In the Matter of: [Student], by and through his parent, [Parent], Petitioner, v. SCHOOL DISTRICT #1, CITY AND COUNTY OF DENVER. Respondent.	FINDINGS AND DECISION CASE NO. 2001:126 Impartial Hearing Officer Andrew J. Maikovich

I. INTRODUCTORY STATEMENT

The above-captioned hearing was held at the offices of Semple, Miller, & Mooney, P.C., in Denver, Colorado, on October 15, 16, 17, and 23, 2001.

Petitioner requested the hearing pursuant to the Individuals with Disabilities Education Act (IDEA), as amended, 20 U.S.C. § 1400 et seq., 34 C.F.R. § 300 et seq. and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. Although the action was brought under both the IDEA and Rehabilitation Act, Petitioner stated that all issues brought under the Rehabilitation Act were covered by the IDEA and that no additional evidentiary findings were required by the Impartial Hearing Officer (IHO). Because the IHO was unable to identify specific unique issues within the Rehabilitation Act, all findings within this opinion are limited to the IDEA.

The single issue presented by Petitioner and identified by the IHO at the beginning of the hearing is whether the Petitioner is entitled to be reimbursed by the Respondent for the costs of the student's home schooling. The Petitioner has the burden of proof on this issue.

II. FINDINGS OF FACT

1. [Student] was born on [D.O.B.]. From six months of age, [Student] has had various epileptic disorders.
2. [Student] began attending public school in Aurora, Colorado.
3. [Student] entered the Denver Public School system in December 1995. At that time, it was determined [Student] had a significant emotional disability (SED).

4. In November 1996, [Student]'s disability was listed in his IEP as emotional disability (primary) and speech/language (secondary).
5. On or about October 16, 1997, a Triennial evaluation was conducted. [Student]'s disabilities were identified as learning disability (primary) and emotional disability (secondary).
6. In September 1998 (beginning of the sixth grade), [Student]'s mother, [Parent], enrolled him in [Private School]. [Parent] enrolled him in private school because she was concerned about the environment at the public school [Student] would attend, [Middle School].
7. Because of the cost of tuition and the fact that [Student] was frequently missing school because of health problems, [Parent] withdrew [Student] from [Private School] and enrolled him at [Middle School] on October 27, 1998. [Student] was 12 years old and in the sixth grade.
8. On or about November 5, 1998, [Student]'s special education teacher at [Middle School], [SpEd Teacher], gave [Student] a notice of meeting for [Student]'s annual IEP staffing and a copy of Educational Rights of the Student/Parents. She asked [Student] to give them to his mother, [Parent]. The meeting was scheduled for November 24, 1998.
9. [Parent] notified [SpEd Teacher] that she could not attend the IEP meeting.
10. Using [Student]'s October 1997 Triennial evaluation and her recent classroom experience with [Student] as a guide, [SpEd Teacher] developed [Student]'s IEP by herself on November 24, 1998. [SpEd Teacher] presented a copy of the IEP to a fellow special education teacher, [SpEd Teacher 2], for review.
11. [SpEd Teacher] gave a copy of the IEP to [Parent] and later discussed it with her at school.
12. On an unidentified date in the spring semester of 1999, physical education teacher [PE Teacher] asked [Student] to stand up and participate in the class. [Student] did not stand up. [PE Teacher] removed [Student] from the class. The IHO is unable to discern the amount of force [PE Teacher] used to remove [Student] from the class or whether the force used by [PE Teacher] was appropriate or inappropriate for the situation.
13. [PE Teacher] recommended to [Middle School] principal [Principal] that [Student] be removed from the gym class because he would not participate in the class. [PE Teacher] was unaware of [Student]'s epilepsy and seizure disorders and had not read his IEP.

14. [Principal] discussed [Student]'s physical education class with special education coordinator [Coordinator]. [Principal] told her to remove [Student] from the class. [Principal] told [Parent] she was concerned about [Student]'s safety and recommended he not take physical education. [Parent] agreed that [Student] should be removed from the class. [Student] was given another elective class to replace physical education (either computers or woodwork).
15. [Paraprofessional] was a paraprofessional who assisted [SpEd Teacher] during the 1998-99 year. On one occasion, [Paraprofessional] kicked [Student] in the ankle when [Student] tried to pass him. [Student] did not receive a physical injury from the kick. In another incident, [Paraprofessional] pushed or slapped [Student] on the head while playing boxing with him. [Paraprofessional]'s interactions with [Student] were typical of his interactions with other male students in the room.
16. After [Student] complained to [SpEd Teacher] about being hit on the head by [Paraprofessional], [SpEd Teacher] asked [Paraprofessional] to stop the behavior. [SpEd Teacher] was afraid the "horseplay" would become more serious.
17. [Paraprofessional] was not employed by [Middle School] after the 1998-1999 school year ([Student]'s sixth grade year).
18. [Student] experienced academic progress during the sixth grade and [Parent] was generally supportive of the education [Student] received from [SpEd Teacher]. [SpEd Teacher] placed [Student]'s desk next to hers so that she could monitor his seizure disorders more closely. She would discuss [Student]'s progress with [Parent] on almost a daily basis. She would let [Parent] know when she was going to be absent and [Parent] often kept [Student] home on those days. [SpEd Teacher] continued to keep in touch with [Student] in seventh and eighth grade even though she was not assigned to him.
19. In the summer of 1999, [Student] began experiencing drop-type seizures. During the summer, [Student] suffered a drop seizure while riding his bicycle and dislocated his shoulder.
20. Prior to the beginning the seventh grade in September 1999, [Parent] met with Assistant Principal [Assistant Principal] and [Coordinator] to discuss [Student]'s drop seizures and her concerns for his safety. ([Coordinator] was scheduled to be [Student]'s primary special education teacher.)

21. Because [Parent] believed [Student]'s seizures were more prevalent in the mornings, she requested that [Student] not begin school early in the morning. [Assistant Principal] and [Coordinator] agreed to begin [Student]'s schedule at 10:20 a.m. [Middle School] had the ability to, and expected to, provide [Student] with a full schedule prior to [Parent]'s request.
22. All of [Student]'s courses were scheduled on the second floor to reduce the number of times he would need to use the stairs. When transitions were required between floors, a "buddy system" was developed so that [Student] would have an escort. [Parent], [Assistant Principal], and [Coordinator] also discussed providing [Student] with access to a school elevator to transition between floors.
23. Following the meeting, [Assistant Principal] wrote an addendum to [Student]'s IEP.
24. A classmate and friend of [Student]'s was selected as the "buddy" who would escort [Student] to the first floor cafeteria. At an unidentified date, [Coordinator] told [Student] about how to use the elevator.
25. On November 5, 1999, [Coordinator] was absent and a substitute teacher supervised [Student]'s classroom (located on the second floor). [Student] told the substitute teacher that he left a notebook on the first floor and asked her if he could retrieve it. The substitute teacher did not know about [Student]'s need to have an escort when transitioning between floors and approved his request.
26. As [Student] got near the stairs, school psychologist [School Psychologist] saw him and told [Student] to take the elevator rather than the stairs. [School Psychologist] focused her attention elsewhere. [Student] continued down the stairs, lost his balance and fell over the railing. The fall broke [Student]'s wrist. The IHO makes no determination as to the cause of [Student]'s fall (i.e., seizure, tripping, etc.).
27. On November 9, 1999, [Coordinator] sent [Parent] a notice of meeting for [Student]'s annual IEP. The meeting was scheduled for November 24, 1999.
28. [Parent] left [Coordinator] a voice-mail message that she could not attend the November 24, 1999, IEP meeting.
29. On an undetermined date close to November 24, 1999, [Parent] obtained counsel. One of her attorneys, Lisa Levinson, contacted [Coordinator] and asked her to reschedule the IEP meeting. They agreed on January 11, 2000, for an IEP staffing.

30. Despite the fact [Parent] or her attorney could not attend the November 24, 1999, IEP staffing, [Coordinator], special education teacher [SpEd Teacher 3] and general education teacher [Teacher] developed an IEP for [Student]. They developed the IEP because of a desire to complete an IEP within one year of [Student]'s previous IEP (dated November 24, 1998).
31. On or about January 11, 2000, a new IEP staffing was conducted. Attendees were [Coordinator], [SpEd Teacher], special education teacher [SpEd Teacher 4], school psychologist [School Psychologist], school nurse [School Nurse], [Principal], [Parent], and her attorneys, Ms. Levinson and Gary Lozow. A general education teacher was not in attendance. While [Student]'s disabilities were again identified as learning disability (primary) and emotional disability (secondary), the team believed he may have a physical disability. [SpEd Teacher 4] informed [Parent] and her attorneys that the change in disability would require a Triennial staffing to be held in the future. The team determined that [Student]'s Triennial staffing would be moved up to approximately March 2000.
32. [Parent] and her attorneys were satisfied with the recommendations from the January 11, 2000, IEP staffing.
33. On or about January 13, 2000, a typed IEP for [Student] was developed and provided to [Parent] and her attorneys. On January 17, 2000, Ms. Levinson sent [Coordinator] a letter describing her disagreement with certain information in the IEP, such as the meeting being a supplement to the November 24, 1999, meeting. At Ms. Levinson's request, 1/11 was added next to the names of individuals attending the staffing on that date.
34. On or about January 21, 2000, [Coordinator] requested a paraprofessional to accompany [Student] while at [Middle School].
35. On February 1, 2000, [Coordinator] sent [Parent] a staffing notice of a Triennial review meeting. The meeting was scheduled for March 1, 2000.
36. The District approved the request for a paraprofessional on or about February 8, 2000. The position was filled by [Paraprofessional 2].
37. On March 1, 2000, a Triennial review staffing was conducted. Attendees were [Coordinator], [SpEd Teacher 4], [SpEd Teacher 3], general education teacher [Teacher 2], [School Psychologist], school social worker [Social Worker], [Principal], and [Parent]. [Student]'s disabilities were identified as physical disability (primary) and learning disability (secondary).

38. At the March 1, 2000, Triennial review, private schools were discussed, but [Parent] dismissed them as "too expensive." The school district's responsibilities with respect to bearing the costs associated with various educational environments were not discussed.
39. In April 2000, [Student] had surgery on his neck in an effort to reduce the number of seizures. The surgery helped, although it did not eliminate the seizures. Because of the surgery, [Student] missed an undetermined amount of school in excess of one week.
40. On or about September 11, 2000, [Parent] met with [Principal] and informed her that [Student] would not start the semester on time because of [Student]'s health problems.
41. [Student] started school on or about October 2, 2000, with special education teacher [Primary Teacher] as his primary teacher. Paraprofessional [Para 3] was hired to sit with [Student] on a fulltime basis, as well as escort him between classes.
42. [Student] did not have a computer class in eighth grade. His elective and general education class in the first semester of the eighth grade was CTE Wood Tech (woodshop).
43. On or about November 11, 2000, [Primary Teacher] reprimanded [Para 3] and [Student] for arriving late to her class on three or four occasions.
44. On or about November 28, 2000, [Parent] went to [Primary Teacher]'s room to discuss a math homework assignment she had given [Student]. [Parent] was angry with [Primary Teacher] and left the homework in the room.
45. In November 29, 2000, a disagreement occurred between [Parent] and [Principal]. The IHO is unable to make a factual finding as to the specific reason for the disagreement—whether [Parent] mistakenly thought [Student] was not allowed to take a standardized test, or whether she was upset [Student] was studying in [Principal]'s office, or some other reason. The IHO finds both parties were angry. [Principal] pointed her finger at [Parent] and told her words to the effect that she had 1,600 kids to supervise and that she could not be responsible for [Parent]'s one child.
46. After the discussion with [Principal], [Parent] removed [Student] from [Middle School] and did not return him to school. His last day attending [Middle School] was November 29, 2000.

47. When [Middle School] personnel called [Parent] regarding [Student]'s absences in the days following his removal, [Parent] did not return the calls.
48. On December 10, 2000, [Parent] provided written notification to the Denver Public Schools that she was home schooling [Student].
49. By letter dated December 27, 2000, attorney Levinson informed the Denver Public School system that [Parent] was home schooling [Student] and indicated various reasons for the withdrawal.
50. [Parent] purchased a home school curriculum (Christian Liberty Academy) for [Student] and has home schooled him to the present.
51. To determine his placement in the home school, [Student] took the California Achievement Test (CAT), which identified his spelling level at second grade/fifth month, and reading comprehension at fifth grade/fourth month.
52. [Parent] does not have the ability to teach [Student] language arts (reading and writing skills) without assistance.
53. [Student] is involved in church groups and attends a recreational center. The IHO was unable to determine the amount of time [Student] participates in these activities. [Student] also participates in physical activities with his family, including skiing and scuba diving.
54. At an undetermined date during [Student]'s enrollment at [Middle School], a teacher called [Student] "fat boy." [Note: Petitioner stated in her claim that [Teacher 3] made the comment. [Principal] testified she reprimanded [Teacher 4] for using the term "fat boy," and told him to call children only by their given names. The IHO finds that an employee of [Middle School] made one comment of "fat boy" to [Student], but makes no findings as to the specific person or date of the comment.]
55. During his stay at [Middle School], [Student] did not attend any field trips. Denver Public Schools did not prohibit [Student] from attending field trips. [Student] may have been excluded from a field trip in the sixth grade with [SpEd Teacher] as a penalty for not completing an assignment or handing in a proper form. However, the testimony was inconclusive and the IHO cannot identify any specific field trips that [Student] was prohibited from attending in either the sixth, seventh or eighth grade.

56. Approximately once a semester, [Middle School] has an ice cream social—an all-school function in which various activities such as movies, dancing, and games are set up in the school. Denver Public Schools did not prohibit [Student] from attending ice cream socials. [SpEd Teacher 3] did tell [Parent] in the spring 2000 semester that the school did not have someone to watch [Student] during an ice cream social. ([Student]'s paraprofessional had not yet been hired.) She told [Parent] that the mother could watch [Student], [Student] could stay with her in a room where she was supervising students in detention, or he could stay at home that day or leave early.

III. DECISION

The sole issue in this case is whether the Petitioner is entitled to reimbursement by the Respondent for the costs associated with [Student]'s home schooling.

At the end of the hearing, the IHO asked the parties for post-hearing briefs on the issue of whether, under the IDEA, the costs of home schooling a child are reimbursable under any circumstances in the state of Colorado. After conducting brief preliminary research on the issue, the IHO questioned whether he had the authority to grant Petitioner's requested relief. Therefore, this decision is separated into two sections—first, the IHO's authority to grant Petitioner reimbursement under any set of facts, and second, a decision on the merits.

Section 1—Are costs associated with home schooling a child in the state of Colorado reimbursable under the IDEA?

Under the IDEA, an agency must pay the cost of educating a child with a disability "at a private school or facility" if a free appropriate education ("FAPE") has not been made available and the parents' placement is appropriate. 20 U.S.C. § 1412(a)(10)(c). Throughout this decision, the IHO will refer to the federal regulation that implements private school reimbursement under the IDEA, 34 C.F.R. § 403. Specifically, subsection 34 C.F.R. § 403(c) states:

> Reimbursement for private school placement. 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 preschool, elementary, 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 FAPE available to the child in a timely manner prior to that enrollment and the private placement is appropriate. A parental placement may be found to

be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.

Neither the IDEA or implementing regulations explicitly define the term "private school or facility," or whether home-based education can constitute a private school or facility. The United States Department of Education Office of Special Education Programs (OSEP) has issued policy letters stating that the determination of whether home-based education can be considered a private school or facility must be based on State law. *OSEP Policy Letter to Williams*, 18 IDELR 742, 744; OSEP *Policy Letter to Sarzynski*, 29 IDELR 904. The Ninth Circuit has upheld the right of states to determine whether home schooling can be considered a private school or facility. *Hooks v. Clark County School District*, 228 F.3d 1036 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1602 (2001). See also, *Swanson v. Guthrie Independent School District 1-L*, 135 F.3d 694 (10th Cir. 1998) (finding constitutional the right of states to refuse services to home-schooled children).

The IHO finds that states are allowed to determine whether home-based education can be considered a private school or facility under the IDEA. Therefore, the next question is, "Does the state of Colorado define home-based education as a private school or facility under the IDEA?"

Colorado's revised statute, § 22-33-104.5, provides legislative declarations, definitions, and guidelines for home-based education in the state. Specifically, § 22-33-104.5(2)(a) states, "[A non-public home-based educational program] is not intended to be and does not qualify as a private and non-profit school."

On first impression, the IHO read this passage as finding the state of Colorado disqualified home-based programs from the provisions directed to private schools under Part B of the IDEA. However, as pointed out by both parties, the statute says that home school programs do not qualify as a private *and* non-profit school (*emphasis added*). In other words, while the statute rejects home schooling as a conjunctive "private and non-profit school," it does not specifically prohibit home schools from qualifying as either a separate "private" or "non-public" school.

Respondent argues that the Colorado legislature made a mistake and actually intended the meaning had the words "private *or* non-profit school" been used. Petitioner, on the other hand, argues that the plain meaning of the words "private and non-profit school" is the conjunctive form of the words. The IHO agrees with both arguments.

In legislative drafting, the difference in meanings between the words "and" and "or" is significant. The IHO is in substantial agreement with Respondent's argument that the Colorado legislature probably intended to use the word "or" rather than "and" in § 22-33-104.5(2)(a). The IHO could not identify any other use of the phrase

"private and non-profit school" anywhere else in the revised statutes. However, the words "private or non-profit school" are located in numerous passages. It is doubtful the Colorado legislature intended to define non-public home-based educational programs with a meaning found nowhere else in the statutes.

Although the IHO believes a drafting error probably occurred, statutory construction dictates that fact finders use the "plain meaning" of the words of a statute. "Words of a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary." *Dennis v. Poppel*, 222 F.3d 1245 (10th Cir. 2000). The IHO finds that conjunctive term "private and non-profit school" to be clear and unambiguous. Therefore, the IHO will proceed with a ruling on the merits.

Section 2—Is Petitioner entitled to be reimbursed by the Respondent for the costs of the student's home schooling?

The landmark U.S. Supreme Court case allowing parents to be reimbursed by LEAs for the unilateral placement of a child in a private school facility is *School Committee of the Town of Burlington v. Mass. Dept. of Educ*., 471 U.S. 359, 105 S. Ct. 1996 (1985). In *Burlington*, the court found that a school district may be required to pay for private school services obtained for a child if the parent can show:

1. The school district failed to provide a free and appropriate public education (FAPE) to the child.
2. The private placement was appropriate for the child.
3. Equitable considerations support the parent's claim for reimbursement.

These elements were essentially codified in 34 C.F.R. § 403(c), which allows for private school reimbursement only if the hearing officer finds the agency had not made FAPE available to the child in a timely manner and the parents' private placement is appropriate. With respect to equitable considerations, 34 C.F.R. § 403(d) allows for the cost of reimbursement to be reduced or denied if, prior to removing the child from public school, the parents fail to inform the IEP team that they are rejecting the placement proposed by the school, including stating their concerns and their intent to enroll their child in a private school at public expense; or, at least 10 business days prior to a removing the child from public school, the parents provide written notice to the school of the information described above.

The IHO will consider each element of proof separately.

1. Did the school district provide [Student] **with FAPE?**

In *Board of Educ. of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982), the U.S. Supreme Court held that an inquiry into whether a child has been provided a free appropriate public education (FAPE) is twofold:

1. Have the procedures set forth in the IDEA been adequately complied with?
2. Is the IEP reasonably calculated to enable the child to receive educational benefits?

Both parties presented evidence regarding [Student]'s education, or lack thereof, during the entire 2 ½ years that [Student] attended [Middle School]. Because the issue in the present case is whether the school district must reimburse the Petitioner for her home schooling of [Student], the question is not whether Respondent provided FAPE to [Student] at all times during his attendance at [Middle School], but whether the Respondent was providing FAPE to [Student] at the time [Parent] removed him from [Middle School] on November 29, 2000.

The IHO identified no case in which a Petitioner prevailed in seeking reimbursement for a private school placement because of a local education agency's (LEA) past failures in providing FAPE to a student. In *Burlington* and every other case cited by the parties, the issue was whether the LEA was offering FAPE to the student at the time of the unilateral placement. In fact, even when an LEA is not presently providing FAPE to a student, 34 C.F.R. § 403(d) provides school districts with the opportunity to fix problems prior to requiring restitution.

However, because evidence prior to the March 2000 IEP that was in force on [Student]'s last day at [Middle School] can shed light on whether FAPE was provided at the time of the student's removal, the IHO will review the evidence from [Student]'s entire stay at [Middle School].

IEPS AND EVENTS PRIOR TO MARCH 2000

There were significant problems with [Student]'s educational plan during the sixth and seventh grades. As stated in *Rowley*, the first question with respect to whether a child is receiving FAPE is determining whether the procedures set forth in the IDEA have been complied with. [Student]'s early IEPs at [Middle School] were in severe non-compliance.

[Parent] placed [Student] in a private school at the beginning of his sixth grade year. [Parent] testified that he missed a lot of school for health reasons, so she enrolled him at [Middle School] at the end of October 1998. On or about November 5, 1998, [Student]'s special education teacher at [Middle School], [SpEd Teacher], notified

[Parent] about [Student]'s annual IEP staffing, scheduled for November 24, 1998. [Parent] notified [SpEd Teacher] that she could not attend the IEP meeting.

Almost stunningly, [SpEd Teacher] developed [Student]'s IEP by herself on the scheduled staffing date, November 24, 1998. She used [Student]'s October 1997 Triennial evaluation and her recent classroom experience with [Student] as a guide. She had a fellow special education teacher, [SpEd Teacher 2], review the IEP she developed. Upon completion, [SpEd Teacher] sent a copy of the IEP to [Parent] and later discussed it with her at school.[1]

Despite the problems with the IEP, [Parent] was generally satisfied with the education [Student] received in [SpEd Teacher]'s classroom. [SpEd Teacher] took great interest in [Student], including placing his desk next to hers so that she could more closely monitor his seizure disorders. She also stayed in contact with [Student] during his seventh and eighth grade years even though she had no direct supervisory responsibilities over his education. Based on her ability to make admissions against interest during her testimony and her obvious concern for [Student], the IHO credits the testimony of [SpEd Teacher] as being particularly forthright and truthful during the hearing.

Although [Parent] was happy with [SpEd Teacher]'s tutelage of [Student], other problems arose during the sixth grade. In physical education class, [Student] was often non-responsive to teacher [PE Teacher]. [PE Teacher] testified that [Student] would often stare at her when she gave him directions. Although staring is one of the symptoms [Student] displays when he is having a seizure, [PE Teacher] was unaware that [Student] had a disability, neither having read his IEP nor having this verbally communicated to her.[2] During one incident, [PE Teacher] removed [Student] from her class.[3]

The paraprofessional who assisted [SpEd Teacher] during the 1998-99 year, [Paraprofessional], enjoyed "horseplay" with the boys in the class. His interactions with [Student] were similar to interactions he had with other

[1] Respondent cited a number of cases in which de minimus procedural violations of IDEA requirements were not found to constitute a FAPE violation. The procedural violation in [Student]'s November 24, 1998, IEP is not de minimus. Regardless of whether [SpEd Teacher] established an educational plan that provided extraordinary educational benefit to [Student]—the evidence appears to show she developed an adequate to good plan—this procedural violation is a denial of FAPE. The IDEA requires staffing teams to collaborate on IEPs because it is anticipated staffing participants' collective knowledge will produce a superior IEP.

[2] The IHO is disturbed that in addition to [PE Teacher] not being aware that [Student] had an IEP, she testified that it would be "unrealistic" for her to read all of her students' records to identify those students with educational disabilities. The IHO strongly recommends that [Middle School] and other Denver Public School District schools develop systems and policies by which *all* teachers of special education students (mainstream and elective) are informed of students' disabilities and required accommodations as required by 34 C.F.R. § 342(a)(3).

boys in the class. On one occasion, [Paraprofessional] kicked [Student] in the ankle when [Student] tried to pass him. [Student] did not receive a physical injury from the kick. In another incident, [Paraprofessional] pushed or slapped [Student] on the head while playing boxing with him. After [Student] complained to [SpEd Teacher] about being hit on the head by [Paraprofessional], [SpEd Teacher] asked [Paraprofessional] to stop the behavior.

Prior to the beginning the seventh grade in September 1999, [Parent] met with Assistant Principal [Assistant Principal] and special education teacher [Coordinator] to discuss [Student]'s drop seizures and her concerns for his safety. That summer, [Student] began having drop seizures. He had fallen off his bicycle and hurt his shoulder during one of the seizures. [Parent] wanted [Student] to have an escort between classes, particularly if moving from one floor to the other, in case he had a drop seizure. The parties agreed to a "buddy" system in which [Student] would have an escort when transitioning between classes.

Because [Student]'s seizures were more prevalent in the morning, [Parent] asked that [Student] start school later in the day. [Coordinator] and [Assistant Principal] agreed that [Student] would begin his day at 10:20. They developed a schedule in which [Student] would take Math, Language Arts, Computers, and Reading courses, all in classrooms located on the second floor.

As a significant change in placement, the school district should have scheduled a new IEP staffing to discuss [Student]'s new schedule. Respondent's expert, [Expert], testified that, although a staffing should have been called, safety is the primary concern. The IHO agrees with [Expert] to the extent that preliminary placements are appropriate to ensure the safety of students. However, a staffing should be held as soon as possible following a major change to ensure the preliminary placement was appropriate.

[Parent] testified that she was told that she should not bring [Student] to [Middle School] until approximately two weeks after the beginning of the school year (both in the seventh and eighth grades) because the school did not have a schedule for [Student]. Respondent's witnesses testified that no such instruction was given. Weighing the testimony and documentary evidence, the IHO finds that this instruction was never provided. The IHO finds that [Parent] told the school district that [Student]'s health prevented him from beginning the school year on time.

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[3] Petitioner alleges that [Student] was inappropriately dragged across the gym floor. The IHO finds a lack of proof with regard to this allegation.

On November 5, 1999, [Student]'s special education teacher, [Coordinator], was absent. The substitute teacher in [Student]'s classroom was not made aware of [Student]'s need to have an escort when transitioning between floors. [Student] told the substitute teacher that he left a notebook on the first floor and asked her if he could retrieve it. She agreed. As [Student] approached the stairs, school psychologist [School Psychologist] saw him and told him to take the elevator rather than the stairs. [School Psychologist] focused her attention elsewhere. [Student] continued down the stairs, lost his balance and fell over the railing. The fall broke [Student]'s wrist. The IHO makes no determination as to the cause of [Student]'s fall (i.e., seizure, tripping, etc.).

Regardless of the physical reasons behind [Student]'s fall, it would have been prevented had Respondent properly implemented the September addendum of [Student]'s IEP. [Coordinator] and [SpEd Teacher 3] testified they were responsible for ensuring [Student] had an escort between floors. [Student] left the room unsupervised because no system was in place by which a substitute could have easily obtained this information. [Coordinator] testified she had left lesson plans for the substitute, but not information about student disabilities or related accommodations.

On November 9, 1999, the school sent a notice of meeting to [Parent] that [Student]'s annual IEP staffing would occur on November 24, 1999. [Parent] left [Coordinator] a voice-mail message that she could not attend the November 24, 1999, IEP meeting. Very close to that time, [Parent] obtained counsel. One of her attorneys, Lisa Levinson, contacted [Coordinator] and asked her to reschedule the IEP meeting and they agreed to reschedule the IEP staffing to January 11, 2000. Despite the fact [Parent] or her attorney could not attend the November 24, 1999, IEP staffing, [Coordinator], special education teacher [SpEd Teacher 3] and general education teacher [Teacher] met that day and developed an IEP for [Student].

As with [SpEd Teacher]'s IEP from a year earlier, the IEP developed on November 24, 1999, if implemented, would have been a denial of FAPE. Each school district is responsible for ensuring that one or both parents of a child with a disability are present at an IEP meeting, including scheduling the meeting at a mutually agreed upon time and place. 34 C.F.R. § 345(a). Because [Coordinator] and Ms. Levinson scheduled an IEP staffing for January 11, 2001, the IHO is unable to identify the purpose of the November 24, 1999, meeting.

On or about January 11, 2000, a new IEP staffing was conducted. Attendees were [Coordinator], [SpEd Teacher], special education teacher [SpEd Teacher 4], school psychologist [School Psychologist], school nurse

[School Nurse], principal [Principal], [Parent] and her attorneys Lisa Levinson and Gary Lozow. A general education teacher was not in attendance as required by 34 C.F.R. § 344(a)(2).

[Parent] and her attorneys were generally happy with the recommendations of the January 11, 2000, staffing. With respect to [Student]'s safety, the school agreed to provide adult supervision for school transitions, which ultimately resulted in the District hiring a full-time paraprofessional to accompany [Student]. While [Student]'s disabilities were again identified as learning disability (primary) and emotional disability (secondary), the team believed [Student]'s physical disability might also qualify him for services under the IDEA. [SpEd Teacher 4] informed [Parent] and her attorneys that the change in disability would require a Triennial staffing to be held in the future. The team determined that [Student]'s Triennial staffing, scheduled for the following year, would be moved up to approximately March 2000.

Although a self-contained program for [Student] was discussed, [Parent]'s attorney Lisa Levinson testified that she didn't believe that was an appropriate setting for [Student]. "We thought ([Middle School]) could provide FAPE."

In summary, the January 11, 2000, staffing produced a strong technical document approved by the parent and her attorneys.[4]

IEPS AND EVENTS FROM MARCH 2000 TO THE PRESENT

As stated earlier, the issue with respect to reimbursement is not whether [Middle School] historically provided FAPE to [Student], but whether the Respondent was providing FAPE to [Student] at the time [Parent] removed him from [Middle School]. The IHO finds that Respondent provided [Student] with FAPE from March 1, 2000, until his last day at [Middle School] on November 29, 2000.

On March 1, 2000, a Triennial review meeting was conducted. Procedurally, all parties required by the IDEA were in attendance. The staffing team included [Coordinator], [SpEd Teacher 4], [SpEd Teacher 3], general education teacher [Teacher 2], [School Psychologist], school social worker [Social Worker], [Principal], and [Parent].

[4] The January 11, 2000, IEP staffing did not include a general education teacher. The IHO disagrees with [Expert]'s testimony that general education teacher [Teacher]'s attendance at the November 24, 1999, staffing might meet the requirements under 34 C.F.R. § 344(a)(2). Although a general education teacher is not required to attend every IEP staffing, the November 24 staffing was procedurally deficient. The IHO makes no determination whether the lack of a general education teacher at the January 11 staffing was a de minimus procedural violation of the Act.

Petitioner's arguments with respect to the District not providing FAPE to [Student] after March 1, 2000, are discussed below.

Discussion of private school tuition responsibilities

Petitioner argues the school district never told [Parent] that it would be responsible for paying for a private school if it was determined that the school district could not provide FAPE to [Student]. Private school was discussed during the staffing. The school nurse received a report from [Student]'s doctor prior to the Triennial that suggested [Student] might do better in a private school placement. Petitioner argues that had [Parent] known the school district would have paid for private schooling, she would have accepted it.

The design, implementation, and evaluation of an IEP should be reached by consensus of the IEP staffing team. 34 C.F.R. 300.248. In this case, the staffing team reached consensus that [Middle School] was able to provide FAPE to [Student]. [Parent]'s attorney, Ms. Levinson, testified that at the January 11, 2001, IEP staffing, "we thought ([Middle School]) could provide FAPE" to [Student]. There is no evidence that new information surfaced between January and March that would lead Petitioner to a different conclusion. If FAPE could be provided by the school district, there was no obligation to explain the school district's financial obligation with respect to private schools in a different circumstance.

Documentation of majority and minority opinions

Petitioner argues that [Student]'s IEP did not document majority and minority opinions. Specifically, Petitioner points to [SpEd Teacher 3]'s testimony that she was inclined to follow the physician's advice with respect to [Student] potential private school placement. [SpEd Teacher 3]'s opinion is not listed in [Student]'s IEP. [5]

The IHO can find no statutory authority requiring each staffing team individual's opinion to be separately documented in an IEP. As discussed earlier, the goal for IEP teams is to reach consensus, rather than taking majority votes. Question 9 in Appendix A to Part 300--Notice of Interpretation, states:

> 9. What is a public agency's responsibility if it is not possible to reach consensus on what services should be included in a child's IEP? The IEP team should work toward consensus, but the public agency has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive FAPE. It is not appropriate to make IEP decisions based upon a majority "vote." If the team cannot reach consensus, the public agency must provide the parents with prior written notice of the agency's proposals or refusals, or both, regarding

[5] There is no evidence [SpEd Teacher 3] voiced the opinion that [Student] should be in a private school setting at the IEP staffing.

> the child's educational program, and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing.

In the opinion of the IHO, consensus means that, at times, members will agree to solutions that may vary from his or her personal opinion. In this case, the team, including [Parent], reached consensus regarding the ability of [Middle School] to provide FAPE to [Student]. The IHO also notes that [Parent]'s opinion sided with the majority.

Availability of a physical education class

Petitioner argues that [Student] was not provided a physical education class. 34 C.F.R. 300.307(a) states, "Physical education services, specially designed if necessary, must be made available to every child with a disability receiving FAPE."

[Student]'s IEP states, "No PE due to medical condition." An identical statement was recorded in [Student]'s January 11, 2000, IEP. There was little testimony about the amount of discussion that occurred with respect to physical education in either staffing, which the IHO assumes was limited. [Parent] testified that she didn't consider gym class as an option because of the problems with [PE Teacher]'s class in the spring semester of 1999 and [Principal]'s statement that physical education class was not safe for [Student].

While the IHO finds there were significant problems with the District's handling of the physical education issue in the sixth grade, there was not a similar denial in the January 11 and March 1, 2000, staffings. Because [Student] was taking only four classes at his mother's request, [Student] was basically limited to one elective.[6] It is reasonable that a parent might determine that computer class or woodworking would be more valuable electives than physical education. [Parent] had two attorneys attend the January 11, 2000, staffing. [Parent] or her attorneys could have requested physical education at that time, either as a substitute for the one elective or as an additional class.[7] There is no evidence [Parent] wanted physical education for [Student]. In fact, physical education was not made an

[6] Petitioner impliedly argued that even if [Parent] requested [Student] only receive four hours of school, Respondent should have denied the request. That is a decision for an IEP team. [Parent] had two attorneys with her at the January 11, 2000, staffing, when [Parent] again was provided with a schedule beginning at 10:20 a.m. If Petitioner presently believes [Student] should attend additional hours, she should call for a new IEP staffing to discuss the alternatives.

[7] Ms. Levinson testified that she did request P.E., but also testified that the school district gave Petitioner's everything they wanted at the January 11, 2000, staffing. The IHO finds that if she mentioned physical education, it was only in passing. Ms. Levinson sent three letters to the school district regarding [Student]'s education. Physical education was never mentioned in the identified issues.

issue in this case until [Parent]'s request for a due process hearing. Finally, [Student]'s present academic program that Petitioner argues is appropriate for him does not include a physical education component.

Specificity of learning objectives

Petitioner argues that the objectives developed for [Student] were not specific. Petitioner's expert, [Expert Witness], testified that she would have needed [Student]'s reading grade level listed on the IEPs to be able to use them. With respect to math, [Student] apparently had progressed beyond one math objective.

The IHO finds that each objective may not have been perfectly clear. However, there was no evidence that any of the objectives in question hindered [Student]'s educational program to any degree. While [Expert Witness] would not have known where to begin with [Student], school district personnel apparently based [Student]'s program on previous experience with him. In fact, the evidence showed that [Student] was ahead of one math objective and apparently progressing well. In general, [Primary Teacher] testified that once [Student] met a particular math standard, she would just go on to the next one without calling for a new IEP staffing. While [Student]'s reading grade level was not listed on the IEP, there is no evidence [SpEd Teacher 3] or [Primary Teacher] were not teaching [Student] at the appropriate skill level. If anything, the IHO finds this to be a de minimus procedural violation that does not involve a failure by the district to provide FAPE.

Failure to implement the IEP with respect to computer class

Petitioner's next argument regarding FAPE involves computer class. In the March 2000 IEP, it states that with respect to [Student]'s participation in the general education curriculum, extracurricular and other non-academic activities, "Participation in general education for Computer class." [Student] apparently liked computers and did well in a computer class in sixth grade.

[Student] did not take a computer class in the eighth grade. Because of illness, [Student] did not begin school until October 3, 2000. At that time, [Student]'s schedule called for him to take computer class. The facts with respect to what happened next are unclear. [Parent] testified that she was told the computer class was too full and there wasn't a computer for [Student]. [Principal] testified that she ordered a computer for [Student]. [Parent] testified that the computer teacher said [Student] was too far behind in the computer class. School District witnesses

testified as to the "wheel" at [Middle School], in which students changed classes every six to 12 weeks. The IHO was unable to make a finding of fact as to why [Student] did not take a computer class in eighth grade.[8]

Although this scenario provided a close call for the IHO, I do not believe [Student] was denied FAPE because of his failure to receive a computer course during the first semester of the eighth grade. Instead of computer class, [Student] was enrolled in woodshop. [Parent] testified that [Student] liked woodshop and that she wanted him to have that course. [Principal] testified that although she was worried about [Student] taking woodshop, she agreed to the placement because of the mother's desire. [Student] apparently liked woodshop and received an "A" in two six-week grade reports. It appears [Parent] and [Student] approved of the alternative course provided, which also placed [Student] in a general education classroom with children who did not have disabilities. As a change in placement, an IEP staffing should have been called within a reasonable period of time to ensure the placement was appropriate. This procedural error, however, did not deny FAPE.

Field trips, ice cream socials, and staffing issues

Petitioner's final arguments involve the entire period that [Student] attended [Middle School]. Petitioner argues that [Student] was excluded from field trips and ice cream socials throughout his 2½ years at [Middle School]. Petitioner's allegation fails for a lack of proof. Petitioner was unable to identify any specific field trip that [Student] was not allowed to attend. There was no supporting evidence regarding field trips to which [Parent] testified. [SpEd Teacher] testified to a vague memory that [Student] may have been prohibited from attending a field trip while in her sixth grade class because he hadn't completed a project or turned in a note. She strongly denied [Student] was systematically prevented from attending field trips. Again, the IHO credits the testimony of [SpEd Teacher] as being truthful.

Petitioner identified one ice cream social in seventh grade in which [Student]'s teacher, [SpEd Teacher 3], told [Parent] that the school did not have an escort for [Student]. She told [Parent] that [Parent] could escort him, [Student] could stay with her in a room in which she was supervising children in detention, [Student] could leave early that day, or [Student] could stay home the entire day as an excused absence. Petitioner is correct that another option was not provided, namely that the school would find someone to supervise [Student]. Respondent is correct

[8] The IHO had difficulty establishing when many of these conversations took place, as there was some confusion surrounding computers in the seventh grade, also. The IHO discounts Respondent's apparent argument regarding a "wheel," however. Whether other non-disabled students are on a "wheel" is not relevant to whether a special education student with an individualized education plan may have a schedule that varies from the norm.

that it was an isolated incident and that [Middle School] was in the process of hiring a fulltime paraprofessional for [Student] alleviating the problem in the future. As to [Parent]'s blanket allegation that [Student] was prohibited from attending all ice cream socials, [Parent] recounted that [SpEd Teacher] asked [Student] if he wanted to attend a social. [Student] said no. At home, [Student] apparently told [Parent] he would have liked to attend the social. According to [Parent], the school put [Student] "on the spot." The IHO finds that the one ice cream social event described by [SpEd Teacher 3] did not deny [Student] of FAPE.

[Parent] also testified that [Middle School] personnel repeatedly called and informed her that she should keep [Student] at home because they were short staffed. Petitioner's argument fails for a lack of proof. [SpEd Teacher] testified that she would tell [Parent] when she would be absent during [Student]'s sixth grade year and that [Parent] would generally keep him at home on those days. Other than [Parent]'s general allegations, no evidence was provided that [Middle School] personnel called [Parent] to request that she keep [Student] home because of staffing difficulties.

At a date uncertain, a [Middle School] teacher apparently called [Student] "fat boy." Petitioner identified this teacher as [Teacher 3] in its statement of issues. No evidence regarding [Teacher 3] was presented at hearing. [Principal] testified she reprimanded [Teacher 4] for using the term "fat boy," and told him to call children only by their given names. No context was provided for the statement (joking or serious) or when it may have occurred. Neither [Teacher 3] nor [Teacher 4] were [Student]'s teachers. While inappropriate under any circumstances, the incident did not involve [Student]'s educational program and it had absolutely no affect on [Parent]'s decision to remove [Student] from [Middle School].[9]

In conclusion, the IHO identified numerous problems with [Student]'s early IEPs that led to a lack of FAPE at that time. However, with respect to the issue of reimbursement that is the only issue in this case, the question is whether Respondent was providing FAPE to [Student] at the time he was removed from school. While sympathetic to the Petitioner regarding incidents early in [Student]'s schooling at [Middle School], I find that the Denver Public School District was providing FAPE to [Student] at the time of his removal.[10]

[9] Petitioner amended its statement of issues to include this incident shortly before the hearing, stating that it had only recently been discovered.

[10] The IHO also notes that the final events that led [Parent] to remove [Student] from [Middle School] had nothing to do with FAPE, but rather involved personal conflicts between [Parent] and [Student]'s special education teacher, [Primary Teacher], and the principal of the school, [Principal].

2. Was the parent's private placement appropriate for [Student]?

The IHO's determination that Respondent was providing FAPE to [Student] at the time of his removal from [Middle School] prevents reimbursement even if the parent's placement was appropriate. For purposes of a full record, the IHO will review the additional elements required to receive reimbursement. With respect to whether the parent's placement of [Student] was appropriate, the IHO finds it is not.

Respondent virtually admits that the home school program for [Student] is not appropriate in its present form. Petitioner's expert witness, [Expert Witness], testified that [Parent] is not competent to instruct [Student] in English and writing. Based on [Expert Witness]' review of [Student]'s course work, [Parent] was not catching all of the errors made by [Student] in these subjects.[11]

Petitioner argues that although [Parent] needs help teaching [Student] reading and writing, she isn't presently in the financial position to do so and that it would be "unconscionable" to find her placement of [Student] was inappropriate because of her financial constraints.

The IHO finds no statutory or legal authority to change the requirement that the child's placement be appropriate to a lesser "would have been appropriate" standard if the parent had greater financial capabilities. To do so would allow parents with no financial capabilities to place a student in any educational setting.

Petitioner argues that [Parent] should be paid $22/hour for home schooling [Student]. Citing [Expert Witness]' testimony that [Parent]'s requested hourly rate of $22/hour was reasonable for the "market," Petitioner seeks reimbursement for the hours [Parent] spends home schooling [Student]. However, [Expert Witness] also testified that she did not know of one other person on the planet who would pay [Parent] any amount of money to tutor their child. To the IHO, a "market" must include a class of purchasers, not just a market of one. [Expert Witness] also testified that "almost anyone" can teach the home schooled curriculum purchased by [Parent]. The IHO does not believe the market for "almost anyone" is $22/hour.

The IHO agrees that being in the same household as [Student] is a benefit only [Parent] can provide. However, the IHO does not believe [Parent] is the only person who can be "in tune" with [Student] with respect to his seizure disorder. In general, the only qualification [Parent] possesses for teaching [Student] is the fact that she is his mother. The IHO does not believe this makes the placement appropriate.

Petitioner argues in the alternative that the school district should be responsible for paying appropriate professionals in the future. This is not a decision before the present IHO. Whether Respondent can provide [Student] with FAPE in the future should be determined by a new IEP staffing team.[12]

Petitioner provided no evidence that [Parent] has even a high school degree. Based on [Expert Witness]' testimony that [Student] will never reach age level reading or math expertise, the IHO is also concerned with the fact that [Student]'s home-based program does not include a transition plan, such as vocational training. Home-based education is also not a least restrictive environment for [Student].

Based on the reasons above, the IHO finds the parent's placement is not appropriate.

3. Do equitable considerations support the parent's claim for reimbursement?

As described earlier, 34 C.F.R. § 403(d) allows for the cost of reimbursement to be reduced or denied if, prior to removing the child from public school, the parents fail to inform the IEP team that they are rejecting the placement proposed by the school, including stating their concerns and their intent to enroll their child in a private school at public expense; or, at least 10 business days prior to removing the child from public school, the parents provide written notice to the school of the information described above.

Petitioner admits that [Parent] did not provide written notice to Respondent within 10 days of removing [Student] from school on November 29, 2000. On December 10, 2000, [Parent] provided written notification to the Denver Public Schools that she would be home schooling [Student]. By letter dated December 27, 2000, attorney Lisa Levinson informed the Denver Public School system that [Parent] was home schooling [Student] and various reasons for the withdrawal. [Parent] first requested reimbursement for home schooling with this request for due process.

In addition to failing to provide the district with written notice, [Parent] did not provide constructive notice of her intentions either. When asked whether she told [Principal] why she removed [Student] from school, [Parent] testified, "I didn't tell her why…She already knew." [Parent] also testified that when [School Staff] called her house to inquire why [Student] was absent following his removal, she "didn't return her calls…I didn't want to be bothered."

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[11] [Parent]'s home-based curriculum reading materials are approximately at a third grade reading level. While Petitioner only seeks tutoring for reading and writing skills, [Expert Witness] testified that language is important across all curriculums.

Petitioner argues that she is absolved from the requirements of 34 C.F.R. § 403(d) through the exception in 34 C.F.R. § 403(e), which states, "Notwithstanding the notice requirement in paragraph (d)(1) of this section, the cost of reimbursement may not be reduced or denied for failure to provide notice if—(4) The parents had not received notice, pursuant to section 615 of the Act, of the notice requirement in paragraph (d)(1) of this section."

[Parent] testified that she has never received a booklet entitled "Educational Rights of Students and Parents." [SpEd Teacher] testified that she gave a copy of the booklet to [Student] to give to his mother in the sixth grade. The IHO does not find this complies with the notice requirement, as children are not always reliable in forwarding information. [SpEd Teacher 3] testified that either she gave the booklet to [Parent] herself or she gave it to [Coordinator], who gave it to [Parent], during the March 2000 IEP. The IHO finds that it is more likely than not that [Parent] received the booklet. The District was apparently concerned with a lawsuit at that time and it is unlikely it failed to take this procedural step.

Petitioner argues that [Middle School] should have called an additional staffing in the fall of 2000 when [Student] was enrolled in woodshop rather than computer class. Following Petitioner's argument, had [Middle School] conducted a new IEP staffing, [Parent] would have received another booklet in the fall of 2000.

The IHO does not agree. The IHO finds [Parent] received notice of the reimbursement requirement in March 2000. She did not comply with the requirement in December 2000. The IHO also notes that this case is an excellent example of why 34 C.F.R. § 403(d) exists. Many of the reasons presented by Petitioner in support of its claim for reimbursement were presented for the first time as part of this due process hearing. Many of Petitioner's issues either had no factual basis, or were dropped or modified at hearing. Following a full hearing, the IHO is not able to identify the specific changes in [Student]'s educational plan that Petitioner would have sought on November 29, 2000.

IV. CONCLUSION

The sole issue in the present hearing is whether the Petitioner is entitled to be reimbursed by the Respondent for the costs of the student's home schooling. Based on the above findings and conclusions, it is the decision of the Impartial Hearing Officer that:

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[12] [Student] would be enrolled in high school had he stayed in public schools. A new IEP would have been developed with a new staff.

1. Respondent was providing FAPE to [Student] at the time of his removal from school on November 29, 2000.
2. The parent's private placement was not appropriate for the student.
3. The parent did not provide appropriate notice to the school district pursuant to 34 C.F.R. § 403(d).

Therefore, the parent's request for reimbursement is denied.

The IHO identified a number of procedural errors that denied FAPE to [Student] during his sixth and seventh grades at [Middle School]. Petitioner made no request for compensation, so none is ordered.

The IHO will mail this decision to the Petitioner's attorney, Respondent's attorney, and the Colorado Department of Education. Either party may request a state level review by contacting the State Department of Education if dissatisfied with the decision and findings rendered by the IHO. An Administrative Law Judge will be appointed to hear the appeal.

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Andrew J. Maikovich
Date: November 5, 2001