STATE OF COLORADO **OFFICE OF ADMINISTRATIVE COURTS** 633 17th Street, Suite 1300 Denver, Colorado 80202	
JEFFERSON COUNTY SCHOOL DISTRICT R-1, Appellant, vs. **[STUDENT], by and through [Student's] parents, [Parents],** Appellees.	**COURT USE ONLY** **CASE NUMBER:** **EA 2009-0003**

DECISION UPON STATE LEVEL REVIEW (Corrected)[1]

This matter is before Administrative Law Judge (ALJ) Robert Spencer upon Appellant's appeal of the decision of an Impartial Hearing Officer (IHO). This state level review is governed by 20 U.S.C. § 1415(g) of the Individuals With Disabilities Education Act (IDEA), and its implementing regulations at 34 CFR § 300.510; and the state Exceptional Children's Educational Act (ECEA), §§ 22-20-101 to 118, C.R.S. and its implementing regulations at 1 CCR 301-8, § 2220-R-6.02(7)(j).

Following a due process hearing on August 20, 21, 24, 25 and 26, 2009, the IHO issued a decision on September 15, 2009 finding in Appellees' favor. The Appellant, Jefferson County School District R-1 (the District), filed its appeal October 15, 2009. Per regulation § 6.02(7)(j)(iii)(A), the ALJ stayed briefing upon the appeal pending a telephone status conference to determine whether there was a need for additional evidence, oral argument or hearing. The status conference was held November 4, 2009. The parties did not seek to submit additional evidence, but asked to file appellate briefs and make oral argument. The ALJ approved that request and adopted a briefing schedule proposed by the parties that closed December 14, 2009. By agreement of the parties, oral argument was initially set for December 22, 2009, but was continued until December 23, 2009 due to the ALJ's unavailability. Oral argument was held on that date and the matter is now ripe for decision.

Alyssa C. Burghardt, Esq. and W. Stuart Stuller, Esq. of Caplan and Earnest LLC, represented the District. Eloise Henderson Bouzari, Esq. and Katherine Gerland, Esq., represented [Student] ([Student]) and [Student's] parents, [Parent] and [Parent] (the Parents).

Case Summary

The Requirement of a FAPE

[1] The decision is corrected to read "[State 3 RTC]," rather than "[Facility 1]," in the last sentence of the second-to-last paragraph on page 21.

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)(A). Central to the IDEA is the requirement that local school districts develop, implement, and revise an Individual Education Plan (IEP) calculated to meet the eligible student's specific educational needs. 20 U.S.C. § 1414(d). A school district satisfies the requirement for a FAPE when, through the IEP, it provides a disabled student with a "basic floor of opportunity" that consists of access to specialized instruction and related services that are individually designed to provide educational benefit to the student. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 201 (1982). The school district is not required to maximize the potential of the handicapped child, but must provide "some educational benefit." *Id.* at 199-200. Although that benefit must be more than *de minimus, Urban v. Jefferson County Sch. Dist. R-1,* 89 F.3d 720, 726-27 (10th Cir. 1996), "some progress" toward the student's educational goals is all the IDEA requires. *Thompson R2-J Sch. Dist. v. Luke P.,* 540 F.3d 1143, 1154 (10th Cir. 2008), *cert. denied.* Finally, in providing FAPE, children should be educated in the "least restrictive environment," meaning that, "[t]o the maximum extent appropriate," disabled children should be educated in public classrooms, alongside children who are not disabled. 20 U.S.C. § 1412(a)(5)(A).

Factual History

[Student] is an [age]-year-old [gender] suffering significant emotional and behavioral disorders. [Student] was neglected by [Student's] birth parents who had a history of substance abuse. [Student] was placed with the Parents for foster care and adopted by them at age three. [Student] had severe temper tantrums at age four and began receiving mental health care. [Student]'s severe emotional problems have affected [Student's] ability to learn. Over a seven-year period [Student's] IQ dropped 32 points, likely due to [Student's] psychiatric difficulties. In 1999, while in third grade in [Other State], [Student] was placed on [Student's] first IEP. Despite psychiatric hospitalizations and evaluation by many mental health providers over the ensuing years, [Student's] diagnoses were never well defined.

[Student] and [Student's] Parents moved to Colorado in 2000 and took up residence in the District. Though [Student's] diagnoses were still not well understood, the District and the Parents cooperated in developing an IEP.[2] Pursuant to this and subsequent IEPs, [Student] attended a series of schools with variable success until the fall of 2006 when the Parents became dissatisfied with [Student]'s placement. As a result of a mediated settlement agreement between the Parents and the District, [Student] attended the ninth grade (2006-2007 school year) at [Private School] ([Private School]) in [City], Colorado. [Private School] is a private school for children with significant learning disabilities due to emotional and behavioral issues. Pursuant to the settlement agreement, the Parents and the District split the tuition expense.

[Student]'s performance was variable at [Private School] during the ninth grade.

[2] [Student]'s most recent IEP, dated November 28, 2005, described [Student] as suffering a Significant Identifiable Emotional Disability (SIED) as well as a Perceptual or Communicative Disability.

[Student] started the year well, but [Student's] behavior and performance declined as the year drew to a close. Nonetheless, [Student] met most of [Student's] academic, social and emotional goals, and the Parents and the District were sufficiently satisfied with [Student's] progress that they entered a new agreement continuing [Student's] placement at [Private School] for the tenth grade (2007-2008 school year), this time at the District's expense. [Student] again did well at the beginning of the year, but again [Student's] performance and behavior deteriorated toward the end of the year. Though [Student] made progress academically, [Student] was not sufficiently productive to advance to the eleventh grade. Due to the emotional problems that were interfering with [Student's] academic ability, there was some question whether [Private School] could continue to meet [Student]'s needs. However, both [Student] and the Parents liked [Private School] and wanted [Student] to continue there. On August 11, 2008, the District and the Parents agreed to renew [Student]'s placement at [Private School], under the condition that [Student] undergo a reevaluation by the District's Centralized Assessment Team (CAT) to determine whether [Student] should remain at [Private School] or whether alternative placement, including placement in a residential treatment center, should be considered.

Unlike [Student's] ninth and tenth grade years, [Student] did not have a good start when [Student] returned to school in August 2008. [Student] missed two of the first six days of school and part of a third. Although [Student] completed some assignments and earned some credit, overall [Student] was not very productive. [Student's] behavior at home further deteriorated, to include lack of hygiene and emotional rages. As a result of these issues, and the concern that [Student]'s emotional and behavioral problems had not been accurately diagnosed, the Parents searched for a mental health facility that could adequately evaluate [Student] and arrive at an accurate diagnosis. At a CAT meeting on Friday, August 15, 2008, the Parents advised the District's representatives that they were considering sending [Student] out-of-state for diagnostic evaluation, either to the [Facility 2] in [State 2] or the [Facility 1] ([Facility 1]) in [State 1]. The CAT team voiced no objection to the Parents' plan. Although the Parents questioned whether the CAT assessment should be delayed pending the psychiatric evaluation, the District preferred to proceed with the evaluation if possible. At the District's request, the Parents signed the necessary assessment permission forms.

Over the following weekend, [Student]'s behavior at home further deteriorated, to include threats to kill [Student's] parents and a physical assault on [Student's] younger brother. As a result, on August 17th the Parents decided to go ahead with their plan to send [Student] to a diagnostic center. The facility they chose was the [Facility 1] in [State 1]. One of the advantages of [Facility 1] was that it specialized in the assessment of behaviorally troubled youth, and could evaluate its patients in a classroom setting. [Student] was admitted to [Facility 1] on Wednesday, August 20, 2008. Though the Parents had informed the District on August 15th that they were considering admitting [Student] to an out-of-state hospital for psychiatric assessment, they did not tell the District in advance of [Student's] departure that they had made the decision to do so, and did not notify the District until August 26, 2008 that [Student] was admitted to [Facility 1] on August 20th.

The Parents initially expected [Student] to remain at [Facility 1] for six to eight weeks, at which time a decision could be made about whether [Student] should return home or go elsewhere. The Parents hoped [Student] would be able to return to [Private School] with a more accurate diagnosis that would improve [Student's] chances for success. On September 24, 2008, however, the District unilaterally withdrew [Student] from enrollment at [Private School] without notice to the Parents.[3] When the Parents learned of the District's action, they objected that the District's unilateral withdrawal of [Student] from [Private School] was a breach of their settlement agreement. On October 7, 2008, the District's attorney responded that because the Parents unilaterally placed [Student] at [Facility 1], [Student] was no longer a District student and the settlement agreement was moot. The District believed it no longer was obligated to provide [Student] with FAPE, as required by the IDEA.

The District's decision was based upon the mistaken belief that [Facility 1] was a residential treatment center (RTC) unilaterally chosen by the Parents for [Student]'s education. [Facility 1], however, is a psychiatric hospital, not an educational institution; and the Parents admitted [Student] to [Facility 1] for diagnosis and treatment, not for education. Although the Parents did not coordinate [Student]'s admission to [Facility 1] with the District, they did periodically inform the District of [Student]'s progress at [Facility 1] and repeatedly informed the District that [Facility 1] was a psychiatric hospital (not an RTC) to which [Student] had been admitted for evaluation and treatment.

Due to the complexity of [Student]'s psychiatric condition at [Facility 1], [Student's] stay became prolonged. [Facility 1] found [Student] to be an extremely difficult diagnostic challenge. [Facility 1] never did arrive at a definitive diagnosis, although they concluded that [Student] was most likely suffering a panoply of psychiatric disorders, including [ ], [ ], [ ], [ ], [ ], and [ ] Disorders, together with a "rule out" diagnosis of [ ] and a history of [ ]. After thirteen weeks of evaluation and treatment, [Facility 1] found [Student's] condition sufficiently stabilized to permit discharge, but strongly recommended immediate transfer to an RTC where [Student] could continue [Student's] high school education in a residential treatment context. According to the [Facility 1] staff, [Student] was at a high risk of regression and psychotic break if [Student] returned home. [Student] therefore required the structure and 24-hour care that only a residential facility could provide. Because [Student]'s emotional and psychiatric problems impact [Student's] ability to function in an educational environment, it was not possible to address [Student's] educational needs without addressing [Student's] mental health needs. [Student's] ability to progress academically therefore required residential placement.

When the Parents learned of [Facility 1]'s recommendation for transfer to an RTC, they informed the District and asked it to convene an IEP team meeting to discuss a residential placement. Although District representatives agreed to meet with the Parents, the District continued to assert that because the Parents unilaterally placed

[3] The District contends it did this to avoid paying tuition to [Private School] for an absent student; however, pursuant to its agreement with [Private School], the District would have been reimbursed for tuition paid for any period of 20 consecutive days or more that [Student] was not in attendance. Tr. p. 769.

[Student] out-of-state at [Facility 1], it had no responsibility to serve [Student] under the IDEA unless and until [Student] returned to live within the District's boundaries.

On November 10, 2008, the Parents sent the District written, ten-day advance notice that they considered the District's refusal to discuss residential placement to be a violation of the IDEA, and therefore intended to unilaterally place [Student] at [State 3 RTC], an RTC located in [State 3]. The notice also demanded that the District reimburse them for the cost of the [State 3 RTC] program. On November 20, 2008, the District again responded that because the Parents had "unilaterally placed [[Student]] in a program in [State 1]," it had no obligations to [Student's] under the IDEA.

The Parents learned of [State 3 RTC] through the recommendation of an educational consultant retained at their expense to locate a suitable RTC for [Student]. In addition to residential treatment, [State 3 RTC] offers a course of high school instruction accredited by the state of [State 3], the National Association of Therapeutic Special Purpose Schools, and the National Association of Accredited Schools. All its teaching staff members are licensed by the state of [State 3]. It provides a home-based environment where its residents can live and attend school and at the same time receive mental health care from professional staff under the supervision of a child and adolescent psychiatrist. [Student] was discharged from [Facility 1] on November 22, 2008 and admitted to [State 3 RTC] on November 24, 2008. [Student] did not return home and remains at [State 3 RTC] as of this writing. The [State 3 RTC] staff expect that, given [Student's] current rate of academic progress, [Student] will not meet high school graduation requirements until sometime in 2011.

The Parents contend that by refusing to discuss [Student]'s placement at an RTC unless [Student] first returned to Jefferson County, the District failed to provide a FAPE as required by the IDEA, and incurred liability for [Student's] unilateral placement at [State 3 RTC]. The District, on the other hand, contends that by removing [Student] from [Private School] and admitting [Student] to [Facility 1] without advance notice to the District, the Parents violated their obligation under the IDEA to provide notice prior to removal of their child from the District, and deprived the District of its prerogative to conduct the evaluation needed to determine proper placement. The District therefore asserts it has no obligation to [Student] under the IDEA. Furthermore, the District argues that [State 3 RTC] is not an appropriate placement for [Student], and even if the District is obligated to pay any portion of [Student]'s expenses at [State 3 RTC], that obligation extends only to the cost of [Student's] education and not to the cost of [Student's] psychiatric care.

Following a five-day due process hearing, the IHO found in the Parents' favor and ordered the District to pay all [Student]'s expenses at [State 3 RTC], except for the cost of services provided by a licensed physician. The District appealed.

For reasons explained below, the ALJ concludes that the District did fail to meet its obligation to provide [Student] with FAPE, that [State 3 RTC] is an appropriate education and related services at [State 3 RTC].

IHO's Findings of Fact

The IHO's decision contains a very detailed and thorough account of the facts. With the following limited exceptions, the ALJ agrees with and adopts those findings:

Lack of Educational Benefit at [Private School]

The IHO finds that "[Student] was not benefiting from [Student's] educational program at [Private School] in August 2008."[4] While the ALJ agrees that [Student] was not doing well academically in the first six days of the school year, the ALJ modifies the finding to the extent that it implies that [Private School] was an improper placement and [Student] could no longer receive educational benefit there. The first six days of the school year is too brief a period to make that conclusion. Prior to August 2008, [Student] made satisfactory progress at [Private School] and received educational benefit. [Student] and [Student's] Parents liked [Private School] and wanted [Student] to stay there.[5] The [Private School] staff, though concerned by [Student]'s lack of progress, had not concluded that [Private School] could no longer serve [Student], and continued [Student's] enrollment with the expectation that [Student] would return to [Private School] when released from [Facility 1].[6] Furthermore, the deterioration in [Student]'s performance was related in significant part to the effects of intensive psychotherapy [Student] began in the spring of 2008, and it remained to be seen what long term impact the therapy would have. Therefore, though [Student]'s performance in the first six days of August raised doubt about [Student's] ability to continue receiving educational benefit at [Private School], the record is insufficient to find as fact that [Student] could not.

The IHO's finding that "Had [[Student]] not been admitted to a psychiatric hospital at this time [August 2008] [Student] would have continued to fail, both academically and therapeutically" also merits comment. This finding was based upon the testimony of [Psychologist], a psychologist who evaluated [Student] after [Student's] admission to [Facility 1]. [Psychologist] believed that, while at [Facility 1], [Student] was one of the most neurologically compromised patients he had seen and that [Student] would have suffered a complete psychotic break and failed academically and clinically had [Student] remained in an "unstable" environment at home.[7] [Psychologist]'s opinion, however, was based upon [Student]'s presentation at [Facility 1], and the record is not clear as to what effect the circumstances of [Student's] transfer to [Facility 1] had upon [Student's] condition. Specifically, the evidence shows that at 3:00 a.m. on the morning of August 20, 2008, an "intervention team" from [Facility 1] arrived at the Parents' home to pick up [Student] and transport [Student's] to [Facility 1]. After the intervention team spoke briefly with the Parents, the Parents went to their bedroom and the intervention team went to [Student]'s room, removed [Student's] from the house and transported [Student's] to [Facility 1].[8] There is no evidence [Student] had any prior warning this was to happen. Though this intervention ultimately may have been in [Student]'s best

[4] IHO decision, p. 4.
[5] During oral argument, the Parents agreed that they had no complaint about the District's placement of [Student] at [Private School].
[6] Tr. pp. 219, 247, 251.
[7] Tr. pp. 127-28.
[8] Tr. pp. 747-48.

interests, the experience of being removed from home by strangers in the middle of the night and transported to a distant and unfamiliar location would be emotionally traumatic to any person, much less a psychologically fragile youth.[9]

The possible psychological trauma associated with this event was not explored at the hearing, and so the impact it had upon [Student's] presentation during [Student's] stay at [Facility 1] is not known. Therefore, it is not possible to conclude with any degree of certainty, based upon [Student]'s presentation at [Facility 1], that [Student] would have suffered a psychotic break and would have failed academically had [Student] remained at home and continued attending school at [Private School], rather than being admitted to [Facility 1].

In light of the foregoing, the ALJ makes the following modified finding: As a result of [Student's] academic performance during the first six days of school in August 2008, [Student]'s ability to receive further educational benefit at [Private School] was in doubt. Given [Student]'s deteriorating behavior at home, the Parents decided to admit [Student] to [Facility 1] for psychiatric evaluation to achieve a better understanding of [Student's] psychiatric condition, and with the hope that [Student] would return to [Private School] after [Student's] discharge. However, given [Student's] precarious psychiatric condition while at [Facility 1], [Student] was unable to return to [Private School] and required admission to an RTC.

Parents' Actions

The IHO finds that "the Parents have acted reasonably in all of their actions" as they pertained to cooperation with the District, and finds it "hard to imagine any parents doing more."[10] The ALJ does not entirely agree with this finding.

The ALJ does agree that the Parents acted with appropriate concern for [Student]'s welfare, and that after [Student]'s admission to [Facility 1], they kept the District informed of [Facility 1]'s recommendations and appropriately invited the District to become involved in [Student's] educational placement. However, the Parents were not entirely cooperative with the District in that they unilaterally decided to send [Student] to [Facility 1], non-emergently, without consideration of the District's plan to conduct a CAT evaluation of [Student]. This finding is based upon the following evidence:

Although the parties disagreed as to whether the District was able to provide FAPE with District resources, the parties worked together and entered settlement agreements to place [Student] at [Private School] during the 2006-2007 and 2007-2008 school years. They cooperatively entered into another agreement for the 2008-2009 school year that allowed [Student] to continue at [Private School] pending reevaluation by the District to ensure that [Private School] remained the best placement for [Student], and to explore alternative placement if necessary. The key paragraphs of the settlement agreement, signed August 11, 2009, read as follows:

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[9] Even a 72 hour mental health hold could cause emotional harm to [Student]. *See* IHO Decision, n. 8. *A fortiori*, involuntary removal to a facility in another state could cause emotional trauma.

[10] IHO decision, pp. 28-9.

> 2. The Parties agree that an IEP team meeting will be convened on or before August 29, 2008, to discuss [Student]'s triennial reevaluation and to determine, in compliance with 34 C.F.R. § 300.305, what data should be collected as part of the reevaluation. *The [Parents] agree that the District shall be allowed to commence the reevaluation following the meeting that will take place on or before August 29, 2008.* In conducting the reevaluation, the District agrees to be respectful of [Student]'s mental health needs. After the reevaluation has been completed, the Parties will convene an IEP meeting to review the results of the reevaluation, consider any reports received from [Student]'s private providers, and discuss programming and placement options for the remainder of the 2008-2009 school year.
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> 3. The Parties agree that [Student] may remain at [Private School] for the remainder of the 2008-2009 school year, if the IEP team determines that [Private School] is an appropriate placement for [Student]. *If it is determined that [Student] should be moved to a different placement, then a plan will be developed so that [Student] can transition to that placement.* If a transition plan is needed, the IEP team will develop the transition plan with input from [Private School] staff, [Student]'s private treatment providers, and the staff of the new placement.
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> . . . .
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> 5. If for any reason [Student] does not complete the 2008-2009 school year at [Private School], any tuition refunded by [Private School] will be provided to the District. The Parties are aware that [Student]'s current mental health may decline to the point that [Student] may require residential treatment. If so, the District agrees to convene an IEP meeting to discuss residential placement options for [Student].

Exhibit A, p. 2 (emphasis added). Thus, the Parents were on notice of the District's desire to evaluate [Student] to ensure [Student's] proper placement, and had agreed to work cooperatively with the District to complete that evaluation in a timely fashion.

The Parents, however, were not entirely cooperative in carrying out the spirit of that agreement. Although the Parents informed the District on August 15, 2008 that they were considering sending [Student] to an out-of-state facility for psychiatric evaluation, they did not advise the District that they had actually decided to do so or that [Student's] admission to [Facility 1] was imminent. They did not notify the District that they signed an admission agreement on August 17, 2008, or that they planned to admit [Student] to [Facility 1] on August 20th, following which [Student] would be gone for at least six to eight weeks. The Parents did not advise the District of [Student]'s admission until August 26, 2008, six days after the fact.

[Student]'s deteriorating behavior at home in August 2008 required urgent attention, but it was not a medical emergency. Furthermore, according to [Assistant

Principal], [Private School] Assistant Principal, there was nothing about [Student]'s observable behavior at [Private School] in August 2008 that indicated a need for psychiatric admission.[11] The Parents therefore had time to inform the District of their decision to admit [Student] to [Facility 1] for evaluation, and possibly even coordinate that admission with the District's plans for evaluation. Under the explicit terms of the settlement agreement, the parents knew of the District's plans to reevaluate [Student] at the end of August and that the District considered the evaluation an essential step in determining [Student]'s proper educational placement. The Parents knew that [Student]'s admission to [Facility 1] for six to eight weeks would interfere with that plan. They were also aware of the District's desire to begin the evaluation process before [Student] departed the state.[12] Though advance notice of [Student]'s imminent admission to [Facility 1] may not have provided the District with sufficient opportunity to complete the CAT evaluation before [Student's] departure, it would at least have provided the parties with the opportunity to discuss their options and perhaps begin the CAT evaluation. Although, for reasons discussed below, the Parents had no legal obligation under the IDEA to provide the District with advance notice of their decision to hospitalize [Student] at [Facility 1], their failure to do so was not consistent with the level of cooperation contemplated by the settlement agreement.[13]

The Parent's conduct, however, is not determinative of the outcome in this case. Despite [Student]'s admission to [Facility 1], the District still retained the right to demand a CAT evaluation before agreeing to a residential placement. The Parents' conduct in sending [Student] to [Facility 1] for psychiatric evaluation did not extinguish that right, and nothing in the law required the District to forego that evaluation. However, rather than demand its right to that evaluation, the District simply terminated [Student]'s enrollment from the District and took the position that it owed no obligation to [Student] under the IDEA until [Student] returned to the District. As the IHO correctly found, this refusal was a breach of the District's responsibility and amounted to a denial of FAPE.

Parents' Concerns About JCMH

The IHO found that the Parents' concerns about working through Jefferson County Mental Health (JCMH) for residential placement were "reasonable and well-founded."[14] This finding requires further elaboration.

JCMH is the community "partner" that assists the District in locating and providing suitable residential placement when placement at an RTC is deemed appropriate. The preponderance of the evidence showed that JCMH was prepared to promptly evaluate [Student] and was competent to assist the District and the Parents in determining whether residential placement was appropriate. A number of residential facilities exist in the Denver area that might have been suitable for [Student]. The Parents, however, chose not to work with JCMH, and so it cannot be determined

[11] Tr. p. 251.
[12] Tr. pp. 1019-20.
[13] Despite this failure of cooperation, the ALJ agrees with the IHO that there is little persuasive evidence that the Parents were "gaming the system to extract free tuition" at Innercept. *See* IHO decision, p. 29.
[14] IHO decision, p. 9.

whether JCMH would have been able to offer a suitable RTC placement.

The Parent's rejection of JCMH was, in large measure, based upon two factors. First, their educational consultant opined that the public residential treatment facilities in Colorado were too large and had too many "court-ordered" placements, and therefore were not a good fit for [Student].[15] The consultant's expertise, however, was with private-pay residential facilities, and he had little personal, in-depth knowledge of JCMH or the available public facilities in Colorado. The evidence supporting the consultant's bias against these facilities was therefore extremely tenuous.

The Parents were also concerned that JCMH would give them too little input into selection of [Student]'s placement, and that any available placement would be too short-term. However, the JCMH Residential Treatment Coordinator, [Treatment Coordinator], testified that parents are actively involved in the placement process, and that although short-term placement is preferred in order to reintegrate children back into their home environment as quickly as possible, the placement can be extended if clinically necessary.[16]

Because the Parents opted against an evaluation by JCMH, it is not possible to know what JCMH's recommendation would have been. It is therefore not possible to know whether a placement coordinated by JCMH would have satisfied the District's obligation to provide FAPE. The District, however, forfeited this possibility when it abandoned its demand for evaluation and took the hard-line position that it no longer owed [Student] any obligation due to [Student's] admission to [Facility 1].

Discussion and Conclusions of Law

Standard for Review

The IDEA establishes procedural safeguards that give parents of a disabled child the right to file a complaint and attend a due process hearing before an IHO to determine whether the school district is meeting its obligation to provide FAPE. 20 U.S.C. § 1415. Following the due process hearing, either party may petition for state level review before an administrative law judge. 20 U.S.C. § 1415(g); 1 CCR 301-8, 2220-R-6, § 6.02(7)(j). The ALJ is to issue an "independent" decision upon the specified issues. 20 U.S.C. § 1415(g). In the context of a district court review of a state level decision, such independence has been construed to require that "due weight" be given to the administrative findings below. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982). In reviewing the decision of the IHO, the ALJ is in a position analogous to a district court reviewing a state level decision. Therefore, it is appropriate for the ALJ to apply a "modified de novo standard" in reviewing a hearing officer's decision and decide, based on a preponderance of the evidence in the administrative record, whether the requirements of the IDEA are met. *L.B. ex rel K.B. v. Nebo Sch. Dist.,* 379 F.3d 966, 973-74 (10th Cir. 2004). In so doing, the ALJ must give due weight to the hearing officer's findings of fact, which are considered prima facie correct. *Id.* at 974.

[15] Tr. 564-68.
[16] Tr. 921-22, 924-25, 928-32.

Issues on Review

Review upon appeal is limited to the issues identified in the notices of appeal and cross appeal (if any).[17] Regulation § 6.02(7)(j)(ii)(C)(IV) and (D). The issues identified by the District in its appeal are summarized as follows:

> I. Were the Parents required to provide written notice in accordance with 20 U.S.C. § 1412(a)(10)(C)(iii)(I) prior to taking [Student] out of school to admit [Student's] to [Facility 1]?
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> II. Did the Parents make [Student] available for an evaluation by the District in accordance with 20 U.S.C. § 1412(a)(10)(C)(iii)(II)?
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> III. Was the District required to travel out-of-state to evaluate [Student]?
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> IV. Was [State 3 RTC] an "appropriate" placement for [Student]?
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> V. Did the Parents act "unreasonably," and if so, should the cost of reimbursement for [State 3 RTC] expenses be reduced or denied in accordance with 20 U.S.C. § 1412(a)(10)(C)(iii)(III)?
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> VI. If the Parents are entitled to reimbursement, are they entitled to multiple years reimbursement?

Burden of Proof

As an initial matter, the parties disagree about who bears the burden of proof (burden of persuasion) in this case. Although the IDEA does not explicitly assign the burden of proof, the seminal case of *Schaffer v. Weast*, 546 U.S. 49, 58 (2005) places the burden of persuasion "where it usually falls, upon the party seeking relief." *See also Thompson R2-J Sch. Dist., supra* at 148 ("The burden of proof . . . rests with the party claiming a deficiency in the school district's efforts.") The Parents, on the other hand, cite case law from other federal circuits holding that the party challenging an administrative decision bears the burden of proof.[18] The Parents argue that the District should bear the burden of proof because it is the party challenging the IHO's decision.

The ALJ concludes that the Parents bear the burden of proof. Although the District is challenging the IHO's decision, the burden placed upon the Parents by *Schaffer v. Weast* does not change upon review of that decision by the ALJ. Pursuant to the IDEA, the ALJ's administrative review is de novo and independent of the IHO's decision. Therefore, the burden should remain "where it usually falls, upon the party seeking relief." *Schaffer, supra; Richardson v. Indep. Sch. Dist. v. Michael Z.,* 580 F.3d 286, 292 n. 4 (5th Cir. 2009)("at the district court level, as at the administrative level, the party challenging the IEP bears the burden of showing that the IEP and the resulting

[17] There is no cross appeal in this case.

[18] The cases cited by the Parents are *Clyde K. v. Puyallup Sch. Dist. No. 3,* 35 F.3d 1396 (9th Cir. 1994); *Burlington v. Dep't of Educ. for Mass.,* 736 F.2d 773 (1st Cir. 1984), *aff'd* 471 U.S. 359 (1985); *Barnett v. Fairfax County Sch. Bd.,* 927 F.2d 146 (4th Cir. 1991); *Bd. of Educ. v. Illinois State Bd. of Educ.,* 41 F.3d 1162 (7th Cir. 1994); and *Kerkam v. McKenzie,* 862 F.2d 884 (D.C. Cir. 1988).

placement are inappropriate under the IDEA.") The cases cited by the Parents, which arguably hold to the contrary, all predate *Schaffer v. Weast* and are not Tenth Circuit cases. Therefore they are not persuasive.[19]

Having assigned the burden of proof to the Parents, the ALJ will proceed to address each of the issues on appeal.

Issue I: The Parents Were Not Obligated to Provide Written Notice Prior to Admitting [Student] to [Facility 1]

The District argues that by failing to provide written notice prior to placing [Student] at [Facility 1], the Parents relieved the District of its obligation to provide services under the IDEA. The IDEA indeed contemplates that parents provide ten-day advance written notice to a school district prior to removing their child from the district. 20 U.S.C. § 1412(a)(10)(C)(iii)(I). As the District points out, the purpose of this advance notice is to give a district the opportunity to learn of the parents' objections to the district's choice of placement and to correct any deficiencies. Courts have denied reimbursement for private placements where parents have not provided the required advance notice. *See for example, Berger v. Medina City Sch. Dist.,* 348 F.3d 513, 523-24 (6th Cir. 2003).

The ALJ, however, agrees with the IHO that the IDEA did not require the Parents to provide written notice prior to admitting [Student] to [Facility 1]. The relevant IDEA provision, 20 U.S.C. § 1412(a)(10)(C)(iii)(I), reads in pertinent part:

> The cost of reimbursement [at a private school without school district consent] may be reduced or denied - -
>
> (I) If - -
>
> (aa) at the most recent IEP meeting that the parents attended prior to *removal* of the child from the public school, the parents did not inform the IEP Team that they were *rejecting the placement proposed by the public agency* to provide a free appropriate public education to their child, including stating their concerns and their *intent to enroll their child in a private school at public expense*; or
>
> (bb) 10 business days . . . prior to *the removal of the child from the public school,* the parents did not give written notice to the public agency of the information described in item (aa).

Emphasis added.

As the emphasized language indicates, prior notice is required only "prior to the removal of the child from the public school." The Parents, in this case, did not "remove" [Student] from the District (or from [Private School]), within the meaning of this

[19] At oral argument the Parents pointed out that if they bear the burden of proof they should have been allowed to file the opening and reply briefs, rather than the District. The Parents, however, did not raise this issue at the time of the scheduling conference when the briefing schedule was determined. The Parents therefore waived this aspect of their argument.

provision. The context of the section clearly shows that a "removal" occurs when the child's parents "reject" the school district's placement with intent to place their child "in a private school at public expense." Here, when the Parents took [Student] out of school to admit [Student's] to [Facility 1], they were not rejecting the District's placement at [Private School]. To the contrary, they had lobbied for the [Private School] placement, were satisfied with it, and hoped that [Student] would return to [Private School]. Furthermore, the admission to [Facility 1] was not to a "private school at public expense." [Facility 1] was a psychiatric hospital, not an educational facility. The Parents' purpose in admitting [Student] to [Facility 1] was to clarify [Student's] diagnoses, not to obtain an education. Moreover, the Parents never sought or intended to seek public reimbursement for [Student]'s stay at [Facility 1]. Finally, as the IHO correctly found, it was not the Parents who "removed" [Student] from the District, but rather the District that removed [Student] when it unilaterally terminated [Student's] enrollment at [Private School] on September 24, 2008. Until that time, [Student] was still enrolled at [Private School] though listed as being "absent."

When, following [Facility 1]'s recommendation, the Parents finally did decide to enroll [Student] at [State 3 RTC] and seek public reimbursement, they provided the required ten-day advance notice. The District does not argue that this notice was defective.

Under these circumstances, the Parents did not fail to provide the notice required by 20 U.S.C. § 1412(a)(10)(C)(iii)(I), and there are no grounds to reduce or deny reimbursement under this provision.

Issue II: The Parents Did Not Refuse to Make [Student] Available for Evaluation

Section 20 U.S.C. § 1412(a)(10)(C)(iii)(II) states that the cost of private placement reimbursement may be reduced or denied if:

> prior to the parents' removal of the child from the public school, the public agency informed the parents . . . of its intent to evaluate the child . . . but the parents did not make the child available for such evaluation.

Here, by virtue of the settlement agreement, the Parents were well aware of the District's intent to reevaluate [Student] beginning immediately after August 29, 2008, and that [Student]'s placement was contingent upon the outcome of that evaluation. The District contends that by admitting [Student] to [Facility 1], the Parents prevented that evaluation and therefore violated § 1412(a)(10)(C)(iii)(II). The ALJ cannot agree.

The law is relatively clear that a school district's right to conduct an evaluation prior to making a placement decision is nearly absolute. Most courts have held that in the absence of a violation of the IDEA, parental decisions that prevent a school district from evaluating a child relieves the district of its IDEA obligations to the child. *See Great Valley Sch. Dist. v. Douglas M.*, 807 A.2d 315, 321 (Pa. 2002)(citing cases). Where the child has been unilaterally placed out of state by the parents, the parents may be required to return the child to the district for evaluation or risk loss of

reimbursement. *Id.; Patricia P. v. Bd. of Ed. of Oak Park,* 203 F.3d 462, 469 (7th Cir. 2000)(parent who unilaterally placed child out-of-state and made no genuine offer to make the child available to the district for evaluation forfeited her claim to reimbursement). The school district's right to conduct an evaluation is paramount even where there is evidence that the evaluation process might be harmful to the child. *Andress v. Cleveland Indep. Sch. Dist.,* 64 F.3d 176, 178-79 (5th Cir. 1995)("we hold that there is no exception to the rule that a school district has a right to test a student itself in order to evaluate or reevaluate the student's eligibility under IDEA"); *but see* the dissent in *Douglas M., supra* at 324*,* arguing that requiring a child to undergo an evaluation that might be harmful to him is both "incomprehensible and inappropriate."[20]

In this case, although the Parents admitted [Student] to a hospital in [State 1], and by so doing initially interfered with the District's planned evaluation, the Parents never refused to return [Student] to Colorado for evaluation. While it is true that [Facility 1] strongly recommended that [Student] be directly placed at an RTC and the Parents had no intent to return [Student] to Colorado, there is no evidence the Parents ever refused to return [Student] to Colorado for evaluation or that the District ever asked them to do so. Instead, the District unilaterally refused the Parents' request to convene an IEP meeting to discuss [Student]'s post-[Facility 1] placement. The District's refusal not only contravened the parties' settlement agreement, but also violated the District's obligations under the IDEA.[21] The fact that a child is currently attending an out-of-state facility does not relieve a school district of the obligation to conduct an evaluation and offer FAPE, provided the child continues to *reside* within the school district's boundaries.[22] *District of Columbia v. Abramson,* 493 F.Supp.2d 80, 85-86 (D.D.C. 2007). Therefore, it was not the Parents' admission of [Student] to [Facility 1] that prevented the District from complying with the IDEA, but rather the District's failure to pursue its right to an evaluation and refusal to convene an IEP team meeting to discuss how that evaluation might be accomplished.

The District's failure to pursue its right to an evaluation is compounded by its failure to provide the Parents with advance notice prior to terminating [Student]'s enrollment at [Private School]. Federal regulation 34 CFR 300.503(a)(1) states that a school district is obligated to provide a child's parents with written notice if the district "Proposes to . . . change the . . . educational placement of the child . . ." The notice must include "An explanation of why the agency proposes . . . to take the action." 34 CFR § 300.503(b)(2). In this case, the District provided the Parents with no notice prior to terminating [Student]'s placement at [Private School], and therefore deprived the Parents of an accurate understanding of the District's concerns. Had the District told

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[20] Given the District's promise in paragraph 2 of the settlement agreement to "be respectful of [Student]'s mental health needs" in conducting its evaluation, it is arguable that it waived its right to demand [Student]'s return to Colorado for evaluation if doing so would jeopardize [Student's] mental health. Nonetheless, the District had no right to abandon its obligations to [Student].

[21] The District's refusal violated the settlement agreement because the agreement recited that, "The Parties are aware that [Student]'s current mental health may decline to the point that [Student] may require residential treatment. If so, the District agrees to convene an IEP meeting to discuss residential placement options for [Student]." Exhibit A, p. 2, ¶ 5.

[22] At all times, [Student]'s legal residence was that of the Parents' residence in Jefferson County.

the Parents that its real reason for terminating [Student's] enrollment was its inability to perform the planned evaluation of [Student], as it now argues, the Parents would have had the opportunity to respond to that objection and perhaps negotiate a resolution with the District.[23] As it was, the only explanation the District gave at the time for [Student]'s disenrollment was [Student's] admission to [Facility 1].

Issue III: The District Was Not Required to Travel Out-of-State

Cases such as *Patricia P., supra*, and *Douglas M., supra,* hold that a school district cannot be required to travel out-of-state to conduct an evaluation. That, however, is not the issue here. The issue, as noted above, is the District's refusal to do anything because [Student] was then out-of-state at [Facility 1]. Despite [Student]'s hospitalization in [State 1], the District retained the obligation to conduct an evaluation and offer FAPE as long as [Student] remained a resident of Colorado. Had the District pursued its right to perform an evaluation in Colorado and complied with its obligation to convene an IEP meeting to discuss [Student]'s placement, and had the Parents refused to allow an evaluation in Colorado, this would be a different case. But that is not what happened. Therefore, though Issue III must be answered in favor of the District, the issue is not dispositive of the case.

Issue IV: [State 3 RTC] Was an Appropriate Placement

To be entitled to reimbursement for a private placement, the Parents must show that residential placement at [State 3 RTC] was "otherwise proper under IDEA." *Florence County Sch. Dist. Four v. Carter,* 510 U.S. 7, 9 (1993). To the extent the District argues that placement at [State 3 RTC] was not appropriate because [Student] does not receive occupational or speech-language therapy, is not under an IEP at [State 3 RTC], and is not in a least restrictive environment, the ALJ adopts the IHO's discussion rejecting those arguments. Parents are not barred from reimbursement because the private school in which they place their child does not meet the precise IDEA definition of FAPE – such IDEA requirements "cannot be read as applying to parental placements." *Michael Z.,* 580 F.3d at 295, *quoting Carter, supra* at 13. A parental private placement must be appropriate, but it does not have to be perfect. *Warren G. ex rel. Tom G. v. Cumberland County Sch. Dist.,* 190 F.3d 80, 84 (3rd Cir. 1999); *Mary T. v. Sch. Dist. of Philadelphia*, 575 F.3d 235, 242 (3rd Cir. 2009).

[State 3 RTC] is a highly regarded therapeutic program specializing in treatment of adolescents with behavioral disorders, is educationally accredited by the state of [State 3], and was recommended to the Parents by their educational consultant who specializes in private placement of emotionally disturbed children. After a slow start, [Student] is making progress in [Student's] treatment and education. Furthermore, residential treatment such as that supplied by [State 3 RTC] is necessary for [Student] to make educational progress. Every expert that testified at the hearing opined that the Parents' decision to place [Student] at [State 3 RTC] was reasonable and appropriate.

[23] The District's Special Education Director, [Special Education Director], admitted that, prior to the Parents' request for a due process hearing, the District never asserted its inability to complete a CAT evaluation as the reason for refusing to provide services. Tr. p. 1257.

Furthermore, because residential placement is currently necessary for [Student] to receive educational benefit, placement at [State 3 RTC] does not violate the "least restrictive environment" requirement. *See Kruelle v. New Castle County Sch. Dist.,* 642 F.2d 687, 695 (3rd Cir. 1981) ("once a court concludes that residential placement is the only realistic option for learning improvement, the question of 'least restrictive' environment is also resolved.") The ALJ therefore concludes that placement at [State 3 RTC] was "appropriate" in the sense that it was reasonably calculated to address [Student]'s problems.

Whether residential placement is "proper," however, involves more than just its reasonableness. To be eligible for reimbursement, a placement must also be proper in the sense that it provides the "special education and related services" required by 20 U.S.C. § 1401(9)(A). That section defines FAPE to include both "special education" and "related services." "Special education" is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings." 20 U.S.C. § 1401(29)(A). "Related services" means:

> transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be *required to assist* a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. § 1401(26)(A) (emphasis added).

The federal regulations clarify that "[I]f 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." 30 C.F.R. § 300.104.

Related services "broadly encompass" all those supportive services that may be "required to assist" a child with a disability to benefit from special education. *Cedar Rapids Comm. Sch. Dist. v. Garret F.,* 526 U.S. 66, 73 (1999)(the school district must provide one-on-one nursing care to ventilator dependent child during school hours because the child needs that care to attend school). Although financial burden is a legitimate concern for the district, the cost of the service may not be the sole determining factor. *Id.* at 77. In the context of residential care for children with emotional difficulties, the determination of whether residential care with all its counseling, psychotherapy, and other services, etc., are "related services" can be hard

to determine. A fine line exists between the need for such services when "required to assist" the disabled child to benefit from special education, and thus are reimbursable, versus the need for those services only for treatment of the child's underlying emotional problems, and thus are not reimbursable.

The federal circuits are somewhat divided as to how this line should be drawn. In *Kruelle v. New Castle County Sch. Dist.,* 642 F.2d 687, 693 (3rd Cir. 1981), the Third Circuit stated that the analysis must focus on "whether full-time placement may be considered necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are *segregable from the learning process*." If residential placement is "*necessary* in order to allow [the child] to learn," it is a reimbursable related service. *Id.* at 694 (emphasis added). *See also Mary T., supra* at 246 (finding that because the child's "medical and educational needs are severable," residential treatment for those medical needs is not reimbursable).

In *Clovis Unified Sch. Dist. v. Calif. Office of Admin. Hearings,* 903 F.2d 635, 643 (9th Cir. 1990), the Ninth Circuit adopted a different rule, holding that the focus of the inquiry must be whether residential placement is "considered necessary for educational purposes, or whether the placement is a response to medical, social, or emotional problems that is necessary *quite apart* from the learning process." Emphasis added. Applying this standard, the court found that the intensive psychotherapy the child received at a psychiatric hospital, which provided little or no educational services, was for treatment of her emotional problems and not primarily to aid the child to benefit from special education. *Id.* at 645-47. Because the services were not primarily for education, but were provided for emotional problems "quite apart" from the child's education, they were not reimbursable as related educational expenses. The Ninth Circuit reaffirmed this standard in the very recent case of *Ashland Sch. Dist. v. E.H.,* 587 F.3d 1175, 1185 (9th Cir. 2009), holding that because E.H. was "not transferred to a residential facility because of educational deficiencies but for medical reasons," the school district was not obligated to pay for his care.

The Seventh Circuit has followed a similar rule in *Butler v. Evans,* 225 F.3d 887, 893 (7th Cir. 2000)(where child was admitted to a psychiatric hospital "almost exclusively" for medical reasons, not educational purposes, and received "almost exclusively" medical services, not educational ones, hospitalization was not a reimbursable "related service"); and *Dale M. ex rel. Alice M. v. Bd. of Educ. of Bradley-Bourbonnais H.S.,* 237 F.3d 813, 817 (7th Cir. 2001)(child's placement at boarding school was primarily for "confinement" not for educational purposes, therefore it was not a "related service"). *But see* the dissent in *Dale M.,* 237 F.3d at 818 (disagreeing with the majority's "primarily educational" test in favor of the *Kruelle* "necessary predicate for learning" test).

In the recent case of *Richardson Ind. Sch. Dist. v. Michael Z., supra,* the Fifth Circuit Court of Appeals frankly rejected the Third Circuit's *Kruelle* "segregability" test as overbroad because it could lead to situations where a school district's liability would be expanded far beyond that contemplated by the IDEA. Instead, the *Michael Z.* court adopted a test similar to the Seventh Circuit's "primarily educational" test developed in *Butler* and *Dale*. Under the Fifth's Circuit's test,

> In order for a residential placement to be appropriate under IDEA, the placement must be 1) essential in order for the disabled child to receive a meaningful educational benefit, and 2) primarily oriented toward enabling the child to obtain an education.

Id. at 299.

Applying that test, the Fifth Circuit agreed with the district court that residential placement was essential for Michael Z. to receive educational benefit. However, because the district court had not addressed the second element, it remanded the case for consideration of that prong. In so doing, the court of appeals directed a "fact-intensive inquiry" to consider the extent to which the services provided in the residential placement were "primarily oriented toward enabling the child to obtain an education." *Id.* at 301.

In this case, the ALJ finds that residential services at [State 3 RTC] were "related services" regardless of which federal circuit test is used. Under the Third Circuit's *Kruelle* rationale, the services provided by [State 3 RTC] are reimbursable because [Student]'s emotional problems are not segregable from [Student's] learning problems, and residential treatment is necessary for [Student] to receive educational benefit. [Student] cannot succeed academically if [Student's] mental health needs are not met.

Placement at [State 3 RTC] also meets the Ninth Circuit's "quite apart" test and the Seventh Circuit's "primarily educational" test, as discussed in *Clovis, Ashland, Butler,* and *Dale M*. This can be seen by the distinction between [Student]'s admission to [Facility 1] and [Student's] subsequent placement at [State 3 RTC]. [Student] was admitted to [Facility 1] for evaluation and treatment of [Student's] psychiatric condition, which was manifesting itself in deteriorating behavior at home. Though [Facility 1] had classrooms to provide an observational platform as an aid to diagnosis, [Facility 1] was primarily a hospital and the focus of its effort was on diagnosis and treatment. Thus, the services it provided to [Student] were not primarily educational, and its efforts were quite apart from [Student's] education. The care at [Facility 1] was therefore not a "related service" for which the District had financial responsibility under the rationale of *Clovis, Ashland, Butler,* and *Dale M*. The Parents, however, have not claimed it was a related service, nor have they asked the District to pay for [Facility 1].

Unlike [Student]'s admission to [Facility 1], a primary purpose of [Student's] admission to [State 3 RTC] was to receive education in a therapeutic environment. Unlike [Facility 1], [State 3 RTC] has a significant educational function, with integrated clinical and academic care. Its on-campus school is academically accredited and its classroom teachers are licensed by [State 3]. [State 3 RTC] has other client/students whose tuition is paid by school districts. Much of [Student]'s day is spent pursuing education, either inside or outside the classroom. Furthermore, the goal of [Student]'s stay at [State 3 RTC] is [Student's] successful graduation from high school and assimilation into the community, not just improvement of [Student's] psychiatric condition. Therefore, because the focus of [Student]'s stay at [State 3 RTC] is primarily educational, and the treatment of [Student's] psychiatric condition is not "quite apart" from [Student's] education, [State 3 RTC] is a related service under the *Clovis, Ashland,*

Butler, and *Dale M.* tests.

To the extent that the Fifth Circuit's newly announced test in *Michael Z.* differs from that of *Clovis, Ashland, Butler* and *Dale M.,* it too is satisfied. The first prong is met because residential treatment is essential for [Student] to receive a meaningful educational benefit. The second prong is also met because placement at [Facility 1] is primarily oriented toward enabling [Student] to obtain an education, as opposed to psychiatric care.

Having determined that [Student]'s placement at [State 3 RTC] was appropriate and that such residential treatment is presently required for [Student] to receive benefit from [Student's] special education, a final look is necessary to determine whether *all* the costs associated with the placement are "related services." According to *Michael Z.*:

> [T]he court must then examine each constituent part of the placement to weed out inappropriate treatments from the appropriate (and therefore reimbursable) ones. In other words, a finding that a particular private placement is appropriate under IDEA does not mean that all treatments received there are *per se* reimbursable; rather, reimbursement is permitted only for treatments that are related services as defined by the IDEA at 20 U.S.C. § 1401(22).

Michael Z., supra at 301.

In this case, the District is responsible for [Student]'s tuition, room and board, and non-medical care at [State 3 RTC]. 34 C.F.R. § 300.104. This includes responsibility for related services such as speech-language pathology, psychological services, physical and occupational services, therapeutic recreation and counseling services including rehabilitation counseling, orientation and mobility, social work services, and parent counseling and training. 34 C.F.R. § 300.34(a).

The ALJ agrees with the IHO that medical services provided by a licensed physician are not reimbursable related services. *Garret F., supra.*

The ALJ, however, disagrees with the IHO that the cost of the Parents' travel to and from [State 3 RTC] from Colorado to participate in family therapy is a reimbursable related service.[24] The record does not satisfy the Parents' burden of proof that it is necessary for the Parents to personally appear at [State 3 RTC] as opposed to appearing by telephone or videoconference, in order for [Student] to receive FAPE.

Issue V: The Parents' Conduct Should Not Bar Reimbursement

The IDEA also permits the cost of reimbursement to be reduced or denied upon a finding of unreasonableness with respect to actions taken by the parents. 20 U.S.C. § 1412(a)(10)(C)(iii)(III). That section reads:

> The cost of reimbursement described in clause (ii) may be reduced or denied if - -

[24] IHO decision, p. 31.

. . . .

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

As noted above, the ALJ disagrees with the IHO that the Parents were totally blameless in this matter. Though the Parents had no legal obligation under the IDEA to provide ten-day notice because they were not "removing" [Student] from the District, they nonetheless interfered with the District's plan to conduct its evaluation. The fact that the Parents sent [Student] to [Facility 1] non-emergently knowing that [Student's] absence would interfere with the District's plan to conduct an in-school evaluation at the end of August, without giving the District any prior notice or opportunity to begin [Student's] evaluation prior to departure, was not consistent with the expected spirit of cooperation. Given that [Student]'s admission to [Facility 1] was non-emergent and would inevitably interfere with the District's evaluation, the Parents were at fault in not discussing this situation with the District prior to [Student]'s departure.

The Parents' action, however, was overcome by the District's total refusal to work with the Parents after it learned [Student] was hospitalized in [State 1]. Rather than ask that [Student] return to Colorado for evaluation or to explore other avenues of evaluation, the District unilaterally terminated [Student]'s placement at [Private School] without notice or adequate explanation as required by the IDEA. The District then took the erroneous position that it had no further obligation to [Student] because [Student] was out-of-state. Furthermore, contrary to the terms of the settlement agreement, it refused the Parents' request to convene an IEP meeting to discuss [Student]'s post-[Facility 1] placement unless [Student] first returned to live in the District. These actions were a denial of FAPE that justified the Parents' unilateral placement of [Student] at [State 3 RTC].

Moreover, the Parents' actions do not involve the bad faith or obstinate refusal to cooperate that courts have found necessary to justify denial or reduction of benefits. *Justin G. v. Bd. of Educ. of Montgomery County,* 148 F.Supp. 576, 586 (S.D. Md. 2001)("Absent a showing of bad faith, parents taking an adversarial or uncooperative stance in advocating for their child's right to a FAPE does not justify a complete denial of reimbursement") and *C.G. v. Five Town Comm. Sch.,* 513 F.3d 279, 288 (5th Cir. 2008)("the cause of the disruption was the parents' single-minded refusal to consider any placement other than a residential one.") To the contrary here, the Parents are the ones who sought an IEP team meeting to discuss [Student]'s post-[Facility 1] placement, but were stonewalled by the District's "single-minded refusal" to conduct such a meeting until [Student] returned to Colorado.

Furthermore, the ALJ does not agree with the District's argument, made during oral argument, that the Parents' actions left it "defenseless." The District's ultimate defense was to insist upon the evaluation that was its right, and to convene an IEP team meeting to discuss placement. Had the Parents then refused to return [Student] to Colorado or to submit [Student's] to evaluation under any arrangement reasonable to meet the District's legitimate needs, the District would have had no further obligation to [Student]. The District, however, chose an alternate course and thus waived its defense.

Because the District refused further discussion with the Parents rather than pursue its right to evaluation, it bears the ultimate responsibility for the denial of FAPE. Under the circumstances, no offset due to the Parents' conduct is appropriate.

Issue VI: Multiple Years Reimbursement

[Student] may need to continue at [State 3 RTC] into 2011 to accumulate sufficient credits to graduate, and the IHO accordingly held that the District "shall continue to be responsible for [Student]'s expenses at [State 3 RTC] until such time as [Student]'s placement is changed in accordance with the terms of the IDEA."

Although the District identified "multiple years reimbursement" as one of its appellate issues, the District made no argument in its brief or at oral argument relevant to this issue. In the absence of such argument, the ALJ agrees with the IHO that the District should continue to bear the cost of special education and related services at [State 3 RTC] until such time as [Student]'s placement is changed in accordance with the IDEA, [Student] achieves sufficient credit to graduate from high school, or [Student] turns twenty-one.

Decision

The District's unilateral disenrollment of [Student] from [Private School] during [Student's] stay at [Facility 1], and the District's refusal of the Parents' request to convene an IEP meeting to discuss [Student]'s post-[Facility 1] placement, amounted to a failure to provide FAPE. The Parents' unilateral decision to place [Student] at [State 3 RTC] following this denial of FAPE was appropriate. The Parents are therefore entitled to reimbursement of the cost of [Student]'s education and related services at [State 3 RTC] until such time as [Student] graduates from high school, turns twenty-one, or [Student's] placement is properly changed pursuant to the IDEA.

This decision is the final decision on state level review. Either party may challenge this decision in an appropriate court of law, either federal or state.

Done and Signed
February 2, 2010
Nunc pro tunc
January 19, 2010

ROBERT N. SPENCER
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of the above **DECISION UPON STATE LEVEL REVIEW (Corrected)** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

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on this ___ day of February 2010.

_____
Court Clerk