BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS
STATE OF COLORADO

CASE NO. ED 2001-020

DECISION UPON STATE LEVEL REVIEW

IN THE MATTER OF:
[student], by and through his parent, [parent],

Appellant,

v.

SCHOOL DISTRICT #1, CITY AND COUNTY OF DENVER,

Appellee.

This is a state level review of a decision of an impartial hearing officer ("IHO") pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* ("IDEA") and the Colorado Exceptional Children's Educational Act, Section 22-20-101 *et seq.,* C.R.S. (2001) ("ECEA"). Appellant [student] through his parent [parent], was represented by Brian A. Murphy, Esq. School District #1, City and County of Denver ("District") was represented by Patrick B. Mooney and Erica L. White, Semple, Miller & Mooney, P.C. No additional evidence or oral argument was presented for this state level review. The parties submitted an Appeal Brief, Appellee's Response Brief, and a Reply Brief, as well as the transcript of the due process hearing.

PROCEDURAL BACKGROUND

By letter dated July 24, 2001, [STUDENT], through his parent [PARENT], filed a request for a due process hearing in this matter. The request reflected that [STUDENT] was being home schooled by [PARENT] after being removed from [Middle School] and sought reimbursement for the costs of home schooling. Andrew J. Maikovich was selected as the Impartial Hearing Officer ("IHO"), and an evidentiary hearing was held on October15, 16, 17, and 23, 2001, in Case No. 2001:126. The IHO issued Findings and Decision on November 5, 2001.

The Findings and Decision found that the District was providing a free appropriate public education ("FAPE") to [STUDENT] when he was removed from [Middle School] on November 29, 2000; that the private placement (home schooling) for [STUDENT] was not appropriate; and that the parent did not provide appropriate notice to the District pursuant to 34 CFR §

300.403(d). It therefore denied [STUDENT]'s request for reimbursement of home schooling costs.

[STUDENT] subsequently filed an appeal. The District filed no cross appeal and concedes that [STUDENT]'s appeal was timely filed. The ALJ has reviewed the transcript of the hearing in this matter, the record of the hearing before the IHO, and the briefs submitted and now issues this decision upon state level review.

ISSUES ON APPEAL

[STUDENT] has identified two issues on appeal: 1) whether [Middle School] provided a FAPE to [STUDENT] prior to his enrollment in home schooling and 2) whether the District is required to reimburse [PARENT] for the costs of home schooling [STUDENT]. The ALJ finds, however, that under the facts of this case, these are not separate issues. The sole issue before the IHO and now before the ALJ on state level review is whether [STUDENT] was entitled to be reimbursed by the District for the costs of home schooling.[1] For the purposes of this appeal, the determination of whether the District was providing [STUDENT] a FAPE prior to his withdrawal from [Middle School] is only relevant for the purposes of determining whether [STUDENT] is entitled to reimbursement.

FINDINGS OF FACT

1. [STUDENT] is a 15-year-old who from the age of six months has had various epileptic disorders. Beginning in the summer of 1999, [STUDENT] began experiencing drop-type seizures which at times have caused him injury.

2. [STUDENT] began receiving special education when he was in third grade.

3. October 27, 1998, part way into his sixth grade year, [STUDENT], age 12, re-enrolled in the District after a short stint at a private school and began attending [Middle School]. [STUDENT] received special education services at [Middle School] and continued to attend [Middle School] until November 29, 2000, when his mother [PARENT] removed him from [Middle School] and the District. [STUDENT] has not returned to [Middle School] or any other District school since that time and instead has been home schooled by [PARENT].

4. [STUDENT] raises a number of alleged violations of FAPE which occurred during his sixth, seventh, and eighth grade years. Due to the ALJ's determination regarding the relevant time period for determining whether [STUDENT] was receiving a FAPE (*i.e.,* at the time of his withdrawal from school on November 29, 2000), the ALJ addresses only

1 While the ALJ is also required on state level review to "ensure that the procedures at the hearing were consistent with the requirements of due process" [34 C.F.R. § 300.510(b)(2)(ii)], [STUDENT] here has claimed no due process violation at the hearing.

those violations asserted in relation to [STUDENT]'s last IEP, which was established as of March 1, 2000.[2]

5. A Triennial Review staffing regarding [STUDENT] was held on March 1, 2000, due to the staffing team's concern during a January 11, 2000 IEP staffing that [STUDENT] might have a physical disability. Prior to that time, [STUDENT] had been identified as having a learning disability (primary) and emotional disability (secondary). As a result of the Triennial Review staffing, [STUDENT] was identified as having a physical disability (primary) and learning disability (secondary). [STUDENT] was in the seventh grade at that time.

6. Conduct of Triennial Review. Those attending the Triennial Review staffing, as listed on the ensuing IEP, were [Coordinator], as the special education director or designee; [SpEd Teacher 4], as the principal's designee; [SpEd Teacher 3], [STUDENT]'s seventh grade special education teacher; [Teacher 2], a general education teacher; [School Psychologist], the school psychologist; [Social Worker], the school social worker, and [PARENT].

7. [STUDENT] contends that the IEP team did not reach consensus, failed to discuss the private school option and failed to conduct a comprehensive reevaluation. [School Nurse], the [Middle School] nurse, prepared a report the day before which was considered at the Triennial Review. This report included [School Nurse]'s recommendation that [Middle School] follow the recommendation of [Physician], a physician who had seen [STUDENT]. [Physician], as reported in [School Nurse]'s nursing report, "recommends that [[STUDENT]] attend Children's Day Treatment where he can be supervised more closely and to allow psychological support for his family" and that [STUDENT] "be considered for homebound services until alternative school arrangements can be arranged." [School Nurse] concurred with [Physician]'s recommendations and apparently did not change her mind. The record is unclear regarding whether [School Nurse] attended the Triennial Review. She is not listed on the IEP as an attendee or signatory.

8. [SpEd Teacher 3], [STUDENT]'s special education teacher at the time of the Triennial Review, also concurred with [Physician]'s recommendation regarding homebound instruction. The record does not establish any position taken by [SpEd Teacher 3] on [Physician]'s recommendation for [STUDENT]'s placement at Children's Hospital Day Treatment program. While [SpEd Teacher 3] preferred the option of homebound instruction, she did agree to [STUDENT]'s placement at [Middle School], as evidenced by her signing the IEP resulting from this Triennial Review.

9. The option of homebound services was discussed at the Triennial Review but was not pursued when [PARENT] indicated that she did not want this option.

2 The FAPE violations asserted by [STUDENT] which were not established as occurring after March 1, 2000, include *inter alia* the following: 1) an incident in the 1998-99 school year when a paraprofessional kicked [STUDENT] in the ankle on one occasion and pushed or slapped his head on another; 2) a teacher's calling [STUDENT] "fat boy" on an undetermined date; and 3) [STUDENT]'s falling over the stairs railing at [Middle School] and breaking his wrist on November 5, 1999.

10. The option of a private school placement for [STUDENT] was discussed during the staffing, but [PARENT] dismissed it as "too expensive." The District's responsibility to bear the costs associated with various educational options was not discussed. The District did not volunteer the information that should the IEP team agree on [STUDENT]'s placement at the Children's Hospital Day Treatment program, the District would be obligated to pay the costs associated with that placement.

11. The IEP did not record any majority and minority opinions of the participants.

12. The fact that [School Nurse] and [SpEd Teacher 3] concurred at least in part with [Physician]'s recommendations does not establish that the IEP team failed to reach consensus, as [STUDENT] asserts. In fact, the IEP team, including [PARENT], reached a consensus that [Middle School] was able to provide FAPE to [STUDENT].

13. In preparation for the Triennial Review, [STUDENT] received additional assessments, and additional information regarding him was collected. In addition, the psychologist, school nurse and social worker reviewed and reevaluated [STUDENT]'s educational, medical and social needs.

14. After the March 1, 2000 IEP was developed, [STUDENT] completed his seventh grade year at [Middle School]. Sometime during the end of seventh grade, a paraprofessional was hired to sit with [STUDENT] on a full-time basis and to escort him between classes. [STUDENT] began his eighth grade year late on October 2, 2000, due to health problems.

15. <u>Physical Education</u>. In the spring semester of 1999, when [STUDENT] was in sixth grade, his physical education teacher recommended to the [Middle School] principal [Principal] that he be removed from physical education class because he did not participate in the class. After discussing [STUDENT]'s physical education class with the special education coordinator [Coordinator], [Principal] told [PARENT] that she was concerned about [STUDENT]'s safety and recommended that he not take physical education. [PARENT] agreed, requested that [STUDENT] be removed from the class, and never again requested that he be re-enrolled. [STUDENT] was given another elective class to replace physical education.

16. During the remainder of the remainder of sixth grade, during all of seventh grade, and at the beginning of eighth grade, [STUDENT] was not enrolled in a physical education class at [Middle School].

17. Physical education was discussed at the Triennial Review and was found not to be appropriate for [STUDENT].

18. The March 1, 2000 IEP states "No PE due to medical condition." This is the same language used regarding physical education in the November 24, 1999 IEP.

19. <u>Half-Day Schedule</u>. Before [STUDENT] began seventh grade in September, 1999, [PARENT] met with [Middle School] personnel to discuss [STUDENT]'s drop

seizures, which had started that summer, and her concerns for his safety. Because [PARENT] believed that [STUDENT]'s seizures were more prevalent in the mornings, she requested that he not begin school early in the morning. [Middle School] agreed to begin [STUDENT]'s schedule at 10:20a.m. Before this request, [Middle School] had the ability and expected to provide [STUDENT] with a full schedule.

20. The March 1, 2000 IEP states that "due to [[STUDENT]'s] documented medical disability, he attends classes from 10:20-2:30 with all his classes being on the first floor." This language parallels that of a prior IEP.

21. Due to this half-day schedule, [STUDENT] only had time for one elective.

22. Computer Class. The March 1, 2000 IEP, when describing how [STUDENT] would participate in the general education curriculum, states the following: "[p]articipation in general education for Computer class." While [STUDENT] had a computer class in the spring semester of seventh grade, he did not have one in eighth grade (fall semester of 2000). This elective and general education class for the fall semester of eighth grade was CTE Wood Tech (woodshop). The woodshop class was also a general education class with students who do not have disabilities.

23. Both woodshop and computer are electives. Electives are offered on a nine- or twelve-week rotation. The IEP team at [STUDENT]'s Triennial Review discussed the fact that [STUDENT]'s elective might rotate depending on his interests and class availability.

24. The record does not establish why [STUDENT] did not take a computer class in eighth grade (*e.g.,* whether a computer was unavailable for him, whether an additional computer was ordered for him, whether he was simply too far behind in the class due to his late start to eighth grade, or whether [PARENT] requested woodworking instead). There was some evidence that [PARENT] tried to get [STUDENT] enrolled in a computer class. She and [STUDENT] also approved of the alternative woodshop course and wanted him to have that course. [PARENT] in fact demanded that [STUDENT] be permitted to enroll in the woodshop course.

25. Although [PARENT] was actively involved in the decision regarding [STUDENT]'s elective for the fall of 2000, no written notice was given to [PARENT] when [STUDENT] was placed in woodshop rather than the computer class. Likewise, no IEP staffing was convened.

26. Extra Time on Tests and Assignments. [STUDENT]'s March 1, 2000 IEP provides as a necessary accommodation for participation in the general education program "[e]xtended time to complete assignments especially in written language and math. Extended time on tests."

27. [PARENT] asked [STUDENT]'s seventh and eighth grade teachers for additional time for [STUDENT] to take tests. Based on these teachers' statements to

[PARENT] that they would not provide such additional time, the ALJ finds that [STUDENT] was at least on one occasion in both seventh and eighth grades not provided extended time on tests, as called for in the March 1, 2000 IEP. Since [PARENT]'s testimony in this regard was general and did not provide any specifics about these requests, the record does not establish the parameters of this IEP violation, *e.g.,* the number of times extra time was denied or whether [STUDENT] in fact needed extra time on those tests.

28. Instructions to Keep [STUDENT] Home. The record does not establish that [Middle School] personnel called [PARENT] to ask her to keep [STUDENT] home on April 21, 2000.[3]

29. Field Trips. During the time he attended [Middle School], [STUDENT] did not participate in any field trips, and [PARENT] never received any parental consent forms to permit him to participate in field trips.

30. The District did not prohibit [STUDENT] from attending field trips.[4]

31. School Socials. Approximately once a semester, [Middle School] has a school ice cream social, an all-school function with activities such as movies, dancing, and games. The District did not prohibit [STUDENT] from attending ice cream socials.

32. During the spring of 2000, when [STUDENT] was in seventh grade, his special education teacher [SpEd Teacher 3] told [PARENT] that [Middle School] did not have anyone to watch [STUDENT] during the school social and outlined three choices for [STUDENT]: [PARENT] could watch [STUDENT] during the social, [STUDENT] could stay with [SpEd Teacher 3] in a room where she was supervising students in detention, or [STUDENT] could stay at home that day or leave early. [Middle School] thus effectively excluded [STUDENT] from attending the social.

33. Home Schooling. On November 29, 2000, a disagreement occurred between [PARENT] and [Principal]. Both parties were angry, and after this disagreement,

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3 The IHO found that although [PARENT] testified that [Middle School] personnel had repeatedly called and informed her that she should keep [STUDENT] at home because they were short staffed, this argument failed for lack of proof. [STUDENT] now contends that given [PARENT]'s undisputed testimony, the record supports a determination that [Middle School] personnel asked [PARENT] to keep [STUDENT] home on two days (January 19 and April 21, 2000) when classes were in session at [Middle School]. One of these dates, January 19, 2000, is not in the relevant time period. In addition, [PARENT]'s testimony was not undisputed, as [Principal] testified that neither she nor anyone of whom she was aware had ever instructed [PARENT] to keep [STUDENT] at home when school was in session. The ALJ declines to disturb the IHO's credibility-based finding in this regard.

4 [STUDENT] cites testimony by [PARENT] that [STUDENT]'s seventh grade class went on several field trips, as relayed to her by an [Middle School] employee perhaps named [Employee] who [PARENT] understood was the special education coordinator who scheduled field trips. No dates for these field trips were provided, so it is not clear that any such field trip occurred after March 1, 2000. There was also testimony from [Principal] and special education teacher [SpEd Teacher 5] that [STUDENT] was not excluded from field trips. Given [PARENT]'s vague testimony and the conflicting testimony of [Middle School] personnel, the ALJ declines to overturn the IHO's determination that [STUDENT] failed to establish that the District excluded him from any field trip.

[PARENT] removed [STUDENT] from [Middle School] and did not return him to school. The last day [STUDENT] attended [Middle School] was November 29, 2000.

34. In the days that followed his removal, [Middle School] personnel called [PARENT] regarding [STUDENT]'s absences. [PARENT] did not return the calls, because she did not want to be bothered.

35. [PARENT] first notified the District that she was home schooling [STUDENT] on December 10, 2000, when she provided written notification to this effect. [PARENT] first requested reimbursement for home schooling in a letter dated December 27, 2000, to the District from her attorney.

36. [PARENT] purchased a home school curriculum (Christian Liberty Academy), which she has used in home schooling [STUDENT].

37. [PARENT] does not have the ability to teach [STUDENT] language arts (reading and writing skills) without the assistance of a professional tutor. The record does not establish [PARENT]'s qualifications to provide home schooling to meet [STUDENT]'s education needs or even whether she possesses a high school diploma. [PARENT] does not have a full grasp of the English language and does not catch some of the grammatical errors in [STUDENT]'s writing. A professional tutor with a full grasp of the English language is needed to instruct [STUDENT] in written language skills.

38. At the Triennial Review, [PARENT] received the booklet entitled "Educational Rights of Students and Parents." This booklet informed her of her obligation to notify the District of her rejection of [STUDENT]'s placement and her intent to seek reimbursement from the District for her unilateral placement of [STUDENT].

DISCUSSION

I. Scope of Review

Pursuant to IDEA and ECEA, the ALJ must conduct an impartial review of the IHO's decision, examine "the entire hearing record," and make an "independent" decision on state level review. 20 U.S.C. § 1415(c); 34 C.F.R.§ 300.510; and Section 2220-R-6.03(11)(b)(v) (1 CCR 301-8). Neither party presented additional evidence, as is permitted by 34 C.F.R.§ 300.510(b)(2)(iii). In reviewing the Findings and Decision of the IHO, the ALJ must give "due weight" to the factual findings of the IHO. *See Board of Education of Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, 206 (1982); *Burke County Board of Education v. Denton,* 895 F.2d 973 (4th Cir. 1990); *Roland M. v. Concord School Committee,* 910 F.2d 983 (1st Cir. 1990).

The 10th Circuit Court of Appeals, in the context of a judicial review of a final administrative proceeding, has addressed the standard for conducting an independent

review while giving due weight to factual findings. Since that standard is analogous to that of the ALJ reviewing the IHO's decision, it is instructive:

> The district court must therefore independently review the evidence contained in the administrative record, accept and review additional evidence, if necessary, and make a decision based on the preponderance of the evidence, while giving "due weight" to the administrative proceedings below.

Murray v. Montrose County School District, 51 F.3d 921, 927 (10th Cir. 1995).

Factual findings based on credibility determinations "deserve deference unless non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion." *Carlisle Area School v. Scott P.,* 62 F.3d 520 (3rd Cir. 1995). In all other areas, a non-deferential standard is contemplated, and the ALJ exercises "plenary review." *Id.*

II. General Legal Background

Pursuant to IDEA, states must provide each disabled child with a FAPE through the development and implementation of an IEP. 20 U.S.C. § 1412. A free appropriate public education is one which is "reasonably calculated to enable the child to receive educational benefit." *Board of Education v. Rowley,* 458 U.S. 176, 188-89 (1982). IDEA does not require a school district to provide a perfect or ideal education to students with disabilities, but the educational program must be reasonably calculated to allow the child to achieve passing grades and advance from grade to grade. *Board of Education v. Rowley, supra*; *Lenn v. Portland School Committee,* 98 F.2d 1083 (1st Cir. 1993) [FAPE need not provide educational benefit to highest attainable level; no entitlement to residential placement permitting child to reach full potential]; *Doe v. Board of Education of Tullahoma City Schools,* 9 F.3d 455 (6th Cir. 1993) [FAPE does not require school district to pay for tuition at private school which would provide superior services so long as proposed IEP is reasonably calculated to enable child to receive educational benefits]; *Kerkam v. Superintendent D.C. Public Schools,* 931 F.2d 84 (D.C. Cir. 1991) [when public school offered an appropriate education, it need not reimburse parents for unilateral enrollment in private school which confers greater education benefit]. *In accord Hampton School District v. Dobrowolski,* 976 F.2d 48 (1st Cir. 1992). The educational benefit conferred must be meaningful and not trivial or *de minimus. Polk v. Central Susquehanna Intermediate Unit 16,* 853 F.2d 171, 184 (3rd Cir. 1988). The IEP is the primary vehicle for delivering appropriate educational services to children with disabilities. *See Honig v. Doe,* 484 U.S. 305, 311 (1988).

If a school district fails to provide FAPE to a child with a disability, the child's parents may unilaterally place the child in an appropriate private school or facility and request tuition reimbursement from the school district. Parents make a unilateral placement "at their own financial risk." *Burlington School Committee of the Town of Burlington v. Department of Education of Massachusetts,* 471 U.S. 359 (1985). In order for a parent to

obtain school district reimbursement for a unilateral placement of his child at a private school or facility, the parent must establish three prerequisites, as outlined in *Burlington* and 34 C.F.R. § 300.403(c) and (d):

1) The school district must have failed to make available a FAPE to the child.
2) The private placement for the child must be appropriate.
3) Equitable considerations must support the parent's claim for reimbursement. 34 C.F.R. 300.403(d) specifically requires the parent to inform the school district that he is rejecting the proposed placement and is intending to enroll the child in a private school at public expense.

III. Reimbursement of Home Schooling Costs: Is Home-Based Instruction a "Private School or Facility" under Colorado Law?

1. District's Ability to Dispute IHO's Determination that Home Schooling Costs are Reimbursable under Colorado Law. In the Appellee's Response Brief, the District seeks to dispute the IHO's determination that Colorado law permits reimbursement of home schooling costs. As referenced above, IDEA requires a school district to pay the cost of educating a child with a disability "at a private school or facility" if a FAPE has not been made available, the parents' placement is appropriate, and the parents have properly notified the school district. 20 U.S.C. § 1412(a)(10)(c) and 34 CFR § 300.403(c) and (d). State law then governs whether home schooling is a "private school or facility." *OSEP Policy Letter to Williams*, 18 IDELR 742, 744; *OSEP* P*olicy Letter to Sarzynski,* 29 IDELR 904; *Hooks v. Clark County School District,* 228 F.3d 1036 (9th Cir. 2000), *cert. denied,* 121 S. Ct. 1602 (2001); *see Swanson v. Guthrie Independent School District 1-l,* 135 F.3d 694 (10th Cir. 1998) [state's refusal of services to home-schooled children constitutional].

The IHO found that Colorado defines home schooling as a "private school or facility" under the IDEA and that home schooling costs were therefore reimbursable. Section 22-33-104.5(2)(a), C.R.S. The District now seeks to dispute this conclusion, while [STUDENT] argues that since the District did not file a cross appeal, it is precluded from contesting the IHO's ruling.

ECEA rules permit a party to file a cross appeal within five days after receipt of a notice of appeal of a due process hearing decision. 1 CCR 301-8, Section 2220-R-6.03(1)(b). While the District did not file any cross appeal, it contends that it is permitted to dispute the IHO's legal conclusion because it prevailed on the reimbursement issue (*i.e.,* the IHO found on other grounds that [STUDENT]'s home schooling costs were not reimbursable) and because the IHO's denial of reimbursement can be affirmed for any legitimate reason. For the reasons described below, the ALJ finds that the District may dispute the IHO's legal conclusion that home schooling constitutes a "private school or facility" for reimbursement purposes.

Issues not raised on cross appeal are generally waived. *Country World Casinos, Inc. v. Tommyknocker,* 181 F.3d 1146, 1150 (10th Cir. 1001); *Hutchinson v. Pfeil,* 105 F.3d 562, 564 (10th Cir. 1997); *D.E.B. Adjustment Co, v. Cawthorne,* 623 P.2d 82 (Colo. App. 1981); *Board of Education of the City Sch. Dist. Of the City of N.Y.*, 31 IDELR Section 95 (NY 1998). It is equally well-established, however, that an appellee is not required to cross appeal in order to advance a different ground for upholding the decision being appealed. Arguments supporting the judgment entered—as distinguished from those seeking to modify the judgment—can be made without filing a cross-appeal. *Hansen v. Director, Office of Workers' Comp. Programs,* 984 F.2d 364, 367 (10th Cir. 1993) [cross-appeal rule applied in administrative context]; *In re Robinson*, 921 F.2d 252, 253 (10th Cir. 1990) ["An appellee may defend the judgment won below on any ground supported by the record without filing a cross appeal."]; *Housing Authority v. City of Ponca City,* 952 F.2d 1183 (10th Cir. 1991) ["An appellee may present an argument on appeal (without filing a cross-appeal) only if it does not enlarge the rights conferred by the original judgment."]; *See Koch v. City of Hutchinson,* 847 F.2d 1436, 1441 n.14 (10th Cir.) (en banc), *cert. denied,* 488 U.S. 909, (1988); 15 Wright, Miller & Cooper, *Federal Practice and Procedure,* Section 3904 (1992 and 2001 Supp.), p. 195-196 [general rule that cross-appeal is required to support modification of the judgment, but arguments that support the judgment as entered can be made without a cross-appeal].

No cross-appeal is required when the prevailing party merely seeks to advance arguments in support of the judgment. An appellee may raise arguments in support of the judgment in his favor without filing a cross-appeal so long as those arguments do not increase his rights under the judgment. *City of Delta v. Thompson*, 548 P.2d 1292 (Colo. App. 1975). This rule applies despite the fact that the lower court may have explicitly rejected the argument now being advanced on appeal, as the IHO here rejected the District's contention that Colorado law does not define home schooling as a "private school or facility" and thus precludes reimbursement of home schooling costs. *Wycoff v. Menke,* 773 F.2d 983, 985, *cert. denied* 475 U.S. 1028 (1985); *U.S. v. Hilger,* 867 F.2d 566, 567 (9th Cir. 1989); Wright, Miller & Cooper, *supra* at pp. 199-203.

The District in this matter prevailed before the IHO on the issue of whether the costs of [STUDENT]'s home schooling were reimbursable—the IHO held that they were not. The District is therefore able, without filing a cross-appeal, to advance other arguments in support of the IHO's ruling, including whether such costs are reimbursable under Colorado law. Without filing a cross-appeal, it may attack this reasoning of the IHO's ruling because it is not attempting to dispute the IHO's conclusion that [STUDENT]'s home schooling costs are not reimbursable. The District is merely advancing an alternative ground upon which the ALJ could uphold the IHO's decision and may do so without having filed a cross-appeal.

2. <u>Home-Based Education Not a Private School or Facility Under Colorado Law.</u> Colorado law specifically provides that home-based education is a legitimate alternative to classroom attendance for the instruction of children. Section 22-33-104.5, C.R.S. (2001).

It defines a "non-public home-based education program"[5] in Section 22-33-104.5(2)(a) as follows:

> "Non-public home-based educational program" means the sequential program of instruction for the education of a child which takes place in a home, which is provided by the child's parent or by an adult relative of the child designated by the parent, and which is not under the supervision and control of a school district. *This educational program is not intended to be and does not qualify as a private and nonprofit school.*

(Emphasis added.)

The IHO concluded that Colorado law permits reimbursement for a Colorado home-based educational program as a "private school or facility," despite the fact that it is not a "private and nonprofit school." The ALJ disagrees. The term "private and nonprofit school" appears only once in Colorado statutes. Given the statutes' repeated differentiation among home-based educational programs, private schools, and public schools, however, it is clear that a private and nonprofit school is simply a private school which is nonprofit and is not a "private school or facility" as referenced in 34 C.F.R. Section 300.403.

Colorado statutes specifically differentiate between home-based education and private schools and use these terms to designate separate entities. For example, in the statutes regarding home-based education, a home-based education program is distinguished from a private school in that a student in a non-public home-based education program can participate in extracurricular or interscholastic activities offered by a public or by a private school.[6] Section 22-33-104.5(6)(b)(I), C.R.S.

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5 The parties and the ALJ have also used the term "home schooling" to refer to the "non-public home-based educational program" defined in Colorado statutes.

6 Colorado statutes contain other references differentiating between home-based education and private schools. Section 22-30.5-106(2) prohibits a private school *or* a non-public home-based education program from filing an application to convert to a charter school. The use of "or" indicates that these are in fact different entities. In addition, in Section 22-2-114.1(3)(a), the term "dropout" is defined as a person who leaves school before completion of a high school diploma and who does not transfer to another public or private school *or* enroll in an approved home study program or on-line program. The terms "private school" and "home study program" are used in the disjunctive. Likewise, if home-based education were considered a private school, there would be no need for the legislature to require instruction in the U.S. Constitution in all public and private schools [Section 22-1-108, C.R.S.] and separately in Section 22-33-104.5, C.R.S., for home-based educational programs. The separate attendance reporting requirements of private schools and home-based education programs also support the conclusion that these are different entities. Sections 22-1-114 and 22-33-104.5(3)(g), C.R.S. Other examples of these terms being distinguished occur in Section 22-33-104.6(4)(a)(II), C.R.S.[regarding pupil counts by school districts]; Section 22-33-104(5)(b), C.R.S. [differentiating a "independent or parochial school" and a "non-public home-based educational program" in the context of compulsory school attendance]; Section 22-7-409(1.5)(III), C.R.S. [differentiating a "nonpublic school" from a "home-based educational program" in the context of the requirements for statewide student assessments]; and Section 22-33-104.5(6)(b)(II)(B), C.R.S.[differentiating private schools from non-public home-based educational programs in the context of defining the school district of attendance].

The conclusion that home-based education is not a private school or facility is consistent with the legislative mandate that home-educated students can only be counted for funding purposes if they are enrolled in the district for part of the day. Section 22-33-104.5(6)(a), C.R.S. It would be incongruous for Colorado law to require school district reimbursement to home-educated students on the one hand and to provide no funding to the school district for those students on the other. In addition, while the legislature has not directly defined "private school," it has defined "nonpublic school" twice and in each instance contemplates an educational institution, not a home-based educational program.[7] Further, the General Assembly's use of "home-based educational *program*" appears to be a conscious choice to differentiate this form of education from a school. The common use of "school" refers to an educational *institution*, not parent-provided at-home education. *See Hooks v. Clark County School District, supra* at 1040 [common usage of "school" as "institutional for the instruction of children"].

The conclusion that the costs of home-based education are not reimbursable under Colorado law disposes of [STUDENT]'s appeal. The ALJ proceeds, however, to address each of the requirements for reimbursement.

IV. Reimbursement of Home Schooling Costs: Did the District Provide [STUDENT] with a FAPE ?

As discussed above, [STUDENT] has the burden of establishing three prerequisites to any reimbursement of the costs of his home schooling. The first of these is that the District failed to provide him a FAPE prior to his removal from school on November 29, 2000. [STUDENT] has alleged numerous instances of alleged violations of IDEA, each of which in his view amounts to a violation of FAPE.

[STUDENT] claims initially that the relevant time period in determining whether the District provided him a FAPE for reimbursement purposes is the entire time he was enrolled at [Middle School]. The ALJ disagrees. The IDEA clearly contemplates that the relevant time period for assessing whether a school district is fulfilling its requirement to make available a FAPE is the time period when the parent effectuates the unilateral withdrawal. That determination requires some historical context, rather than an assessment of the actual day of withdrawal, but does not require a review of asserted violations many months or years in the past. In this case, a Triennial Review was held on March 1, 2000, and the IEP issued at that time. Events which occurred prior to that time are simply too distant in time to be relevant in determining whether the District made available a FAPE to [STUDENT] as of November 29, 2000. The ALJ has therefore made no factual

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7 "Nonpublic school" in the State Department of Education Act of 1964 is defined as "a school organized and maintained by a recognized religious or independent association performing an academic function." Section 22-2-102, C.R.S. This definition clearly does not include home-based education programs offered in the home by a parent or relative but rather contemplates an educational institution. Section 22-32-116.5(10)(c) provides separate definitions for "nonpublic school" and "nonpublic home-based education program" and defines the former as "any independent or parochial school that provides a basic academic education."

findings or conclusions of law regarding asserted FAPE violations predating March 1, 2000.

[STUDENT] asserts the following FAPE violations beginning on March 1, 2000:

1. Consensus and Discussion at Triennial Review. An IEP team is required to "[r]each decision through group discussion and consensus. Should consensus not be reached, the majority and minority opinions of the participants shall be recorded as part of the IEP and made available to the director of special education." Section 2220-R-4.02(6). Petitioner contends that the IEP team on March 1, 2000, was required to record the minority opinion of [School Nurse] and [SpEd Teacher 3] supporting an interim placement for [STUDENT] with homebound instruction and an ultimate placement with Children's Hospital Day Treatment program. The record establishes, however, that consensus was reached.

[STUDENT] relies on [SpEd Teacher 3]'s and [School Nurse]'s support for [Physician]'s placement recommendations in asserting that no consensus was reached. [SpEd Teacher 3] did agree with [Physician]'s recommendation of homebound instruction, but the record does not establish whether she agreed to a placement with Children's Hospital Day Treatment program. [School Nurse], on the other hand, agreed with [Physician]'s recommendation in its entirely. The fact that participants start with different views and that their preferred resolution is not adopted by the IEP team does not indicate a lack of consensus. The ECEA regulations themselves contemplate the give the take of a group discussion which permits the participants to reach a consensus and a decision. Section 2220-R-4.02(6). [SpEd Teacher 3] specifically indicated her agreement with the IEP Team's placement decision by signing the IEP. While [School Nurse] did not sign, and in fact is not listed as a participant, the fact that she apparently did not change her mind about the preferred placement does not establish a lack of consensus. Since consensus was reached, the requirement for recording minority and majority opinions does not arise. Section 2220-R-4.02(6)(c).

[STUDENT] further claims that the IEP Team did not adequately discuss the District's financial responsibilities regarding private schools during the Triennial Review. Although the IEP team on March 1, 2001, did discuss the option of a private school, the District did not volunteer the information that should the IEP team agree on [STUDENT]'s placement at the Children's Hospital Day Treatment program, the District would be obligated to pay costs associated with this placement. Since consensus was reached regarding the appropriate placement, *i.e.,* [Middle School], the District was not obligated to provide information about its financial obligations in relation to another placement option. The District's actions did not, therefore, violate Section 2220-R-4.02(6), which provides that IEP teams must "[d]raw upon and consider information from a variety of sources including information from the family, if available. Insure that information obtained from all these sources is documented and carefully considered."

2. Comprehensive Re-Evaluation at Triennial Review: Physical Education and Half-Day Schedule. [STUDENT] also asserts that the Triennial Review of March 1, 2000, was not a "comprehensive evaluation" because it did not adequately reexamine his disability as it related to his educational needs in the areas of physical education and the half-day schedule. Section 2220-R-4.01(3)(j) and 20 U.S.C. § 1414(a)(2) and (b) [STUDENT]

appears to rely in part on the fact that the March 1, 2000 IEP copies the same language of the November 24, 1999 IEP: "No PE due to medical condition." [STUDENT] also asserts that the IEP team at the Triennial Review did not adequately reexamine his half-day schedule, which started at the beginning of seventh grade. The March 1 IEP states that "due to [[STUDENT]'s] documented medical disability, he attends classes from 10:20-2:30 with all his classes being on the first floor." This language parallels that of a prior IEP.

The record establishes, however, that in preparation for the Triennial Review, [STUDENT] received additional assessments and that additional information regarding him was collected. In addition, the psychologist, school nurse and social worker reviewed and reevaluated [STUDENT]'s educational, medical and social needs. The record simply does not reflect [STUDENT]'s contention that the Triennial Review failed to comprehensively evaluate the fact that [STUDENT] did not receive physical education instruction and was on a half-day schedule. The fact that the March 1, 2000 IEP used the same language as previous ones to reflect these conclusions is not helpful in determining whether these decisions were adequately reviewed at the Triennial Review.

3. Lack of Computer Class in Eighth Grade. [STUDENT]'s March 1, 2000 IEP reflects that he will participate in the general education curriculum for a computer class. While [STUDENT] did have a computer class in the spring semester of seventh grade, in eighth grade he did not take any computer class but instead took woodshop. Both computer and woodshop are electives, and due to his schedule, [STUDENT] could only take one elective at a time. At the Triennial Review, there was discussion about the fact that [STUDENT]'s elective might rotate depending on his interests and class availability. The record does not reflect why [STUDENT] did not take a computer class in eighth grade.

Appellant contends that the lack of a computer class raises both procedural and substantive violations of IDEA. First, Appellant argues that this change was material and therefore required a comprehensive re-assessment and an IEP meeting before he was denied the computer class. Appellant relies on both ECEA regulations and the IDEA:

> When a child's educational program is materially altered, such as a change in the amount of a given service . . . the change in program/services is considered a change in placement and must be determined by an IEP team. Written notice of such changes must be provided to the parent. Consent is not required. A non-significant change in placement may be made by an IEP team without reassessment.

Section 2220-R-5.04(1)(b). The IDEA also requires "written prior notice to the parents of the child whenever such agency – (A) proposes to initiate or change . . . the identification, evaluation, or educational placement of the child." 20 U.S.C. § 1415(b)(3).

Although [STUDENT]'s placement in woodshop, when his IEP called for a computer class, constitutes a change in his educational program, it is not a significant or material change triggering the notice and IEP reassessment requirements. Section 2220-R-

5.04(1)(b) and (2)(a) ["significant change in placement" defined to include an "addition or termination of an instructional or other related service"] and 20 U.S.C. § 1415(b)(3). The change of general education classes does not involve a significant change in placement. *Cavanaugh v. Grasmick*¸75 F. Supp. 2d 446, 468-470 (C. Md. 1999*)* [no change of placement found in a discretionary curriculum change from one special education class to another]; *Lunceford v. District of Columbia Board. of Ed.,* 745 F.2d 1577, 1582 (D.C. Cir. 1984) ["a move from one mainstream program to another, with the elimination of a theater arts class" does not constitute a change in placement]. The woodshop class was, like the computer one, a general education class. The reason for [STUDENT]'s not enrolling in the eighth grade computer class is unknown, and there is at least some evidence of [PARENT] and [STUDENT]'s concurrence with the woodshop placement. Under these circumstances, the change was neither significant nor material, and [STUDENT] has failed to establish a procedural violation in relation to this substitution.

[STUDENT] further contends that the District's failure to provide [STUDENT] the eighth grade computer class was a substantive FAPE violation in that it denied him a service called for in his IEP. [STUDENT]'s March 1, 2000 IEP clearly called for his enrollment in a computer class. Given the discussion at the Triennial Review regarding possible rotation of electives, [PARENT]'s request that [STUDENT] be placed in the woodshop class, and the fact that both classes are general education classes, albeit of significantly different content, the ALJ does not find that this violation of the IEP rises to the level of a violation of [STUDENT]'s FAPE.

4. Extra Time on Tests and Assignments**.** [STUDENT]'s March 1, 2000 IEP provided for extra time on tests and assignments as a necessary accommodation for participation in the general education program. At least once in seventh grade and once in eighth grade, [STUDENT]'s teachers denied him extended time on tests. Absent any additional details regarding these denials, the record does not establish that this departure from the IEP constitutes a denial of FAPE.

5. Instructions to [PARENT] to Keep [STUDENT] Home on Two Days**.** The record does not establish that [Middle School] personnel told [PARENT] to keep [STUDENT] at home on the regularly-scheduled school day of April 21, 2000, the only date asserted by [STUDENT] in the relevant time period.

6. Field Trips and School Socials**.** [STUDENT] claims that he was not allowed to attend field trips or school socials in violation of the IDEA requirement that "[e]ach public agency shall take steps to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities." 34 C.F.R. § 300.306(a). The ALJ has found, however, that the District did not prohibit [STUDENT] from participating in field trips.

[STUDENT] also argues that he was excluded from numerous school socials, a fact not established by the record, and that his exclusion from the school social in the spring of

2000 constitutes a denial of FAPE. This single exclusion of [STUDENT] from a social event at school, while inappropriate, simply does not rise to the level of a FAPE violation.

6. Physical Education. [STUDENT] was withdrawn from physical education during sixth grade and was never again enrolled in a physical education class while at [Middle School]. While [STUDENT] seeks to assert this removal from PE class as a denial of FAPE, this occurred well prior to March 1, 2000, and therefore will not be considered by the ALJ. [STUDENT] also asserts that [Middle School] was prohibited from denying [STUDENT] access to PE. 34 C.F.R. § 300.307. The record, however, does not support [STUDENT]'s contention that he was denied such access. Rather, the record establishes that after talking to [Principal], who expressed her opinion that physical education class was not safe for [STUDENT],[8] [PARENT] asked to have [STUDENT] removed from the class and never again requested that he be re-enrolled. Physical education is an elective. At [PARENT]'s request, [STUDENT] was on a half-day schedule which allowed only one elective, and [PARENT] requested on her son's behalf computer and woodshop, not physical education. Physical education was discussed at the March 2000 IEP meeting, and the IEP team found that it was not appropriate for [STUDENT] due to his disability.

7. Protection of [STUDENT] from Physical and Emotional Harm. [STUDENT] asserts that he was denied a FAPE because he was subjected to physical and emotional harm while at [Middle School], as evidenced by a [Middle School] paraprofessional's kicking him in the ankle and pushing or slapping his head during the sixth grade, his falling over the railing on stairs at school and fracturing his wrist on November 5, 1999, and having been called "fat boy" by an [Middle School] teacher on an unspecified date. The first two incidents clearly occurred prior to the relevant time period, while the record does not disclose when the third occurred. Since the record does not establish that these incidents occurred during the relevant time period, the ALJ need not address them.

V. Reimbursement of Home Schooling Costs: Is Parent's Private Placement of [STUDENT] Appropriate?

The second prerequisite which [STUDENT] must satisfy in order for [STUDENT] to prevail on his claim for reimbursement for home schooling costs is that [PARENT]'s placement of [STUDENT] in home schooling was appropriate. The ALJ finds that [STUDENT] has failed to establish this prerequisite to reimbursement.

[STUDENT] must establish that [PARENT] is providing [STUDENT] an educational program that meets his special education needs." *Burlington School Committee of the Town of Burlington v. Department of Education of Massachusetts, supra.* Although [STUDENT]'s expert witness testified that his home schooling was appropriate, the record as a whole does not establish [PARENT]'s qualifications to provide him an educational

8 [STUDENT] contends that [Principal]'s statement that PE was unsafe for him was a lie designed to get [PARENT] to agree to [STUDENT]'s withdrawal from the class. This assertion is not supported by the record.

program that meets his needs. [PARENT] does not have a full grasp of the English language and does not effectively catch grammatical errors in [STUDENT]'s written work. In addition, the fact that [STUDENT]'s placement in home schooling is not the least restrictive environment weighs against finding that his unilateral placement is appropriate. *M.S.ex rel S.S. v. Board of Educ. of the City Sch. Dis. of the City of Yonkers,* 231 F.3d 96, 105 (2nd Cir. 2000).

VI. Reimbursement of Home Schooling Costs:
Do Equitable Considerations Preclude or Limit Reimbursement?

In order to prevail on his claim for reimbursement of home schooling costs, [STUDENT] must also establish that equitable considerations weigh in his favor. Federal regulations implementing IDEA provide that reimbursement may be reduced or denied in certain circumstances, including if the parents fail to notify the school district ten days before removing the child from the public school that they are rejecting the proposed placement, including stating their concerns and their intent to reenroll their child in a private school at public expense. 34 C.F.R. § 300.403(d)(ii).

The record in this matter establishes that [PARENT] gave no prior notice, written or verbal, to the District before removing [STUDENT] from [Middle School]. In fact, [PARENT] did not even respond to District inquiries about [STUDENT]'s whereabouts when he failed to come to school after November 29, 2000, because she did not want to be bothered No written notice was provided that [PARENT] would be home schooling [STUDENT] until December 10, 2000, or that [PARENT] would seek reimbursement until December 27, 2000.

[PARENT] contends at the due process hearing that she was exempted from the notice requirements of 34 C.F.R. § 300.403(d) based on the exception created by 34 C.F.R. § 300.403(e)(4) prohibiting any reduction or denial of reimbursement when "[t]he parents had not received notice, pursuant to section 615 of the Act, of the notice requirement in paragraph (d)(1) of this section." This contention is not supported by the record, which instead reflects that [PARENT] received the booklet entitled "Educational Rights of Students and Parents" during the March 1, 2000 Triennial Review and that this booklet provided the necessary notice. Under these circumstances, reimbursement of the costs of home schooling [STUDENT], even if otherwise allowable, should be denied.

CONCLUSIONS OF LAW AND DECISION

1. The ALJ has jurisdiction to hear this matter pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*; Colorado Exceptional Children's Education Act, Section 22-20-101 *et seq.,* C.R.S. (1997); and Section 2220-R-603(10), 1 CCR 301-8.

2. Home-based instruction is not a "private school or facility" under Colorado law, and therefore the costs of home-based instruction are not reimbursable by the District.

3. At the time [PARENT] withdrew [STUDENT] from public school on November 29, 2000, the District was providing [STUDENT] a free appropriate public education.

4. Home schooling of [STUDENT] by [PARENT] is not an appropriate placement for [STUDENT].

5. Equitable considerations, *i.e.,* [PARENT]'s failure timely to notify the District of her rejection of [STUDENT]'s placement at [Middle School] and of her intent to home school [STUDENT] at public expense, support the denial of reimbursement in this matter.

6. Since the costs of home-based instruction are not reimbursable, the District has offered [STUDENT] a FAPE, home schooling by [PARENT] is not an appropriate placement for [STUDENT], and equitable considerations preclude reimbursement, the District has no obligation to bear the costs of [STUDENT]'s home-based education.

7. The appeal filed by [STUDENT] is dismissed in its entirety.

8. This decision of the ALJ is the final decision on state level review, except that any party has the right to bring a timely civil action in an appropriate court of law, either federal or state. Section 2220-R-6.03(12) (1 CCR 301-8).

DONE AND SIGNED
October ____, 2002

NANCY CONNICK
Administrative Law Judge