

**STATE OF VERMONT  
STATE BOARD OF EDUCATION**

**IN RE: THE MILL SCHOOL RATE PETITION FOR DECLARATORY  
RULING**

**PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
RECOMMENDED ORDER**

This matter was considered on June 29, 2021. This is a Petition for Declaratory Ruling to the Vermont State Board of Education. The Mill School (TMS) was represented by Mark D. Gettinger, Esq. The Agency of Education (AOE) was represented by Emily Simmons, Esq. The hearing was held before a Hearing Officer, George Belcher, Esq., who was appointed by the Vermont State Board of Education (SBE). The appointment was made pursuant to SBE Rule 1236.1. The Hearing Officer makes the following Findings of Facts and Conclusions based upon the evidence presented and the briefing of the parties. The Hearing Officer recommends that the State Board of Education adopt the Findings of Fact and Conclusions of Law. In addition, the Hearing Officer recommends that the State Board of Education approve and adopt the proposed order.

Exhibits Admitted into Evidence

- Petitioner Exhibit 1 Addison NWSD Packet
- Petitioner Exhibit 2 Burlington SD Packet
- Petitioner Exhibit 3 Champlain Valley SD Packet
- Petitioner Exhibit 4 Colchester SD Packet
- Petitioner Exhibit 5 Essex-Westford SD Packet
- Petitioner Exhibit 6 Franklin West SU Packet
- Petitioner Exhibit 7 Grand Isle SD Packet
- Petitioner Exhibit 8 Milton Town SD Packet
- Petitioner Exhibit 9 Mount Mansfield SU Packet
- Petitioner Exhibit 10 South Burlington SD Packet
- Petitioner Exhibit 11 Winooski SD Packet
- Petitioner Exhibit 12 May 6, 2021 Public Records Request
- Petitioner Exhibit 14 Jen Barnett Chronology
- Petitioner Exhibit 15 Rachel Smith Statement
- Petitioner Exhibit 16 TMS Petition for Declaratory Ruling and Attachments
- Petitioner Exhibit 17 Email from Emily Simmons to Mark Gettinger, 7/3/19

- Agency of Education Exhibit A Settlement Agreement 8/12/20
- Agency of Education Exhibit B Letter of M. Gettinger 11/11/20

Agency of Education Exhibit C Letter and Emails from E. Simmons  
11/16/20

Agency of Education Exhibit D Email from E. Maguire to B. James  
10/19/20

Agency of Education Exhibit E Brad James Memo 10/27/20

## Background Facts

1. The Mill School is licensed as an independent school.
2. Timothy Feeney, PhD, is one of the founders of The Mill School. He had prior involvement in a therapeutic independent school in Vermont. After the closure of that school and several inquiries to him about his ability to provide services to Vermont schools, he and others applied for The Mill School to become licensed as an independent school in June of 2018.
3. The Mill School is designed as a "therapeutic school". It offers special education services to students of middle and high school age with disabilities in autism spectrum disorders, emotional disturbance, traumatic brain injury disorders, specific learning disabilities, and other health impairments. The Mill School is designed as a "year-round" school meaning that it has 219 school days per year. The school year runs from July 1 through June 30.
4. In February of 2019 The Mill School became licensed as an independent school by the State Board of Education. The approval did not, however, include a per student tuition rate as part of the approval process.
5. The Mill School accepted its first student on March 5, 2019.
6. When a sending school identifies a special education student with needs which cannot be met at the school which the student would ordinarily attend, the special educators (Individual Education Plan Team) can recommend that the sending school contract with an independent school to provide the special education services to that student under terms and compensation arranged between the sending school and the independent school.'

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**SBE Rule** 2363.10 TEP Requirements for Placements by LEAs in Independent Schools or Tutorial Programs ( 34 CFR § 300.325 ).

(a) Before an LEA places a student eligible for special education services in, or refers a student to, an independent school, or a tutorial program, the LEA shall initiate and conduct a meeting to develop an IEP for the student that reflects the change in placement.

(b) The LEA's placement shall be at no cost to the parents and the independent school or tutorial program shall provide an education that meets the standards that apply to education provided by the local LEA.

(1) Placements by LEAs in independent schools shall be in schools that have been approved according to Rule 2228.

7. The sending school might be a Supervisory Union (SU) or a Supervisory District (SD)<sup>2</sup> within which the student's actual school is contained. The contracting authority, whether Supervisory Union or Supervisory District, is further described as an LEA<sup>3</sup> (Local Education Agency) when it contracts for special education services with an independent school.
8. 16 VSA Sec. 2963 establishes a system for Supervisory Unions to receive a special-education-expenditures grant each school year.<sup>4</sup> The grant partially reimburses each supervisory union ' s allowable special education expenditures. The statute directs the State Board of Education (SBE) to define allowable expenditures by rule. State Board of Education Rules 2366.1-2366.10 define allowable expenditures.
9. Special Education expenses for students , whether within a local school or whether provided by contract by an independent school, are subject to reimbursement to the school district from the State of Vermont. The rate of reimbursement is 56% for the first \$60,000.00 of the per student special education expenses, and 95% for amounts exceeding \$60,000.00. For example, if a school district pays an independent school \$68,000.00 in special education expenses for a student in a school year, the State would

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<sup>2</sup> The terms Supervisory Union and Supervisory District are used interchangeably for the purpose of this decision.

<sup>3</sup> Local Education Agency. Local Education Agency (LEA) means the supervisory union unless there is a unanimous vote at a supervisory union meeting that the supervisory union will only coordinate special education services on behalf of member districts in which case the LEA is the local school district (16 YSA 261a(6)) . SBE Rule (2361.1)(24)

<sup>4</sup> 16 V.S.A. § 2963 (a) Based on where the related cost is incurred, each town school district, city school district, union school district, unified union school district, incorporated school district, the member school districts of an interstate school district, and unorganized town or gore or supervisory union shall receive a special education expenditures reimbursement grant each school year.

(b) The amount of a school district's or supervisory union's special education expenditures reimbursement shall be equal to the total of its special education expenditures multiplied by the reimbursement rate for that year.

(c) As used in this subchapter :

(1) Special education expenditures are allowable expenditures for special education, as defined by rule of the State Board, less the following:

(A) revenue from federal aid for special education;

(B) mainstream service costs, as defined in subdivision 2961(c)(1) of this title;

(C) extraordinary special education expenditures, as defined in section 2962 of this title;

(D) any transportation expenses already reimbursed;

(E) special education costs for a student eligible for aid under section 2963a of this title; and

(F) other State funds used for special education costs as defined by the State Board by rule.

(2) The State Board shall define allowable expenditures under this subsection. Allowable expenditures shall include any expenditures required under federal law.

(3) "Special education expenditures reimbursement rate" means a percentage of special education expenditures that is calculated to achieve the 60 percent share required by subsection 2967(b) of this title.

reimburse (56% of \$60,000.00 and 95% of \$8,000.00) a total of about \$41,200.00. The school district would be responsible for the difference of \$26,800.00.

## The Rate Setting Process

10. The rules surrounding rate approval for independent schools such as The Mill School, require that the school be established before a rate application can be made.<sup>5</sup> For example, staff must be hired, facilities must be arranged, faculty must be contracted, and so forth, before a complete application for a per student tuition rate approval can be made.
11. Since The Mill School was approved for students in February, 2019, and since no tuition rate was included in the approval, the management of The Mill School looked to tuition rates for other schools which ranged between \$40,000 and \$107,000. The Mill School set its initial tuition rate at \$60,000.00 per student per year for the 2018-19 school year. Students were placed at The Mill School in the spring of 2019 with contracts using this interim rate and the sending schools paid this rate.
12. On April 22, 2019, The Mill School applied for a tuition rate to be approved by the Secretary of Education. The Mill School estimated that its per student annual costs were \$72,457.22.

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<sup>5</sup> SBE Rule 2228.8 Rate Approval for Independent Schools Approved for Special Education Purposes

(1) Each independent school approved for special education purposes by the State Board of Education shall annually report its rates for special education tuition, related services and room and board to the Commissioner on a form prescribed for that purpose.

(2) The rates that an independent facility approved for special education purposes charges for tuition, related services and room and board shall be no more than the costs that are reasonably related to the level of services provided to its publicly-placed special education children. Reasonable relationship shall be determined by utilizing generally accepted accounting principles, such as those set forth in the Handbook (II) for Financial Accounting of Vermont School Systems.

(3) The Commissioner shall review each special education approved independent school's annual rate report. If the Commissioner concludes that a special education approved independent school's rates are not reasonably related to the level of services provided to publicly-placed special education children, the Commissioner shall make a determination as to the maximum rate that public schools and the State Department of Education would pay to the independent school for those services and offer the school an opportunity for explanation regarding why the maximum rate the Department would pay is not adequate. If the explanation is not satisfactory to the Commissioner, he or she shall notify the Council for Independent Schools and shall refer the matter to the State Board of Education.

(a) Upon such referral by the Commissioner, the Board shall conduct a formal proceeding in accordance with the requirements of Rule 1230, et seq.

(b) The State Board's determination shall be final.

(4) Timelines for rate approvals from the Department

(a) To have a new rate approved for the ensuing school year, an independent school shall submit a request for rate approval with supporting documentation to the Department prior to November 15. The Commissioner shall notify the independent school of the results of the review on or before January 15.

(b) If a request for a new rate approval is not submitted by November 15, the most recent approved rate will be in effect until the following November 15, when the next rate request is due.

13. On June 27, 2019, the Agency of Education, by letter, set an interim tuition rate for the Mill School at the rate of \$44,995 per student per year. In response to this decision, The Mill School worked with Agency of Education staff to clarify what the Mill School felt were mistakes in the calculations used by the Agency. Simultaneously, the Agency was changing its processes for rate-setting of Independent Schools which required different forms, additional information, and different formats for submission.
14. By letter dated August 26, 2019, a final rate was set at the same rate as the interim rate (\$44,995). This surprised the Mill School management since, in the opinion of the Mill School, the review team at the Agency of Education had agreed to changes in allowable expenses which would have increased the rate. When The Mill School inquired about this, they were told by Deborah Onnsbee on behalf of the Agency that the only route to resolve the matter was to appeal to the Secretary. See SBE Rule 2228.8(3)
15. In September of 2019 The Mill School representatives met with the Secretary of Education regarding the rate. On October 14, 2019, the Secretary of Education denied the appeal of The Mill School but did make some adjustments to the rate calculation. The Mill School was later informed that a modified rate of \$46,000 would be allowed. The Mill School was still of the view that there were errors in the rate calculation.
16. On October 24, 2019, The Mill School took an appeal of the rate issue to the State Board of Education. See SBE Rule 2228.8(3).
17. In the late winter and spring of 2020, the focus of The Mill School was upon the impacts of the Covid pandemic and the steps necessary to keep students and staff safe, while continuing to provide special education to the enrolled students.
18. Between October of 2019 and August of 2020, The Mill School was in negotiations with the Agency of Education regarding the appeal. The State Board of Education assigned a hearing officer. The date for the rate appeal hearing was set for August 19 and 20, 2020.
19. On August 12, 2020, the parties reached a Settlement Agreement and filed it with the hearing officer.
20. During the negotiation of the agreement there was no mention or acknowledgment by the representatives for the Agency that there was any rule-based deadline preventing recoupment based upon the new rate set forth in the agreement. There was no mention of any SBE rule which might prohibit recovery of the increase in the allowed rate retroactively, or recoupment of the State's share of retroactive payments to the Supervisory Unions. The Settlement Agreement was approved by the State Board of

Education at its regular meeting on August 19, 2020. This was after The Mill School school year of 2019-2020 was over.

21. It appears that it was the understanding of the Agency of Education negotiating team that retroactive recoupment of the changed rate would be permitted and would occur. In response to a question by the Hearing Officer on July 20, 2020, Attorney Rachel Smith who represented the Agency in the negotiation stated:

And currently, um, the, as I understand it, the LEA's are contractually obligated to pay the existing rate and then they have agreed with The Mill School that if The Mill School were to prevail on this appeal and get a higher rate, that the local education agencies, um could be back billed.

See Exhibit 15. Attorney Smith later queried The Mill School attorney on this issue and was satisfied that in the view of The Mill School the contracts allowed recoupment of the increased rate. See Exhibit 14, email from R. Smith to M. Oettinger, 8/10/20.

### **The Settlement Agreement**

22. The Settlement Agreement (attached as Exhibit A to this decision and contained in Mill School Exhibit 16, Agency of Education Exhibit A) provided:

- a. Dismissal of the rate appeal with prejudice;
- b. Budget adjustment allowances and agreements regarding the capacity for students; and
- c. "Final Rates".

23. The approved final rate for the school year (SY) 2018-2019 and the school year 2019-2020 was set at \$66,783.24; the rate for school year 2020-2021 was set at \$65,140.36. Obviously, these rates were a significant elevation of the interim rate of \$44,995.00. The agreement also contained the statement, "TMS agrees it will not seek additional recoupment from school districts for the SY/19." Clearly, this implied and disclosed that The Mill School would be seeking additional recoupment for the school year of 2019-2020. The Agency of Education by entering the stipulation, agreed.

## The Contracts

24. State Education Board Rules require that special education services provided by Independent Schools be provided by contracts.<sup>6</sup> Obviously this requirement assures the schools and the Agency of Education as to what services are being provided and what are the costs for those services.
25. The Mill School used a standard contract for its services from its commencement. While there were minor changes from the 2018-2019 contracts to the 2019-2020 contracts, they were substantially the same. The 2019-2020 contracts were entered into evidence as TMS Exhibits 1-11.
26. Each of the eleven contracts contains the following language:

VI. Tuition The Tuition for the Student's Program for the Term of the Agreement shall be calculated using the school's approved annual student rate set by the Vermont Agency of Education for general and special education. The currently approved rate for the academic year is \$44,995. If the approved rate is increased during the term of the agreement, The Mill School will notify the LEA and an amendment to the agreement will be issued to the new rate with an effective date based on the Agency of Education's approved date, which may be retroactive to the initial enrollment date for the school year.

The School shall invoice the LEA and shall include but not be limited to including the student's name, date(s) of service, services and associated payment terms that tie back to the deliverables outlined in the scope of work (Section **XXXIII** below) and attendance record; and the LEA shall pay the Tuition in advance on a monthly basis. The LEA shall pay the Tuition regardless of student's attendance or participation up until the point the student is no longer enrolled at the Mill School

**XXIII** Amendment No amendment to the Agreement shall be permitted without the written agreement of the parties. An amendment may be required if the Student's IEP changes impact on the Scope of Work or if the Mill School receives a different approved tuition rate.

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<sup>6</sup> SBE Rule 2228.4.1 Agreement as to Costs

In order to obtain special education approval, an independent school shall assure the State Board of Education that prior to enrolling a publicly-placed child who is served pursuant to an IEP, it will enter into a written agreement with the sending responsible agency that outlines tuition, room, board and other costs associated with the child's attendance. For children on an IEP who are placed by a state agency or a designated community mental health agency, or any other agency defined by the Commissioner, in accordance with 16 V.S.A. § 2948, the agreement shall be with the Commissioner of Education. In the instance of an emergency placement, such provisions may be agreed upon within thirty days of the child's enrollment.

27. Each of the schools (LEA's) were informed in November of 2019 that the 2019-2020 rate of \$44,995 is under "... continuing discussion with AOE regarding the tuition rate..." See Exhibits 1-11.
28. Following the August 12 settlement and its approval by the Board on August 19, 2020, Tim Feeney on behalf of the Mill School reached out to the contracting schools telling them that the 2019-20 rate had been increased and that the schools were going to be billed for the difference in the rates. Six (6) of the eleven (11) school districts immediately said that they were not obligated to pay the change in rate. Others responded to Mr. Feeney that it was "a lawyer question".
29. When confronted by the refusal by the schools to pay the change in rate, Mr. Gettinger reached out to Agency counsel, Emily Simmons and indicated to her that he understood that the schools would pay the increase in the rate if they received assurance that the Agency would reimburse the State share of the increased rate. See Exhibit 14, Email from M. Oettinger to Emily Simmons, 9/15/20.
30. On October 6, 2020, an email was sent from Clare O' Shaughnessy (attorney for the Agency) to the Burlington Supervisory Union advising that the contracts did not allow retroactive payment without an amendment or a new contract. Exhibit 14, Email of Ms. O' Shaughnessy to L. Nugent, 10/6/2020. <sup>7</sup> According to an email from Elizabeth Jennings to Brad James on October 19, 2020, AOE Attorney O' Shaughnessy also advised the Addison Northwest School District that The Mill School "... did not have grounds to bill us all for a prior year this late . . ." <sup>8</sup> Ms. O'Shaughnessy was not part of the negotiating team for the Agency of Education regarding the settlement. This is important because an Agency of Education attorney was advising at least two of the districts as to their contract obligations with The Mill School after the Settlement Agreement. It is likely that the school districts were consulting with each other regarding what their response to the new billing would be. <sup>9</sup>
31. After several inquiries by Mr. Oettinger about the willingness of the Agency of Education to reimburse its share of the increased rates if the schools were to pay the retroactive invoices, Ms. Simmons asked that the schools inquire of her and of the Agency Education Finance Director, Brad James, if they had questions on this issue. Consistent with that suggestion,

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<sup>7</sup> Exhibit 2, Email from Clare O' Shaughnessy to Laura Nugent dated October 8, 2020, reads in part, "I don't know the exact date of their rate letter, but I don't think their contract covers what they are trying to do which is back bill in the absence of amendment and/or execution of a new contract later in time."

<sup>8</sup> Exhibit 1, Email from Elizabeth Jennings to Brad James, October 19, 2020

<sup>9</sup> See Exhibit 10, Email from Amadee Denton to Brad James, October 21, 2020



Cary Myers, the CFO of The Mill School suggested to the school districts that they contact Brad James regarding the issue of State reimbursement of the increased 2019-20 rate. See Exhibit 14, Email from Carey Myers to districts dated October 19, 2020.

### **The Brad James Memorandum**

32. Brad James is the Education Finance Director and Director of Special Education Financing for the Agency of Education. He has long experience with the Agency of Education in finance (24 years). He is active regarding the State reimbursement to School districts regarding allowable and unallowable special education expenses. He is familiar with the special education reporting system whereby school districts report their special education expenses for partial reimbursement by the State. Each district files SEER reports (Special Education Expenditure Reimbursement Reports) with the final reports for the school year being required to be filed by August 1 of each year. Occasionally amended SEER Reports are filed out-of-time and final adjustments can be made in September or October regarding the State reimbursement calculation. This practice is done without violation of the rules in special situations.
33. Mr. James received at least five (5) emails from school districts inquiring about the revised invoices from The Mill School. See Exhibit 14. Some of the emails indicated that the school districts did not believe the contracts justified retroactive billing. Some of the emails specifically asked about whether the State would reimburse if the invoices were paid. Mr. James responded to several of the emails indicating that he would have to do research and have "internal conversations".
34. On October 27, 2020, Mr. James issued a formal memorandum. See Exhibit 16, Sub"G". The memorandum was addressed to Business Managers and Special Education Directors (but not The Mill School). The memorandum stated in part as follows:

A number of school districts that have had students at the Mill School for the 2019-2020 school year have asked the following question:

If the district was to pay the additional money the Mill School claims they are owed for services provided in the 2019-2020 school year, would those costs be eligible for special education reimbursement?

The answer is, no, those costs would not be eligible for special education reimbursement.

The contracts in question with the Mill School were for a school year and expired on June 30, 2020. There was no contract in place to cover the 2019-2020 school

year at the time the rate change was decided. Both the State Board of Education rules and the Technical Guide for Special Education Cost Documentation<sup>10</sup> require a contract to be in place for costs to be considered eligible for reimbursement. Key statements from both are underlined and highlighted in red font. (remainder of Memorandum not quoted).

35. Although the Memorandum refers to the specifics of The Mill School 2019-2020 contracts, Mr. James admitted in his testimony that he had not read (or even seen) any of the contracts prior to issuing this memorandum.
36. Mr. James testified that his conclusions about the terms of the contracts contained in the Memorandum were correct since he did not receive negative feedback from any of the school districts.<sup>11</sup>
37. Mr. James had no experience with school district contracts for special education services which lasted longer than the usual school year (July 1 to June 30).
38. Mr. James testified that he did not seek input from The Mill School before issuing his memorandum. Likewise, he did not copy The Mill School or its attorney when he issued the Memorandum.
39. Mr. James testified that if the contract allowed for an adjustment which extended the contract, there would be no rule-based obstacle to "after-the-fact reimbursement". He testified that if the contracts allowed retroactive modification of the tuition rate, and if he had known about it, he would "have thought differently" about the issue.<sup>12</sup>
40. The memorandum by Mr. James was not conditional or subject to assumed facts. For example, he could have said that *if the school* paid the invoice pursuant to a contractual obligation, or *if the school* paid the

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<sup>10</sup> This document is not a SBE Rule.

<sup>11</sup> Mr. Oettinger: So, I guess your conclusion is that because the settlement occurred after the conclusion of the year, that it is too late from a contractual standpoint, for the district... for the, uh, for The Mill School to seek a modification, correct?

Ms. Simmons: Objection. That's a question for a lawyer. Brad doesn't know if it is a contractual matter, it is too late.

Mr. Belcher: We'll allow the answer to that. You can answer, Mr. James, if you have an answer.

Mr. James: I'm not a contract expert. I'm not a contract attorney. Um, my understanding of a contract is there are dates where they begin and where they end, and my understanding for school district contracts, they end on June 30, at the end of the fiscal year, at the end of the school year. Again, as I have said several times before, no one said they had asked for an extension. No one had said this was happening and questioned my decision... my judgment on what I had read.

<sup>12</sup> Mr. Oettinger: But to the extent that the process and the system caused a delay, as I said, you would not have a problem, assuming that the contracts would permit after-the-fact reimbursement, you would not say that there is any rule-based barrier to that, uh, to reimbursement after the fact. Correct?

Mr. James: I'm not sure that I would say that the process, as such, was a problem because I was not a part of it. Um, I would say that had that been in the contract that they were talking about, and people extended the contract, and that information was given to me, yes, I would have thought differently about it.

- invoice pursuant to a court order interpreting the contract, then there could be reimbursement. Instead, his memorandum opinion was unconditional and absolute based upon his determination that there was no contract in place at the time of the rate determination in the Settlement Agreement.
41. Once The Mill School counsel discovered a copy of the Memorandum, he complained by email on November 5, 2020, to Agency counsel, Emily Silmnons. He stated that he was "stunned" by this event; that Mr. James' interpretation of the contract was incorrect and it had the effect of giving legal advice to the school districts; he complained that the Memorandum constituted a change of position on the part of the Agency which had agreed to a change in the 2019-2020 rate and implicitly agreed to reimbursement for that year; and he complained that this development (of the Memorandum) called into question whether the settlement agreement was reached in good faith.
  42. Ms. Simmons responded by email on November 16, 2020. One paragraph of that email stated, "The AOE is not a party to the contracts. The AOE has not and will not determine whether the requests for payment are valid under the contracts. Only the Districts and their attorneys can determine whether they are bound to pay." This statement flies in the face of AOE Attorney O' Shaughnessy's opinion expressed to school districts such as her email on October 6, 2020.<sup>13</sup> This statement also is inconsistent with the clear language of the Memorandum by Mr. James.
  43. The Mill School requested that the Memorandum be retracted. It was not.
  44. Mr. James testified, and the Board so finds, that if the school districts or supervisory unions had to pay the increased rates caused by the adjustments in the Settlement Agreement, it would not cause a significant increase in the overall tax burden of the school districts or supervisory unions. Likewise, if the State was required to reimburse for the adjusted rate, it would cause a negligible impact upon the State education fund.<sup>14</sup>
  45. Mr. James also testified that there are sometimes adjustments to the special education expenses of school districts after the school year in

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<sup>13</sup> Exhibit 2, Email from Clare O' Shaughnessy to Laura Nugent dated October 8, 2020, reads in part, "I don't know the exact date of their rate letter, but I don't think their contract covers what they are trying to do which is back bill in the absence of amendment and/or execution of a new contract later in time."

<sup>14</sup> "Whether or not the SUs receive the special education reimbursement amount toward the costs in question does not significantly impact any SU's budget or tax rate. The impact of the total funds TMS is attempting to recoup on the Statewide Education Fund would be negligible or a rounding error" (Testimony of Brad James, H.R. 2 at 43:37-46:26 Stating in part "their [Colchester] tax rate would go up ... from 1.3791 up to 1.3799, a thousandth or two one-thousandth of a cent on the tax rate". See Agency of Education Proposed Findings of Fact No. 7

question and these might be carried over into the next year's school budget. Such adjustments are not prohibited by SBE rules.

46. The Agency of Education has argued "The AOE determination of Rule 2366.2.5 has no bearing on the TMS' s ability to recoup tuition form the SUs." See AOE Proposed Finding of Fact Number 8, quoted in part. This argument fails. If the Agency of Education has an obligation to reimburse, the Supervisory District's share of the 2019-2020 tuition which the District pays to The Mill School, the District' s payment is thereby reduced by approximately \$41,200.00 per pupil. (See Finding Number 3 above).
47. In addition, the Agency of Education argues that the issue of the construction of SBE Rule 2366.5 "is not ripe" because "TMS has failed to demonstrate any causal link between the AOE's interpretation of the rule and harm to TMS". See AOE's proposed Conclusions of Law, 3 and 4. This argument also fails because the Brad James memorandum essentially thwarted any ambigtJity which may have existed surrounding reimbursement. The harm caused by the memorandum to the position of The Mill School is obvious and beyond doubt.

### **The Petition for Declaratory Ruling**

48. The Agency did not retract the Memorandum.
49. The Mill School brought a Petition for Declaratory Ruling on April 1, 2021. That Petition requested the Board: to construe SBE Rule 2366 to permit reimbursement; to instruct the AOE to retract the Brad James Memorandum; to communicate the ruling to the 11 affected districts; and to instruct the AOE to process any and all related reimbursement requests in the ordinary course.
50. This case presents clearly conflicting interests and points of view. The Mill School believes that it was wronged by the low initial interim rate and that it has suffered delays and injury to their relations with the school districts in appealing that errant determination... only to then encounter a change of position by the Agency. One school district Special Education representative testified to the opinion that the contracts are between the School and The Mill School, and cannot be modified by the Agency of Education agreement with the Mill School. In addition, that school representative pointed out that the books for the school year of 2019-2020 were closed and a retroactive change in rate creates an unanticipated surprise. The Agency of Education takes the position that it is only applying the rules which have been adopted by the SBE and it has no discretion to waive or deviate from the rules. Likewise, the Agency is of

the view that any problem The Mill School is having, could have been prevented by amendments by The Mill School to its contracts and clearer terms in the Settlement Agreement.<sup>15</sup>

## Conclusions of Law

51. Vermont Law allows parties to request declaratory rulings from agencies. 3 VSA Sec. 808 and SBE Rule 1235.<sup>16</sup> Generally speaking, declaratory judgments determine the rights of parties to the action who have sought the declaratory ruling, or those who have been made parties to the action by intervention or otherwise. Under Vermont's Declaratory Judgment Act, it is clear that " ... no declaration shall prejudice the rights of person not parties to the proceeding". 12 VSA Sec. 4721. Although this case incidentally involves contracts between The Mill School and certain school districts, those school districts were not parties to this petition for declaratory ruling.
52. At the outset, it is important to underline that the issue in this case does not determine the contractual rights of The Mill School and the school districts. A final interpretation of the contracts is not essential to the declaratory ruling now before the Board. It is enough that there is a contractual issue which might involve contract recovery by The Mill School with the school districts. The Petition for Declaratory Ruling did not ask that the contracts be determined. Rather, the Petition seeks a determination as to the proper construction of the State Board of Education Rule.
53. The Petition for Declaratory Ruling asks the State Board of Education to construe SBE Rule 2366 in light of the Settlement Agreement and the Brad James memorandum. SBE Rule 2366.2.5(b) (which is the rule cited by Brad James to justify refusal of reimbursement) reads as follows:

2366.2.5 Costs of Placement in Approved Independent Schools

(a) Subject to (b), reasonable and necessary costs, required by a student's IEP, excluding general education tuition, of a placement in an independent school are allowable if either:

(1) The independent school is approved by the State Board of Education for

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<sup>15</sup> See AOE Answer to Petition, Para. 12. "TM S's own failure to attend to the terms of the contract with the 11 districts is the reason that no written agreement existed to cover the invoices in question."

<sup>16</sup> SBE Rule 1235 Declaratory Ruling

Petitions for declaratory ruling as to the applicability of any statutory provision or of any rule or order of the state board of education or the department of education will be entertained by the board or the department. Such petitions shall be filed with the commissioner and will be considered and disposed of promptly. (emphasis added)

purposes of providing special education pursuant to Rule 2228 for the category of disability under which the student was determined to be eligible for special education and has been reviewed and received reimbursement approval through the residential review process;

(2) The student's placement has been recommended for reimbursement either through the residential review process or as an exception by the Secretary pursuant to Rule 2228.2. of a high cost day or residential placement; or

(3) The student's placement is required by a due process hearing order issued following a hearing on the merits or a court order.

(b) Costs approved by the State Board of Education at an independent school are only allowable if covered by a written agreement pursuant to Rule 2228.4.1<sup>17</sup> and at a rate approved under Rule 2228.8 or for an out of state placement, the rates approved under that state's approval system.

(c) If the costs relating to a student's attendance at an independent school or program are pursuant to a legally binding settlement agreement, the parties shall, at a minimum, make reference in the IEP to the settlement agreement as the means by which the parties have agreed to resolve placement differences. The agreement shall provide for annual review by the parties of any resolution of placement issues.

54. There is nothing in the rule which prohibits contracts which include retroactive adjustments. There is nothing in the rule which prevents written agreements which allow for costs to be covered if there is a post-agreement adjustment of allowed rates. There is nothing in the rule which requires that all the contract terms be co-terminus with the school year of the school. The rule provides that the costs be "covered by a written agreement" but nothing in the Rule or the Technical Guide for Special Education Cost Documentation prohibit a contract from ending the date of required services on one date, and from adjusting for the costs of those services at a later date.

55. In short, if the contracts allow retroactive adjustment of the rates, as argued by The Mill School, the State Board Rules 2366.2.5 and 2228.4.1 do not prohibit reimbursement. Likewise, the rules do not require that the "contract be in place" at the "time the rate change was decided" as Mr.

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<sup>17</sup> SBE Rule 2228.4.1 Agreement as to Costs

In order to obtain special education approval, an independent school shall assure the State Board of Education that prior to enrolling a publicly-placed child who is served pursuant to an TEP, it will enter into a written agreement with the sending responsible agency that outlines tuition, room, board and other costs associated with the child's attendance. For children on an IEP who are placed by a state agency or a designated community mental health agency, or any other agency defined by the Commissioner, in accordance with 16 V.S.A. § 2948, the agreement shall be with the Commissioner of Education. In the instance of an emergency placement, such provisions may be agreed upon within thirty days of the child's enrollment.

James stated in his Memorandum. While the State Board of Education could adopt rules which cut off the time for costs to be allowable, it has not done so in the Rules which were cited by Mr. James.

56. This construction of the SBE Rules can be reached upon a simple reading of the Rule. "The primary rule when reviewing construction of administrative rules and regulations is to give language its plain, ordinary meaning." In re Hydro Energies Corp., 147 Vt. 570,573,522 A.2d 240, 242 (1987) see also In re Vitale, 151 Vt. 580,584,563 A.2d 613,616 (1989) ("The primary rule when reviewing [the] construction of an administrative rule is to give language its plain, ordinary meaning.")
57. This construction of the Rules (to allow retroactive reimbursement) is also supported by the scheme of our licensing and rate-setting rules. As in this case, it takes a new independent school significant outlay to "stand-up" and become running before applying for an allowable rate. If the rate is set too low or too high, there can be delays in appealing the interim rate to the review committee, the Secretary of Education, or then to the State Board. It seems predictable that in some cases the rate might be adjusted after the close of the year in question or after the service term of the contract. Unless the SBE Rules specifically prevent retroactive adjustment and reimbursement (which they do not), a retroactive adjustment of rate might be foreseeable to the parties and allowed in a contract. It is conceivable, that some school districts might want to allow for downward or upward rate adjustments, and to allow recoupment at the adjusted rate. Noting in the current rules prevent reimbursement of such adjusted rates if allowed in the contract.
58. Administrative agencies are given deference when they are interpreting their own rules. For example, Vermont courts give deference to agency interpretations of policies or terms of rules when (1) that agency is statutorily authorized to provide such guidance; (2) complex methodologies are applied; or (3) such decisions are within the agency's area of expertise. Athens School District v. Vermont State Board of Education, 2020 VT 52, 237 A.3d 671 (2020).
59. Moreover, it is reasonable to construe the SBE Rules in this case to allow reimbursement (if payment to The Mill School of the revised rate is allowed under the contracts) since the Settlement Agreement clearly contemplated that there would be an upward adjustment of the allowable "Final Rate" for the 2019-2020 school year. Why would the Agency make this agreement on August 12, 2020 (with the clearly implied agreement provision that The Mill School would seek reimbursement from the school districts) if it understood or knew that the Agency would deny

reimbursement based on the Rules cited above? If there was a time preclusion or deadline (as Mr. James stated in the Memorandum) then this construction would be inconsistent with the overall thrust of the Settlement Agreement.

60. There is an implied term of good faith in every Vermont contract including settlement agreements. "The implied covenant of good faith and fair dealing exists to ensure that parties to a contract act with 'faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.'" Carmichael v. Adirondack Bottled Gas Corp., 161 Vt. 200, 208, 635 A.2d 1211, 1216 (1993) (quoting *Restatement (Second) of Contracts* § 205 cmt. a (1981)). While it is likely that the Settlement Agreement was entered into in good faith and with the expectation that The Mill School would resolve any contractual issues with the school districts if such issues existed, that good faith was called into question when reimbursement was denied out of hand in the Memorandum: (1) by the same Agency which made the agreement; (2) with reference to rules which did not specifically deny reimbursement; (3) by an Agency employee who had not read or seen the contracts upon which he concluded denied coverage; (4) by an Agency employee who had not sought input from both parties to the agreement according to his testimony.
61. "The implied covenant of good faith and fair dealing provides that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Anthony's Pier Four, Inc. v. HBS Assocs., 411 Mass 451, 471-471, 583 N.E.2d 806 (1991).
62. The Agency of Education correctly points out that the Secretary of Education, through the Agency, must execute the policies adopted by the State Board of Education. 16 VSA Sec. 212. The Agency of Education is required by law to conform its practice to the State Board's decision and interpretation of SBE Rule 2366.2.5.
63. The Board hereby determines that SBE Rule 2366, by its terms, does not prohibit reimbursement of special education funds to Supervisory Unions or School Districts either outside of a particular school year, or retroactively to accommodate a tuition rate set after the school year or after the term of the contract is over if the contract allows for such. Whether the contracts in this case allow for the retroactive invoices is outside the scope of this declaratory ruling.



64. To the extent that this determination of this Board conflicts with the Brad James memorandum of October 27, 2020, it would be the expectation of this Board, that the Secretary would withdraw the memorandum.

**Proposed Order**

*Based upon the above, Board determines that: (1) SEE Rule 2366, by its terms, does not prohibit reimbursement of special education funds to Supervisory Unions or School Districts either outside of a particular school year, or retroactively to accommodate a tuition rate set after the school year or after the term of the contract is over if the contract allows for such; (2) to the extent that the Brad James memorandum of October 27, 2020 is inconsistent with this decision, the Secretary of Education should withdraw the Memorandum and deem it as inconsistent with the rules and decision cited herein; (3) in the event that school districts or supervisor unions pay the increased rates to the Mill School and seek reimbursement, reimbursement should not be denied upon the grounds which were cited in the Memorandum.*

**SO ORDERED.**

The Hearing Officer does report to the Vermont State Board of Education the proposed Findings of Fact, Conclusions of Law, and the Proposed Order as set forth above. This "Proposal for Decision" is being served upon the parties. It is recommended to the Board that this proposal for decision be scheduled for consideration by the Board at a meeting and notice of that meeting be given to the parties. Copies of exhibits, pleadings, an electronic recording of the hearing, and any other filings in this matter are available through SBE staff member, Maureen Gaidys at [Maureen.Gaidys@vermont.gov](mailto:Maureen.Gaidys@vermont.gov)

Dated this 27 day of July, 2021.



Hearing Officer for the Vermont State Board of Education

## STATE OF VERMONT

## IN RE MILL SCHOOL RATE APPEAL

## SETTLEMENT AGREEMENT

1. The parties to the above-captioned rate appeal enter into the following Settlement Agreement;
2. The substantive terms of the Settlement Agreement are contained in the attached document, Exhibit A hereto, which is fully incorporated herein;
3. The parties agree that the Hearing Officer may dismiss the appeal with prejudice, subject to any approval that may be deemed necessary or appropriate by the State Board of Education;
4. In connection with the dismissal of the appeal, the parties release each other from any and all claims that each has against the other, through and including the date hereof.

DATED this 12th day of August, 2020.

By: J. / - L D . -

The Mill School

By: Mark D. Oettinger, its attorney

By:

Emily Simmons

Vermont Agency of Education

By: Emily L. Simmons, its attorney

# Exhibit A

This is to summarize the agreed to terms for The Mill School (TMS) rate appeal.

## Budget Items

In addition to AOE's identified approved budgeted costs totaling \$1,254,605, the parties agree that the following expenses shall also be allowed:

1. 0.5 FTE for School Director: \$38,438
2. Office Management Book keeping, HR, IT: \$54,308

On future rate applications, TMS will continue to represent these expenses under operational costs as a service agreement for these services, unless staff are hired directly by TMS.

3. Administration and Strategic Support (CEO & COO): \$55,097  
In all future rate setting applications and/or rate reviews, TMS will provide time study reports if requested by AOE for the CEO and COO.

## School Capacity and Final Rates

**SY18/19 and SY19/20:** AOE approved TMS's school capacity to be reduced from 30 to 23 for SY18/19 and SY19/20. 90% student capacity is 20.7. All parties agree to use 21 student capacity for this rate calculation.

Rate Calculation: Budget total: \$1,402,448.00/21 students;:: \$66,783.24

TMS agrees it will not seek additional recoupment from school districts for the SY18/19.

**SY20/21:** AOE approved TMS's school capacity to be increased from 23 to 25 for SY20/21. It was agreed to include the expense of hiring an additional professional staff of \$63,210.00 (salary and fringe) to the base budget for SY20/21. 90% capacity is 22.5. All parties agree to use 22.5 student capacity for this rate calculation.

SY20/21 allowable budget total: **\$1,465,658.00**

Rate Calculation: Budget total: \$1,465,658.00/22.5 students = \$65,140.36

Additionally, should TMS reach full capacity of 25 students for the SY20/21 and have requests for admissions that exceed the approved student capacity of 25, TMS agrees that it will notify AOE. If AOE chooses to approve TMS for additional student capacity, both AOE and TMS will discuss TMS's SY20/21 actual student enrollment to date, additional staff/cost needed to accommodate the additional student(s) and, if the approved SY20/21 rate requires recalculation and/or adjustment for additional students. TMS will not deny admission to a student solely on the basis of having reached a capacity of 25 students.