

STATE OF VERMONT
DEPARTMENT OF EDUCATION

Special Education
Case # DP-14-02 ()

Due Process Hearing

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Nature of the Case, Issues and Exhibits

A Due Process Hearing Request was filed in this matter on September 9, 2013, by the Parent acting pro se. Respondent Rutland City Public School District (hereinafter "District") filed a response on September 19, 2013, through its attorney, Dina L. Atwood, Esq., of Stitzel, Page & Fletcher, P.C.,

The parties identified the following issues to be decided at the hearing.

1. In what respect, if any, is the placement offered by the District inadequate thereby denying the Student a free appropriate public education (FAPE)?
2. Does offer any programs to Student that are not available at ?
3. What are these programs?
4. Why are they necessary to Student?
5. Is Parent's alleged unilateral private placement reimbursable based upon the alleged failure of Rutland to provide a FAPE?
6. Why was the placement unsuccessful from January 2013 to June 2013 and why do Respondents assert that it would be successful from September 2013 on?
7. Has Plaintiff established a denial of a FAPE by the following allegations:
 - (a) excessive use of
 - (b) failure to control Student's
 - (c) failure to offer an educational benefit through lack of furniture, papers, pens or other materials;
 - (d) using Student;
 - (e) attempting residential placement;
 - (f) threatening and involvement;
 - (g) lack of safety;
 - (h) miscategorizing Student's disability?
8. Is Parent entitled to recovery as claimed for: (a) legal fees, (b) advocacy, (c) staffing, (d) (e) (f) , and (g) lost wages?
9. Should Parent's claim be dismissed as untimely or premature?
10. Is Parent entitled to an order removing Eloise McGarry and from the IEP team?
11. Is the IEP of August 13 appropriate and should it be implemented?

The hearing took place on November 6 and 7, 2013, at the Leonard Wing Mediation Center in the Rutland Superior Court at 83 Centre Street, Rutland, Vermont. Although acting pro se, (hereinafter called "Father") was assisted throughout the hearing by his advocate, . Also present throughout the hearing were District representatives and Eloise McGarry along with counsel, Dina Atwood, Esq. References to the transcript of the November 6 and 7 hearing will be noted in this decision as T followed by the applicable page number.

The following Respondent's Exhibits were admitted into evidence. The Respondent's Core Exhibits which will be referenced as C plus the applicable stamped page number. Respondent's 5-day exhibits which will be referenced as F plus the applicable stamped page number. Affidavits submitted by Respondent including the affidavit of , the affidavit of and accompanying chart, the affidavit of and the affidavit of .

The following Parent's exhibit was admitted into evidence. Parent's notebook containing 339 pages of 5-day exhibits. The notebook was not stamped or numbered but for ease of reference for this decision I have numbered the pages. These exhibits will be referenced as "P" plus the applicable numbered page.

Findings of Fact

A. General Background

1. hereinafter called "Student", was born and is now years of age. is eligible for special education services in accordance with the IDEA (Stipulation of the parties recited in the Prehearing Conference Order).
2. Student's birth parents separated when was years old. The mother prevented the father from having visitation or custody by making false and unfounded accusations against him. (C398).
3. The mother then lived for seven years with a . Student's older have reported occurred towards the children. Student was up in one incident and threatened with and in another. Student was and (C399, 414, 439, 928, T 171-172, 177-178). In , Student recalled being held down by several people as part of the (T 171-172).
4. Student's mother was uncooperative with the school system where they lived. (P 330). As a result Student had some home tutoring but little if any formal schooling. (C 438). Student was hospitalized times in 2009. (T 43).
5. In 2010 the father, obtained custody of Student. At that time, it was discovered that Student was on different medications. was weaned off these medications successfully. (P 330).

6. Student now lives in a large duplex with father and stepmother. One of Student's older [redacted] also lives in the home. In addition, [redacted] parents and three other step siblings live in the home. (C 397, P 330, T 65-66). Student has established a positive relationship with Father and stepmother. (F 449, 487, 420-764, T40-42).

7. Student has had multiple [redacted] starting when [redacted] was [redacted] in (C 437).

8. Student has been diagnosed at different times with the following (C 437):

(a) [redacted] which falls within the broader category of [redacted]

(b) [redacted] otherwise specified [redacted] which falls within the broader category of [redacted]

(c) [redacted]

(d) [redacted] disorder.

(e) [redacted] disorder.

(f) [redacted] disorder not otherwise specified.

9. Student is intelligent, creative, and artistic. (C 437, T 584).

10. Despite this, Student cannot tolerate frustration. When [redacted] feels overwhelmed, Student will act out in [redacted] and [redacted] ways. [redacted] has extremely poor [redacted] (C 437).

11. On April 19, 2010, Student enrolled in the Rutland School District. (P 297).

12. Shortly thereafter, Student was placed in the [redacted] a [redacted] where [redacted] remained from [redacted], 2010 to [redacted], 2010 with a diagnosis of [redacted] (T 81, C 414).

13. Student was discharged but in a short time returned to the [redacted], where [redacted] remained from [redacted] 2011 to [redacted], 2011. (T 82).

14. On [redacted] 2011, Student was enrolled in the [redacted] Program, later known as [redacted] which was and is an [redacted] educational program run by the Rutland City School District. (T 82).

15. [redacted] also known as [redacted], has worked with Student since 2010. As case manager for Student's after school program, her duties included going to Student's home at 6:45 AM, getting Student ready and accompanying [redacted] to school. After school, she works on an [redacted] and [redacted] plan with Student. Until Student ceased attending [redacted] n [redacted]

2013, provided District with a day to day log of after school and home activities. In the course of her work developed a good rapport with Student as well as Student's father and stepmother. (F 420-515, T 277-278). learned what triggered Student's problem and devised ways to prevent (T 297-298). Student's home life and the afterschool program were generally positive experiences for Student. (F 420-515).

16. In the beginning, the paraeducators working for the District used to discuss Student's progress freely with . At one point the former director of told the paraeducators to stop talking to . (T 455-456). District expressed no interest in listening to suggestions or input. (T 290-291, 297, 347-348).

17. District wanted to transition Student from to a class in the Rutland School starting in September, 2012. Father did not per se oppose Student's transition into the School, but he felt the supports offered were inadequate. He brought a Due Process complaint requesting inter alia that private be hired and a private workspace provided. (P 327).

18. Father lost the due process hearing. Student was transitioned to the in , 2012 without the additional supports Father sought. (P 327).

19. The transition failed. On , 2012, Student was back at the (P 57-59, C 929, T 83).

20. After Student's discharge, in , 2012, Student was placed back at the program instead of the School. (C 929, T 83).

21. Initially there was improvement in Student's behavior at . However, by and of 2013, Student's behavior drastically. (C 98, 630, P 58, 101, T 23-25, 83-87).

B. Restraints

22. District's records show that in the months of February, March and April, 2013, Student had to be forcibly by District personnel different times. (C 700-848, 982-984).

23. Restraints had long been a bone of contention between Father and the District, with the Father maintaining that restraints should be avoided, were used excessively, and were done improperly with excessive force. (P 327).

24. In all of 2011, there were restraints of Student by District personnel. In all of 2012, there were restraints of Student. However, in only three months of 2013, there were restraints. (C 700-1250, P 630).

25. What is involved in a restraint? When Student's behavior creates an unsafe condition, Student is immobilized and held by District personnel in a "basket hold" for up to 15 minutes. (T 503).

26. District states that restraints are done by three to four persons (T 576). Father, stepmother, and state that the restraints usually involve four to six people. (T 195-199, T305, 24, P23). These positions are not entirely inconsistent. Despite restraints typically being done by three or four people, two others stand nearby in reserve. District's 4500 reports generally reflect six people at the scene. (C 700-1250).

27. Father maintains that restraints should be avoided entirely, or, if absolutely necessary, should be easily accomplished by one person only, since Student is a year old (P 123).

28. Some of the that triggered restraints involved attempted and attempts to throw objects. As a result, during the months of , and , 2013, for most of the time Student was kept in a locked room, devoid of furniture. The room had no desks, no chairs, and no writing materials. Pictures on the wall were ripped up by Student on April 1, 2013. Only pictures near the ceiling remained. (T 24-25, 33, 83-87, 99, 105, 109, 125, 137, 144, 145, 149-150, 195-199, 305, 308-309, C 98, 630, P 58, 202, 42, 152-153, 123, F 123-351).

29. Student was kept in this bare room from day to day with six District personnel available to monitor No meaningful instruction occurred. (T 24-25, 33, 83-87, 99, 105, 109, 125, 137, 144, 145, 149-150, 195-199, 305, 308-309, C 98, 630, P 58, 202, 42, 152-153, 123).

30. Two from at the behest of Father treated Student in 2013 for the suffered as a result of the repeated restraints and the circumstances leading to them. (P 128, 39, C 624, T 40, 97-200).

31. Student viewed the environment at as a "cell". The door was locked from outside. felt threatened and unsafe. (T 99, 109). Removing all the furniture from the room, ostensibly for protecting Student and staff, reinforced the perception of a jail cell. (C 982, T 200, P 122-123).

32. Restraints done with overwhelming force by four adults holding tightly against will brought back Student's and from the years when Student was and as a young child. (T 171-172, 149, 150, 105, 109, 125).

33. The more frequently that Student was restrained, the more was and perceived restraints and the threat of restraints as assaultive. believed that would be hurt. (T 149-150, 144-145, 105).

34. The increased use of restraints in 2013 caused the deterioration in Student's District permitted this situation to spiral out of control. (T 149-150, 144-145). Student's explained the dynamics of the restraints as follows (T 150-151):

I don't think that the school's intention was to – to create an environment that was for but a lot of the restraints that were done mirrored for events that have happened in past and that has shared. So perception of that was that they are – that it

was traumatic.

When [redacted] saw – When [redacted] saw the people that came at [redacted] and was restrained by more than one person, [redacted] perception is that, Oh my God, I'm going to be hurt. So what it triggered for [redacted] was [redacted] fight, flight, or freeze response.

I think unfortunately for the school it created a kind of a catch 22. As [redacted] began to perceive – [redacted] perception – perception was that this place is not safe, [redacted] – [redacted] ratcheted up a notch, because it triggered [redacted] fight, flight, or freeze response. So [redacted] reacted like you would – anybody who was cornered. [redacted] fought, [redacted] did whatever [redacted] could to try to get out of there, 'cause [redacted] was scared. [redacted] didn't feel safe in that environment. And unfortunately for the staff and the people there, when [redacted] reacted in that way, they had to restrain [redacted] further, because they were trying to keep their own staff safe.

So I think it was like this catch 22. [redacted] got scared, [redacted] reacted, the school reacted to their feelings of unsafety, and it created an environment where it was like a constant trigger, not only for [redacted] but I – I think for the staff, as well.

35. On [redacted], 2013, Father was present at the school to pick up paperwork. He observed that there were no tables, chairs, or other material in Student's room. He spoke to [redacted] personnel who told him that Student had not earned having the furniture placed back and it was too heavy to keep moving in and out each day. (P 122-123, 153, T 195-200).

36. Father then observed Student try to climb out the window. Two paraeducators grabbed [redacted] and jolted [redacted] back from the window, throwing [redacted] to the ground. In the struggle to control Student, four paraeducators grappled with [redacted]. They failed to use the proper type of restraining holds and instead held [redacted] legs spread eagle, and also [redacted] wrists. (P 123, 8, C 982, T 195-200).

37. Father took Student out of the school for the rest of the day. Student said: "Dad, dad, please promise you'll never ... send me back to that jail again." (T 200, C 982, P 122-123).

38. On [redacted], 2013, the [redacted] treating Student concluded that Student was suffering so much [redacted] at the [redacted] school that it would be detrimental for to return there. (P 128). An alternative school setting was recommended. (P 8).

39. Father was in favor of such a placement. (P 78). Student was fearful even from driving near [redacted] towards a different destination. (T 151, 200).

40. District wanted Student to have another residential placement, i.e. [redacted] such as the [redacted]. Father has always opposed residential placements. He consistently arranged for Student to see [redacted] professionals other than [redacted] Services, which had a contract with the School, as a way of getting a more independent opinion on such issues, one that did not have to be filtered through the School. (P 51, P 259, P 42, 58-59, C 116, 111).

41. On April 16, 2013, District commenced an expedited Due Process proceeding to compel a residential placement. (P 51). However, the complaint was withdrawn by District due to the opposition of the Vermont Agency of Education Residential Review Team. (P 78).

42. The Residential Review Team recommended an alternative school other than (P 78, 61).

43. Vermont Secretary of Education Armando Villaseca expressed support on June 21, 2013 for an alternative school setting such as (P 73).

C. Summer 2013

44. On or about May 8, 2013, Father took Student out of the / School and worked to set up a summer educational program for (T 186).

45. Father hired to set up and supervise the summer program. has a doctorate in Reading and Education and a masters in Special Education. She has significant teaching experience. (P 213-214).

46. provided the day to day educating of Student under supervision and evaluation. charged \$65 per hour for her services. (P 211). This fee was paid by the Student's family. (T 188).

47. On May 16, 2013, District was asked to provide tutoring but stated that any tutoring would have to occur at . This was not acceptable to Father. (P 116, T38).

48. Father sent District written notice on August 7, 2013, and August 9, 2013, that he intended to enroll Student in (T 273).

49. At the end of August, 2013, Father actually did enroll Student in (T 273).

D. The August 16, 2013 IEP

50. District held an IEP meeting on August 14, 2013, without Father's participation. District adopted a new IEP plan on August 16, 2013. As this is the plan which the District wants to have approved and implemented, it is important to consider it carefully. (C 93-117).

51. In comparing the academic goals of the August 16, 2013 plan to the December 11, 2012 plan it appears that the academic goals had either remained the same or had been watered down. Thus, reading in December was to be "up to 100 words" (C 184). Reading in August was only "target words". (C 98). Math in December and August both involved multiplying numbers of 12 or less. (C 101, 186). Writing in December was to be 3-5 sentences. (C 189). Writing in August had no length specified, (C 102).

52. The August 16, 2013, IEP states that Student “has not completed any academic work since January, 2013.” (C 98).

53. The August IEP further indicates that prior to January 23, 2013, Student was able to complete an average of three out of ten scheduled educational sessions. However, after that, Student was “not engaging in educational program.” (C 96).

54. The August IEP states “ work environment is simplified with limited and stimulation ...” (C 96).

55. Under the heading of “Other Considerations”, the August IEP states:

Since mid-March 2013, behavior has become more , e.g., will aim spit at the face of staff, bang head against any and all hard objects in the classroom and regularly engages in unprovoked attacks (unprovoked defined as no verbal or nonverbal antecedent) towards staff. When not in this aggressive state, appears to sit for hours at a time that is suggestive of a When aggressive, needs physical management several times throughout the day; during these holds, (C 96).

56. The August 2013 IEP plan team states that the best option for Student is a residential placement because it “would provide the most comprehensive programming for academic, and needs since it would provide 24/7 oversight from a and ” (C 116).

57. However, as noted above, the State of Vermont’s Residential Review team did not agree to a residential placement, and the Father did not consent to a residential placement. (P 78, 61). Therefore, the August IEP team stated that Student’s “needs can be met” in a special education day program at which has

- (a) access to a : throughout the school day;
- (b) access to a 60 minutes a week;
- (c) access to consult from 30 minutes monthly;
- (d) full time teacher throughout the school day; and
- (e) school based that would include

(C 115).

58. The August 2013 IEP does not make any provision for changing District’s policy or practices on restraints. It does not provide for restoring desks and furniture to Student’s room. It has no provisions for overcoming Student’s fear of returning to (C 93-117).

E. Student’s progress from August to November, 2013

59. envisioned a slow transition from Student’s summer educational program to regular classes. The Director believed a slow transition was necessary for Student’s ability

to adjust to a new program. In addition, the tuition has not yet been paid and that needs to be resolved. (T 244). Tuition for the school year is \$84,900. (P 165).

60. The Director of _____ stated: "Students that have experienced _____ also feel a real need for control." Therefore one of the things _____ does is to enlist the Students "as co-architects and co-creators of their programming." (T 247).

61. _____ is an organization that tailors the educational progress around the needs of the child rather than trying to fit the child into the program they already have. (T 85-86).

62. _____ hired _____ as a paraeducator to work under the supervision of a _____ teacher on staff. (T 243, 259-260).

63. At present, _____ is working with Student one on one at the _____ in Rutland. Eventually, a gradual transition will be made to _____ (T 243).

64. Student has not required any restraints in the last 90 days. (T 249, 289).

65. There has been a huge difference in Student. Now, Student is enjoying _____ education and has made significant progress. (T 42, 318-319, 88).

66. Student's _____ have personally observed that Student is improving academically and is more available to learn. (T 156, 160-161, 116).

67. Numerous witnesses agreed that for Student to learn it is essential that _____ feels safe. (T 33, 97-172, 247, 321, 374). At present, Student does feel safe. (T 321).

68. Student's self control and confidence have progressed to the point where _____ was able to go to a Jonas Brothers concert with _____ year old stepsister (T 40, 45). The family took a trip to Connecticut and visited an aquarium with _____ (T 41). _____ was also able to go shopping with stepsister. (T 45).

F. Differences between _____ and _____

69. The placement at _____ as reflected in the August IEP, and the placement at _____ both have their strengths and weaknesses.

70. _____ has the benefit of continuity with _____ continuing as an instructor. She has a good rapport with Student, and is able to deflect _____ problems due to her experience and knowledge of trigger points. (F 420-515, T 277-278, 297-298). She has proven herself able to engage Student in a successful instruction program provided that _____ has an expert guiding _____ as to the academic guidelines. (P 213-214, T156, 160-161, 116).

71. The flexible teaching methods employed by _____ which afford a high degree of control to the Student are in accord with the Student's needs as a _____ of prior _____ (T 247, 85-86, 114, 154).

72. _____; emphasis on safety is in harmony with the Student's needs as a _____ of (T 33, 97-172, 247, 321, 374, 155).
73. _____ philosophy is to work closely with parents. (T 247).
74. _____ has been set up to avoid the trappings of a traditional school. The personnel who work there have been intentionally selected to be different in appearance and method from traditional teachers. The benefit to this approach is that it would avoid negative associations of teachers, repeated restraints, and empty rooms. (T 560, 114).
75. On the negative side, _____ personnel do not have the same depth of qualifications and resources as the teachers at _____.
76. The differences as to qualifications and resources were summarized in the testimony of _____, in her affidavit which was received in evidence, and in the chart accompanying her affidavit.
77. Both _____ and _____ have a full time _____ teacher available as part of the education team. (P 165).
78. _____ has more paraeducators available. _____, who is Student's paraeducator at _____, has a _____ and is studying for a masters in _____. She has eight years experience in the _____. (T328-329).
79. _____ has _____ (_____) consultation. _____ has none. (P 165).
80. _____ has a school _____ five days a week. _____ has a _____ : one day a week.
81. _____ has a master's level school based _____ available five days a week. _____ has none. _____ does have a _____ once per week for a full day. (T 262).
82. Nonetheless _____ has significant drawbacks. As noted previously, Student was unable to function there for four months.
83. _____, who is a former director of _____, testified that if Student were to go back to _____, there would be a three month delay to allow for adjustment to the transition. (T 454).
84. _____ has a poor record of cooperating with the family. (T 54-55, 85-86).
85. _____ also has a poor record in failing to listen to helpful information available from _____ and Student's _____. (T 455-456, 344, 347-348, 290-291, 297, 113, 126).

86. _____ and _____; all agreed that an essential factor in Student's educational success is for _____ to feel safe. _____ failed at this task and has not demonstrated any reason why it would succeed given a second chance. (T 97-172, 247, 321, 374, 375).

G. Whether Student has _____

87. The poor _____ skills which Student exhibits are characteristic both of _____ and _____. (C 390). There has been a controversy over whether or not Student suffers from _____

88. The basis for Student's diagnosis of _____ has been primarily _____ significant deficits. These are also symptoms of _____. Therefore it is difficult to separate one from the other.

89. _____ prepared a report in July, 2012 in which she found that Student does have _____ as well as _____. Prior evaluations by _____ and _____ in 2007 also found that Student had _____. The _____ in 2006 found that Student had _____ (C 390).

90. For a number of years, the Rutland City School District based Student's IEPs on a diagnosis of _____. However, this was eventually changed to _____

91. Student's current _____; from _____ and _____, both testified that Student has _____ as well as _____. (T 113, 178-179). Student's Father and stepmother both believe that Student has _____ as well as _____

92. District disagrees. School _____ submitted an affidavit and testified that Student does not have _____ (T 404).

93. School _____ submitted an affidavit and testified that Student does not have _____ (T 565).

94. Former School _____, who has a PhD in _____ testified that Student does not have _____ (T 361-375).

95. One reason that this dispute received so much attention at the hearing was that _____ accepted a diagnosis of _____ as well as _____ but _____ not. Therefore, based upon whether or not Student has _____, one or the other program might be deemed preferable.

96. I find that the controversy over _____ is illusory. _____ testified credibly that _____ shows up at a very young age. Therefore, the lack of medical records for Student's early years creates uncertainty as to whether or not Student currently has or has not _____. (T 384-388).

97. Both _____ and _____ if present, cause the same or similar symptoms of _____. Both _____ and _____ plan to address these _____. When and if there is significant _____

improvement, it will be possible to say more definitively whether there is a lingering component of (T 387-388).

98. Neither program showed such a degree of rigidity and inflexibility in its instruction that it would be unable to adapt to Student's needs as Student's education progressed and it became clear the was or was not present.

99. Therefore, the dispute over whether is or is not present does not support choosing one program over the other. I agree with the testimony of that the lack of early medical records renders it uncertain at this stage in Student's life as to whether Student has

Credibility of witnesses

100. It is evident that Student's Father and Stepmother both love Student very much. Stepmother is in the process of adopting Student. (T 74). Father would certainly not have fought the legal and financial battles he did to keep Student in the least restrictive environment were it not for his devotion to his well being.

101. Father and Stepmother have shown the ability to gauge what Student can handle and what will work for Student. By hiring Father chose an individual who has a beneficial ability to connect with Student. (T 42, 297, 318-319). In hindsight, Father's instincts were right when he cautioned that Student would not be able to make the transition to School without additional support systems in place. (P 328). The two hired by Father have worked well for Student and have demonstrated the capability to help Student advance in spite of a past. (T 97-184).

102. Overall, I found the testimony of Father and Stepmother to be straightforward, candid and credible. The only reservation I have about their testimony is that they were not necessarily good with dates or subordinate details. Father was credible as to the main points of his account of the incident on , 2013, but as to some of the details it appears he confused the incident with a similar incident in , 2013, shortly before he took Student out of . (P 122-123, 153, T 195-200, C 982, P 8).

103. It is evident that the parents had to deal with a series of reports and truancy claims initiated by the District, none of which were ever found to be substantiated. Despite the fact that these claims may have been upsetting and intimidating to the parents, I do not find that the reports or claims were made in bad faith and therefore I am not considering them as a ground for relief. See 33 VSA 4913, 4914 re reporting requirements.

104. Both and were credible witnesses. Their explanation of the dynamics of Student's problems was clear and cogent.

105. was also a credible witness. She was clear and confident in explaining herself and her personality is obviously an asset in helping her deal with Student. She testified credibly that every Tuesday morning at 10:00 A.M. she observed Student to be in a completely bare room. (T 308-309). She said: "Never a table, never a chair." A photo corroborates this. (P 152).

106. District's position was that furniture was always restored to start the morning, then later removed for safety reasons. District's documentation has numerous references to a table in January and February, 2013 (F 162-202), largely in the context of Student hiding under it. The records also show this table being removed as early as 8:22 A.M. (F 189).

107. In March, 2013, references to the table cease except for one reference on March 1 to the possibility that a table might be brought in, with no indication that it actually was brought in. (F 203, 203-233, 340-351). The evidence establishes that furniture was available to Student only minimally in January and February, and even less than that from March to May, 2013. (F 162-233, 340-351, T 25).

108. [redacted] was a credible witness for District and her explanations were dispassionate and free of bias. Others of District's witnesses, however, were not as credible.

109. In her testimony, [redacted]; the [redacted] of [redacted], was conflicted. She was questioned about the period of four months from January 2013 through early May 2013 when documents show Student was being restrained almost every day, Student was either [redacted] or [redacted] and Student was locked in an empty room devoid of furniture. At one point she said that this was "poor risk management on my part." (T 514). At another point she said: "It was a very sad, hopeless situation." (T 517). These statements were heartfelt and sincere. However, she then proceeded to summon more self control and tried to blame others for the debacle.

110. Her main point was that the District wanted to change the IEP in March 2013 to add an additional clinical support person affiliated with [redacted] and parents objected.

111. Based on this, [redacted] took the position that the four months of restraints and lack of learning was really the parent's fault. (T 559, 518-523).

112. This is an untenable position because there was no evidence that, if another [redacted] had been hired, he or she would have said anything different that the two [redacted] i.e. that the District's excessive restraints were traumatizing Student and a new alternative placement was needed. (T 97-184).

113. When faced with the question of why the Student's education came to a complete standstill from January to May, 2013, [redacted] blamed the parents.

114. [redacted] testified that Student lost trust in the school because the school sent home in November, 2012, when she did not want to go home. She stated that November, 2012 was a key turning point for Student. (T 571, 572, 575).

115. This is rebutted by the fact that the Student was doing relatively well in November and December, 2012. (T 479, 480). Student had no reported restraints in December, 2012. (C 700-1250).

116. testified that Student did not react badly to restraints and that instead Student's problems stemmed from the fact that the family did not love or want which made at one point almost: (T 577-579). However, admitted that she made no reports to or to anyone else regarding these allegations. (T 579). testimony that restraints were not traumatic is amply rebutted by other testimony, including that of director who testified that Student fought restraints and ' very strong." (T 506).

117. testimony was not credible. Her evident antagonism towards the parents colored her testimony. Her attacks on the parents were a byproduct of the general air of antagonism that had developed over the years between the parties. Overall, Student had and has a very positive relationship with Father. (F 449, 487, 420,764, P 327). In contrast, Student reported wrongdoing by District staff, stating, for example, that Student's on a table (F 597) and that grabbed arm (F 603). This is not to say that these events happened as reported but merely that Student was fearful of District staff, not Student's parents. As Student's mental health clinicians pointed out, District staff's overuse of restraints initiated a downward spiral which put Student in a fearful state of mind. By May, 2013, Student feared even going near (T 151, 200). Parenthetically it should be noted that although District's posthearing brief refers to as a " (p.8), testimony was unequivocal that she was only licensed as a school , not a (T 566).

118. Eloise McGarry, the Director of Support Services for District, also tried to blame the Father for Student's problems. She tried to argue that since Father had gone into the drawers in a kitchenette during a meeting, that therefore he was planning to stab school personnel and was steering Student to want to harm District employees. (T 597, F 254). She omitted to state that this meeting happened prior to October 9, 2012. Yet in November and December, 2012, Student was doing relatively well at school. (T 479, 480). Looking in the drawers of a kitchenette during a meeting hardly qualifies as dangerous behavior.

119. The speculation by Eloise McGarry that Father was somehow influencing Student to hate school is completely unfounded. If this had been the case, the and others would have detected it. (T 97-172).

120. In addition to lacking credibility, the attempts by District personnel to avoid taking responsibility for Student's lack of education for four months were inconsistent. said that Student wanted to escape from Father, implying a lack of any close relationship. Ms. McGarry claimed that Father must have influenced Student to hate school personnel, which implied the presence of a close relationship. admitted "poor risk management" on her part, but then blamed parents all the same. (T 517, 559, 518-523).

121. the director of until 2011, was asked why Student was doing poorly in 2013 and responded that it was probably due to the normal ups and downs of one with disabilities. (T 467). She contended that restraints are not traumatic. (T 426-443).

122. I did not find her testimony to be probative because she did not see Student during the difficult time period in question. (T 444).

123. admitted that she is the one who directed staff not to talk to (T 455-456). This was most regrettable because had valuable information that might have assisted District (T 338, 347-348, 289, 290-291, 297, 318-321).

124. testified that, although she was on the board of ; the District never sends Students to or because “we had a better program.” (T 464-465).

125. Although District may well be proud of its record as to the vast majority of students it teaches, the inflexibility demonstrated by testimony in the present case was one element among others leading to the denial of FAPE to Student. District has shown no inclination to reassess its position in light of the total lack of education for Student in 2013 by District for a four month period. Instead, District personnel have attempted to blame others and avoid taking responsibility for the failed program, giving further indication that a return of Student to District would not be any more successful than the prior experience.

CONCLUSIONS OF LAW

In accordance with the federal Individuals with Disabilities Education Act (IDEA) 20 U.S.C. § 1400 et seq., and Vermont’s implementing regulations, Department of Education Regulations 2360 et seq., children with disabilities in the State of Vermont are entitled to receive a free, appropriate public education (FAPE). The Act requires that the education provided must be tailored to the unique needs of the disabled student by means of an individualized educational program (IEP).

Under the leading case of *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed. 2d 690 (1982), the requirements of law are met when the school provides “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” 458 U.S. at 203. Additionally, the IEP “should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”

In the present case, Father seeks reimbursement for the costs of his unilateral placement of Student at School. It is well established that Father bears the burden of proof that District’s August, 2013 IEP, which was adopted shortly prior to the enrollment, did not offer Student a FAPE, thereby justifying an alternate choice. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed. 2d 387 (2005). Father also bears the burden of proving that was a proper placement. *Berger v. Medina School District*, 348 F.3d 513 (6th Cir. 2003); *Briere By and Through Broom v. Fair Haven Grade School Dist.*, 948 F.Supp. 1242 (D.Vt 1996).

Keeping these basic precepts in mind, it is now possible to resolve the eleven issues that were formulated in the Prehearing Conference.

1. In what respect, if any, is the placement offered by the District inadequate thereby denying the Student a FAPE?

It is evident that the August IEP is inadequate in many respects. The academic goals therein have either stayed the same or regressed from the December 11, 2012 IEP (C 184, 98, 101, 186, 189, 102 and 98). The August IEP advocates residential placement as the best option, whereas residential placement is the most restrictive option. Given that Student has been restraint-free for 90 days and has been making good academic and progress, residential placement is strongly contraindicated.

Significantly, the August 2013 IEP makes no provision for changing District's policy or practices in restraints. It does not provide for restoring desks and furniture to Student's room. It has no provisions for rebuilding shattered relationships with Student's family. It has no provisions for overcoming Student's fear of returning to Additionally testified that a three month transition period would be needed before could begin to instruct Student, which would be an unfortunate setback considering all the time Student has already lost.

In light of those deficiencies it is manifest that the August 2013 IEP does not offer Student a FAPE.

2-4. Does offer any programs to Student that are not available at ?
What are these programs? Why are they necessary to Student?

District has consistently argued throughout these proceedings that enrollment at is a mere change in location without the addition of any specialized programs to address Student's disabilities. Therefore, District maintains that enrollment at is not reimbursable.

District cites State of Vermont Special Education Rule 2364.3(a) which provides in part that District "determines the specific site of the educational placement." See also *A. W. v Fairfax School Board*, 372 F.3d 674 (4th Cir. 2004); *O'Toole v. Olathe District Schools*, 144 F.3d 692 (10th Cir. 1998).

Is this directive absolute, or is it qualified by other considerations? *Lillibask v. Conn. Dept. of Educ.*, 397 F.3d 77 (2d Cir. 2005) held that the IDEA requires a state to consider safety issues in planning the education of disabled students. 397 F.3d at 93. It would make no sense for a school to hold classes for a student suffering from claustrophobia in a tiny room, or to assign a student with acrophobia to a classroom in a high tower.

The same Special Education Rule relied upon by District confirms that the safety of the student needs to be considered. Thus, VSER 2364.3(f) states: "In selecting the LRE, consideration shall be given to any potential harmful effect on the student."

In light of Student's fear of and its history of and , sending back there would be inappropriate. Nevertheless, Father is not entitled to reimbursement solely on the inadequacy of District's proposed placement. He needs to show that has distinctive

programs designed to address Student's special education needs. *Berger v. Medina School District*, 348 F.3d 513 (6th Cir. 2003).

The evidence in the present case demonstrates that [redacted] does have a distinctive specialized program of instruction to address Student's special educational needs. In order to give students a feeling of control, which is important for [redacted] of [redacted] enlists the students as "co-architects and co-creators of their programming." (T 247). [redacted] tailors the educational program around the needs of the child, rather than trying to fit the child into a pre-set program already in place for others.

[redacted] employs one full time [redacted] teacher. [redacted] also uses [redacted] as a paraeducator, which is beneficial because of her ability to [redacted] situations that could trigger a [redacted] problem, and her proven ability to engage Student in a successful educational program.

[redacted] has been set up to avoid the trappings of a traditional school. The personnel who work there have been intentionally selected to be different in appearance and method from traditional teachers. The benefit to this approach is that it would avoid negative associations of teachers, repeated restraints, and empty rooms. The flexible teaching methods employed by [redacted] which afford a high degree of control to the Student are in accord with the Student's needs as a [redacted] of prior [redacted] emphasis on safety is in harmony with the Student's needs as a [redacted] of [redacted]

Therefore, [redacted] does offer specialized programs to address Student's disabilities. These programs are not available at [redacted] and are necessary to Student. Applying the factors of *Sch. Comm. v. Town of Burlington v. Dept. of Educ.*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed. 2d 385 (1985), I find that Student was denied a FAPE, [redacted] is an appropriate placement, and the equities favor funding Student's tuition at [redacted]

5. Is Parent's alleged unilateral private placement reimbursable based upon the alleged failure of Rutland to provide a FAPE?

District argues, without citing any cases, that there can be no reimbursement because Father has not yet paid [redacted] the amount of its tuition. (District's Posthearing brief, p. 13). However, [redacted] director testified that the enrollment occurred in August, 2013, and expenses have been incurred by [redacted] in reliance upon parents eventually coming up with the tuition. Stepmother testified to working long hours overtime to try to bolster the family's ability to meet its expenses.

Since the liability for tuition has been incurred by parents as a result of the enrollment, but the tuition has not yet been paid, direct payment to [redacted] school should be ordered. *Mr. & Mrs. A. v. N.Y. City Dept. of Ed.*, 769 F.Supp. 2d 403 (S.D. NY 2011).

At the hearing Father submitted evidence of the cost of tuition, but neither party submitted any evidence as to the reasonableness of this cost, nor has this question been addressed in the briefs. Under Vermont Board of Education Rules for Independent Schools, Section 2228.8, the State of Vermont has a procedure for review and approval of reimbursement rates. Consequently, the tuition set by [redacted] is payable in accordance with the rates established under state law.

6. Why was the placement unsuccessful from January 2013 to June 2013 and why do Respondents assert that it would be successful from September 2013 on?

As noted previously, District has failed to learn the lesson that its excessive restraints were harmful to Student. District has supplied no credible proof that returning Student to would produce any better results than those occurring from January to May 2013.

7. Has Plaintiff established a denial of a FAPE by the following allegations:

- (a) excessive use of restraint;
- (b) failure to control Student's
- (c) failure to offer an educational benefit through lack of furniture, papers, pens or other materials;
- (d) using force that Student;
- (e) attempting residential placement;
- (f) threatening and involvement;
- (g) lack of safety;
- (h) miscategorizing Student's disability?

The answers to these issues are as follows.

- (a) Yes.
- (b) Yes.
- (c) Yes.
- (d) Yes.
- (e) No, because the Residential Review team disallowed a residential placement. The mere possibility or discussion of such a placement does not deny Student a FAPE. The IDEA requires consideration of a continuum of services.
- (f) No.
- (g) Yes.
- (h) No.

8. Is Parent entitled to recovery as claimed for: (a) legal fees, (b) advocacy, (c) staffing, (d) , (e) tutoring, (f) tuition, and (g) lost wages?

The answers to these issues are as follows.

- (a) No. Legal fees are not recoverable in a due process proceeding. *C.O. v. Portland Pub. Sch.*, 679 F.3d 1162 (9th Cir. 2012).
- (b) No. Since these services are analogous to legal fees, the same rule should apply. In addition, Father offered no evidence at the hearing regarding the services or costs of such advocacy. Even if these costs were recoverable, which they are not, no evidence was submitted to support recovering them.
- (c) No. At the hearing Father put on no evidence as to the cost of s services in the after school program. The testimony was unclear but seemed to indicate that was paid by for her after school services, (T 279, 331). Therefore, I find that Father has not met his burden of proof to justify reimbursement for the after school program.

(d) No. The fact that Father hired his own [redacted] instead of those available through the school's contract with [redacted] was a matter of personal preference. No evidence was submitted to establish that there was anything objectionable about using the [redacted] that could be obtained free of charge, or that such [redacted] would have done anything differently from the ones privately hired. Father apparently suspected that the [redacted] were too closely allied with District and too ready to approve residential placement. However, suspicion is not evidence and reimbursement cannot be ordered on the basis of suspicion.

(e) By "tutoring" father is referring to the services of [redacted], who set up an academic summer program for Student when she withdrew from [redacted] in May, 2013.

According to the IEP in effect in May, 2013, and the August IEP formulated thereafter, all summer tutoring and instruction had to occur at [redacted]. It is understandable why Father refused to accept this plan. Ideally, however, he should have notified District before hiring [redacted], giving them a chance to supply an alternative of their own choosing. That he did not is attributable to the friction between the parties at that time, the speed with which Father acted to set up the program in May, and the fact that Father did not have an attorney to guide him in sending notices.

In *Anchorage School District v. M.P.*, 689 F.3d 1047 (9th Cir. 2012) reimbursement of tutoring services was allowed. The Court held that absence of notice to the school district was outweighed by the school district's lack of cooperation with the parents.

In the present case, [redacted] services were shown to be valuable and necessary. District has not contested the reasonableness of the cost and has shown no prejudice from the want of notice of hiring of [redacted]. The emergency whereby Father was forced to take Student's education into his own hands in May 2013 was due to the District's failure to provide a FAPE, and Father's action under the circumstances were reasonable. Therefore I find that the expense from [redacted] services should be reimbursed.

(f) Yes, for reasons noted above.

(g) No. Consequential tort damages of this nature are not recoverable in a due process proceeding. *C.O. v. Portland Pub. Sch.*, 679 F.3d 1162 (9th Cir. 2012).

9. Should Parent's claim be dismissed as untimely or premature?

No. District has produced no evidence to support such a defense.

10. Is Parent entitled to an order removing Eloise McGarry and [redacted] from the IEP team?

No. Ordinarily, the school districts have sole discretion to assign staff. *Slama v. ISD No. 2580*, 259 F.Supp. 2d 880 (D. Minn. 2003), subject to limitation in extreme circumstances not presented here. *Moubry v. ISD No. 696*, 951 F.Supp. 867 (D.Minn. 1996).

11. Is the IEP of August 13 appropriate and should it be implemented?

No on both counts for reasons noted above.

ORDER

District is hereby ordered to pay directly to _____ the sum of \$84,900.00 for tuition for Student for the 2013-2014 school year. If there is a lower sum in effect under Vermont Board of Education Rules for Independent Schools Section 2228.8, then payment of this lower sum will be sufficient.

District is also hereby ordered to reimburse Father for his expenses in hiring in the amount of \$3,607.00.

NOTICE OF APPEAL RIGHT

Pursuant to Vermont Department of Education Rule 2365.1.8:

“(a) The decision of a hearing officer is final unless appealed to a state or federal court of competent jurisdiction within 90 days of the decision.

(b) Parties have right to appeal the hearing decision by filing a civil action in a federal district court or a state court of competent jurisdiction. An appeal from a due process hearing decision to a court of competent jurisdiction in accordance with Rule 2365.1.9 shall be commenced within 90 days from the notice of the final decision, and not after.”

Dated this 3 day of December 2013 at Brattleboro, Vermont.


Bruce Hesselbach, Hearing Officer