

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

In Re: Student v.
Boston Public Schools

BSEA# 1702809

DECISION

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

On October 27, 2016, Parent requested a hearing in the above-referenced matter. Thereafter, the matter was continued for good cause. The Parties engaged in Discovery and Rulings on two motions (a Joinder Motion and on a Motion to limit the Scope of the Claims) filed by Boston Public Schools were issued. Hearing dates were established at a Pre-hearing Conference held on February 2, 2017.

The Hearing in this matter was held on March 17, 20 and 21, 2017¹, at the offices DALA/BSEA, One Congress St., Boston, Massachusetts, before Hearing Officer Rosa Figueroa. Those present for all or part of the proceedings were:

Parent/Legal Guardian	
Daniel Heffernan, Esq.	Attorney for Parent/Student
Melanie Jarboe, Esq.	Co-counsel for Parent/Student
Janelle Dempsey	Parent's Attorney's Legal Intern
Gretchen Timmel, M.Ed.	Massachusetts General Hospital Educational Liaison on Down Syndrome
Brian Skotko, M.D., M.P.P.	Massachusetts General Hospital
Kay Seligsohn, Ph.D.	Massachusetts General Hospital
Annie Frenn	BCBA, Advances Learning Center
Jessica Wenig	BCBA, Advances Learning Center
Jude Morgan	Cardinal Cushing
Kristine Duhamel, MSW, LICSW	Cardinal Cushing
Ginger Sullivan, M.B.A.	Cardinal Cushing
Amy Purkis, M.Ed.	BCBA, Cardinal Cushing
Christine Curtis	Speech and language pathologist assistant, Cardinal Cushing
Paula Kirby	Special Education Teacher, Cardinal Cushing

¹ The Hearing was scheduled to begin on March 14, 2017 but Massachusetts State Offices were closed that day due to inclement weather.

Michael Losde
Jeannette Sedgwick, Esq.
Ann Marie Beliveau
Zachary Hauston
Stephanie Moreau
Agnes Martin, Ph.D.
Blakely Markham, Esq.
Jane Williamson

Boston Public Schools
Attorney for Boston Public Schools
Boston Public Schools Legal Intern
Boston Public Schools
BCBA, Boston Public Schools
School Psychologist, Boston Public Schools
Clark, Hunt, Ahern & Embry
Doris O. Wong Associates Inc., Court Reporter

The official record of the hearing consists of documents jointly submitted by Parent and Boston Public Schools marked as exhibits JE-1 through JE-40², and documents submitted by Boston Public Schools (Boston) marked as exhibits SE-1 through SE-13; recorded oral testimony, and written closing arguments. The Parties' written closing arguments were received on April 18, 2017,³ and the record closed on that date.

ISSUES FOR HEARING:

1. Whether the IEP proposed by Boston offering Student a day placement at Cardinal Cushing is reasonably calculated to provide Student a free, appropriate public education (FAPE), in the Least Restrictive Environment (LRE) If not;
2. Whether Boston is responsible to offer Student residential placement at Cardinal Cushing.

POSITIONS OF THE PARTIES:

Student's Position:

Parent/Student state that Student is almost 19 years old and the current combination of extended day programming/placement at Cardinal Cushing and services privately provided in the home are insufficient to allow her to achieve her transitional goal of living in a supported group home. Parent does not dispute the appropriateness of the day program at Cardinal Cushing, where Student has been placed by Boston since ninth grade. Rather, Parent asserts that without the intensity, consistency, structure and reinforcement that a 24/7 residential program can offer, Student will be unable to derive the necessary educational benefit that will allow her to be as independent as her potential allows when she transitions out of special education in approximately three years.

Parent notes that Student's numerous interfering/ non-compliant/ aggressive behaviors and other related needs, resulting from her Down Syndrome, Autism Spectrum Disorder, Mood Disorder, Communication Disorder and other health related disorders (including severe sleep

² Any reference in the record to "Parent's Exhibits" refers to Joint Exhibits.

³ At the conclusion of the Hearing the Parties requested a continuance of the Hearing to submit written closing arguments by April 3, 2017. Thereafter, on March 23, 2017, Boston requested an extension to submit written closing arguments, which request was granted (over Parent's objection) on March 24, 2017. The new date for filing written closing arguments was set at April 18, 2017.

apnea), cannot be appropriately addressed within the current scheme despite the numerous additional services privately provided to her in the home.

Parent asserts that additional home services will not be sufficient to prepare for transition and independence because the ABA intervention that works best with Student, i.e., “waiting her out”, cannot be appropriately implemented in the home given the time constraints relating to morning bus pick-up schedule and home evening routine, something that can take hours unless Parent assists Student.

According to Parent, Student has become more dependent over the past several months and is not consistently displaying the activities of daily living skills she had once mastered. Several independent/private evaluators and professionals (i.e., physicians, a neuropsychologist, BCBA’s and an educational consultant) have recommended residential placement as the only way to effectively address Student’s numerous challenges appropriately.

Lastly, Parent argues that the desensitization and behavioral interventions that can be implemented by the evening/awake staff at Cardinal Cushing’s residence will allow Student to learn to consistently wear her Continuous Positive Airway Pressure device (CPAP) which is essential to her health and availability to receive education. As such, Parent requests that Boston offer Student residential placement at Cardinal Cushing.

Boston’s Position:

Boston asserts the appropriateness of Student’s day placement with extended day services at Cardinal Cushing, in which she is making effective progress, and argues that Student does not require residential placement to receive a FAPE. According to Boston, issues were noted both in school and at home during observations conducted by Boston’s experts which, if properly addressed, will help Student remain in the home. Boston’s experts recommended a more effective delivery of Student’s educational program in school, as well as more fidelity in the implementation of Student’s behavioral support plan/ interventions at home and in school.

At Hearing, Boston offered to add an ABA provider in the mornings in order to assist Parent in getting Student ready for school, so as to better address Student’s interfering/ stalling/ non-compliant behaviors in the morning. Boston also suggested the possibility of providing Student with private transportation so that she could be “waited out” even if this meant that Student arrived a little late to Cardinal Cushing. Boston disagrees that residential placement is the LRE for Student and further notes that it is not responsible to address Student’s severe sleep apnea as that is a medical condition not covered under the IDEA.

Boston argues that the goals and objectives in Student’s 2016-2017 IEP are appropriate and that the IEP offering Student day placement with extended school day/ year services affords Student a FAPE and is the LRE.

FINDINGS OF FACT:

1. Student, who will turn nineteen in the summer of 2017, is currently in the twelfth grade at Cardinal Cushing. She is a resident of Boston and lives with Parent, grandparent and a sibling (JE-2; Parent). Student has been described as a sweet, loving, and friendly young woman who enjoys socializing, dancing, and laughing with her family and friends (JE-31; Parent). Student carries the diagnoses of Down Syndrome, Autism Spectrum Disorder, Mood Disorder, as well as various health concerns such as severe obstructive sleep apnea and clinical obesity (she weighs 242 pounds and is approximately 4 feet 8 inches tall) (Parent; JE-2; SE-1; SE-7). Student's most recent evaluation also diagnoses her with Communication, Emotional, Intellectual and Health Disabilities (JE-23).
2. In addition to several medications taken on an as needed basis, Student takes Paxil (30 mg. daily), Rifampin (300 mg. daily), Topiramate (75 mg twice per day), Zolpidem (5 mg. daily), Metformin (500 mg. twice per day), Clindamycin (300 mg twice per day) and Norethindrone (10 mg. daily) (JE-25).
3. Student's medical and neuropsychological needs are followed through the Lurie Center for Neurodevelopmental Care at the Massachusetts General Hospital (MGH) (SE-8).
4. Parent was appointed legal guardian of Student on August 11, 2016 (JE-1).
5. At present, Student receives educational services at the Cardinal Cushing Center (Cardinal Cushing) in Hanover, MA, under a partially accepted IEP (P-2; S-1). Although Cardinal Cushing offers both day and residential programs, Student's current placement is in the Day Program. Boston provides Student with transportation services to and from Cardinal Cushing daily. Student also receives daily home services through sources other than Boston (Parent).
6. Parent is a single working mother of two, who has been devoted to addressing Student's needs and has created a loving and supportive home environment. In the home, Student receives assistance from Grandparent, who lives in the same building and acts as Student's caretaker, as well as from several different combinations of privately funded home service providers (Parent).
7. As Student has grown older Parent has become increasingly concerned that Student will require additional services if she is to effectively transition into independent living. Parent is further concerned that Student's needs have grown beyond what Parent can effectively handle with the system currently in place at home (Parent).
8. Student is eligible to receive special education services through her 22nd birthday in July of 2020.

9. Parent and Boston agree that Student's educational services and placement need to address activities of daily living, life skills, socio-emotional skills and vocational skills relevant to becoming more independent as Student transitions out of special education (JE-14; JE-15; JE-23; Parent, Moreau, Martin).
10. From the time she was born until age three, Student received early intervention services. Thereafter, she received special education services in Boston through the beginning of ninth grade when her aggressive behaviors and significant transitioning issues⁴ caused the Team to reevaluate her placement. Student's Team agreed that an out of district placement was warranted and in October of 2013, Student entered Cardinal Cushing as a Day Student (Parent). She remains at this placement to date (*Id.*).
11. Between 2011 and the present time, Student has faced several health issues. She required a three-month inpatient hospitalization at Bradley Hospital related to mental health issues, during which she was diagnosed with a Mood Disorder (JE-40; Parent).
12. In June 2011, Student underwent surgery to have her tonsils and adenoids removed in order to address worsening sleep apnea. Student experienced complications after the surgery, requiring her to stay in the hospital for an additional forty (40) days (Parent; Skotko). At present she is not a candidate for any further surgeries (Parent; Skotko).
13. Student has received intensive behavioral supports at home since she was in elementary school. She received a DESE/ Department of Developmental Services (DDS) grant which provided skills trainers that came to the house to work with Student for several hours during the week and on weekends (Parent). Initially, these supports were provided by Toward Independent Living ("TIL"), a vendor used by DDS (Parent).
14. In addition to the intensive behavioral support services provided by DDS, Student also began to receive ABA services at home, initially provided by Apex through Parent's private health insurance, but changes in ABA laws and Parent's insurance prevented her from continuing these services (Parent).
15. In June of 2015, Parent selected Children's Behavioral Health Initiative, and arranged for Student to receive home ABA services through Advances Learning Center (Advances) (Parent, Frenn).
16. On June 3 and 10, 2015, Gail Clifford, M.S. Ed., BCBA Senior Consultant with Advances, conducted a Functional Behavior Assessment of Student. She recommended that Student receive 24 hours weekly of direct ABA instruction and Parent training by a BCBA. Additionally, the BCBA would require 12 hours for providing ongoing case planning and collaboration with the Advances team members as well as with Parent,

⁴ Student choked one of the teachers with the teacher's I.D. lanyard and she scratch and caused physical harm to other teachers. Transitions were especially difficult for Student and the staff used school police to physically move Student around the building (Parent).

other care givers and service providers. The treatment plan further called for six (6) hours per week of instruction by a paraprofessional with bi-weekly supervision by a BCBA (JE-25).

17. Advances initial plan proposed to address Student's: a) aggressive behaviors (which usually followed denied access to an item, activity or attention); b) non-compliance with demands (e.g., during transitions involving transportation, completing daily self-care routines, food grabbing and stealing, which was of great concern to Parent given Student's obesity); c) property destruction; d) inappropriate language/ gestures; e) grabbing; and f) entering personal space/ inappropriate touching (P-25).
18. Advances recommended that once Student had mastered the objectives in her plan, and had demonstrated for four consecutive weeks, the services could be faded over time in a process that involved approximately seven phases.
19. Annie Frenn, M.S., B.C.B.A, L.A.B.A, with Advances, began supervising Student's home ABA services in July of 2015 (JW-33; Frenn). To date, Student continues to receive home ABA services through Advances paid through Parent's health insurance (Parent; Frenn).
20. Ms. Frenn testified that Student receives six hours of direct instruction weekly, two hours supervision weekly and 2 hours direct and Parent services every other week. Ms. Frenn accompanies Student to her private appointments (such as speech and medical appointments). Ms. Frenn has also observed Student at Cardinal Cushing (Frenn).
21. She noted that over time Student has demonstrated responsiveness and progress in her targeted behaviors (Frenn). She opined that transitions hinder Student's progress as do negative behaviors such as verbal protesting, inappropriate gestures and language, and non-compliance (JE-28; Frenn).
22. Regarding implementation of the home behavioral service plan, Ms. Frenn explained that once Student has mastered/met a goal, the goal will remain in the plan for maintenance, but it is no longer the main focus of Student's ABA session. According to Ms. Frenn, non-compliance (not complying with a demand within 10 seconds) continues to be the greatest issue hindering Student's ability to meet her objectives. Because of non-compliance, Student often does not get through all of the objectives in her two hour session (Frenn).
23. Ms. Frenn testified that Parent, sibling and Grandparent follow the home behavioral intervention plan, and noted "lots of positivity" by all of Student's caregivers in the home (See JE-24 and JE-25; Frenn). According to Ms. Frenn, over time, while the prompting and some strategies in Student's behavioral intervention plan have changed, strategies such as ignoring the behaviors have not (Frenn).

24. Ms. Frenn supported residential placement for Student because of the benefits of peer modeling (she agreed that Student is very socially motivated) and the opportunity it would provide to consistently “wait her out” and help her with the ADL routines (Frenn).
25. Student’s current weekdays begin at 6:00 a.m., when Parent wakes her up and helps Student prepare for the day (JE-30; Parent). Parent takes on most of the responsibility during the morning process because of Student’s stalling (Parent). While Student has acquired some self-care skills, she often exhibits non-compliant behavior. Student is only responsive after being repeatedly, verbally prompted to perform a skill, and even then, she does not perform the task unless she is “waited out”. Because the school bus arrives by 6:53 a.m., Parent does not have time to “wait out” Student in the morning, and thus Parent takes over Student’s self-care routines (e.g., prompting Student to get out of bed, helping her wash, choosing her clothes, and dressing her) in order to get Student ready and out the door on time (Parent). Parent noted that on Sundays Student is able to dress and undress herself independently after church, demonstrating that she has not lost this skill but rather, aware that if she stalls long enough during the weekdays, refusing to follow her morning routine and dress herself, Parent will do it for her (Moreau, Parent).
26. At night, Student often refuses to sleep in her own bed (which is like a hospital bed elevated to address Student’s sleep apnea issues) and crawls in bed with her mother in the middle of the night (Parent; JE-22).
27. Despite Student showering at night, Parent has to wash her again in the mornings, as Student is still incontinent at night. While Student has the ability perform many self-care skills (e.g., dressing and applying lotion) she requires assistance/ prompting when performing skills such as showering or brushing her teeth and often becomes aggravated with Mother when assisted (Parent). While Parent verbally prompts Student to wash and dress herself, she often gives up after two minutes of waiting because of time constraints. Parent noted that there was a time when Student was able to put on most of her clothes on her own, but due to the rigid morning schedule during weekdays, and to avoid Student missing the bus, Parent is unable to wait for Student to comply and helps Student get it done (Parent). The process of waking, washing, and dressing Student takes approximately thirty (30) minutes to complete. At times Parent can get Student to perform some of the tasks on her own, but this requires ample time to wait as Student goes through the motions. After washing and dressing, Student takes her medication and has breakfast before leaving the house. According to Parent, the current schedule does not allow for Student to develop the necessary activities of daily living skills (e.g., bathing and dressing) she will require for independent living, as Student has learned to avoid performing tasks independently. (Parent).
28. Student takes medications three times a day, however, not independently and often resists taking them. Similarly, Student will not use her prescribed CPAP machine necessary to treat her severe obstructive sleep apnea (Parent).

29. Student most frequently engages in non-compliant behavior during transition periods such as when leaving the house to take the bus to school in the morning. When Student refuses to board the bus after being prompted to do so, Parent has to physically pull her on the bus. If Student misses the bus Parent faces additional obstacles getting Student to school. This adds stress and pressure to the family's morning routine (Parent).
30. Wednesdays are half-days at Cardinal Cushing. As such, Parent has arranged for Student to receive an afternoon exercise program every other week. Student has been successful with this program, at times being able to walk on the treadmill for 24 minutes. (JE-30; Parent).
31. On Mondays, Tuesdays and Thursdays, Student arrives home at approximately 5:30 p.m. Her Advances ABA service provider works with her in the house from 6:00-8:00 p.m. (JE-30; Parent; Frenn).
32. Student's home ABA services begin with an exercise routine with Student's choice of Zumba or Yoga. The rest of the time is spent getting Student to shower and get ready for bed. While the goal is to have Student ready to join the family for dinner before 8:00 p.m., Student is often not ready for dinner due to non-compliance/ stalling delays in following her routine and therefore has to eat her dinner late. While Parent's presence is a source of motivation/ reward for Student, it is also a great distraction. If Student hears Parent's voice or sees her, she will want to be with Parent and will not comply with the ABA's demands to complete her activities of daily living routines. Parent is concerned that eating late is contributing to Student's weight and health issues (JE-22; JE-30; Parent).
33. Parent testified that she saw the height of Student's progress with adaptive life skills such as dressing, brushing her teeth, washing herself, household chores, etc., years ago after Parent's successful use of scaffolding to change and encourage Student's behavior during the morning routine. However, according to Parent, Student's progress has diminished over the recent years as Student's non-compliant behavior has increased; Student learned that if she does not comply, Parent will do the task for her (Parent).
34. Student enjoys social interactions such as attending church and parties when in the right mood. She loves to dance and enjoys talking with others, but quickly becomes frustrated when people do not understand her speech (Parent).
35. Parent noted that Student's social skills and ability or willingness to regulate her behaviors in public have decreased. Student and her family used to go to restaurants, an activity Student enjoys, but stopped because Student refuses to leave the restaurant despite knowing that she has to do so once the check is paid. Parent no longer brings Student to the grocery store for similar reasons. Student's limited social skills and ability to comply with demands from unfamiliar adults has also impacted the family's ability to travel (e.g., Student is not able to comply with demands from TSA agents or police officers and they do not understand how to deal with her) (Parent).

36. Student's Team convened on April 9, 2015 for the annual IEP review (JE-2). The ensuing IEP, which covered the period from 4/09/2015-4/07/2016, which found Student eligible under intellectual, communication and health impairment domains, called for her to receive specially designed instruction in a highly structured, small group setting in a separate private day school, to wit: Cardinal Cushing. Student would also receive related services including speech/language therapy, ADL instruction, OT, PT, APE, and ABA services. (Per Grid C, direct special education and related services were as follows: PT (PT) 1 X 30 minutes/week; education/pre-vocational 1 X 32 hours/week with a Special Education Teacher; clinical 1 X 30 minutes/week; speech/language 1 X 30 minutes/week; and OT 1 X 30 minutes/week.) This IEP also calls for participation in extended school day and extended school year programs. Student's extended school day involved participation in the after school program at Cardinal Cushing, Monday-Thursday from 2:45 pm to 4:30 pm, with the exception of Wednesdays and Fridays which are early dismissal days on which Student is released at 1:30 pm (JE-2). Consultation services, as follows, were also proposed: physical therapy (PT) 1 X 15 minutes/month; case management 1 X 30 minutes/week; assistive technology (AT) with an AT Specialist 1 X 15 minutes/month; clinical services 1 X 15 minutes/month; speech/language 1 X 15 minutes/month; and occupational therapy (OT) 1 X 15 minutes/month (JE-2).
37. At the April 9, 2015 Team meeting Parent stated her concern that Student's routine at home was interrupted and complicated by Student's many medical issues, such as worsening sleep apnea. Also, Student's home services had stopped because Parent's insurance had stopped paying for Apex ABA services which Student had been receiving up to that point (Parent). Parent and Boston agreed that Student struggles with schedule changes as with routine daily transitions. Parent opined that Student required more consistency in her routine and more effective methods to address transitions and acquisition of life skills. She noted that without the benefit of 24- hour programming, Student Student's emotional, social and behavioral deficits would be ill served and thus requested consideration of a residential placement for Student (JE-2).
38. On May 27, 2015, Parent consented to the Cardinal Cushing placement but rejected Boston's offer for day programming only (JE-2). Since this IEP, Parent has maintained that Student requires residential placement to receive a FAPE (JE-2).
39. On January 20, 2016, Michelle L. Palumbo, Student's pediatric psychiatrist at MGH, recommended that Student continue to receive at least 10 hours per week of intensive ABA therapy to address her speech/language/communication impairments, behaviors and social difficulties (SE-8). The recommendation for 10 hours weekly of home ABA services had previously been made by Dr. Kerim Munir in early 2015 (SE-11).
40. Amy Purkis, MA.ABA., BCBA, is the Director of Behavioral Services at Cardinal Cushing (JE-32; Purkis). She testified that the behavioral staff at Cardinal Cushing has flexible schedules: some work between 7:30 a.m. and 3:30 p.m., others 3:30 p.m. to 11:00 p.m. and that she personally is always on call (Purkis).

41. Ms. Purkis testified that she collaborates closely with the clinical staff, some of their staff share offices and staff meet formally twice per month (Purkis).
42. Ms. Purkis testified that in the spring of 2016, Cardinal Cushing conducted a functional behavioral assessment of Student. Student's attention-seeking behaviors, stalling and active refusals were identified as behaviors interfering with Student's ability to progress. The report notes that individualized one-to-one attention from preferred staff is a reinforcer for Student and a motivator for good behavior (JE-16; Purkis). Ms. Purkis noted that when Student shuts down, her behaviors are multifunctional; avoidant and attention seeking (Purkis).
43. Ms. Purkis explained that Student has a behavioral plan which calls for teachers to ignore or "wait out" Student's attention-seeking behaviors, which behaviors Student repeats or maintains when she receives attention for the behaviors from peers or adults (e.g., repeating "shut up"). The goal of the behavioral services is to help Student become more independent. She noted that Student had made progress through her behavioral plan (Purkis).
44. Ms. Purkis has never spoken with Dr. Agnes Martin or Stephanie Moreau of Boston Public Schools. (Purkis).
45. Between April and May 16, 2016, Boston conducted a three-year re-evaluation of Student (JE-14; JE-15).
46. Dr. Agnes Martin, who holds a PH.D. in counseling psychology and is a school psychologist in Boston, conducted Student's psychological assessment. She evaluated Student on April 25, 2016, using the Adaptive Behavior Assessment System—Third Edition (ABAS-3), the Behavior Assessment System for Children—Second Edition (BASC-2) Teacher Form Adolescent, Test of Nonverbal Intelligence—Fourth Edition (TONI-4) (used for individuals ages 6 to 89.11); conducted a classroom observation, reviewed pertinent records and consulted with staff at Cardinal Cushing (JE-14). Consistent with previous evaluations, her report, dated May 16, 2016, notes that Student scored in the extremely low category in the ABAS-3, her non-verbal cognitive functioning as per the TONI-4 placed her in the very poor category indicative of an intellectual disability, (below the 1st percentile, standard score of 59), and the BASC placed her socio-emotional skills in the clinically significant or at risk category for all scales except "withdrawal" in which she scored at the average level (JE-14).
47. Dr. Martin noted that Student would continue to require participation in a "highly structured educational program with access to one-to-one instruction to enhance her overall academic, adaptive and socio-emotional skills" (JE-14). Dr. Martin further recommended a full medical assessment inclusive of vision and hearing evaluations and to evaluate Student's limited ability to sustain attention (JE-14).

48. Dr. Martin also observed Student in her classroom, which she described as highly structured, with clear schedules and routines, and offering visual supports. She noted that when Student disconnected, peers interceded and encouraged her to participate. Student listened actively when the teacher read and she answered questions appropriately. Dr. Martin concluded that Student was making progress in her program at Cardinal Cushing (Martin).
49. Kelly A. Gallagher, LCSW, Pupil Adjustment Counselor in Boston, conducted Student's Social Assessment (JE-15). She noted Student's difficulties with aggression, impulsivity, and her severe educational needs, recommending that Student continue her day placement at Cardinal Cushing. She further recommended additional discussion around parental concerns about morning routines/bus pick up time, and that input from the home BCBA team should be obtained to better understand the behavioral issues in the home setting (JE-15).
50. Some of the other evaluations were conducted by Cardinal Cushing staff on behalf of Boston, such as an occupational therapy assessment (JE-9), a cognitive communication evaluation (JE-10) and a physical therapy evaluation (JE-11). The Brigance Comprehension Inventory of Basic Skills II in Mathematics and English was administered to assess Student's math and reading skills (JE-12), and the Wechsler Fundamentals Academic Skills was also administered to assess Student's reading, spelling and math calculation abilities (JE-13). Student scored significantly below age expectation in all cognitive and academic areas. Her physical therapy evaluation found that she demonstrated functional balance for daily activities but recommended that Student be afforded extra time to move around campus, to complete her physical activities, decreased repetitions when exercising, mixed with rest breaks and the use of appropriate footwear to support her arch and heel (JE-11). The occupational therapy evaluation showed Student to have less hand and lower arm strength than her typically developing peers and a weak pincer grasp, which would make activities of daily living such as manipulating clothing, buttons, tying her shoes, latching zippers, etc., challenging for her. She demonstrated basic motor planning skills and her visual motor integration skills were 2 years and 11 months equivalence for visual motor coordination, 3 years 1 month for visual integration, and 4 years 8 months for visual perception. Student was observed to require supervision when conducting self-care tasks and regarding sensory integration, she scored an overall "Definite Difference" as per the scores Short Sensory Profile (JE-9). Numerous recommendations were made by the evaluators to address the aforementioned areas.
51. Student's Team reconvened on May 16, 2016 (JE-4). The IEP resulting from this meeting, covering the period from 5/16/2016 to 5/15/2017, continued to offer Student placement at Cardinal Cushing (JE-3), as the Boston TEAM was of the opinion that Student did not require residential placement in order to make effective educational progress and receive a FAPE (JE-3).

52. The Service Delivery Grid in this IEP included the same consultation services as the previous IEP except that it refers to “Clinical” as counseling services. Similarly, Grid C offered the same amount of OT, PT, speech and language and counseling services as the previous IEP, but differs in that the current one offered Student vocational services 3 X 45 minutes/week, functional academics 5 X 213 hours/week, functional life skills 5 X 120 minutes/week all provided by the special education teacher (JE-3).
53. By May 2016, Student’s daily commute to and from school had become challenging. Student was stating that “she did not want to take the bus” which raised concern with her family. In response, at the Team meeting Boston proposed to provide Student door-to-door transportation services with a 1:1 bus monitor who could communicate with Student (JE-3).
54. The goals in the 5/16/2016 to 5/15/2017 IEP focused on vocational skills, task completion, functional academics, reading, activities of daily living/OT, communication, emotional regulation and physical (strength and endurance building) (JE-3). Specifically, Goal #2 addressing task completion notes that Student requires significant verbal and gestural cues to complete 3-step tasks. She takes 15 minutes to initiate the first step and thereafter, attempts to sit down between tasks, requiring multiple cues to focus on the task at hand (JE-3). Goal #5 addressing ADL/OT, notes that while Student is able to complete some basic daily living tasks with minimal assistance, such as hand washing, she faces significant challenges with toileting, especially with bowel management, which requires continuous verbal prompts from staff for Student to focus and demonstrate proper personal hygiene. (JE-3). The corresponding Measurable Annual Goal to be attained by the end of the IEP period on May 15, 2017, is for Student “to complete her toilet hygiene routine with five verbal prompts per step and staff demonstration using a personal hygiene aid, in 4 out of 5 opportunities observed (JE-3).
55. Student’s Transition Planning Form (TPF) dated 5/16/2016 (which is part of the 5/16/2016 to 5/15/2017 IEP) notes Parent’s concerns: “while Student has made progress at her placement in the day program at Cardinal Cushing, her needs have grown beyond what a day program can manage.” Parent remained concerned that despite the gains achieved at Cardinal Cushing, Student continued to struggle
- ...with transitions, and continues to lack basic adaptive/daily living skills, self-regulation skills and safety skills. After putting many different home-based supports in place so that [Student] could learn these skills while living at home, it has become clear that this patchwork of services is not effective. She requires a residential program to learn the basic skills that will enable her to be a safe and productive member of her community, both now and as an adult (JE-3; JE-4).
56. The TFP further notes that Student would like to live at home with her mom when she grows up, and mentioned several work possibilities, such as a grocery store, fast food

restaurant, Kmart, or something involving animals. Student acknowledged that she still needed to work on skills such as cooking, cleaning, doing laundry, paying bills, managing her money, caring for her health needs, and personal hygiene (JE-3; JE-4). Student was able to make decisions regarding the programs she watched on TV, the activities in which she engaged after school and the foods she ate. She however strived to make other choices such as where to live, work and who to befriend when she grew up (JE-4).

57. At Hearing Parent testified that her goal for Student is that she be successful in a group home with as much independence as possible, and successfully participate in supportive employment with a sheltered workshop (Parent).
58. On April 8, 2016, Kay Seligsohn, PhD, clinical psychologist at Massachusetts General Hospital (CV at JE-35), conducted a neuropsychological evaluation of Student due to concerns regarding Student's progress in developing language, communication and adaptive skills (JE-20; Seligsohn). Student was referred to Dr. Seligsohn by Dr. Skotko, a clinical geneticist in the Down Syndrome Program at Massachusetts General Hospital (MGH) who has treated Student for many years. According to Dr. Seligsohn, in April 2016 Student was reported to be displaying an increase in difficulties with transitions, deviant and disruptive behaviors (including aggression), mood dysregulation, anxiety, behavioral outbursts occurring several times per week, lack of personal safety awareness, staring spells, sexual curiosity/inappropriate behaviors in addition to her complex medical and psychiatric profile (*Id.*).
59. Dr. Seligsohn noted that Student was an engaging adolescent with pervasive cognitive and adaptive delays. Her cognitive and reasoning skills in both verbal and nonverbal domains were found to be extremely low, consistent with an intellectual impairment per the Stanford Binet Intelligence Scales–5th Edition (which is normed for ages 2 to 85). Student's cognitive skills were at the 2-year-11-month level (JE-20; Seligsohn). Her verbal reasoning skills were also at the late 2-year-level. She evidenced a reduced vocabulary base and had great difficulty with understanding of verbal concepts. Student's single word vocabulary was an area of relative strength, as her abilities were closer to the 3-year-9-months level in the Receptive One Word Picture Vocabulary Test–4th, and she was at the 4-year-2-months in the Expressive One Word Picture Vocabulary Test–4th (JE-20; Seligsohn). Dr. Seligsohn concluded that Student could not use language in a functional manner. She was unable to understand much of what was said to her or effectively communicate her needs. Student's overall level of independence was found to be extremely low as per the SIB-R, which assessed her adaptive skills. Motor skills, personal living skills (e.g., eating, dressing, toileting) and social communication skills all fell between the 3 and 4.2 year old level, except that her self-care skills were found to be a relative strength at the 7 year old level. Her visual spatial skills were also found to be limited, impacting Student's ability to navigate the community independently or manage daily home-related tasks (*Id.*). Community living skills fell in the 5 years-11month range. Student could not read, write or complete mathematical problems as evidenced on the WRAT-4, on which her scores fell at or below Kindergarten level (JE-

20; Seligsohn). Dr. Seligsohn opined that because of Student's "limited to negligible adaptive skills", she would require extensive supports (JE-20; Seligsohn).

60. Dr. Seligsohn's evaluation noted observations from Student's classroom teacher, Ms. Madeline Patch, who reported that in the classroom setting, when Student is able to focus, she enjoys engaging in academic work among her peers. Ms. Patch further reported that while Student takes pride in her work and appears pleased when she has done a good job, she is far behind academically, often engages in stubborn behaviors and has particular difficulty engaging with vocational tasks (JE-20).
61. Dr. Seligsohn noted that Student's aggressive behaviors, difficulty mastering basic safety skills, and significant difficulty meeting daily demands, in concert with her failure to develop basic skills required intensive supports and programming. She further noted that her testing revealed that Student understands cause and effect and has the capacity to learn and master new skills (JE-20).
62. Dr. Seligsohn recommended that Student attend a residential program with 24/7 care, focused on developing Student's self-regulation and daily living skills. According to this witness, only with the level of consistency and predictability of a residential placement would Student be able to benefit effectively from her educational program (JE-20).
63. Dr. Seligsohn further recommended a Functional Behavior Assessment (FBA) to better understand and address the variables causing Student's behavioral difficulties. The results of the FBA should be used to develop a Behavior Intervention Plan (BIP) that provides the positive behavioral strategies to address aberrant behaviors interfering with Student's educational progress. She also recommended the use of technology to facilitate communication (JE-20).
64. On June 17, 2016, Parent partially rejected Boston's proposed IEP due to its failure to provide a residential placement at Cardinal Cushing (JE-3).
65. Student started the 2016-2017 school year in her Cardinal Cushing day program in a class with three adults (a teacher and two aides) and 8 students (Kirby, Timmel). She participates in the extended day program on Monday, Tuesday and Thursdays (Parent).
66. Student's Team reconvened on September 12, 2016 to discuss the report of Dr. Seligsohn's April 2016 evaluation and the next steps for Student following Parent's rejection of the proposed 2016-2017 IEP in May 2016 (JE-4). The September 2016 Team again discussed Parent's request for a residential placement, but ultimately concluded that Student did not require 24/7 care in order to make effective progress. As such, Boston forwarded a Notice of School District Proposed Action on September 14, 2016, proposing that no changes be made to Student's IEP/TPF, and noting that "ideally", the next step would be for Parent to accept the proposed day placement for Student (JE-4).

67. On January 30, 2017, Stephanie Moreau (M.A., B.C.B.A., L.A.B.A, Boston P.S.) conducted an hour and fifteen minute observation of Student in her after-school program at Cardinal Cushing (JE-23; Moreau). She reported that the antecedents to Student's refusal behaviors were demands placed on her, noting that Student's behavior is motivated by avoiding or escaping demands. She indicated that the demands placed on Student were not consistently followed through, and while Student's Behavior Support Plan (BSP) called for first/then cards, frequent social reinforcement and visual schedules, she only observed provision of non-contingent social reinforcement. She noted that the BSP was not followed with fidelity in the after-school program. By report, the educators that work with Student in the day program have the ability to "wait her out" and be "firm but fair" with their demands. Ms. Moreau further noted that Student is motivated to access attention but she appears to lack the social and communication skills to do so appropriately (JE-23).
68. Ms. Moreau also observed Student in the home during part of the home ABA session on January 30, 2017 (JE-23). This observation lasted approximately one hour and included an interview with Parent and observation of the ABA provider's home program. According to Ms. Moreau, Student engaged in active refusal and stalling behaviors, and her transition from the kitchen to her bedroom lasted 37 minutes during which she had to be "waited". During the remaining 23 minutes Student was observed to engage in inappropriate vocal behaviors (i.e., "shut up") and grabbing at Parent's hand and arm while Parent was using the laptop. The family reported that Student engages in active refusal daily and in aggressive behaviors approximately 3 out of 5 days. Denial of attention by Parent and placing a demand were observed to be the antecedents for Student's interfering behaviors. By report, denial of food or access to electronics is the antecedent for aggressive behaviors that may include hitting, spitting, pushing or kicking (JE-23; Moreau).
69. Ms. Moreau recommended that Student receive 240 minutes (4 hours) per month of consultation that involved training to the caregivers on how to implement the Behavior Support Plan in order to generalize supports across settings so as to decrease Student's maladaptive behaviors. She further recommended five hours per week of teaching Student in the home setting, supervised by a BCBA, preferably in the morning, to help Student get ready for school and decrease stalling. In school, Student would require implementation of ABA throughout the day across all settings with utilization of the BIP to reduce her maladaptive behaviors (JE-23; Moreau).
70. On February 10, 2017, Dr. Seligsohn conducted a second neuropsychological evaluation of Student to measure growth and provide a cognitive comparison with the results of the previous testing of April 2016. Parent had reported a failure to acquire functional living skills necessary for Student to achieve independence, aggressive behaviors several times per week, was disruptive several times per day, was destroying property a few times per month and continued to demonstrate difficulty with transitions (JE-21).

71. Dr. Seligsohn administered the Stanford Binet Intelligence Scales-Fifth Edition Abbreviated IQ (JE-21). Dr. Seligsohn found that Student's overall cognitive skills, which fell in the extremely low range (3 years 3 month level, below the 1st percentile), was consistent with previous testing which had been slightly higher (3 years 4 month level). Testing results indicated no cognitive growth between the evaluation conducted in April 2016 and the February 2017 evaluation. Student's verbal knowledge showed no measurable growth over the previous ten months. (As before, her single word vocabulary was somewhat stronger.) Overall Student's language was so limited that she was unable to use language in a functional manner (JE-21; Seligsohn).
72. Dr. Seligsohn noted that Student's nonverbal problem solving skills and her ability to read, write, or complete mathematical problems (as per the WRAT-4) evidenced no measurable growth over the past ten months. She found that Student's adaptive skill (as per the SIB-R) functioning was at the 3-year11-month level, 10 months below the level of functioning demonstrated in the 2016 evaluation. While motor skills remained constant, social/communication skills (at the 5 year level with language comprehension at the 5 year level and language expression at the 2 year level) and personal living skills (3-year-3-month level) had decreased over the past year. Dressing and self-care in the February 2017 testing were at the 2-year-level, eating/meal preparation at the 4-year-level, and toileting is at the 3-year-level. Domestic skills remained an area of relative strength at a 5-year-level, but were still considerably below her skills presented in 2016. Student's community living skills were had also diminished over past 10 months (4-year-10-month level) as she "could not tell the time, manage her schedule, provide exact amount of money to make purchases, or count out change" (JE-21). Similarly, she "could not work consistently for 5 minutes or request the appropriate tools to complete a task" requiring much assistance and supervision when in public (JE-21).
73. Overall, Student's limited to negligible adaptive skills required her to receive extensive supports. Dr. Seligsohn concluded that Student was failing to make effective educational progress and noted that she required more programming and supervision. Testing demonstrated that Student continued to have the capacity to learn and master new skills and that she understood cause and effect. Furthermore, Student understood that if she simply stops engaging, her caretakers at some point will stop pushing her, which has led to her acquiring maladaptive coping skills (JE-21).
74. Dr. Seligsohn stressed the need for more intensive educational programming and recommended that Student participate in a residential program where the faculty and staff are trained in developing skills and working with a population similar to Student. She also recommended residential programming to address Student's aggressive behaviors and personal safety issues, and opined that only with the consistency and predictability of a program that employs the same approach 24 hours per day, 7 days per week, would Student be able to benefit from her educational programming and be ready to transition to adult life,

It is imperative that everyone uses exactly the same approach, 24

hours a day, 7 days a week. It is only with this level of consistency and predictability that Student will effectively benefit from the services provided to her . (JE-21; Seligsohn).

75. On February 15, 2017, Gretchen L. Timmel, M.Ed, (licensed educational psychologist and certified teacher) MGH, conducted a home observation of Student (JE-36; JE-22; Timmel). She found Student's most interfering behavior to be non-compliance, complicated by the increasing wait time that providers and caregivers need to allow for compliance with a demand (JE-22; Timmel). Her report offered a lengthy description of the daily difficulties Student's caregivers and ABA providers encounter in getting Student to comply with the ADL routine in the home. For example, Student likes to sit with Parent or engage with her as the ABA providers are asking Student to perform her ADLs. Addressing Student's non-compliance results in numerous interruptions to the evening's flow as Parent often has to stop what she is doing and step out of the house (Timmel, Parent). Student also leaves her bed in the middle of the night and crawls in bed with Parent which is problematic not only because it is difficult for Parent to quiet her to sleep, but also because Student's bed is elevated to address her severe sleep apnea. Student also refuses to use her sleep apnea apparatus (JE-22; Timmel, Parent).
76. Ms. Timmel explained that transitions are problematic for Student; the adults placing the demands are often faced with Student's refusal to comply, stalling, protesting, crying, tantrums and at times spitting. According to Parent, the triggers for Student's outbursts are unclear (P-22). Ms. Timmel opined that Student is likely to be confused between what she is supposed to do at school and at home, with different combinations of caregivers with or without Parent and she is unable to perceive the context of the teaching at home. Student is therefore unable to internalize the basic routines so as to make meaningful strides toward independence in the area of self-care (JE-22).
77. Ms. Timmel noted that during the two-hour home observation Student did not engage meaningfully in some of the activities she attempted (such as the exercise routine) and did not automatically go through any of the ADL routines she was supposed to complete without being continuously prompted (Timmel). The most successful technique to address Student's non-compliance (i.e., stalling and protesting) is to "wait it out", as she learns from cause and effect but the ability to "wait it out" is limited in a non-residential setting. This has resulted in regression of Student's adaptive skills and is also reinforcing her non-complaint behavior as it is teaching her that she can escape the activity (e.g., dressing herself) through non-compliance (P-22; Parent; Timmel).
78. Ms. Timmel opined that Student had the ability to acquire skills in the home environment, but various interfering factors needed to be filtered so as to access that potential in the home (Timmel). She noted that

It is reasonable to assume that in the home setting there are more variables that can change on a daily basis, such as preferred objects

in the room (stuffed toys), casual talk between [Student's sibling and Parent], and [Parent's] presence, that compete with the directive and teaching associated with the acquisition of basic ADL's (JE-22).

79. On February 27, 2017, Ms. Timmel observed Student in her classroom setting at Cardinal Cushing and toured the facility, including the residences (JE-22). In the classroom, as in the home setting, Student was observed not to initiate a task when she was asked to do so, but five minutes after being prompted, left alone to initiate, and Student noticing that two peers near her had completed the task, she obliged. After noticing this and other instances when Student observed her peers do something and modeled what they did (e.g., move along the line in the cafeteria), Ms. Timmel concluded that besides waiting Student out, the second most effective method to address Student's non-compliance is peer modeling. According to Timmel, Student was observed to engage in warm, comfortable, exchanges with some of her peers (JE-22; Timmel).

80. Ms. Timmel's observation of Student in the school setting led her to conclude that Student showed increased capacity for independence and compliance in the classroom setting/doing academic work, than performing ADL's in the home setting. She remarked on the fact that when

...[Student's] teacher left the room for a moment (other teachers were present) and before leaving asked [Student] to "keep working". [Student] did so, turning the page and going on to some other questions. Thus, [Student] is showing the capacity for more independence and initiation than was witnessed with her execution of her ADL's in the home setting (JE-22).

81. Ms. Timmel also inquired about the residential program and students' residences. She learned that the overnight staff is trained by Cardinal Cushing. Every residence has one or more staff that sleepover and intervenes at times of crisis, and there is also an overnight staff who stays awake through the night ("awake staff") (Timmel).

82. Ms. Timmel recommended residential placement for Student as

...it will provide her with a consistent environment that will allow for consistent expectations and follow through on her part. The discrete nature of a residence will allow [Student] to focus her attention on the life skill she is learning and not be interrupted by competing activities or the need for parental attention. The residence rooms are tailored in a manner that clearly shows the function of the room, and remove [Student] from the presence of maladaptive behaviors that are associated with her prior attempts at learning these skills. Peer models will be present and model ADL's for [Student]; over time she will likely find it easier to move to a more independent level of functioning; independence is deemed to be more difficult for her in the home as she

is accustomed to the to the role of a “child”, as she has not shaped her behaviors to a higher level in this important area of her life (JE-22).

Ms. Timmel opined that in addition to the benefits from peer modeling, Student’s use of the sleep apnea mask could be appropriately addressed. Ms. Timmel noted that Student would also “require around the clock monitoring for safety” (JE-22).

83. Boston offered to arrange for an additional ABA home provider to come to Student’s home in the mornings to assist Parent with Student’s morning routine as an alternative to residential placement (JE-23). In order that Student may be “waited out” Boston further suggested that it could arrange for private transportation to Cardinal Cushing.
84. Kristine Duhamel, Director of Clinical services at Cardinal Cushing since 2016, supervises five clinicians (JE-38; Duhamel). She works closely with Ms. Purkis, the Director of Behavioral Services. She opined that clinically, Student benefitted tremendously from the carryover, consistency and frequency of the program in school, as well as the access to peers and social opportunities, especially given that Student is almost 19 years old. She noted that Student’s mood can change quickly (i.e., “from happy to nasty”) (Duhamel). Ms. Duhamel opined that participation in the after school program was beneficial but worried about Student’s acquisition and mastery of ADLs and how effective her transition into adulthood will be given Student’s presentation and her current lack of skills essential to living successfully in an adult world. While in her opinion Student was making effective educational progress, there were necessary areas where more progress could be made (Duhamel).
85. Ms. Duhamel testified that she never spoke to Agnes Martin or Stephanie Moreau of Boston (Duhamel).
86. Ms. Duhamel and Ms. Purkis discussed Student’s progress at Cardinal Cushing, noting that Student’s stalling and active refusal behaviors had decreased at the time of the hearing. The significant decrease in stalling behaviors noted in school, led Ms. Frenn to conclude that stalling does not significantly interfere with Student’s academic, social and self-care progress at Cardinal Cushing (Frenn). According to the Cardinal Cushing staff, Student’s behavioral improvement had been achieved through implementation of the behavioral plan (Duhamel, Purkis).
87. The private home ABA charts also show that the frequency of stalling and aggressive behaviors in the home have decreased over the past couple of years, but remain areas of concern that need to be addressed in the home ABA plan (JE-28).
88. Paula Kirby is a licensed speech and language pathology assistant and she has masters of education in special education. She holds preliminary licensure in all levels of severe disabilities. Ms. Kirby is also a teacher at Cardinal Cushing (JE-39; Kirby). She described the benefits of the residential experience at Cardinal Cushing, which offered students increased opportunities for communication through their daily living

experiences. She described Student as a clever, social young woman who knew how to get what she wanted. She opined that Student benefitted greatly from multi-sensory approaches, consistency and repetition (Kirby). Student however, was displaying increased difficulty writing, with her ADLs and her lack of awareness of her own body and what is appropriate to do in public (e.g., lifting her shirt to adjust her brassiere, she does not blow her nose independently, etc.). Ms. Kirby noted Student's non-compliance with demands and difficulties around transitions, and further noted that preferred staff and peers were good motivators for Student (Kirby).

89. Ms. Kirby opined that Ms. Timmel's description of Student's classroom was accurate (Kirby).

90. Despite Student's progress toward meeting academic goals 1, 2, 3 and 6 in her IEP (involving communication and task completion), Ms. Kirby supported residential placement for Student because the consistency, routine, and work with familiar staff would help Student bridge the gap to adulthood. She explained that if Student got lost in the community she would not be able to find/ identify a safe individual to help her. Student also is unable to get up and out of a building without support and encouragement during fire drills. Similarly, at present, Student is unable to cook, clean, perform all aspects of hygiene, do the laundry, manage money, follow a schedule, etc., independently (Kirby).

91. Ms. Kirby testified that she never spoke with either Ms. Moreau or Ms. Agnes Martin (Kirby).

92. Ginger Sullivan is the Director of Residential Services at Cardinal Cushing (JE-37; Sullivan). She explained that at Cardinal Cushing there are 13 residences/houses located in the heart of campus. The smallest houses two people and the largest houses 7 individuals. The staff to student ratio in the largest house was 1 staff to 2 students, with 3 overnight awake staff. The overnight staff participates in a weeklong orientation and receives training necessary to address the individual needs of residents. All of the rooms are fully accessible. A nurse is always available at the nurse's center and can visit students in the residences when students are ill (Sullivan).

93. Ms. Sullivan discussed the benefits of Student's participation in the residential program, stating that Student would not have to travel to and from school, giving her more learning and socialization opportunities to in the afternoons. She would have chores, and increased opportunities to develop ADLs and social skills. The staff would be able to wait her out in the morning if she stalled during self-care routines. Staff has experience working with CPAP sleep apnea devices, and Cardinal Cushing has met with success in getting the residents to use them (Sullivan). Lastly, Cardinal Cushing staff would be able to work closely with Parent during the transition, and later with the Department of Developmental Services (DDS) to enhance student's skills as she enters adulthood (Sullivan).

94. Ms. Sullivan testified that she never spoke with either Ms. Moreau or Ms. Agnes Martin.

95. Judith Morgan is the Director of Academic Services at Cardinal Cushing. Ms. Morgan has attended all of Student's IEP meetings. She explained that Student is eligible to participate in what is known as the Core Program, which services students ages 18 to 22, offering community opportunities, exploration of worksite on campus and later in the community, as students transition out of academics. Student however, has not transitioned into the Core Program at Parent's request. According to this witness, Student is an active participant in the Cardinal Cushing community and activities (Morgan).
96. Ms. Morgan testified that Cardinal Cushing works closely with DDS in preparing Student to transition. Student's educational services include teaching of skills necessary for a group home experience socially, vocationally and with respect to ADLs. She opined that Student has made progress at Cardinal Cushing especially around transitions (Morgan).
97. Christine Curtis is the speech and language pathologist assistant who has worked with Student in her classroom at Cardinal Cushing since on or about November 2016 (Curtis). She noted Student's continued struggles with communication and conversation (e.g., turn taking, initiating and closing conversation). She opined that Student understood more than she let you know. In Ms. Curtis' opinion, participating in the residential program would be beneficial to Student's communication because it would support her goal of expanding communication with peers. Ms. Curtis testified that she never spoke with either Dr. Martin or Ms. Moreau from Boston (Curtis).
98. Dr. Brian G. Skotko, M.D., M.P.P., is the MGH physician responsible for treating Student's sleep apnea (JE-34). He has known Student for 15 years in a professional capacity. Dr. Skotko is extremely well versed in the area of medical pediatrics, particularly Down Syndrome. Additionally, he has conducted extensive research and has numerous publications regarding sleep apnea in individuals with Down Syndrome (Skotko).
99. Dr. Skotko testified that that for several years Student has been afflicted with severe obstructive sleep apnea. Student has undergone all of the recommended medical treatment possible (including the surgery described in Fact # 12, which was ineffective to treat the sleep apnea). According to Dr. Skotko, at present, the best way to address Student's sleep apnea is through the use of a CPAP (Skotko). Although Student has this device and is supposed to use it every night, she has not been able to tolerate using it at home despite Parent's efforts, which included employing evening personal care attendants (Parent; Skotko).
100. Dr. Skotko explained that untreated, severe obstructive sleep apnea results in diminished levels of oxygen reaching the brain during the night. Left untreated, sleep apnea can lead to behavioral issues, attention deficit/concentration, issues catatonia, and even death. Dr. Skotko testified that even mild sleep apnea can lead to a loss of nine (9) IQ points in a year's time. It is also partially responsible for a student feeling fatigued.

He explained that weight loss will not change Student's sleep apnea condition. Dr. Skotko opined that this medical condition poses serious threats to Student's health, behavior, and cognitive abilities. These negative effects worsen the symptoms of Student's disabilities and hinder her ability to properly access her educational programming. He opined that Student's medical condition of severe obstructive sleep apnea, left untreated, will restrict Student's ability to access her education. Dr. Skotko reasoned that teaching Student to tolerate and use her CPAP device through the night must be part of Student's educational programming (Skotko).

101. Parent has become increasingly concerned about the effects sleep apnea has on Student. When Student comes to Parent's bed in the middle of the night, which she often does, Parent will wake up to hear Student coughing and choking while struggling to breathe in her sleep (Parent).
102. Dr. Skotko testified that despite his confidence in Parent's responsiveness to his recommendations and her best efforts, he has no confidence that at home, Student will change her behaviors and wear the CPAP nightly as she is supposed to do. He was, however, hopeful that Student could learn to tolerate the CPAP with consistent appropriate interventions within the context of a residential placement such as Cardinal Cushing, as Cardinal Cushing has experienced success in helping other students tolerate and use the CPAP through desensitization and other behavioral intervention strategies provided by the overnight staff (Skotko).
103. In addition to non-compliance and difficulties with transitions, Parent remains concerned about Student's display of verbal and physical aggression often directed toward her sibling, Parent and Grandparent. Parent worries that Student may become aggressive with other people or in public. While Student understands the repercussions of her physical aggressions after the fact, she is not consistently able to stop the behavior, rather, she appears to become distraught when others explain that they are in pain (Parent).
104. Parent testified that Student understands the concept of "earning" and rewards. She has also demonstrated understanding the concept of "saving", as displayed by a report from Cardinal Cushing indicating that Student had chosen to save her good behavior "points" at school in order to save up for a favorite activity gift card (Parent).
105. Parent's confidence in Cardinal Cushing has grown over time as she has seen Student becoming successful in school. Parent however is frustrated that while Student continues to progress in her day program at Cardinal Cushing, Student does not generalize that progress into the home (Parent).
106. Parent noted Student's desire to "live with friends" rather than "live with Mom" as her transitional goal. Student has also stated a desire to work in a fast food restaurant, grocery store, or obtain a job working with animals (JE-2; JE-3; Parent). Parent shares Student's vision of living in a semi-independent community with peers upon transitioning

out of special education (Parent). Mindful that Student is nearing the end of her special education entitlement, Parent fears that without more intensive programming, Student will not attain her transition goals. Thus, Parent seeks residential placement for Student at Cardinal Cushing (Parent).

CONCLUSIONS OF LAW:

The Parties in the instant case do not dispute Student’s diagnosis, entitlement to special education under the Individuals with Disabilities Education Act⁵ (IDEA) and the state special education statute⁶, or even that the least restrictive environment to address her needs is an out-of- district placement. Their sole dispute involves whether Student requires residential placement in order to access a FAPE.

The IDEA and the Massachusetts special education statute, as well as the regulations promulgated under those acts, 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 needs⁷ in a way “reasonably calculated to confer a meaningful educational benefit”⁸ to the student.⁹ Additionally, said program and services must be delivered in the least restrictive environment appropriate to meet the student’s needs.¹⁰

The above standard, which has been adopted by hearing officers and courts in Massachusetts, is aligned with the Supreme Court’s recent decision in *Andrew F. v. Douglas County Sch. Distr.*, 137 S. Ct. 988 (March 22, 2017) requiring that a student’s program and placement be

⁵ 20 USC 1400 *et seq.*

⁶ MGL c. 71B.

⁷ 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”).

⁸ See *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012) where the court explicitly adopted the meaningful benefit standard.

⁹ *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.”).

¹⁰ 20 USC 1412 (a)(5)(A).

“reasonably calculated to enable [the student] to make progress appropriate in light of the child’s circumstances.” *Andrew F. v. Douglas County Sch. Distr.*, 137 S. Ct. 988 (March 22, 2017); *D.B. ex rel. Elizabeth B.*, 675 F.3d at 34. In *Andrew F.*, the Court rejected the “merely more than *de minimus*” standard adopted by the Tenth Circuit, a standard that afforded students significantly less than the standard utilized in Massachusetts.

Pursuant to the standard embodied in *Andrew F.*, *supra*, and consistent with the standard *applied* in Massachusetts, 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.¹¹ Educational progress is then measured in relation to the potential of the particular student.¹² At the same time, the IDEA does not require the school district to provide what is best for the student.¹³

Furthermore, for students between the ages of 18 through 21, an integral part of the concept of FAPE is the IDEA’s mandate that eligible students be prepared for further education, employment, and independent living. 20 USC 1414(d)(1)(A); see also *Mr. I. v. Maine School Administrative District No. 55*, 480 F.3d 1, 12 (1st Cir. 2007). Consistent with this mandate, school districts are required to develop transition plans that detail the transition services to be offered to eligible students.¹⁴ Transition planning discussions must begin

¹¹ MGL c. 69, s. 1 (“paramount goal of the commonwealth 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”).

¹² *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.”).

¹³ 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 provide an IEP that is ‘reasonably calculated’ to provide an ‘appropriate’ education as defined in federal and state law.”)

¹⁴ The IDEA defines Transition Services as

- ...a coordinated set of activities for a child with a disability that—
- (A) is designed to be within a results– oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child’s movement from school to post– school activities, including post– secondary education, vocational educational, integrated employment (including supported employment), continuing and adult education, adult services, independent living, for community participation;
- (B) is based on the individual child’s needs, taking into account the child’s strengths, preferences, and interests; and
- (C) Includes instruction, and related services, community experiences, the development of employment and all other post– school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation. 20 USC 1401(34).

when the student turns fourteen years old.¹⁵ Transition plans must be developed at the Team meetings, taking into account the student’s needs, his/her preferences, interests and strengths. 20 USC 1401(34). See also, 34CFR 300.43¹⁶.

As part of the transition plan, the IDEA requires that, school districts develop “appropriate measurable post-secondary goals based on age appropriate transition assessments related to training, education, employment, and, where appropriate independent living skills...”. The Plan must provide “transition services (including courses of study) needed to assist the child in reaching those goals”. 20 USC 1414(d)(1)(A)(i)(VIII)(aa) and (bb); CFR 300.320(b). Transition services must be results-oriented, coordinated activities that focus “on improving the academic and functional achievement” of the eligible student so as to facilitate his/her movement to post school activities. 34 CFR 300.43. Transitional goals and objectives are particular to the specific child and can vary greatly depending on that child’s aptitude, interests, abilities and skills.

The Massachusetts Department of Elementary and Secondary Education has designed Forms and offered helpful guidance in the development and implementation of Transition Plans, in an effort to guide school districts through this process. See *Technical Assistance Advisory SPED 2013-1* and *Technical Assistance Advisory SPED 2014-4*.¹⁷

With this guidance I turn to the specific facts in the case at bar.

Parent asserts that Student’s needs are severe and complex and that the only way to prepare her for a more independent life is through the structure and consistency of a residential placement. Parent argues that by failing to provide Student with residential placement Boston is denying her a free, appropriate public education (FAPE).¹⁸

¹⁵ In Massachusetts the age for beginning transition planning is 14. Section 2 of M.G.L. c.71B as amended by Chapter 285 of the Acts of 2008.

¹⁶ “(a) Transition services means a coordinated set of activities for a child with a disability that—

- (1) Is designed to be within a results– oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child’s movement from school to post school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;
- (2) Is based on the individual child’s needs, taking into account the child’s strengths, preferences, and interests; and includes—
 - (i) Instruction;
 - (ii) A related services;
 - (iii) Community experiences;
 - (iv) The development of employment and all other post school adults living objectives; and
 - (v) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.

(b) Transition services for children with disabilities may be special education, if provided as specially designed instruction, or a related service, if required to assist the child with a disability to benefit from special education.” 34 CFR 300.43.

¹⁷ See also MGL c.688.

¹⁸ 34 CFR 104.33(b).

As the moving party, Parent carries the burden of persuasion pursuant to *Schaffer v. Weast*, 546 U.S. 49, 126.S.Ct.528 (2005), and must prove her case by a preponderance of the evidence.

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

Upon consideration of the evidence, the applicable legal standards and the arguments offered by the Parties, I find that Parent has met her evidentiary burden of persuasion that Student requires residential placement in order to make effective progress and receive a FAPE. With only three years of special education entitlement remaining, Student requires a 24/7 program that can help her improve upon and master necessary life/transition skills, as explained below

I note that Parent has been requesting residential placement for Student since May 27, 2015, when she partially rejected Boston's offer to continue Student's day placement at Cardinal Cushing in the 2015-2016 IEP (JE-2). Thereafter, Parent partially rejected the subsequent IEP for the same reason, maintaining that Student requires 24-hour educational programming by trained staff, to access a FAPE (JE-3). Parent asserts, and the record supports a finding that, Student's significant educational needs in the behavioral, social and life skills domains can only be appropriately addressed in a residential placement, particularly given the limited time left in her entitlement to special education (JE-2; Parent).

Parent and Boston agree that Student's educational services and placement must address life skills and vocational skills necessary to becoming more independent as she transitions to adult life. (Parent, Martin). Dr. Seligsohn, Ms. Timmel and Dr. Skotko supported residential placement for her in order to accomplish this. Cardinal Cushing staff that work directly with Student also recognized the benefits of residential placement for Student. Only Boston's two experts, Ms. Moreau and Dr. Martin, opined otherwise.

Dr. Seligsohn's April 2016 revealed that Student's cognitive skills fell at the 2-year-11 month level. Student fared better on tasks with a concrete model or structured response style. Academic tasks revealed that Student was not able to read, write, or complete mathematics problems (WRAT-4). Student's adaptive skills assessments suggested that her overall level of independence was extremely low (below the 1st percentile, age equivalent of 4 years-9months); that her gross and fine motor skills were extremely low (also below the 1st percentile); and that her social/ communication skills were also extremely low (at the 4-year-old equivalency level, with social interaction skills at the 6-year-old level, language comprehension at a late 5-year-old level, and expressive language skills at the late 2-year-old level (JE-20).

Similarly, Dr. Seligsohn found Student's personal living skills to be below the 1st percentile, at an age equivalence of 4 years-6 months. Dressing and toileting abilities were at the 3-year-level, and eating and meal preparation at the 4 year-level. Her highest scores were for self-care skills (7-year-level) and domestic skills (at the 10 year-level). She was able to take clothing off and put simple garments on, but could not consistently put shoes on the correct

foot or tie them. While she was able to use the toilet, she was not independent in toilet hygiene and required assistance with bowel movements and when in public places. Student's community living skills also fell in the extremely low category (below 1st percentile) with a 5-year-11-month age equivalence (JE-20).

It is worthy of note that when choosing the testing instruments Dr. Seligsohn chose the Stanford Binet Scales of Intelligence, because this test is normed for individuals ages 2 to 85. She did so to more accurately capture Student's true cognitive abilities, which fell at the 2 year 11 month level, with slightly higher levels on certain subtests (JE-20; JE-21, Seligsohn). In contrast, Boston's evaluator, Dr. Martin, selected the TONI-4 which is used for individuals starting at age 6, thereby not capturing how low Student's abilities truly are in certain areas (JE-14; Martin).

Later assessments conducted by Dr. Seligsohn in February of 2017 yielded results similar to the 2016 evaluation, with even lower scores in certain areas. For the most part, Student's cognitive and academic scores had remained stable between her testing in April 2016 and February 2017 (JE-20; JE-21). However, Student's adaptive skills had regressed and she demonstrated fewer daily living skills. According to Dr. Seligsohn, Student's judgment and reasoning skills were akin to those of a toddler. (She explained that when Student misbehaves she is not making a decision to misbehave per se) (Seligsohn).

Overall, Student's adaptive functioning had dropped between 2016 and 2017, leading Dr. Seligsohn to conclude that Student would require residential programming to acquire the skills needed to enjoy a more independent life (JE-20; JE-21; Seligsohn). Dr. Seligsohn opined that Student possessed the ability to acquire and master new skills, but required the consistency of a structured residential program, where the faculty and staff were trained in developing skills and working with students who manifested severe cognitive and behavioral deficits, to address them effectively (JE-20; JE-21). Dr. Seligsohn further indicated that Student could not care for herself independently and would always need to live in a supervised setting with a responsible adult (JE-21; Seligsohn).

Gretchen Timmel, Student's educational specialist/liaison at MGH's Lurie Center, has had experience working with individuals with dual diagnoses of Autism/Down Syndrome. During Ms. Timmel's February 27, 2017 classroom observation of Student at Cardinal Cushing, Student engaged in active refusal, but with consistency, direct instruction, reinforcement and peer modeling, Student was able to comply and participate in the classroom activities (Timmel). Ms. Timmel noted that Student mostly gets stuck in transitions. According to Ms. Timmel, Student benefits greatly from peer interaction at school, as she takes to modeling behavior, which is often helpful (Timmel). And, according to Parent, Student has in fact displayed significant improvement with non-compliant behaviors at school (Parent).

Dr. Timmel also observed Student in the home for two hours and fifteen minutes during an ABA session on February 15, 2015 (Timmel). She noted that Student required full prompting for many activities and that her speech was difficult to understand because of

articulation issues. Stalling and inability to attend to task for more than 10 or so minutes hindered Student's ability to get through her routines. Student was found not to be in contact with time and space continuously, appeared to lose track of what needed to happen within a set period of time, and got stuck, this in contrast to her school behavior where she followed routines by modeling peers, and took a task more to completion without requiring direction through every step of the process (Timmel). Dr. Timmel opined that Student was an associative learner, noting that the home environment was not appropriate for instruction because at home Student sees herself as a child, which does not contribute to Student's independence. Dr. Timmel opined that in the home Student experienced confusion regarding mother's role and the caretakers who direct her (Timmel). In this witness' opinion, Student has the potential to acquire skills, but at home, other things get in the way of her learning (Timmel).

Dr. Timmel testified that Student needs residential placement to learn ADLs in a functional fashion, and to get into a more adult/independent state of mind. In addition, Student's sleep apnea could be better addressed and Student would have increased access to peer modeling, neither of which could occur at home (Timmel). She recommended an environment with 24/7 systematic instruction (Timmel)

Lastly, in testimony, Ms. Timmel dismissed Boston's suggestion that Student's refusal behaviors were possibly due to adolescence, because Student's developmental state and functional abilities are akin to those of a much younger child (Timmel).

Ms. Frenn, Student's home ABA provider/supervisor, also supported residential placement for Student. She noted the benefits of available peers whom Student could model, given that Student is very socially motivated. She also stressed that in a residential setting the providers would have the ability to consistently wait Student out, the strategy that best works to address her behaviors. Residential placement would also benefit Student by helping her master her ADL routines (Frenn).

Ms. Duhamel and Ms. Purkis discussed Student's progress at Cardinal Cushing, noting that Student's stalling and active refusal behaviors had decreased in that environment. While private home ABA charts also show that the frequency of stalling and aggressive behaviors in the home have decreased over time, the significant decrease in stalling behaviors noted in school led Ms. Frenn to conclude that in the school setting, stalling did not significantly interfere with Student's academic, social and self-care progress (JE-28; Frenn). She indicated that the difference between the two is the intrinsic nature of the environments, that is, the structure of the school environment cannot be replicated in the home. According to the Cardinal Cushing staff, Student's behavioral improvement had been achieved through implementation of her behavioral plan (Duhamel, Purkis).

Student's progress to date is due to the combination of school and home services Student has received thus far. Student's home services have been consistently provided by Parent through her private insurance and the DESE/DDS grant (Parent). One cannot emphasize enough the need for/ benefit derived from the home ABA services provided by Advances,

since June 2015. However, despite all these services, Student's interfering behaviors are preventing her from making effective progress in critical ADL skills, and there is little more that can be done in the home to alter this (Timmel, Seligsohn, Parent). The evidence is convincing that adding a session of ABA in the morning would not be sufficient to facilitate Student's effective progress toward her transitional goals.

Parent testified that Student's difficulty with transitions continues to be a contributory factor to her failure to progress in ADL skills. She opined that given Student's current busy schedule, adding an ABA person for one hour in the morning as Boston suggested would not help the situation and Student's daily schedule would likely feel busy, overcomplicated, and confusing (Parent).¹⁹

Both Ms. Timmel and Parent noted that Parent's presence, while motivating to Student, is also a great distraction. If Student is trying to get something done and hears Parent's voice, she will stop and go to her (Parent). As a result, Parent has to lock herself in her room or wait in her car while Student is doing her home ABA routines. This interrupts the flow of the evening and often, Student has not completed her routine by dinner time at 8:00 p.m. (JE-22; Parent, Frenn).

Other concerning behaviors, such as verbal and physical aggression, which Student has been displaying in the home (e.g. scratching, hitting, kicking) also require consistent intervention. Parent testified that when she goes out with Student she must ensure that Student is in a good mood to avoid her engaging in aggressive behaviors. (To date Parent has used social stories, first/ then cards (which Student ripped), and rewards for good behavior. Additionally, Student's family works with the adult family care program) (Parent).

Parent is also concerned about Student's safety in the community. For instance, Student's inability to comply with instructions from TSA agents and police officers can place her at great risk. Parent fears that Student will not be able to live on her own if she does not understand the urgency in complying with such figures, as non-compliance in those instances Boston relied on the testimony of Ms. Moreau and Dr. Martin to rebut Student's need for residential placement. Boston however, is not persuasive in its arguments.

Ms. Moreau, who is acknowledged to be a qualified expert in her field, only observed Student during her after school program at Cardinal Cushing and for only one hour during the ABA session in the home (Moreau). Notably, Student engaged in refusal/non-compliance during a transition when a demand was placed on her and had to be waited out for 37 minutes. Student also engaged in verbal aggression that evening and she did not complete

¹⁹ At present, Student's Monday to Friday schedule involves waking up at 6:00 a.m., washing and dressing, taking medications and breakfast at 6:30 a.m., and boarding the bus at 6:53 a.m. Student is in school from 7:00 a.m. to 5:00 p.m., she has ABA services to assist with her ADLs at home from 6:00 p.m. to 8:00 p.m., and gets to bed by approximately 9:00 p.m. (P-30). Because of the tight morning schedule, Parent cannot implement the one strategy that works with Student, waiting her out, when Student initiates non-compliant behaviors in the mornings (Parent).

her routine (Moreau). These issues have been consistently addressed by experts over the past several years and it is clear that in the home environment Student will not be able to internalize the skills she requires.

Ms. Moreau did not discuss implementation of Student's behavioral plan during the academic portion of Student's day, nor did she speak with any of Student's day program providers or teachers, raising concerns as to the depth of information on which she based her opinion.

Dr. Martin observed Student during her academic program and noted the appropriateness of the program for Student. The testing instruments she selected, however, failed to capture the extent of Student's academic/ cognitive limitations because they were not normed for individuals below age 6, and Student's cognitive and ADL abilities fall below the four year old level. She also did not discuss Student's needs and progress with Cardinal Cushing staff servicing Student (Martin).

Both Dr. Martin's and Ms. Moreau's testimony offered a fragmented vision of the totality of Student's issues, needs and programming, and therefore, their testimony is not as helpful or persuasive as that of Parent's witnesses.

As such, I find that Student warrants the 24 hour consistency and repetition offered through a residential placement to make effective progress in developing her adaptive, self-care, independent living skills, to generalize those skills and to effectively address the interfering behaviors preventing her from progressing toward her transition goals (Parent, Seligsohn, Timmel, Skotko, Frenn).

Sleep Apnea:

Parent argues that Student also requires residential placement to help her address the self-help management skills necessary to handle her severe sleep apnea. She further asserts that this is a component of a school district's FAPE obligation to students transitioning into adulthood. See 603 CMR 28.06(4). I note that in Student's case this "self-help management skill" involves desensitization to and use of the CPAP device while sleeping.

Boston argues that sleep apnea is a medical condition, not educational in nature, and that the residential program at Cardinal Cushing does not treat sleep apnea, it only implements prescribed interventions (Sullivan). Boston further asserts that there are no doctors or nurses in the residences at Cardinal Cushing and the staff relies on 911 emergency personnel to address medical emergencies that may arise there. Furthermore, house managers do not live in the residences and the staff responsible for students in the residences receive only minimal CPR and first aid training. Moreover, Boston argues that there is no written policy at Cardinal Cushing's residential program to address behavioral issues that occur at night or after school hours.

The Courts have established that the determination of whether a school district is required to provide a service pursuant to IDEA hinges upon whether the service falls under the category of non-medical “related services” or, conversely, whether the services qualify as “medical services.” See *Cedar Rapids Community School Dist. v. Garret F. by Charlene F.*, 106 F.3d 822, 824-826 (8th Circ. 1997). The dichotomy is relatively clear: if the service is “related” then the district must provide the service; if the service is “medical” then the district is not required to cover such service. See *Cedar Rapids, supra*, 106 F.3d at 824; *Irving Indep. School Dist. v. Tatro*, 468 U.S. 883, 890-893 (July 5, 1984).

In *Irving Indep. School Dist. v. Tatro*, the court delineated a two pronged test to determine whether a service is “related” or “medical.” See *Tatro*, 468 U.S. at 890; *Cedar Rapids*, 106 F.3d at 824. First, the court must determine if the service qualifies as a “supportive service ... required to assist a child with a disability to benefit from special education.” See *id.* In *Cedar Rapids*, the Court found that a student who required a ventilator and monitoring by a nurse during the school day met the first prong of the *Tatro* test because the student needed these services in order to attend school and benefit from special education instruction. See *Cedar Rapids*, 106 F.3d at 825. If this first prong is satisfied, then the analysis next turns to whether the “service is a medical service beyond diagnosis or evaluation.” See *Cedar Rapids*, 106 F.3d at 824-825; *Tatro*, 468 U.S. at 890. For this prong, if the ongoing service requires intervention by a physician, it would qualify as a medical service, whereas if the service can be provided by a nurse or layperson, it would instead be considered a related service which districts are required to provide. See *Cedar Rapids*, 106 F.3d at 825; *Tatro*, 468 U.S. at 891-895.²⁰

With this guidance I turn to the question of whether Student’s need for behavioral training relating to use of her sleep apnea device (CPAP) is a related service that Boston is required to provide, or whether it constitutes a medical service excluded under the IDEA. In this context, *Cedar Rapids* and *Tatro* set a very clear line differentiating non-medical from medical services in the special education context. See *Cedar Rapids*, 106 F.3d at 824-825; *Tatro*, 468 U.S. at 890-895. The question turns not on the underlying medical condition, but rather on its relationship to the student’s ability to benefit from special education and the type of intervention/individual required to provide the intervention. Where a physician’s ongoing assistance within an educational setting is required, the service is considered a medical service, but, where a nurse, assistant or layperson can deliver the service it is non-medical and therefore permissible. See *id.*

Dr. Skotko, who has known Student for 15 years, discussed the severity of her condition and the dire implications of untreated sleep apnea. He explained that untreated severe obstructive sleep apnea poses serious threats to Student’s health, behavior, cognitive abilities, and to her ability to benefit from her educational programming. He testified that obstructive sleep apnea, left untreated could lead to behavioral issues, attention deficit and issues with concentration (Skokto). Untreated sleep apnea has a negative impact on Student’s day to day

²⁰ In *Cedar Rapids*, the court decided that since the student required the assistance of a nurse and not a physician, the student’s services were a related, non-medical service. See *Cedar Rapids*, 106 F.3d at 825.

availability to receive an education; she is often fatigued, appears to space out, cannot concentrate on a task for more than 10 minutes or so, and this lack of sleep/oxygenation to the brain can impact her behavior. Dr. Skotko further explained that even mild sleep apnea, left untreated in people with Down Syndrome, can lead to a loss of nine IQ points a year. (Dr. Skotko; See also JE-40; SE-11). It thus appears that the first prong of the *Tatro* test, that is, that use of the CPAP is “a supportive service ... required to assist a child with a disability to benefit from special education”. Clearly, diagnosis, calibration of the CPAP, assessment and evaluation of the obstructive sleep apnea condition are medical interventions not covered under the statute. However, ensuring that Student is desensitized to the device and utilizes it consistently are behavioral interventions appropriately managed through a behavior intervention plan such as has been successfully accomplished with other Cardinal Cushing Students (Sullivan, Purkis). This behavioral service can be delivered by a trained individual supervised by a BCBC, not a medical doctor. As such, it would appear that this satisfies the second prong of the *Tatro* test.

The evidence further shows that Cardinal Cushing staff has experience with successfully getting residents to use CPAP machines through behavioral intervention strategies and reinforcement with overnight staff (Sullivan, Purkis, Skotko). The residence in which Student would likely live were she to attend offers sleep and awake staff that can provide the consistency working with her to keep the CPAP device on through the night. Asking Parent to be fully responsible for this training in the home is neither realistic nor appropriate. As explained by the persuasive testimony of Ms. Timmel and Dr. Seligsohn, just as Student’s non-compliant behaviors concerning her self-mastery of ADL skills are reinforced in her home environment, Student’s non-compliance as to the CPAP is reinforced at home as well. The residential experience would offer Student a more structured environment (in which she traditionally demonstrates more compliance) with experienced staff, and hence it is likely that Student’s non-compliant behaviors with respect to use of the CPAP would be better managed and decreased in the context of the residential component than in the home.

Moreover, pursuant to 603 CMR 28.06(4), school districts in Massachusetts are mandated to ensure that transitional educational options are available to eligible students. This regulation specifically provides that school districts

Ensure that options are available for older student, particularly those eligible students of ages 18 through 21 years. Such options shall include continuing education; developing skills to access community services; developing independent living skills; developing skills for self-management of medical needs; and developing skills necessary for seeking, obtaining and maintaining jobs. Such programs may have an educational and/ or vocational focus... 603 CMR 28.06(4). (Emphasis supplied).

Learning to tolerate and use her CPAP device is precisely the type of skill development contemplated under 603 CMR 28.06(4), especially considering that failure to master this skill, or at least accept assistance and tolerate the device, can potentially be fatal (Skotko).

Parent and Dr. Skotko are convincing that in addition to enhancing her ability to access her education, Student needs to address the aforementioned medical self-care skill if she is to be prepared for successful independent living. Addressing the behaviors associated with use of the CPAP constitutes yet an additional basis for residential placement, and the record is uncontested that Cardinal Cushing can appropriately address this transition goal.

Finally, Boston's argument regarding Cardinal Cushing's lack of written policy on how to address behavioral issues that occur in the residences is neither persuasive nor supported by the evidence. Ms. Purkis, testified that she was always on call and available to address any behavioral issue that may arise, at any time. Ms. Purkis and Ms. Duhamel work closely to address the clinical needs of students at Cardinal Cushing (Purkis, Duhamel). Since CPAP device training will involve implementation of a behavioral service, it is reasonable to conclude that Ms. Purkis (or another qualified BCBA) would conduct the functional behavioral assessment to address the use of the CPAP, draft the behavioral intervention plan (BIP), train the individuals responsible for its implementation, monitor implementation of the BIP and supervise those responsible for delivery of this related service. Moreover, the uncontroverted testimony by Cardinal Cushing staff is that they have had success in helping other students tolerate and use their CPAP devices (Sullivan).

The interventions required to help Student address her sleep apnea are not medical, requiring assistance by a physician, but rather behavioral interventions, implemented by a trained non-medical staff person, and can be successfully managed through Cardinal Cushing's residential program. Such intervention falls squarely within the array of interventions set forth at 603 CMR 28.06(4), necessary for Student to avail herself of FAPE and better prepare her for her transition into adulthood.

ORDER:

Boston shall write an IEP providing for Student's residential placement at Cardinal Cushing and shall fully fund tuition and transportation costs attendant thereto.

By the Hearing Officer,

Rosa I. Figueroa

Dated: May 26, 2017

May 26, 2017

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

BOSTON PUBLIC SCHOOLS

BSEA # 1702809

BEFORE

**ROSA I. FIGUEROA
HEARING OFFICER**

**DANIEL T. S. HEFFERNAN, ESQ., ATTORNEY FOR
STUDENT/PARENT
JEANNETTE SEDGWICK, ESQ., ATTORNEY FOR
BOSTON PUBLIC SCHOOLS**