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. 2001:132 Impartial Hearing Officer Andrew J. Maikovich

I. INTRODUCTORY STATEMENT

The above-captioned hearing was held at the School District #1 offices in Denver, Colorado. Prior to the hearing, Respondent filed a Motion to Dismiss based on the student's residency. The IHO took testimony and evidence on this issue on January 15 and 22, 2002.

A hearing on the merits regarding Petitioner's request for due process hearing was held in the year 2002 on January 28, 29, 30, 31, and February 1, 13, 14, and 22, 27, 28, and March 13. The pro se 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. In the Petitioner's request for due process hearing, [PARENT] also alleged that numerous additional federal statutes, regulations, the U.S. Constitution, and criminal laws were violated. Prior to the hearing, the IHO dismissed these claims as outside of the scope of his jurisdiction.

During prehearing discussions, the IHO identified the following IDEA issues:

1) Least Restrictive Environment
    i) [STUDENT] was placed in a self-contained classroom since 1997, with gym class being his only interaction with non-disabled students.
2) Change of Placement
    i) In 1996-97, [STUDENT] was placed in a self-contained classroom without an IEP team meeting or approval.
    ii) Prior to November 9, 1999, [STUDENT] was suspended in excess of 10 days without a manifestation determination hearing.
    iii) On or about December 12, 1999, [STUDENT] was provided homebound education without an IEP team meeting or approval.
    iv) Respondent violated the "Stay Put" provision on dates uncertain.
3) Manifestation Determinations
    i) Prior to April 29, 1999, [STUDENT] was suspended in excess of 10 days without a manifestation determination hearing.
    ii) Prior to November 9, 1999, [STUDENT] was suspended in excess of 10 days without a manifestation determination hearing.
    iii) In December 1999 and January 2000, [STUDENT] was expelled without a manifestation determination hearing.
4) Procedural Deficiencies, alleging Respondent failed to provide Petitioner with adequate notice for:
    i) [STUDENT]'s Triennial review in 1996.
    ii) [STUDENT]'s reevaluation for change of placement in 1997.
    iii) Manifestation determination hearings held on December 5 and 15, 1999, and January 21, 2000.
    iv) IEP staffing on or about December 14, 1999.
    v) [STUDENT]'s Triennial Review on February 18, 2000 was performed over three months late.
5) Insufficient or Inadequate IEPs
    i) Reading and math goals and objectives were either missing, inaccurate, and/or immeasurable from 1996 to the present.
6) Related Services
    i) [STUDENT] was not provided with assistive technology, including computer hardware and software, from 1996 to the present.

II. FINDINGS OF FACT

1. [STUDENT] was born on [D.O.B.].

2. [STUDENT] was first identified as having a formal learning disability (L.D.) beginning in the first grade at [Elementary School] in the Denver Public School (DPS) system.

3. [STUDENT] has always possessed talent in art, which was noted in his elementary school IEPs. Behavior problems were first noted in an IEP in the fourth grade.

4. [STUDENT]'s fifth grade IEP (a Triennial review) identified [STUDENT]'s reading level at 2.8, math level at 4.5, and written language skill at 1.6.

5. In sixth grade (1997-98), [STUDENT] attended [Middle School]. His educational disability was identified as "learning disability," with goals to improve reading skills, written language skills, social skills, and organizational skills. [PARENT] did not attend [STUDENT]'s IEP meeting in the sixth grade.
6. In the sixth grade, [STUDENT] was placed in a self-contained special education classroom for his core academic courses. The classroom had students from the sixth, seventh, and eighth grades. [STUDENT] had art, physical education, and lunch with non-disabled students. [STUDENT]'s reading level was 2.8.
7. [STUDENT]'s sixth grade teacher for reading and written skills was [Teacher]. [Teacher] and [STUDENT] had a good relationship. [STUDENT]'s reading improved in the sixth grade. One of [STUDENT]'s reading objectives in the seventh grade was to use decoding strategies while reading fourth-grade level books.
8. [STUDENT] had minor disciplinary problems in the sixth grade, including a suspension for fighting. [STUDENT] also refused to remove a sports jersey after being warned by [Middle School] Principal [Principal]. Because of gang problems at the middle school, students were not allowed to wear jerseys or other gang-related apparel to school (e.g., red-on-red).
9. In the seventh grade (1998-99), on or about October 5, 1998, [STUDENT] was suspended pending a parent conference for having four tardies in September and early October. He returned to school after [PARENT] discussed the issue with school officials.
10. According to Assistant Principal [Asst Principal], it was school policy to develop a behavior plan after a suspension so that the behavior could be corrected. [Middle School] staff did not develop a behavior plan for [STUDENT] following the suspension for excessive tardies.
11. In seventh grade, [STUDENT]'s educational disability was identified as "learning disability," with goals to improve reading skills, written language skills, social skills, and organizational skills. The "Present Level of Functioning, Achievement, and Performance" page of the IEP was nearly identical to [STUDENT]'s sixth grade IEP.
12. [PARENT] did not attend [STUDENT]'s seventh grade IEP meeting on October 30, 1998.

13. In the seventh grade, [STUDENT] continued in a self-contained special education classroom for social studies, science, language arts, and math. [STUDENT] had reading in a resource room with [Teacher 2], a regular education teacher. All of the students in [STUDENT]'s reading class were special education students. [STUDENT] had home economics, possibly physical education, and lunch with non-disabled students. [STUDENT]'s reading level had improved, with one reading goal listed at the fourth grade level.
14. On or about November 25, 1998, [STUDENT] refused to remove a sports jersey after arguing with the teacher about the rule. School officials had a conference with [PARENT], at which time they informed her of the dress code policy regarding jerseys.
15. Because of gang issues, [Principal] instituted a policy that students must tuck in their shirts so that the pockets of their pants are visible. She instituted the rule to reduce the number of concealed weapons in the school. While the rule was not in written form, most [Middle School] teachers applied it. Students would test the rule on a daily basis and teachers would ask them to tuck in their shirts.
16. On or about April 29, 1999, [STUDENT] was asked by a teacher to tuck in his shirt. [STUDENT] refused and said, "Why dude?" [STUDENT] was suspended for five days for defiance, disrespect, and profanity, with the school requesting an additional 10-day suspension.
17. Shortly after the April 29, 1999, suspension, [PARENT] and [STUDENT] met with [Middle School] staff to discuss the behavior and potentially develop a plan to correct it. [PARENT] informed [Middle School] staff that she disagreed with the rule that students needed to tuck in their shirts, her belief that it would not prevent weapons from entering the building, and that she would not force [STUDENT] to tuck in his shirt. [STUDENT] told [Middle School] staff that he would not tuck in his shirt. [Middle School] staff informed [PARENT] and [STUDENT] that he would not be allowed to attend [Middle School] until he agreed to tuck in his shirt.
18. Because of the disagreement regarding tucking in his shirt, [STUDENT] missed the rest of his seventh grade year (28 school days) and received F's during the third grading period of the semester. [Middle School] teachers sent homework to [STUDENT] during this period, but had no other contact with him.
19. In the August 1999 [School Newspaper] (the [Middle School] school newspaper), the "tuck in the shirt" rule was listed as a "voluntary" rule.

20. [STUDENT]'s eighth grade year (1999-2000) was difficult on a personal level. In November, his cousins were placed in foster care. In December, his grandmother died after a series of illnesses. In January, his brother was injured in an auto accident. In February, his sister was injured in an auto accident. At an undetermined date, a close friend committed suicide.
21. In the eighth grade, [STUDENT] was placed in general education classes as well as special education. ([Middle School] discontinued the self-contained special education classroom model during the 1999-2000 school year.) [STUDENT] was provided with more "mainstream classes." [STUDENT] had language arts, math, and vocations with special education teachers. He had physical education, social studies, and science in regular education classrooms. [SpEd Teacher] assisted [STUDENT] with the general education classes, with which [STUDENT] became increasingly frustrated.
22. On or about October 5, 1999, [STUDENT] was suspended for five days (October 6, 7, 8, 11, and 12) for using profanity after being asked by a teacher to sit in an assigned seat in the lunchroom. The written notification provided to [PARENT] did not state the suspension would be counted as an habitually disruptive act. (Students can be expelled for three habitually disruptive acts.) DPS later identified this incident as an habitually disruptive act at an expulsion hearing.
23. On or about October 8, 1999, special education teacher [SpEd Teacher] mailed [PARENT] a permission slip that requested [PARENT]'s permission to conduct new evaluations for [STUDENT]'s Triennial Review.
24. On or about October 13, 1999, [PARENT], [STUDENT], [SpEd Teacher], and [Asst Principal 2] met to discuss [STUDENT]'s suspension. They developed a Behavior Plan for [STUDENT] involving respect for self and others. [STUDENT] was allowed to return to school. As a curriculum modification, [STUDENT] was removed from [Teacher 3]'s advisement period., since she and [STUDENT] had not built a successful working relationship.
25. On or about October 20, 1999, special education teacher [SpEd Teacher] gave [STUDENT] a second slip to take home to his mother that requested her permission to conduct evaluations for his Triennial Review.
26. On or about October 22, 1999, [Middle School] performed Woodcock-Johnson tests on [STUDENT] Worksheet scores showed that [STUDENT] did not qualify for special education services.

27. On or about October 26, 1999, [STUDENT] was suspended for three days for repeatedly not tucking in his shirt. The written notification provided to [PARENT] stated the suspension would count as an habitually disruptive act.

28. Although [PARENT] still did not agree with the rule, she did not want [STUDENT] to miss more school and told him to comply with the rule. [STUDENT] agreed to comply with the dress code and returned to school on October 29, 1999.

29. On or about October 26, 1999, [STUDENT]'s IEP staffing (a Triennial review) occurred and it was determined that [STUDENT] did not qualify as having a learning disability. The first four pages of the IEP are missing, so the IHO is unable to determine specific findings that were made at the staffing or who attended the staffing. As a Triennial review, the IEP was incomplete because a psychologist had not evaluated [STUDENT]

30. On or about October 29, 1999, [PARENT] met with [SpEd Teacher] to discuss [STUDENT]'s IEP. ([PARENT] was at the school because it was [STUDENT]'s first day back from suspension.) [SpEd Teacher] informed [PARENT] that [STUDENT] was no longer eligible for special education services. She told [PARENT] that [STUDENT] would no longer be in a self-contained classroom, but would be in a general education curriculum.[PARENT] signed page 5 of the IEP following their meeting, but did not initial the sentence marked, "I understand my child is not eligible for Special Education Services." [SpEd Teacher] gave [PARENT] a copy of her procedural safeguards.

31. On November 4, 1999, [Teacher 3] referred [STUDENT] to counseling for missing his advisement period with her. [Teacher 3] was unaware that [STUDENT] had been transferred to another teacher's advisement period. The problem was identified and no discipline resulted.

32. On or about November 9, 1999, [STUDENT] wore his hair to school in tight braids and squares. [Principal] believed [STUDENT]'s hair broke the school dress policy regarding gang attire and told [STUDENT] to remove the braids. [STUDENT] refused and was suspended pending a parent conference. ([STUDENT] would eventually miss six days of school.)

33. On or about November 10, 1999, [PARENT] told [Principal] that she had tied [STUDENT] hair in tight braids and that he had a right to wear it that way. [Principal] told [PARENT] that she would call the school's attorney regarding the issue and get back to her.

34. On or about November 19, 1999, [Principal] told [PARENT] that the school attorney informed her "she didn't have a leg to stand on" to suspend a student for his hairstyle and that [STUDENT] could return to school.

35. On November 19, 1999, [STUDENT] returned to school. [PARENT] had prepared [STUDENT]'s hair in similar tight braided squares. Some [Middle School] teachers were unaware that the rule had changed and students were allowed to wear this type of hairstyle.

36. When [Teacher 3] saw [STUDENT]'s hair, she said words to the effect of, "What's up with your hair?" One or more students told [STUDENT] that [Teacher 3] was talking about his hair. [STUDENT] became very upset and angry and went to [Middle School] psychologist [School Psychologist]'s office to discuss the situation. ([School Psychologist] had an open door policy with [STUDENT] whereby he could come by her office to discuss issues that bothered him.)

37. While [STUDENT] was talking to [School Psychologist], [Teacher 3] entered [School Psychologist]'s office. (The IHO was unable to determine the reason [Teacher 3] entered [School Psychologist]'s office, but does not believe it is relevant.)[STUDENT] angrily jumped to his feet and began moving toward [Teacher 3]. [School Psychologist] moved behind [STUDENT] and grabbed his arms to ensure he did not come into contact with [Teacher 3]. ([School Psychologist] did not feel threatened by [STUDENT], but was concerned by his anger and wanted to prevent a potential escalation.) [STUDENT] raised his arms and [School Psychologist] lost her balance, falling against a chair or table.

38. [Security Guard], a school security guard at [Middle School], was called to [School Psychologist]'s office. He took [STUDENT] to a different area and discussed the situation with [STUDENT] and calmed him down.

39. [STUDENT] returned to class. Later that afternoon (seventh period), [STUDENT] was walking in the hallway during class time. Special education teacher [SpEd Teacher 2], who did not know [STUDENT], asked him words to the effect of, "Where are you supposed to be?" [STUDENT] said words to the effect of, "It's none of your business." [SpEd Teacher 2] called security, who escorted [STUDENT] to the principal's office.

40. [School Psychologist] called [PARENT] and asked her to pick up [STUDENT] She told [PARENT] that she would call her at a later date regarding the actions the school might take.

41. [Asst Principal 2] discussed the incidents with [Principal], who told her to suspend [STUDENT] for five days. She also requested 10 additional days, which would require the approval of a DPS superintendent, and an expulsion hearing.

42. On or about November 19, 1999, [Asst Principal 2] completed a parental notification letter for [PARENT] regarding the suspension and expulsion hearing. The notification stated the suspension would be counted as an habitually disruptive act. [STUDENT] was suspended from November 22, 1999, through December 14, 1999.
43. [Principal] asked [School Psychologist] to write a memorandum regarding the incident. The IHO is unable to determine the date that [School Psychologist] wrote the memo, although it was probably three days following the November 19, 1999, incident (i.e., the Monday following the Friday incident). [School Psychologist] dated the memorandum November 12, 1999.
44. On or about November 22, 1999, [Principal] forwarded a memo to Superintendent [Superintendant] requesting a 10-day extension to the suspension with an expulsion recommendation.
45. On or about December 3, 1999, [Asst Principal 2] sent a letter (with a stamped signature of [Principal]) to [PARENT] stating that the DPS Superintendent had approved a 10-day extension of the suspension and that DPS would seek to expel [STUDENT] for up to one year. The address to which DPS sent the letter was incorrect and did not reach [PARENT]
46. At some date between December 3, 1999, and December 13, 1999, [PARENT] was informed by telephone that an expulsion hearing would be held for [STUDENT] on December 14, 2000.
47. On or about December 13 or 14, 1999, [SpEd Teacher] completed a manifestation determination document on [STUDENT] [SpEd Teacher] dated the document December 5, 1999. [Asst Principal 2] signed the manifestation determination document, which stated [STUDENT]'s behavior was not a manifestation of the student's learning disability. (Respondent stipulated the manifestation determination was not convened prior to the tenth day of removal, did not include a general education teacher, and the parent was not provided notification.)
48. [School Psychologist] added information to the manifestation determination document at an undetermined later date. She included the names of [Teacher 2] and [Principal], who did not participate in the manifestation determination.
49. On December 14, 1999, an expulsion hearing was held for [STUDENT], which [PARENT] attended. [Hearing Officer] was the hearing officer. [Asst Principal 2] represented DPS. DPS's reason for attempting to expel [STUDENT] was three habitually disruptive events.

50. At the end of the hearing, [Hearing Officer] told [PARENT] that he would get back to her in a day or two with his decision.

51. During the afternoon of December 14, 1999, [Hearing Officer] informed DPS executive director of student services/special education [Director] that he was placing [STUDENT] on homebound education. [Asst Principal 2] completed the paperwork and [Hearing Officer] signed the document on behalf of the parent, [PARENT], placing his initials beside her signature. [Hearing Officer] signed for the parent in an effort to get homebound services provided prior to the Christmas holidays. [Director] signed on behalf of the Office of Admissions. The application was forwarded to DPS homebound services on December 17, 1999.

52. On or about December 15, 1999, a second manifestation determination was prepared because of the procedural failures regarding the December 5 manifestation determination. This manifestation determination was also procedurally deficient in that the IEP team did not convene together.

53. On or about December 17, 1999, [Hearing Officer] had a letter mailed to [PARENT] stating that [STUDENT] would not be expelled, that homebound services would extend for the rest of the first semester, and that a determination would be made for placement in the second semester. (The IHO makes no determination as to whether [PARENT] received the letter.) December 17, 1999, was the last school day before the holiday break, with school restarting on January 3, 2000.

54. At an unidentified date, [PARENT] was put in contact with DPS student services coordinator [Coordinator]. [Coordinator] reviewed [STUDENT]'s student files and identified problems with his IEP on October 26, 1999, and his manifestation determinations.

55. On or about January 3, 2000, homebound services coordinator [Homebound Coordinator] forwarded a memo to [Teacher 2] at [Middle School] that requested [STUDENT]'s IEP and reminded the school that an IEP meeting was required because of the change in [STUDENT]'s setting. [Middle School] never forwarded [STUDENT]'s IEP, nor would [Middle School] staff return [Homebound Coordinator]'s telephone call(s). Homebound service provider [Homebound Instructor] was not provided a copy of [STUDENT]'s IEP during the two months of homebound instruction and therefore was required to make his own determination of what [STUDENT] needed to work on.

56. On January 13, 2000, [STUDENT] began homebound instruction with [Homebound Instructor].

57. In January, [STUDENT] failed to appear for six of the 10 sessions. [Homebound Coordinator] called [STUDENT] and [PARENT] to discuss his poor attendance. [STUDENT] agreed to try harder. His grades in January were D's, primarily because of the absences. From February 1 through March 2, [STUDENT] had only one unexcused absence. His grades were B's and C's.
58. On or about January 21, 2000, a manifestation determination meeting was held with [SpEd Teacher], [Asst Principal 2], [Teacher 2], [School Psychologist], and [PARENT]. The information in the January 21 manifestation determination is virtually identical to the earlier manifestation determination documentation.
59. On or about January 25, 2000, [PARENT] called either [Hearing Officer]'s and/or [Coordinator's] office to explain that she wanted to appeal [STUDENT]'s expulsion from [Middle School].
60. On or about January 27, 2000, [Coordinator] called [PARENT] and told her that [Hearing Officer] had determined that [STUDENT] could attend any middle school other than [Middle School] and that transportation would be provided. [PARENT] said she would consider it and get back to her.
61. On or about January 28, 2000, [PARENT] informed [Coordinator] that she wanted [STUDENT] to remain at [Middle School] and that she would appeal the decision.
62. On February 4, 2000, [Coordinator] mailed [PARENT] a letter regarding the IDEA and her rights.
63. On February 18, 2000, an IEP staffing was held. [PARENT] attended with parent advocate [Advocate]. [Coordinator] also attended to assist the family and DPS. The team reviewed the emotional disability (ED) checklist and determined [STUDENT] qualified as having ED. The parent participated in the discussion. During the staffing, [SpEd Teacher] erroneously stated that [STUDENT] had previously been identified with ED, which [Coordinator] later believed might have unduly influenced the team. The team found [STUDENT] had a secondary learning disability in math and written language. Test results did not identify [STUDENT] as qualifying for a reading disability, therefore no reading goals were developed. His annual goals included improving skills in: written language, mathematics, decision-making and compliance, anger management, pre-vocational. [PARENT] was satisfied with the meeting.
64. Because [STUDENT] was in homebound education from the time of his expulsion hearing, the IEP staffing team accepted the homebound placement as a given. The IEP did not show that [STUDENT] would have a change of placement into the emotional disability (ED) center or program if he returned to [Middle School].

65. On or about February 23, 2000, [PARENT], [STUDENT], and [Advocate] met with DPS administrators [Administrator 1] and [Administrator 2] about the possibility of reenrolling [STUDENT] at [Middle School].
66. At some date between February 23, 2000, and March 7, 2000, [Administrator 1] called [PARENT] and informed her that [STUDENT] could return to [Middle School].
67. On March 7, 2000, [STUDENT] returned to [Middle School]. [STUDENT] was placed in the ED classroom. Special educator [SpEd Teacher 3] began developing a Behavior Plan for [STUDENT], which he discussed with [PARENT] and [Advocate]. [SpEd Teacher 3] collected information from [SpEd Teacher], [School Psychologist], and possibly others to develop the plan. [PARENT] did not express disagreement with [STUDENT]'s placement at that time. [Advocate], [PARENT]'s parent advocate, believed it was an appropriate placement.
68. [STUDENT]'s IEP objectives were developed between March 8 and March 22, 2000. [SpEd Teacher] crossed out the dates the objectives were developed and hand wrote 2/18/00 with her initials. The completed IEP was mailed to [PARENT] on March 22, 2000.
69. In [SpEd Teacher 3]'s ED classroom, students must earn privileges. [STUDENT] was not allowed to have a physical education class, but had to earn that right over six weeks. [STUDENT] was allowed to attend lunch with mainstream students.
70. [STUDENT] had excellent behavior in the ED class, receiving nearly all points in all weeks.
71. On or about March 10, 2000, [STUDENT] was referred to Assistant Principal [Asst Principal 3] for refusing to tuck in his shirt far enough to see his waistband. [Asst Principal 3] warned the student and talked to [PARENT]'s friend by telephone.
72. On or about March 15, 2000, [SpEd Teacher] mailed an IEP notice of meeting to [PARENT] for a proposed change of time regarding [STUDENT] special education classes. On March 21, she handed [STUDENT] a similar notice to give to his mother that also stated, "We are required to meet to change [STUDENT]'s IEP to reflect time with [SpEd Teacher 3] (sic)." The meeting was scheduled for April 6, 2000. [SpEd Teacher] mailed a third notice on March 23. Multiple notices were mailed because [STUDENT] said his mother hadn't received prior ones.
73. On or about April 6, 2000, [SpEd Teacher] signed a new IEP form for [STUDENT] that reflected the ED center services. She called [PARENT] by telephone to inform her of the change in IEP.

74. On April 19, 2000, [STUDENT] was provided a physical education class. ([STUDENT] received an F in physical education during the period he was denied the class. The F was subsequently removed from his record.)

75. On May 4, 2000, [PARENT] filed a complaint with the U.S. Department of Education, Office of Civil Rights (OCR) against DPS, alleging the district discriminated against her son on the basis of race and retaliation. Specifically, [PARENT] complained [Middle School]'s hairstyle rules could be used to discriminate against Black students. Numerous meetings were held by OCR and DPS personnel over the next five months to resolve the complaint.

76. [STUDENT]'s ninth grade year (2000-2001) began at [High School]. [STUDENT]'s paperwork did not get properly moved from [Middle School] to [High School], so [STUDENT] was given a full regular education schedule.

77. Neither [STUDENT] nor [PARENT] informed [High School] of a problem with his schedule. The general education classes were difficult for [STUDENT] After struggling for approximately two weeks in September 2000, [STUDENT] stopped going to school.

78. On or about September 18, 2000, [PARENT] notified DPS that she would home school [STUDENT] [PARENT] used various materials she had available, including newspapers, old textbook(s), and television. [PARENT] did not have the finances to purchase a home school curriculum or text books.

79. In early October 2000, [High School] case manager [Case Manager] called [PARENT] to find out why [STUDENT] wasn't attending school. [PARENT] explained she was home-schooling [STUDENT], but that she wanted some additional testing performed.

80. On October 27, 2000, OCR and DPS agreed to a Written Commitment to Resolve (commitment) the OCR complaint. [Coordinator] and [PARENT] discussed compensatory hours on at least three occasions prior to the resolution. In general, DPS agreed to provide [STUDENT] with one hour of homebound education for every day of school that he missed due to suspensions over 10 days. In addition, DPS agreed to clarify its dress policy, seal copies of [STUDENT]'s disciplinary record regarding violations of the dress policy, better document habitually disruptive acts, provide training to teachers and staff, and develop procedures regarding truancy.

81. In November 2000, Child Find conducted a series of educational and psychological evaluations on [STUDENT] at the request of DPS. [STUDENT] overall reading score was 4th grade, 8th month. Specific weaknesses were identified in phonics and anonyms/synonyms. His overall written language skills score was 3.8. His overall math score was 5.0.

82. In December 2000, special education teacher and administrator [Administrator] was informed that there was a problem with [STUDENT]'s schedule. She called [STUDENT] at home and scheduled a meeting to discuss [STUDENT] returning to [High School] in the second semester.

83. On January 17, March 1, and March 15, 2001, IEP meetings were held at [High School]. [STUDENT] was identified as having a learning disability, with specific impairment in written language and math. His reading level of 81 did not qualify as a disability. The team also did not find that [STUDENT] had an emotional disability, in that his social withdrawal tendencies and power struggles did not significantly interfere with his education. No specific reading goals were developed in the IEP.

84. On February 6, 2001, [STUDENT] returned to [High School]. The first half-day at [High School] went without incident. In the afternoon, [STUDENT] went to a vocational setting at CEC. [STUDENT] and a male friend were talking to a group of females. [STUDENT]'s male friend said something to one of the females, who slapped him. [STUDENT] grabbed the female, whose friend then grabbed [STUDENT]. A brawl ensued. All of the participants (male and female) were suspended from CEC.

85. In March 2001, [PARENT] and family were evicted from their home at [ ], Denver, Colorado. [PARENT] has been homeless since that time. She has stayed with her sister, brother, father, a friend in Aurora, and homeless shelters. Her children are sometimes with her, at other times living apart.

86. On or about March 15, 2001, [STUDENT]'s schedule was changed so that he would not have a first period class. [STUDENT]'s sleep disorders made it difficult for him to get to school for an early class. [STUDENT]'s schedule was also changed to start him with a physical education class to help invigorate him for the rest of the day.

87. On or about March 27, 2001, [STUDENT] was approved for 28 hours of homebound compensatory services pursuant to the OCR commitment. On April 9, homebound services began. [STUDENT]'s previous homebound teacher, [Homebound Instructor], was contracted to provide the services. [STUDENT] attended six of the 28 sessions (approximately seven hours of instruction).

88. On April 26, 2001, [STUDENT] was suspended from [High School] for five days for truancy.

89. On or about May 1, 2001, social worker [Social Worker] mailed [PARENT] and DPS legal staff a 5-day letter regarding truancy issues.

90. In June 2001, [PARENT] met with [Director], [Coordinator], and [Academy Director] to discuss possibilities regarding [STUDENT]'s schooling for the Fall 2001 term.

91. On September 5, 2001, [PARENT] filed a Notification of Home School with DPS. The request was denied because [PARENT] did not provide information about the curriculum. She did not provide this information because there was no curriculum.

92. On October 4, 2001, DPS reading specialist [Reading Specialist] performed reading tests on [STUDENT] [STUDENT]'s phonics, word attack, and decoding skills are deficient. In general, [STUDENT]'s reading is slow and laborious.

93. On November 27, 2001, [PARENT] filed for a due process hearing against DPS.

94. On January 8, 2002, an IEP staffing team at [High School 2] met to begin developing an IEP for [STUDENT]. [PARENT] participated in the meeting.

III. DECISION

Prior to the hearing, Respondent filed a Motion to Dismiss based on the allegation that [PARENT] and [STUDENT] were residents in another school district prior to filing the current request for due process. The IHO accepted testimony and evidence on this issue prior to hearing the case on the merits.

Does the IHO lack jurisdiction to hear the case because the student resided outside of the school district prior to filing a request for a due process hearing?

Prior to a hearing on the merits, Respondent argued that Petitioner relinquished her right to file for due process against DPS because [PARENT] and [STUDENT] voluntarily moved their residence outside of the City and

County of Denver prior to requesting a hearing. In support of its motion to dismiss, Respondent cited *Smith v. Special School District*, 184 F.3d 764 (8th Cir. 1999) and *Thompson v. Board of Special School District No. 1*, 144 F.3d 574 (8th Cir. 1998), which held that students who voluntarily move to and reside in a different school district prior to filing a due process complaint waive the right to file in the prior district.

In the present case, [PARENT] and her family were evicted from their Denver residence in March 2001. [PARENT], [STUDENT], and [PARENT]'s other children have lived at various addresses since that time. People with whom [PARENT] has lived include her sister, brother, father, friends, and homeless shelters. At times her children accompany her; at other times they are separated. Throughout this period, [STUDENT] remained enrolled in the DPS system.

One of the individuals with whom [PARENT] and [STUDENT] have lived is [ ] in Aurora, Colorado (a suburb of Denver). In October 2001, [PARENT] was served process at [ ]' residence. Respondent argues that by residing in Aurora, Colorado, [PARENT] waived her right to file for due process hearing against DPS.

Unlike the cases cited by Respondent, [PARENT] never voluntarily established a new residency outside the Denver. While [PARENT] and [STUDENT] were provided shelter by [ ] at various times over the past year, they never took any steps, such as establishing mail or telephone service, to establish permanent residency there. [PARENT] never enrolled [STUDENT] in the public school system in Aurora.

The IHO finds that a homeless person does not waive his or her rights under the IDEA because they accept assistance and shelter from individuals outside of the school district in which the student is enrolled. In addition, the rulings in *Smith* and *Thompson* relied on the fact that Petitioners received notice that voluntarily moving away from a school district would result in their being prohibited from filing for due process within that school district. No evidence was presented in the present case that Petitioner received similar notice that accepting shelter outside of Denver would waive her son's IDEA rights with respect to DPS.

Was Petitioner Denied a Free and Appropriate Public Education?

Petitioner cited a number of issues in her complaint.[1] In a pre-hearing ruling, the IHO determined the statute of limitations was two years in this case. Colorado Revised Statute § 13-80-102(1)(i) and (g). Petitioner filed her complaint on November 27, 2001. Therefore, compensatory education would only be considered for IDEA violations identified after November 27, 1999. However, the IHO agreed to consider Petitioner's argument that the statute of limitations should be equitably tolled to January 17, 1999—two years after [PARENT] admitted receiving written notice of her IDEA rights.

The IHO declines to toll the statute of limitations beyond two years. The IHO is not persuaded there is equitable tolling based on a parent's failure to receive notice of his or her IDEA rights. In any case, the IHO does not find equitable considerations support the parent's claim. Petitioner testified that she did not receive a copy of her rights from the beginning of [STUDENT]'s elementary school education through the middle of eighth grade. However, a notice of rights was attached to one of her exhibits (Exhibit Q). The IHO also finds that based on the testimony, it is more probable than not that DPS personnel sent the Notice of Rights with many, if not all, of their IEP meeting notices from third grade through eighth grade.

Petitioner testified she may have received the notices, but doesn't recall them. She argued that even if she did receive the notices, DPS did not take additional steps that could have educated her about her IDEA rights. Petitioner testified that DPS could have provided seminars on special education rights. Petitioner also testified that she did not attend any of [STUDENT]'s IEP staffings from third grade through the second semester of eighth grade. According to her testimony, she was a single parent of five children and delegated much of her children's supervisory responsibilities to her mother, who did not attend [STUDENT]'s IEP meetings. The IHO does not believe the Petitioner would have attended general informational seminars when she did not attend her children's individual IEP staffings. Under these facts, equitable considerations do not favor the Petitioner and the IHO will consider only IDEA violations that occurred after November 27, 1999 ([STUDENT]'s eighth grade year).[2]

The eighth grade was difficult for [STUDENT] both personally and educationally. On October 5, 1999, he was suspended from school for five days for using profanity in the lunchroom. On October 26, 1999, he was

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[1] At pre-hearing, the IHO dismissed Petitioner's constitutional, criminal, and Section 1983 claims as outside of his IDEA jurisdiction.

suspended for three days for repeatedly not tucking in his shirt when asked. On November 9, 1999, [STUDENT] was suspended for wearing tight braids in his hair. [Principal] had instituted both rules—students must tuck in their shirts so that their waistbands are visible and prohibiting males from wearing braids in their hair—in an effort to prevent gang-related school violence.[3] These rules were unwritten at that time, but well known by teachers and students. All of the teachers testified they reminded students to tuck in their shirts on multiple occasions nearly every school day.

[PARENT] believed the rule against males wearing braids in their hair discriminated against African-American students. She told [Principal] that she had tied [STUDENT]'s hair in tight braids and that he had a right to wear them in that style. [Principal] told [PARENT] that she would ask a DPS attorney about the rule.

On or about November 19, 1999, [Principal] informed [PARENT] that a school attorney informed her that "she didn't have a leg to stand on" to suspend a student for his hairstyle and that [STUDENT] could return to school. [PARENT] took [STUDENT] back to school close to lunchtime on that date. [STUDENT] was wearing the same hairstyle. At the time of his return, not all [Middle School] teachers were aware that the rule regarding hairstyles had changed.

One teacher, [Teacher 3], saw [STUDENT]'s hair and said words to the effect of, "What's up with your hair?" Other students told [STUDENT] that [Teacher 3] had been talking about his hair. [STUDENT] became upset and went to [Middle School] psychologist [School Psychologist]'s office to discuss the situation. While [STUDENT] was talking to [School Psychologist], [Teacher 3] entered [School Psychologist]'s office. Petitioner argued that [Teacher 3] went to the office to create problems for [STUDENT]. [School Psychologist] testified that [Teacher 3] went to her office to return a jersey. The IHO does not agree with either explanation, but does not believe [Teacher 3]'s motivation is relevant.

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[2] The IHO included findings of fact that occurred prior to November 27, 1999, for purposes of providing a historical perspective to IDEA violations within the statute of limitations and to protect the parties' appellate rights.

[3] [Principal] believed tucking in shirts would reduce the number of weapons in the school. Her prohibition against males wearing braids in their hair was instituted to reduce gang influences in school.

When [Teacher 3] entered [School Psychologist]'s office, [STUDENT] angrily jumped to his feet and began moving toward [Teacher 3]. [School Psychologist] moved behind [STUDENT] and grabbed his arms to ensure he did not come into contact with her. When she grabbed [STUDENT]'s arms, he raised them, causing [School Psychologist] to lose her balance. She fell against a chair or table. [School Psychologist] did not feel threatened by [STUDENT], but was concerned by his anger and wanted to prevent a potential escalation. She believed her fall was an accident. However, she did call security and [STUDENT] calmed down after speaking with the security official.

Later that afternoon, [STUDENT] was walking in the hallway during class time. [SpEd Teacher 2], who did not know [STUDENT], asked him words to the effect of, "Where are you supposed to be?" [STUDENT] said words to the effect of, "It's none of your business." [SpEd Teacher 2] called security, which escorted [STUDENT] to the principal's office.

The incidents that occurred on November 19, 1999, ultimately resulted in DPS calling for an expulsion hearing. Petitioner presently requests the IHO to find the expulsion hearing—which was based on [STUDENT] having three habitually disruptive acts—and penalty were too harsh, procedurally flawed, and in violation of the IDEA.[4] As the IHO stated at numerous times during the hearing and pre-hearing process, the IDEA does not provide special education students with a second chance at challenging neutral disciplinary actions. DPS's decision to conduct an expulsion hearing had no connection with [STUDENT] qualifying as a special education student. In fact, Petitioner filed a complaint with the U.S. Department of Education, Office of Civil Rights (OCR) regarding [Middle School]'s dress code, in which DPS agreed to revisit the policy. Although Petitioner is not totally satisfied with the OCR resolution, the IHO does not have the jurisdiction to review a school district's general disciplinary policy or rules.

Hearing officers have jurisdiction over whether a school district's implementation of a disciplinary policy complies with IDEA. In this case, Respondent's implementation of its disciplinary policy violated the IDEA on various occasions. Shortly before the expulsion hearing on December 14, 1999, DPS staff realized that they had not conducted a manifestation determination review to determine whether [STUDENT]'s behavior was a result of his learning disability. Specifically, if an action is contemplated that could result in the removal of a child with a disability who violates a rule or code of conduct, the LEA must conduct a manifestation determination review no

[4] The IHO notes that only two of the three habitually disruptive acts identified by the DPS were so identified.

later than 10 school days after the date on which the decision to take that action is made. 34 C.F.R. § 300.523(a)(2). Respondent stipulated it did not convene the manifestation determination review prior to the tenth day of removal. Respondent also stipulated that the manifestation review did not include a general education teacher and the parent was not provided notification of the meeting. 34 C.F.R. § 300.523(a)(1), 34 C.F.R. § 300.523(b).

The reason that Respondent did not conduct a proper manifestation determination review is still somewhat of a mystery. An IEP team and other qualified personnel may determine that the behavior of the child was not a manifestation of the child's disability only if the IEP team and other qualified personnel determine that—

(i) In relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;

(ii) The child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action;

(iii) The child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

34 C.F.R. § 300.523(c)(2)(i-iii).

In the present case, DPS might have overlooked the manifestation review requirement because [STUDENT] was identified as having a learning disability rather than an emotional disability. The three habitually disruptive acts the school identified at the expulsion hearing included profanity, a refusal to tuck in his shirt, and the defiant acts of November 19, 1999. None of these incidents, on their face, appear to be connected to or caused by a learning disability such as dyslexia.

In the IHO's opinion, the failure of DPS to conduct a timely and proper manifestation determination review was more likely caused by an inexplicable removal of [STUDENT] as a special education student. On or about October 26, 1999, [STUDENT]'s IEP staffing (a Triennial review) occurred and it was determined that [STUDENT] did not qualify as having a learning disability. The first four pages of the IEP are missing, so the IHO is unable to determine specific findings that were made at the staffing, or who was in attendance. Respondent admits that the Triennial review was incomplete because a psychologist had not evaluated [STUDENT]

In fact, student services coordinator [Coordinator] testified that the IEP team's finding that [STUDENT] was not eligible for special education services on October 26, 1999, was a primary reason she requested [Middle

School] to perform a second Triennial review on February 18, 2000.[5] Again, because the paperwork is missing and [PARENT] did not attend [STUDENT]'s October 26, 1999, IEP staffing, facts from the meeting are sketchy.

The IHO finds that it is more likely than not that the manifestation determination review was not timely conducted because [STUDENT] was no longer identified as a special education student. If that were the case, there would have been no need for a manifestation review. At some point, DPS must have determined that it was in error when it determined that [STUDENT] was not eligible for special education services. The IHO also notes that the four pages missing from [STUDENT]'s file are the ones that would likely have explained the findings.[6] Respondent admitted that [STUDENT]'s Triennial review was not completed timely. The IHO also finds that the October 26, 1999, Triennial review was improperly conducted.

DPS's second manifestation determination review was similarly flawed. The manifestation determination review on December 15, 1999, did not include a meeting of the entire IEP team. [PARENT] was not provided notice of the review, which she did not attend.

On or about January 21, 2000, a third manifestation determination review was held with [SpEd Teacher], [Asst Principal 2], [Teacher 2], [School Psychologist], and [PARENT] The information in the January 21 manifestation determination is virtually identical to the earlier manifestation determination documentation.

Petitioner argues that this team did not consider the fact that [STUDENT] might have had an emotional disability as well as a learning disability. However, the regulations provide for instances when a school district does not have knowledge that a child is a child with a disability. "If an LEA does not have knowledge that a child is a child with a disability…prior to taking disciplinary measures against the child, the child may be subjected to the same disciplinary measures as applied to children without disabilities who engaged in comparable behaviors..." 34 C.F.R. § 300.527(c)(1). In this case, DPS did not have knowledge that [STUDENT] might qualify for special education with an emotional disability prior to the incidents on November 19, 1999, that triggered the expulsion hearing.[7]

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[5] The IHO credits the testimony of [Coordinator] as being particularly forthright and truthful during the hearing.

[6] The IHO also found disconcerting the testimony from [Asst Principal 2] that [Middle School] backdated the first manifestation determination to December 5, 1999 (which was a Sunday).

[7] [PARENT]'s testimony regarding whether [STUDENT] actually had an emotional disability was inconsistent. [PARENT] testified that she did not provide the IEP team with certain family information that lead to the identification of an emotional disability. The IHO finds that the staffing team could not have acquired the information from any other source.

Expulsion hearing officer [Hearing Officer] ultimately decided that [STUDENT] would not be expelled. [Hearing Officer] placed [STUDENT] on homebound education until a future placement could be determined. He informed [PARENT], through [Coordinator], that [STUDENT] could attend any middle school in the district and that the district would provide transportation. [PARENT] wanted [STUDENT] to remain at [Middle School], however, and pursued an appeal to [Hearing Officer]'s decision that he change schools.

Some of Respondent's witnesses testified that [STUDENT]'s homebound education in January 2000 was not actually a change of placement, but an interim step until a new placement for [STUDENT] was determined. At that point, a new IEP arguably would have been developed. The IHO understands that new IEPs are not always possible for interim assignments of short duration. In this case, however, [STUDENT] received homebound services from December 17, 1999, through March 7, 2000. Clearly this was a change of placement requiring a new IEP staffing. In fact, a memo forwarded by homebound services coordinator [Homebound Coordinator] to [Teacher 2] at [Middle School] stated that an IEP meeting was required because homebound services are a change in setting.

[Middle School]'s provision of these homebound services was similarly flawed. In the same January 3, 2000, memo, [Homebound Coordinator] requested a copy of [STUDENT]'s current IEP so that it could be forwarded to the homebound instructor. [Middle School] staff never forwarded a copy of [STUDENT]'s IEP to her. [Homebound Coordinator] testified that she had difficulty getting anyone at [Middle School] to return her telephone calls. As a result, homebound instructor [Homebound Instructor] was never provided a copy of [STUDENT]'s IEP during the two months of homebound instruction and therefore was required to make his own determination of what [STUDENT] needed to work on.

[Middle School]'s failure to provide a copy of [STUDENT]'s IEP to the homebound coordinator is consistent with the IHO's finding that [STUDENT] was no longer considered a special education student. Although Respondent argued that [STUDENT] still had an IEP in place from October 1998 (now over one year old), the fact that the IEP was never forwarded is compelling evidence that it was not considered in effect at that time.

DPS's administration of [STUDENT]'s homebound paperwork was similarly inefficient. [Hearing Officer]'s request was made on December 17, 1999. The holiday break ended on January 3, 2000. [STUDENT] was not provided services until January 13, 2000. [Homebound Coordinator] testified that it sometimes takes a couple of days to organize homebound instruction. Ten days is significantly longer than two days.

Despite the fact that the IEP was never forwarded to [Homebound Instructor], he took great interest in [STUDENT] and the two worked well together. [STUDENT] started his homebound education slowly because of personal

problems, including the death of his grandmother and serious injury to his brother. However, once [STUDENT] began attending homebound meetings with [Homebound Instructor], he made satisfactory progress.

On February 18, 2000, an IEP staffing was held. [PARENT] attended with parent advocate [Advocate]. [Coordinator] also assisted [PARENT] at the meeting. The team found [STUDENT] had a learning disability in math and written language. Test results did not identify [STUDENT] as qualifying for a reading disability, therefore no reading goals were developed. His annual goals included improving skills in: written language, mathematics, decision-making and compliance, anger management, pre-vocational.

For the first time in [STUDENT]'s education, the staffing team also reviewed an emotional disability (ED) checklist to determine whether [STUDENT] qualified for ED services. During the staffing, [SpEd Teacher] erroneously stated that [STUDENT] had previously been identified with ED, which [Coordinator] later believed might have unduly influenced the team. It is unclear why [PARENT] did not correct [SpEd Teacher]'s misstatement. The team ultimately determined [STUDENT] qualified for ED services. [PARENT] was satisfied with the meeting at that time, apparently concurring with the ED designation.

[PARENT] presently argues [STUDENT]'s ED placement was not in the least restrictive environment. Once [STUDENT] returned to school on March 7, 2000, [STUDENT] was placed in [Middle School]'s ED classroom. The ED classroom employs strict discipline, with students earning the right to have normal student privileges, such as gym class and lunch with general education students. The first day that [STUDENT] returned, [PARENT] and [Advocate] met with ED classroom teacher [SpEd Teacher 3] to discuss the program. [PARENT] did not express disagreement with [STUDENT]'s placement at that time. [Advocate], [PARENT]'s parent advocate, believed all were in agreement that the ED center was an appropriate placement.

Petitioner argues that Respondent violated the IDEA by not calling another IEP staffing to discuss [STUDENT]'s ED setting. Respondent appears to argue that [STUDENT]'s ED placement was temporary, rather than permanent, so that no staffing was required. The IHO agrees with the Petitioner. Again, a temporary setting can be no more than 10 days. At a minimum, [STUDENT]'s ED placement was scheduled for six weeks. Respondent impliedly admitted that placing [STUDENT] in the ED center was a change of placement by scheduling a "change of time" IEP staffing on April 6, 2000. In the notice to [PARENT], [SpEd Teacher] stated, "We are required to meet to change [STUDENT]'s IEP to reflect time with [SpEd Teacher 3] (sic)." However, [STUDENT]'s February 18, 2000, IEP did not discuss the ED center at all, so it was clearly more than a change in time.

The IHO also does not believe that every [Middle School] student identified with ED necessarily should be placed in the ED center. While [SpEd Teacher 3] has particular expertise and experience teaching ED students, and therefore his suggestions regarding ED students might carry more weight at an IEP staffing, the entire staffing team is still responsible for developing individual student programs. In this instance, [STUDENT]'s IEP team delegated the authority to develop a program and behavior plan for [STUDENT] to [SpEd Teacher 3].

[STUDENT] began ninth grade at [High School] where he was initially provided a general education curriculum. [High School] administrator [Administrator] testified that [STUDENT] "fell through the cracks," when his special education files were not transferred from [Middle School]. After struggling for two weeks, [PARENT] removed him from [High School] and notified that school that she would begin home schooling [STUDENT] beginning on September 18, 2000.[8]

An attempt was made to get [STUDENT] back in school during the second semester. On January 17, March 1, and March 15, 2001, IEP meetings were held at [High School]. [STUDENT] was identified as having a learning disability, with specific impairment in written language and math. His reading level of 81 did not qualify as a disability, so no specific reading goals were developed in the IEP. The team also did not find that [STUDENT] had an emotional disability, in that his social withdrawal tendencies and power struggles did not significantly interfere with his education.

[STUDENT] returned to [High School] on February 6, 2001. The first half-day at [High School] went without incident. In the afternoon, however, [STUDENT] went to CEC, a vocational setting. [STUDENT] and a male friend began talking to a group of female students. [STUDENT]'s male friend said something to one of the females, who slapped him. [STUDENT] grabbed the female, whose friend then grabbed [STUDENT] A brawl ensued. All of the participants (male and female) were suspended from CEC. Respondent again asked the present IHO to remove the disciplinary documentation regarding this incident from [STUDENT]'s file. [PARENT] argued that she was denied due process because she was not allowed to question the teachers who witnessed the incident at that

[8] Petitioner provided no explanation why no one informed [High School] that [STUDENT] needed special education services or the fact that [STUDENT]'s frustration with a general education curriculum led to his removal.

time. The IHO finds that he lacks jurisdiction under the IDEA to provide the relief requested regarding the appeal of a disciplinary decision.[9]

Since the incident at CEC, [STUDENT] has only sporadically attended school. [PARENT] testified that she continues to home school [STUDENT], although her requests for home schooling have been denied based on her failure to produce a curriculum. ([PARENT] testified that she does not have the financial ability to purchase a curriculum.)

Summary of IHO's findings regarding IDEA violations.

In summary, the IHO finds the Respondent committed the following IDEA violations from November 27, 1999, to the present:[10]

1) Individual Education Plan (IEP) Procedures, Implementation, and Change of Placements
    i) Respondent violated 34 C.F.R. § 300.343 by failing to conduct a proper and timely Triennial review on October 26, 1999.
    ii) Respondent violated 34 C.F.R. § 300.346 by failing to have an IEP team assess [STUDENT]'s homebound placement on or about January 3, 2000. Respondent further violated the IDEA by not providing the homebound teacher with a copy of [STUDENT]'s IEP.
    iii) Respondent violated 34 C.F.R. § 300.346 by failing to have an IEP team assess [STUDENT]'s placement in the ED center and appropriate behavior strategies on or about March 7, 2000.
    iv) Respondent violated 34 C.F.R. § 300.343 by failing to have an IEP team assess [STUDENT] prior to starting the ninth grade at [High School] in September 2000.
2) Manifestation Determinations
    i) Respondent violated 34 C.F.R. § 300.523 by failing to conduct a timely manifestation determination review prior to the December 14, 1999, expulsion hearing.
    ii) Respondent violated 34 C.F.R. § 300.523 by conducting manifestation determination reviews on December 14, 1999, and December 15, 1999 without a full IEP staffing team.

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[9] The IHO notes that although the stories provided by the teacher witnesses varied slightly, the teachers were credible and had no motivation to lie. Neither teacher had contact with [STUDENT] prior to that date. In addition, all of the students involved in the fight, males and females, were suspended.

[10] Certain violations include dates prior to the statute of limitations when the violations carried over beyond November 27, 1999.

The IHO does not find the Respondent violated the IDEA with respect to Petitioner's allegation that Respondent failed to provide [STUDENT] with necessary assistive technology. Petitioner failed to identify specific technology that Respondent refused to provide [STUDENT] at specific times. Rather, Petitioner generally alleged that there must have been some technology that could have helped [STUDENT] learn to read throughout his education. The IHO is unable to make a specific finding in this regard.

The IHO also finds that Petitioner's allegations that [STUDENT] placement in a self-contained classroom in 1997 and 1998 were not the least restrictive environment and that his math and reading goals and objectives were missing, inaccurate, and/or immeasurable during his sixth and seventh grades are time barred. The IHO finds that a page from another student's IEP goal that was found in [STUDENT]'s file was an administrative error with no IDEA implications.

IV. RELIEF

Although the IHO identified a number of IDEA violations, this case is really about compensation. Respondent in this case admitted to a number of violations prior to and during the hearing. Petitioner sought greater admissions, particularly with respect to the intent of certain individuals and statutes outside of the current IHO's IDEA jurisdiction. The IHO attempted to provide Petitioner with a full and fair hearing of the facts, which, in fact, resulted in a relatively lengthy hearing.

With respect to relief for admitted violations, Respondent offered a variety of compensatory steps, including:

- A return to [High School], [High School 2], or another DPS school.
- A placement at [Academy], which has a small teacher-student ratio and is run by [Academy Director]. [PARENT] expressed admiration for [Academy Director]'s approach to children with special needs. [Academy] also employs the FAST reading program.
- A potential future progression to the Contemporary Learning Academy.
- An art mentor, potentially of African-American descent. ([STUDENT] expressed his desire to have a male role model.)
- A one-on-one reading tutor.
- Assistive technology as identified by an IEP team.

The primary question with respect to relief is Petitioner's request that Respondent reimburse the Petitioner for home schooling [STUDENT] 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 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:

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

The IHO identified a series of IDEA violations that denied [STUDENT] FAPE at various times during his education. For purposes of requiring a school district to pay for private school services, however, the hearing officer must determine whether FAPE was being provided at the time the parent unilaterally removed the student from public school.

In the present case, the last violation identified by the IHO was Respondent's failure to have a staffing team assess [STUDENT] and develop an IEP for him prior to beginning [High School] in September 1999. Although [PARENT] removed him on September 18, 2000, because [STUDENT] was struggling with his general curriculum, [PARENT] eventually returned him to [High School] during the Spring semester. [PARENT] then removed [STUDENT] following an incident at CEC in which [STUDENT] was suspended for fighting. The IHO did not find an IDEA violation based on that incident. [PARENT] testified that her only concern with [STUDENT]'s March 2000 IEP was a lack of reading goals. The IHO finds that Respondent would have added reading goals if requested and that the IEP in existence was reasonably calculated to enable the child to receive educational benefits.

The IHO finds that DPS was providing FAPE in the spring of 2000.

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 [High 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.

[PARENT] testified that [STUDENT]'s home school program has no standard curriculum. She uses various materials she has available, including newspapers, old textbook(s), and educational television shows on building and animals. She also testified that she has conducted research on the Internet with respect to reading instruction and was attempting to implement ideas discussed by Respondent's witnesses during the present hearing.

[STUDENT]'s current placement with respect to home schooling is clearly inappropriate.

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

As described earlier, 34 C.F.R. § 300.403(d) allows for the cost of reimbursement to be reduced or denied if, prior to removing a 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 she did not provide written notice to Respondent within 10 days of removing [STUDENT] from school. Her requests to home school have been repeatedly denied because of the lack of a curriculum.

Petitioner may be absolved from the requirements of 34 C.F.R. § 300.403(d) through the exception in 34 C.F.R. § 300.403(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."

While the IHO determined that the Petitioner had received various pamphlets provided by DPS to inform parents of their rights, there is no evidence the notices discuss the issue of unilateral placements by parents. However, even at the hearing, Petitioner refused to describe steps the school district could take to provide FAPE to [STUDENT] Rather, Petitioner testified that she would not return [STUDENT] to a district that failed him in the past. Under these circumstances in which the Petitioner presently fails to comply with the regulation, the IHO finds equitable circumstances do not favor the parent.

The IHO will now look at other types of relief.

The IHO identified a number of IDEA violations that prevented [STUDENT] from receiving full educational benefit from January 3, 1999, through May 2000. [STUDENT] obviously received some benefit from homebound education with [Homebound Instructor]. However, [Middle School] did not provide homebound service from January 3, 1999, through January 12, 1999. The IHO finds [Homebound Coordinator]'s frustration with [Middle School] refusal to supply the homebound teacher with [STUDENT]'s most recent IEP—or at least calling [Homebound Coordinator] to explain why they weren't forwarding it—was well founded. [STUDENT] was similarly prevented from receiving a full IEP team's advice regarding homebound services, as well as education within the ED center.

As compensation for the above violations and the manifestation determination violations admitted by the Respondent, the IHO orders Respondent to provide [STUDENT] with summer school education in reading and math. Reading instruction will include sessions of one-on-one training with a certified reading specialist. No evidence was provided regarding the amount of one-on-one training that would best serve [STUDENT]'s interests. The IHO assumes it would be for no less than two hours per week for the duration of a normal summer school semester, but an exact determination as to the amount of services to maximize [STUDENT]'s return to education should be made by an IEP team.

The IHO understands that [STUDENT] may not be enthusiastic about participating in summer school. [STUDENT] has missed so much education, however, that he needs to return to school as soon as possible without excessive breaks.

In addition to summer services, the IHO finds the educational offer made by the Respondent at the hearing is adequate compensation. This offer includes:

- A return to [High School], [High School 2], or other DPS high school.
- A potential placement at [Academy], should the Petitioner so desire, with a specific focus on improving [STUDENT]'s reading. [PARENT] and [STUDENT] should visit the Academy to determine its appropriateness for [STUDENT]
- An art mentor, preferably of African-American descent.
- A one-on-one reading tutor of time and duration to be determined by the IEP team.
- Assistive technology as identified by an IEP team.

The IHO understands that some acrimony exists between [PARENT] and DPS. However, the IHO strongly believes that [STUDENT] can succeed in meeting his goal of bringing his reading and math to the point of functional use if all parties ([STUDENT], [PARENT], and DPS) work together. [PARENT] testified that she didn't understand her rights under the IDEA until recently. The IHO is disconcerted that now that [PARENT] understands her rights and can supervise [STUDENT]'s educational progress, she has removed him from public education. The fact is, [STUDENT] needs to return to school with all parties working together. With effort from everyone, not the least of which must come from the student himself, [STUDENT] can meet the goals he identified for himself at the hearing.

Petitioner requested that the IHO order Respondent to modify various disciplinary documents in [STUDENT]'s files. The IHO declines. While 34 C.F.R. § 300.567 gives hearing officers the right to correct inaccurate of misleading records, the records must involve a violation of the IDEA. In this case, the disciplinary files identified by the Petitioner involve incidents that are unrelated to [STUDENT]'s disability. For example, Petitioner never alleged that [STUDENT] was suspended for the incidents on November 19, 1999, because of his special education status. Rather, [PARENT] testified that she believed [STUDENT] was suspended and nearly expelled because they challenged [Principal]'s rule regarding hairstyles. Petitioner argued that the reports of two teachers at CEC should be removed because of a due process violation. Neither teacher had seen [STUDENT] before the incident or knew that he was a special education student. Again, the IHO does not believe the IDEA provides special education students with a second chance at appealing disciplinary rulings that are applied to all students.

V. CONCLUSION

The IHO will mail this decision to the Petitioner, Respondent, 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: April 2, 2002