DEPARTMENT OF EDUCATION, SPECIAL EDUCATION
STATE OF COLORADO
Due Process Hearing No. 2007:116

A STUDENT, By His Parents,

Petitioners,

v.

BOULDER VALLEY SCHOOL DISTRICT RE-2,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

THIS MATTER came before the Impartial Hearing Officer (IHO) for a due process hearing upon the Petitioners' request, filed with the Respondent, for a due process hearing as was their right under IDEA. The hearing was held on October 15-17, 2007.

The date for entry of a Final Order was extended several times until December 14, 2007.

Petitioners appeared pro se. Respondents appeared by W. Stuart Stuller of Caplan and Earnest LLC.

ISSUES TO BE DETERMINED

I. Is the Individualized Education Plan (IEP) developed after an IEP meeting and dated May 31, 2007, reasonably calculated to provide the Student with a meaningful educational experience consistent with IDEA?

II. Is the Respondent wholly or partially responsible to pay the tuition and other expenses at the [PRIVATE SCHOOL] school for the Student for the 2007-2008 school year?

After receiving the testimony of numerous witnesses on behalf of both parties and many documentary exhibits, and after giving all this evidence due consideration and such relevance as the IHO determined to be proper, the IHO makes the following Findings of Fact, Conclusions of Law and Final Order:

FINDINGS OF FACT

1. The Student is an [AGE] year old child who resides with his parents within the boundaries of the Boulder Valley School District RE-2.
2. The Student has high functioning autism.
3. Autism is characterized by an impairment in the domain of communication, an impairment in the domain of social relatedness, and the presence of repetitive stereotypic behaviors.
4. Autism is a spectrum disorder, meaning that the intensity of the identifying characteristics varies with each individual. As a child with high functioning autism, the characteristics of autism are not as pronounced in the Student, as with children at the other end of the spectrum.
5. The Student also has significant cognitive abilities. For example, the Student's most recent scores on the Weschler Intelligence Scale for Children – IV range into the very superior range in some sub-tests. (Petitioners' Exhibit 45, pp. 16-18.) Other tests have placed the Student's IQ as high as 153.
6. Students, like this Student, who have both a disability and a specific aptitude, are often referred to as "twice-exceptional" students.
7. The Student was originally enrolled in a Montessori school in [OTHER STATE]. Within the first months, however, the parents received calls from the school about the Student engaging in defiant behaviors and not following directions.

8. The Student then attended kindergarten at a [OTHER STATE] charter school and had a successful year with a teacher who had special education training.
9. The Student attended a different school for first grade and started having problems, prompting a referral to a psychologist who gave the Student a diagnosis of possible Aspergers syndrome, a disorder closely related to high functioning autism.
10. The Student's parents identified several possible programs for the Student in the Denver/Boulder area and moved to Colorado in mid-November.
11. The Student was enrolled in the [ANOTHER SCHOOL], but was expelled within a few months.
12. The Student was then enrolled in the [PRIVATE SCHOOL 1]. This was a private school.
13. During the Student's third grade year, his Parents learned that [PRIVATE SCHOOL 1] was going to close for financial reasons. In spring of 2005, they enrolled the Student at [ELEMENTARY SCHOOL] in the Boulder Valley School District.
14. Boulder Valley evaluated the Student and determined that he was eligible for special education services.
15. The [ELEMENTARY SCHOOL] staff and the Student's parents developed an individualized educational program (IEP) for him that contained goals and objectives in the areas of writing, math computation, responsibility for learning, social communication, and emotional functioning.
16. The IEP called for The Student to be educated primarily with nondisabled peers in the regular education classroom. The Student would receive twelve hours a week of support from a special education teacher (ten of which would be direct service in the regular education classroom). The Student also would receive thirty minutes a week

of social/emotional support from a social worker/school psychologist; and forty-five minutes a month of consultative speech/language and occupational therapy services.

17. The Student attended [ELEMENTARY SCHOOL] as a member of the fourth grade class.
18. [ELEMENTARY SCHOOL] has approximately 350 students. The school does not have classroom walls or doors. Instead, the classrooms are separated by bookshelves and partial dividers. As a result, students in one class often can hear students in another class. In addition students from one class regularly transition through the space occupied by other classes.
19. As a new student, The Student did not have any friends.
20. While The Student's fourth grade teacher had experience working with students with disabilities, she had not taken a specific class in educating children with high-functioning autism and/or twice exceptional students.
21. The teacher had structure, rules, and expectations for her classroom that she applied to the Student. The Student needs flexibility and he found these demands very stressful.
22. In November of 2005, the Student received a yellow (warning) card, leading to a classroom "meltdown." His parents took him to clinical psychologist, Dr. Bruce Casey, who diagnosed the Student with "adjustment reaction," also known as "adjustment disorder," with a depressed mood.
23. Adjustment disorder affects two to eight percent of children. Thus, at a school the size of [ELEMENTARY SCHOOL], with an enrollment in excess of 300 students, at any given time six to twenty-four students might be suffering from adjustment disorder.

24. Adjustment disorder involves “clinically significant” emotional or behavioral symptoms that arise in response to a “stressor.”
25. A stressor can be anything from a death in the family to the rigors of school.
26. A child’s response is clinically significant when the child suffers an impairment in social or occupational functioning or when the child’s response is greater than what might be expected.
27. Dr. Casey diagnosed the Student with adjustment disorder because The Student’s response to the stresses of school was greater than might be expected.
28. Adjustment disorder may progress from symptoms of hopelessness evidenced by statements like “I don’t know if I should be alive,” to more serious maladies evidenced by clear suicidal ideations with an intent to act on those ideations, warranting a diagnosis of dysthemic disorder in which depressive symptoms exist over a prolonged period of time, but fall short of major depression, and may even progress to a major depression.
29. Dr. Casey monitored the Student for development of a major depression, provided clinical interventions and wrote to the school suggesting strategies that he recognized the school might already have in place.
30. The Student responded well. He finished the year earning grades of A’s and B’s, scoring proficient or above on all but one of the nineteen content areas on the Colorado Student Assessment Program, and had developed some genuine friendships.
31. Near the end of his fourth grade year, the Student’s IEP team met to review and revise his IEP for his fifth grade year. (Resp.ex.4.) The IEP documents indicate that during his fourth grade year The Student progressed in several areas including written

language skills, social skills, and self-advocacy, as well as having established several friendships.

32. The Student's IEP goals and objectives were updated while maintaining his placement in the regular education classroom with some pull-out special education and related service support.
33. Prior to the start of the next school year, fifth grade teacher, [TEACHER], learned that she would have three boys coming into her class who were on the autism spectrum. Therefore, she took a course in educating students with Asperger's syndrome that met four times over the course of several months, and included individual research. [TEACHER] found the class to be tremendously beneficial.
34. The Student's fifth grade class had twenty-five students.
35. The Student had a very successful year in fifth grade, both academically and socially, earning A's and B's.
36. Under the School District's system, fifth grade is the last grade in the elementary school cycle. Therefore, students begin middle school with their sixth grade year.
37. Under the School District's enrollment system, the Student would attend Platt Middle School, his neighborhood school, for his sixth grade year unless he "open-enrolled" into a different school. COLO.REV.STAT. § 22-36-101 (2007) (permitting students to attend any school in the School District <u>if space is available</u>).
38. When the number of applicants for a school exceeds the number of seats available, the available sets are allocated through a lottery.
39. Midway through the Student's fifth grade year, his parents met with school staff members to discuss open enrollment options for the Student.

40. His parents knew that several of the Student's friends were going to attend Southern Hills Middle School.

41. Only one of the Student's friends would be attending Summit Middle School, a charter school within the School District.

42. Similarly, only one of the Student's friends was open enrolling at Platt CHOICE. In addition there was no assurance that the student would draw a seat in the lottery.

43. Platt CHOICE is a school within a school, located within Nevin Platt Middle School, which the Student would normally be assigned to attend. Platt CHOICE students attend core classes in a separate wing of the Nevin Platt building, but also attend elective classes and participate in extracurricular activities with Nevin Platt students.

44. The Student's parents applied to Summit Middle School and Platt CHOICE School, but not Southern Hills.

45. The Student's parents were not successful in the open enrollment lottery. The Student was placed 59th on a wait list of 81 students for Summit, and 48th on a wait list of 60 students for Platt CHOICE.

46. In March, 2007, the Student's parents sent the School District a letter expressing concern that a large school like Nevin Platt Middle School would be inappropriate for the Student. (Resp. ex. 10.) They asked the School District to transfer the Student (1) to a program with low student-teacher ratios, (2)a minimum of noise and chaos, (3) a student body that would be accepting of the Student and (4) with the high proportion of students with academic strengths and social weaknesses.

47. The parents also forwarded the School District a letter from Dr. Casey, who opined that the "ideal" situation for the Student would include a low student-teacher ratio with a teacher experienced in teaching students with high-functioning autism.

48. In conjunction with these letters, the parents requested that the Student be administratively transferred to Summit Middle School.

49. The School District's regulation governing administrative transfers provides:

> Administrative transfers are not to be used as a means of extending the Open Enrollment period, but, rather as a means to address changes in personal circumstances that could not reasonably be anticipated during the Open Enrollment window. Only extreme circumstances will justify an administrative transfer.

(Resp. ex. 12.)

50. The Parents' request for an administrative transfer was denied because there was no space available at Summit or Platt CHOICE, and the Student's special education needs could be accommodated at <u>any</u> middle school in the District.

51. The Student's parents appealed to deputy superintendent, now Superintendent of the School District, Dr. Chris King, to review.

52. Dr. King denied their appeal, stating that he was unwilling to leapfrog the Student over children from other families on the Summit and Platt CHOICE wait lists. (Resp. ex. 17.)

53. <u>Dr. King offered to transfer the Student to Casey Middle School, a school of similar size to Summit and with low student teacher ratios</u>. (Resp. ex. 17, p. 2.)

54. The Parents did not accept this offer.

55. An IEP meeting was held in late May to revise the Student's IEP. (Resp. ex. 5.) The parents asked that the Student be placed in a school with existing friends, taught by teacher who was trained in the characteristics of autism, and in classes with low student teacher ratios. (Resp. ex. 5, p. 6.)

56. Following the IEP meeting, an attorney representing the Parents, wrote the School District, contending that Platt Middle School was not an appropriate placement for the Student. (Resp. ex. 19.)

57. The School District's general counsel responded to the Parents' attorney by inviting the Parents to enroll the Student in any middle school in the School District that had space available. (Resp. ex. 21.) The general counsel also notified the Parents' attorney that the District had offered summer training to the Platt staff, and asked the Parents to notify the District as soon as possible if they chose to enroll the Student in a different school so that training could be offered to the staff at that school. (Id.)

58. In anticipation of the Student's arrival at Platt, several members of the Platt staff attended a multi-day training on educating children with educational challenges such as those affecting the Student.

59. In addition, the District had "in-house" training resources available including training on working with twice exceptional students and children with autism.

60. When students transition from elementary to middle school, Boulder Valley implements a number of strategies for acclimatizing incoming students to their new environment. These strategies include setting up social networks with peers and teachers.

61. These strategies cannot be implemented if the District does not know where the child will attend school.

62. By early July, the Parents still had not notified the School District as to what school the Student would attend.

63. In early July, deputy superintendent, Dr. Ellen Miller-Brown, again invited the Parents to enroll The Student in any middle school that had space available including

Casey Middle School, a school of similar size to Summit and with student-teacher ratios of 18-1, Angevine Middle School with student teacher ratios of 18-1, Centennial and Manhattan Middle Schools with student teacher ratios of 20-1. (Resp. 26, p. 2.) Dr. Miller-Brown asked the Parents to notify the District of their decision as soon as possible so that the District could provide summer training to the appropriate staff. (Id.)

64. The Parents never responded to the request of Dr. Miller-Brown.

65. Approximately one week after Dr. Miller-Brown's letter, the Parents filed a request for due process. (Resp. ex.1.)

66. The Parents contend that the Student's most recent IEP does not comply with the IDEA because it does not include:

    a. a statement that all teachers will be trained in working with students with high functioning autism;

    b. a statement that the Student must be placed with existing friends, including adult staff;

    c. a statement that the Student requires a low student-teacher ratios preferably 16-18:1; and

    d. a statement that the Student requires a small, calm campus. (Id.)

67. The Parents demanded that the Student be placed at either Southern Hills or Summit Middle School, or that the District create a program specifically for students with high functioning autism. (Id.)

68. The Parents subsequently enrolled the Student at the [PRIVATE SCHOOL 2], a private school.

69. The Student's IEP calls for a school psychologist to work with the Student. (Resp. ex. 5, p. 15.)

70. The [PRIVATE SCHOOL 2] does not employ a school psychologist.

71. The Student's IEP calls for the services of a speech pathologist.

72. The [PRIVATE SCHOOL 2] does not employ a speech pathologist

73. The [PRIVATE SCHOOL 2] does not implement any of the Student's IEP goals and objectives. Nor does the [PRIVATE SCHOOL 2] have the functional equivalent of an IEP. Rather, the [PRIVATE SCHOOL 2] limits its practices to general education interventions. (Vol. III. 18-21.)

CONCLUSIONS OF LAW

I. Burden of Proof.

Since the Student's parents seek relief, they bear the burden of proof as to each element of their claim for relief. Schaffer v. Weast, 546 U.S. 49 (2005).

II. Elements of a Reimbursement Claim.

The IDEA requires school districts to make a "free appropriate public education . . . available to children with disabilities." 20 U.S.C. § 1412(a)(1)(A).

Parents who believe that their local school district has not provided their child with a free appropriate public education may enroll their child in a private school and then seek reimbursement from the school district, but "do so at their own financial risk." Burlington School Comm. v. Mass. Dept. of Ed., 471 U.S. 359, 374 (1985). Parents are entitled to reimbursement only if they prove that the school district did not make a free appropriate public education available to their child, *and* that the private school is appropriate for the child. 20 U.S.C. § 1412(a)(10)(C)(ii); Florence County Sch. Dist. v. Carter, 510 U.S. 7, 14-15 (1993).

The underlying question then is: What is a free appropriate public education?

Congress adopted the IDEA pursuant to its authority under the Spending Clause. Arlington Cent. Sch. Dist. v. Murphy, 126 S.Ct. 2455, 2458 (2006; Board of Educ. of Hendrick Hudson Sch. Dist. v. Rowley, 458 U.S. 176, 204 n.26 (1982); U.S.Const. art. I, § 8, cl 1. Spending Clause legislation offers states funding in exchange for their agreement to abide by conditions that Congress could not otherwise impose so long as Congress sets forth those conditions "unambiguously." Murphy, 126 S.Ct. at 2459; Rowley, 458 U.S. at 204 n. 26.

The central condition of the IDEA is that school districts make a "free appropriate public education . . .available to children with disabilities." 20 U.S.C. § 1412(a)(1)(A).

> The term "free appropriate public education" means special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; © include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. § 1401(9)

"Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded to handicapped children." Rowley, 458 U.S. at 189.

Given that a free appropriate public education consists of special education and related services that are provided pursuant to an individualized education program (IEP), the IEP is the dispositive document. An IEP need only provide a basic floor of educational opportunity, not one that maximizes the student's potential. Id. at 198 & 202.

In deciding whether an IEP satisfies the IDEA, courts are to ask two questions. O'Toole v. Olathe Unified Sch. Dist. No. 223, 144 F.3d 692, 701 (10th Cir. 1998). First, was the IEP developed in accordance with the Act's procedural requirements? Rowley, 458 U.S. at 206; O'Toole, 144 F.3d at 701. Second, is the IEP "reasonably calculated to provide some educational benefit? Rowley, 458 U.S. at 201; O'Toole, 144 F.3d at 708. The IEP need not be "correctly calculated," only "reasonably calculated" to provide some benefit. School Dist. of Wisconsin Dells v. Z.S., 295 F.3d 671, 677 (7th Cir. 2002) ("The administrative law judge . . . thought [the educators] mistaken, and they may have been; but they were not unreasonable.") In addition, the educational benefit need not be optimal, just "more than *de minimus.*" Urban v. Jefferson County Sch. Dist. R-1, 89 F.3d 720, 727 (10th Cir. 1996).

In addition, where as here, the parents withdraw the child from school before the IEP can be implemented, "the measure and adequacy of [the] IEP can only be determined as of the time it is offered to the student, and not at some later date." O'Toole, 144 F.3d at 701; Carlisle Area Sch. V. Scott P., 62 F.3d 520, 534 (3rd Cir.1995). Thus, a student's asserted progress at a subsequent private school is not relevant to whether the IEP was reasonably calculated to provide some educational benefit. O'Toole, 144 F.3d at 708. Finally, information that was not provided to the IEP team is not relevant to determining the appropriateness of the IEP. Susan N. v. Wilson Sch. Dist., 70 F.3d 751, 762 (3rd Cir. 1995).

III. The May 2007 IEP Satisfied the IDEA

The Student's parents concede that the four items they insist be included in the Student's IEP for 2007-2008 were not listed on either of the Student's two previous IEP's. Nonetheless, under each of those IEP's, the Student earned A's and B's both

school years. Such academic success clearly demonstrates that Boulder Valley offered the Student a basic floor of educational opportunity. E.g., Rowley, 458 U.S. at 207 n. 28; Todd v. Duneland Sch. Corp., 299 F.3d 899, 906 n.4 (7th Cir. 2002); Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 (2nd Cir. 1998.) Per Zumwalt Sch. Dist. v. Clynes, 119 F.3d § 11 on page 7, the Court states as follows:

> [11] The Clynes removed Nicolas from Hawthorne without the Permission of the school district before they sought review under IDEA, thus putting themselves at risk that they would not be reimbursed for private school costs. *Evans*, 841 F.2d at 832. Parents may not obtain reimbursement for the time a child is placed in private school without the permission of the school district if it is ultimately determined that the proposed IEP met the IDEA requirements. *See Burlington Sch. Comm.*, 471 U.S. at 374, 105 S.Ct. at 2004-05*; Evans*, 841 F.2d at 832*; see also* 34 C.F.R. § 300.403 (1997*)* (no requirement for State to pay private school costs if child has available free appropriate public education). Since the 1991-92 IEP met IDEA requirements, the Clynes were not entitled under federal law to reimbursement***615** for either the 1991-92 or 1992-93 school years.[FN7]

While the Student's parents may protest that the Student's cognitive abilities give him the ability to earn good grades easily, this observation does not demonstrate that the District failed to extend The Student a basic floor of opportunity, especially in light of the Student's previous school experiences which included short stays and expulsion. Moreover, the Student showed significant progress in areas of socialization and communication – two of the central deficits of autism – in both his fourth and fifth grade years.

Two of the persons who worked routinely with the Student – [TEACHER] and [TEACHER] – had significant expertise in educating children with autism, and were certified as experts in that field. Both testified that the Student progressed without low-student teacher ratios, in a setting where multiple elementary age classes were combined

under one roof without walls, hallways, or doors, and without existing friends at the outset of his education at [ELEMENTARY SCHOOL].

Thus, it was entirely reasonable for School District to assume that the Student would benefit from a sixth grade IEP that did not include statements that were not part of his fourth and fifth grade IEP.

A. There Is No Legal Basis for the Parents' Demands.

The IDEA specifically lists the information that must be included in an IEP. 20 U.S.C. § 1414(d)(1)(A)(I). An IEP must include statements pertaining to the child's present levels of academic and functional performance, measurable annual goals, as well as the special education and related services and supplementary aids that are to be provided to the child. Id. The section setting out the requirements of an IEP does not mention anything about teacher training, class size, existing friends, or the character of the school campus. Id.

Moreover, Congress amended the IDEA in 2004. These amendments included a "rule of construction" that specifically applies to the statutory provision setting out the required contents of an IEP. The rule of construction provides: "Nothing in this section shall be construed to require that additional information be included in a child's IEP beyond what is explicitly required in this section." 20 U.S.C. § 1414(d)(1)(A)(ii) (emphasis added). As the Senate Committee report states:

> The committee has examined a number of actual IEP, and has discovered that many items in those documents are not required by federal IDEA law. While it has proven difficult to determine the source or sources generating this additional paperwork, the committee wants to ensure that the federal law does not contribute to this problem. Therefore, section 614(d)(1)(A)(ii) provides that nothing in the section shall be construed to require that additional information be included in an IEP beyond what is explicitly required in the section.

S.Rep. No. 108-185, pt. 1, R 23 (2003)

Even prior to IDEA, 2004, "Congress left teacher competency in the control of school administrators." Lachman v. Illinois State Bd. Of Educ., 852 F.2d 290, 297 7th Cir. 1988). "A parent no matter how well-intentioned, cannot dictate to a school district, as part of her child's IEP, how teachers will be trained or how their competency will be measured." Sioux Falls Sch. Dist. v. Renee Koupal, 526 N.W. 2d 248, 252 (S.D. 1994); cert. Denied 515 U>S. 1143 (1995).

Consistent with the statutory mandate, the implementing regulations adopted by the Department of Education for IDEA 2004 state that the regulations shall not be construed to require that "additional information be included in a child's IEP beyond what is explicitly required in section 614 of the Act." 10 34 C.F.R. § 300.320(d). The commentary accompanying the regulations reflects that the Department rejected "numerous comments" requesting IEP content beyond that specified in 20 U.S.C. § 1414(d):

> We received numerous comments requesting that we require the IEP to include additional content that is not in the Act. Under section 614(d)(1)(A)(ii)(I) of the Act, the Department cannot interpret section 614 of the Act to require public agencies to include additional information in a child's IEP that is not explicitly required under the Act. Therefore, we generally have not included these comments in our analysis and discussion of § 300.320.

71 Fed.Reg. 46661 (Aug. 14, 2006). The commentary goes on to reject twelve specific requests for additional IEP content on the grounds that each such request would run afoul of 20 U.S.C. § 1414(d)(1)(A)(ii). See 71 Fed. Reg. 46661-46669.

Prior to the hearing, the Parents tendered some materials that they contended supported their request for including teacher training on the IEP. Those materials, however, conflict with a regulation – 34 C.F.R. § 300.347 – that no longer exists following the adoption of IDEA 2004.

2. There is No Factual Basis to Include the Demanded Statements.

Even if there were legal room to argue that statements pertaining to teacher training, class size, existing friends, and the character of the school campus should be included in an IEP, there is no factual basis for asserting that those statements were necessary in order to insure that The Student would receive a free appropriate public education. As discussed above, those items were not included on any previous IEP, and the Student still benefitted from his schooling.

a. Teacher Training.

It is undisputed that the School District *did provide* training to the staff members at Platt Middle School, the Student's neighborhood school, in anticipation of his arrival there.

The School District invited the Parents to enroll the Student in any school that had space available, and was ready to provide training to appropriate staff members at whatever school they selected. Because the schools desired by the Parents did not have space available, they never notified the School District as to what school the Student would attend. As a result, the School District did not know who to train.

b. Student-Teacher Ratios.

While the Parents want the IEP declared invalid because it did not provide that the Student was to be educated in classes with small student-teacher ratios – 16-18:1 – they asked that the Student be placed at Southern Hills Middle School, where student-teacher ratios are 25-30:1. In addition, Casey and Angevine Middle Schools both offer student teacher ratios of 1:1. The School District offered the Parents the opportunity to enroll the Student in either of those schools, but the Parents declined.

c. Character of Campus.

Similarly, the Parents sought a statement that the Student be educated at a school with a small quiet campus. Nonetheless, the Parents demanded that the Student be enrolled in Platte CHOICE, a school within Nevin Platt Middle School, a school that they rejected because the campus was too large. While Platt CHOICE hosts core classes in a separate wing, Platt CHOICE students take elective classes with Nevin Platt students, making the distinction between a large campus and a small campus immaterial. Moreover, the Student was successful in an elementary school that did not have doors, walls, or hallways.

d. Existing Friends.

There is no doubt that middle school students wish to be educated with existing friends. There also is no doubt that the Student's autism makes it more difficult for him to establish new friends. Nonetheless, when the Student's parents had the opportunity to enroll the Student in Southern Hills Middle School, a school that they knew would include a number of the Student's friends, through the open enrollment process, they did not take this opportunity, choosing instead to pursue open enrollment at Summit where only one friend would attend and Platt CHOICE where there is no assurance that even one friend would enroll there. Moreover, the Student started at [ELEMENTARY SCHOOL] with no friends and still succeeded in forming friendships. Finally, as with teacher training, there are various strategies that can be used to ease [STUDENT]'s transition to a new school, including teaming The Student with peers, and establishing social networks. Nonetheless, a prerequisite to implementing those strategies is knowing where the Student would attend school, and the Parents never told the School District where the Student would attend.

In the end, while The Parents may prefer particular programming – that is, a particular type of teacher training, the presence of friends, a small campus, a low student-teacher ratio – the" IDEA does not require school districts to employ specific educational methodologies based merely on parental preferences." Todd v. Duneland Sch. Corp, 299 F.3d 899, 904 (7th Cir. 2002). Rather, "[a]s long as a student is benefitting from his education, it is up to the educators to determine the methodology." E.S. v. Independent Sch. Dist. No. 196, 135 F.3d 566, 568-69 (8th Cir. 1998).

> It could be debated forever which program provides the better education for [the Student}. But it is not the duty of public schools to provide the better education. It is the duty of public schools to provide an appropriate public education and the District in this case has done that and has the ability to do that in the future.

Independent Sch. Dist. No. 283 v. S.D., 88 F.3d 556, 559 (8th Cir. 1996) (quoting the hearing officer's decision).

In light of the foregoing, there is no question that the challenged IEP was reasonably calculated to provide the Student with a free appropriate public education. Thus, the Parents are not entitled to reimbursement for their unilateral placement of the Student at a private school.

IV. Appropriateness of Private School.

Even if the School District had failed to make a free appropriate public education available to the Student (which it did not), the Parents would not be entitled to reimbursement unless they could show that [PRIVATE SCHOOL 2] is an appropriate placement for the Student.

The Parents contend that the Student is doing well at the [PRIVATE SCHOOL 2], and therefore, the [PRIVATE SCHOOL 2] is "appropriate." Nonetheless, the IDEA defines a free *appropriate* public education as (1) *special education* and (2) *related services* that are provided pursuant to an (3) IEP. 20 U.S.C. § 1401(9). The [PRIVATE SCHOOL 2] does

not provide any (1) special education or (2) related service to the student under any (3) IEP. Thus, even if the [PRIVATE SCHOOL 2] is a fine school, its failure to provide what the IDEA specifically requires takes it outside the definition of what is appropriate under the IDEA. Berger v. Medina City Sch. Dist., 348 F.3d 513, 523 (6th Cir. 2003) ("A unilateral private placement cannot be regarded as 'proper under the Act' when it does not, at a minimum, provide some element of special education services in which the public school was deficient."); Tracy, 335 F.Supp.2d at 692 (no reimbursement where family fails to identify *"any special education service"* that was provided at private school that was not available at public school) (emphasis in original); Mr. & Mrs. I v. Maine Sch. Admin. Dist., 416 F.Supp.2d 147, 172 (D.Ma.2006) (same).

As a result, the Parents fail to establish either element of their request for relief.

V. Reasonableness.

Even if parents establish the elements for reimbursement, reimbursement may be limited or denied where the student's parents acted unreasonably. 20 U.S.C. § 1412(a)(10)(C)(iii)(III); Loren v. Atlanta Indep. Sch. Dist., 349 F.3d 1309, 1318 (11th Cir. 203).

Here, the Student's parents determined at least by January 2007, that they wanted the Student to attend either Summit Middle School or the Platt CHOICE. Unfortunately their application was not drawn in the lottery for either school. The Parents then sought an administrative transfer to Summit or Platt CHOICE, a process that is not to be used to compromise the integrity of the open enrollment system. Their request was denied. The Parents then presented the School District with four demands; teacher training, placement with friends, small quiet campus, and low student teacher ratio. As relief, they sought the Student's placement in the schools for which they did not gain entry through open

enrollment. None of the schools met all of the criteria that they demand be placed on the Student's IEP.

The IHO relies heavily upon the letter from Ellen Miller-Brown to the Parents dated July 2, 2007, (Resp. ex. 26) to show that the District was willing to go the "extra mile" to work with the Parents to ensure the middle school success for the Student.

These offers were rejected by the Parents. (See Resp. ex. 28.)

ORDER

I. The IEP developed in the Spring of 2007 for the Student does meet the requirements of a Free Appropriate Public Education under IDEA.

II. The Petitioners' request for reimbursement from the Respondent Boulder Valley School District for tuition at the [PRIVATE SCHOOL 2] is hereby denied.

III. Enclosed with this decision, please find a copy of your appeal rights under the ECEA, 1 CCR 301-8 2220-R-6.03(9) through (14).

Done at Denver, Colorado, this _____ day of December, 2007

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Richard G.Fisher
Impartial Hearing Officer
3686 South Forest Way
Denver, Colorado 80237-1015

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing **Findings of Fact and Conclusions of Law and Order** via U.S. Mail, postage prepaid, this _____ day of December, 2007, to the following:

[PARENTS]

Boulder Valley School District
6500 Arapahoe Avenue
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(Hand Delivered)

By: _____
Richard G. Fisher