UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

JOAN R. and her Parents, MR. and MRS. R., Plaintiffs,	:	
v.	:	CA 02-282ML
BARRINGTON PUBLIC SCHOOLS and the RHODE ISLAND DEPARTMENT OF EDUCATION, Defendants.	:	

REPORT AND RECOMMENDATION

David L. Martin, United States Magistrate Judge

This action is brought pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1487,[1] and the Regulations of the Board of Regents for Elementary and Secondary Education Governing the Education of Children with Disabilities §§ 300.510, 300.512. See Complaint ¶¶ 1, 8. Plaintiffs seek judicial review of a decision by a hearing officer, appointed by the Rhode Island Department of Education ("RIDE"), denying their request for reimbursement of the residential portion of the tuition which they paid for their disabled child to attend a private school in Vermont during the 2001-2002 school year. See id. ¶ 1.

Before the court is Plaintiffs' Motion for Summary Judgment and Request for Oral Argument ("Motion for Summary Judgment" or "Motion") (Document #11). The Town of Barrington (the "Town") has filed an objection to the Motion. See Town of Barrington's Objection to Plaintiffs' Motion for Summary Judgment

[1] The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1487, guarantees disabled children between the ages of three and twenty-one, see id. § 1412(a)(1)(A), access to a "free appropriate public education ["FAPE"]," id.; see also id. § 1400(d)(1)(A).

("Objection") (Document #14). This matter has been referred to me for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and D.R.I. Local R. 32(a). For the reasons stated below, I recommend that the Motion be denied and that the decision of the hearing officer be affirmed.

I. Synopsis

In 1999 Joan R.'s parents enrolled her at a private school in Vermont and then sought reimbursement from the Town for the cost of this placement. The Town refused, and her parents requested a due process hearing before RIDE. The dispute was ultimately resolved by a settlement agreement pursuant to which the parties agreed to share the cost of Joan's placement. The Town agreed to pay Joan's tuition, and her parents agreed to pay her room and board. The agreement covered Joan's sophomore and junior years in high school (1999-2000 and 2000-2001).

After the settlement agreement expired in June 2001, both parties continued to make payments to the school in accordance with the cost-sharing arrangement stated therein. On November 30, 2001, Joan's parents requested another due process hearing, seeking to have the Town pay the entire cost of Joan's placement for her senior year (2001-2002). A hearing officer denied the parents' claim, finding that they had failed to prove that Joan's placement at the school was necessary and also finding that there was a contract implied in fact between the parties to continue with the previous cost-sharing arrangement.

This court finds that although the hearing officer erred in determining that Joan's parents were required to prove that her placement was necessary, the hearing officer's other reason for denying their claim, namely that a contract implied in fact existed, is valid. Accordingly, Plaintiffs' motion should be denied, and the decision of the hearing officer should be affirmed.

II. Facts and Travel

Plaintiff Joan R. ("Joan," "Joni," or "Joanie") was born on September 21, 1983. See Complaint ¶ 8. She was at all times here relevant a child with a disability within the meaning of 20 U.S.C. § 1401(3). See id. ¶ 8. Joan and her parents, Plaintiffs Mr. and Mrs. R. ("Joan's parents" or "Parents"), reside in Barrington, Rhode Island. See id. ¶¶ 2-3. Joan has a long history of learning disabilities and social difficulties. See id. ¶ 8. She received special education services from Defendant Barrington Public Schools ("Barrington") from kindergarten through fifth grade (September 1989-June 1995). See id. ¶ 9. Her academic difficulties became more severe as she advanced in grade level. See id. As a result, she attended St. Andrew's School ("St. Andrew's"), a private special education day school located in Barrington, from the sixth grade through the ninth grade (September 1995-June 1999). See id. Joan's enrollment at St. Andrew's was the result of unilateral action taken by her parents, but Barrington ultimately agreed to that placement. See id.

In the fall of 1998, a dispute arose between Joan's parents and Barrington regarding her continued eligibility for special education. See id. ¶ 10. Barrington took the position that Joan should attend regular education classes at Barrington High School. See Plaintiffs' Statement of Undisputed Material Facts in Support of Their Motion for Summary Judgment ("SUF") at 3.[2]

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[2] Plaintiffs' Statement of Undisputed Material Facts in Support of Their Motion for Summary Judgment ("SUF") is in memorandum format, and Plaintiffs' undisputed facts are not numbered. Defendant, Town of Barrington's, 12.1(a)(2) Statement of Material Facts Which Creates a Genuine Issue to be Litigated, although much briefer than Plaintiffs' SUF, is also in memorandum format. For the guidance of counsel in the future, facts set forth in a SUF should be numbered. While a few discrete facts may be combined within a single, numbered paragraph, a SUF which does not contain any numbered facts or paragraphs should be avoided. When responding to a SUF, counsel should address each of the numbered facts (or paragraphs) in the moving party's SUF and state

Believing that their daughter still required special education services, Joan's parents searched for an appropriate program on their own. See Complaint ¶ 11. They enrolled Joan as a residential student at the Pine Ridge School ("Pine Ridge" or "the School"), a private school located in Williston, Vermont, for the 1999-2000 school year and requested a due process hearing before RIDE, pursuant to 20 U.S.C. § 1415, in order to obtain a determination of eligibility and reimbursement for the cost of the Pine Ridge placement. See id.

This dispute was litigated before a hearing officer appointed by RIDE (Joan R. v. Barrington School District, Nos. 98-37, 99-37). See id. Joan's parents wanted her to remain at Pine Ridge during the 2000-2001 school year, and this issue also became part of the hearing process. See Affidavit of Mrs. R. ("Aff. of Mrs. R.") ¶ 10. On August 3, 2000, Joan's parents reached an agreement in principle with Barrington to settle their disputes as to both the 1999-2000 and 2000-2001 school years. See id. ¶ 12. The agreement was subsequently embodied in a Settlement Agreement and Consent Order (the "Settlement Agreement") which was signed by Joan's parents on September 8, 2000, and approved by the hearing officer on September 11, 2000. See Settlement Agreement at 4.[3]

On September 1, 2000, slightly less than one month after the agreement had been reached in principle and approximately a week before the Settlement Agreement was signed by the parties, Joan's parents sent Mr. Ralph Malafronte ("Mr. Malafronte"),

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plainly whether each fact (or paragraph) is disputed or not. Doing so will greatly assist the court in determining what facts are actually in dispute.

[3] The Settlement Agreement and Consent Order ("Settlement Agreement") is attached to the Hearing Officer's Decision ("Decision"). The Decision is appended as to the Complaint as an exhibit. The court cites to these documents as Settlement Agreement, Decision, and Complaint.

Barrington's Superintendent of Schools, a one sentence letter, stating that they were giving him notice that they intended to enroll Joan at Pine Ridge at public expense for school year 2000-2001. See Transcript of 4/25/02 Hearing ("Tr." of 4/25/02), School Department ("Dept.") Ex. 1 (Letter from Parents to Mr. Malafronte of 9/1/00).[4] According to Mrs. R., the Parents sent this letter "just in case there was a glitch with the Consent Order [Settlement Agreement] and it didn't get signed," Tr. of 4/25/02 at 49, so that they could still "go to hearing," id. at 50, for the 2000-2001 school year, see id.

In the Settlement Agreement, the parties agreed, inter alia, to share the cost of Joan's program at Pine Ridge for the 1999-2000 and 2000-2001 schools years. See Complaint ¶ 12. Barrington agreed to pay the full amount of her tuition (i.e., the full cost of the day portion of her placement), which was approximately $30,000 per year.[5] See Settlement Agreement ¶ 1. Joan's parents agreed to pay the room and board portion of her placement which was approximately $10,000[6] per year. See id. The Settlement Agreement also provided, in the event of a dispute regarding the appropriate placement for Joan after June

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[4] The record in this case consists of the transcript of the administrative hearing which took place over portions of three days: March 15, April 5, and April 25, 2002. See SUF at 5 n.6. The Rhode Island Department of Education ("RIDE") only filed the April 25, 2002, transcript with the court. See id. Plaintiffs have submitted copies of the transcripts from March 15 and April 5, 2002. See id.; see also Affidavit of Mrs. R. ("Aff. of Mrs. R."), Exhibits ("Ex.") A (Transcript of 3/15/02 hearing) and B (Transcript of 4/5/2 hearing). The court cites to these transcripts as "Tr. of 3/15/02," "Tr. of 4/5/02," and "Tr. of 4/25/02."

[5] This approximation is based on the fact that 2001-2002 tuition cost was $31,400. See Tr. of 4/25/02, School Dept. Ex. 6 (Letter from Ms. Blum to Ms. DeFanti of 5/15/01, Enclosure (Enrollment Agreement) at 1.

[6] This approximation is based on the fact that the room and board portion of Joan's placement for the 2001-2002 school year was $10,525. See Transcript of 3/15/02 hearing at 33.

2001: that Pine Ridge would constitute her "placement pending appeal" within the meaning of 20 U.S.C. § 1415(j) and applicable regulations; that the parties would share the cost of tuition, room, and board on the same basis as they had for the 1999-2000 and 2000-2001 school years; and that Joan's parents retained the right to seek full reimbursement, through the hearing process, of any amounts that they might pay in connection with any such placement pending appeal. See Settlement Agreement ¶ 2.

On May 15, 2001, Pine Ridge sent an enrollment agreement to Barrington for the 2001-2002 school year. See Tr. of 4/25/02 at 111; id., School Dept. Ex. 6 (Letter from Ms. Blum to Ms. DeFanti of 5/15/01), Enclosure ("Enc.") (Enrollment Agreement) at 1. This document indicated that the total cost of Joan's tuition and room was $41,900 and that the portion to be paid by Barrington was $31,400. See id. Payment was to be made in three installments. See id. Barrington's Director of Pupil Personnel and Special Education, Anne DeFanti ("Ms. DeFanti"), signed the enrollment agreement on May 21, 2001, confirming Barrington's acceptance. See Tr. of 4/25/02 at 112, id.; School Dept. Ex. 6, Enc. at 2.

On or about May 29, 2001, Mr. R. wrote a check for the first installment of the room and board portion of Joan's placement at Pine Ridge for 2001-2002 school year. See Tr. of 4/25/02 at 51. The Parents made this payment in order to secure Joan's placement for the fall. See id. at 51-52. Although Mrs. R. testified at the hearing that it was their position that Barrington was responsible for the room and board portion of Joan's placement, they did not communicate this fact to Barrington, see id. at 52, 54, or to the School, see id. at 55-56, and they had the School bill Barrington for the tuition portion of Joan's placement, see id. at 52, 55.

Barrington made a payment of approximately $20,900 to Pine Ridge on or about July 3, 2002. See id. at 44; id., School

Department ("School Dept.") Ex. 6, Enc. at 1. This represented both the first and second installments of the amount due for Joan's tuition for the 2001-2002 school year. See id. Barrington did not advise the Parents of this payment, but they were notified of it by Pine Ridge. See Tr. of 4/25/02 at 44. The Parents paid the second installment of Joan's room and board ($3,525) on or about August 4, 2002. See id. at 56.

On August 29, 2001, Mrs. R. delivered a letter to Mr. Malafronte which stated that the Parents intended to continue to enroll Joan at Pine Ridge at public expense for the 2001-2002 school year. See Tr. of 3/15/02 at 25; Tr. of 4/25/02 at 47, 56, 61-62; Tr. of 4/25/02, School Dept. Ex. 1. The letter was identical to the letter which they had sent a year earlier to Mr. Malafronte (except for the dates). See Tr. of 4/25/02 at 61-62. Mrs. R. testified that the August 29, 2001, letter was sent "[b]ecause the regulations state that you have to give a ten-day notice before a child enters the placement .... [Joan] was starting school on September 8th, so August 29th was eight days, or just about ten days before she would have started the placement." See id. at 56.

Around September 19, 2001, Cheryl Ursillo, a "diagnostic prescriptive teacher," id. at 115, employed by Barrington, contacted Pine Ridge for the purpose of scheduling a meeting to develop an individualized education program ("IEP")[7] for Joan. See id.; see id., School Dept. Ex. 2 (Letter from Ms. DeFanti to Ms. Easton of 10/1/01). This contact did not produce a response

[7] "The IEP is in brief a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs. [20 U.S.C. § 1401(11); 20 U.S.C. § 1414(d)(1)(A)]. The IEP is to be developed jointly by a school official qualified in special education, the child's teacher, the parents or guardian, and, where appropriate, the child." Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ., 471 U.S. 359, 368, 105 S.Ct. 1996, 2002, 85 L.Ed.2d 385 (1985).

from Pine Ridge. See Tr. of 4/25/02 at 116; id., School Dept. Ex. 2. On October 1, 2001, Ms. DeFanti sent a follow-up letter to the School regarding the development of an IEP for Joan. See Tr. of 4/25/02 at 116-17; see id., School Dept. Ex. 2. In her letter, Ms. DeFanti suggested that the Parents, Pine Ridge, and Barrington could participate in the development of the IEP by way of a conference call. See id., School Dept. Ex. 2.

Pine Ridge did not respond directly to Ms. DeFanti's letter, but on October 10, 2001, the Parents' attorney, Eileen M. Hagerty ("Ms. Hagerty"), sent a letter to Barrington's attorney, David V. Abbott ("Mr. Abbott"). See Tr. of 4/25/02 at 117; see id., School Dept. Ex. 3 (Letter from Ms. Hagerty to Mr. Abbott of 10/10/01). In her letter, Ms. Hagerty indicated that she and the Parents had received a copy of Ms. DeFanti's letter of October 1, 2001, (School Dept. Ex. 2) and noted that "it is a violation of law for Barrington to schedule an IEP meeting without proper notice to the parents and the student." Tr. of 4/25/02, School Dept. Ex. 3 at 1. After observing that Ms. DeFanti's letter seemed to imply that Barrington intended to write an IEP continuing Joan's placement at Pine Ridge, Ms. Hagerty stated that Plaintiffs "would be willing to discuss the possibility of waiving the requirement of a meeting to develop the IEP." Id.

On November 7, 2001, Ms. DeFanti wrote to the Parents. See Tr. of 4/25/02, School Dept. Ex. 4 (Letter from Ms. DeFanti to Parents of 11/7/01). In this letter, Ms. DeFanti stated that Barrington had learned through the Parents' attorney that they objected to Barrington's contacting Pine Ridge to set up an IEP meeting. See id. Ms. DeFanti noted that Barrington had "a responsibility and a right to work with Pine Ridge to develop an IEP," id., but that it was unable to comply with that responsibility, see id. Observing that the cooperation of everyone was needed to develop an IEP for Joan and expressing a desire to "normalize our relationship," id., Ms. DeFanti

requested that the Parents clarify whether they had consented to Barrington contacting Pine Ridge directly for the purpose of developing Joan's IEP for the current school year, see id.

The Parents replied to Ms. DeFanti in a letter dated November 13, 2001, the contents of which are reproduced below:

> We received your letter of November 7, 2001. We thought our attorney had addressed the issue of the IEP in her letter of October 17, 2001 to Barrington's (your) attorney.
>
> Joan is currently in the stay-put year of the settlement agreement between Barrington and ourselves. Within that settlement agreement it specifically states that Barrington will not write an IEP for Joan. This clause was put in at your request.
>
> As you are no doubt aware, the IEP request must include the parents and student as participants in the development process. We are surprised at your sudden interest in Joan, and would consider an IEP written for Joan with Pine Ridge School as the service provider. We would expect the opportunity to participate in this IEP meeting with our daughter, which recognizes Pine Ridge School as her placement provided the proper procedure under IDEA is followed.

Tr. of 4/25/02, School Dept. Ex. 5 (Letter from Parents to Ms. DeFanti of 11/13/01). Ms. DeFanti received this letter on November 19, 2001. See Tr. of 4/25/02 at 118.

The next significant event occurred on November 30, 2001, when the Parents sent Mr. Malafronte a request for a due process hearing, seeking to have Barrington pay the room and board portion of Joan's placement at Pine Ridge. See id. at 119; Complaint ¶ 16; Aff. of Mrs. R., Ex. C (Letter from Parents to Mr. Malafronte of 11/30/01), Attachment ("Att.") (Request for Impartial Due Process Hearing). RIDE assigned Hearing Officer Arthur G. Capaldi to the case, see Complaint ¶ 16, and he conducted hearings in the matter on March 15, 2002, and April 5, 2002, see Tr. of 3/15/02 ; Tr. of 4/5/02. However, after a

contentious hearing on April 5, 2001, see Tr. of 4/5/02 at 13-22, Hearing Officer Capaldi recused himself because Mr. R. indicated that the Parents had "some concerns," id. at 22, about the manner in which Mr. Capaldi was handling the case, see id. at 21-22.

RIDE then appointed Rita G. Michaelson to succeed Mr. Capaldi as hearing officer. See Complaint ¶ 19. She conducted an evidentiary hearing on April 25, 2002, and issued her Decision on or about May 24, 2002. See id. ¶¶19-20. Ms. Michaelson determined that the Town was not responsible for payment of Joan's room and board at Pine Ridge for the 2001-2002 school year. See Decision at 7; see also Complaint ¶ 20. She found that the Parents had failed to prove that Pine Ridge was the necessary placement. See Decision at 6. Ms. Michaelson also apparently found that there was an implied in fact contract between the parties for the 2001-2002 school year to share the cost of the placement as they had for the two previous years. See id. at 4-7.

Joan's parents received the decision on May 25, 2002. See Complaint ¶ 20. On June 24, 2002, Plaintiffs filed their Complaint (Document #1) in this court. Barrington on July 19, 2002, filed its answer (Document #5). The instant Motion for Summary Judgment (Document #11) was filed on November 21, 2003. Barrington's objection (Document #14) to the Motion was filed on December 4, 2003. A hearing was conducted on January 8, 2004, and the court thereafter took the matter under advisement.

III. Standard of Review

Although a party in an IDEA appeal may move for "summary judgment," the fact that a motion is so captioned does not mean that the court uses its normal summary judgment standard of review in which it examines whether genuine issues of material fact exist. See Browell v. Lemahieu, 127 F.Supp.2d 1117, 1120 (D. Haw. 2000). Rather, the Act provides that, when an action is brought in the District Court, the Court:

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C.A. § 1415(i)(2)(B)(i)-(iii) (2000); see also T.B. v. Warwick Sch. Dep't, No. Civ.A. 01-122T, 2003 WL 22069432, at *6 (D.R.I. June 6, 2003). "[T]he provision that a reviewing court base its decision on the 'preponderance of the evidence' is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206, 102 S.Ct. 3034, 3051, 73 L.Ed.2d 690 (1982). Due weight must be given to the state administrative proceedings. See id.; Abrahamson v. Hershman, 701 F.2d 223, 230(1st Cir. 1983).

> Although the exact quantum of weight is subject to the district judge's exercise of informed discretion, see Hampton [Sch. Dist. v Dobrowolski], 976 F.2d [48,] at 52 [1st Cir. 1992]; G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 946 (1st Cir. 1991), the judge is not at liberty either to turn a blind eye to administrative findings or to discard them without sound reason. See Burlington [v. Dep't of Educ.], 736 F.2d [773,] at 792 [(1st Cir. 1984), aff'd, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)] ("The court, in recognition of the expertise of the administrative agency, must consider the findings carefully and endeavor to respond to the hearing officer's resolution of each material issue."). In the end, the judicial function at the trial-court level is "one of involved oversight," Roland M. [v. Concord Sch. Comm., 910 F.2d [983,] at 989 [1st Cir. 1990]; and in the course of that oversight, the persuasiveness of a particular administrative finding, or the lack thereof, is likely to tell the tale.

Lenn v. Portland Sch. Comm., 998 F.2d 1083, 1087 (1st Cir. 1993).

In short, "the law contemplates an intermediate standard of review on the trial-court level--a standard which, because it is characterized by independence of judgment, requires a more critical appraisal of the agency determination than clear-error review entails, but which, nevertheless, falls well short of complete *de novo* review." Id. at 1086.

IV. Discussion

Plaintiffs argue that both of the grounds stated by the Hearing Officer for denying Plaintiffs' request for reimbursement are erroneous. See Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Mem.") at 7. The court considers each ground separately.

A. Lack of Placement Evidence

As to the first ground, that Plaintiffs failed to present evidence that the residential placement at Pine Ridge was necessary, see Decision at 6, Barrington agrees that this issue was not in dispute, see Town of Barrington's Memorandum of Law in Support of Their Objection to Plaintiff's Motion for Summary Judgment ("Town's Mem.") at 2. The Town's concurrence is fully warranted.

In both written and oral statements, the Town's attorney had repeatedly stated that the Town was not contesting the appropriateness of the Pine Ridge residential placement. See, e.g., Tr. of 3/15/02 at 13-14 (confirming that the Town is not contesting placement), 37-38 (agreeing that the issue to be decided is whether there was an implied contract); Tr. of 4/25/02 at 11 (stating that "[p]lacement in this case has never been an issue ...."); Aff. of Mrs. R., Ex. E (Letter from Mr. Mahoney to Mr. Capaldi of 2/1/02) at 1 ("The issue of placement of Joan is not in issue."). Based on these representations, Hearing Officer Capaldi indicated that the hearing would involve only the single legal issue of implied contract and would not involve factual

issues such as the appropriateness of the Pine Ridge placement. See Tr. of 3/15/02 at 16 (stating "the issue before [him]"); id. at 17 ("the town has just advised us that they do not have an issue of placement"); id. at 31 (stating that evaluations of Joan were "not important to this hearing"); id. at 37 ("the question of law that I'm going to have to answer is whether or not you people had an implied contract ....").

Furthermore, the record indicates that the Parents were prepared to present evidence regarding the appropriateness of Joan's placement. Dana Oswiecki, a psychologist who had evaluated Joan during the summer of 2001, was present at the March 15, 2002, hearing and ready to testify. See Tr. of 3/15/02 at 14-17. However, Hearing Officer Capaldi told the Parents that "[i]f your witness could not shed any light on those issues [of implied contract], then I don't want to waste her time, your time, or the town's time." Id. at 16.

The court agrees with Plaintiffs that Ms. Michaelson's rejection of the Parents' reimbursement claim for lack of evidence on the issue of Pine Ridge's appropriateness was "surprising, unjust, and unfounded." Plaintiffs' Mem. at 10. The Parents were entitled to rely on the Town's representations and on the rulings of the first Hearing Officer, Mr. Capaldi, regarding the issue to be decided. See Ellis v. United States, 313 F.3d 636, 646 (1st Cir. 2002)("[A] legal decision made at one stage of a civil or criminal case constitutes the law of the case throughout the pendency of the litigation.")(quoting Flibotte v. Pa. Truck Lines, Inc., 131 F.3d 21, 25 (1st Cir. 1997); Unum Life Ins. Co. of Am. v. Cappello, 278 F.Supp.2d 228, 233 (D.R.I. 2003) (holding that court was bound by prior determination made by another district judge, who had accepted a magistrate judge's report and recommendation, that a question of fact existed regarding the effect of a release).

Accordingly, I find that the appropriateness of Joan's placement at Pine Ridge was not at issue in the hearing below. I further find that Hearing Officer Michaelson's denial of the Parents' request for reimbursement for Joan's room and board on the ground that they had failed to prove that her placement was necessary is not supported by the evidence. Thus, the Decision should not be affirmed on this ground, and I so recommend.

B. Implied Contract

The court now turns to the second reason for the denial of the Parents' request for reimbursement, namely that there was an implied contract between the parties to continue to share the cost of Joan's placement at Pine Ridge on the same basis as set forth in the Settlement Agreement. See Decision at 5-7.[8]

1. Law

The Rhode Island Supreme Court has explained the elements of a contract "implied in fact" as follows:

> A contract implied in fact, ... or an implied contract in the proper sense, arises where the intention of the parties is not expressed, but an agreement in fact, creating an obligation, is implied or presumed from their acts, or, as it has been otherwise stated, where there are circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intent to contract.
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> It has been said that a contract implied in fact must contain all the elements of an expressed contract. So, such a contract is dependent on mutual agreement or consent, and on the intention of the parties; and a meeting of the minds is required. A contract implied in

[8] The court agrees with Plaintiffs' assessment that "although [Hearing Officer Michaelson] did not state this conclusion of law [that there was an implied contract] in so many words, she apparently found that a contract to continue the division of expenses set forth in the Settlement Agreement covering the two preceding years should be implied in fact for the 2001-2002 school year." Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Mem.") at 7 (citing Decision at 5-7).

> fact is to every intent and purpose an agreement between the parties, and it cannot be found to exist unless a contract status is shown. Such a contract does not arise out of an implied legal duty or obligation, but out of facts from which consent may be inferred; there must be a manifestation of assent arising wholly or in part from acts other than words, and a contract cannot be implied in fact where the facts are inconsistent with its existence.

J. Koury Steel Erectors, Inc. of Mass. v. San-Vel Concrete Corp., 387 A.2d 694, 697 (R.I. 1978)(quoting Bailey v. West, 249 A.2d 414, 416 (R.I. 1969)(alteration in original)(internal quotation marks omitted).

Thus, the essential elements of an implied contract are mutual agreement and an intent to promise, but the agreement and the promise have not been made in words and are implied from the facts. See Bailey v. West, 249 A.2d at 416. Mutual agreement is sometimes referred to as "mutual assent," and an intent to promise is sometimes referred to as "an intent to contract." Kenney Mfg. Co. v. Starkweather & Shepley, Inc., 643 A.2d 203, 209 (R.I. 1994)(finding no facts from which the court could reasonably infer "mutual assent" on behalf of defendant or "an intent to contract" on behalf of [plaintiff]); see also Mills v. Rhode Island Hosp., 828 A.2d 526, 528 (R.I. 2003)("In order to establish an express or implied contract a litigant must prove mutual assent or a 'meeting of the minds between the parties.'") (quoting J. Koury Steel Erectors, Inc. of Mass., 387 A.2d at 697); Bailey v. West, 249 A.2d at 417 (holding "that there never existed between the parties an element essential to the formulation of any true contract, namely, an 'intent to contract'").

"The difference between an express contract and an implied-in-fact contract is simply the manner by which the parties express their mutual assent." Marshall Contractors, Inc. v. Brown Univ., 692 A.2d 665, 669 (R.I. 1997); see also A.T. Cross

Co. v. Royal Selangor(s) PTE, Ltd., 217 F.Supp.2d 229, 236 (D.R.I. 2002)("Under Rhode Island law, an implied-in-fact contract differs from a 'single clearly expressed written document' in the way that the parties express their mutual assent.")(quoting Marshall Contractors, Inc., 692 A.2d at 669); A & B Construction, Inc. v. Atlas Roofing & Skylight Co., 867 F.Supp. 100, 108 (D.R.I. 1994)("the sole difference is the manifestation of assent by the parties"); J. Koury Steel Erectors, Inc. of Mass. v. San-Vel Concrete Corp., 387 A.2d at 697 (noting that distinction between express and implied contract "is not based upon legal effect but upon the way in which mutual assent is manifested").

Like express contracts, contracts implied in fact require the element of consideration to support them. See Hayes v. Plantations Steel Co., 438 A.2d 1091, 1094 (R.I. 1982).

> [C]onsideration consists either in some right, interest, or benefit accruing to one party or some forbearance, detriment, or responsibility given, suffered, or undertaken by the other. Valid consideration furthermore must be bargained for. It must induce the return act or promise. To be valid, therefore, the purported consideration must not have been delivered before a promise is executed, that is, given without reference to the promise. Consideration is therefore a test of the enforceability of executory promises, and has no legal effect when rendered in the past and apart from an alleged exchange in the present.

Id. (internal citations omitted).

2. Hearing Officer's Decision

In her Decision, Hearing Officer Michaelson stated Barrington's position "that the issue in this case is whether there was an implied in fact contract between the Parties for the 2001-2002 school year, in spite of the fact [that] there was not a writing that existed between them." Decision at 4. She took cognizance of Barrington's argument that the conduct of the

parties relative to the 2001-2002 school year acknowledged a continuation of the agreement that the Parents would pay the residential cost of Joan's placement at Pine Ridge and the Town would pay the tuition cost. See Decision at 5. After reciting the agreements contained in Paragraph 2 of the Settlement Agreement (which would apply in the event of a dispute regarding the appropriate placement for Joan after June 2001), see id., the Hearing Officer made several findings of fact relevant to the issue of an implied in fact contract:

> Both the Parents and the Town acted in the same way in the Spring o[f] 2001 as they had in the past two years. The Town paid tuition, the Parents sent in room and Board deposit. The Town signed an Agreement with Pine Ridge to pay the tuition. The Parents in August sent the same letter they had the previous year, with the same wording, informing the Town that they were sending their daughter to Pine Ridge for the year 2001-2002.
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> ....
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> When the Parents accepted less than the full expense of Joan's tuition, room and board after informing the Town that they were enrolling Joan at Pine Ridge at public expenses [sic], when all they got was tuition for the years 1999-2000 and 2000-2001 and when they sent the identical letter on August 29, 2001 that they had sent in 2000, the Town had every right to anticipate the letter was asking the Town to do the same as they had done the previous two years.
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> ....
>
> Indeed, the conduct of the Parents throughout suggests they recognized the payment of residentia[]l services to be their responsibility. Even the Pin[]e Ridge School understood the limited responsibility of the Parents as evidenced by the Enrollment Contract and accompanying letter (SD 6[9]).
>
> ....

[9] SD 6 is School Dept. Ex. 6 which is attached to the Tr. of 4/25/02.

> Although Parents had numerous opportunities to seek residential costs during 2001, they never hinted that the Town was responsible for those costs until November 30, 2001 when they filed for a Due Process Hearing.

Decision at 5-7.

3. Application of Law to Facts

a. Plaintiffs' Arguments

1) Reservation of Rights Clause

Plaintiffs argue that there was no agreement between the parties. See Plaintiffs' Mem. at 12-20. Among the evidence which Plaintiffs cite in support of this contention is the reservation of rights provision in Paragraph 2 of the Settlement Agreement. See id. at 15-16. Paragraph 2 is set forth below:

> 2. Barrington shall be under no obligation to develop an IEP for Joan specifying her placement at Pine Ridge for the 2000-2001 school year. The parties agree, however, that **in the event of a dispute** regarding the appropriate placement for Joan after June, 2001, the Pine Ridge residential program shall constitute Joan's placement pending appeal (otherwise known as her "stay put" placement), within the meaning of 20 U.S.C. §1415(j) [and federal and state regulations]. The parties agree to share the cost of tuition, room, and board for any such placement pending appeal on the same basis as set forth in Paragraph 1 of this Agreement; **provided, however, that the Parents by so agreeing do not waive their rights to seek full reimbursement, through the hearing process, of any amounts that they may pay in connection with any such placement**.

Settlement Agreement ¶ 2 (bold added).

Plaintiffs also note that the Settlement Agreement provides that it "may not be amended or modified except by a writing signed by all parties," Plaintiffs' Mem. at 15 (quoting Settlement Agreement ¶ 8), and that the parties never executed such a modification, id. Thus, in Plaintiffs' view, because the Settlement Agreement explicitly reserved the Parents' right to seek reimbursement, "the hearing officer should not have implied

an agreement by the parents to waive that right, in the absence of equally clear evidence of their intent." Plaintiffs' Mem. at 15. Plaintiffs cite Kenney Manufacturing Co. v. Starkweather & Shepley, Inc., 643 A.2d 203, 208 (R.I. 1994), for the proposition that silence does not constitute acceptance of a term[10] and Marshall Contractors, Inc. v. Brown University, 692 A.2d 665, 669 n.3 (R.I. 1997), which holds that where terms of an express contract are clear, a court should not imply a different contract involving the same subject.[11] See Plaintiffs' Mem. at 15-16.

It is clear that the reservation of rights applies only in the event of a dispute about Joan's placement after June of 2001.[12] Plaintiffs' argument assumes that there was a dispute between the parties about Joan's placement for the 2001-2002 school year prior to November 30, 2001, and that this dispute triggered the Parents' reservation of rights.[13] However, there

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[10] Plaintiffs presumably base this proposition on the statement in Kenney that: "As a general rule, silence does not constitute acceptance of an offer." Kenney Mfg. Co. v. Starkweather & Shepley, Inc., 643 A.2d 203, 208 (R.I. 1994).

[11] "[W]here there is an express contract between the parties referring to a subject matter, there can be no implied contract arising by implication of law governing the same subject matter." Marshall Contractors, Inc. v. Brown Univ., 692 A.2d 665, 669 n.3 (R.I. 1997).

[12] The court bases this conclusion on the following facts. First, the entire discussion about post-June 2001 matters begins with the second sentence of Paragraph 2. Logically, everything which follows that sentence is subject to the statement or condition expressed therein. Second, grammatically, the reservation of rights clause qualifies the first clause of the third sentence. A clause which is a component of one sentence does not modify or limit a prior, independent sentence. Lastly, the first clause, which the reservation clause qualifies, specifically refers to "placement pending appeal." An "appeal" would only come about if there were a dispute.

[13] To the extent that Plaintiffs may contend that the reservation of rights clause applies regardless of whether there was a dispute as to Joan's placement after June 2001, the court rejects that argument.

is virtually no evidence of a dispute between the parties regarding Joan's placement for 2001-2002.

From the middle of May of 2001 to November 30, 2001, both parties continued to act and conduct themselves exactly as they had during the previous two years relative to the cost of Joan's placement. See Tr. of 4/25/02 at 50 (Mrs. R. testifying that what the Parents did on August 29, 2001, "was the exact same thing" which she had done on September 1, 2000); id. at 61-62 (Mrs. R. agreeing that they "sent out the very same letter, verbatim" in 2001 as they had in 2000); id. at 107-08 (Mrs. R. acknowledging that, other than the August 29, 2001, letter, there was no communication from the Parents or their attorney to Barrington which indicated that the cost-sharing practice which had been followed for the two previous years would be changed); id. at 108 (Mrs. R. admitting that there was communication between the parties about matters other than the cost of Joan's placement); see also id. at 120 (Ms. DeFanti testifying that other than the August 29, 2001, letter she did not receive a request from the Parents or their attorney to pay the 2001-2002 residential bill at any time before November 30, 2001); id. (Ms. DeFanti testifying that she never received a request from the Parents or their attorney in the summer of 2001, September, October, or November to establish an IEP for their daughter); id. at 123 (Mr. Malafronte testifying that for 2001-2002 his state of mind was that Barrington would be responsible for the tuition cost and the Parents would be responsible for the residential cost).

This court finds that there was no dispute between the parties regarding Joan's placement after June of 2001 until the Parents' November 30, 2001, request for a due process hearing. The Settlement Agreement contemplated that after Joan's junior

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See n.12.

year (2000-2001) either party could object to the placement and that if such objection occurred, the stay-put provision (and also the reservation of rights clause) of Paragraph 2 would be triggered. The Parents recognized that both they and Barrington could object to the placement.[14] Neither side objected to Joan remaining at Pine Ridge, and they each continued to operate as if the previously agreed-to cost-sharing arrangement continued. Thus, the reservation of rights clause does not bar a finding that there was an implied contract between the parties.

2) August 29, 2001, Letter

The court rejects Plaintiffs' argument that August 29, 2001, letter to Mr. Malafronte demonstrates the existence of a dispute as of that date between the parties (or an intent not to contract). See Plaintiffs' Mem. at 16. If anything, the fact that the notice was virtually identical to notice given the previous year (at a time when the Parents and Barrington had reached, but not yet executed an agreement to resolve their dispute about Joan's placement at Pine Ridge for the years 1999-2000 and 2000-2001), would have strongly suggested to Barrington

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[14] At the March 15, 2002, hearing, the Parents made the following statements:

> Mr. R.: We had discussions when the contract [Settlement Agreement] was presented to us to be signed. We asked, "What happened beyond the two years covered by the contract?" And the explanation given to us was that would be the stay put year based on the contract. **Either side could object to the placement** but that was not covered by the contract.
>
> Mrs. R.: In the meantime, Joanie would stay there while the objections were taking place. That was our understanding.

Tr. of 3/15/02 at 42 (bold added). As explained above, the court finds that neither party objected to Joan's placement or to the cost-sharing arrangement regarding that placement until the Parents November 30, 2001, request for a due process hearing.

that the Parents were satisfied with the then-existing cost-sharing arrangement. This court also attaches significance to the fact that from August 29, 2001, to November 30, 2001, when communications were on-going between the parties (and Plaintiffs' attorney), neither the Parents nor their attorney ever mentioned that they were seeking to have Barrington pay for Joan's room and Board.[15]

3) Attempt to Schedule an IEP

Plaintiffs posit that Barrington's attempt to schedule an IEP meeting in September and October of 2001 is "inconsistent with the agreement that Barrington seeks to imply." Plaintiffs' Mem. at 18. According to Plaintiffs, "assuming *arguendo* that the parties had agreed to extend the terms of the Settlement Agreement into a third year (which the parents vigorously deny), there would be no need for Barrington to develop an IEP for 2001-2002." Plaintiffs misapprehend Barrington's position. Barrington does not contend the Settlement Agreement was extended. Rather, Barrington argues only that the parties agreed to continue with the same cost-sharing arrangement which they had followed for the previous two years. Thus, Barrington's effort to schedule an IEP meeting is not inconsistent with the existence of an implied contract.

4) November 30, 2001, Hearing Request

Plaintiffs also claim that their November 30, 2001, request for a due process hearing demonstrates that they did not believe as of that date that any agreement existed and that they did not

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[15] The court strongly disagrees with Mrs. R.'s contention that the August 29, 2001, letter "was [Barrington's] opportunity to dispute the placement and bring Joni back, if they had an IEP or not, and they didn't choose to do that. Obviously, they chose to pay." Tr. of 4/25/02 at 57. As the Hearing Officer found, see Decision at 6, 7, Barrington had no reason to believe that the Parents were seeking anything beyond payment of Joan's tuition at Pine Ridge for the 2001-2002 school year.

intend to bear the cost of Joan's room and board for 2001-2002. See Plaintiffs' Mem. at 17. However, by November 30, 2001, each party had substantially performed its share of the implied contract. Barrington had paid two thirds of Joan's tuition and the Parents had paid two thirds of Joan's room and board. More importantly, by that late date, Barrington, in practical terms, no longer had the option of challenging Joan's placement at Pine Ridge because the school year would be virtually over by the time a decision was rendered. Thus, the court rejects Plaintiffs' implicit argument that the Parents' November 30, 2001, request for a due process hearing prevents a finding that they had, by their actions, agreed to an implied contract.

5) Parents' Intent

Plaintiffs assert "that Joan's parents intended throughout to assert their rights to reimbursement of her 2001-2002 room and board from Barrington." Plaintiffs' Mem. at 16. It is true that Mrs. R. testified that the August 29, 2001, letter reflected the Parents' intent that Joan be educated at the Pine Ridge School "at public expense ...." Tr. of 4/25/02 at 48; see also id. at 128 (stating that it was their expectation in filing the letter that they would recover "all costs" for Pine Ridge). However, the Hearing Officer rejected, at least implicitly, this testimony. See Decision at 6 ("the Town had every right to anticipate the [August 29, 2001] letter was asking the Town to do the same as they had done the previous two years"); id. at 7 (stating that "the conduct of the Parents throughout suggests they recognized the payment of residentia[]l services to be their responsibility"); see also id. ("Parents had numerous opportunities to seek residential costs during 2001, [and] they never hinted that the Town was responsible for these costs until November 30, 2001 when they filed for a Due Process Hearing.").

This court has reviewed the record, and it finds, as apparently Hearing Officer Michaelson also found, that the

testimony of Mrs. R. is unpersuasive and unconvincing. In several instances, her testimony is implausible. The most glaring example of this is Mrs. R.'s contention that the purpose of the second paragraph of the Parents' November 13, 2001, letter[16] to Ms. DeFanti was to "remind" Barrington that it was Barrington's responsibility to write an IEP, see Tr. of 4/25/83 at 86; see also id. at 83, and her denial that the paragraph reflected a belief (albeit erroneous) by the Parents that under the Settlement Agreement Barrington would not participate in an IEP for 2001-2002, see id. at 84-86. Both the wording of the paragraph and its placement within the letter weigh heavily against Mrs. R.'s claim that the purpose was to remind Barrington of its responsibility to write an IEP. No fair reading of this letter would convey the message which Mrs. R. ascribes to the paragraph.

Moreover, in the letter the Parents express "surprise[]," id., School Dept. Ex. 5, at Barrington's "sudden interest in Joan ...," id. This expression of surprise is consistent with an erroneous[17] belief by the Parents that the terms of the Settlement Agreement had been extended to cover the 2001-2002 school. Earlier in the hearing, Mrs. R. admitted that "as of early November [the Parents] were working under the assumption that Joan would not have an IEP because ... she was in a stay put year[.]"[18] Id. at 66. Thus, Mrs. R.'s claim that the second

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[16] The text of the November 13, 2001, letter (School Dept. Ex. 5) is set forth at p. 9 supra.

[17] The court uses the word "erroneous" in the sense that the Parents appear to have believed that the entire Settlement Agreement (including the provision relieving Barrington of the responsibility of preparing an IEP) had been extended as opposed to just the cost-sharing arrangement.

[18] Q So as of early November you were working under the assumption that Joan would not have an IEP, because, as you put it in this [November 13, 2001] letter,

paragraph of their November 13, 2001, letter was to "remind" Barrington of its IEP obligation is implausible.

Both Mr. and Mrs. R. initially claimed that they had never seen Ms. DeFanti's letter to Ms. Easton of 10/1/01 (School Dept. Ex. 2), see Tr. of 4/25/02 at 76 (Mr. R.); see also id. at 76, 86 (Mrs. R.). After being questioned as to how their attorney came to have a copy of the letter if the Parents had not received a copy, see id. at 87-88, Mrs. R. theorized that Ms. Easton "must have faxed it," id. at 87, to their attorney, see id. Mrs. R. continued to maintain that she had not seen the letter and had never requested a copy of it. See id. 87-88. When asked why she would take issue with the letter "if you didn't know what it said," id. at 88, Mrs. R. responded: "Well, I knew what it said, she read it to me over the phone, but I had never seen the letter," id. When the Hearing Officer pointed out that the October 10, 2001, letter from their attorney (School Dept. Ex. 3) in fact stated that "The [Parents] and I requested and received a copy of the letter this week from Pine Ridge, after hearing about it from Ms. Easton," School Dept. Ex. 3; see also Tr. of 4/25/02 at 88, Mrs. R. continued to assert that "we didn't receive it," id. at 91, pointing out that the letter from her attorney indicated that the copy sent to Mr. and Mrs. R. was "without enclosure," id. at 90. However, later in the hearing, after Barrington's attorney noted that when the Parents claimed in their November 13, 2001, letter (School Dept. Ex. 5) to have been surprised by Barrington's allegedly "sudden interest in Joan," id., School Dept. Ex. 5, the Parents had been in possession of the letter from Ms. DeFanti for "at least five weeks," id. at 98,

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> it was your assumption, ma'am, that she was in a stay put year?
>
> A That's right.

Tr. of 4/25/04 at 66-67.

Mrs. R. equivocated. For the first time, she indicated that she could not say "yes" or "no" as to whether the letter was in their possession, see id. Barrington's attorney then asked Mrs. R. if she would agree that the October 1, 2001, letter from their attorney (School Dept. Ex. 3) specifically stated that "the [Parents] and I requested and received a copy of the letter this week from Pine Ridge after hearing about it from Ms. Easton," id. at 99. Mrs. R.'s responses are telling, and they are reproduced below:

> A Correct, and when she says us, a lot of times she's representing us, and us can be an umbrella term.
>
> Q She didn't say us. []She said ["]the [Parents] and I requested."
>
> A Right. And **we may have it at home**. It's just, I can't, I just can't remember."

4/25/02 Tr. at 99 (bold added).[19]

Additionally, Mrs. R.'s explanation as to why they did not request a due process hearing until November 30, 2001, is not persuasive. See id. at 102-06. Mrs. R. stated that Joan had been seriously injured in a horseback riding incident on April 7, 2001, and claimed that:

> [O]ur primary focus in September and October was getting Joni set up at school, getting the proper chairs for her to sit in, to setting up. I spent a lot of time in Vermont, setting up physical therapy appointments, getting a gym for her to work out at. That was our primary focus. Unfortunately, at that point that was it. So, by the time I came home and we could focus on

[19] Following this exchange, Barrington's attorney questioned Mrs. R. about why she and her husband objected to Ms. DeFanti contacting Ms. Easton. See Tr. of 4/25/02 at 99-101. Mrs. R.'s responses are not persuasive, and they suggest an inconsistent and contradictory position by the Parents relative to the IEP, which detracts from the overall credibility of Mrs. R.'s testimony. See id.

> education issues, it was around that time in November and we filed for the hearing.

Id. at 103-04. However, as the questions posed by Barrington's attorney demonstrated, Joan's injury (and its after-effects) did not prevent the Parents from sending checks to Pine Ridge in May and August of 2001 for Joan's room and board, see id. at 104; it did not prevent Mrs. R. from delivering the August 29, 2001, letter to Mr. Malafronte, see id.;[20] it did not prevent them from responding to Ms. DeFanti's letter of October 1, 2001 (School Dept. Ex. 2), see id. at 104-05; and it did not prevent them from responding to Ms. DeFanti's letter of November 7, 2001 (School Dept. Ex. 4), see id. at 105. After securing these admissions, Barrington's attorney posed the question again:

> Q So, my question again is, why is it in September and August and November you didn't request the due process hearing?
>
> A Because the year hadn't come up yet.
>
> Q What year?
>
> A This year. She has to start school in order for there to be --
>
> Q Well, had she started school on September 10th?
>
> A About the 8th.
>
> Q Had she started school on September 10th?
>
> A I believe so. I think they start on like a Wednesday.
>
> Q Had she started school on October 1st?
> A Yes.

---

[20] In the transcript, Barrington's attorney refers to Mrs. R. "sending out the ten-day letter on or about September 1st," Tr. of 4/25/02 at 104," but it is clear from the context that he is referring to Mrs. R.'s delivery of the August 29, 2001, letter to Mr. Malafronte.

Q Had she started school on November 1st?

A Yes.

Q So, again, I ask you, why is it that in September and October and through all of November you didn't request the hearing then?

A For the reasons I've explained, and plus I didn't want any more stress. I needed to get her straightened out before I had the stress of a hearing. I mean --

HEARING OFFICER MICHAELSON: Let's take that as an answer.

A Yes. I don't know what else I can say.

Tr. of 4/25/04 at 105-06.

A further example of the unpersuasiveness of Mrs. R.'s testimony was her insistence that the reason she and her husband did not want Barrington to contact Pine Ridge was because Joan was eighteen, see id. at 143, and that Ms. DeFanti should have known that this was the basis for their objection even though it was not stated explicitly their letter to her of November 13, 2001 (School Dept. Ex. 5):

Q Let's be specific then, not theoretical. Between October 1st and November 13th, when you wrote to Ms. DeFanti, did you verbally or in writing ever contact, or did someone on your behalf, Barrington and say to them you have our consent to communicate with Pine Ridge about the education of our daughter Joan?

A No, we did not.

Q And that's because you didn't want them to, isn't it?

A Oh, because Joan is 18.

Q So you're telling us that you weren't deferring to your daughter's decision in that regard?

A She should have been part of that decision.

Q So now what you're telling us is, the reason that you didn't allow Barrington to communicate –-

A I don't think we did.

Q -- with Pine Ridge is because, in addition to you, when she became 18, Joan needed to be in the equation?

A Absolutely, absolutely.

Q So why is it on November 13th, when you wrote the letter to Ms. DeFanti, you didn't tell her that?

A Because she should have known that.

Q Oh, she should have known that she was 18?

A That's right. Her birth date is on everything.

Tr. of 4/25/02 at 142-43.[21]

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[21] Also detracting from Mrs. R.'s credibility is her obvious antipathy towards Barrington's counsel. She demonstrated this hostility almost immediately after being sworn at the April 5, 2002, hearing:

Q Mrs. [R.], your daughter Joan was born September 21, 1983, is that correct?

A That's correct.

Q So this past September she became what, nineteen years old?

A No.

Q No. How old is she?

A Figure it out, -- eighteen.

[Hearing Officer]: No. Wait a minute.

A But, he asked me a question. I answered no. No, she's not.

MR. CAPALDI: When he asked you how old she was,

In sum, this court finds that the Hearing Officer's implicit determination to reject Mrs. R.'s testimony, at least to the extent that her testimony is inconsistent with a finding that the Parents agreed to an extension of the financial arrangement which had existed with Barrington for the previous two years and that they intended to contract with Barrington in that regard, is

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and you said, you figure it out.
Do you know her age?

A She's eighteen.

.....

Q What is completely true?

A That's already been gone over. I don't feel that I want to answer that at this point.

Q What is completely true?

A It's in litigation right now in Federal Court. So I don't feel that I should have to answer that question.

MR. CAPALDI: Ma'am, I make those decisions, whether you have to answer or not. You can't make that decision for yourself.

A Well, considering it is in litigation, I don't feel that I should have to answer.

MR. CAPALDI: Ma'am, litigation has nothing to do with this hearing --

A --well, it does.

MR. CAPALDI: Ma'am, litigation has nothing to do with this hearing.
You're under oath. Do you refuse to answer the question?

A I refuse to answer, because of the fact that we are in litigation, because of the placement issue that happened three to four years ago, yes.

Tr. of 4/5/02 at 2-4.

persuasive and warranted by the record. Even on the basis of a cold record, the court has little difficulty reaching this conclusion. Thus, the court finds that, notwithstanding Mrs. R.'s testimony to the contrary, the Parents intended to be bound to a continuation of the existing cost-sharing arrangement.

6) Consideration

Plaintiffs claim that "there is no evidence of consideration for any putative agreement." Plaintiffs' Mem. at 19. The court disagrees. When in May of 2001 the Settlement Agreement was nearing its expiration, Barrington could have sought to change Joan's placement for the 2001-2002 school year. It could have taken the position that Barrington was able to educate Joan in her home town and requested a due process hearing to have the matter determined. While such action would have doubtless triggered the stay-put provision of the Settlement Agreement, requiring Barrington to make the tuition payments to Pine Ridge, there was a reasonable prospect that the matter would be resolved before Barrington had to pay Joan's tuition for the entire year.

Thus, the consideration which the Parents received from Barrington was twofold. Barrington forbore seeking to change Joan's placement for the 2001-2002 school year, and it made tuition payments which the Town was not obligated to make unless there was a dispute as to her placement. The court has already determined that there was no dispute as to Joan's placement prior to November 30, 2001. See Discussion part IV.B.3.a.1) supra at 20; cf. Hayes v. Plantations Steel Co., 438 A.2d 1091, 1094 (R.I. 1982)("[C]onsideration consists either in some right, interest, or benefit accruing to one party or some **forbearance**, detriment, or **responsibility** given, suffered, or **undertaken** by the other.")(bold added).

The consideration which Barrington received was that Plaintiffs did not seek (between the middle of May 2001 and

November 29, 2001) to have Barrington pay for the entire cost of Joan's placement at Pine Ridge for her senior year. The Parents also could have sought to place Joan at an even more costly private school for her senior year and to have Barrington pay the entire cost of the new placement. While such a move would also surely have triggered an objection from Barrington and activated the stay put provision of the Settlement Agreement, the fact remains that the Parents were free under the terms of the Settlement Agreement to do so. Their forbearance from doing so also constitutes valid consideration for the implied contract between the parties.

The court rejects Plaintiffs' contention that "[b]oth parties, in making the payments that they made to Pine Ridge for 2001-2002, were just carrying out the 'stay-put' provisions of the previous Settlement Agreement, not entering into any new contract." Plaintiffs' Mem. at 19. As previously explained, neither party was obligated by the Settlement Agreement to make any payments to Pine Ridge unless there was a dispute as to Joan's placement, and the court has found that there was no dispute. See Discussion part IV.B.3.a.1) supra at 20.

The court also finds that the requirement that consideration "must be bargained for" is satisfied. Hayes v. Plantations Steel Co., 438 A.2d 1091, 1094 (R.I. 1982). Barrington would not have forborne seeking to change Joan's placement and it would not have made the tuition payments if it did not believe that it was receiving in exchange the Parents' agreement to continue with the existing cost-sharing arrangement. As previously explained, Barrington was under no obligation to make the tuition payment in July of 2001. Therefore, Barrington would not have paid two-thirds of Joan's tuition at that time except for the requirement of the implied contract. See Tr. of 4/25/02 at 123-24 (Mr. Malafronte testifying that Barrington was "required by Pine Ridge

to pay two-thirds of the tuition costs prior to the fall").

The Parents were aware that Barrington had paid two-thirds of the tuition, see Tr. of 4/25/02 at 57, 60, and they were obviously aware that Barrington was not seeking to change Joan's placement for the 2001-2002 school year, see id. at 57, 58. It is reasonable to conclude that the Parents acted as they did in order to induce Barrington: 1) not to seek to change Joan's placement and 2) to continue to pay Joan's tuition at Pine Ridge. The following facts support this conclusion. The Parents directed Pine Ridge to bill Barrington for the tuition, but did not direct Pine Ridge to bill Barrington for the room and board. See id. at 52, 55. The Parents accepted, at least until November 30, 2001, Barrington paying only the tuition portion of the placement. See id. at 55-56. The Parents did not explicitly notify Barrington until November 30, 2001, that they wanted the Town to pay the entire cost of Joan's placement, at which point it was too late, in practical terms, for Barrington to seek to have Joan educated in Barrington. Based on all of the foregoing facts, the court concludes that the consideration was "bargained for." Hayes v. Plantations Steel Co., 438 A.2d 1091, 1094 (R.I. 1982).

b. Finding Re Mutual Assent

The court finds that the parties mutually agreed to a continuation of the existing cost-sharing relationship regarding Joan's placement at Pine Ridge. The evidence of "mutual assent or a 'meeting of the minds,'" Mills v. Rhode Island Hosp., 828 A.2d 526, 528 (R.I. 2003), is found in the fact that neither party sought to change Joan's placement at Pine Ridge after June 2001 or the financial arrangements for that placement. It is also found in the fact that the parties continued to make their respective payments to Pine Ridge. These actions demonstrate that the parties desired that the existing cost-sharing

arrangement for placement continue on the same basis as it had during the previous two years. Thus, the parties' conduct and their communications (which demonstrate that no dispute existed regarding the continuation of the cost-sharing arrangement prior to November 30, 2001) "evidence[] mutual agreement with regard to the material terms," A.T. Cross Co. v. Royal Selangor(s) PTE, Ltd., 217 F.Supp.2d 229, 236 (D.R.I. 2002) (quoting Marshall Contractors, Inc. v. Brown Univ., 692 A.2d 665, 669 (R.I. 1997)), of a contract implied in fact.

c. Finding Re Intent to Contract

The court finds that there was an intent to contract by both parties. Barrington's intent is demonstrated by the following facts. It did not seek to change Joan's placement or the existing financial arrangement between the parties regarding that placement. It included in its 2001-2002 school year budget the tuition for Joan's placement at Pine Ridge. See Tr. of 4/25/02 at 124. Barrington made the payments in response to the statement which it received from Pine Ridge (School Dept. Ex. 6, Enc.). That statement was sent to Barrington at the direction of the Parents. See Tr. of 4/25/02 at 52 ("We had the school bill them."). Both Ms. DeFanti and Mr. Malafronte testified to their understanding that Barrington and the Parents would share the cost of Joan's placement for 2001-2002 on the same basis as the previous years. See id. at 111-12 (Ms. DeFanti's testimony); id. at 123 (Mr. Malafronte's testimony).

The Parents' intent to contract is demonstrated by the following facts. The Parents had Pine Ridge bill Barrington for Joan's tuition, but not for her room and board. See id. at 52. They knew it was their responsibility (and not the School's) to notify Barrington that the Town should pay Joan's room and board. See id. at 55-56. The Parents knew as of September 1, 2001, that Barrington had paid two-thirds of Joan's tuition at Pine Ridge,

see id. at 57, but they did not clearly communicate to Barrington until three months later their contention that Barrington was obligated to pay the entire cost of Joan's placement, see id. at 62, 106-08. In sum, "there are circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intent to contract." J. Koury Steel Erectors, Inc. of Mass. v. San-Vel Concrete Corp., 387 A.2d 694, 697 (R.I. 1978)(quoting Bailey v. West, 249 A.2d 414, 416 (R.I. 1969) (internal quotation marks omitted).

The court also finds that the parties had a "simultaneous mutual intention to be bound," A.T. Cross Co. v. Royal Selangor(s) PTE, Ltd., 217 F.2d Supp.2d 229, 236 (D.R.I. 2002) (quoting Marshall Contractors, Inc. v. Brown Univ., 692 A.2d 665, 669 (R.I. 1997)), during the period between mid-May 2001 and November 29, 2001. It is unnecessary to determine a precise starting date for this period. The court is satisfied that certainly as of July, when both parties made payments to Pine Ridge, that simultaneous mutual intent to contract existed.

C. Summary

For the reasons stated in Part IV. A., I find that the Hearing Officer's conclusion that the Parents failed to prove that Joan's placement at Pine Ridge was necessary during the 2001-2002 school year is not a valid reason for denying their request for reimbursement of the cost of Joan's room and board for that year. Therefore, the Decision may not be affirmed on that ground.

For the reasons stated in Part IV. B., I find that the Hearing Officer's conclusion that an contract implied in fact existed between the parties was correct. The parties agreed to continue Joan's placement at Pine Ridge on the basis of the same costing sharing arrangement as had been in effect during the previous two years. Accordingly, the Decision of the Hearing

Officer should be affirmed on that ground, and I so recommend.

V. Conclusion

For the reasons stated above, I recommend that Plaintiffs' Motion for Summary Judgment be denied and that the Decision of the Hearing Officer be affirmed. Any objections to this Report and Recommendation must be specific and must be filed with the Clerk of Court within ten (10) days of its receipt. See Fed. R. Civ. P. 72(b); D.R.I. Local R. 32. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and of the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

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David L. Martin
United States Magistrate Judge
October 20, 2004