

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

In Re: Student v.
Dennis-Yarmouth Regional School District

BSEA# 2105659

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.

Guardian filed a Hearing Request on January 22, 2021. Thereafter, on February 12, 2021, Dennis-Yarmouth Regional School District requested a postponement of the Hearing which request was granted for good cause, and the Hearing was rescheduled to proceed in April 2021 at the request of the parties.

The Hearing was held remotely via Zoom on April 12, 13 and 15, 2021, before Hearing Officer Rosa Figueroa. Those present for all or part of the proceedings were:

Guardian

Jeffrey M. Sankey, Esq.	Attorney for Parents/ Student
Katelyn Gleason	Attorney for Parents/ Student
Linda Daniel, Psy.D.	Neuropsychologist Parent's Expert, Learning Curve Assessment Center
Tina Qvarnstrom	Student's/Guardian's Advocate, Cape Cod Advocates
Vineesha Sow, Esq.	Attorney for Dennis-Yarmouth Regional School District
Melissa O'Reilly	Dennis-Yarmouth Regional School District, Team Chair
James Stefanski, LCSW	Dennis-Yarmouth Regional School District, School Adjustment Counselor
Maria Lopes	Dennis-Yarmouth Regional School District, Director of Pupil Services
Christopher Marsh	Dennis-Yarmouth Regional School District, Special Education Math Teacher
Robert Smith	BCBA, Compass Behavioral Solutions, LLC
Patricia Casey	Dennis-Yarmouth Regional School District, Special Education Teacher
Naomi Leather	Dennis-Yarmouth Regional School District, TIDES Program
Katelyn Gleason	Dennis-Yarmouth Regional School District, Special Education English Teacher
Carol Kusintz	Stenographer, Doris O. Wong Associates

The official record of the hearing consists of documents submitted by Guardian marked as exhibits PE-1 through PE-29, and Dennis-Yarmouth Regional School District's (DY or District) documents marked as exhibits SE-1 through SE-16, recorded oral testimony, and written closing arguments. At the request of the Parties, received on April 16, 2021¹, the Hearing was continued through May 17, 2021 for submission of written closing arguments.

The record closed on May 17, 2021 upon receipt of the Parties' written closing arguments.

ISSUES FOR HEARING:

1. Whether the IEP proposed by DY offering Student an in-district placement in its substantially separate program is reasonably calculated to offer Student a free and appropriate public education (FAPE)? If not;
2. Whether Student requires placement in a therapeutic, residential program for intellectually intact students with social and emotional needs?
3. Whether DY violated Student's procedural due process rights, and if so, whether those violations resulted in a denial of FAPE to Student?
4. Whether Student is entitled to compensatory education services resulting from the District's denial of FAPE².

POSITIONS OF THE PARTIES:

Guardian's Position:

Student/ Guardian assert that Student, who experienced an unstable childhood, presents with a complex profile with disabilities that impact his social, emotional, behavioral, academic and activities of daily living skills. Student's impairments have intensified over the years and impacted his ability to derive meaningful benefit from the specialized instruction and services offered him, especially during the COVID-19 state health emergency school closures and subsequent remote learning opportunities. Student/ Guardian seek a finding that DY's proposed in-district program no longer offers him a free, appropriate, public education (FAPE) and that he requires the consistency and intensity of a therapeutic residential placement to allow him to generalize skills across settings and to make effective progress commensurate with his potential and average cognitive abilities.

Student/ Guardian further assert that Student's procedural due process rights have been violated and as a result they seek compensatory services for Student. For these transgressions, Student/ Guardian do not seek services separate from or in addition to placement in an appropriate residential program.

¹ The Parties had previously made an oral request for continuance of the Hearing on the record, on April 15, 2021, which request was Granted orally the same date.

² Guardian seeks residential placement of Student as a relief for this claim.

DY's Position:

DY asserts that it has offered Student an appropriate program and placement through the Teens Insight to Discovering Emotional Stability (TIDES) therapeutic, in-district program, where Student was receiving services and demonstrating educational success prior to the COVID-19 state health emergency school closures.

DY concedes that Student did not do well with the District's transition to remote learning, which resulted in an interruption to his learning and decreased interest in participation in the learning process. DY responded by increasing Student's "special education and related services in the form of home-based behavioral services to support Student's return to in-person learning, address his decline and focus him on making educational progress."

DY disputes that Student's needs can only be met through residential placement and instead asserts that the in-district TIDES program can offer him a FAPE and further asserts that it constitutes the least restrictive placement for him.

FINDINGS OF FACT

1. Student is a seventeen-year-old, tenth grader who attends the Dennis-Yarmouth Regional High School. Student's home life has been difficult and riddled with instability, as he has resided with numerous family members over the years,³ resulting in multiple school transitions. Family instability and witnessing of caregiver conflict and abuse, has left Student feeling abandoned, isolated, and experiencing difficulties with attachment contributing to an exacerbation of his emotional deficits (Daniel; Guardian).
2. From a young age, Student presented with emotional, behavioral and social challenges as well as developmental delays. He has been diagnosed with Autism Spectrum Disorder, Attention Deficit Hyperactivity Disorder (ADHD)-Predominantly Inattentive type, which causes him to experience great difficulty with sustained focus and concentration, and Major Depressive Disorder– Recurrent– with anxious distress (DM SM-5 296.32) which is marked by "features of irritability – persistent anger, a tendency to respond to events with angry outbursts or blaming others, exaggerated sense of frustration over seemingly minor matters" (PE-1; SE-5).
3. Student also possesses many strengths. He enjoys camping and can set up the equipment on his own, he has participated in horseback riding competitions and has won awards, he

³ Student's parents have not resided together since his birth. He lived with his mother until he was five years of age, then with grandmother for about three months before returning to his mother's house from age five to seven. He then lived with his father from age seven to eight and once again returned to his mother's home where he remained until he was twelve. At twelve years old he resided with his father for approximately nine months until his father threatened to send him to foster care, and Student went to live with his great aunt for five months. When she no longer could support his needs, Student went to live with his grandmother for approximately one year and then went to live with his mother once again. Once again, this arrangement was unsuccessful, and Student returned to his grandmother's house where he has remained except for a short period during the COVID-19 health emergency (Daniels; Guardian).

regularly volunteers at a horse barn where he “mucks out the horse stalls”, feeds and provides water to the horses, walks and rides them. He travels independently throughout the community on his bicycle, and in 2021 obtained his driver’s license. He is very afraid of the police and of breaking the rules. (Guardian) He interacts socially through virtual games with three individuals (a young man in Australia, a truck driver and a teacher). The interactions are exclusively about the game. On a few occasions, he has been kicked out of the game (Guardian)

4. Student has received special education services since he was three years old (PE-5; SE-9; Daniel).
5. Between Kindergarten and eighth grade, Student attended DY. In January of 2019, half-way through his eighth grade, Student transferred to the Monomoy Regional High School where he received educational services in the SANDS Program, a substantially-separate therapeutic classroom for students experiencing social-emotional and academic deficits (PE-1; SE-5).
6. Over the past three years Guardian has arranged for Student to receive private Behavior Therapy from JRI, family therapy with Ana Gold, and individual therapy with Gordon Barney (Guardian).
7. Student has had at least one psychiatric hospitalization between December 12 and 20, 2018, as a result of escalating aggression and oppositional behavior that started in school. The Cambridge Hospital Progress Notes describe Student’s unstable and traumatic childhood (exposed to physical and emotional abuse and bullying). The primary diagnosis per the DSM-V was Post Traumatic Stress Disorder (PTSD) and several other secondary diagnoses, including: Disruptive Mood Dysregulation Disorder, Anxiety Disorder, ADHD, psychosocial and educational problems (Student had been failing in school). His Global measure of Disability was severe. The Discharge Summary notes recommend that Student participate in weekly therapy, aftercare services including in-home therapy, intensive care coordination, and implementation of a behavior plan (PE-3).
8. On or about April of 2019 Student began living with his grandmother (Guardian), who is retired. She became Student’s legal guardian on August 20, 2019 (PE-23). Living with his grandmother appears to be the most stable home environment Student has experienced, but it isn’t without challenges, as there have been confrontations between Student and Guardian resulting from her demands for compliance with chores, school and activities of daily living. Guardian also cares for an elderly parent who lives nearby (Guardian).
9. Student began ninth grade at Cape Cod Regional Technical High School’s (Cape Cod Tech) Student Support Program, where he received most of his academics in the general education setting with support from an instructional assistant. Shortly after starting at Cape Cod Tech, Student began to demonstrate extreme difficulty managing the school environment. He struggled socially, emotionally, behaviorally and academically. He

was noncompliant, began to make verbal threats, exhibited emotional reactivity, self-regulation issues, and was not having academic success (PE-1; SE-5; PE-8; SE-7).

10. While at Cape Cod Tech Student participated in his IDEA three-year re-evaluation, consisting of a psychological evaluation performed by Dr. Paul Lapuc and a functional behavioral assessment (FBA) performed by Erica Tasha, LCSW, to help identify and address Student's behaviors (PE-8; SE-7).

11. The FBA identified several behaviors that interfered with Student's ability to access his education successfully: he was not completing classwork, was disrespectful to staff and peers, misused the computer and was disruptive in the classroom, which most often resulted in negative attention from teachers and peers. The FBA determined that Student's interfering behaviors were an attempt to escape work, gain attention from adults and peers and escape from anxiety provoking situations (PE-5). Ms. Tasha recommended,

therapeutic interventions for [Student], beginning with psychoeducation on what anxiety is, its signs and symptoms, and how to recognize them in himself. It would also be essential for a therapist to work with [Student] on the underlying causes of his anxiety and both short and long term strategies to assist him in dealing with it. Cognitive Behavioral Therapy and Mindfulness are both research-based techniques that could help [Student] alleviate symptoms of anxiety and improve overall functioning (PE-5).

12. Paul Lapuc, PhD, licensed psychologist was retained by Cape Cod Tech to conduct Student's psychological assessment (PE-24; SE-4). His report, dated November 4, 2019, notes that Student experienced extreme anxiety and that he had a long history of aggression toward others, starting in preschool. At the time of this evaluation Student was taking medication (Abilify and Effexor), participating in therapy with Gordon Barney, had a therapeutic mentor and received support from a family partner through JRI (PE-24; SE-4).

13. As part of his evaluation, Dr. Lapuc reviewed several records, conducted interviews and administered the Wechsler Intelligence Scale for Children-V (WISC-V), selected subscales of the Wechsler Individual Achievement Test-III (WIAT-III), the Rorschach, the Piers-Harries-2 Self Concept Scale, the Millon Adolescent Personality Inventory (MAPI), the Multidisciplinary Anxiety Scale for Children-II and other informal projective measures (PE-24; SE-4). Student was found to demonstrate solid average cognitive abilities and intelligence, especially in the area of crystalized intelligence⁴, albeit showing weaknesses in processing speed. Specifically, he demonstrated high average verbal reasoning abilities, average visual spatial and working memory skills, low

⁴ Dr. Lapuc defined crystalized intelligence as "the ability to use skills, knowledge, and experience that one learns in one's lifetime through reading, listening and exposure to various experiences" (PE-24; SE-4).

average fluid reasoning abilities and extremely low processing speed per the WISC, and average reading skills with weaknesses in math per the WIAT. Dr. Lapuc noted that Student's internal motivation was weak, explaining that,

Both sources of motivation, external and internal, are critical to driving goal-directed behavior toward tasks. Internal motivation is essential to achieve the intended outcome in the absence of external motivation in the immediate context. (PE-24; SE-4).

14. Dr. Lapuc noted that Student presented predominant features of ADHD, and, owing to his ASD⁵, evidenced difficulties understanding complex social situations and perspective-taking and when stressed by social demands responded impulsively with inappropriate behaviors and comments. Dr. Lapuc further noted that Student has not learned to be accountable for poor behaviors (PE-24; SE-4).
15. Emotional functioning assessments reflected Student's high level of dependency. He was found to have limited insight into his relationships and global environment, and he struggled to empathize and identify with others. Student possessed little "emotional currency" and could be demanding and passively aggressive as well as reactive. He often experienced disappointment and felt rejected; was prone to regressive behavior and could quickly become defensive when challenged. According to Dr. Lapuc, complaining about or labelling Student with respect to his lack of drive, motivation, self-discipline and willpower was insufficient to effectively address Student's emotional/ social/ behavioral issues. He noted that "pulling back from assisting him to let the natural consequences occur, as if this will teach him a lesson that will correct his behavior, is likewise a recipe for disaster" (PE-24; SE-4).
16. In addition to diagnosing Student with ADHD and ASD, Dr. Lapuc found Student to meet the criteria for Oppositional Defiant Disorder. He concluded that,

Student presents with a set of complex social, personal, and academic needs. He requires reduced stimulation. He is overwhelmed by and struggles with the stimulation of multiple classrooms and teachers. He requires intervention at the point of occurrence. He requires alternative methods of teaching material. He requires alternative methods of assessing his knowledge. He requires emotional support in the moment. He requires externalization of material. In terms of academics this means employing multimedia methods of teaching material. His work needs to [be] modified, chunked, and he requires additional time for completing work. He also requires externalization of behavioral expectations and consequences... (PE-24; SE-4).

⁵ Autism Syndrome Disorder.

17. Dr. Lapuc opined that Student’s needs could not be met at Cape Cod Tech and that he instead should receive his education in a more structured self-contained classroom with opportunities for inclusion as he demonstrated readiness. Dr. Lapuc further recommended ongoing counseling and medication management (PE-24; SE-4).
18. Student’s Team convened on November 18, 2019, at Cape Cod Tech to discuss the result of the evaluations. The Attendance Sheet does not list the name of any DY participant and no representative from DY was in attendance (SE-6). Once again Student was found eligible to receive special education services under a primary diagnosis of Health Disability- ADHD, and ASD as his secondary qualifying disability (PE-8; SE-7; PE-5). The Team recognized that Student was “demonstrating extreme difficulty in the Cape Cod Tech environment and ha[d] consistently not been able to self-regulate or to have academic success” (PE-8; SE-7). As a result of the evaluations and discussions, the Team recommended that Student return to his home District and that his IEP be updated by DY (PE-8; SE-7).
19. A new IEP was drafted by Cape Cod Tech covering the period from November 18, 2019 to December 18, 2020⁶ and offering Student placement in a substantially-separate classroom.⁷ Although the IEP reflects that services would be provided at Cape Cod Tech, Guardian understood and agreed that Student would return to DY for the IEP period (PE-8; SE-7; Guardian). The proposed IEP sought to address Student’s social-emotional needs, behavior and skill development related to vocational preparation and experience, and offered Student the following services:

Grid A: Consultation:

Consultation	Social learning /Inclusion Specialist	2 x 15 per cycle ⁸
Consultation	Adjustment Counselor	2 x 15 per cycle

Grid B: Special Education and Related Services in General Education

Classroom:

Math	Sp. Ed/ IA	20 x 56 per cycle
History	Gen. Ed/ IA	10 x 56 per cycle

Grid C: Special Education and Related Services in Other Settings:

English	Sp. Ed/ IA	20 x 56 per cycle
Social Learning	Sp. Ed/ IA	10 x 56 per cycle

⁶ This appears to be a typographical error as the Service Delivery Grid makes reference to provision of services from November 18, 2019 to November 17, 2020, the accurate timeline for this IEP (PE-8; SE-7).

⁷ The IEP issued by Cape Cod Tech was issued on the same date that DY convened Student’s Team to discuss his transition into the District.

⁸ Cycles at Cape Cod Tech were 20 days (PE-24; SE-4;).

Academic Support

Counseling	Adjustment Counselor	4 x 20 per cycle
Science	Sp. Ed/ IA	10 x 56 per cycle

(PE-8; SE-7).

20. On November 22, 2019, DY convened the Team to discuss Student's transition back to DY and in-district placement. Guardian attended this meeting with her advocate, but no representative from Cape Cod Tech was invited or consulted about updated information on Student. At the meeting, Student expressed hesitation about returning to DY because of social issues, handling hallways with other students and because he believed that rumors were being spread about him (PE-25).
21. DY Team Meeting Notes from November 22, 2019 reflect that at the time of this meeting, DY did not yet have a copy of Dr. Lapuc's Report, the FBA report or Cape Cod Tech's proposed IEP (PE-25). The Team participants discussed the TIDES program, an in-district therapeutic program within Dennis-Yarmouth High School (High School), which was ultimately verbally proposed during the meeting (O'Reilly). A two-day transition period back to DY was proposed during which Student would attend half days (on November 25 and 26, 2019), and then he would begin attending full days starting on December 2, 2019. The Team also agreed to reconvene eight weeks after Student's start to review his progress in the TIDES program (PE-25; O'Reilly).
22. Melissa O'Reilly, DY special education Team chair and former special education teacher, testified that DY wanted to gather data on Student and then reconvene to draft an IEP that reflected Student accurately (O'Reilly). DY's Team never reconvened to discuss Student's progress or draft a new IEP (*Id.*).
23. On or about November 25, 2019, Student began attending the TIDES program. The operative IEP at that time was the IEP forwarded to Guardian by Cape Cod Tech on November 22, 2019, reflecting services different from those Student was offered at the TIDES program (PE-8). DY did not draft or issue a new IEP reflecting the changes necessitated by the fact that the programs and cycles in both schools were different and that the TIDES program had been identified as the new placement for provision of services to Student (O'Reilly). Student was not offered inclusion math and history as specified in the Cape Cod IEP accepted by Guardian. At TIDES, Student received all core academic instruction in the substantially separate setting (*Id.*).
24. On December 2, 2019, Guardian partially accepted the IEP proposed by Cape Cod Tech and consented to Student's placement in a substantially-separate classroom. She rejected portions of the proposed program that omitted scaffolding for essays and lack of techniques to expand Student's writing (a weakness) and she requested oral testing so that Student could properly demonstrate his knowledge, given his strong verbal abilities. Guardian requested additional accommodations and further stated her disagreement with the use of punitive measures to address Student's hyperactivity and inattention, noting

that the medications he took to address his anger and irritability contributed to his hyperactivity (PE-8; SE-7).

25. On December 12, 2019, Student was suspended for inappropriate behavior toward DY staff (PE-1; SE-7; PE-16; PE-17).
26. DY reconvened Student's Team on December 16, 2019, to discuss an initial behavior/safety plan that had been drafted by Cape Cod Tech, which Guardian provided to DY (PE-26). The Meeting Notes⁹ state that Student was disrespectful and argumentative throughout the meeting, he stated his desire to attend the collaborative (a more restrictive placement than DY) and left the meeting in an oppositional mood. Student also noted his preference for home schooling, something that Guardian would only entertain if he had a good balance of the year and made good choices in school (PE-26). CBT therapy for Student was recommended and Guardian was advised to request a referral from Student's doctor.
27. On January 14, 2020, Dr. Pamela Fee, DY school psychologist, and a JRI therapist, observed Student in the TIDES program (PE-18). The TIDES program is a therapeutic, self-contained program designed for students with significant social, emotional disabilities. There are no more than eight students in the class. Academic content courses are taught by special education teachers (Gleason; Marsh). Individual and group counseling is offered to address the students' emotional needs and focus on self-management, coping skills, social skills and self-advocacy (Stefanski). Mr. Stefanski, LISW, school adjustment counselor, also teaches a course on Professional Development intended to teach students strategies and techniques to manage emotions across settings. A daily support period is also offered to the students.
28. During the January 14, 2020 observation Student was observed to put his head down on the desk intermittently, failed to complete assignments, had off topic conversations with peers, engaged in work inconsistently and was disrespectful to staff, engaged in attention seeking behaviors with attitude. He was reported to do better with class discussion than with independent work (PE-18; PE-1; SE-5; SE-8; O'Reilly). Ms. O'Reilly who also observed Student in his program noted some of the same behaviors. She testified that Student's anxiety was apparent and he "could come off as being rude to adults and to students" (O'Reilly).
29. On January 23, 2020, Dr. Fee drafted a Behavior Intervention Plan (BIP) to address negative behaviors that interfered with Student's school day (PE-15; PE-1; SE-5). The BIP noted that Student continued to exhibit interfering behaviors similar to the ones he displayed at Cape Cod Tech. It further noted his difficulty completing assigned work, exhibiting disruptive behavior in class, occasional minor self-harming behaviors (e.g., hitting his head against the wall), and difficulties using coping strategies to calm down.

⁹A note attached to the Meeting Notes provides that "If [Student] escalates and won't make a choice, notify [Guardian] first. Safe person- ask [Student]- aide in class? Send BIP to [Guardian]" (PE-26).

His behaviors included “negative social reinforcement (escape) and social positive reinforcement (attention)” (PE-15). Proactive interventions were put in place to reduce the probability of, or to prevent, the targeted behaviors from occurring, and reactive strategies to address the target behaviors when they occurred (PE-15; PE-1; SE-5; O’Reilly).

30. DY did not convene Student’s Team to discuss the BIP or to incorporate its recommendations into Student’s IEP (O’Reilly).
31. Mr. Stefanski described his relationship with Student as “hot and cold”; when present in the building Student would be receptive to his offers for support about fifty percent of the times, and other times he would not speak to him (Stefanski). Student’s ninth grade English teacher in the TIDES program, Katelyn Gleason, testified that the program offered a therapeutic environment, and that Mr. Stefanski was in class often. Tom Lonergan, an assistant, and Donta Phillips, assistant and basketball coach, also worked in the program with Patricia Casey, and three other DY staff visited from time to time. Ms. Gleason testified that she did not know Student well, that he kept to himself, was very quiet, was absent a lot and did not interact much with his peers. She noted that most of his interactions were with Mr. Lonergan. Student talked about horses a great deal and was able to verbally express his thoughts well, as when discussing the novel, *The Outsiders*. She indicated that she did not get a great deal of written work from Student and that he was offered a scribe and extended time to complete written work. He put his head down on the desk often, especially when she read to the class, but he appeared to be listening to the discussion. At times, he refused to do work in her class and made rude statements to his peers and called the staff “professionals idiots.” Regarding Student’s personal appearance, Ms. Gleason testified that Student’s jeans were dirty, which he attributed to working with horses. While she did not observe this first-hand, Ms. Gleason testified that at meetings she learned that Student had been teased and or bullied because of his appearance. Ms. Gleason testified that prior to the COVID-19 state health emergency related school closure, Student was making progress with verbal output, but not with his written work (Gleason). Ms. Gleason opined that at the time Student was attending DY in person, his needs were being appropriately met at the TIDES program.
32. Christopher Marsh, Student’s special education math teacher in the TIDES program, also opined that the program was appropriate for Student and that his profile and needs were similar to that of other students in the program (Marsh).
33. Student’s Progress Report dated February 10, 2020 noted that Student made great gains in the academic, executive functioning and behavior areas.¹⁰ He was earning good grades in most of his core curriculum courses (81 in English, 82 in math and 85 in science) except for one (60 in social studies). While Student needed prompting to initiate and remain on task, he was accepting of staff support, and he participated in class discussions.

¹⁰ See also PE-20, Points Earned Diagram for the period from 12/2/2019 through 3/9/2020.

He was also making social/ emotional strides by displaying healthier emotional responses and by seeking support (PE-9; SE-10).

34. On March 16, 2020 Massachusetts declared a health emergency due to COVID-19 and a state-wide school closure plan was implemented. When classes resumed, a few weeks later, it was only through remote learning for the remainder of the 2019-2020 school year. Student did not transition well to remote learning and quickly began disengaging from educational services and showing signs of distress: he declined socially, emotionally and behaviorally, did not leave the house, did not perform regular self-care activities and disengaged from participating in daily living activities. Adjustment to the new learning modality became increasingly challenging; he became frustrated with technology glitches, had difficulties completing assignments, staying on task and organizing / prioritizing work (PE-5; SE-9). Eventually, Student stopped participating in remote learning altogether (Guardian; Gleason). Student did not respond to the school staff's attempts to communicate with him via email between March 27 and June 11, 2020 (PE-1; SE-5).
35. An undated Spring COVID Closure Note indicates that 12 emails with resources and activities were forwarded to Student from DY between March 27 and June 10, 2020. Additionally, he was sent invitations to participate in Zoom counseling meetings with Mr. Stefanski (adjustment counselor), Pamela Fee and Kyle Bowen (school psychologist intern). Student's participation was minimal to none as he was unresponsive to the emails and he failed to log-in for the Zoom sessions (PE-19; PE-21; SE-12).
36. Student's Executive Functioning IEP Progress Report, dated May 6, 2020, completed by Ms. Casey, notes that Student's grades for the third term were: 29 in English, 33 in Math, 83 in Science, and 65 in Social Studies. Student's grade decline in English and Math was significant, but he was able to improve his science and social studies grades by four and twenty-four points respectively (PE-10; SE-10). In academic support, he only responded to the staff's offers to help him with assignments less than 20% of the time. The report notes that Student will have to become more responsible for his work if he is to achieve progress toward meeting his IEP goals (PE-10; SE-10; PE-1; SE-5).
37. The June 2020 Executive Functioning Progress Report notes that despite DY's attempts to address Student's academic goals via remote modalities, Student was unable to demonstrate progress of his skills because he did not access the services consistently enough to compile data and measure his progress (PE-11; SE-10). Similarly, the June 19, 2020, Social Emotional Progress Report notes Student's inability to demonstrate progress of his skills. This report indicates that DY's ability to address and monitor the goals and objectives is not the same as when instruction is provided in person, and notes that after the school closure, Student was unable to sustain engagement and did not progress (PE-11; SE-10).
38. Student and Guardian elected that Student continue to attend the 2020-2021 school year via remote instruction, owing to their concerns related to the Corona virus (O'Reilly).

39. Email communications dated September 28, 2020, among several DY school staff, Guardian and her special education Advocate, Tina Qvarnstrom discuss Student's preference for remote learning after DY had prepared a schedule for him as a hybrid participant. Student's/ Guardian's Advocate explained that Student likely refused to attend school and Guardian could not transport him safely, despite the adults' belief that Student needed to be in school to access his education. Guardian would continue her attempts to get him to school and welcomed any assistance DY could provide (PE-22). According to Guardian, two DY staff came to her house to try and persuade Student to attend school to no avail (Guardian).
40. At some point during the fall of 2020, DY changed Student's placement from the TIDES program to a full-inclusion, fully remote program that offered limited special education services. Guardian was not notified of this change and DY did not seek her consent (O'Reilly).
41. On October 24, 2020, Linda Daniel, Psy.D. (CV at PE-2) conducted a neuro-psychological evaluation of Student at Guardian's request, due to the latter's concerns regarding Student's academic deterioration, social-emotional functioning and difficulties with daily living skills (Daniel). Dr. Daniel is a licensed pediatric neuropsychologist with 15-years-experience evaluating students on the autism spectrum who present with social, behavioral and emotional deficits (*Id.*).
42. Dr. Daniel performed a series of formal educational, attention, psychological and personality assessments, as well as behavior rating inventories and social responsiveness scales.¹¹ She also reviewed records and interviewed Student's mother and Guardian, who completed a developmental questionnaire, and she had Guardian and educators complete a structural rating (PE-1; SE-5).
43. The cognitive assessment (WISC-5) confirmed that Student possessed intact verbal (SS 95, 37th percentile) and visual-spatial abilities (SS 100, 50th percentile) albeit significantly reduced fluid reasoning (SS 85, 16th percentile), working memory (SS 67, 1st percentile) and processing speed (SS 66, 1st percentile) abilities (PE-1; SE-5). Student's verbal IQ scores showed an 18-point decline (113 to 95) when compared to Student's performance in Dr. Lapuc's evaluation the previous year. Dr. Daniel attributed this decline to Student's disengagement from the educational process (PE-1; SE-5; Daniel). On the WRML-2, Student demonstrated deficits which made Dr. Daniel question whether Student could learn in a mainstream classroom despite having average cognitive abilities. Student's skills in reading, writing and math also fell well below his intellectual capacity. Dr. Daniel noted that the academic portion of the assessment was remarkably challenging for Student despite provision of numerous accommodations (PE-1; SE-5; Daniel).

¹¹¹¹¹ She administered the: WISC-V, WRAML-2, VMI, WIAT-4, NDRT-Form I, TOWLE-4, NIH Toolbox®, GARS-3, PAI-A, Achenbach YSR, Achenbach CBCL, Achenbach TRF, BRIEF-2, SRS-2 and the GSRT was attempted (PE-1; SE-5).

44. Dr. Daniel indicated that Student's social and emotional assessments raised numerous concerns including: significant thinking and concentration problems; prominent distress and dysphoria; withdrawn and isolated presentation; and thought process marked by confusion, distractibility, and difficulty concentrating. Student reported many depressive symptoms, including feelings of sadness, loss of interest in normal activities, loss of pleasure in things that he previously enjoyed, and feeling socially isolated, having few close interpersonal relationships. He reported being preoccupied with his health and physical problems. According to Dr. Daniel, Student's responses were indicative of moodiness, emotional lability, and rapid and extreme mood swings (PE-1; SE-5; Daniel).
45. Dr. Daniel noted in her report that an assessment of daily living skills reflected deterioration over the past year, with almost all aspects of day-to-day functioning presenting as a challenge, including difficulty sleeping, using the bathroom and maintaining good hygiene (PE-1; SE-5).
46. Dr. Daniel concurred with previous evaluators that Student presented with Major Depressive Disorder – Recurrent- with anxious distress, Autism Spectrum Disorder, and Attention Deficit Hyperactivity Disorder- Predominantly Inattentive Presentation, and she also diagnosed Frontal lobe and executive function disorders (PE-1; SE-5; Daniel).
47. To address Student's social/ emotional deterioration, chronic disengagement from academics/ school participation, significant self-care and hygiene issues, and because of his difficulties generalizing skills across settings, Dr. Daniel recommended residential placement in a therapeutic program, designed to meet the needs of socially and emotionally vulnerable students who are intellectually intact (PE-1; SE-5; Daniel). She recommended that the program be highly structured, offer highly individualized and small group academic instruction, and "have a consistent presence of effectively trained psychological/ behavioral staff and educators" that can provide twenty-four hour wellness monitoring. She also recommended that social enrichment and clinical services be increased. Such comprehensive program should also have,

A highly structured therapeutic setting that provides on-campus residential placement with an initial focus on stabilization. The social-emotional curriculum employed should focus on promoting group living, improving prosocial skills, increasing coping strategies, improving adaptive and daily living skills. Importantly, the consistency, routine, structure and access to mental health and behavioral professionals are important in order to provide Student with a stable living environment and an effective learning setting (PE-1; SE-5).

48. Dr. Daniel warned that a fragmented approach to programming was counter-indicated for a student with Student's presentation, and thus endorsed fluid collaboration between mental health professionals, behavioral providers, special educators and support staff to

foster a cohesive and comprehensive approach. She also recommended an initial assessment and implementation of a clear and consistent behavioral plan that was periodically assessed and modified as needed. Access to milieu-based groups to improve socialization and decrease negative externalizing behaviors, and access to leisure activities and effective therapeutic recreation groups were also recommended. The setting should encourage and value family involvement and should help Student improve his self-awareness, personal responsibility, self-confidence and self-esteem. The placement should offer access to a comprehensive educational program capable of supporting Student's learning needs, and include access to assistive technology. Further recommendations included functional skill building in relation to topics like "health, safety, social norms, relationship concerns, and sexuality" (including topics related to prevention of victimization), and, of paramount importance given Student's age, appropriate Transition planning (PE-1; SE-5).

49. Student's annual review Team meeting was convened on October 27, 2020 (PE-7; SE-8). At this meeting Guardian learned that without her knowledge or consent, Student's DY program had been changed to a full inclusion setting (Guardian). Guardian shared her concerns that: Student disengaged from learning after the school closures in March of 2020; that he was failing his classes and became hostile and aggressive when pressured about school-work at home; that he was demonstrating low frustration tolerance, was experiencing low self-confidence and low self-esteem; that he lacked self-regulation and coping skills necessary for conflict resolution and to manage his outbursts; was socially isolated and lacked the skills to make and maintain friends; and, that at 16 years of age, he was still dependent on adults for completing activities of daily living, functioning at home and in the community, management and supervision of medication administration and for completing schoolwork (PE-7; SE-8; Guardian).
50. The Team offered Student participation in a full inclusion program at DY, supplemented with ten minutes per week consultation by the special education liaison, and direct services consisting of one hour per day of academic support provided by the SPED teacher, and fifteen minutes weekly counseling with the adjustment counselor. No services were offered to support Student in the general education classroom (PE-7; SE-8). This IEP resulting from this meeting was forwarded to Guardian on November 1, 2020. The IEP covered the period from October 27, 2020 to October 26, 2021 (PE-7; SE-8).
51. On December 1, 2020, Guardian partially rejected the IEP and rejected the proposed placement, including omission of extended school year services, noting that the proposed IEP failed to offer the services Student required to make effective progress. Guardian requested that the Team reconvene when the private neuropsychological evaluation report was available (PE-7; SE-8).
52. Dr. Daniel reviewed this IEP and found it to be quite inappropriate given Student's history of struggles in even more restrictive settings (i.e., substantially separate classroom). Moreover, she opined that given Student's depression, he lacked the skills necessary to meaningfully and effectively participate in a full inclusion program (Daniel).

53. Student's Team reconvened on December 21, 2020 to review Dr. Daniel's evaluation report (Guardian). The Team recommended that Student return to the TIDES program for the balance of the IEP period (October 26, 2021) through which he would receive daily language arts and math from the SPED teacher; 15 x 45 minute sessions of academic support; and twenty minutes daily counseling with the adjustment counselor. (PE-5; SE-9). The Present Levels of Educational Performance Part B list Student's needs under social/emotional, behavior and skill development related to vocational preparation or experience categories (PE-5; SE-9; Daniel). The IEP lists goals for executive functioning and social/ emotional needs. As with the previous IEP, DY did not offer extended school year services or in-home therapy services (O'Reilly). DY made it clear to Guardian that Student would not be able to transition into the TIDES program until February 1, 2021, and also did not commit to the support services that might be available when school was back in session in January of 2021 (Guardian). This is the last IEP issued by DY present in the record.
54. The IEP reflecting discussions from the December 21, 2020 Team meeting was forwarded to Parent on January 21, 2021 (PE-5; SE-9).
55. On January 31, 2021, Guardian partially rejected Student's IEP (PE-6). While she agreed with the proposed goals and objectives, she opined that the proposed program and placement offered by the District were inconsistent with the findings and recommendations of Dr. Daniel and were therefore, inappropriate to meet Student's needs. Guardian noted her objection to the District's unilateral change of placement for Student from TIDES to a full inclusion program without her consent, and failure to propose a remote service plan for Student. While she ultimately rejected placement at TIDES, she agreed that Student could receive services through that program until an appropriate placement became available. Guardian noted several additional rejections/objections to the proposed IEP, including that it did not reflect BCBA services, although mentioned in the N1 (PE-6).
56. Progress Reports dated February 4, 2021 note Student's lack of participation and engagement, resulting in the staff's inability to measure progress toward meeting academic and behavior goals (PE-13; SE-10).
57. Student's final report card for 9th grade (2019-2020 school year) and first and second quarters of 10th grade (2020-2021 school year) show that Student received 5.8 credits in 9th grade and 0.0 credits in 10th grade. Final course grades for 9th grade were as follows: Design Squad= C+, Visual Arts= C+, Rock and Pop I= C, TIDES 1= Pass, Math= F, Social Studies= D+, Science= B, ELA= F, Personal Development/SSC= Pass, Physical Education/ Health= C and Introduction to Robotics (grade 8) = A. In 10th grade, Student received an F in U.S. History, Algebra Foundations, Biology, Personal Development and Elements of Nonfiction, and he Withdrew from Integrated Geometry (PE-29; SE-11).
58. Student's Attendance Records for ninth grade show that prior to the COVID-19 changes, during his first three months in DY he was absent from school seven times, dismissed

twice, was tardy on 17 occasions without an excuse and four other times with an excuse (PE-16). Between September 2020 and January of 2021, his tenth grade, Student was absent 73 times and present for remote learning on five occasions, to wit: September 16, 17 and October 1, 2 and 7, 2020 (PE-16; O'Reilly).

59. In the fall of 2020, Student did not want to attend school because of fear of contracting COVID-19 and/ or infecting his grandmother/ Guardian (PE-1; SE-5; Guardian). He has reported that he does not want to be a high school dropout, and though he has tried to participate in his education it has been difficult for him. Guardian opined that Student felt like a failure and thus became deeply depressed. He has participated in out-patient counseling with minimal success (Guardian).
60. DY concedes that Student did not do well with remote learning and that Student's interest and participation in school and with the learning process decreased. The District further concedes that the intensive therapeutic services like the ones provided in the TIDES program cannot be fully replicated through the remote learning model. After the restrictions caused by the pandemic, DY continued to offer Student access to special education staff including individual and group counseling with Mr. Stefanski (O'Reilly).
61. DY asserts that Student experienced successful outcomes while attending the TIDES program in person and that despite being aware of remote learning difficulties, the "district felt compelled to respect Student's desire to [continue] to learn through the remote model" given Student's and Guardian's personal circumstances amidst the pandemic (SE-2).
62. At home, Student has become increasingly non-compliant and verbally abusive to Guardian, physically posturing toward her in a threatening manner (PE-1; SE-5; PE-4).
63. Guardian testified that Student spent most of his day playing video games and while she recognized that this was unhealthy, she did not intervene in an effort to avoid abuse from Student. In the past she attempted to get him to attend school by yelling, bribing or cajoling him, but Student refused to participate. She also was unable to provide Student with technical assistance to engage him in remote learning (Guardian).
64. Guardian testified that in December of 2020 she realized that Student was in "real trouble" due to his depression and isolation, so she arranged for him to return to his volunteer job at a horse barn because in order to get him out of the house and because of its therapeutic benefits (Guardian).
65. Email communications between Melissa O'Reilly and Patricia Casey, indicate that in January 2021, DY contracted with Robert Smith, M.A., M.Ed., BCBA, LABA (CV at

SE-16) to assist Student return to school (SE-13 PE-14; SE-14).¹² Additional emails between Mr. Smith and Melissa O'Reilly indicate that Mr. Smith first met Student (remotely) on January 26, 2021 and also participated in Zoom meetings with other members of DY staff on the same date (SE-13).

66. Mr. Smith proposed to meet with Student remotely three times per week for 30 to 60 minutes, and to meet with Guardian once per week for one hour (or twice per week for half an hour) to provide her with strategies on what to do and not do for managing Student (Smith). Mr. Smith considered that one of the vital components for Student's return to school involved Guardian becoming capable of managing Student (Smith).

67. Guardian testified that by the time Mr. Smith was engaged, Student was "way beyond" Guardian's ability to manage him; if she took away preferred activities Student "would demolish [her] house... would probably stop taking showers... and would probably stop doing anything" (Guardian).

68. On January 22, 2021, Guardian filed the instant Hearing Request seeking,

...an order of immediate placement as a residential student in a highly structured therapeutic residential program that provides the wrap-around structure and services that [Student] requires, as well as compensatory services. Because most, if not all, of the possible programs will not consider [Student's] admission without a referral, the guardian further seeks an order directing the District to send referral packets to all DESE-approved programs identified by the guardian (SE-1).

69. Email communication between Mr. Smith, Maria Lopes (of DY) and Melissa O'Reilly, dated February 8, 2021, note Guardian's openness to meeting with Mr. Smith, describe the proposed frequency of the meetings planned for Student and Guardian and request that easy academic work be provided as it will eventually be used in the sessions (PE-28; SE-13). The email further notes that Mr. Smith,

...discussed with [Guardian] that the goal would be for [Student] to spend less time 'multitasking when I am on with him, more time engaged in 'less preferred' activities than gaming (AKA talking with me, engaged in non-preferred conversations) and engaged in no preferred activities/ schoolwork – including with other people. We discussed that this is how you develop frustration tolerance, anxiety management, delay in gratification and self-esteem. The goal for working with [Guardian] would be to give her strategies (what to do

¹² Student's IEP was not amended to include BCBA services (O'Reilly).

and not to do) for managing [Student] and talking with [Student] about school” (PE-28; SE-13).

On February 15, 2021, Guardian and Mr. Smith agreed that Student and Parent/Guardian training would begin on February 26, 2021 (*Id.*).

70. By mid-April 2021, Mr. Smith had communicated with Student remotely on eight occasions, with no communication occurring between January 25 and March 1, 2021 (PE-27; SE-15; Smith). During three non-assessment sessions (March 17, 24 and 26, 2021) Student was refusing to meet and became verbally abusive toward Guardian. During the session on March 26, 2021, Student was introduced to Joe Calise (a tutor from DY that would be helping Student with academic instruction), but Student’s behavior was escalated (swearing and yelling at Guardian), and he did not want to meet. Student attempted to take a phone from Guardian’s hand, causing him to push her. He then threw the phone on the ground (PE-27; SE-15; Guardian).
71. On March 24, 2021, Mr. Smith submitted a Treatment Recommendation Report explaining Student’s behavioral presentation and noting that functionally, Student’s “school refusal appears to serve an escape/avoidance from an aversive situation (school remote or in person) and access to highly reinforcing activities that are concurrently available during the school day” (PE-14; SE-14). Mr. Smith noted that demands had been virtually eliminated from his environment and that this served to reinforce a general refusal response. Mr. Smith’s treatment recommendations centered on Guardian reducing/ eliminating access to preferred activities (e.g., barn/ horses, computer access or buying a truck tire) and making them contingent on school attendance and engagement, and that the demands/ access to reinforcer be gradual, akin to “toleration training” (PE-14; SE-14). He also recommended that school and school personnel be paired with highly reinforcing activities; that schoolwork be introduced at an instructional level below Student’s ability to discourage encounters with aversive situations that increase Student’s frustration; that ADLs should be assessed and taught; that explicit instruction be provide in social perspective, and self-management strategies; and, that direct and explicit in the moment, social skills instruction be furnished. (PE-14; SE-14; Smith).
72. Mr. Smith testified that in-person interventions would be necessary to effectively re-engage Student in learning. By the time of the Hearing, no such arrangement had taken place and Student remained out of school (Smith).
73. Student considers this school year to be a bust and has given-up hope of passing any of his classes and sees no benefit on returning to school this year (Smith).
74. Mr. Smith testified that within four remote sessions with the support of his academic tutor, Joe Calise, to whom Student was introduced on March 26, 2021, Student engaged in and tolerated academic work above his instructional level (Smith). Student and his tutor made approximately four appointments and despite Student liking him, he refused to work with the tutor on two occasions due to his difficulty regulating his mood

(Guardian). According to Mr. Smith, the next step in re-engaging Student would be to increase toleration and social skills to encourage increased school participation, with the goal of getting Student to return to the school building and resume instruction in his areas of need (Smith).

75. At the time of the Hearing Student had ceased communicating with Mr. Smith. In a previous session, Student had told Guardian that he did not wish for her to handle scheduling of his appointments with Mr. Smith. Guardian stopped making the appointments and Student never scheduled one (Smith).
76. Therapy Progress notes for the period from December 10, 2020 to March 23, 2021, prepared by Gordon Barney, Student's private therapist, note that Student was very depressed, unmotivated, very angry at Guardian, in "I don't care mode", and making unrealistic demands (e.g., wanting a motorcycle to do well), during most sessions (PE-4). Student appeared to be in a good mood during one of the sessions related to a truck and camper and getting his driver's license in April (PE-4).¹³
77. Overall, Student's ability to handle change is limited. He is inflexible and has difficulties with impulse control and managing his emotional state, but because he has average expressive language skills, he may give the illusion of being more capable than his behaviors demonstrate, and in this sense is able to mask his global limitations (PE-27; SE-3; Guardian). Guardian further indicated that Student tends to do well when he first starts something, but things tend to go badly soon thereafter (Guardian).
78. Student's personal care is quite impaired. He has poor hygiene habits, is often unkempt and appears to lack self-awareness of basic bodily functions and body odor, which is noticeable to others and negatively impacts opportunities for social situations with peers and adults. It also may cause others to make comments that Student interprets negatively (Guardian; Smith). He lags behind same-age peers with respect to performing basic household chores and with preparing food independently; he often leaves a mess behind. He has obtained his driver's license, but shows limited awareness of safety in the community and mostly uses his bike to get around (Guardian).

CONCLUSIONS OF LAW:

The Parties agree that Student is eligible to receive special education and related services pursuant to the Individuals with Disabilities Education Act¹⁴ (IDEA) and Massachusetts special education law¹⁵. The Parties further agree with Student's diagnoses and presentation. The dispute in the instant matter centers on the appropriate placement in which to educate Student; while Guardian asserts that he now requires residential placement, DY states that his special education and related services can be met through the TIDES program, an in-district,

¹³ Guardian testified that these therapy sessions took place outdoors while Student took walks with his therapist.

¹⁴ 20 USC 1400 *et seq.*

¹⁵ MGL c. 71B.

therapeutic, substantially-separate program that would offer Student increased opportunities for mainstreaming as he demonstrates his readiness. Guardian further asserts that the procedural violations in this matter are significant and denied Student a FAPE. Guardian seeks residential placement of Student because of his high level of need and the District's substantive and procedural violations.

The IDEA and the Massachusetts special education law, 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 needs¹⁶ in a way "reasonably calculated to confer a meaningful educational benefit"¹⁷ to the student.¹⁸ Additionally, the program and services offered to the student must be delivered in the least restrictive environment appropriate to meet the student's needs.¹⁹

The above standard, which has been adopted by courts and hearing officers in Massachusetts, is aligned with the Supreme Court's 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 "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 adopted in Massachusetts.

¹⁶ 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").

¹⁷ See *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012) where the court explicitly adopted the meaningful benefit standard.

¹⁸ *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.").

¹⁹ 20 USC 1412 (a)(5)(A).

Pursuant to the standard embodied in *Andrew F.* and consistent with the Massachusetts standard, *supra*, 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.²⁰ Educational progress is then measured in relation to the potential of the particular student.²¹ At the same time, the IDEA does not require the school district to provide what is best for the student.²²

In the instant case, Guardian carries the burden of persuasion and thus, must prove her case by a preponderance of the evidence, pursuant to *Schaffer v. Weast*, 126 S.Ct. 528 (2005).

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

Upon consideration of the evidence, the applicable legal standards and the arguments offered by the Parties, I find that Guardian has met her burden of persuasion regarding her substantive and procedural claims, and that at present, residential placement is the least restrictive appropriate setting in which Student's needs can be met. My reasoning follows.

Student presents with significant social, emotional, behavioral and educational deficits resulting from his multiple diagnoses including Autism Spectrum Disorder, Major Depression Disorder and ADHD. During a psychiatric hospitalization in 2018, he was also diagnosed with PTSD as a result of witnessing abuse, being neglected and experiencing multiple home displacements throughout childhood. He has significant difficulty performing self-care activities, including personal hygiene, on a regular basis, and lags behind other typically developing same-age peers in activities of daily living. At seventeen years of age, he does not have friends. Student experiences a great sense of alienation from others as well as feelings of abandonment.

²⁰ 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”).

²¹ *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.”).

²² 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.”)

Over the years he has encountered great difficulty functioning in a traditional educational environment, and has required multiple private and public interventions and supports to access his education. Between 2018 and 2020 he had five separate educational placements (DY, Monomoy Regional High School, Cape Cod Tech, DY- TIDES and remote learning) and has bounced among three different family member homes, culminating with Guardian for the majority of 2019 through 2021 with exception of brief stays with his mother, the most recent in 2021 (Daniel, Guardian).

DY states that Student transitioned back into the District in late November of 2019, because his behaviors and educational needs could no longer be met at Cape Cod Tech. Student entered DY with an IEP issued by Cape Cod Tech calling for participation in a substantially-separate setting, an IEP that DY never amended to reflect Student's services and placement at DY, or subsequent transition to the remote learning model until its expiration.

At Hearing, both Parties relied on the fall 2019 evaluation and recommendations of Dr. Lapuc to support Student's transition into the in-district substantially-separate program at TIDES. Student's successful transition into the TIDES program was short lived because of COVID-19. According to DY, but for the COVID-19 school closures, Student's educational needs would have been met effectively at DY. Documentary and testimonial evidence shows that Student's transition and progress up to that point was mixed, although he met with some successes (Guardian, Gleason, Stefanski, Marsh, O'Reilly). An observation performed by DY's school psychologist in January of 2020 revealed a student who was inattentive in class, often put his head down on the desk, was disrespectful to staff and did not complete his work (PE-18). He was observed to be rude to peers and staff, had poor personal hygiene, and displayed inconsistent performance and anxiety (O'Reilly). At DY, as at Cape Cod Tech, Student required implementation of a BIP which noted that he was displaying "behaviors that [] negatively impacted his school day", such as being disruptive in class, having difficulty completing assigned work and accessing coping strategies for self-regulation (PE-15). Progress reports for February 2020 do not note any of Student's challenges and only describe a student meeting academic and other success. Later progress reports either note Student's failures or note that the report could not be completed (SE-10). Student's grades plummeted as did participation in class instruction. He was absent or dismissed seven times during a three-month period and was tardy on at least 17 occasions without an excuse (SE-16).

DY's argument centers on the premise that if Student can get into the school building, they will then be able to offer him the type of programming and interventions he requires. But getting Student into the school building is precisely the challenge, and by April of 2021, DY had not been able to achieve Student's return.

It is true that Student's social, emotional, behavioral and educational difficulties were exacerbated with the advent of COVID-19 school closures, during which he had a disastrous transition to a remote learning model, culminating with his total disengagement from education. Once disengaged, Student has remained stagnant in a virtual educational limbo

where he has lost over 14 months of his education. To date, DY's efforts to re-engage him have been ineffective.; these efforts were also slow to come.

The Parties agree that Student's difficulties increased when remote learning was implemented on or about late-March and April of 2020. COVID undeniably made instruction extremely difficult for districts to implement. Despite the District's attempts to offer students access to their education and services, remote learning posed great difficulties and disruptions, especially for programs such as TIDES, whose population relies on consistency and structure. Because of COVID, Student simply did not have access to the level of structure and support he required to access his education and Guardian could do little to help him.

When everything else failed, DY unreasonably relied on Guardian to remedy what the District was unable to do itself: manage Student's emotional, behavioral and psychological issues to reengage him in his education and return him to school, something she testified was beyond her capabilities to do safely. By then Student had become very angry, frustrated, anxious, defiant and verbally abusive, and he postured toward her on several occasions. Student's mood and behaviors deteriorated to the point Guardian could no longer manage him. Student was disenfranchised from his education and the outside world. The record shows that in an attempt to re-engage Student, Guardian facilitated the reconnection for Student to volunteer at a barn where he engaged in horse-related activities. Student had a positive response to this intervention which he called his "therapy" (Guardian; Daniel).

In the fall of 2020, after being offered participation in a hybrid in-person/ remote learning program, Student refused to attend in person owing to COVID concerns and his general disengagement from school. Since Student was not attending in-person his TIDES program services were not offered. Without notice to Guardian and without first seeking her consent, the District placed Student in a full-inclusion program. Following a visit to Guardian's house in the fall of 2020, DY made no other efforts to re-engage Student in his education, did not issue a remote learning plan and did not otherwise attempt other interventions in the home. On November 1, 2020, following the late October 2020 Team meeting, DY issued an IEP reflecting the change in Student's placement to full inclusion, which placement Guardian rejected on December 1, 2020 (PE-7). Thereafter, Student was still not offered services consistent with his stay-put rights until January of 2021.

Later in December of 2020 or January of 2021, and only after Dr. Daniel's report recommending residential placement was discussed, did DY engage a BCBA to help return Student to school. DY's efforts in January of 2021 were too little, too late. At the time of the Hearing in April of 2021, the District still had been unable to reengage Student in his education and yet, it did not offer a different placement. The only additional service (mentioned only in the N1) was that of a BCBA who was unsuccessful in his efforts to engage Student through remote learning; a modality that has never worked for Student.

Dr. Daniel's evaluation revealed that Student's academic performance lagged below his cognitive abilities, which were solidly in the average range in most areas. The evaluation

revealed a student who was socially and emotionally in distress, isolated and with intense feelings of sadness and extreme mood swings. This evaluation further validated Guardian's observations that Student's daily living skills had deteriorated significantly, and highlighted Student's lack of independence around hygiene, taking his medication, organizing leisure activities, household chores and the like (Guardian, Daniel).

I rely heavily on Dr. Daniel's findings and expert recommendation, and conclude that Student's needs are currently far more complex than DY acknowledges, and that, in order to stabilize and reengage in his education, he requires far more significant support and intervention than he can receive at DY's program. In November of 2020 Dr. Daniel encountered a student in crisis with a presentation far different than the one Dr. Lapuc encountered the year before.

DY is correct that Student requires individualized, specialized academic instruction in a self-contained classroom, with educators capable of addressing his needs. The program must also address Student's emotional needs through therapeutic interventions including individual and group counseling, and must offer social skills instruction, and opportunities for Student to practice skills across settings must be available. Behavioral interventions must also be implemented. Student further requires intensive intervention around personal hygiene, self-care and other activities of daily living.

Consistent with 603 CMR 28.02(12), placement in a more restrictive setting is warranted when the student demonstrates an inability to learn effectively through specialized instruction and support services in a lesser restrictive environment. Contrary to what DY suggests, the opportunity to be educated with typically developing peers does not cure an otherwise inappropriate program. In designing an IEP for an eligible student, school districts are responsible to offer an educational program that addresses all of the student's identified educational needs based on that individual's presentation at the time the IEP is developed. The Team's then current knowledge regarding that student's presentation at any given point in time drives the type and frequency of services to be offered, so as to enable the student to make effective educational progress commensurate with his/her unique abilities and potential. As the individual changes, and responds or not to the program provided, the Team is called upon to evaluate and modify that student's IEP. In that sense, IEPs should be looked at as dynamic tools that guide the student in his/her journey toward becoming as independent as his/her potential permits.

Given Student's current status, the record is convincing that the January 2021 IEP, calling for placement in the TIDES Program, is insufficient and inadequate to meet his needs, commensurate with his educational potential. This program fails to effectively address all of Student's areas of need. In order for Student to receive a FAPE and make academic and educational gains he needs the in the moment interventions and structure, with services to reinforce learning across settings, in all targeted areas of need. This cannot be achieved unless Student first re-engages in his education, and he cannot do that unless he is "present" in the educational setting. As such, DY's IEP cannot be modified to render it appropriate

(Daniel). At this juncture, DY's program is not reasonably calculated to enable Student to make effective educational progress in light of his particular circumstances²³.

Residential placement is among the continuum of programs/ settings available to IDEA eligible students. It is undoubtedly more restrictive than day programs, including substantially-separate special education programs²⁴. When considering a student's entitlement to a residential placement, the appropriate standard, as reflected within several First Circuit decisions, is whether the educational benefits to which a student is entitled can only be provided through around-the-clock special education and related services, thus necessitating placement in an educational residential facility.²⁵

In the instant case, absent the benefits of a more robust IEP and the intensity, structure and consistency of the wrap-around, around the clock services offered in a residential placement, Student is not likely to access or benefit from his education and will not receive a FAPE (Daniel). The evidence supports a finding that, at present, Student requires residential placement if he is to receive a FAPE. Thus, Student is entitled to the relief sought; that is, residential placement in a therapeutic program consistent with the analysis above.

Together with Guardian, DY shall identify and forward referral packets to potential residential placements for Student. DY shall also convene Student's Team to simultaneously work on short-term goals designed to better support Student at home and at DY (if he returns) while he awaits acceptance at an appropriate residential placement. Given Student's age, disabilities, the severity of his presentation and the fact that he has had minimal engagement with his education and special education services for well over a year, it is paramount that DY proceeds with its search for residential placement expeditiously.

Procedural Violations:

In addressing claims of procedural violations, 20 USC §1415(f)(3)(E)(ii) authorizes the Hearing Officer to find that the procedural inadequacy rose to the level of deprivation of a FAPE only when the alleged procedural violation: 1) impeded the child's right to a free appropriate public education; 2) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or 3) caused a deprivation of educational benefits. In this sense, a procedural violation that is technical or *de minimis* is not compensable.²⁶

²³ *Andrew F. Douglas Sch Distr.*, 137 S.Ct. 988 (March 22, 2017).

²⁴ See *Walczak v. Florida Union Free School Dist.*, 142 F.3d 119 (2nd Cir. 1998).

²⁵ See *Gonzalez v. Puerto Rico Department of Education*, 254 F.3d 350 (1st Cir. 2001); *Abrahamson v. Hershman*, 701 F.2d 223, 228 (1st Cir. 1983); *In Re: Nauset Regional School District and Massachusetts Department of Developmental Services*, BSEA # 1300562 (Crane, 2013).

²⁶ See *In Re: Student v. Winchester Public Schools*, BSEA # 18-04106 (Berman, 2018) ("I find that these alleged violations are *de minimis*, did not interfere with Parent's or Student's ability to participate in the Team process and did not deprive Student of FAPE.")

In the instant case, Guardian's procedural claims involve: failure to obtain and consider information regarding Student prior to making a placement in November 2019, consistent with 34 CFR 300.324(a)(i-v); failure to draft an IEP that accurately reflected the services DY was offering Student in December of 2019 and present Guardian with a placement page that identified the TIDES program as the proposed placement for Student; failure to convene the Team to discuss the BIP; failure to convene a Team meeting prior to changing Student's placement in the fall of 2020; violation of stay-put rights when the District changed Student's placement and services in October of 2020 without the Guardian's knowledge/ notice and consent; and failure to Amend Student's IEP in January of 2021 to accurately reflect the services Student would receive, including BCBA services.

Federal and state law mandate that school districts draft IEPs and identify the specific program and placement proposed for an eligible student. The IEP must be drafted at a Team meeting where the parent is offered a genuine opportunity to participate. The Service Delivery Grid in the IEP must accurately reflect the goal to which the proposed service responds, the nature of the service to be provided, the frequency of provision of that service, the individual responsible to offer the service and the period during which the service will be provided. The IDEA is clear that districts may not alter a student's program or placement without convening the Team and obtaining parental input and consent. Moreover, federal and Massachusetts statutes and regulations grant eligible students the right to "stay-put" in the last agreed upon placement during the pendency of a dispute. The concept of stay-put is central to the procedural protections afforded eligible students under federal and state mandates.

When DY convened Student's Team in November of 2019, it had insufficient information on Student prior to placing him in the TIDES program (O'Reilly). Ms. O'Reilly testified that the Team proposed to reconvene within eight weeks of Student's return to DY to review his progress and draft an IEP. In effect, DY proposed to conduct an extended evaluation, but it never drafted an IEP to reflect this, and it never convened eight weeks later to discuss Student's progress.

DY also did not draft its own IEP and did not present Guardian with a placement page reflecting Student's proposed placement in the TIDES program which, as a general rule, can be fatal, because the development and implementation of an IEP is fundamental to a district's compliance with state and federal special education mandates²⁷. Pursuant to Massachusetts²⁸ and federal regulations DY was responsible to adopt the IEP from the previous school or develop and implement a new IEP²⁹. While it would appear that DY adopted the IEP issued by Cape Cod Tech, it never issued a new placement page calling for the TIDES program and it is unclear whether DY delivered services in the manner described in the Cape Cod Tech IEP Grid.

²⁷ See *Forest Grove Sch. v. T.A.*, 129 S.Ct. 2484 (2009).

²⁸ 603 CMR 28.03(c)(1).

²⁹ 20 USC 1414(d)(2)(C)(i).

DY also failed to convene a Team to discuss the BIP it created for Student in early 2020, precluding Guardian from the opportunity for meaningful participation in the educational decision-making process which is a fundamental procedural right³⁰.

Similarly, DY again deprived Guardian of her right to meaningful participation when it failed to convene the Team in the fall of 2020 before changing Student's placement to a full-inclusion remote learning program without Guardian's knowledge/ notice or consent.

DY memorialized the change to a full inclusion placement on October 27, 2020, but then, after Guardian rejected this placement, did not offer Student services consistent with his stay-put IEP. In so doing, DY violated Student's stay-put rights, given that it only had Guardian's partial acceptance of Cape Cod Tech's IEP calling for Student's placement in a substantially-separate program.

Lastly, DY failed to amend Student's IEP in January of 2021 to accurately reflect the BCBA services Student would receive.

The evidence in this case is persuasive: DY violated several of Student's fundamental procedural due process rights. These violations were substantial and resulted in a denial of FAPE to Student, for which he is entitled to compensatory services as discussed below.

Compensatory services:

Guardian seeks compensatory services for the District's procedural and substantive violations and the only relief she seeks is residential placement of Student.

Courts and hearing officers are authorized to "grant such relief as [they] determine is appropriate"³¹. An award of compensatory services is a remedy available to hearing officers to make a student whole when the school district commits procedural violations that result in a denial of FAPE to an eligible student³². In addition, where a denial of essential special education services or a significant interruption in the provision of those services has occurred during the period of the student's entitlement to special education, compensatory services may be awarded³³.

³⁰ See *In Re: Belmont Public Schools*, BSEA #08-3070 (Crane, 2008).

³¹ 34 CFR 300.516 (c)(3). *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 359, 105 S. Ct. 1996, 1997, 85 L. Ed. 2d 385 (1985).

³² See *Pihl v. Mass. Department of Education*, 9 F.3d 184 (1st Cir. 1993).

³³ See *Stock v. Massachusetts Hospital School*, 467 NE. 2d 448, 392 Mass. 205 (1985).

An award of compensatory services by nature is an equitable remedy designed to correct a district's failure to provide something it was obligated to offer under the IDEA and pursuant to the Student's IEP. Its intention is to right a wrong.³⁴

Since compensatory education services is an equitable remedy, principles of equity and fairness guide the determination of whether compensatory services should be awarded, the type and amount of the award³⁵.

Some courts have held that compensatory education may be provided in the form of a private placement. For instance, the 11th U.S. Circuit Court of Appeals held that nothing in the IDEA precludes an award of compensatory education in the form of a private placement³⁶. The BSEA has also awarded residential placement as a form of compensatory services.³⁷

A student who is found to be entitled to compensatory services must receive sufficient services to help him/her overcome lost educational opportunities. In this sense, Guardian is persuasive in arguing that here, "it is not feasible to provide additional services to Student to compensate for [the] lost opportunities, [thus] it still remains equitable to award him compensatory relief, but, -- to do so in the form of residential placement, in conjunction with the same relief to which he is already entitled to address his complex needs" appropriately.

The record thus supports a finding that DY's responsibility to place Student in a therapeutic residential program is additionally grounded in his entitlement to compensatory relief for DY's programmatic and procedural failures.

³⁴ See *Diaz-Fonseca v. Comm. of Puerto Rico*, 451 F.3d 13 (1st Cir. 2006) (compensatory services are essentially a discretionary remedy designed to make a student whole – that is, to make up for what was lost as a result of not having received the requisite special education services. See, e.g., *C.G. ex rel. A.S. v. Five Town Community School Dist.*, 513 F.3d 279, 290 (1st Cir. 2008) ("compensatory education is . . . a discretionary remedy for nonfeasance or misfeasance in connection with a school system's obligations under the IDEA"); *Pihl v. Mass. Dept. of Ed.*, 9 F.3d 184 (1st Cir. 1993) ("compensatory education is available to remedy past deprivations"); *G. ex rel. RG v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 309 (4th Cir. 2003) ("Compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student."); *Lester H. v. Gilhool*, 916 F.2d 865 (3rd Cir. 1990), cert. denied 499 U.S. 923, 111 S.Ct. 317 (1991) (compensatory education is intended to be "an appropriate remedy to cure the deprivation of a child's right to a free appropriate public education"); *Miener v. State of Missouri*, 800 F.2d 749 (8th Cir. 1986) (compensatory education intended to cure the deprivation of a handicapped child's statutory rights).

³⁵ See *In Re: Taunton Public Schools and Adam*, BSEA #1708888, 23 MSER 67 (2017) (finding that the student was entitled to compensatory services to ameliorate the effects of the district's egregious procedural error).

³⁶ See *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275 (11th Cir. 2008).

³⁷ See, for example, *Medford Public Schools District*, BSEA #02-0640 (Figueroa, 2002) ("Thus, as a result of the inadequacy of programs provided, procedural due process violations and interruptions in provision of services as explained thus far, I find that the Student is entitled to receive compensatory services from Medford. Such services amount to one full year of residential placement for the Student.")

ORDER:

1. DY shall immediately convene Student's Team, inclusive of any relevant professional or consultant that can help support Student's programming until residential placement becomes available.
2. DY shall forward referral packets to residential schools that can meet Student's needs including schools identified by Guardian.
3. DY shall place Student in an appropriate residential school consistent with this Decision as soon as said placement becomes available and as early as the summer of 2021.

By the Hearing Officer,

Rosa I. Figueroa

Dated: June 25, 2021

June 25, 2021

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

**DENNIS YARMOUTH REGIONAL SCHOOL DISTRICT
BSEA # 2105659**

BEFORE

**ROSA I. FIGUEROA
HEARING OFFICER**

**JEFFREY W. SANKEY, ESQ., ATTORNEY FOR PARENTS
VINEESHA S. SOW, ESQ., ATTORNEY FOR DENNIS
YARMOUTH REGIONAL SCHOOL DISTRICT**