STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4th Floor, Denver, Colorado 80203	
[Father] and [Mother], Complainants, vs. **MESA COUNTY VALLEY SCHOOL DISTRICT 51,** Respondent.	▲ COURT USE ONLY ▲ **CASE NUMBER:** **EA 2017-0038**

AGENCY DECISION

On December 19, 2017, the Colorado Department of Education ("CDE"), Exceptional Student Services Unit, received a due process complaint filed by [Father] and [Mother] ("Complainants" or "Parents") on behalf of their minor daughter, [Student], alleging that Mesa County Valley School District 51 ("Respondent" or "District") violated the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482, ("IDEA"), under its implementing regulations at 34 C.F.R. § 300.511, and Colorado's Exceptional Children's Educational Act ("ECEA"), 1 CCR 301-8, by failing to provide [Student] with a free appropriate public education ("FAPE"). Specifically, Parents filed the due process complaint after the District denied their request for tuition reimbursement when they placed [Student] at [Residential Treatment Center], a residential treatment center located in [City B], [State A]. The District asserts that Parents failed to meet their burden of proving the required elements for reimbursement of a unilateral private residential placement.

The due process complaint was forwarded to the Office of Administrative Courts ("OAC") and assigned to Administrative Law Judge ("ALJ") Tanya T. Light for an impartial due process hearing. The hearing was convened in accordance with 20 U.S.C. § 1415(f), and held in Grand Junction, Colorado on May 4, 7, 8, and 9, 2018.

Theresa Sidebotham, Esq. of Telios Law, PLLC, represented Complainants, and Tammy M. Eret, Esq. of Hoskin Farina Kampf PC, represented the District. [Special Education Coordinator], the District's Special Education Coordinator, served as Respondent's advisory witness. At hearing, the ALJ admitted into evidence the following stipulated exhibits:

Complainants' Exhibits 1-22 (Binder one)
Complainants' Exhibits 23-46 (Binder two)

Respondent's Exhibits A-Z; AA-RR (Volume 1)
Respondent's Exhibits SS-ZZ; AAA-WWW; WWW1; WWW2; and WWW3 (Volume 2)
Respondent's Exhibits XXX1-XXX15; YYY (Volume 3)
Respondent's Exhibits QQQ-1; ZZZ-1; ZZZ-2; ZZZ-3

ISSUE PRESENTED

Whether Parents have met their burden of proof to establish a claim for tuition reimbursement from the District for their placement of [Student] at [Residential Treatment Center].

FINDINGS OF FACT

[Student]

1. [ ]

2. [Student] was diagnosed with autism at two-and-a-half years old. She does not have intellectual disabilities. Exhibits 2; 7. [Student]'s family moved to Grand Junction in 2011, and she started school in the District during the last week of fourth grade. She began receiving special education services from the District in the fifth grade at [Elementary School]. Exhibit 8 at 0182.

3. At all times relevant to this case, the [Family] have lived in the District, and reside there currently.

Fifth Grade – 2011-2012

4. In fifth grade, [Student] was assigned a full-time, one-on-one aide during the school day, as called for in her Individualized Education Program ("IEP"). She has had a full-time paraprofessional aide every year she has been at the District.

5. In fifth grade, [Student] had her first admission to the [Treatment Center] ("[Treatment Center]") in Grand Junction, which is a "step-down" facility that provides psychiatric treatment for children as an alternative to hospitalization.

6. [Psychiatrist], M.D., a psychiatrist, is [Treatment Center]'s Medical Director. He has also been [Student]'s treating pediatric psychiatrist since 2011.

7. While [Student] was at the [Treatment Center], she attended [Elementary School] during the day.

8. [Fifth Grade Teacher] was [Student]'s fifth grade general education teacher. She testified that [Student] is "darling"; that there were ups and downs with her; that what worked one day did not work the next; and that her needs changed. [Student]'s educational team met "constantly" to determine the best ways to help [Student] access the general education curriculum.

9. [Fifth Grade Teacher] further credibly testified that [Student] exhibited extreme behaviors in fifth grade: she was suspended because of a physical altercation; she stated she wanted to kill herself and others; she was physical with peers; she grabbed a pair of scissors and threatened the school psychologist; and she ran out into moving traffic. There were times when [Student] would yell and scream, and there were times the school had to send her home. How [Student]'s day began at home often affected how her school day progressed.

10. Parents gave [Student] simple chores to complete before school, which was a source of tension and fights. [Student] was often angry at Parents, and there was stress in the home.

11. Despite her [Treatment Center] stay, [Student] was able to keep up academically, and had 88% attendance in the fifth grade.

12. [Fifth Grade Teacher] and [Student]'s other teachers utilized [Treatment Center]'s recommendations, and were in constant contact with [Mother]. The teachers utilized a behavioral plan that they would adjust accordingly, and used daily "check-ins" and "check-outs" with [Student]. [Elementary School] had a school counselor, a school psychologist, an autism specialist, and a behavioral specialist available to help [Student].

13. Because [Student] had a one-on-one aide, she was able to attend school field trips with her peers, who were generally understanding and accepting of [Student].

<u>Middle School 2012-2015 – 6th through 8th Grades</u>

14. [Special Education Teacher] is a District special education teacher who was [Student]'s special education case manager in sixth through eighth grades.

15. On the first day of sixth grade, [Student] threw herself on the floor and said "I'm going to kill myself." [Special Education Teacher] got her up and told her we "don't do that in middle school."

16. [Special Education Teacher] testified that [Student] is smart, high-functioning, and "concrete." She likes routine and having a quiet place. [Student] had a Behavior Intervention Plan ("BIP") during middle school, which included immediate consequences; redirecting her in the moment; and extra time on a computer if she did well in class, among other things.

17. [Special Education Teacher] further testified that [Student] would bang her head on her desk and hit herself on the head. School personnel would use a therapeutic basket hold when she engaged in these behaviors, which they were trained to use. According to [Special Education Teacher], [Student] was a tough kid to manage, but the school was always able to deal with her behaviors and never sent her home. She would escalate, but [Special Education Teacher] and school staff were able to help her de-

escalate. She was good with peers, loved being at school, and was easy to bond with. Once, she was nominated for "best dancer."

18. [Special Education Teacher] and the school worked with [Student]'s outside providers, including [Psychiatrist] and [Therapist], [Student]'s therapist. [Special Education Teacher] incorporated their recommendations into [Student]'s IEP and BIP. [Student] also worked with a Board Certified Behavior Analyst ("BCBA") at home.

19. [Student] was suspended for an incident in which she developed an elaborate and concrete plan to kill her mother. According to [Special Education Teacher], she "researched the heck out of it," and the plan included dismembering [Mother] and placing her in a trashcan while her father was out of town. The school found the plan and took the threat seriously. [Special Education Teacher] explained that [Student] wanted to kill her mother because her mother would not kill her, and [Student] thought the only way she could be managed was if someone killed her.

20. [Student] threatened to kill [Special Education Teacher]. Despite that fact and the other issues with [Student], [Special Education Teacher] never worried about her safety, and was confident in her and the school's ability to educate [Student]. She testified that she and the school would do whatever it took to serve [Student] educationally, and that the school had "way more significant kids" than [Student].

21. [Special Education Teacher] believes [Student] was successful during middle school, except for the incident in which she was suspended after the threat to her mother. [Special Education Teacher] worked well with her, and believes the school had [Student]'s behaviors well maintained.

22. [Special Education Teacher] was an effective and talented special education teacher, and was committed to [Student].

23. [Special Education Teacher] and [Mother] developed a close friendship. That friendship ended over an incident in which [Mother] asked [Special Education Teacher] to sign a letter to an insurance company that [Father] had drafted seeking insurance coverage for one of [Student]'s placements. The letter included statements that were inaccurate or untrue, such as that [Student] had had a "lot" of suspensions and had been "self-contained" in middle school.

24. In sixth grade, [Student] began researching suicide. She stated that she wanted to kill [Friend], a friend of hers at school with whom she became obsessed. She also ran out of her house with a knife and threatened a group of boys, saying that she was going to kill one of the boys. She told [Special Education Teacher] she had done that to prove to her mother that she did not like boys.

25. [Student] had no placements outside the home during sixth grade. However, she was taken to the [Treatment Center] twice during the summer. A pattern developed where [Student]'s behaviors began to worsen prior to school breaks, and then

significantly deteriorated during school breaks.

26. In seventh grade, [Student] threatened to kill herself and others, became delusional, and researched "suicide without pain." She was placed at the [Treatment Center] three times. At the end of seventh grade, [Student] was placed at [Psychiatric Residential Treatment Center], a psychiatric residential treatment center in [State A]. [Mother] testified that [Student]'s treatment team (which did not include District personnel) did not believe [Student] would be safe in public school at that time. [Student] remained at [Psychiatric Residential Treatment Center] from June through October of 2014; the fall semester of eighth grade.

27. During an eighth grade school dance, [Student] saw her friend [Friend] dancing with someone else and became upset. She had to be removed from the dance in handcuffs by a sheriff. She threatened school staff and received a five day suspension.

28. [Student]'s middle school grades were generally good. Her behavior was better at school than at home.

[High School] – 2015 through 2017

29. In the summer after eighth grade, [Student] was sent to [Residential Treatment Center #2], a residential treatment center in [State B]. She remained there four months; Parents removed [Student] from [Residential Treatment Center #2] due to her being overly medicated, taken to the emergency room, and developing Tardive Dyskinesia.

30. Upon return to Grand Junction, [Student] started ninth grade at [High School] ("[High School]") and was doing better. She was rarely disruptive in class. Parents worked hard to keep [Student] living at home and attending public school due in part to their negative experience with [Residential Treatment Center #2]. They installed video cameras and alarms throughout the house; made extra visits to [Student]'s treatment providers; and developed highly structured schedules for [Student] during breaks.

31. [Paraprofessional] was [Student]'s one-on-one paraprofessional aide. She started in August of 2015, at the beginning of [Student]'s ninth grade year, and remained [Student]'s full time aide through [Student]'s last day in District schools. [Paraprofessional]'s duties were to help [Student] be organized; help her in class; help her get from class to class; and at times help her control her behavior. [Paraprofessional] sat close to [Student] if she needed help, and she sat in the back of the classroom if [Student] did not need as much help.

32. [Paraprofessional] witnessed [Student]'s delusional behaviors. She heard [Student] talk about how [Friend] had implanted a chip in her head and had people following her. She saw [Student] researching articles about placing chips in people's heads.

33. If [Student] thought she saw [Friend] under the stairs (he did not attend [High School]), [Paraprofessional] would take her to look under the stairs. If she thought she saw him in the hall, they would look for him in the hall.

34. According to [Paraprofessional], [Student] never had discipline problems at [High School], and was never placed in the in-school suspension room ("ISS") for discipline. She chose to go to the ISS room because the ISS teacher, [ISS Teacher], was one of the "safe persons" she had chosen to visit when she needed to take a break or de-escalate. [ISS Teacher] did not log [Student]'s visits to the ISS room.

35. [Paraprofessional] did not log where [Student] went throughout the day. If [Student] was frustrated and did not want to do school work or be in the classroom, she and [Paraprofessional] would go to the hallway to talk, or [Paraprofessional] would take her to the ISS room to talk with [ISS Teacher].

36. [Paraprofessional] and [Mother] were in constant communication, texting up to 20 times per day.

37. According to [Paraprofessional], [Student] did well in class and socially, and was keeping up in her classes. She attended school dances and all school assemblies of 1800 students.

38. [Paraprofessional] never called [Mother] to pick [Student] up from school due to her behavior; she never felt unsafe with [Student]; and she would "absolutely" take her back if she came back to [High School].

39. [Case Manager] was [Student]'s high school special education case manager. [Case Manager] credibly testified that in the fall of 10th grade, [Student] was having a tough time, but the majority of her behaviors were occurring outside of school.

40. The District never changed [Student]'s IEP placement when she was at residential treatment centers and psychiatric hospitals. Instead, she was marked as absent. [Case Manager] testified that [High School] staff did not have IEP discussions about [Student] while she was gone, and did not discuss changing her IEP placement to a residential treatment center.

41. [Case Manager] testified that [Student] did not receive Extended School Year ("ESY") services because she did not show academic regression over the summer. Also, her IEP did not call for mental health services because Parents had a private treatment team in place.

42. As [Student] entered puberty, her thinking became more irrational. For example, Parents had bought a cockatiel, and [Student] said that the bird had raised its middle finger at her and did not like her.

43. [Student]'s delusions about [Friend] increased: she believed he was stalking

her, was outside her window, and had agents following her.

44. [Student]'s anxiety increased. Crowds became debilitating to her, and if she saw people talking, she believed they were talking about her. As of the spring of 2016, Parents were no longer able to take [Student] in public. Once, they took a trip to Moab, Utah, and [Student] started screaming at a stranger.

45. In the fall of 2016, the beginning of tenth grade, [Student] believed she saw [Friend] everywhere. She went into a stranger's house looking for him, and the police were called. This event scared Parents, who worried that the stranger could have used a gun when they saw [Student] enter their home.

46. On September 26, 2016, [Student] was admitted to [Psychiatric Hospital], a [City] psychiatric hospital. Exhibit 15 at 348. On October 17, 2016, Parents placed [Student] at the Comprehensive Assessment and Treatment ("CAT") program at the University of [State A] Neuropsychiatric Institute ("[NI]") for a full psychiatric evaluation. The trip there was difficult. At one point [Student] tried to get out of the moving car. In a bathroom during a lunch stop [Student] thought someone was talking about her, but no one was there. She was in a full psychotic state at this point.

47. [Student] remained at [NI] for eight weeks and was discharged on December 16, 2016. Exhibit 7 at 0001 and 0040. While there, [Student] was diagnosed with psychosis, autism spectrum disorder, and Mood Disorder, unspecified. *Id.*

48. [School Nurse], [High School] school nurse, testified that in the second semester of the 2016-2017 school year, [Student] had 46 visits to the nurse's office, some of which were to take her "as needed" medication; [Mother] was called 20 times; and [Student] was sent home nine times.

49. As in middle school, [Student]'s behavior was better at school than at home. There was stress, yelling, and turmoil in the home due to her mental illness, and Parents were worn down and exhausted from dealing with [Student].

50. One of [Student]'s therapists, [Therapist #2], worked with Parents and taught [Mother] how to react in a therapeutic manner. [Therapist #2] testified that Parents went to greater lengths to work with [Student] than any parents she had ever worked with.

51. Despite the home stress, the ALJ finds as fact that [Student]'s most extreme negative behaviors – her suicide threats, threats to harm others, her psychosis, etc., were caused by her mental illness, not by Parents' behavior or by her home life.

<u>May 10, 2017 IEP</u>

52. On April 20, 2017, [Mother] signed a document indicating she had received a copy of the special education procedural safeguards. Exhibit 8 at 179.

53. On May 10, 2017, a triennial IEP meeting was convened. Exhibit 8 at

00182. [Mother] was in attendance and agreed with the IEP teams' decisions, including placement, and signed the IEP.

54. The IEP states that [Student] had an overall attendance of 61.28% for the 2016-2017 school year, and no history of discipline referrals in high school.

55. The IEP attaches and incorporates the full psychological evaluation that was performed by [NI], which shows [Student]'s full scale IQ in the average range, at 98.

56. The primary disabilities listed in [Student]'s IEP are autism spectrum disorder, serious emotional disability, and speech/language impairment. Exhibit 8 at 185 through 187.

57. [Student]'s academic supports and interventions include the following accommodations:

a. An aide is with [Student] throughout the day.
b. She is able to access the resource room as needed throughout her day; sitting close to the instructor; frequent checks for understanding;
c. Weekly locker/back pack check for organizational support;
d. Classwork reorganization;
e. No expectation of homework due to anxiety;
f. Re-teaching/pre-reaching of skills;
g. Extra time;
h. Testing in small group/quiet setting; frequent redirects;
i. Frequent breaks and allow movement and snacks throughout the day;
j. Notes provided as needed/graphic organizers/visual schedules;
k. Shortened class time to deal with fatigue and lack of focus;
l. Essential learnings taught – focus on content not quality of work completed;
m. Accountability, highly structured support, and concrete visual aids. Exhibit 8 at 0184.

58. The IEP includes social/emotional goals and communication goals. It calls for [Student] to receive 215 minutes weekly direct support in academic access outside the general education classroom; 215 minutes weekly of direct support in math outside the general education classroom; and 90 minutes monthly of direct speech support outside the general education classroom. *Id.*

59. [Student]'s grades as of the May 2017 IEP were the following:

n. Art: A
o. Comp/Lit 10B: C
p. Pre Math 1B: C
q. Study Skills: A+
r. Food Science 1: C+
s. World Hist Modern B

t. Biology B: C+

60. Her cumulative grade point average was 2.52. *Id.*

61. The IEP narrative includes the following statements:

> [[Student]] did spend the entire 2nd quarter at a facility in [State A] getting treatment for her emotional needs. The needs were very high and interfering with [[Student]] being able to function within any setting. When [[Student]] returned, she was very excited to be back at school and to be around her friends.
>
> Academically, [[Student]] does very well. Last year, [[Student]] had mostly all A's and B's with only a couple C's on her transcript. [[Student]] lost some partial credits when she was gone for a quarter, but since she is in 'good shape' academically. It will not hurt her chances of graduating when she should.
>
> Emotionally, [[Student]] struggles with many different areas and issues while in and out of school . . . [h]er hallucinations and paranoias are interfering with her being able to function well at school and outside school.
>
> [[Student]]'s] mother is an excellent resource to the school, and it is important to maintain frequent communication with her to align with what the school is doing, therapists, and home. She has a team of outside people that work with her including a private counselor, home behavior therapists, and [Psychiatrist]. These are excellent resources that should be included when working with [[Student]]
>
> If she continues to escalate, runs, threatens harm to herself or others, parents should be called, police, and admin. If [[Student]] is doing harm to herself or another person she may be restrained by trained personnel in extreme cases only.
>
> Recently, [[Student]] has had significant issues with abdominal pain and nausea that have led to her spending time in the health office and going home at times.
>
> Mom reports that they have been very happy with all that we have been trying to achieve for their daughter. Mom reports that the school has always been very responsive when a problem has arisen. They have been happy with all that we have been doing. Exhibit 8 at 193-198.

62. The IEP does not include a BIP or ESY services. Exhibit 8 at 0199 and 202. It does not include mental health services.

63. Concerning the Least Restrictive Environment ("LRE"), [Student] is in the general education classroom 40-79% of the time. *Id.* at 0205.

64. Parents believe the May 2017 IEP was appropriate for [Student] as of the date of the IEP meeting, but that it was no longer appropriate or providing FAPE after her suicide attempt.

65. The District believes the May 2017 IEP was and is appropriate for [Student], and it is the District's current offer of FAPE.

Summer and Fall of 2017

66. [Student]'s behavior further declined during the spring and summer of 2017. During the summer of 2017 [Student] was volatile and oppositional. She would sneak onto dating websites and contact men. She was not able to be in public. She had delusions that [Friend] was everywhere and was following her. She ran away from home. She stole $200 from her mother.

67. Parents had hired a home aide, [Home Aide], to help with [Student] starting in 2012. She originally worked with [Student] two days per week. That summer, [Student]'s deteriorating behavior necessitated [Home Aide]'s presence seven days a week; Parents then had to hire a second home aide to help maintain [Student]. [Mother] and the home aides created a highly structured schedule in an attempt to keep [Student] from declining. Several of [Student]'s treatment providers testified they had never seen a family go to the lengths Parents did to try to help [Student].

68. [Home Aide] credibly testified that [Student] had a pattern of ups and downs, but that her bad behaviors were more frequent and worse in the summer of 2017, to the point where [Home Aide] was no longer able to take [Student] to the movies (which she had been able to do in the past) because [Student]'s psychosis got "so bad."

69. [Student] was admitted to [Psychiatric Hospital] for ten days in July of 2017. Parents were hoping that school starting on August 16 would help [Student] stabilize.

70. On August 17, 2017, [Student] arrived at school "very upset" and spent an hour in a conference room calming down with [Paraprofessional]. Exhibit 26 at 0021.

71. On August 18, 2017, [Student] was not compliant with her mother at home. She was not feeling well, felt like throwing up, and spent time in the school health office. *Id.* at 0023, 0024, and 0028.

72. August 24, 2017 was [Student]'s last day at [High School]. [Case Manager] emailed [Paraprofessional] that [Student] "sat and did nothing the entire [art] period. Everytime I suggested getting out work, she refused." Exhibit 26 at 0061.

73. That afternoon, [Mother] took [Student] to see [Therapist #2], which calmed

[Student].

74. Later that day, Parents were talking about the possibility of a therapeutic boarding school for [Student] and she overheard the conversation. She found her bottle of Xanax and swallowed the entire bottle of pills. Her father was unable to rouse her and called 911. [Student] left a suicide note in which she wrote that people would be better off if she were dead.

75. [Student] was taken to the emergency room, and then, because she was determined to be in danger of hurting herself or others, she was taken back to [NI].

76. On August 25, 2017, [Case Manager] emailed [Mother] and said "[Paraprofessional] is keeping me updated. I just wanted you [to] know that I was thinking about your [sic] guys. I am guessing that [facility] is going to happen too. I know that you guys will do what you need to make sure that she gets help she needs." Exhibit 26 at 0066.

77. On August 31, 2017, [Mother] sent the following email to [Paraprofessional]:

> Hi sweetie. [[Student]] is still struggling. We are investigating therapeutic boarding schools but nothing is definite yet. Please ask [Case Manager] for a copy of her transcripts with the credits she has completed and what she needs to graduate. I can pick it up in the office when they are ready. *Id.* at 0073.

78. On September 1, 2017, [Case Manager] sent [Mother] [Student]'s transcripts, IEP information, and "the files that any school would request and want to understand [[Student]]. *Id.* at 0085.

79. [Student] remained at [NI] for 23 days. At that point, [NI] staff told Parents [Student] would not be safe at home or at school, and needed to be placed in a highly specialized setting. [Residential Treatment Center] ("[Residential Treatment Center]") was recommended but did not have a bed available, so Parents placed [Student] at [Residential Program], a residential program in [City C], [State A], on September 18, 2017.

80. On September 22, 2017, [Case Manager] wrote [Mother] that "I have been wondering about [[Student]]. How are things going? [Paraprofessional] said that she is at a therapeutic boarding school. How long is she looking to be there? I hope that it is fitting her needs." *Id.* at 0090.

81. [Mother] responded "I don't have any idea. She is still struggling and may have to return to the hospital. We take it day by day, but we are both extremely concerned because she has never been this bad." *Id.* at 0091. [Case Manager] wrote back: "It makes me sad that she is struggling so much. At least, she is in a location that is better equipped to help her. I hope she doesn't return to the hospital, but she needs to be where she is getting the proper help." *Id.* at 0092.

82. A bed opened up at [Residential Treatment Center], and on September 26, 2017, [Student] was admitted. She remained there up through the date of hearing.

83. Parents did not consult with the District about placing [Student] at [Residential Treatment Center] prior to doing so.

84. The ALJ finds as fact that Parents did not place [Student] at [Residential Treatment Center] out of a desire for respite care, but in order to abide by [NI]'s recommendation and to keep her safe.

85. Parents requested insurance coverage of [Student]'s stay at [Residential Treatment Center], and were denied.

86. On October 4, 2017, [Case Manager] moved [Paraprofessional] to another position, but emailed District staff and [Paraprofessional] that "when [[Student]] returns [Paraprofessional] MUST come back to me! [[Student]] is not stable and she would be significantly less stable without [Paraprofessional]. I have asked the family to give us a few weeks 'heads up' when [[Student]] is going to return." *Id.* at 94 (emphasis in original).

87. On October 4, 2017, [Case Manager] informed [Mother] that "I have to withdraw [[Student]] because legally she cannot be enrolled in two different schools. So when she returns then we will need to reenroll her into school and accept the credits she is working on in her other location." *Id.* at 0096.

88. On October 4, 2017, Parents sent an email to the District seeking tuition reimbursement for [Residential Treatment Center]. The letter stated in pertinent part:

> At this time, we would politely request that the Mesa County School District 51 contribute an appropriate amount, not less than the cost of her aide and support they receive for her from public funds, to help fund her stay at [Residential Treatment Center], and its [RTC School]. According to our providers it is likely that this may be necessary for the next one to two years, until she is ready for graduation. This school has been selected by her entire team of providers as the most appropriate place for her to continue her education and they are in unanimous agreement that she cannot be adequately schooled at [High School] any longer . . . we all feel that if she returns to [High School] that the lack of specialized care that she needs will likely result in another suicide attempt and that she will never complete her high school education. *Id.* at 0099.

89. On October 5, 2017, [Executive Director], Ed.S., Executive Director of Student Services, acknowledged Parents' email and requested a few days to review [Student]'s records, speak with the [High School] special education coordinator, and get back with Parents. *Id.* at 0103.

90. On October 12, 2017, Parents emailed [Executive Director]:

> Good morning [Executive Director], it has been a week since our first communication. Do you have the information you need, so that we can have a have to face meeting to discuss [[Student]'s] educational needs? We look forward to hearing from you soon, so that we can get [[Student]'s] educational needs met. *Id.* at 0109.

91. Later that day, [Executive Director] responded in pertinent part:

> The team at [High School] feels that [[Student]] is successful when she is at school and appears to like school. Even with the large number of days she missed in the fall of 2016, her GPA is 2.719 and she continues to be on track to meet the requirements for graduation. District #51 has offered and provided a Free and Appropriate Education (FAPE) and is ready willing and able to continue to provide those services for your child when she returns to school. At this time District 51 denies to pay for any costs associated with [[Student]'s] placement at [Residential Treatment Center]. If you would like to discuss any change in her IEP services, please contact [High School Special Education Coordinator] or her case manager at [High School] to schedule an IEP meeting. *Id.* at 0110.

92. Parents emailed [Executive Director] back, disagreeing with her decision, stating "although her prior GPA and other issues do not reflect it, the truth is that at this time, she is unable to be educated any longer at [High School]. As a child with the [Syndrome], she is much worse than before and she needs a very low ratio of teachers to students, much lower than at Mesa County school. Her mental disturbance is now much worse, and she requires a specialized school that can address her autism and psychosis at the same time as educating her. This cannot take place at any school in Mesa county." *Id.* at 0111.

93. On October 24, 2017, [Executive Director] reviewed and denied Parents' request for reconsideration. She re-iterated that District 51 offered and provided FAPE and is "ready, willing, and able to continue to provide those services when [Student] returns to school." *Id.* at 113. She instructed them to contact [High School Special Education Coordinator], the High School special education coordinator, if they wished to discuss changes to [Student]'s IEP services or supports, and to schedule an IEP meeting. *Id.*

94. On November 2, 2017, Parents wrote [Executive Director]: "We request a new IEP but will have to wait until we have all our documents and personnel ready for the next meeting. This will be in the next week or two." *Id.* at 0114.

95. On November 9, 2017, Parents wrote to [Case Manager]:

> [[Student]] continues to struggle and would not be safe here in Grand Junction at the moment. [Residential Treatment Center] is a school,

> and is the educational placement that we are requesting the district to support. While the district has so far declined, we are requesting an IEP meeting to discuss this placement. However, please note that we are not un-enrolling [[Student]] from the district, as we believe this is the placement the district should support. We respectfully request this meeting after the Thanksgiving Holiday to give ample notice to all those who need to attend. Please also forward to [High School Special Education Coordinator] if required. *Id.* at 0116.

96. On November 17, 2017, [Executive Director] responded to Parents, writing in part:

> After reviewing [[Student]'s] IEP and gathering information from our staff, we are confident that she received an appropriate educational placement and services at [High School] ([High School]), and that the school staff faithfully implemented her IEP during her attendance. Although we understand and appreciate your deep concern regarding your daughter's safety and well-being, we have no reason to believe that her school environment or instructional placement would place her at risk.
>
> It is our understanding that [[Student]] was hospitalized in August 2017 for medical/mental health reasons that arose outside the school setting. After she was discharged, you elected to enroll her at [Residential Treatment Center]/ [RTC School], a private school in [State A]. We did not arrange or authorize this placement, and did not learn of it until the school received your letter dated October 1, 2017, which states you placed her at that school on September 26, 2017. On October 10, 2017, the school processed [[Student]'s] withdrawal from [High School] based on your letter. We did not retain [[Student]] as an enrolled pupil because by then it was clear she would not resume attendance at any of our schools or programs on account of her enrollment at [Residential Treatment Center]/ [RTC School]. It is our school district's practice and policy to withdraw a student who is no longer attending upon receipt of reliable information that the student has left and has enrolled at another school.
>
> We wish [[Student]] well at [Residential Treatment Center]/[RTC School]. <u>However, we must respectfully decline your request for an IEP meeting to discuss her placement at that school, because under the circumstances we are not responsible for her education there. In all candor, we do not believe the IEP team process is properly invoked, given that [[Student]] is no longer an enrolled student and the evident purpose of your request is simply to renew your plea that the school district bear some or all of the cost of the private school placement you have already made unilaterally</u>. As we have indicated previously, the school district will not offer financial assistance for such placement.

> <u>If and when you decide to withdraw [[Student]] from her current school and re-enroll her at [High School] or other District School, we will certainly re-evaluate her (with your consent) and conduct an IEP meeting</u> to consider information from her current school and updated medical information to determine what placement, services and accommodations she needs at that time. Please contact me when [[Student]] returns to Grand Junction so we can schedule these important steps. *Id.* at 0124 (emphasis added).

97. Parents responded that "we do not agree with your decision to unilaterally deny the IEP we requested and do not agree that you are not responsible for her education. You yourself offered us an IEP and we did request it. You then denied it …" *Id.* at 0125.

98. The last correspondence between Parents and the District occurred on November 30, 2017, when [Executive Director] wrote an email that Parents testified they never received. That email states in full:

> I have reviewed my October email correspondence to you. My statements that you could request an IEP meeting to discuss changes to [[Student]'s] IEP services and supports were made in the context of my assurances to you that the District is ready, willing and able to provide [Student] with an appropriate educational program and services <u>upon her return to school here</u>. I apologize if either of those emails was not clear on this point. However, I believe those emails, like my November 17 email, made our position regarding your request that the District fund [[Student]'s] current educational placement in [State A] abundantly clear. Your dissent from that position is noted. We have previously provided you with a notice explaining the procedural safeguards available to you. Please advise if you would like us to send you another copy. *Id.* at 0127 (emphasis added).

99. [District Special Education Coordinator] is the District Special Education Coordinator and coordinated the response to Parents' request for tuition reimbursement for [Executive Director]. Upon their request, [District Special Education Coordinator] consulted with [High School Special Education Coordinator], who spoke with [Student]'s teachers. [District Special Education Coordinator] asked [Student]'s teachers if they felt they could continue to serve [Student], and none of them had any reservations whatsoever about their ability to do so.

100. [District Special Education Coordinator] explained that [Student] had had a lot of out of school placements that she always returned from, and the school had always been able to serve her upon her return. According to [District Special Education Coordinator], the only thing Parents said in their request for reimbursement was that [Student] was going to commit suicide, and everyone – her teachers and staff – felt strongly that they had been seeing this behavior for years with [Student] and had always been successful with her in the past. [Student]'s teachers felt "blind-sided" by Parents.

101. [District Special Education Coordinator] testified that what happened to [Student] was a psychiatric crisis, and that her educational needs did not cause that crisis; nor was the crisis educational in nature.

102. [District Special Education Coordinator] testified that she and [Executive Director] discussed that convening an IEP meeting would be futile; Parents had made it very clear, and it was "unanimous" to them, that [Student] could not be educated in Mesa County. [District Special Education Coordinator] was convinced that Parents only wanted an IEP meeting in order to bring in experts to tell the District what to do, and that they not want to actually discuss IEP services. Also, since [Residential Treatment Center] was implementing the District's IEP, [District Special Education Coordinator] did not know what there would be to discuss at an IEP meeting. Therefore, the District did not believe an IEP meeting had been properly invoked.

103. [District Special Education Coordinator] testified that futility could be a reason to turn down a request for an IEP meeting.

104. When asked if she thought the IDEA stated a district is not required to have an IEP meeting just because parents have a choice of placement, [District Special Education Coordinator] answered that it was futile.

105. [District Special Education Coordinator] testified that if Parents had stated that they had new information, the District would have looked at that. She explained that the District has a continuum of services, but was not given an opportunity to look at [Student]'s records.[1] There is no evidence in the record that the District requested [Student]'s medical records upon receiving Parents' request for an IEP meeting or upon receiving their request for tuition reimbursement.[2]

106. [District Special Education Coordinator] further testified that if Parents had asked for an IEP meeting prior to placing [Student] at [Residential Treatment Center], the District would have convened a meeting.

107. [District Special Education Coordinator] explained that there is a locked-down therapeutic day program in the school district with security cameras and a full time school resource officer. The District also contracts with [facility] in Grand Junction. If students cannot be successful at therapeutic day programs, the District can recommend placement at a residential treatment center. The District has contracts with residential treatment centers and various payment options (other than parents). The District currently has 18 students placed in residential treatment centers for which the District is paying. [District Special Education Coordinator] explained that when the District cannot separate student's mental health and their education, they will use a residential treatment center. None of these placements were offered to Parents.

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[1] The ALJ assumes [District Special Education Coordinator] meant the District was not given an opportunity to review [Student]'s medical records from [NI].

[2] The District, through counsel, requested [Student]'s medical records in preparation for this due process hearing.

108. The only placement that was offered to [Student] on the May 2017 IEP was [High School].

[Residential Treatment Center]/ [RTC School]

109. [Residential Treatment Center] ("[Residential Treatment Center]") is a licensed residential treatment center in [City B], [State A]. Although it is not a locked facility, there is trained staff present at all times with 24-hour line of sight of the residents. [Residential Treatment Center] utilizes four levels of physical restraints, and has used all four on [Student].

110. One of [Residential Treatment Center]'s exclusion criteria is a persistent intent to harm others.

111. [RTC School] is [Residential Treatment Center]'s affiliate school. It is an accredited private school that follows [State A]'s core curriculum and standards. It is an unlocked, open campus. It is not located on [Residential Treatment Center]'s campus, but is nearby. [Student] takes a bus to school every day.

112. [Special Education Administrator] is [RTC School]'s special education administrator. She has a bachelor's degree in special education from the University of Utah and is finishing a master's degree in special education. At hearing she was deemed an expert in adolescent behavioral issues and special education issues.

113. [Special Education Administrator] testified that [RTC School] currently has 41 students. The primary diagnoses of the students are autism, borderline personality disorder, PTSD, anxiety, major depression, and schizophrenia. Most students have dual diagnoses. The school meets for five and half hours, five days per week, year round except for a three week summer break.

114. [RTC School] employs nine teachers. Four teachers have teaching certificates; two teachers are certified in special education. The average class size is six students and the maximum class size is eight. [Student] is not in class with a special education teacher.

115. [RTC School] attempts to provide as normal a high school experience as possible by having field trips, dances, a leadership council, spirit week, and guest speakers.

116. [Special Education Administrator] testified that [Residential Treatment Center]/ [RTC School] provides "wrap-around care." [RTC School] staff meet with each [Residential Treatment Center] "house" once a month to discuss how each student is doing at home. Therapists conduct school staff training monthly, but meet with school staff informally almost daily. In the morning, the [Residential Treatment Center] house staff update the school staff about how each student was doing at home. Similarly, at the end of the day, the school staff updates the house staff. [Residential Treatment Center] utilizes a behavior based point system. [RTC School] and [Residential Treatment Center] collaborate daily concerning the students' points, goals, and needs.

117. In [Special Education Administrator]'s expert opinion, [Student]'s educational needs cannot be met without also addressing her mental health issues.

118. Educationally, [RTC School] is implementing [Student]'s May 2017 IEP.

119. [RTC Therapist] is a [Residential Treatment Center] therapist. She has a master's degree in educational psychology, with a specialty in working with kids with Autism.

120. [RTC Therapist] leads therapy groups, staff trainings, and staff meetings, and collaborates with [RTC School]. She meets with school staff to discuss how to support students.

121. [Residential Treatment Center] and [RTC Therapist] developed a master treatment plan for [Student] upon her admission. The plan has seven goals, including individual and family therapy; dealing with her emotions; social skills; adaptive skill functioning; and school goals.

122. [Student] receives weekly individual therapy and family therapy, which Parents participate in through Skype. She participates in group therapy three times weekly.

123. It is [RTC Therapist]'s professional opinion that [Student]'s educational needs cannot be met without also addressing her mental health needs, due in large part to the fact that when emotions are running high, executive functioning skills are limited. Those executive functioning skills are necessary to be able to function in school.

124. [Residential Treatment Center]/ [RTC School]'s monthly tuition is approximately $10,675.

Expert Witness – [Child Psychiatry Expert], M.D.

125. [Child Psychiatry Expert] received her medical degree from Johns Hopkins University and is currently an Associate Professor of Child and Adolescent Psychiatry at the Johns Hopkins University School of Medicine. She is also the Medical Director and attending child psychiatrist of the Neurobehavioral Unit of the Kennedy Krieger Institute, a nonprofit affiliate of Johns Hopkins that provides inpatient and outpatient mental health services in Baltimore. [Child Psychiatry Expert] is board certified in child and adolescent psychiatry. Exhibit 1. She was one of Parents' expert witnesses.

126. [Child Psychiatry Expert] has worked with hundreds of children who have symptoms like [Student]'s.

127. At hearing, [Child Psychiatry Expert] was deemed an expert in child psychiatry, autism, and mental illness in adolescents.

128. [Child Psychiatry Expert] reviewed [Student]'s May 2017 IEP; her psychiatric and medical records; and notes from [Residential Treatment Center]. She interviewed Parents as well as [Residential Treatment Center] and [RTC School] staff and teachers. She visited [Residential Treatment Center] on February 22 through 24, 2018. While there, she conducted a therapeutic interview of [Student] and observed her at school and at a dance. [Child Psychiatry Expert] did not review [Student]'s [High School]

records or speak with anyone from the District. She did not observe [Student] in public school.

129. According to [Child Psychiatry Expert], [Student] meets the DSM-5 criteria for major depressive disorder with both psychotic and catatonic features. The term "[Syndrome]" is a way of understanding [Student]'s unique disease presentation. "[Syndrome]" is identified when an individual has diagnoses of autism, psychosis and catatonia; the theory being it is more effective to treat those three disorders together. [Child Psychiatry Expert] would add a fourth prong of anxiety to [Student]'s [Syndrome] description, due to her extreme anxiety. [Syndrome] is not DSM-5 diagnosis.

130. In [Child Psychiatry Expert]'s expert opinion, [Student]'s mental health needs and educational needs are intertwined. She opined that [Student] is currently at high risk of having suicidal impulses based on her diagnoses and past behavior.

131. In [Child Psychiatry Expert]'s expert opinion, since [Student]'s decline in the summer and fall of 2017, she would rapidly deteriorate in a regular high school; she is not ready to go back to high school; and would only last at best days, if not hours, in a regular general education classroom. [Child Psychiatry Expert] opined that further damage would happen if [Student] kept moving from school to home to hospital and back to school again.

132. In [Child Psychiatry Expert]'s opinion, [Student] is significant risk of harming others in public school.

133. [Child Psychiatry Expert] opined that the May 2017 IEP would have been educationally appropriate if [Student] had remained stable throughout the fall of 2017, but that was not the case.

134. [Child Psychiatry Expert] opined that [Student] can be safely and effectively educated at [Residential Treatment Center] and that it is an appropriate placement for her to access education. She explained that at [Residential Treatment Center], the mental health goals are paramount because the only way the students are able to meet their educational goals is if they first receive mental health help.

135. In a written opinion, [Child Psychiatry Expert] stated that "[w]orking with [Student], and educating her, is like walking on eggshells. . . if she is not educated in an appropriate setting, she is incapable of learning to her academic capacity, and is at high risk of severe psychiatric decompensation." Exhibit 2 at 0006.

136. She continued:

> I have worked over the past 15 years with hundreds of children like [[Student]], and cannot imagine that she can receive an education commensurate with her ability, and function safely and appropriately in a regular high school classroom. Regardless of IQ, an autistic child with additional severe affective, psychotic, catatonic and anxious pathology is a very delicate individual who most certainly is only going to function safely and optimally in a therapeutic educational setting. [Student] has

> demonstrated herself at [RTC School] that she can learn and function in a therapeutic setting, after repeatedly demonstrating that she can neither learn nor function in a regular public school setting. *Id.* at 0009.

<u>Expert Witnesses – [Therapist #2]</u>

137. [Therapist #2] also testified for Parents. She has a master's degree in psychology, is a licensed professional counselor, and is a board certified behavior analyst ("BCBA"). She specializes in children and adolescents with autism, and has treated over 100 patients with autism. She has 30 years' experience working with children who have mental illness. At hearing, [Therapist #2] was deemed an expert in adolescent behavioral issues, and the proper diagnosis and educational placement for those adolescents.

138. [Student] has been a counseling client of [Therapist #2]'s since late 2014.

139. [Therapist #2] reviewed [Student]'s [Residential Treatment Center] records; her psychiatric records; the May 2017 IEP; and notes from [NI].

140. According to [Therapist #2], [Student] was doing very well at [High School] for quite a while. She had supports in place and a one-on-one aide.

141. [Student] was the best [Therapist #2] had seen her when she returned home from her first admission at [NI], in October of 2016. [Therapist #2] testified that prior to [NI], [Student] had paranoia and delusions. After [NI] her affect/mood was much more stable. She was able to focus on understanding that some of the things she believed were probably not true.

142. According to [Therapist #2], [Student]'s improvement lasted until she started deteriorating in June of 2017. At that point, her mood was more unstable and she was increasingly paranoid about [Friend]. In July of 2017 she was anxious about school starting. She was increasingly paranoid and less cooperative. Her therapy sessions increased.

143. [Therapist #2] testified that [Student]'s delusions increased. She would say she did not deserve to love, and she drew a picture of herself being stabbed. It got to where there was someone with her at all waking hours, and she could not go out in public at all.

144. [Therapist #2] and [Mother] kept [Student] on a level system that summer. She would escalate, yell, and threaten her mother.

145. According to [Therapist #2], [Student] did not want to start school that fall and was anxious about it, particularly the social aspect of school. In early August 2017 [Student] was more anxious and more paranoid about [Friend]. She was deteriorating. She believed she saw [Friend] following her to school, and would not believe people when they told her he was not there.

146. After [Student]'s suicide attempt in August of 2017 [Therapist #2] visited her

in the hospital. [Therapist #2] opined that [Student] could not have come home from the hospital and gone to [High School] – she was still suicidal and needed further placement. She was not stable.

147. [Therapist #2]'s opinion is that [Student] is complex. Her set of disorders is unusual and difficult, and [Therapist #2] has only seen three children with [Syndrome] in her 30 year career. In [Therapist #2]'s opinion, the complex nature of her mental illness keeps [Student] from being successful, not her autism.

148. [Therapist #2] does not believe that [Student] could be stabilized at [High School], or that a therapeutic milieu like [Residential Treatment Center]'s can be replicated there. She believes [Student] could be stable for a while, but unable to maintain that stability. The problems for [Student] at [High School] would be her impulsivity; her perceived threat of danger; her lack of anger management skills; and her delusional state.

149. [Therapist #2] believes [Student] has potential for violence at school and that there may be times where others would not have enough warning before [Student] became violent. She does think [Student] could get violent at school.

150. [Therapist #2] only knows about [Residential Treatment Center]/ [RTC School] from what she has seen on the Internet, but in her opinion [Residential Treatment Center] is an excellent placement for [Student].

<u>Expert Witnesses – [Psychiatrist]</u>

151. [Psychiatrist], M.D. was another of Parents' expert witnesses. He is a child and adolescent psychiatrist and is board certified in general psychiatry and child and adolescent psychiatry. He has worked with thousands of children with mental illness and hundreds with autism. [Psychiatrist] has been [Student]'s outpatient psychiatrist since 2011. At hearing he was deemed an expert in child psychiatry and mental illness in adolescents.

152. [Psychiatrist] testified that [Student] had trouble regulating her mood and anxiety from a very early age. In at least second grade she started getting worse. Later, with adolescence approaching, she struggled more and more with mood, anxiety and autism-related issues.

153. [Psychiatrist] opined that [Student] has emotional reactivity: she overreacts and interprets situations from a very difficult perspective. She fixates on things. She is very preoccupied with dating. Her depression and anxiety about dating worsened in adolescence. Her depressive episodes became longer and deeper. [Psychiatrist] witnessed [Student]'s psychosis developing. He explained that she has always struggled understanding the social world and that her reality testing was not good. She started developing paranoia. She thought people were stalking her, and that [Friend] was out to harm her, kill her, or was in love with her.

154. [Student] thought others were referring to her and laughing at her, leading to public outbursts. She had to leave public places. [Psychiatrist] explained that a delusion is a fixed false belief, and that persons experiencing delusions cannot be reasoned with. [Student]'s delusions were always present; there might be days she did not express them, but they were always there.

155. [Student] was extremely complex compared to [Psychiatrist]'s other patients. She ranked in the top five of the most difficult patients he has treated; possibly the top most difficult. He never knew how she would behave in his 30 minutes sessions with her. She would interpret something badly and would just change and become angry and irrational in an instant. Sometimes she could calm down and other times she could not. She has very impaired thinking.

156. [Psychiatrist] testified that from April to June of 2017 [Student]'s paranoia was getting worse, but she was better able to hide it which was an added concern. She could "go off" at any moment. The decline continued throughout the summer.

157. In [Psychiatrist]'s expert opinion, [Student] could not return to [High School] after leaving the hospital after her suicide attempt, due to the stress of public school life; the safety of others; and her psychotic state – she wanted to kill [Friend].

158. In [Psychiatrist]'s opinion, [High School] is not a suitable placement for [Student] from the date of her suicide attempt to the present. Parents' extensive efforts to keep her in the community were unsuccessful. Her disability affects her ability to adjust to a large public school in that she is a person at high risk of being taken advantage of sexually and emotionally, due to her preoccupation with dating and relationships.

159. In [Psychiatrist]'s opinion, it is a terrible practice to have [Student] in and out of [High School] and hospitals; it is a roller-coaster approach that does not work. That practice increases chaos for her already chaotic thought life, and adds to her instability. In his opinion, [Student] needs to be in a stable placement, and [Residential Treatment Center] is an appropriate placement for her.

160. In [Psychiatrist]'s opinion, [Student] is unable to maintain in the community. He believes the level of services Parents provided were similar to an outpatient, community based treatment model. In 26 years, he had never seen a family provide the level of services that Parents provided – and it still did not work.

161. In [Psychiatrist]'s option, "it would be a joke" to separate [Student]'s educational needs from her mental/emotional needs.

162. [Psychiatrist] based his opinions on his outpatient treatment of her; his treatment of her at the [Treatment Center], where he is Medical Director, and his interaction with the family during her crises. He did not meet with [Residential Treatment Center]/ [RTC School] staff or with District staff. It is not known if he reviewed [Student]'s IEP.

Expert Witnesses – [Autism Expert]

163. [Autism Expert], Ph.D was the District's expert witness. [Autism Expert] received her Ph.D from Vanderbilt University in Child Psychology. She is a clinical child psychologist specializing in autism disorders and anxiety in people with autism. [Autism Expert] is a tenured professor at Colorado State University. At hearing she was deemed an expert in autism and mental health concerns relating to anxiety, depression, and psychosis, as well as educational practices with dual diagnosis patients.

164. [Autism Expert] reviewed [Student]'s medical and school records. She visited [High School] and met with [Case Manager], [Special Education Teacher], [ISS Teacher], [School Psychologist], the school psychologist, and [District Special Education Coordinator]. She did not meet with [Student], Parents, [Residential Treatment Center] or [RTC School] staff. There is no evidence in the record that [Autism Expert] has ever actually seen [Student].

165. [Autism Expert] questioned the diagnosis of catatonia. She has been on treatment teams of children who had catatonia, and [Student] did not have the loss of motor skills and the frequent freezing like the children she has treated. Moreover, ECT and a thorough neurological assessment are required when catatonia is diagnosed, and it did not appear to [Autism Expert] that either of these had been done for [Student].

166. [Autism Expert]'s opinion was that [Student]'s symptoms presented as cyclical as opposed to a downward spiral. A pattern with [Student] is that lack of structure is an antecedent to her stressors and to her experiencing strong anxiety. When she is not engaged in structure she is more vulnerable. Moreover, autistic children do not handle transitions well. Thus, [Student]'s behavior deteriorates the closer she gets to school breaks and immediately following breaks. For example, Exhibit ZZZ-1, [Elementary School] and [High School] school calendars, demonstrates that pattern. [Student]'s residential treatment center and psychiatric hospitalizations increase the closer it gets to winter or summer breaks, and upon return from breaks. She then stabilizes and maintains for longer periods when breaks are not upcoming.

167. In [Autism Expert]'s opinion, [Student]'s challenges were impacting her medical well-being, but when she was at school, she was "making it" – i.e. [Student]'s mental health issues did not impact her educationally while she was at school.

168. According to [Autism Expert], the threat of being sent away can be very difficult for a person like [Student], particularly the anticipatory anxiety and loss of control. She sees a threat even when there is not one there, and the threat of being sent away can precipitate a crisis.

169. [Autism Expert] does not believe [Residential Treatment Center] is an appropriate placement for [Student]. She explained that [Residential Treatment Center] uses "response cost procedures," where students lose points for bad behavior. She testified that the literature shows people who suffer from anxiety do not do well with

response cost procedures: they preoccupy with the points and self-sabotage the points to get rid of the anxiety.

170. [Autism Expert] believes [Residential Treatment Center] is not the least restrictive environment for [Student] and that it is exacerbating her symptoms. She is not being educated with typical peers, which she needs in order to have access to models. At [High School], in comparison, she was with on-disabled peers 75% of the time. Also, [Student] was restrained nine times from October of 2017 through March of 2017; whereas she was only restrained twice in District schools. She has been aggressive toward peers three times at [Residential Treatment Center] and [Autism Expert] did not see that she had been aggressive to peers in District schools.

171. According to [Autism Expert], [Residential Treatment Center] is not performing a functional assessment of [Student]'s behaviors, which should be done in order to tailor interventions. She is concerned that no functional assessment has been done. However, [Autism Expert] has never met or spoken with [Residential Treatment Center] staff.

172. [Autism Expert] testified that [Student] meets [Residential Treatment Center]'s exclusion criteria. [Residential Treatment Center] is not a medical facility and their literature states they should not be a placement for a medically complex person. [Autism Expert] explained that If [Child Psychiatry Expert] diagnosed [Student] with catatonia, then she needs to be in a medical facility.

173. It was concerning to [Autism Expert] that there was only one certified special education teacher at [RTC School], and that [Residential Treatment Center] and [RTC School] have a more “reactive” approach to [Student].

174. [Autism Expert] testified that there are places that could have been made available to [Student] prior to [Residential Treatment Center] and that there are less restrictive alternatives in Colorado, such as Children's Hospital in Denver, and a day treatment center in Grand Junction.

175. The placements [Autism Expert] referred to were never offered to Parents.

176. In response to a cross-examination question about [NI] recommending [Residential Treatment Center] to Parents upon [Student]'s discharge after her suicide attempt, [Autism Expert] testified that if a treatment facility such as [NI] says it recommends the best place for your child, you should evaluate that placement.

177. The ALJ finds that [Psychiatrist]'s, [Therapist #2]'s, and [Child Psychiatry Expert]'s expert opinions are more persuasive than [Autism Expert]'s. [Psychiatrist], [Therapist #2], and [Child Psychiatry Expert] have all met with, treated, and/or examined [Student], whereas [Autism Expert] has not, nor is there any evidence that [Autism Expert] has ever even seen [Student]. [Psychiatrist] has known and treated [Student] since 2011, and has a longitudinal and extensive history of working with her and witnessing her

decline. Similarly, [Therapist #2] has worked with [Student] since 2014, and worked intensively with her during the summer of 2017 during her decline, engaging in up to four weekly therapy sessions with her. In contrast, [Autism Expert] has never observed, evaluated, or diagnosed [Student]. [Autism Expert] is not a medical doctor, and therefore is unable to make a diagnosis or credibly question [Child Psychiatry Expert]'s medical opinions. [Psychiatrist] and [Therapist #2]'s expert opinions are persuasive due to their extensive experience and history with [Student].

178. [RTC Therapist]'s professional opinion was also persuasive because of her extensive work in individual therapy with [Student] since she has been at [Residential Treatment Center]. The ALJ finds, based on [RTC Therapist]'s testimony, that when [Student]'s emotions are running high, her executive functioning skills are limited, and that limitation negatively affects her ability to access education.

179. The ALJ finds [Psychiatrist]'s opinion that [Student]'s educational and mental health needs can cannot be separated persuasive due to his extensive knowledge and experience working with [Student]. The ALJ agrees with [Psychiatrist], [Child Psychiatry Expert], and [RTC Therapist] and finds that unless [Student]'s mental health needs are met, she cannot access education.

180. Concerning whether [Residential Treatment Center] is an appropriate placement for [Student], the ALJ finds [Child Psychiatry Expert]'s opinion that it is an appropriate placement more persuasive than [Autism Expert]'s opinion that it is not. [Child Psychiatry Expert] visited [Residential Treatment Center] for three days. She met with staff and observed [Student] in school and at a social function. She has worked with "hundreds" of kids just like [Student]. There is no evidence in the record that [Autism Expert] has worked with "hundreds" of children similar to [Student], nor did she visit the [Residential Treatment Center] campus or talk with the staff.

181. The ALJ accepts as fact [Child Psychiatry Expert]'s expert opinion that [Student] needs to be in a therapeutic setting such as [RTC School] in order to receive educational benefit and that placement in a regular public school setting will cause her to further decompensate.

DISCUSSION

The Requirement of a FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that provides special education and related services designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)(A). Central to the IDEA is the requirement that local school districts develop, implement, and revise an IEP calculated to meet the eligible student's specific educational needs. 20 U.S.C. § 1414(d). A school district satisfies the requirement for a FAPE when, through the IEP, it provides a disabled student with a "basic floor of opportunity" that consists of access to specialized instruction and related services that are individually designed to provide educational benefit to the student. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 201 (1982). To

meet its obligations under the IDEA, the school district "must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas County School District RE-1*, 580 U.S. __; 137 S.Ct. 988 (2017).

In providing FAPE, children should be educated in the "least restrictive environment," meaning that, "[t]o the maximum extent appropriate," disabled children should be educated in public classrooms, alongside children who are not disabled. 20 U.S.C. § 1412(a)(5)(A).

<u>Burden of Proof</u>

Although the IDEA does not explicitly assign the burden of proof, *Schaffer v. Weast*, 546 U.S. 49, 58 (2005) places the burden of persuasion "where it usually falls, upon the party seeking relief." *See also Thompson R2-J Sch. Dist. v. Luke P.,* 540 F.3d 1143, 1148 (10th Cir. 2008) (stating that "[t]he burden of proof . . . rests with the party claiming a deficiency in the school district's efforts"). Parents therefore bear the burden of proving by a preponderance of the evidence that the District violated its obligations under the IDEA by failing to provide [Student] with FAPE, and that they have established the elements required to establish a claim for tuition reimbursement from the District for their placement of [Student] at [Residential Treatment Center].

<u>Tuition Reimbursement</u>

20 U.S.C. § 1412 (a)(10)(C)(ii) states in full:

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.
>
> Limitations are placed on this provision as follows:
>
> The cost of reimbursement described in clause (ii) may be reduced or denied
> (I) if (aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
> (bb)10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school,

the parents did not give written notice to the public agency of the information described in item (aa);
(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or
(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents. 20 U.S.C. § 1412 (a)(10)(C)(iii) (internal citations omitted).

The statute further explains that:

(iv) Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement—
(I)shall not be reduced or denied for failure to provide such notice if—
(aa) the school prevented the parent from providing such notice;
(bb) the parents had not received notice, pursuant to section 1415 of this title, of the notice requirement in clause (iii)(I); or
(cc) compliance with clause (iii)(I) would likely result in physical harm to the child; and
(II)may, in the discretion of a court or a hearing officer, not be reduced or denied for failure to provide such notice if—
(aa) the parent is illiterate or cannot write in English; or
(bb) compliance with clause (iii)(I) would likely result in serious emotional harm to the child. 20 U.S.C. § 1412 (a)(10)(C)(iv).

In *Jefferson County School District R-1 v. Elizabeth E. ex rel. Roxanne B.*, 702 F.3d 1227, 1236-1237 (10th Cir. 2012) the Tenth Circuit explained:

The plain language of the Act thus supplies the appropriate framework through which to determine whether a unilateral private school placement without the consent of or referral by the school district is reimbursable. A court or hearing officer must:

(1) Determine whether the school district provided or made a FAPE available to the disabled child in a timely manner; if it did, the unilateral parental placement is not reimbursable; then

(2) Determine whether the private placement is a state-accredited elementary or secondary school; if not, the placement is not reimbursable; then

(3) Determine whether the private placement provides special education, i.e., "specially designed instruction ... to meet the unique

> needs of a child with a disability"; if the placement provides no such instruction, it is not reimbursable.
>
> (4) If the private placement provides additional services beyond specially designed instruction to meet the child's unique needs, determine whether such additional services can be characterized as "related services" under the Act, i.e., "transportation, and such developmental, corrective, and other supportive services ... as may be required to assist a child with a disability to benefit from special education," excepting medical services which are not for diagnostic and evaluation purposes. If the additional services cannot be so characterized, they are not reimbursable.

<u>Did the District Provide [Student] FAPE in a Timely Manner</u>

Using the *Elizabeth E.* framework, the first question is whether the District provided [Student] FAPE in a timely manner. The District's offer of FAPE has been the same since May of 2017 to the present – the May 10, 2017 IEP. According to that IEP, [Student]'s placement is [High School], in the general education classroom 75% of the time. Parents do not dispute that as of May 2017 that placement was appropriate. However, they argue that after [Student]'s suicide attempt in August, it was no longer appropriate. The significant fact that leads the undersigned to agree with this conclusion is that the [NI] staff told Parents that [Student] would not be safe at home or at school, and needed to be placed in a highly specialized setting. [NI] is affiliated with a major university – the University of [State A]. The [NI] staff had worked with and observed [Student] for 23 days upon her discharge. The [NI] staff had previously conducted a full evaluation of [Student] during her first stay there in 2016. Clearly, [NI] had a full and clear picture of [Student]'s needs and capabilities, and their recommendation should not have been taken lightly. Parents did not take their recommendation lightly, and rightly so. Once [NI] informed Parents that [Student] would not be safe at home or at school – and this merely 23 days after a serious suicide attempt – [High School] ceased being an appropriate placement for [Student]. Despite this fact, the District did not change the May 2017 IEP for reasons discussed below.

[District Special Education Coordinator] testified that the District was not provided [Student]'s records, and that if the District had received new information, it would have considered that information. She also testified about the various day treatment programs and residential treatment centers that could have been made able to [Student]. Her testimony seemed to imply that if Parents had done or said things differently in the fall of 2017, litigation could have been avoided.

The problem with that implication, however, is that the procedure for the District to have considered new information or to make a change of placement on [Student]'s IEP, would have been by convening an IEP meeting, which the District refused to do so despite being asked twice by Parents. The ALJ does not necessarily disagree with the District that Parents most likely requested the IEP meeting to discuss placement of [Student] at

[Residential Treatment Center] and to renew their request for tuition reimbursement. Even assuming for the sake of argument that the District is correct and Parents' only motivation for requesting the IEP meeting was to renew their plea for reimbursement, the fact is that discussing [Residential Treatment Center] in any capacity related to [Student]'s placement or her educational needs is a discussion about change of placement. Discussions about changes of placement are made in IEP meetings. 34 CFR § 300.116 (a)(1). Also, an IEP meeting would have been the opportunity to request information from [NI] and discuss other placement options within the District that its witnesses referenced. It does not matter that the District believed an IEP meeting would be futile. First, Parents are correct that there is no "futility" exception in the IDEA that allows school districts to refuse to convene IEP meetings when requested by parents. *See* 20 U.S.C. § 1400 *et seq*,; *see also J.T. v. Department of Educ., State of Hawaii*, 59 IDELR 4 (D. Hawaii 2012). Second, the problem with expressing the belief that holding an IEP meeting is futile because Parents want tuition reimbursement for a changed placement begins to hint at the idea that the District had predetermined that [High School] was the only appropriate placement for [Student]. *See H.B. v. Las Virgenes USD*, 239 Fed Appx. 342 (9th Cir. 2007) (explaining "predetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. In such case, regardless of the discussions that may occur at the meeting, the School District's actions would violate the IDEA's procedural requirement that parents have the opportunity to 'to participate in meetings with respect to the identification, evaluation, and educational placement of the child'….Although an educational agency is not required to accede to parents' desired placement, it must maintain an open mind about placement decisions and be willing to consider a placement proposed by the parents, as well as its own placement"). (Emphasis added).

The ALJ concludes that the District did not maintain an open mind and was not willing to consider the placement proposed by Parents, [Residential Treatment Center], or even other placement options referenced by [Autism Expert] and [District Special Education Coordinator]. A predetermination argument is bolstered by [Executive Director]'s emails:

> "If and when you decide to withdraw [[Student]] from her current school and re-enroll her at [High School] or other District School, we will certainly re-evaluate her (with your consent) and conduct an IEP meeting"
>
> "My statements that you could request an IEP meeting to discuss changes to [[Student]'s] IEP services and supports were made in the context of my assurances to you that the District is ready, willing and able to provide [Student] with an appropriate educational program and services upon her return to school here."
>
> "However, we must respectfully decline your request for an IEP meeting to discuss her placement at that school, because under the

> circumstances we are not responsible for her education there. In all candor, we do not believe the IEP team process is properly invoked, given that [[Student]] is no longer an enrolled student and the evident purpose of your request is simply to renew your plea that the school district bear some or all of the cost of the private school placement you have already made unilaterally."

This last email is particularly troubling because it appears to present a legal argument that the IEP team process was not properly invoked because [Student] was no longer enrolled in the District. That argument is bothersome because it was the District that withdrew [Student] from District enrollment, not Parents. In fact, Parents objected to [Student] being disenrolled. More importantly, the *Elizabeth E*. case made clear that school districts are not relieved of their IDEA obligations merely because a student lives outside the district, when it affirmed the hearing officer's award of tuition reimbursement by a Colorado public school district for a student no longer enrolled in that school district but in an Idaho residential treatment center. *See Jefferson County School District R-1 v. Elizabeth E. ex rel. Roxanne B.*, 702 F.3d 1227 (10th Cir. 2012).

In sum, once the District knew about [Student]'s suicide attempt and knew she was at [Residential Treatment Center], but refused Parents' November 2017 requests for an IEP meeting, the District failed to timely provide [Student] FAPE. The District was required to ensure that its offer of FAPE conformed to [Student]'s changed circumstances. The District's refusal to consider her changed circumstances, and the ALJ's determination that [High School] was no longer appropriate, rendered the District's inaction a denial of FAPE.

The District's refusal to convene the IEP was also a procedural violation that led to a substantive violation of FAPE, because the refusal "seriously infringe[d] on the parents' opportunity to meaningfully participate in the IEP process, the result is a per se denial of FAPE." 34 CFR 300.513(a)(2)(ii).

Finally, the May 2017 IEP does not provide for FAPE because [Student] is unable to maintain her behavior for any appreciable length of time such that she is unable to remain in the public school setting. This fact is seen over and over again in her years attending District schools. [Student] had multiple out-of-school placements: several [Treatment Center] placements, [Residential Treatment Center #2], [NI], and [Psychiatric Hospital]. One year she missed almost an entire quarter of school. The evidence is persuasive that these out-of-District placements were caused by her mental illness which is the Serious Emotional Disorder identified on the IEP. District witnesses testified about how they were successful in educating [Student] when she was at school, and the ALJ agrees – those teachers worked hard and clearly cared about [Student], and effectively dealt with her negative behaviors when she was at school. But those same witnesses could not educate [Student] when she was not physically there. [Student] could only comport her behavior for so long before requiring an out-of-school placement. Parents and their experts argued that [Student] was on a downward spiral. [Autism Expert]'s theory was that [Student]'s behavior manifested as a cyclical pattern based on anxiety

over school breaks as opposed to a downward spiral. The ALJ is more persuaded by the downward spiral description, but regardless of which theory is accepted, the fact of the matter is that for many years [Student] has not been able to string together full school years actually present at school. Her inability to do so is due to her mental illness, and to believe that her mental health needs can be separated from her educational needs is not tenable. The ALJ concludes that FAPE cannot be provided when a student is in a repeated pattern of public school, decompensation leading to hospitalization and/or residential treatment center placement, back to school, and repeat.

The District argues that [Student]'s grades, grade advancement, and her being on target to graduate timely with her peers shows that the District has and is providing FAPE. These facts have been used by courts as factors concerning whether FAPE is provided. These facts are also a testament to [Student]'s teachers' hard work and dedication to [Student]. However, under the standard articulated under *Endrew F.*, the District's IEP had to be reasonably calculated to enable [Student] to make progress appropriate in light of her circumstances. Her circumstances include the fact that her mental health and educational needs are intertwined and cannot be separated, and that she is unable to remain in public school for an appreciable amount of time before decompensating, whether that is due to a downward spiral or a cyclical pattern. Her circumstances include a serious suicide attempt and a university psychiatric hospital stating that she is unable to return to public school. Her circumstances include Parents who have gone to more lengths then most people to try to keep [Student] at home and in public school, but have been nevertheless unsuccessful. Her circumstances include periods of active psychosis in which [Student] would most likely not be safe to herself or others in public school. The ALJ concludes that these circumstances are more persuasive evidence that [Student] is not receiving FAPE in public school than the evidence of her good grades and grade advancement is evidence that she is.

For all of these reasons, the District's May 2017 IEP placement at [High School] is not a timely offer of FAPE.

I[Residential Treatment Center]/[RTC School] is a State Accredited School

The evidence is unrefuted that [RTC School] is an accredited private school that follows [State A]'s core curriculum and standards, and this criteria is met.

[Residential Treatment Center]/ [RTC School] Provides Specially Designed Instruction to Meet [Student]'s Unique Needs

[RTC Therapist] testified that [Residential Treatment Center] developed a master treatment plan for [Student] upon her admission that included seven major goals and included individual and family therapy; dealing with her emotions; social skills; adaptive skill functioning; and school goals. The evidence in the record is that [RTC School] and [Residential Treatment Center] work closely together to provide [Student] the mental health services and supervision she needs in order to access education. Her school and home staff are in daily communication about her needs. Her therapist is in communication

with the school staff and provides training to the school staff – formally once a month and informally daily. [RTC School] is providing specially designed instruction to meet her unique needs through its implementation of [Student]'s May 2017 IEP, although in a setting/placement where [Student] has line-of-sight supervision and access to help 24 hours per day, which is currently necessary for her. For these reasons, the ALJ concludes that this criterion has been met.

The Additional Services [Residential Treatment Center] is Providing are 'Related Services"

For the reasons cited in the previous paragraph, the ALJ concludes that [Residential Treatment Center]'s services to [Student] – housing, room and board, 24 hour line-of-sight supervision, individual, group, and family therapy – are all related services necessary because of [Student]'s mental illness to enable her to access education. At [High School], where [Student] does not have these services, the record demonstrates that she was rarely able to remain in school for an entire school year. [Student] has been able to remain at [Residential Treatment Center] and access education at [RTC School] from the date of her placement through the date of hearing without any breaks for hospitalization. This fact is persuasive that these residential and therapeutic services are the kind of supportive services required to assist [Student] to benefit from special education. This criterion has been met.

Because all of the criteria for an award of private school reimbursement have been met, the ALJ orders an award of tuition reimbursement for the cost of [Student]'s education at [Residential Treatment Center]/ [RTC School].

Tuition Reimbursement Reduction

The IDEA gives the ALJ discretion to deny or reduce tuition reimbursement because Parents failed to inform the District of their intent to remove [Student] at the May IEP meeting; or because they failed to give the District advance notice ten business days prior to her removal from the District; or if Parents' actions are found to be unreasonable. However, the ALJ is not permitted to reduce the award if compliance with the notice clause would likely have resulted in physical harm to [Student].

As of the May 2017 IEP meeting, [Student] had not swallowed a bottle of Xanax, and Parents had not been told by [NI] that she was not safe to return to home or school. The evidence is persuasive that Parents' intent had always been to try to keep [Student] in public school as much as her mental illness permitted. They had no intent as of May 2017 to remove [Student] from [High School], and therefore they had no obligation to inform the District of any such non-existent intent.

Parents placed [Student] at [Residential Treatment Center] on September 26, 2017. Ten days prior to that date was September 16, 2017. On September 18, 2017, Parents placed [Student] at [Residential Program], the residential program in [City C], [State A]. From September 16 to 18, 2017, [Student] was at [NI], and from September 18 through 26, she was at a residential treatment center. These facts show that [Student] was safe ten days prior to the date she was admitted to [Residential Treatment Center]. These facts also show that Parents knew as of at least September 18 that [Student] would not be returning to [High School]. October 6, 2017 is ten days after [Student]'s placement at [Residential Treatment Center]. Because Parents failed to give the District ten days advance notice of [Student]'s placement even though she was safe, the ALJ is reducing the tuition reimbursement award by ten days. Therefore the award of tuition reimbursement will begin ten days after [Student] started at [Residential Treatment Center], on October 6, 2017.

Parents' actions in this case have not been unreasonable. [Father]'s letter to the insurance company that contained inaccuracies and possibly untrue information was ill-advised, not least because it may have negatively impacted the District's reaction to Parents' request for reimbursement due to the District's memories of that letter's exaggerations/inaccuracies/misstatements. That one action, however, was an isolated event. The overwhelming evidence in the record is that [Mother] worked very well with the District and was cooperative in every aspect. Without making any conclusions about matters not at issue in this case, there is at least an argument that Parents could have been requesting tuition reimbursement long before [Residential Treatment Center], but they did not. They worked with the District, they worked with their very troubled daughter, and they worked with her providers and aides. Despite all of their efforts, she remained seriously mentally ill and unable to consistently access her education at [High School]. Parents' actions have been reasonable, and the award of tuition reimbursement will not be reduced any further.

DECISION

Mesa County Valley School District 51 is ordered to reimburse [Parents] for the cost of tuition at [Residential Treatment Center]/ [RTC School] as of October 6, 2017 and going forward until and unless her IEP team changes her placement.

This decision is the final decision of the independent hearing officer, pursuant to 34 CFR §§ 300.514(a) and 515(a). In accordance with 34 CFR § 300.516, either party may challenge this decision in an appropriate court of law, either federal or state.

Hearing recorded by:
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DONE AND SIGNED July 13, 2018

/s/ Tanya T. Light
TANYA T. LIGHT
Administrative Law Judge