COLORADO DEPARTMENT OF EDUCATION

SPECIAL EDUCATION SERVICES UNIT

Due Process Hearing L2009:115

IMPARTIAL HEARING OFFICER'S FINDINGS OF FACT AND DECISION

In the Matter Of:

[STUDENT], by and through [Student's] parents [Mother] and [Father],

Petitioner,

and

JEFFERSON COUNTY SCHOOL DISTRICT R-1,

Respondent

This matter is a due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA) (20 USC §1415(f)(1)), its implementing regulations (34 CFR §300.507(a)), and the implementing regulations of the Colorado Exceptional Children's Educational Act (1 CCR 301-8, 2220-R-6.02(7)). The parents of the student involved in this matter ("the Parents") requested a due process hearing on April 23, 2009. The student will be identified in this decision as "[Student]".

This due process hearing was initially scheduled for July 13 through 17, 2009. The hearing was continued on the motion of Jefferson County School District R-1 (the District), and in an order dated July 6, 2009 the Impartial Hearing Officer (IHO) continued the hearing date and granted an extension of time for issuing this decision until September 21, 2009. 34 CFR §300.515(c); 1 CCR 301-8, 2220-R-6.02(7)(e)(ii).

The IHO conducted this due process hearing on August 20, 21, 24, 25 and 26, 2009 in [City], Colorado. Louise Bouzari, Esq. and Katherine Gerland, Esq. represented [Student]. The District was represented by W. Stuart Stuller, Esq. and Alyssa C. Burghardt, Esq. The IHO issues these Findings of Fact and Decision pursuant to 1 CCR 301-8, 2220-R-6.02(7)(h)ii).

I. FINDINGS OF FACT

A. Background

[Student] was born in [State] on [Date] and was substantially neglected by [Student's] birth parents, who had substance abuse problems. [Student] was removed from [Student's] birth parents' home at 11 months of age and placed in a foster-adopt program. The Parents became [Student]'s foster parents when [Student] was 16 months old and they adopted [Student] when [Student] was three and one-half years old. The Parents reside within the boundaries of the District.

In both infancy and early childhood [Student] was unhappy and had severe temper tantrums. When [Student] was 4 years old [Student] bit [Student's] mother, after which the Parents took [Student] to a therapist. Thus began [Student]'s treatment by a series of mental health providers.[1] At the age of seven [Student] was hospitalized after [Student] growled at other students at school, hid under a desk and then locked [him/her]self in a bathroom stall and threw [him/her]self against the walls of the stall. An evaluation of [Student] after [Student's] hospitalization diagnosed [Student] with a number of problems, including short term memory issues, processing deficiencies, reactive attachment disorder and visual-motor problems.

By this time it was clear that [Student]'s emotional and behavioral issues were interfering with [Student's] ability to perform in school. In the third grade [Student's] educational program was provided pursuant to an Individualized Education Program (IEP) developed pursuant to the IDEA. [Student] continued with psychiatric treatment and has been hospitalized several times, most recently in the summer of 2007.

[Student] and [Student's] family moved to Colorado in March, 2000 and [Student] began attending the District's schools. [Student] was identified by the District as a student with disabilities eligible for special education and related services under the IDEA. At first [Student] received homebound education. [Student] then attended [Elementary School] for the third through fifth grades pursuant to an IEP that had [Student] working with a school psychologist and that enabled [Student] to go to a resource room when [Student] needed to calm down and get away from other students. At [Elementary School] [Student] spent a good deal of time in the resource room and asked to be taken home at least once a week. [Student] would become so upset that at times [Student's] mother had to take [Student] out of school and bring [Student] home.

1. Mental health and educational experts who have dealt with [Student] over the years have identified [Student] as one of the most severely challenged children in terms of mental health of any they have dealt with.

[Student] next attended [Charter School], a charter school in [City], Colorado. The structure at [Charter School] suited [Student] and [Student] did well there; [Student] was able to focus on [Student's] school work and made friends. [Student] was at [Charter School] for the sixth and seventh grades.

The District closed [Charter School] and [Student] then attended [Option School] for the eighth grade. After a decent start to the school year [Student] did poorly at [Option School]. The organization of the school day was stressful to [Student] and when [Student] could no longer handle the classroom [Student] would go to the office and cry and complain. [Option School] had no consistent person with whom [Student] could deal and no program to refocus [Student] and get [Student] back to the classroom. Although [Student] did well at the start of the school year ([Student's] pattern was to do well early in any school year), after six weeks [Student's] mother had to come and pick [Student] up almost every day.

B. [Private School]

By the fall of 2006 the Parents told the District that they needed to look for a different placement for [Student]. As a result, for [Student's] ninth grade year (2006-07) [Student] went to [Private School] in [City], Colorado, a school for children with significant learning disabilities and emotional and behavioral issues.

[Student] was not placed at [Private School] pursuant to an IEP process; rather, that placement occurred as the result of a mediated agreement between the District and the Parents. The Parents claimed that the District did not provide [Student] with a free appropriate public education (FAPE) in the 2005-06 school year and could not do so in 2006-07. The District disagreed, but in settlement of these claims the District agreed to pay for a portion of [Student]'s [Private School] tuition for the 2006-07 school year.

[Private School] staff developed an educational plan for [Student], even though at this point there was no definitive diagnosis of [Student]'s emotional or medical problems.[2] Because the staff at [Private School] could not identify [Student's] problems, their various plans for [Student] were not successful. [Student] would go into rages and the staff at [Private School] had concerns regarding [Student]'s ability to distinguish between fantasy and reality.

Nevertheless, [Student] did well at [Private School] at the start of the 2006-07 school year and to a degree [Student] was successful in school during this year. [Student] liked the program and the teachers and grew socially and emotionally. [Student] was happy and communicated well at [Private School] and met all of [Student's] social and emotional goals and almost all of [Student's]

2. The absence of a definitive diagnosis is a recurring theme in [Student]'s treatment. Many of [Student's] symptoms fit more than one possible diagnosis, and [Student's] presentation has changed constantly.

academic goals. Near the end of the school year, however, [Student] started having problems with peers and problems staying in class. As a school day progressed [Student] would become over-stimulated and unable to process all of the academic and environmental information that [Student] was receiving. [Student's] coping mechanism was to get angry and go home, often by engaging in behavior that would get [Student] removed from the classroom. [Student] would also have anger outbursts, but did not physically threaten anyone at [Private School]. By the spring [Student's] academic performance was in decline; [Student] showed improvement in some classes, but was unable to remain in others.

By the end of the summer of 2007 [Student]'s mental health declined. [Student] refused to participate in activities [Student] had been in previously and acted out more at home. At one point [Student] became violent, hit [Student's] father, threatened to commit suicide, and had to be hospitalized.

[Student] returned to [Private School] in the fall of 2007 for the tenth grade, again pursuant to a mediated agreement with the Parents by which the District agreed to pay the [Private School] tuition for the 2007-08 school year. As usual, [Student] did well at the start of the school year. By November and into December, however, [Student] began to decline. [Student] worked with a therapist to keep [Student] present in the classroom; [Student] had a tendency to dissociate, that is, to mentally check out of the classroom during the day and go into an alternate reality for long periods. Some days [Student] would be lucid, and others [Student] would adopt the persona of a character from a book or movie. [Student] improved after the winter holidays, but by the spring of 2008 [Student's] ability to do the school work at [Private School] deteriorated.[3] [Student's] attendance declined, [Student's] teachers could not get [Student] to do [Student's] work and [Student] did not want to go to school. [Student] would remove [him/her]self from the classroom, and while at first the staff at [Private School] could get [Student] to return, over time they could not get [Student] back to class. Although [Student] made progress in academics at [Private School] [Student] was not sufficiently productive to be on track to graduate. At the end of the 2007-08 school year [Student] had not earned enough credits to advance to the eleventh grade.

By the start of the 2008-09 school year [Private School] staff had doubts about whether they could meet [Student]'s needs. There was a chance [Student] would improve, but in August [Private School] staff observed the same problems [Student] had demonstrated in the spring; [Student] did not start the school year well as [Student] had in prior years. [Student] was absent two of the first six days of class in August, and also missed part of a third day. Although [Student] completed some assignments on the days [Student] was present, overall [Student] was not productive. [Private School] staff discussed with the Parents

3. [Student]'s anxiety increased each spring at [Private School] as [Student] approached the transition of leaving school for the summer.

the possibility that [Student] required residential treatment. In light of the above facts the IHO finds that [Student] was not benefiting from [Student's] educational program at [Private School] in August, 2008.

At this same time [Student]'s behavior at home also deteriorated. [Student] would not shower or wash [Student's] hair or wear clean clothes, and became violent, engaging in major outbursts of yelling, screaming and rage, including hitting family members.[4] [Student] stopped engaging in activities [Student] enjoyed and would stay in [Student's] room.

C. Discussions Between the Parents and the District, April to October, 2008

At an IEP meeting in April, 2008 the Parents informed [Director 1], the District's special education director, that because of [Student]'s mental health decline and [Student's] problems at [Private School] [Student] might require residential treatment in the future. [Student]'s declining attendance at [Private School] and the Parents' concerns regarding [Student's] behavior raised a question in [Director 1]'s mind as to whether [Student] was as successful academically in the 2007-08 school year as [Student] had been the prior year. [Director 1] believed that a full assessment of [Student]'s social, emotional and academic skills was necessary to ensure that [Private School] remained an appropriate placement for [Student]. The participants at this meeting agreed to conduct [Student]'s triennial evaluation in the fall of 2008.

An observation of [Student] in an educational setting was essential to this evaluation. Each member of the evaluation team would have to observe [Student] in the school setting over a period of several weeks in order to determine [Student's] present level of academic and functional performance. Under law and best practices an IEP could not be developed in the absence of these observations.

On August 11, 2008 the Parents and the District entered into a Settlement and Release Agreement (the Agreement). At this time the Parents wanted [Student] to return to [Private School] for the 2008-09 school year. The Agreement recited that the Parents asserted that the District had failed to provide [Student] with a FAPE in 2005-06, 2006-07 and 2007-08 and that the District would also be unable to do so in 2008-09. The District asserted that it could provide FAPE for [Student] in 2008-09. In settlement of these disputed assertions the parties agreed that:

- The District would pay for [Student]'s attendance at [Private School] during the 2008-09 school year.

4. Despite all of [Student's] problems at school related to [Student's] mental health issues, [Student] had never exhibited violent tendencies toward others at school, although [Student] did have a history of screaming at other students.

- An IEP team meeting would be convened by August 29, 2008 to discuss [Student]'s triennial reevaluation and to determine what data should be collected as part of that reevaluation.

- After a reevaluation was completed the parties would convene an IEP meeting to review the results of the reevaluation, consider reports from private providers, and discuss programming and placement options for the remainder of the 2008-09 school year.

- [Student] would remain at [Private School] for the remainder of the 2008-09 school year at the District's expense if the IEP team determined [Private School] was an appropriate placement. If the IEP team determined that [Student] should be placed elsewhere, a plan would be developed to transition [Student] to that placement.

- If the parties disagreed as to the appropriate placement for [Student] for the remainder of the 2008-09 school year, the District would provide prior written notice to the Parents pursuant to 34 C.F.R.§300.503. The Parents then, in turn, could pursue a due process hearing to challenge the District's recommended placement.

- The parties were aware that [Student]'s mental health could decline to the point that [Student] might require residential treatment. If so, the District would convene an IEP meeting to discuss residential treatment options.

On August 15, 2008 the Parents met with some members of the Central Assessment Team of the District, along with [Assistant Director], who was the District's assistant director of special education at the time. [Director 2], the District's Director of Exceptional Student Services for the South and Mountain Areas, attended this meeting for a brief time. The purpose of this meeting was to discuss what testing was needed to evaluate [Student]. At this meeting the parties did not identify or convene an IEP team.

At the August 15 meeting the Parents advised the District that [Student]'s mental health continued to deteriorate. They told the District's representatives that experts they had consulted, including [Student]'s therapist and psychiatrist, had suggested that because [Student]'s condition was complex [Student] needed to be assessed at a hospital that could assess the whole person, not just [Student]'s mental health, and that could observe [Student] for a long time and in different environments. The experts the Parents had consulted had identified only two assessment hospitals considered appropriate for [Student], the [Out of State Facility 1] in [State 1] ([Facility 1]) and a second

facility in [State 2]. No facilities in Colorado were identified by these consultants as being appropriate.

The Parents advised the District at the August 15 meeting that if [Student] went to such a facility the assessment could take from four to eight weeks. The Parents provided the District with information regarding [Facility 1] and the [2nd Facility] at this time. No representative of the District expressed that an out-of-state assessment would be an issue; in the past the District had considered privately obtained assessment results provided by the Parents. The District did not inform the Parents at this time that they would lose services or that [Student] would be withdrawn from [Private School] if [Student] was admitted to an out-of-state assessment hospital. In fact, the Parents hoped that if [Student] had to be hospitalized [Student] could eventually return to [Private School].

Although [Student]'s hospitalization was a possibility at this time, the District's representatives at the August 15 meeting suggested that the Parents should sign the necessary forms to allow the District to proceed with a reevaluation, in the event that an opportunity to evaluate [Student] presented itself. The Parents agreed and signed these forms. At no time after August 15 did the District make either a formal or informal request to evaluate [Student] or offer to evaluate [Student]. Accordingly, at no time after August 15 did the Parents refuse any such request or offer.

All parties hoped at this time that [Student] might improve and that the District could proceed with its reevaluation. However, [Student's] mental health continued to decline. [Student] usually did well at the start of the school year, but [Student] did not do so in August, 2008, including the fact that [Student] now refused to go to school at times. This fact, along with [Student's] deteriorating behavior at home, was of concern to the Parents. At some point in mid-August [Student] became enraged and threatened to kill the Parents and [Student's] brother, and [Student] hit [Student's] brother. [Student] had not struck [Student's] brother before in the course of a full blown rage such as this, and [Student's] pattern was that once [Student] did something it became part of [Student's] behavior. The Parents felt that they had to take steps to protect the safety of [Student] and the family. Accordingly, they signed an admission agreement with [Facility 1] on August 17 and [Student] was admitted to [Facility 1] on August 20. The District did not request that it be given an opportunity to evaluate [Student] after [Student] was admitted to [Facility 1].[5]

5. [Facility 1] did prepare an extensive report on [Student] which the Parents provided to the District on November 14, 2008. While this report included information that would be useful to the District in evaluating [Student], it did not contain the types of assessments that the District needed to allow it to develop an IEP.

On August 26 the Parents notified [Assistant Director] and [Director 2] of [Student]'s admission to [Facility 1].[6] They continued to keep the District apprised of [Student]'s status and progress through early October. On October 7 the Parents' attorney received an e-mail from the District's legal counsel which stated, in part, that "it appears at this point, the settlement agreement is moot, as parents have unilaterally placed [Student] at the [Facility 1] in [State 1]. As such, [Student] is not a District student, and the District has no on-going responsibility to [Student] under the IDEA". This e-mail was the first time the Parents had been advised that the District would not provide special education and related services to [Student]. The District did not provide any other written notice of its decision to withdraw services under the IDEA.

In September the District withdrew [Student] from [Student's] enrollment at [Private School]; the District did not want to keep paying [Student]'s tuition at [Private School] when [Student] was not attending school there. The District understood from a discussion with the director of [Private School] that it was likely [Student] could re-enroll at that school if [Student] returned home. The District did not provide any written notice to the Parents that it was removing [Student] from [Student's] enrollment at [Private School].

On October 15 [Student]'s mother had a phone conversation with [Director 2]. In an e-mail that day [Director 2] told [Student]'s mother that the District was ready to serve [Student] when [Student] returned. The next day [Student]'s mother sent [Director 2] an e-mail confirming her understanding of their conversation, including the following statements by [Director 2]: that the District "unenrolled" [Student] from [Private School] so as to not pay tuition given [Student]'s absence; that the District would not support a placement of [Student] in an RTC; that because [Student] was not present on the headcount day the District receives no funding for [Student], and that is why District's counsel said that the District had no responsibility for [Student]; and that when [Student] returns to Colorado [Student] would again become a District student. The Parents never heard from [Director 2] that any of their understandings about the October 15 conversation, as confirmed in this e-mail, were incorrect. In this phone conversation [Director 2] did not request that the District be given an opportunity to evaluate [Student].

On October 30 the Parents met with [Director 2] and [Assistant Director], and the Parents told the District representatives that [Facility 1] might recommend a residential placement for [Student]. Neither [Assistant Director] nor [Director 2] requested that the District be given an opportunity to evaluate [Student] at this time.

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6. When the Agreement was signed on August 11 the Parents did not know that [Student] would be admitted to [Facility 1] in the next 10 days. Even if they had this knowledge and so notified the District in nearly August, there would not have been sufficient time for the District to conduct an assessment of [Student] before [Student's] admission.

At this meeting [Assistant Director] did not tell the Parents that the District had policies that it would not place students in a residential treatment center (RTC) or out of state. In fact, the District has no such policies. [Assistant Director] did tell the Parents that the District was not in the business of removing children from their homes, and the Parents misconstrued this comment as a statement of a policy that the District would not place a student in residential placement. If a child's IEP team determines that the student requires residential care in order to access [Student's] educational program the District would place the child in an RTC, and in fact has done so.

However, if a child is to be placed out of the home the District does have a policy that another agency, such as Jefferson County Mental Health (JCMH), the community mental health agency for Jefferson County, or Jefferson County Human Services, should concur in that decision. The District has adopted this policy because it is not an agency that determines where children should live, or that they should not live with their parents. Even when an IEP team determines that residential placement is required and the student's parents consent to that placement, the District prefers to obtain the concurrence of another agency in that placement, even though that concurrence is not required for the District to make such a placement.[7]

When [Student] met with the Parents on August 15 and October 30 [Assistant Director] referred the Parents to JCMH and Jefferson County Human Services as possible providers of resources or services for [Student]. The District also made these referrals because, as noted above, the District wants or needs the concurrence of these agencies for an out-of-home placement. The Parents discussed [Student]'s situation with [Staff] at JCMH and [Staff] described a short-term residential treatment option for stabilization and treatment, as well as a psychiatric residential treatment facility that had a more intensive level of treatment in a 30 to 60 day placement. [Staff] also offered to evaluate [Student].

The Parents did not want to work through JCMH because they believed that the evaluation of [Student] (a one to two hour interview with [Student] and a review of [Student's] records) would be inadequate, the placement would be relatively short-term and that they would have little input into [Student]'s treatment or placement. Placements through JCMH are intended to be treatment oriented rather than long-term educational placements, although the typical 30 to 60 day placement could be extended for medical necessity. Given the complexities of [Student]'s condition and history and the recommendations the Parents anticipated receiving from [Facility 1], the Parents' concerns about working through JCMH were reasonable and well-founded.

D. [Facility 1]

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7. In his October 15 telephone conversation with [Student]'s mother [Director 2] made this same point, that the District did not initiate out of home placements without the involvement of these other agencies. He did not say that the District never made residential placements.

[Facility 1] is an acute inpatient psychiatric hospital designed for adolescents who are psychologically or neurologically compromised. There are very few facilities like [Facility 1] in the United States. Patients at [Facility 1] are assessed in long term residential and educational settings so that they can be evaluated over time. The long term nature of the [Facility 1] program and the input of professionals from a variety of disciplines allow [Facility 1] staff to observe patients during good and bad days and weeks from a variety of perspectives and to observe how patients respond to treatment over time. Out-patient psychiatric treatment does not permit such consistent direct observation or such direct input from other disciplines and teachers.

[Facility 1] is not a school. Rather, the outcome for a patient at [Facility 1] is a recommendation for further treatment, placement, therapy and academic accommodations.

The Parents saw [Student]'s mental health deteriorate significantly in August, 2008. [Student]'s psychiatrist and therapist believed that they needed a definitive diagnosis in order to treat [Student] properly. The Parents' primary motivation in admitting [Student] to [Facility 1] was to stabilize [Student] and to obtain an assessment of [Student's] condition so that they could decide on the next steps to take that would address [Student's] mental health needs and educational and school placement concerns.

It was reasonable for the Parents to admit [Student] to [Facility 1] when they did. [Student] needed help because of the dysfunctional way in which [Student] processed information. [Private School] could not develop a plan for [Student] because of its inability to get a handle on what was wrong with [Student]. Had [Student] not been admitted to a psychiatric hospital at this time [Student] would have continued to fail, both academically and therapeutically. At the time of [Student's] admission [Student] was close to a psychotic break that would have predisposed [Student] to continued psychotic or schizophrenic processes. While [Student] was not at imminent risk of self-harm at the time of [Student's] admission to [Facility 1], [Student's] situation was urgent.[8] [Student] had become unstable and there was legitimate concern that at some point in time [Student] would have a psychotic break, manifest overt symptoms of psychosis or harm [him/her]self or others. [Student] was on the verge of schizophrenia and it was appropriate that [Student] be admitted to a facility such as [Facility 1] for stabilization, observation and assessment.[9] The Parents chose [Facility 1], in

8. A 72 hour mental health hold would not have been appropriate for [Student] at this time because [Student] was not acutely suicidal, acutely homicidal or gravely disabled. Such a hospital admission may have actually harmed [Student], and in any event would not have met [Student's] psychiatric needs.

9. Some of the psychological assessments of [Student] performed at [Facility 1] could have been performed while [Student] was at home in Colorado. However, the best practice was for [Facility 1] to conduct these tests itself, so that it could observe [Student]'s behavior during the testing process. Further, had [Student] stayed at home in late August, 2008 for the purpose of

part, because in addition to an assessment of [Student's] mental health, [Facility 1] had the ability, unlike other hospitals, to evaluate [Student] in a classroom environment.

[Student] was one of the most psychologically and neurologically compromised children [Facility 1] had ever evaluated. [Student] presented a very complicated picture and had many diagnoses in the past that [Facility 1] had to rule out or rule in. [Student's] symptoms crossed over the lines of many possible diagnoses. While at [Facility 1] [Student] frequently decompensated (that is functioned at a very low level, unable to function academically or in therapy due to [Student's] tangential thought processes). [Student's] presentation was variable and unpredictable. [Student] had abrupt changes from functioning to decompensating: [Student] could appear organized and functioning at one moment and suffer a mental health crisis the next.[10] The anomalies in [Student's] thought processes prevented [Student's] from thinking logically or coherently and dramatically affected [Student's] ability to process information in the classroom. These thought process anomalies were so severe while [Student] was at [Facility 1] that it was difficult for [Student] to communicate or connect with other people in any meaningful way. While the average stay of a patient at [Facility 1] was approximately 7 weeks, [Student] remained at [Facility 1] for 13 weeks.

[Facility 1] discharged [Student] on November 22, 2008 with numerous diagnoses, including a bipolar affective disorder not otherwise specified, depression, a nonverbal learning disorder, a history of reactive attachment disorder, a cognitive disorder not otherwise specified, borderline mental retardation and the need to rule out schizophrenia. Significantly, the doctors at [Facility 1] found that in addition to [Student's] multiple disabilities [Student] had the probability of an emerging thought disorder, which is a psychotic process. [Student] exhibited early warning symptoms that [Student] was well on the way to a severe psychotic disorder or schizophrenia.

At the time of [Student's] discharge from [Facility 1] [Student] had improved, but was not cured. Although [Student] was functioning better at the end of [Student's] stay at [Facility 1] [Student] was extremely fragile and in the wrong setting would have regressed to where [Student] was when admitted to that hospital. The multi-disciplinary team at [Facility 1] made a strong recommendation that [Student] be placed in an RTC directly from [Facility 1]. The team recommended, among other things, that the RTC have a small program conducive to individualized treatment, strong clinical support by licensed therapists, medication management by a psychiatrist, and an academic

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testing there was a serious possibility that [Student] would harm [him/her]self before [Student] could be placed in an appropriate setting.

10. When [Student] decompensated [Student] could not focus, had problems with planning and organization, and frequently had to leave the academic classroom due to [Student's] frustrations. At times [Student] disrupted the class and had to be restrained.

environment that could cater to [Student's] learning disability and emotional needs. The team also recommended that [Student] receive speech-language and occupational therapy.

The multi-disciplinary team at [Facility 1], which included a psychiatrist, PhD psychologists and a licensed social worker, believed that [Student] needed to be in a structured environment that could provide direct clinical care that responds to [Student's] functioning as needed to keep [Student] from getting frustrated, decompensating and suffering a psychotic break. The opinion of the experts at [Facility 1] was that if [Student] returned to an unstructured environment such as [Student's] home [Student] would lose the benefit of the progress [Student] had made at [Facility 1] and would be at risk for a psychotic break. [11] The impetus for the recommendation for [Student] to be placed in an RTC was that [Student] needed clinical and psychological care, as well as the academics available at an RTC.

Individual aspects of [Student]'s functioning were deficient, such as [Student's] IQ, academic achievement scores, measure of attention, visual-spatial processing and measures of executive functioning.[12] Any of these deficiencies alone would not have supported a recommendation for residential treatment. However, [Student]'s overall presentation, including [Student's] mental health issues and an overall concern about [Student's] clinical care, long-term emotional growth and academic functioning, supported the recommendation for residential placement.

E. [RTC in State 3]

On September 30, 2008 the Parents hired [Educational Consultant], an educational consultant and specialist in private pay residential programs for children, to consult with them regarding their options for [Student]. [Educational Consultant] suggested that the Parents consider three RTCs, including [State 3 RTC], a licensed, non-locked, non-hospital resident facility in [State 3], with an accredited school. The Parents visited these three facilities and also investigated other possible placements. [Educational Consultant] recommended [State 3 RTC] to the Parents. In [Educational Consultant]'s opinion [State 3 RTC] was the only appropriate placement for [Student] in the United States due to its home-based environment, clinical excellence, and highly trained special education teaching staff, as well as its integrated program in which teachers, therapists and staff would work with [Student] on a 24/7 basis. In addition, [Student] needed psychiatric care and [Educational Consultant] looked for a facility that could meet [Student's] psychiatric needs. Neither [Educational Consultant] nor the Parents were able to identify an appropriate RTC for [Student] that was located in Colorado.

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11. [Student]'s personal psychiatrist agrees with this assessment of the consequences of [Student] returning home directly from [Facility 1].

12. Executive functioning involves the ability to plan, organize and problem solve.

[State 3 RTC] includes an adolescent campus housing no more than 14 residents at a time. Up to seven residents live in a family-style home at which staff is present 24 hours per day. The school at [State 3 RTC] is accredited by the State of [State 3]; its educational content must be the same as at any other school in [State 3], and a diploma from [State 3 RTC] is recognized the same as any other high school diploma in the state. All [State 3 RTC] teachers are credentialed by the State of [State 3] and are required to have 20 hours of continuing education annually in dealing with students with mental health issues.[13] The [State 3 RTC] is one aspect of the therapeutic environment at [State 3 RTC] and is integrated into the overall treatment plan for each child.

The medical director of the facility is a child and adolescent psychiatrist, and the professional staff at the adolescent campus includes two PhD certified school psychologists, five masters degree level therapists and two nurses with psychiatric experience. [State 3 RTC] also provides family therapy, including monthly visits from the Parents to [State 3 RTC]. Although family therapy involves [Student]'s relationship with the Parents, it is also considered an important part of [Student's] therapeutic program.

[Student] was admitted to [State 3 RTC] on November 24, 2008. The working diagnoses for [Student] at the time included psychotic disorder not otherwise specified, reactive attachment disorder, cognitive disorder not otherwise specified and rule out dissociative disorder not otherwise specified.[14] The principal and educational director at [State 3 RTC], a professional with over 30 years experience working with special needs children, considered [Student] to be within the top ten percent of the most significantly impaired, high needs children she had worked with in her career.

At [State 3 RTC], as at [Facility 1], [Student]'s presentation fluctuated. [Student] could exhibit normal behavior and suddenly exhibit symptoms of mental illness. [Student's] perceptions of reality were paranoid and even psychotic when [Student] came to [State 3 RTC]; the staff at [State 3 RTC] was not sure if it could help [Student] and believed [Student] may have required hospitalization. Any stressor in [Student's] life, even of a minor nature, resulted in anxiety or panic or even psychosis that made [Student] unwilling to go to or stay in a classroom. When [Student] first arrived at [State 3 RTC] [Student] could not participate in a typical school activity for more than 5 or 10 minutes. [Student] was volatile and unpredictable in the classroom and caused disturbances in the classroom, which could include shouting, throwing books on the floor, and storming out of the

13. The [State 3 RTC] teachers do not have special education endorsements on their licenses, but in this respect they work under the principal's supervision.

14. The current consensus among psychiatrists is that [Student] does not have a dissociative identity disorder (multiple personalities), which had been suspected. It is likely that [Student] does suffer from a schizoaffective disorder. A precise diagnosis of [Student], which has escaped [Student's] doctors and therapists for years, is not necessary to the decision in this case.

room. As [Student] has learned to trust [Student's] therapist and the environment [Student] has improved in recent months. Initially, it was difficult for the staff to get [Student] into the classroom or to keep [Student] there, even though there were only ten students in the classroom, which was located only steps from [Student's] residence. By the time of the due process hearing [Student] was able to attend school and participate in learning 3 hours a day, five days a week, with one to one-and-a-half hours of directed homework.

As of May, 2009 [Student] had not progressed sufficiently to receive credit in any subjects, but [Student] had completed one subject as of the date of the due process hearing and the principal of the [State 3 RTC] predicted that [Student] would complete a second subject by September 1, 2009. [State 3 RTC] anticipates that [Student] will be able to graduate from high school in 2011.

[State 3 RTC] did not prepare a new IEP or written educational plan for [Student]. The professionals at [State 3 RTC] have, however, developed short term goals and daily lesson plans for [Student] and are able to follow and adapt to [Student's] educational progress on a regular basis. Further, [State 3 RTC] does not offer speech-language or occupational therapy on site, but can provide for those services in the community. As of the time of the due process hearing [Student] was not receiving speech-language or occupational therapy; the professionals at [State 3 RTC] had determined that while these therapies could help [Student] in the future, it was important to focus on [Student's] immediate needs for the present time. In addition, [State 3 RTC] did not make available to [Student] updated assistive computer technology that suited [Student's] needs until [Student's] father suggested a better alternative. The District presented no evidence that [State 3 RTC]'s choice of educational methodologies in these respects rendered [Student]'s placement inappropriate.

Based upon the testimony of the professionals who have treated [Student] and educated [Student] at [State 3 RTC], and on a consideration of the entire record, the IHO finds that [State 3 RTC] is an appropriate placement for [Student] and is reasonably calculated to enable [Student] to receive educational benefits. [Student]'s mental health disabilities are the major impediment to [Student's] ability to move forward in the classroom and to benefit from [Student's] educational program; [Student's] mental health and behavioral issues and [Student's] academics are intertwined. [Student]'s educational improvement while at [State 3 RTC] could not have occurred without the small size of the adolescent facility and the full-time structure. The therapeutic environment and interventions at [State 3 RTC] have been critical to [Student's] academic progress.

[State 3 RTC] has long term integrated psychiatric, behavioral and academic care and therapists on call full time. The staff at [State 3 RTC] can therefore react to changes in [Student]'s psychological and neurological condition. In a full-time facility such as [State 3 RTC] the staff can control much

of a resident's environment. The Parents could not provide this level of support at home. Neither the Parents nor others could control what happens between the school, the home, a doctor's office or a visit to a therapist.

At [Private School] [Student] did not transition well from class to class or from school to home. A 24 hour structure lets [Student] know what will happen at all times. For example, [Student] has attachment issues and in a full-time program such as [State 3 RTC] [Student] does not have to gain and change attachments frequently. That type of controlled structure did not exist at home or at [Private School]. If [Student] returned home it is likely that [Student] would become frustrated, decompensate and have a psychotic break. At home, [Student] would run a significant risk of suicide or self-harm.

Accordingly, based upon all of the evidence, including the [Facility 1] multi-disciplinary team and the psychiatrist at [State 3 RTC], the IHO finds that at the time [Student] was placed at [State 3 RTC] and at the present time [Student] required the 24 hour a day, 7 days a week care and the structure provided by an RTC such as [State 3 RTC] in order to function academically. It was reasonable for the Parents to place [Student] at [State 3 RTC] in November, 2008. [Student]'s ability to function fluctuates frequently and [Student] needs 24 hour care to immediately address [Student's] therapeutic and clinical needs. An RTC provides the best opportunity for [Student] to avoid the stresses that could lead to a severe regression. No home-based environment could provide the stability [Student] needs to avoid a psychotic break and make progress in school. Had [Student] returned home from [Facility 1] and attended a public school, and not been placed in an RTC, it was likely that [Student] would have been seriously mentally ill within months of [Student's] discharge from [Facility 1]. As of November, 2008 [Student] could not have received educational benefit in a less restrictive environment than a residential facility.

It is likely that [Student] will require an intensive level of support at [State 3 RTC] for at least nine more months, both for educational success and to deal with [Student's] mental health issues, and an additional 6 months of transitional care at [State 3 RTC]. It is unlikely that [Student] would be able to transition into a self-contained classroom in the next 18 months.

F. Discussions Between the Parents and the District, November and December, 2008

On November 10, 2008 the Parents' attorney provided the District with written notice that they would admit [Student] to [State 3 RTC] in ten business days, and asserted that the District was responsible for the cost of this program. On November 20 the District's attorney responded that the District would not provide reimbursement because the Parents had unilaterally placed [Student] at [Facility 1], but that the District would provide services when [Student] returned to the District.

In an e-mail on December 3 [Student]'s mother asked [Director 2] to start a process to develop an IEP and asked [Director 2] what he though the next steps should be. [Director 2] responded in an e-mail on December 9 that because the Parents had unilaterally placed [Student] in [State 3] the District had no present obligation to evaluate [Student], convene an IEP team, or otherwise serve [Student] under the IDEA. The Parents' unilateral placement at [State 3 RTC] was the only reason the Parents had ever been given for the District's denial of services to [Student]. Neither [Director 2] nor anyone from the District informed the Parents at this time that the District could not develop an IEP or provide placement options for [Student] because it had not performed an assessment of [Student], as had been discussed in August. In fact, it was not until after the Parents requested this due process hearing that the District, for the first time, took the position that it could not provide an IEP or placement options for [Student] because the District had been unable to perform an evaluation.

In his December 9 e-mail [Director 2] offered to provide services to [Student] upon [Student's] return to the District. From this point forward the District did not seek to evaluate [Student] or offer any placement options for [Student] if [Student] did not return to Jefferson County. Had the District sought to evaluate [Student] while [Student] was at [State 3 RTC] the Parents were willing to discuss with the District and [Student]'s doctors the possibility of accomplishing such an assessment, and the Parents were willing (as they always had been) to cooperate with the District in this effort, including paying for District evaluators to travel to [State 3 RTC].

G. Educational Benefit

[Student]'s emotional and psychological problems affect [Student's] ability to function in the classroom and to learn. [Student's] mental health issues are the biggest factors constituting an impediment to [Student's] progressing in [Student's] education. [Student's] educational needs can not be addressed, and [Student] can not progress academically, without addressing [Student's] mental health needs. [Student] could not receive educational benefit from a regular classroom in a public high school or from a self-contained environment with children with mental health issues in a public school. In those settings [Student] would (as [Student] had in the past) decompensate frequently enough that [Student] could not obtain consistent educational benefit. [Student] had deteriorated in those environments in the past, and it has been difficult for [State 3 RTC] to keep [Student] in the classroom, even in that intense, structured environment.

In addition, a day treatment program could not provide the consistency in interventions, intense services and structure that a residential program such as [State 3 RTC] provides. A day treatment center would not provide the support

and consistency [Student] needs at this stage of [Student's] illness to allow [Student] to receive educational benefit.

II. DISCUSSION AND CONCLUSIONS

A. Requirement of a Free Appropriate Public Education

The IDEA requires that all disabled students receive a free appropriate public education (FAPE). 20 USC §1412 (a)(1)(A). In *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982) (*Rowley*) the United States Supreme Court held that the IDEA's minimum requirement is that the state provide a disabled student with (1) access to specialized instruction and related services; (2) which are individually designed; (3) to provide educational benefit to the student. *Rowley* at 201. The IDEA is designed to enable children with disabilities to have access to a FAPE designed to meet their particular needs. *O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 698 (10th Cir. 1998); *Murray v. Montrose County School District RE1-J,* 51 F.3d 921, 925 (10th Cir. 1995).

The IDEA requires that a student receive some educational benefit in order to obtain a FAPE. The law does not require a school district to provide services needed to maximize a student's educational potential. *Rowley* at 198-200; *Johnson v. Independent School District No. 4 of Bixby,* 921 F. 2d 1022, 1028-29 (10th Cir. 1990); *Urban v. Jefferson County School District R-1*, 870 F. Supp. 1558, 1562 (D. Colo. 1994). A school district provides the required educational benefit when the student is making progress toward his educational goals. *See O'Toole v. Olathe District Schools Unified District No. 233*, *supra* at 707 n. 20. *Rowley* established that if a state educational agency complies with the procedures of the IDEA, and if the individualized education program developed pursuant to those procedures is reasonably calculated to enable a student to receive educational benefit, the state has complied with the IDEA. *Rowley* at 206-07; *O'Toole v. Olathe District Schools Unified District No. 233*, *supra* at 701; *Johnson v. Independent School District No. 4 of Bixby*, *supra* at 1025-26.

B. Standards for Reimbursement

In this case the Parents seek reimbursement for [Student]'s placement at [State 3 RTC] from November 24, 2008 through November 23, 2011, the date at which it is anticipated that [Student] will obtain a high school diploma. If placement in a private residential program is necessary to provide special education and related services to a child with a disability that program, including non-medical care and room and board, must be provided at no cost to parents. 34 C.F.R. §300.104. The IDEA specifically provides that if the parents of a child with a disability who previously received special education and related services from a public school district enroll the child in a private school without the

consent of the school district, a hearing officer may require the school district to reimburse the parents for the cost of that enrollment if the hearing officer finds that the school district has not made a FAPE available to the child in a timely manner prior to the enrollment in the private school, and that the private placement is appropriate. 20 U.S.C. § 1412 (a)(10)(C)(ii); 34 C.F.R. §300.148(c). *See Florence County School District Four v. Carter,* 510 U.S. 7, 15 (1993). Parents are entitled to reimbursement under the IDEA if the school district violated the IDEA and the education provided by the private school is reasonably calculated to enable the child to receive educational benefits. *L.B. and J.B. on behalf of K.B. v. Nebo School District*, 379 F.3d 966, 978 (10th Cir. 2004).

C. The District Did Not Make a FAPE Available to [Student]

1. Once [Student] was admitted to [Facility 1] the District abandoned all responsibility to serve [Student] under the IDEA. On October 7, 2008 the Parents' attorney was notified by the District's counsel that [Student] was no longer considered a District student, and that the District had no on-going responsibility to [Student] under the IDEA. [Director 2] reiterated this position in an October 15 telephone conversation with [Student]'s mother. Similarly, on December 9 [Director 2] advised the Parents that because they had unilaterally placed [Student] at [State 3 RTC] the District had no present obligation to evaluate [Student], convene an IEP team, or otherwise serve [Student] under the IDEA.

The District was incorrect in its assertion that it had no responsibility to [Student] under the IDEA once [Student] was admitted to a hospital in [State 1]. Despite that admission, [Student]'s residence remained with [Student's] parents within the District. The responsibility to make a FAPE available to a student falls on the school district in which the parents reside. *Catlin v. Sobol*, 93 F.3d 1112, 1122 (2d Cir. 1996); *Wise v. Ohio Department of Education*, 80 F.3d 177, 182 (6th Cir. 1996) (a state's obligation to provide a FAPE to all children with disabilities within the state includes children who are receiving services in another state).

The court in *District of Columbia v. Abramson*, 493 F. Supp. 2d 80 (D.D.C. 2007) reached the same conclusion on facts similar to those in this case. In *Abramson* the parents requested that the District of Columbia school district in which they resided evaluate their child for IDEA eligibility. Before that evaluation was completed the parents moved the child to a school in Connecticut. The school district argued that Connecticut was therefore responsible for the child's education and that the D.C. school district no longer had a responsibility to provide IDEA services to the child. In rejecting that argument the court held that the fact that the parents had privately placed the student in another state did not relieve the D.C. school district of its responsibility to evaluate the child and provide the student with a FAPE.

The District did not argue in this due process hearing that it had no obligations to [Student] under the IDEA once [Student] was admitted to [Facility 1] or enrolled at [State 3 RTC] simply because [Student] was located out-of-state. In fact, [Assistant Director], the District's assistant director of special education in 2008 and presently the District's director of diverse learners, testified that when another agency such as JCMH placed a student out of state the child was still enrolled in the District and the District had an obligation to provide services. It does not matter whether [Student] was placed by the District, another agency or the Parents; in any case, when [Student] was hospitalized at [Facility 1] [Student] was a child with disabilities who continued to reside in the District, and that residence triggered the District's responsibilities under the IDEA.

The District therefore had an obligation to provide a FAPE to [Student] even while [Student] was hospitalized at [Facility 1] and enrolled in [State 3 RTC]. The situation with regard to [Facility 1] was no different than if [Student] had been in a serious accident and hospitalized out-of-state for a length of time due to [Student's] physical injuries. It is unlikely that it would be concluded under those circumstances that the District no longer was responsible to provide [Student] with a FAPE. The hospitalization at [Facility 1] was of the same nature, differing only in that [Student's] injuries were mental and emotional, not physical. Yet, based solely on the out-of-state hospital admission the District withdrew services under the IDEA and never offered to provide them again. This it was not entitled to do.

2. The Parents assert that the District violated the IDEA because it did not convene an IEP team or write an IEP for [Student] after [Student] was admitted to [Facility 1], and did not offer a specific placement for [Student] following [Student's] discharge from [Facility 1]. The District argues that it could not develop an IEP in the absence of an evaluation. The IHO concludes that by notifying the Parents in October, 2008, and continuing forward from that date, that it no longer had responsibilities to [Student] under the IDEA the District denied [Student] a FAPE. From October forward the District abdicated its responsibilities to provide a FAPE.

The obligation to provide a FAPE includes the requirement to develop an IEP. 20 U.S.C. § 1414 (d)(1)(A); 34 C.F.R. §300.112. The IEP must describe the student's placement. 20 U.S.C. § 1414 (d)(1)(A)(i)(VII) (IEP must identify the location at which special education and related services will be provided). As the IHO has found, an IEP could not be developed in the absence of an evaluation, and extensive observations of [Student] in an educational setting were essential to this evaluation.[15] The District argues that it could not develop an IEP or propose a placement for [Student] because it could not evaluate [Student] once [Student's] parents removed [Student] from Colorado.

15. The IDEA's regulations require that such observations be included in an evaluation. 34 C.F.R. §§ 300.305(a)(1)(iii) and 300.310.

The fact is, however, that once it incorrectly decided that it had no obligations to [Student] under the IDEA because [Student] was no longer located in the state, the District simply did nothing. Its position was that it would wait until [Student] returned to Colorado before providing a FAPE. As discussed above, however, the District had a responsibility to provide a FAPE even though [Student] was not physically in Colorado. As the court concluded in *District of Columbia v. Abramson, supra,* the refusal to continue an evaluation process, develop an IEP and offer an appropriate placement simply because a student was in a private placement out of state constitutes a denial of FAPE. 493 F. Supp. 2d at 85.

The provision of a FAPE includes a responsibility on the part of a school district to "ensure that a reevaluation of each child with a disability is conducted". 20 U.S.C. § 1414(a)(2); 34 C.F.R. §300.303(a). The District did not ensure that a reevaluation of [Student] was conducted. In fact, it did not even attempt to perform the necessary evaluation or discuss the possibility of an evaluation with the Parents. After [Student] was admitted to [Facility 1] the District did not advise the Parents of an intent to evaluate [Student]. The District's only position, from October forward, was to sit back and wait for [Student] to return home. In not taking any steps to ensure that an evaluation was conducted the District denied [Student] a FAPE.

To be sure, evaluating [Student] while [Student] was out of state would have been more difficult than if [Student] was in school in Colorado. Nevertheless, the IDEA regulations do not provide an exception to the evaluation requirement simply because a student is in an out-of-state placement. *See District of Columbia v. Abramson, supra.* Had the District sought to evaluate [Student] after August 20, 2008 and the logistics and [Student]'s condition made this task impossible, the parties would now be considering a different case. In this case, however, the District did nothing. It never requested or attempted an evaluation, and it therefore can not now complain that it was denied an opportunity to conduct an assessment.

3. The District failed to provide written notice to the Parents of its decision to withdraw [Student] from [Private School] or to deny all procedures and services under the IDEA, in the manner required by 34 C.F.R. §300.503. That section of the regulations requires a school district to provide parents with written notice a reasonable time before a district proposes or refuses to initiate or change the identification, evaluation or educational placement of a student. The regulation requires that this notice contain, among other things, a description of the action proposed or refused by the district, an explanation of why it took that action, an explanation of the procedural safeguards available to the parents, and a description of other factors relevant to the district's actions. 34 C.F.R. §300.503 (b).

The District did not provide this prior, detailed written notice to the Parents to advise them that it would not provide services to [Student]; the first notice of this decision was District counsel's October 7 e-mail. The District's actions described in that e-mail constituted a refusal to initiate an evaluation, prepare an IEP or offer a placement of [Student] that would trigger the notice requirement. Nor did the District provide prior written notice of its withdrawal of [Student] from [Private School]. That action constituted a proposal to change [Student's] placement that also triggered the prior written notice requirement.

The District therefore violated the prior written notice requirement of 34 C.F.R. §300.503. Only those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable. *Lesesne v. District of Columbia,* 447 F. 3d 828, 834 (D.C. Cir. 2006); *P.P. v. West Chester Area School District*, 557 F.Supp. 2d 648, 669 (E.D. Pa. 2008); *see Erickson v. Albuquerque Public Schools,* 199 F.3d 1116, 1122-23 (10th Cir.1999). An impartial hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies (I) impeded the child's right to a free appropriate public education; (II) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or (III) caused a deprivation of educational benefits. 20 U.S.C. §1415(f)(3)(E)(ii).

The IHO concludes that the procedural violation of failing to provide the Parents with prior written notice, as described above, resulted in a denial of a FAPE to [Student]. The District's failure to provide prior written notice that it would remove [Student] from [Private School] and deny [Student] any services under the IDEA if [Student] was hospitalized out of state constituted a substantive denial of FAPE because it significantly impeded the Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to [Student]. By not providing the required prior written notice the District prohibited the Parents from working with the District to attempt to meet [Student]'s mental health needs in August, 2008, without losing the benefits of the IDEA. Further, not until the Parents filed for this due process hearing did the District advise them that the real problem, from the District's point of view, was that it had not had an opportunity to evaluate [Student]. By not notifying the Parents of this reason for its decision until well after it acted the District prevented the Parents from any meaningful participation in an attempt to meet the District's concerns.[16]

16. Contrary to the District's assertion, the purpose of a prior written notice is not limited to providing parents with sufficient information to allow them to challenge a school district's actions by filing a request for a due process hearing. This notice is also designed to allow parents to participate in decisions affecting a FAPE (20 U.S.C. §1415(f)(3)(E)(ii)(II)) and to protect their rights under the IDEA (*Kroot v. District of Columbia*, 800 F. Supp. 976, 982 (D.D.C. 1992).

4. In conclusion, the District continued to be required to provide a FAPE to [Student] even after [Student] was admitted to [Facility 1]. The District failed to provide a FAPE. It took no steps to do so and, to the contrary, asserted that it had no IDEA obligations to [Student] after [Student] was admitted to [Facility 1]. Specifically, the District failed to ensure that [Student] was evaluated, which the District acknowledges was necessary to completing its IDEA responsibilities of developing an IEP and offering a placement to [Student]. In addition, the District committed a substantive violation of the IDEA by failing to provide prior written notice to the Parents of its withdrawal of services from [Student], in a manner that significantly deprived the Parents of their participation rights under the IDEA.[17]

D. [State 3 RTC] is an Appropriate Placement for [Student]

1. The IHO has found that [State 3 RTC] is an appropriate placement for [Student] and is reasonably calculated to enable [Student] to receive educational benefits. The District argues, however, that for several reasons [State 3 RTC] is not an appropriate placement. The District claims that the placement at [State 3 RTC] was inappropriate because [Student] is not receiving occupational or speech-language therapy, [State 3 RTC] has not developed an IEP, there was a delay in providing assistive technology and [Student] has only earned one credit. None of these facts make this placement inappropriate. A parental private placement must be appropriate, but it does not have to be perfect. *Warren G. v. Cumberland County School District*, 190 F.3d 80, 84 (3d Cir. 1999).

After what was for [Student] a difficult transition, [Student] is making progress at [State 3 RTC] and is on track to graduate from high school. The professionals at [State 3 RTC] made the decision to defer speech-language and occupational therapies. In addition, while [State 3 RTC] does not have an IEP for [Student], the professional educators at that facility have developed short term goals and daily lesson plans for [Student] and are able to follow and adapt to [Student's] educational progress on a regular basis. The District has presented no evidence that [State 3 RTC]'s choice of these educational methodologies rendered [Student]'s placement inappropriate.[18]

2. The District nevertheless argues that a placement is not appropriate, and parents are not entitled to reimbursement, when the parents'

17. The Parents have also asserted that the District denied a FAPE to [Student] by expressing a blanket policy of never placing students in RTCs. The IHO has found, however, that the District did not have or express such a policy.

18. In deciding whether a school district has provided a FAPE a hearing officer can not substitute his notions of sound educational policy for that of school administrators. A hearing officer must defer to education experts and not compel a district to employ a specific program or teaching methodology. *See Rowley*, supra at 207-08; *Systema v. Academy School District No. 20*, 46 IDELR 71, 106 LRP 46357 (D. Colo. June 7, 2006). By analogy, an appropriate facility such as [State 3 RTC] should also be allowed to choose its educational methodologies.

placement is not in the least restrictive environment.[19] The courts have split on the issue of whether the least restrictive environment requirement applies to a parental placement when parents seek reimbursement for that placement. For example, in *Kerkam v. Superintendent, D.C. Public Schools*, 931 F.2d 84 (D.C. Cir. 1991) the court denied reimbursement because an appropriate less restrictive environment had been proposed by the school district. Similarly, the court in *DeLullo v. Jefferson County Board of Education*, 71 F. Supp. 2d 554 (N.D.W.Va. 1998) declined to require a school district to pay for a private school placement because the parents' proposed residential placement ignored the IDEA's requirement that, to the greatest extent possible, children are to be educated in the least restrictive environment. However, in *Cleveland Heights-University Heights City School District v. Boss*, 144 F.3d 391 (6th Cir. 1998) the court held that that the failure of the school in which the parents placed their child to satisfy the IDEA's mainstreaming requirement did not bar the parents from receiving reimbursement.[20] The Third Circuit reached the same conclusion in *Warren G. v. Cumberland County School District*, *supra* at 83-84.

Even under a least restrictive environment requirement a parental residential placement is appropriate for a disabled child if an RTC is necessary for [Student] to receive benefit from [Student] education. *Seattle School District No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996). The IHO has found that [Student] requires the 24 hours a day, 7 days a week care and the structure provided by an RTC such as [State 3 RTC] in order to function academically. The IHO has also found that [Student] could not receive educational benefit from a regular classroom in a public high school, from a self-contained environment with children with mental health issues in a public school or from a day treatment program. Contrary to the District's assertion, the IHO has also found that in August, 2008 [Student] was not benefiting from [Student's] educational program at [Private School].[21] Accordingly, there is no less restrictive environment in which [Student] could receive educational benefits.

E. The Parents are Entitled to Reimbursement for [Student]'s Placement at [State 3 RTC]

As noted above, the requirements for reimbursement are that a school district failed to make a FAPE available to the child in a timely manner prior to the enrollment in the private school, and that the private placement is appropriate.

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19 . The IDEA requires that to the maximum extent appropriate children with disabilities should be educated in the least restrictive environment. 20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. §300.114(a)(2); *L.B. and J.B. on behalf of K.B. v. Nebo School District,* 379 F.3d 966, 976 (10th Cir. 2004).

20. To the same effect *see Knable v. Bexley City School District*, 238 F.3d 755, 770 (6th Cir. 2001).

21. Even if [Student] was receiving educational benefit at [Private School] at that time, which the IHO has found not to be the case, the District withdrew all services from [Student] when [Student] was hospitalized at [Facility 1], thus leaving [Student] with no educational placement, restrictive or not.

20 U.S.C. § 1412 (a)(10)(C)(ii); 34 C.F.R. §300.148(c). The Parents are entitled to reimbursement under the IDEA if the school district violated the IDEA and the education provided by the private school is reasonably calculated to enable the child to receive educational benefits.

The IHO has concluded above that the District violated the IDEA by failing to make a FAPE available to [Student] after August 20, 2008. The IHO has also found that the placement at [State 3 RTC] was appropriate and is reasonably calculated to enable [Student] to receive educational benefits. The Parents have therefore established the requirements for an entitlement to reimbursement.

F. Defenses to Reimbursement

Under the IDEA reimbursement may be reduced or denied if the parents did not give written notice to a school district of the removal of the child from the district; if prior to the parents' removal of the child from the school the district informed the parents of its intent to evaluate the child and the parents did not make the student available for an evaluation; or if the actions taken by the parents were unreasonable. 20 U.S.C. § 1412 (a)(10) (C)(iii). The District claims that reimbursement should be denied for each of these reasons.

1. Written Notice

The IDEA provides that reimbursement may be reduced or denied if, "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" that the parents were rejecting the placement proposed by the school district, stating their concerns and their intent to enroll their child in a private school at public expense. 20 U.S.C. § 1412 (a)(10)(C)(iii)(I)(bb); 34 C.F.R. §300.148(d)(1)(ii). The District argues that reimbursement should be denied in this case because the Parents failed to comply with this notice requirement.

On November 10, 2008 the Parents, through their attorney, provided notice of their intent to enroll [Student] in [State 3 RTC]. The District does not argue that this notice was inadequate. The District does assert, however, that reimbursement should be denied because the Parents did not provide written advance notice of their intent to remove [Student] from [Private School] and admit [Student] to [Facility 1].

The Parents were not required to provide written notice of [Student]'s removal from [Private School] and admission to [Facility 1]. The IDEA and regulatory provisions requiring such notice apply to the removal of a child from a public school and [Student's] private placement at another educational institution. In this case the Parents did not remove [Student] from [Private School] in order to place [Student] at another educational institution. Rather, they took [Student] out of [Private School] for what they thought was a temporary period of time so that

[Student's] mental health could be evaluated in a hospital ([Facility 1] is a hospital, not a school). The Parents had hoped that after [Student's] evaluation [Student] would return to [Private School]. In fact, it was the District, not the Parents, that formally withdrew [Student] from [Private School].

In addition, the requirement of written notice is set in the context of the conditions under which parents may or may not be able to receive reimbursement for a private school placement. Viewing the statutory and regulatory provisions in this context, prior written notice is a requirement for obtaining reimbursement. However, the Parents are not seeking reimbursement for the cost of [Student]'s hospitalization at [Facility 1], and the prior written notice requirement therefore does not apply to the Parents' decision to have [Student] admitted to [Facility 1].

[Student]'s situation on August 20, 2008 was no different than had [Student] been hospitalized for an extended period of time due to a motor vehicle accident; [Student] would not be in school, but it could not be said that [Student] had been removed from school and moved to a privately funded educational placement. That did not occur, and the requirement for written notice did not apply until [Student] was placed at [State 3 RTC] by [Student's] Parents. As noted, the Parents provided the statutorily required notice prior to [Student]'s admission to [State 3 RTC].

Even if the Parents were required to provide written notice of [Student]'s hospitalization at [Facility 1] (which the IHO has concluded is not the case), denial of reimbursement for that reason would be discretionary (the statute and regulation both provide that reimbursement *may* be reduced or denied for the enumerated reasons. It would be an unreasonable exercise of that discretion to deny reimbursement for the lack of notice of [Student]'s hospitalization. The District argues that [Student's] hospitalization was not an emergency, in the sense that [Student] was not acutely suicidal or homicidal at the time of [Student's] admission. Nevertheless, the IHO has found that there was an urgency to having [Student] hospitalized when [Student] was. It would be unreasonable to deny reimbursement to the Parents because they took actions necessary to the protection of their child's mental health.

The IHO has considered the case law cited by the District in support of its argument that reimbursement should be denied because of a failure of written notice. Nothing in those cases supports an argument that notice is required at the time a child with disabilities is hospitalized due to those disabilities, and nothing in those decisions suggests a result different than that reached here.

2. Availability for Evaluation

a. The IDEA provides that 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". 20 U.S.C. § 1412 (a)(10)(C)(iii)(II); 34 C.F.R. §300.148(d)(2). The District argues that reimbursement should be denied in this case because the Parents did not make [Student] available for an evaluation.

In the present case, as found above, the Parents did not refuse any request or offer of the District to evaluate and they did not fail to make [Student] available for an evaluation. In the Agreement of August 11 the Parents agreed to an evaluation and at the August 15, 2008 meeting they signed forms consenting to [Student]'s evaluation. At that meeting the Parents also informed the District that [Student] may need to be hospitalized out of state. The District did not raise any concerns regarding an opportunity to evaluate at that time.

[Student]'s doctors and other professionals advised the Parents that it was urgent to admit [Student] to [Facility 1] and, later, that [Student] needed to go from [Facility 1] directly to an RTC. In the meantime, while [Student] was still hospitalized, the District informed the Parents that [Student]'s education was no longer their responsibility until [Student] returned to the District. The District never again offered or requested to evaluate [Student].

Thus, this is not a case in which the Parents refused to cooperate with the District and did not make the student available for an evaluation. To the contrary, on December 3, 2008 [Student]'s mother asked the District to start a process to develop an IEP. Rather than engage in a discussion of how an IEP could be developed under the existing circumstances, including how the necessary evaluation could be accomplished, [Director 2] responded that because the Parents had unilaterally placed [Student] in [State 3] the District had no present obligation to evaluate [Student], convene an IEP team, or otherwise serve [Student] under the IDEA. Nevertheless, the Parents at this time were willing to discuss with the District and [Student]'s doctors the possibility of accomplishing an assessment, and the Parents were willing (as they always had been) to cooperate with the District in this effort, including paying for District evaluators to travel to [State 3 RTC].

b. Therefore, the Parents did not fail to make [Student] available for an evaluation within the meaning of 20 U.S.C. § 1412 (a)(10)(C)(iii)(II) and 34 C.F.R. §300.148(d)(2). Even if they did, however, whether to deny reimbursement due to the failure of a parent to make a child available for evaluation is discretionary with the IHO: the statute and regulation cited immediately above both provide that reimbursement *may* be reduced or denied for the enumerated reasons. Under the facts of this case the IHO would not exercise his discretion to deny reimbursement even if the Parents had failed to make [Student] available for an evaluation.

The Parents found themselves in a "Catch-22" situation. The District refused to evaluate [Student] unless [Student] returned to school in Colorado,

and mental health professionals told the Parents that to do so might seriously harm [Student]'s mental health and possibly imperil [Student's] safety. Thus, the Parents could not remove [Student] from [Facility 1] or [State 3 RTC], and all they could do was to offer to work with the District in accomplishing an evaluation. It was the District's refusal to enter into any discussions with the Parents while [Student] was out of state that prevented an assessment, not any recalcitrance or obstruction by the Parents. It would be unreasonable for the IHO to exercise his discretion to deny reimbursement for this reason.

The District cites several judicial decisions for the proposition that reimbursement must be denied where parents move a child to a distant location before the school district has had an opportunity to conduct its evaluation. The major distinction between those decisions and the instant case is that in none of those cases did the school district violate the IDEA by refusing to participate in any process under the IDEA simply because the student was located out of state, as the District has done here.

In *Patricia P. v. Board of Education of Oak Park and River Forest High School District No. 200,* 203 F.3d 462 (7th Cir. 2000), the court denied a claim for reimbursement because of a lack of parental cooperation in the evaluation process. The court noted that the student's mother knowingly frustrated the school's attempt at an evaluation, had not cooperated with the school district, and made no genuine offer to make the student available. The facts in the instant case reflect a much more cooperative attitude on the part of the Parents.

In addition, unlike the present case, the school district in the *Patricia P.* case had not committed a violation of the IDEA. The court in *Patricia P.* noted that school districts are also bound by the IDEA's preference for a cooperative placement process and that the court would "look harshly upon *any party's* failure to reasonably cooperate with another's diligent execution of their rights and obligations under the IDEA". 203 F.3d at 469 (emphasis supplied). The District's refusal to work with the Parents until [Student] returned home, in a manner that violated the IDEA, constituted the lack of cooperation referenced by the Seventh Circuit.

The District also cites *Great Valley School District v. Douglas and Barbara M*, 807 A.2d 315 (Pa.Commw. 2002). In that case the court stated that "Federal courts have uniformly held that *in the absence of a violation of the IDEA,* a unilateral private placement that interferes with a school district's ability to evaluate a child imposes no burdens on the school district". 807 A.2d at 321 (emphasis supplied). The court reiterated this holding later in its opinion: "*In the absence of violation of the IDEA*, there is no basis to impose any responsibility on the School District to overcome conditions created by the parents' unilateral placement decisions". 807 A.2d at 322 (emphasis supplied). As noted above, what distinguishes the cases cited by the District from the present case is that in

the case before the IHO the District did violate the IDEA, by declaring that it had no obligation to provide services under that statute when, in fact, it did.

The dissenting opinion in the *Great Valley School District* case suggests an additional rationale for exercising discretion so as not to deny reimbursement in the instant case. In *Great Valley School District*, as here, the parents removed the student to an out of state facility. The dissent in that case noted that it was inappropriate to require the parents to keep a child in the district when doing so would ignore his immediate needs and go against the advice of his treating medical professionals. To require the child's parents to return him to the district to undergo an evaluation after his treating psychiatrist concluded that doing so would be dangerous would, in the dissent's view, place the parents in an "inconceivable" position. The dissent concluded that the parents' actions in protecting the well-being of their son did not relieve the school district of its responsibility to conduct an appropriate evaluation, even if doing so required conducting the evaluation outside of the state.

Although this analysis was contained in a dissenting opinion, the IHO concludes that it reflects the correct result in the instant case. As established by the evidence of the mental health professionals who dealt with [Student], the Parents here acted reasonably and as required to protect their [child], while the District acted in a manner that violated the IDEA and left the Parents with few, if any, acceptable options. The Parents were willing to work with the District regarding an evaluation but the District refused to discuss any options unless the Parents put [Student] at risk, against the advice of [Student's] doctors, by returning [Student] to Colorado. Under these circumstances it would be unreasonable for the IHO to exercise his discretion to deny reimbursement to the parents.

3. Reasonableness of the Parents' Actions

The IDEA provides that reimbursement may be reduced or denied upon a judicial finding of unreasonableness with respect to the actions taken by the parents. 20 U.S.C. § 1412 (a)(10)(C)(iii)(III); 34 C.F.R. §300.148(d)(3). The District argues that reimbursement should be denied in this case because the Parents acted unreasonably.

The IHO has found that the Parents acted reasonably in admitting [Student] to [Facility 1] when they did and in placing [Student] at [State 3 RTC] in November, 2008. Nevertheless, the District makes several assertions that it claims indicate that the Parents acted unreasonably. First, the District claims that the Parents did not provide notice that it was admitting [Student] to [Facility 1]. As concluded above, the Parents were not legally obligated to do so, but in any event they had advised the District of this possibility on August 15, 2008 and even provided the District with information regarding [Facility 1]. The Parents were not hiding the ball in this or any other respect.

Next, the District asserts that the Parents were considering residential placement for [Student] long before they actually placed [Student] at [State 3 RTC], but did not notify the District of these efforts until they had narrowed their choices to three facilities. The Parents had no obligation to keep the District advised of all of their considerations; their only legal obligation was to provide the 10 day prior written notice required by the IDEA. In any event, once they had narrowed their choices they did advise the District. The fact is that the Parents had advised the District as early as October 15, 2008 that they were considering residential treatment for [Student] and the District did not react to that information in any fashion; it had already told the Parents that it would do nothing until [Student] returned to Colorado. The Parents acted reasonably, kept the District informed, and the District was in no way prejudiced by any actions of the Parents.

In addition, the District argues that the Parents did not act reasonably because they did not follow up on the District's referral to JCMH. As the IHO has found, however, the Parents' concerns about working through JCMH were reasonable and well-founded. In any event, the District could not require the Parents to work with a public agency such as JCMH in order to provide a FAPE. 34 C.F.R. §300.154(d)(2)(i).

Finally, the District claims that the placement at [State 3 RTC] was unreasonable for the same reasons it claims [State 3 RTC] was an inappropriate placement. For the reasons discussed in section D of this Discussion, none of these facts make the Parents decision to place [Student] at [State 3 RTC] unreasonable.

Despite the District's attempts to cherry-pick minor alleged deficiencies in the Parents' conduct, the IHO has found and now concludes that the Parents have acted reasonably in all of their actions. They have not acted in the bad faith manner that would justify a denial of reimbursement. *Justin G. v. Board of Education of Montgomery County*, 148 F. Supp. 2d 576, 586 (D. Md. 2001). To the contrary, the Parents have made extraordinary efforts on their [child]'s behalf, consistent with the opinions of the many mental health professionals who have treated and assessed [Student]. The Parents have attempted to cooperate and communicate with the District throughout a lengthy and difficult process. The District's improper insistence that [Student] was not entitled to the benefits of the IDEA unless [Student] returned to Colorado, not any conduct of the Parents, has been the root cause of the difficulties in this case. In fact, it is hard to imagine any parents doing more. The District's suggestion that the Parents are "gaming the system to extract free tuition" could not be further from the proven facts.

4. Placement at [State 3 RTC] is Necessary and Appropriate to Meet [Student]'s Educational Needs

The District argues that [Student]'s placement at [State 3 RTC] is for medical, not educational, reasons and that the reason for [Student's] admission to [Facility 1] and then [State 3 RTC] was [Student's] behavioral issues at home, not any special education needs. As the District states, the "analysis must focus on whether [the student's] placement may be 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". *Clovis Unified School District v. California Office of Administrative Hearings,* 903 F. 2d 635, 643 (9th Cir. 1990).

In the present case [Student]'s psychiatric and emotional problems are not "quite apart" from the learning process. To the contrary, the IHO has found that [Student]'s mental health disabilities are the major impediment to [Student's] ability to progress in the classroom and to benefit from [Student's] education, and that [Student's] mental health and behavioral issues and [Student's] academics are intertwined. [Student]'s emotional and psychological problems affect [Student's] ability to function in the classroom and to learn. [Student's] educational needs can not be addressed, and [Student] can not progress academically, without addressing [Student's] mental health needs. The therapeutic environment and interventions at [State 3 RTC], which is an accredited school, have been critical to [Student's] academic progress. [Student] could not receive educational benefits in a less restrictive environment than a residential facility.

Even if placement in an RTC is required due to a child's emotional problems or problems at home, a school district is required to fund that placement if it is necessary for the child to make educational progress. *Mrs. B. v. Milford Board of Education*, 103 F.3d 1114, 1122 (2d Cir. 1997). In the *Milford Board of Education* case the Second Circuit concluded that even if residential treatment is necessitated primarily by emotional problems, the IDEA requires the state to pay for the program so long as the RTC is necessary to the proper education of the child.[22]

The court in *Richardson Independent School District v. Michael Z.,* 561 F. Supp. 2d 610 (N.D. Texas 2008) reached a similar conclusion. In that case the court found that the student suffered from a number of debilitating emotional and mental health disorders and that [Student's] academic difficulties were inextricably intertwined with [Student's] behavioral and emotional problems. The court therefore required the school district to reimburse the parents for comprehensive therapy services, including individual, family and group psychological therapy. In so holding the court quoted the following language from *Township of Bloomfield Board of Education v. S.C* No. Civ. 04-3725, 2005 WL 2320029 (D.N.J. Sept. 22, 2005):

22. To the same effect, see *Naugatuck Board of Education v. Mrs. D*., 10 F. Supp. 2d 170, 180 – 81 (D. Conn. 1998).

> [the student's] psychiatric stabilization is a necessary part of his educational program. This is a continuing, interrelated process in which his psychological difficulties and his education continue in tandem. While medical doctors and psychiatrists may diagnose and evaluate [the student] and aides may provide continuing counseling and monitoring, it is part of an educational process. Without the diagnosis and evaluation and without the counseling and monitoring the educational process could not take place. 561 F. Supp. 2d at 618.

As the IHO has found, this is the situation in the present case. Even if [Student]'s behavioral problems at home were a major component of the Parents' concerns at the time [Student] was admitted to [Facility 1], that fact does not alter the conclusion that by the time [Student] entered [State 3 RTC] an RTC was necessary for [Student] to receive educational benefits.

The District asserts that the purpose of placing [Student] at [State 3 RTC] was to avoid a psychotic break, not a result of educational issues. However, if [Student] did have a psychotic break, that event would surely have a negative impact on [Student's] ability to benefit from [Student's] education. [Student]'s mental health and emotional problems simply cannot be separated from [Student's] educational needs.

The District also argues that an RTC was not necessary for [Student] to obtain educational benefit because [Student] was a productive student at [Private School] when [Student] attended school. Of course, a big problem at [Private School] was that [Student] often did *not* attend school. In any event, while [Student] had some academic success at some times over [Student's] years at [Private School], by the start of the 2008-09 school year [Private School] staff had doubts about whether they could meet [Student]'s needs. At this time [Private School] staff observed the same problems [Student] had in the spring; [Student] did not start the school year well as [Student] had in prior years. Although [Student] completed some assignments on the days [Student] was present in August, 2008, overall [Student] was not productive and [Private School] staff discussed with the Parents the possibility that [Student] required residential treatment. The IHO has found that [Student] was not benefiting from [Student's] educational program at [Private School] at the time [Student] was admitted to [Facility 1].

III. DECISION AND RELIEF AFFORDED

The IHO has concluded that the District has not made a FAPE available to [Student] in a timely manner prior to the enrollment in the private school, and that the Parents' private placement of [Student] at [State 3 RTC] is appropriate. The Parents are therefore entitled to reimbursement by the District of the cost of [Student]'s enrollment at [State 3 RTC]. 20 U.S.C. § 1412 (a)(10)(C)(ii); 34 C.F.R. §300.148(c).

A. The District shall reimburse the Parents for [Student]'s tuition at [State 3 RTC], from November 24, 2008 until the conclusion of these administrative proceedings and any subsequent judicial proceedings. 20 U.S.C. § 1415 (j); 34 C.F.R. §300.518(a); 1 CCR 301-8, 2220-R-6.02(7)(m). The District's responsibility shall include the cost of transportation, occupational therapy and speech-language services. 34 C.F.R. §300.34(c)(6), (15), (16). The District is not responsible, however, for the cost of any medical services. 34 C.F.R. §300.104.[23]

B. The District shall continue to be responsible for [Student]'s tuition at [State 3 RTC] until such time as [Student]'s placement is changed in accordance with the terms of the IDEA. *See Murphy v. Arlington Central School District Board of Education,* 297 F.3d 195, 201 (2d Cir. 2002). The District's responsibility shall include the cost of transportation, occupational therapy and speech-language services. 34 C.F.R. §300.34(c)(6), (15), (16).

C, The District shall also reimburse the Parents for the cost of family therapy and the cost of the Parents' travel to [State 3 RTC] for family therapy. Although the District argues that these costs are not part of [Student]'s educational program, the IHO has found that the treatment for [Student's] mental health and emotional problems is intertwined such that [Student] can not benefit from education without treatment for [Student's] mental health and emotional issues. The evidence established that even though this therapy involves the relationship between [Student] and the Parents, family therapy is part of that treatment for [Student]'s mental health and emotional issues. The District has argued, but has not presented any evidence, that family therapy is not required for [Student] to benefit from [Student's] education.

D. The Parents are the prevailing party for the purpose of 20 U.S.C. § 1415 (i)(3)(B)(i)(I).

IV. APPEAL RIGHTS

23. The medical services excluded from the District's obligation to reimburse the Parents are only those services provided by a licensed physician. 34 C.F.R. §300.34(c)(5).

A copy of the parties' appeal rights is enclosed with this decision. 1 CCR 301-8, 2220-R-6.02(7)(j) through (m).

DATED: September _____, 2009

_____
MARSHALL A. SNIDER
Impartial Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this **IMPARTIAL HEARING OFFICER'S FINDINGS OF FACT AND DECISION** on the parties by placing the same in the United States mail, postage prepaid, on September _____, 2009, properly addressed to the following:

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_____
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