

**In re: Special Education Due Process Case # DP-23-05**

**FINAL ORDER**

In this case, Parents filed a due process complaint seeking an order requiring the Supervisory Union to reimburse Parents for tuition paid to a private school after Parents unilaterally placed Student in that private school.

The parties have filed a Joint Motion for Summary Judgment that, if granted, would result in an order requiring the Supervisory Union to reimburse Parents for tuition paid for the school years 2021-2022 and 2022-2023.

For the reasons set forth below, the Joint Motion is granted.

**FACTS**

1. Student and Student's family reside in a town located in the Supervisory Union. Student's school district is located in the Supervisory Union.

2. Student was first evaluated by the District in 2017. Student was found eligible for special education and related services with a disability category of Specific Learning Disability with an adverse effect in math reasoning and math calculation. The District developed an Individualized Education Program (IEP) that provided Student with direct instruction in math in addition to addressing behavioral issues, social/emotional development, and dealing with conflict.

3. Beginning in April 2018, Parents engaged Shauna Hill, LICSW in providing neurodiversity and complex behavioral therapy via individual and family outpatient services, clinical consultations, crisis support, case management/community support engagement, and school advocacy.

### **2019-20 School Year (6th Grade)**

4. On October 10, 2019, Student's IEP Team met and determined that Student required full-time supervision and assistance, being provided at that time in the classroom in small groups. The IEP also noted Student frequently required one-on-one behavior support/supervision.

5. Beginning in December of 2019, Student became unable and unwilling to attend school. An evaluation indicated that "[Student] has been unable to attend [Student's] school since mid-December due to [Student's] emotional and sensory sensitivities that cause the classroom environment to be overwhelming." Student's IEP Team convened in January of 2020 and changed Student's placement to "outside tutoring" based on Student's "need to be stabilized in a safe home environment with access to [Student's] mental health appointments, a non-socially charged school environment, and time to complete the neuropsychological evaluation." During the same time, Student attended a 14-day inpatient program at a Northeastern Family Institute ("NFI") facility "for crisis stabilization, psychiatric consultation, and after-care planning."

6. In January 2020, the District contracted with Dr. Hutton of Deer Creek Psychological Associates to conduct a neuropsychological evaluation. Dr. Hutton concluded that the results of the ADOS2 supported a diagnosis of Autism Spectrum Disorder (ASD). The report noted that rating scales continued to endorse the diagnosis of ADHD, and that Student endorsed symptoms of depression and anxiety despite taking medication to address Student's symptoms.

7. Stephanie Unaitis, the Program Coordinator for NFI, began serving as Student's NFI case manager in the Spring of 2019. On February 4, 2020, Ms. Unaitis submitted a packet to the Vermont Department of Health for CRC review for Student. The forwarding cover letter noted Student's "extensive history of emotional outburst that can result in physical aggression," and stated that despite "attempts at engaging [Student] in treatment and decreasing [Student's] mental health symptoms,

[Student] has not been able to fully access [Student's] supports to make significant therapeutic progress.”

8. As a result of the CRC process, Student was found to need a residential placement with support from the Department of Mental Health. This decision was made in February/March 2020, just before the onset of COVID-19.

9. At Student's three-year reevaluation in February 2020, the IEP Team concluded that Student continued to be eligible for special education and related services with a disability category of Autism Spectrum Disorder.

### **2020-21 School Year (7th Grade)**

10. During the 2020-21 school year, Student had a homebound in-home ABA full-time program. A report indicated that “[Student] was considered a homebound student last year as the parents wanted to have what was determined to be medically necessary ABA services in the home.” S.D. Associates provided in-home support for Student for 40 hours per week beginning in the spring of 2020 through April of 2021. The home environment did not enable Student to make appropriate educational progress. Student was not supported by Autism-trained educators and support professionals who understood Student's needs related to academic instruction in combination with Student's ability to remain regulated and manage Student's sensory and emotional sensitivities.

11. In May 2021, Shauna Hill conducted a Neurobiological-Psycho-Social Evaluation with Recommendations. Ms. Hill noted Student's “history of substantially challenging anxiety, emotional dysregulation, disruptive behavior (refusal, rigidity, verbal aggression, physical aggression, or threats of aggression), long-term obsessive-compulsive features (aversions, rituals, controlling environments, perseveration, that remain sub-clinical for periods but exacerbate in periods of stress of decompensation), cognitive & functional rigidity, sensory processing & integration difficulties, central nervous system (CNS) disorganization & hyperactivation, and social alienation/isolation.” Ms. Hill

stated that Student's specific profile is "a significant clinical & educational 'outlier' due to the extreme reactivity & sensitivity of [Student's] nervous system, as well as the traumatic impact and past risk profile associated with [Student's] particular over-activation & processing profile."

12. Ms. Hill's May 2021 report included diagnoses of ASD (from Dr. Hutton), Persistent Depressive Disorder, ADHD, and other disorders of the nervous system (NOS).

13. Ms. Hill's May 2021 report outlined the interventions that had been attempted over several years with little to no appropriate progress. Her report stated: "Many years of intensive school & community support professionals have collaborated with [Student]'s family to progress, or tolerate [Student's] community school milieu well enough to maintain a consistent focus, sense of environmental & social safety, or cognitive processing required to integrate learning and retain content or skills."

14. Evaluations in the spring of 2021 conclusively recommended that Student attend a residential placement. The report indicated that "[i]t is my assessment that a specialized residential school is the only appropriate option that will provide the basic safety, expertise, curricular accommodation & support [Student] requires to re-engage [Student's] education." The report concluded: "[Student] will gain the most from a residential, wraparound program."

#### **2021-22 School Year (8th Grade)**

15. The IEP Team convened on August 11, 20, and 27, 2021, and drafted an IEP for Student. At the IEP meeting on August 20, 2021, the IEP Team agreed that Student's placement for the 2020-21 school year would be a residential program.

16. At the IEP meeting on August 27, 2021, the IEP Team discussed possible residential placements where Student could attend. The IEP Team discussed a private school in another state and noted that it "meets the picture" of what Student needs but did not have the appropriate certification, as the private school was not approved by the other state to provide special education and related services to children with disabilities.

17. The District would have placed Student at the private school if it was approved to provide special education and indicated a willingness to place Student there if the Agency of Education would make an exception.

18. At the August 27, 2021 meeting, the IEP Team also discussed a residential placement in another state. The student population at the residential program included students with a diversity of diagnoses and Student would only have one peer with ASD in Student's class. Parents noted their concern about the restrictiveness of the placement, stating it seemed more like a treatment program than a school.

19. Shauna Hill was involved in conversations with representatives of the residential program in the summer of 2021. It was Ms. Hill's opinion that the residential program would not provide Student with a free and appropriate public education (FAPE) because it provided an inappropriate peer group, an inappropriate milieu in general, inappropriate therapeutic approaches that are inconsistent with Student's needs, and an inappropriate setting, and would cause a lack of progress and regression. Ms. Hill also believed that the residential program would be too restrictive for Student and would not promote progress on the IEP goals in Student's IEP.

20. Student's August 2021 IEP describes the difficulties in finding services and supports that would meet Student's needs and allow Student to make progress. The IEP describes "several successive school years of increasing social alienation, academic struggle, environmental & sensory overwhelm, behavioral agitation, and emotional reactivity," resulting in Student having "difficulty remaining safe in order to access [Student's] education at school even with the provided accommodations and supports."

21. On September 9, 2021, the District issued a Form 7a announcing the residential program as the proposed educational site where Student's IEP would be implemented for the 2021-22 school year. The Form 7a noted that the IEP Team also considered the private school, but stated that it "is not

approved for special education by the VT AOE or within VT therefore the school district cannot place [Student] there.”

22. Parents unilaterally placed Student at the private school starting on September 11, 2021. The private school is a residential school, primarily serving students with Autism Spectrum Disorder, social disorders, anxiety, ADHD, and non-verbal learning disabilities. Student’s peer group at private school is similar to Student.

23. The private school serves approximately 90 students from 8th grade through post-graduate, and typical class size is 5-8 students.

24. The private school has provided Student with programming focused on inter-personal skills, conflict resolution, and managing emotions and identifying healthy coping strategies when Student is emotionally upset.

25. When Student started at the private school, Student was struggling with social-emotional issues, reciprocal conversations, managing frustrations, and engaging in an academic setting. During the 2021-22 school year, Student made great social-emotional growth and was able to move up a team due to this growth. Student demonstrated a marked increase in engagement at school.

26. Parents filed a due process complaint during the 2021-22 school year, which resulted in a mediation agreement where the parties agreed to submit a joint request for a waiver to the Vermont Agency of Education to permit Student’s placement at the private school. As part of the agreement, the parties agreed that the 90-day statute of limitations governing unilateral placements was tolled and would not be asserted by the District as a defense if a due process case relating to the 2021-22 school year needed to be refiled.

27. In November 2021, Shauna Hill drafted a Neurobiological-Pscho-Social Update Report about Student. To complete the report, Ms. Hill had a two-day school placement visit to the private

school where she spoke with Student's support and academic teams and spent six hours of direct contact time with Student.

28. Ms. Hill's report documented that over the course of Student's first two months at the private school, there had been "a significant re-engagement in education and reduction in all previous domains of concern including general school distress, mental health symptoms ... & behavioral challenges."

29. Ms. Hill's report stated that the private school's administrators reported that Student "has consistently shown higher-than average enthusiasm and engagement for [Student's] education and participated fully in all residential & community programming, quickly making connections with peers[.]"

30. The private school's administrators further cited weekly reports on academic and social-emotional and life skills data, which demonstrated "excellent attendance, participation, progress on academic work, consistent attending of residential responsibilities . . . and substantial participation in groups & community activities." Ms. Hill's report included input from Student's Learning Specialist about Student's academic progress and participation, which noted that Student was "exceeding everyone's expectations," and attending class and completing work consistently.

31. Ms. Hill spoke with Student during the two-day observation at the private school. Student was "demonstrably enthusiastic about [the private school] & the learning model[.]"

32. Ms. Hill concluded: "At this time, [Student] presents as a profoundly more regulated & engaged learner at the private school and is consistently demonstrating success & capacity building in all domains of [Student's] programs. [Student]'s own positive feelings about [Student's] success [is] a refreshing contrast to the demoralized, isolated student I assessed earlier this year and the academic engagement & progress [Student is] maintaining is the result of [Student]'s complex learning needs being met in the FA environment. It is my assessment that [the private school] is consistently delivering the accommodations that [Student] needs per [Student's] IEP."

### **2022-23 School Year (9th Grade)**

33. Student is currently attending the private school.

34. Ms. Hill believes that the private school remains appropriate for Student and is meeting Student's needs, consistent with her observations from November 2021.

35. The Academic Dean at the private school states that Student has made great growth since Student started attending the private school. Student remains very engaged in school, attends classes regularly, and is doing well academically. Student has also made a lot of social progress this year, and has been able to maintain [Student's] room in a "neat and tidy way."

36. The Academic Dean at the private school believes the private school is an appropriate placement for Student as demonstrated by Student's growth and increased independence.

### **CONCLUSIONS OF LAW**

In this case, the parties agree that the private school is an appropriate placement for Student, and have requested an order permitting the District to place Student there. As Student's LEA, the District is required to provide Student with a FAPE. The District's FAPE offer is set forth in Student's IEP, and a District fulfills its FAPE obligation when it offers an IEP that is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 137 S.Ct. 988, 1001 (2017). Part of the FAPE analysis includes consideration of the educational setting and educational environment set forth in the IEP, and the District is required to select an educational site that is the least restrictive environment where Student's IEP can be successfully implemented. Vt. SBE Rule 2361.3.

In selecting the appropriate educational site, school districts in Vermont are confined by Vt. SBE Rule 2363.10(b), which states that when an LEA places a student for special education services in an independent school, the placement must be in "schools that have been approved" by the Agency of Education. The Agency of Education maintains a list of schools that are approved to provide special



education to students, and LEAs are limited in their placement decisions based on schools that are on the list. If the IEP Team is considering placement at an out-of-state independent school, the school must be “approved by the host state for the purpose of providing special education and related services to children with disabilities within that State.” Vt. SBE Rule 2228.1(3).

Under the IDEA and Vermont special education law, if the parents of a child believe that the IEP offered by the school district fails to provide the child with a FAPE, the parents may unilaterally remove the child from the district’s placement and place them at another school at the parents’ own expense, and then file a due process complaint seeking reimbursement. Reimbursement may be awarded upon a demonstration that: “(1) the proposed [programming] failed to provide the student with an appropriate education; (2) the parent’s private placement was appropriate to the child’s needs; and (3) equitable considerations support the parent’s claim.” *Reyes ex rel. R.P. v. N.Y.C. Dep’t of Educ.*, 760 F.3d 211, 215 (2d Cir. 2014); *see also C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 836 (2d Cir. 2014).

When a parent unilaterally places a child and seeks reimbursement, the parent is not limited to schools that have been approved by the Agency of Education. *See Florence Cnty. Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 8 (1993) (holding that IDEA’s requirement that a private school “meet the standards of the state educational agency does not apply to private parental placements”). Hearing officers can order reimbursement for private placements that are not on a State’s approved list of private schools; in fact, “reimbursement is [not] necessarily barred by a private school’s failure to meet state education standards.” *Id.* at 14. Consistent therewith, Vermont law provides an exception to the general prohibition on school districts placing students in private schools that have not been approved by the State, and permits such placement when it is pursuant to a hearing officer’s order. Vt. SBE Rule 2230 (“No . . . LEA shall make a special education placement in an independent school that has not been approved to receive public tuition pursuant to the conditions in Rule 2229, unless the placement is pursuant to . . . a hearing officer’s order.”).

In this matter, the parties discussed the private school as a potential placement for Student. The District noted that it was prohibited from placing Student at the private school because it is not approved by the other state to provide special education and related services to children with disabilities. The District therefore placed Student at the residential program because it is an approved school and was on a list of recommended options from the Agency of Education. Due to their concerns about the residential program, Parents unilaterally placed Student at the private school, and filed a due process action seeking reimbursement from the school district. To prevail on their request for reimbursement, Parents must demonstrate: “(1) the proposed [programming] failed to provide the student with an appropriate education; (2) the parent’s private placement was appropriate to the child’s needs; and (3) equitable considerations support the parent’s claim.” *Reyes, supra*.

In their Joint Motion for Summary Judgment, the parties have requested an order indicating that because the three prongs have been met, Parents’ unilateral decision to place Student at the private school is appropriate, and they are entitled to tuition reimbursement.

For the reasons set forth below, this hearing officer agrees with the parties that (1) the undisputed facts demonstrate that *Reyes*’ three-prong test has been met; (2) Student’s placement at the private school is appropriate; and, (3) Parents are entitled to tuition reimbursement as requested in their due process complaint.

### **I. Proposed Programming Failed to Provide a FAPE**

The District is not seeking to defend the appropriateness of the residential placement in this matter. Rather, the residential placement was purely a function of compliance with State regulations. The residential placement has the capacity to implement Student’s IEP, and is approved to provide special education and related services. Therefore, the District offered the placement.

As noted below, however, the residential placement is a more restrictive environment than the private school, with a less appropriate peer group for Student. Shauna Hill, a licensed social worker who

provided direct support to Student and Parents consistently from 2018-2020 and has provided subsequent evaluations, opined during IEP Team discussions in 2021 that the residential placement was not appropriate for Student. Her concerns – both then and now – are that residential placement provides an inappropriate peer group, an inappropriate milieu in general, inappropriate therapeutic approaches that are inconsistent with Student’s needs and an appropriate setting, and would cause a lack of progress and regression. Ms. Hill also believes that residential placement is too restrictive for Student and would not promote progress on the IEP goals in Student’s IEP. Student would only have had one other peer with Autism Spectrum Disorder (“ASD”).

Therefore, and particularly considering Student’s demonstrated success at the private school, the District does not seek to prove that its offer was appropriate. Instead, the parties jointly seek an order placing Student at the private school.

Based on the agreement of the parties, this hearing officer finds that placement in the residential program is not appropriate because it does not provide Student with a FAPE.

## **II. The Private School Provides Student with a FAPE**

In August 2021, the IEP Team convened to determine an appropriate placement for Student. Based on recommendations from evaluators, all parties agreed that Student required a residential placement, and the IEP Team discussed potential sites where Student’s IEP could be implemented. The IEP Team did not reach an impasse on the substance of what Student requires. The only disagreement arose about the specific site that could offer Student a FAPE in the least restrictive environment. Parents sought placement at the private school, but the District was prohibited from placing Student at the private school because it is not approved to provide special education and related services to children with disabilities. Because the private school was not approved, it was the operation of State regulation (prohibiting the District from placing Student at the private school) that created an educational dispute

about the appropriate site. Consistent with the regulations, the District issued a Form 7a placing Student at the residential placement in another state.

The central issue in this case is whether placing Student at the private school provides Student with a FAPE. Based on the undisputed facts presented by the parties in their Joint Motion for Summary Judgment, this hearing officer finds that it does.

At the time that the IEP Team was considering the appropriate residential site for Student, all Team members were aware of the importance of the placement. Student had been significantly struggling for years, and both the District and Parents had tried numerous options in an effort to provide Student with appropriate support. In December 2019, Student became incapable of attending school, and Student required a 14-day inpatient stay at a NFI facility for crisis stabilization. During the 2020-21 school year, Student had a homebound educational placement so that Student could receive a full-time ABA program. Even this intensive program – where SD Associates implemented an ABA program in Student’s home for 40 hours per week for over nine months – did not permit Student to make any meaningful educational progress. Student’s August 2021 IEP describes “several successive school years of increasing social alienation, academic struggle, environmental & sensory overwhelm, behavioral agitation, and emotional reactivity,” resulting in Student having “difficulty remaining safe in order to access [Student’s] education at school even with the provided accommodations and supports.”

At the August 2021 IEP meetings, the Team agreed that the private school appeared to offer the elements of an educational program that Student required, and the District would have placed Student at the private school if it were approved. The private school primarily serves students with Autism Spectrum Disorder, social disorders, anxiety, ADHD, and non-verbal learning disabilities. Class sizes are typically 5-8 students. Student’s peer group at the private school is similar to Student.

The greatest proof of the private school’s ability to provide Student with a FAPE, however, is the data from the past year and a half demonstrating Student’s success there. When Student started at the

private school, Student was struggling with social-emotional issues, reciprocal conversations, managing Student's frustrations, and engaging in an academic setting. During the 2021-22 school year, Student made great social-emotional growth and was able to move up a team due to this growth. Student demonstrated a marked increase in engagement at school.

In November 2021, Shauna Hill drafted a Neurobiological-Psycho-Social Update Report about Student. Ms. Hill's report documented that over the course of Student's first two months at the private school, there had been "a significant re-engagement in education and reduction in all previous domains of concern including general school distress, mental health symptoms . . . & behavioral challenges." Ms. Hill's report stated that the private school's administrators reported that Student "has consistently shown higher-than average enthusiasm and engagement for [Student's] education and participated fully in all residential & community programming, quickly making connections with peers[.]" Administrators further cited to weekly reports on academic and social-emotional and life skills data, which demonstrated "excellent attendance, participation, progress on academic work, consistent attending of residential responsibilities . . . and substantial participation in groups & community activities." Ms. Hill's report included input from Student's Learning Specialist about Student's academic progress and participation, which noted that Student was "exceeding everyone's expectations," and attending class and completing work consistently.

Ms. Hill spoke with Student during the observation at the private school. Student was "demonstrably enthusiastic about [the private school] & the learning model[.]" Ms. Hill concluded: "At this time, [Student] presents as a profoundly more regulated & engaged learner at the private school and is consistently demonstrating success & capacity building in all domains of Student's programs. [Student]'s own positive feelings about Student's success are a refreshing contrast to the demoralized, isolated student I assessed earlier this year and the academic engagement & progress [Student is] maintaining is the result of [Student]'s complex learning needs being met in the FA environment. It is

my assessment that [the private school] is consistently delivering the accommodations that [Student] needs per [Student's] IEP.”

The Academic Dean at the private school states that Student has made great growth in the last year. The only hurdle in supporting the placement is the Agency's prohibition on placing students at schools that are not approved by the host state to provide special education to students with disabilities, absent a court or hearing officer order. This case presents the exact factual circumstances supporting such an order. For the past year and a half, Student has reengaged in academics, made progress academically and socially, and has increased Student's independence. The parties jointly seek an order placing Student at the private school to allow Student's growth to continue.

The Academic Dean states that Student remains very engaged in school, attends classes regularly, and is doing well academically. Student has also made significant social progress during the current 2022-23 school year, and has been able to maintain [Student's] room in a “neat and tidy way.” This demonstrated success is remarkable given Student's previous struggles to access and engage with education. Both Ms. Hill and the private school's Academic Dean believe that the private school is an appropriate placement for Student as demonstrated by Student's growth and increased independence.

The undisputed facts presented by the parties in their Joint Motion for Summary Judgment support Student's placement at the private school.

### **III. Equitable Considerations Support Reimbursement**

Finally, equitable considerations support an award of reimbursement in this matter. Unlike most due process cases seeking tuition reimbursement, the IEP Team in this matter has never reached substantive dispute. The Team has worked collaboratively for years in an effort to find appropriate programming to support Student and Student's needs. After years of disengagement, alienation, and a lack of progress, Student has finally found a school that has allowed Student to reengage in Student's education. The only hurdle in supporting the placement is the Agency's prohibition on placing students

at schools that are not approved by the host state to provide special education to students with disabilities, absent a court or hearing officer order. This case presents the exact factual circumstances supporting such an order. For the past year and a half, Student has reengaged in academics, made progress academically and socially, and has increased independence.

Student's remarkable progress since enrolling at the private school provides the final and compelling reason supporting an order finding that Parents' unilateral decision to place Student at the private school is appropriate and that they are entitled to tuition reimbursement as requested in Parents' due process complaint.

### **CONCLUSION**

For the reasons set forth above, this hearing officer finds that the undisputed facts demonstrate that the *Reyes* three-prong has been met. Therefore, Student's placement at the private school is appropriate.

For that reason, the Joint Motion for Summary Judgment is granted and the Supervisory Union is ordered to reimburse Parents for tuition paid to the private school for the school years 2021-2022 and 2022-2023.

Dated at Montpelier, Vermont this 1<sup>st</sup> day of January 2023.

David J. Williams  
Due Process Hearing Officer  
Vermont Agency of Education

