said educational services are triggered when the physician completes the *Physician's Affirmation of Need for Temporary Home or Hospital Education for Medically Necessary Reasons* Form prescribed by the Massachusetts Department of Elementary and Secondary Education (DESE). The Form requires the physician to affirm that it is medically necessary to offer the particular student his education in a home or hospital setting, for a specific period of time greater than 14 days. The form requires that the physician provide the medical diagnosis and reasons why the student is medically unable to attend school, describe any limitations warranting reduction or modification to the student's programming, as well as the start date and the date on which the student is expected to return to school. Parent and/ or Dr. Ristaino submitted no such form to AB at any time.

Similarly, Dr. Ristaino's letters of January 24 and March 9, 2020 would not have triggered AB's responsibilities under 603 CMR 28.04 (4) because Student's excused medical absences involved a period of less than 60 school days. The January 24th letter did not cover the period of Student's unexcused absences and was intended to support Student's transfer to a different school, a request to which AB acquiesced. The March 9, 2020 letter sought to excuse Student through the following week because of illness/ flashbacks consistent with PTSD. This letter also recommended Student's transfer to a different school or district. As stated earlier, school closed due to COVID and then resumed instruction remotely from the end of April through June 1, 2020.

Parent listed Dr. Ristaino as one of her witnesses, but she never called him to testify. Instead, she relied on her own testimony and the documents admitted into evidence to support her claim of trauma to Student.¹⁹ Therefore, I turn to Student's medical record (at Exh.PE-32) and the findings and recommendations noted in Dr. Ristaino's letters to assess their credibility and reliability *vis à vis* Parent's claims.

Dr. Ristaino's note for Student's visit on January 16, 2020 (seven days following the January 9, 2020 incident) reflected good appetite, no difficulties falling asleep, sleeping for 8 to 10 hours per night, doing well in school and getting along with friends and family. Dr. Ristaino described Student as "alert, well appearing, cooperative and comfortable" during an exam that was otherwise unremarkable. On January 23, 2020 Parent engaged an attorney to represent her and later that day called Dr. Ristaino's office requesting that he excuse Student

¹⁹ Parent also sought the testimony of Dr. Dawn Griffin Bentley to support other claims.

from school. She visited Dr. Ristaino's office the following day and the LPN's notes indicate that Parent stated Student had been having issues in school, that her attorney recommended that she obtain a letter from the pediatrician stating that Student "had been suffering from effect of witnessing his mom's arrest". She also requested that Student be excused from school and that he be transferred to a different school (PE-32). (In fact, the evidence shows that Student did not witness the incident of January 9, 2020 because he was on the bus, on his way home at the time of the incident. Rather, Parent testified that she showed Student her Facebook live recording of the incident.) Dr. Ristaino did not see Student on January 23 or 24, prior to writing the letter Mother requested, and by then, Student had not been attending school since the date of the incident involving his sibling and Mother.

Dr. Ristaino next saw Student in his office on March 6, 2020 for ADD symptoms and medication re-check. On this date Student did not report irritability, headaches or stomachaches, mood disturbances or suicidal thoughts, though Student and Mother complained that the Student's medication was no longer working to address attention, frustration and impulsive behavior (PE-32). (Student's ADD and sleep medication would continue to be adjusted through the end of April 2020.) The March 6, 2020 medical note indicates that Student was receiving the support of an outside therapist and further noted that Student's school performance was slightly improved.

Student did not attend school on March 9, 2020, and instead saw Dr. Ristaino on this date reporting headaches due to school stress. The medical notes indicate that Student had been experiencing anxiety, panic attacks and headaches for several weeks because of the January 9, 2020 incident and was having difficulty sleeping. Dr. Ristaino concluded that Student was suffering from anxiety-panic disorder and post-traumatic stress. His letter dated March 9, 2020 concludes that Student's difficulties with sleep and flashbacks are consistent with a diagnosis of Post-Traumatic Stress Disorder (PTSD) (PE-32). Lastly, the March 9, 2020 medical record notes that Student was seeing a therapist, Heidi Johnson from JRI.

While Parent raised allegations of trauma involving Student, she did not present any documentary evidence regarding psychological or psychiatric evaluations or therapeutic notes by Ms. Johnson or anyone else. Her list of 8 potential witnesses did not include Ms. Johnson and Mother did not mention her, or Student's therapeutic interventions, in her testimony. If Student was so traumatized that he required therapeutic intervention, contributions by his therapist via testimony or documentary evidence would have been central to support Parent's claim. The fact that Parent chose to rely on Dr. Ristaino's notes and her own testimony, and offered no other evidence regarding therapeutic interventions, render her allegations of trauma suspect and compromises her credibility.

By April 30, 2020, Parent and Student reported satisfaction with the medications and dosages and improved attention and behaviors and the medical note indicates that Student's academic performance was markedly improved despite the fact that Student had been out of school since March 9, 2020.

Subsequent medical encounters were unremarkable up to January 18, 2021 when Dr. Ristaino recommended that Student be allowed to attend in-class instruction four days per week (SE-18). Then on May 6, 2021, a few weeks before the start of the Hearing, Dr. Ristaino noted that Student had expressed significant feelings of anxiety about attending school and recommended that Student attend school in another district and that there be no further communication between Parent and AB. (SE-19)

Dr. Ristaino's medical notes contained inconsistencies regarding Student's presentation during office visits that were closely related, and his letters and recommendations (excepting medications) are largely based on parental report and/ or were drafted at Parent's request and, at least once, upon recommendation of Parent's previous counsel. Also, Parent offered no evidence to support Dr. Ristaino's qualifications to make educational recommendations. As such, I find Dr. Ristaino's letters, diagnosis of PTSD and trauma questionable, and his recommendations unreliable and lacking in credibility.

This case is unique in that it appears to present a fact pattern in which actions are driven by circumstances extraneous to the actual provision of FAPE to Student. Despite never amending the Hearing Request, Parent consistently verbally shifted her attention away from her substantive claims and remedies (which she may well have realized would be difficult to prove), and instead focused on the District's technical, procedural violations. Absent an amendment to the hearing request, AB had to defend against all claims, substantive and procedural, despite having conceded and even stipulated to the procedural violations early on. Parent's claims surviving the Motion to Dismiss were narrow and solely involved procedural violations and substantive denial of FAPE allegations occurring over a relatively short period of time; a time during which AB never stopped offering Student services and attempted to communicate with Parent to re-engage Student in school. When the time came for Parent to present her case at Hearing, much of the effort went into keeping information out. In the end, many of her own documents, admissions and narratives served to mitigate the procedural allegations she raised. As such, the level of overlitigation in this matter was unnecessary and a waste of administrative resources. Parent's exhaustion of administrative remedies in this forum could have been accomplished in a much more genuine and efficient manner.²⁰

²⁰ For example, the Parties could have submitted a joint stipulation addressing the procedural violations and seeking dismissal of the case along with a declaration that they had exhausted administrative remedies at the BSEA.

ORDER:

1. Although AB committed procedural violations, none of the violations amounted to a deprivation of FAPE to the Student.
2. Student is not entitled to compensatory services.
3. AB will arrange for and provide procedural due process training to appropriate staff.

By the Hearing Officer,

Rosa I. Figueroa

Rosa I. Figueroa

Dated: August 27, 2021

I express my grateful appreciation to legal intern Hector Pagan for his contributions to this Decision.

AUGUST 27, 2021

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

ACTON-BOXBOROUGH REGIONAL SCHOOL DISTRICT

BSEA # 2103253

BEFORE

**ROSA I. FIGUEROA
HEARING OFFICER**

**CRISTINA F. FREITAS, ESQ., DEBBIE F. FREITAS ESQ. &
PAUL J. KLEHM, ESQ., ATTORNEYS FOR PARENTS
COLBY C. BRUNT, ESQ., ATTORNEY FOR ACTON-
BOXBOROUGH REGIONAL SCHOOL DISTRICT**