Due Process Hearing L-99-120

In the matter of: [Student], By and through her Mother and Legal Guardian of the Student, [Parent] Petitioner, v. ST. VRAIN VALLEY SCHOOL DISTRICT RE-1J, Respondent.	)	FINDINGS AND DECISION of Impartial Hearing Officer Joseph M. Goldhammer

INTRODUCTORY STATEMENT

The Colorado Department of Education received a request for hearing on August 25, 1999. The Impartial Hearing Officer (IHO) heard this case on October 27, 1999, at 830 South Lincoln Street, Longmont, CO. The parties filed written briefs on or about December 3, 1999, and agreed to extend the time for issuance of a decision to January 5, 2000. Jurisdiction is conferred by 20 USC §1415 (f)(1), 34 C.F.R. §300.507, and 1 CCR 301-8 §6.03(6). The Petitioner, [Student], appeared through her mother, [Parent], represented by Robert W. Johnson, 110 Miramar Drive, Colorado Springs, CO 80906, and Richard N. Lyons, 515 Kimbark Street, Longmont, CO 80502, represented the Respondent, St. Vrain Valley School District RE 1J (the District). The parties entered into a Stipulation of Facts dated October 20, 1999, which was received in evidence at the hearing.

II. ISSUES

After considering all evidence and legal argument, the IHO has determined the following as the issues in this case:

1. Is the Petitioner entitled to reimbursement for the costs of [Student]'s educational program at [Private School] for any period since September, 1998?

2. If so, what is the appropriate remedy?

III. FINDINGS OF FACT

1. [Student] was born in Denver Colorado on [DOB].

2. Her mother noted that she was hyperactive since she was very young, and she was enrolled in special education programs since the first grade.

3. [Student] entered [Middle School] in Longmont Colorado as a sixth grade student in the fall of 1995. [Middle School] was her regular middle school in the District, where she had

special education services in the form of access to a resource room on an as needed basis. (Exhibit 41).

4. In the midst of her seventh grade year, in February of 1997, [Parent] placed [Student] at [Medical Center] in Boulder, Colorado, for medication review for approximately one month. When she returned to [Middle School], she basically shut down and was placed at the [Residential Program] which included the [Day Treatment Program] before the end of the 1996-97 academic year. (Exhibit 42).

5. In August, 1997, [Parent] moved [Student] to the [Clinic], a psychiatric hospital in [State 1]. (Exhibit 10). She remained there until February, 1998, when she returned to Longmont, where she was administratively assigned to the [Adolescent Treatment] program effective approximately 2/25/98. (Exhibit 12). That is a day treatment program. While enrolled in this program in 1998, [Student] lived at home. Due to the short period of time until the triennial staffing after her return to the District, which was to be held by March 13, 1998, that staffing was delayed until April 20, 1998. The Mental Health Center of Boulder County, the Department of Social Services and the District jointly administered the [Day Treatment Program] program. It offers therapy along with social services and education combined into one program.

6. [Student]'s triennial IEP meeting was held on April 20, 1998. Those at the meeting included [Parent], [Counselor], her Counselor at [Day Treatment Program], and [Teacher], [Student]'s teacher for language arts and overseer for her education at [Day Treatment Program]. The parties arrived at a consensus at the meeting that [Student]'s placement in the Least Restrictive Environment should be in a Public School Separate Facility such as [Day Treatment Program]. (Exhibit 13 p. 10). For Special Education and Related Services, the IEP determined

that [Student] should receive an SIED placement with classroom support, direct instruction by a special education teacher, community based educational experiences and group, family and individual therapy for 30 hours per week. (Exhibit 13 p. 9). [Student] had goals and objectives both in the Social-Interpersonal as well as the educational areas. (Exhibit 13, both page eights). The team designated [Student]'s disability as SIED (Significant Identifiable Emotional Disability). (Exhibit 13 p. 7a). The assessment data presented at the IEP meeting showed that [Student] was above grade level in reading and below grade level in spelling. While the IEP states that [Student] was at grade level in math, [Teacher] testified that she was a little below grade level in that subject area. [Parent] did not object to any aspect of the IEP meeting or the written IEP developed in April, 1998.

7. [Teacher] testified credibly that although [Student] demonstrated passive defiant behavior at times, she was a workable student who, like many of the 12 SIED adolescent students at [Day Treatment Program], made slow progress academically.

8. According to [Counselor], [Student]'s counselor in charge of her therapy, that aspect of her educational program proved far more problematic than her academics. During April, [Counselor] noted that [Student] continued to refuse to talk to her therapist and meet with her youth advocate. She scratched the word "hore" on her arm while at school and appeared depressed and moody much of the time. During May, 1998, [Student] refused to go to an appointment with her psychiatrist at [Day Treatment Program], [Psychiatrist]. In June, [Parent] removed [Student] from therapy to go to [State 2] for about a month. Before they left, [Counselor] warned [Parent] that when she returned, [Student] would need to agree to participate more fully in the program, or they would need to look for a more suitable placement.

9. In July, 1998, [Counselor] discharged [Student] from treatment at [Day Treatment Program], documenting generally [Student]'s refusals to participate in therapy and other activities. [Counselor] recorded the doubts of the staff members regarding the efficacy of the [Day Treatment Program] placement. Finally, [Counselor] made a recommendation for [Student] to be evaluated for hospital or residential treatment. (Exhibit 14).

10. In the summer of 1998, [Parent] first contacted [Director], Director of Student Services for the School District expressing concern over [Student]'s current status. [Director] set up a meeting with [Day Treatment Program] Staff for late August 1998, and had [Supervisor], Special Education Supervisor, attend the meeting. [Parent] also attended the meeting, along with [Counselor] and [MHC Coordinator], Mental Health Center Coordinator of the [Adolescent Treatment Program].

11. [MHC Coordinator] testified credibly that the participants in the meeting all agreed that the situation at [Day Treatment Program] was not working very well for [Student]. The meeting presented the opportunity for all concerned to decide whether [Student] should continue at [Day Treatment Program], or whether the circumstances warranted a different placement. [Parent] advised the group that she would explore residential placement options for [Student] outside Colorado, including [Private School] in [State 3]. The parties reached no conclusion as to the proper placement for [Student], but [Parent] related that she would take [Student] on a tour of the out of state facilities and would be in touch with the District upon her return.

12. [Parent] returned to Longmont from investigating possible placements on September 14, 1998, and advised [Director] by letter dated September 18, 1998, that she had enrolled [Student] in [Private School] in [State 3] on September 4, 1998. [Private School] is a residential school for the emotionally disabled with a heavy emphasis on behavioral modification

techniques. Schools such as [Private School] are often termed "Emotional Growth Schools."

13. [Parent] requested an appointment to discuss District funding for this placement in September 1998. She met with [Director] and [Supervisor] on September 24, 1998, and discussed District financing of the residential placement in [State 3]. By that meeting [Director] was aware of the questions raised by the parent and some [Day Treatment Program] staff regarding the viability of [Student]'s program at [Day Treatment Program]. [Director] reasoned that she probably would have to support [Student]'s educational program at another site outside the District in any event, so she proposed to pay the educational costs exclusively of [Student]'s placement at [Private School]. [Parent] seemed pleased with that proposal. [Parent]'s communications to the District in September, 1998, constitute a request for change of placement.

14. [Director] then contacted [Staff member] at [Private School], who informed [Director] that the instructional portion of the costs at [Private School] amounted to $40 per day, six days per week. (Exhibit 24) [Director] then contacted [Parent] and informed her that the District would pay $40 per day, six days per week, towards the cost of [Student]'s program at [Private School], and that the District would execute a contract with [Private School] to memorialize this arrangement. At that time, [Parent] voiced no objection to the District's action.

15. On or about October 14, 1998, [Director] transmitted a contract to a billing executive of [Private School] in [State 4]. She faxed the transmittal letter and contract to [Parent] on the same date. However, [Director] never requested [Parent] to execute the contract, or to agree formally to the contract or the arrangements provided for in the contract at any time. The contract stated that [Private School] would bill the District in the amounts previously mentioned. [Private School] assured that [Student]'s educational program meets the requirements of all applicable federal and state statutes and regulations. The contract extended from September 4,

1998, to June 3, 1999. The billing executive executed the contract and returned it to the District on or about October 20, 1998. (Exhibit 25)

16. The contract between [Private School] and the District constitutes a legally binding commitment by the District to pay public funds for the education of a student with a disability entitled to special education services. As such, federal law required the District to assure that the educational services were provided in the least restrictive environment. Regardless of the subjective intent of the officials of the District, the contract with [Private School] constituted the District's assent that the placement at [Private School] was in the least restrictive environment.

17. When the District learned that [Parent] was requesting a change in placement to [Private School] in September 1998, it did not convene an IEP team meeting to determine the appropriateness of that placement, nor did it notify [Parent] of her procedural rights pursuant to 34 C.F.R. §300.503 and 300.504 to challenge any refusal by the District to change [Student]'s placement to [Private School]. Rather, by agreeing partially to fund that placement, the District assented to that placement.

18. [Student] has been enrolled at [Private School] continuously since September, 1998, to the date of the hearing.

19. In April 1999, [Parent] informed [Director] that she was seeking more financial support for [Student]'s placement at [Private School]. [Director] then learned that [Private School] had failed to bill the District as required by the contract. (Exhibit 25). [Director] met with [Parent] on April 23, 1998, and informed her that the District would make an exception to its general policy and reimburse her directly the amounts the District had agreed to pay towards [Student]'s education at [Private School], since [Parent] had been paying those costs in full. However, [Director] refused to pay the full costs of educating [Student] in the residential

placement at [Private School].

20. The total costs of [Student]'s education, as itemized by [Private School] are $120.00 per day, including $40 for "schooling," $65 for "room and board," $5 for "group therapy" and $10 for "individual therapy." (Exhibit 31). In May, 1999, the District reimbursed [Parent] for the "schooling" portion of those costs exclusively for the period of the contract with [Private School] to June 3, 1999, in the amount of $9,200.

21. On May 20, 1999, [Director] informed [Parent] that the District had not been informed of the annual IEP conference which [Private School] had to complete by April 20, 1999. She informed [Parent] that the District would assume no further educational costs if [Private School] failed to adhere to IDEA regulations. The parties stipulated that [Private School] did not conduct an annual IEP review in April, 1999, and the IHO so finds. (See Stipulation of Facts ¶15). On or about May 20, 1999, [Director] supplied [Parent] with a copy of the District's pamphlet entitled "Educational Rights of the Students and Parents dated August, 1998, which fully informs readers of their procedural rights under IDEA (Exhibit 44).

22. On September 24, 1999, [Private School] sent a letter to whom it may concern, in which the Academic Coordinator outlined the ways in which [Student]'s educational program conformed to her 1998 IEP. (Exhibit 39). However, that document does not meet the standards of an annual review of the IEP. The IHO finds that [Private School] did not conduct that annual review at any time in 1999.

23. On June 29, 1999, [Parent], through her attorney, filed an appeal of the amount of financial assistance offered by the District. By August 24, 1999, the District understood that appeal to be a request for due process hearing and so informed the Colorado Department of Education, which received the request on August 25, 1999.

IV. DISCUSSION AND CONCLUSIONS

A. Introduction.

Initially, the IHO viewed this matter as a traditional tuition reimbursement case governed by the United States Supreme Court's decision in *School Committee of Town of Burlington v. Dept. of Education*, 471 U.S. 359 (1985) and the relatively new statutory and regulatory provisions governing such situations. 20 U.S.C. §4012 and 34 C.F.R. §330.403 (c) and (d). Clearly, [Parent] removed [Student] from her previous placement at the [Day Treatment Program] and enrolled her at the [Private School] in [State 3] without the prior consent or agreement of the District. However, one factor distinguishes this case from all of the numerous tuition reimbursement cases before and after *Burlington.* In this case, the District undertook to fund directly the educational component of the residential placement in [State 3], while simultaneously purporting to withhold its approval of that placement. This complexity removes this case almost entirely from the normal analysis employed in tuition reimbursement cases and requires an application of Federal and State Law to these unique circumstances. The IHO has concluded that the pertinent law required the District or other public entities to fund the full costs of [Student]'s residential placement for the 1998-99 academic year, but not to fund those costs at all thereafter.

B. When Adopted, the Individualized Education Program of April 20, 1998, Provided [Student] with a Free Appropriate Public Education, but Developments in the Spring and Summer of 1998 Raised Doubts as to its Appropriateness.

The petitioner argues that the IEP of April 20, 1998, was "inappropriate" because it did not require a residential treatment program for [Student]. The IHO disagrees. The extensive written and testimonial record shows that no party attending the IEP meeting of April 20, 1998,

advocated a residential placement for [Student] at that time. The IEP itself (Exhibit 13) at page 10 specifies the "Recommended Placement in the Least Restrictive Environment" as "Public School Separate Facility." [Parent] did not voice objections to that educational placement at the April 1998 IEP meeting. The evidence demonstrates that the placement represented the consensus of all those present on April 20, 1998. Furthermore, based upon the data available to those concerned, it provided a Free Appropriate Public Education to [Student] as of April, 1998.

However, in the period between its adoption and the end of the summer 1998, questions arose regarding the appropriateness of the public school separate facility placement at [Day Treatment Program], based upon [Student]'s lack of progress in the therapy element in her overall education and related services. At page 9 of the 1998 IEP (Exhibit 13), the IEP team identified those services as "SIED placement with classroom support, direct instruction by a special education teacher, community based educational experiences, **group, family, individual therapy.**" (Emphasis supplied). Indeed, the focus at [Day Treatment Program] was in serving the student's emotional and social needs, since all 12 of the students there had some emotional or psychological problem, according to [Student]'s teacher. Accordingly, the IEP team acknowledged that [Student]'s emotional and social development constituted an extremely critical aspect of her education by placing her in the [Day Treatment Program] program, and by identifying group, family and individual therapy as one of the key ingredients in her special education and related services.

While her regular teacher did not recognize the difficulty [Student] experienced at therapy and at home in the spring and early summer of 1998, the psychotherapist assigned to [Student] at [Day Treatment Program] from the Boulder County Mental Health Department, [Counselor], voiced serious concerns regarding the appropriateness of the [Day Treatment

Program] placement, based upon [Student]'s lack of progress in therapy. In particular, Exhibits 14, 17 and 18, all of which contain [Counselor]'s notes or the notes of others recording her statements, contain numerous references to [Student]'s deteriorating emotional status. In therapy, she refused to participate or connect with others. In school, she scratched the word "hore" on her arm. The therapist commented that she looked "increasingly depressed, and has made suicidal statements," and that she "appears moody and depressed much of the time." Finally, [Counselor] discharged [Student] from treatment in July 1998, after [Parent] had taken her to [State 1] for approximately one month, recommending that [Student] be evaluated for hospital or residential treatment. (Exhibit 14) [Counselor] testified that by the August meeting involving several staff and the parent, after [Parent] had informed the District in writing of her disagreement with the IEP, the therapist thought that [Student] "was in need of a higher level of treatment."

C. By Agreeing With [Private School] to Fund [Student]'s Educational Costs in Accordance With Federal Laws and Regulations, the District Approved her Placement in that Residential Facility.

When faced with the *fait accompli* of [Student]'s enrollment at [Private School] in September of 1998, [Director] had several choices according to applicable law. First, she could have informed [Parent] that the School District refused to fund any part of [Student]'s education at that residential facility, standing on the April 20, 1998, IEP's placement of "Public School Separate Facility." In that event, the IDEA regulations 34 CFR §300.503 & 504 would have required her to give notice to [Parent] of the refusal of the District to change [Student]'s placement, from "Public School Residential Facility" to a Residential Placement in a private school and to provide a copy of the District's description of procedural safeguards to [Student]. Those safeguards would have notified [Parent] that she had the right to appeal the District's

refusal to change the educational placement of [Student] through a due process hearing, in which [Parent] could have sought tuition reimbursement for her unilateral placement.

Second, [Director] could have immediately convened an IEP team meeting to determine whether [Student]'s educational placement should be modified from the day treatment program authorized by the then current IEP, to the residential placement unilaterally chosen by [Parent]. If the IEP team concluded that the change in placement proposed by [Parent] was justified, and that [Private School] would provide [Student] with a FAPE, the District or other agencies in Colorado would have been liable for the full costs of her education in accordance with 34 CFR §300.302, which requires that the parent bare no costs of a residential program including non-medical care and room and board. If the IEP team found the current IEP appropriate, [Parent] would have been afforded the same rights to notice and a hearing specified above. That course of action also falls squarely within IDEA and its regulations.

Instead, [Director] chose a middle course, which is much more difficult to analyze under the statute and regulations. She made a good faith effort to fulfill whatever legal obligations the District had at that point by offering to pay exclusively for the "educational component" of the [Private School] residential placement costs, valued at $40 per day. This represented a reduction in services from those offered under the April 20, 1998, IEP, since that IEP provided for group, individual and family therapy at no cost to the student, in addition to the purely instructional costs. (Exhibit 13 p. 9). However, the $40 per day represented only the costs of "schooling," as distinguished from room and board, group and individual therapy (Exhibit 31).

By the time [Parent] approached the District to fund [Student]'s education at [Private School], [Director], knew that [Student] and the staff at [Day Treatment Program] had raised misgivings about the feasibility of [Student]'s continuation in the [Day Treatment Program]

before her enrollment in [State 3]. [Director] received a copy of an August 31, 1998 memo from [Supervisor], indicating that the parent and the Day Treatment staff questioned the appropriateness of continuing the [Day Treatment Program] placement at that time. (Exhibit 17, pp. 2 & 3). [Director] testified that she knew that she would be considering another site for [Student]'s education outside of the school District in any event (Tr. 175), so she informed [Parent] that she would pay the educational component of the costs at [Private School], and [Parent] seemed pleased with that decision. The District and [Private School] then entered into a written contract (Exhibit 25) to pay for the educational segment of [Student]'s costs at the [State 3] School.

In so doing, [Director] hoped to discharge any legal liability the District might have to [Student] and her parent, which arose from the uncertain situation which faced the student, her mother, and the District in the fall of 1998. The key question in this case is whether [Director] succeeded in satisfying those obligations through her creative efforts to arrive at a compromise solution to these complicated circumstances by attempting to pay only part of the costs of [Student]'s residential placement while maintaining the invalidity of that placement.

In the process of implementing her proposal, [Director] openly acknowledged [Student]'s rights to an education consistent with applicable state and federal law while placed at [Private School]. In the contract between the District and [Private School] which [Director] drafted, she required the residential school to assure that [Student]'s "educational program meets the requirements of all applicable federal and state statutes and regulations." (Exhibit 25 p. 20). The private residential school could only meet that dictate if the placement there complied with all legal requirements.

Additionally, [Director] testified that the contract with [Private School], as well as

Federal statute and regulations, imposed the obligations upon the District to assure that [Student]'s IEP was being met while she was at [Private School]. (Tr. 179-80). She testified that while it would have been a bit costly to enforce of the IEP in this case, arrangements could have been made through means such as conference telephone calls. [Director] is correct in acknowledging the District's obligation to ensure compliance with the IEP when a private school provides the special education services, since 34 CFR §300.401 requires that a child placed in a private school or facility be provided special education and related services in conformance with an IEP, at no cost to the parents, and affording the same rights as those granted to a child with a disability who is served by a public agency.

Finally, under [Director]' plan, the School District's agreement to pay at least a share of the costs, and its ultimate performance of that agreement by reimbursing partial costs to the parent in the Spring of 1999 evidences a recognition that the private residential placement was appropriate. Otherwise, the District knowingly paid public funds in the amount of $9,200 to support an educational program which violated federal and state law. IDEA requires that federal, state and local funds be utilized to assure that a free appropriate public education is available to all children with disabilities. 20 USC §1412 (1)(A). Certainly, that law does not countenance the use of those funds to support educational efforts which a District knows or contends do not conform to the legal standards of a FAPE or other statutory requirements.

The IHO is acutely aware that [Director] attempted to withhold the District's approval of [Parent]'s placement at [Private School], while simultaneously contributing financial support to her education in that placement. Her October 5, 1998, memo to the student file (Exhibit 22) and her letter to [Parent] of April 29, 1999, (Exhibit 30) reflect that argument. However, that position inherently contradicts the provisions of the IDEA and its regulations. A school district

cannot partially fund the education of a disabled student under a contract requiring compliance with Federal law (Exhibit 25) while repudiating the legality of the placement in which that education is provided. The setting in which special education services are delivered is critical to the appropriateness and legality of the education of the disabled under IDEA. 20 USC §1412(a)(5) clearly requires that disabled students be educated in the least restrictive environment. The IDEA regulations in 34 CFR §300.551 require Districts to provide for a continuum of alternative placements to meet the needs of children with disabilities, as do the Colorado Regulations at 1 CCR 301-8 §5.03(3). If [Student] were not in the least restrictive environment at [Private School], her program there did not comply with all applicable law.

Accordingly, the District could never have expected [Private School] to comply with the contract provision in Exhibit 25 requiring compliance with all applicable state and federal statutes and regulations if it were true that [Student]'s very placement in that school violated those laws and regulations in the first instance. It is untenable to require, as has the District in this case, that [Private School] meet the requirements of all applicable law in expending public funds, while asserting that [Student]'s placement in that school violates the IDEA's clear mandate that all disabled students be educated in the least restrictive environment. Therefore, regardless of the subjective intent of [Director], the IHO concludes that the execution of the contract with [Private School] (Exhibit25) constituted an approval by the District of the residential placement of [Student] in that school. To hold otherwise would be to condone the illegitimate expenditure of public funds.

Certainly, the school District could have entered into a settlement agreement with [Parent] under which both parties would have agreed to resolve their dispute regarding whether [Student] required a residential placement by payment of $40 per day in costs. In effect, the

District implies that such a settlement agreement resulted from the fact that [Parent] seemed pleased after [Director] informed her that the District would fund that amount. However, the parties did not enter into a settlement agreement waiving [Parent]'s right to challenge the District's actions. [Director] also did not notify [Parent] of her procedural rights when she agreed to pay partial costs in September, 1998, as she should have when the educational placement of the student comes into question. 34 C.F.R. §300.503 (a)(1)(i) and (ii) require the notification of rights to a parent when the District changes or refuses to change the educational placement of a child. In September, 1998, the District contends that it refused to change the educational placement of [Student] from "public school separate facility" to a residential placement, and the IHO has found that the District did, by operation of law, ratify that change. In either event, the regulations required the District to notify [Parent] of her rights.

This failure to notify [Parent] of her rights refutes any contention by the District that [Parent] agreed to the partial pay arrangement at [Private School], and waived her right to challenge that arrangement through a due process hearing. She could not waive her right to a hearing if she did not receive the legally required notice of that right prior to the waiver.

Clearly, [Student]'s move from the day treatment program at [Day Treatment Program] to the [Private School] residential facility constituted a change in placement. The Colorado regulations identify off campus programs, such as [Day Treatment Program], and residential facilities, such as [Private School], as distinct phases in the continuum of educational services which must be offered by the District. 1 CCR 301-8 §5.03(d)(i) and (ii). While the parent initiated the change in placement in this case, the District subsequently confirmed that change by agreeing to provide some funding for it under a contract (Exhibit 25) which required compliance with all applicable federal and state statutes and regulations.

D. To Fulfill its Obligations to Provide [Student] with an Education Consistent with Applicable Laws and Regulations, [Student]'s Program at [Private School], Including Non-medical Room and Board, Had to Be Provided at No Cost to the Parents of the Child.

The Federal Regulations require that residential placements be at no cost to the parents of the child. 34 CFR §300.302 provides as follows:

> If a placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

While the District contends that the residential program in this case was not necessary to provide special education and related services to [Student], to consistently maintain that position, the District could not agree to provide funding for the placement in the residential facility under a contract calling for compliance with all applicable law. By doing so, the District conceded the necessity of the residential placement.

The District did not meet its obligations to [Student] by paying only "schooling" costs for her initial nine months at [Private School]. [Student]'s difficulties at [Day Treatment Program] in the spring of 1996 did not stem exclusively from her conduct at home. Family, individual and group therapies were an integral part of [Student]'s IEP while at [Day Treatment Program]. (Exhibit 13 p. 9). Therefore, her failure to cooperate in therapy and her self destructive behaviors at school, as confirmed by [Counselor], constituted an important shortcoming in the fulfillment of her educational program, quite independently of her conduct at home. Therefore, *Sylvie v. Board of Education of Dripping Springs School District*, 48 F.Supp. 2d 681 (W.D. Texas, 1999) is not persuasive, and does not contravene the regulation cited above in any event.

Also, the holding in *Clovis Unified School District v. California Office of Administrative Hearings* 903 F.3d 635 (9th Cir 1990), cited by the District, does not support the payment of

solely the educational component of [Student]'s costs at [Private School]. In that case, the parents unilaterally placed the student in a psychiatric hospital. The quoted regulation applies only to residential placements, not hospitalizations. Therefore, that case would not affect the application of 34 C.F.R. §300.304 in this case.

The IHO concludes that 34 C.F.R. §300.302 applies in this case, and requires that during the period encompassed by the contract between [Private School] and the District, [Student]'s residential program, including non-medical care and room and board, must be at no cost to the parents of the child. The costs may be supplemented by agencies other than the District, just as other agencies contributed to the costs of [Student]'s education at the [Day Treatment Program]. However, the IHO will order the District to assure compliance with that regulation during the term of its contract with [Private School].

E. When [Private School] Failed to Perform the Annual Review of [Student]'s IEP in the Spring of 1999, She Was No Longer Receiving a FAPE, and the District was Justified in Declining to Pay Additionally for that Residential Placement.

In the Spring of 1999, the District learned that [Private School] did not do the Annual Review of [Student]'s IEP which was required by 34 CFR §343(c). Without the cooperation of [Private School], the District could not perform the Annual Review since that Review must include an assessment of whether the goals outlined in the IEP are being achieved. (*Id.)*. Proper maintenance of the IEP is central to compliance with IDEA. In fact, Free Appropriate Public Education, as defined by IDEA, "requires that special educational services be "provided in conformity with the individualized education program . . ." 20 U.S.C. §1401 (8)(D).

[Director] did contact [Private School] to determine why the IEP Annual Review had not been done in April 1999, and was told that they would not be doing an IEP review for the 1998-99 academic year. (Exhibit 36). In view of that fact, [Director] was fully warranted in

discontinuing all support of the educational program there after the expiration of the contract. She notified [Parent] of that position in her letter of May 20, 1999. (Exhibit 33). Additionally, at that time, [Director] gave [Parent] notice of her procedural safeguards. (Tr. 204). Therefore, [Parent] had the full opportunity to challenge the District's position in a due process hearing.

[Parent] did not refute the District's evidence that [Private School] failed to do the Annual Review in the Spring of 1999. Exhibit 39, a letter to whom it may concern dated September 24, 1999, does not measure up to the standards of an Annual Review performed at an IEP meeting as required by the statute and regulations. The District had no choice other than to curtail funding for [Student]'s residential placement, after it became apparent that she was not receiving a FAPE due to [Private School]'s failure to cooperate in the IEP process. It could not commit public funds to an educational program which so obviously did not meet the standards of IDEA.

However, even after learning that [Private School] did not intend to comply with applicable legal principles governing the public funding of special education, [Parent] maintained [Student]'s placement at [Private School]. That is certainly her prerogative. However, it is one which she must finance herself. The District cannot be expected to continue to bear responsibility for [Student]'s special education services under 34 CFR §300.349(c) without the proper assessments of that education provided by the IEP.

The District correctly points out in its brief that during the period pertinent to this case, before the new IDEA regulations took effect in May 1999, the 1997 Amendments to IDEA did not provide that the unilateral placement chosen by the parent be appropriate as a requirement for tuition reimbursement. 20 USC §1412(a)(10)(C). However, this IHO does not construe that congressional omission to overrule the Supreme Court's decision in *Burlington, supra.*, which

requires that the unilateral placement be appropriate. Whether in the context of a unilateral placement case or a case such as the present one, where the District has provided support for a private placement, public funds cannot be committed to any private placement which does not conform to the requirements of IDEA.

V. DECISION

Based upon the above findings and conclusions, it is the decision of the Impartial Hearing Officer that:

1. The District violated the provisions of 34 CFR §302 during the 1998-99 academic year by not assuring that [Student]'s program at [Private School], including non-medical care and room and Board were at no cost to the parent of the child. Therefore, the IHO orders the District to assure the reimbursement of such costs to [Parent] not already paid to her for educational services at [Private School] provided during the period of the contract between [Private School] and the District from September 4, 1998 to June 3, 1999.

2. [Student]'s request for reimbursement of tuition and other costs after June 3, 1999, is dismissed and denied.

Dated in Denver, Colorado, this 5th day of January, 2000.

_____

Joseph M. Goldhammer
Impartial Hearing Officer