

**BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS  
STATE OF COLORADO**

**CASE NO. ED 2002-011**

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**DECISION UPON STATE LEVEL REVIEW**

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**IN THE MATTER OF:  
LEWIS-PALMER DISTRICT 38,**

**Appellant and Cross-Appellee,  
v.**

**[STUDENT], by and through her parents [PARENT] and [PARENT],**

**Appellee and Cross-Appellant.**

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This is a state level review of a decision of an impartial hearing officer ("IHO") pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* ("IDEA") and the Colorado Exceptional Children's Educational Act, Section 22-20-101 *et seq.*, C.R.S. (2001) ("ECEA"). Appellant Lewis-Palmer District ("District") was represented by Robert I. Cohn, Esq., and Brent Benrud, Esq., Stettner, Miller and Cohn, P.C. Alexandra Rivera ("[STUDENT]"), through her parents Jim Rivera ("[PARENT]") and Linda Rivera ("[PARENT]"), was represented by Leo L. Finkelstein, Esq.

This matter involves both an appeal and a cross-appeal. Both parties submitted opening and response briefs, and the District also submitted a reply brief. A transcript of the due process hearing was prepared and submitted. On March 11, 2003, additional evidence in the form of the testimony of Rhonda Sunde was presented by [STUDENT], oral argument was held, and this matter was at issue. The parties waived the time limits for the filing of brief and the issuance of a decision as set forth in 2220-R-6.03, 1 CCR 301-8.<sup>1</sup>

**PROCEDURAL BACKGROUND**

By letter dated June 6, 2002, [STUDENT], by her parents [PARENT] and [PARENT], filed a request for a due process hearing in this matter. In general terms, the request disputed the District's refusal to identify [STUDENT] with a perceptual/communicative disability and thus to provide her with special education services which address her dyslexia, dyscalculia and dysgraphia. Irving J. Kelsey was selected as the Impartial Hearing Officer ("IHO"), and an evidentiary hearing was held on July 29 and August 3, 2002, in Case No. L2002:112. The IHO issued a Final Decision on August 16, 2002.

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<sup>1</sup> The ALJ agreed to issue this Decision Upon State Level Review within 30 days of the Oral Argument.

As relevant here, the IHO's Final Decision denied [STUDENT] the relief she sought in relation being identified with a perceptual/communicative disability and ordered the District to reimburse [STUDENT]'s parents for the November 6, 2001 independent evaluation of [STUDENT] conducted by The NeuroConnection, Inc.

The District subsequently filed an appeal regarding that part of the Final Decision which ordered it to reimburse [STUDENT] for the cost of the NeuroConnection evaluation. [STUDENT] filed a cross appeal. The ALJ has reviewed the transcript of the hearing, the record of the hearing before the IHO, and the briefs submitted and now issues this decision upon state level review.

### **ISSUES ON APPEAL**

The District raises one issue on appeal: whether the impartial hearing officer lacked authority to order the District to reimburse [STUDENT]'s parents for the independent evaluation performed on [STUDENT] by The NeuroConnection, Inc. in November, 2001.

In her cross-appeal, [STUDENT] identifies two issues: 1) whether [STUDENT]'s 2002 Individualized Educational Program ("IEP") should have identified her primary disability as a perceptual/communicative disability, rather than Attention Deficit Disorder and 2) whether the 2002 IEP's failure to require multisensory one-on-one or small group instruction in reading, written expression<sup>2</sup> and math deprived [STUDENT] of services she needed to receive reasonable educational benefit.

### **FINDINGS OF FACT**

1. In the summer of 2002, when the due process hearing was held in this matter, [STUDENT] was nine years old and entering fourth grade for the 2002-2003 school year.

2. Background. [STUDENT] has struggled academically since preschool, when she first received special education services. Since April, 2000, as a first grader, [STUDENT] has had a medical diagnosis of Attention Deficit Disorder ("ADD"). In the spring of 2000, [STUDENT] was evaluated for special education services. At that time, she was not found eligible but was given a Section 504 Plan under the Rehabilitation Act, which included some accommodations for her instruction.

3. During second grade, [STUDENT]'s regular classroom teacher and a college student assistant provided [STUDENT] extra help in reading and math. For example, [STUDENT] had an Individual Literacy Plan in place, was given reading at home, used flash cards, practiced oral reading, and had core words on her desk. In math, she had a number line, used manipulatives, and used Touch Math. Despite these efforts, she made slow progress.

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2 Although [STUDENT] did not identify the area of "written expression" in Petitioners' Notice of Cross Appeal, she argued it without objection throughout the appeal.

4. In third grade, [STUDENT] performed below grade level in reading, writing, and math. Her teacher and a volunteer worked with [STUDENT] one-on-one, provided her hands-on magnetic letters for spelling assignments, provided her extra assistance, and modified the amount of work assigned. [STUDENT]'s Colorado Student Assessment Program reading test results as a third grader in the spring of 2002 were unsatisfactory.

5. Recognizing [STUDENT]'s difficulties, her parents began arranging for her to receive extra tutoring and assistance outside the school system at their own expense and tried to discover teaching techniques which were effective with [STUDENT]:

a. At times during the summer of 2000 and in August 2001, Kristin Mason, a perceptual/communicative disability teacher, tutored [STUDENT] in math and reading. She believes that a paper and book approach is less helpful for [STUDENT] than a more active approach through movement and songs.

b. For 68 hours in January through June, 2002, Jana Brucker, who holds a master's degree in education and was a special education teacher in New York, tutored [STUDENT] in phonics and phonological awareness, *i.e.*, the ability to isolate and manipulate every sound in spoken words. Ms. Brucker believes that [STUDENT] needs systematic one-on-one phonics instruction for three to four hours a week to improve her reading and spelling. She also believes that [STUDENT] needs one-on-one or small group instruction in mathematics.

c. For 20 hours in January and February, 2002, Karen Cromer, who has master's degrees in mathematics and teaching, tutored [STUDENT] in math. Based on her experience, Ms. Cromer believes that [STUDENT] would have a very difficult time learning math in a traditional classroom and would benefit from one-on-one non-traditional approaches.

d. Since November, 2002, [STUDENT] has had music therapy one hour a week where, for example, she learns multiplication tables through songs. Her teacher Kathryn Jackson believes that all children, including [STUDENT], could benefit from this multisensory approach.

6. The NeuroConnection Evaluation. In November, 2001, before any additional special education referral for [STUDENT] was made, [STUDENT]'s parents arranged for her to receive a psychoeducational evaluation by The NeuroConnection, Inc., a private child and adolescent center for neurology and neuropsychology located in Colorado Springs. This evaluation included a battery of tests including a clinical interview; review of records; the Wechsler Intelligence Scale for Children-III ("WISC-III"), a standard IQ test; the Wechsler Individual Achievement Test ("WIAT"); Subtests #22 and #31 from the Woodcock Johnson-Revised; the Gray Oral Reading Test-3 ("GORT-3"), a test of oral reading ability including rate, accuracy and comprehension; and various other tests of phonological processing, word association, complex figures, memory and learning, visual motor integration, anxiety, depression, and behavior.

7. J. Christopher Stewart, a licensed clinical psychologist with NeuroConnection, and Rhonda Sunde, a NeuroConnection learning specialist, assimilated this testing and evaluation data into a seven-page psychoeducational evaluation, which concluded with six recommendations. These recommendations included that [STUDENT] be reconsidered for special education services given the evidence of dyslexia and dyscalculia compared to her average intelligence; be provided one-one-one multisensory remediation with a focus on phonemic awareness skills; receive individualized, multisensory instruction in math; be referred to a family practice physician to explore treatment options for Attention Deficit Hyperactivity Disorder-Inattentive Type; receive structure to address her attentional issues; and have an occupational therapy evaluation to address her handwriting and fine motor difficulties.

8. Based on his evaluation of [STUDENT], Dr. Stewart diagnosed [STUDENT] with dyslexia, dyscalculia and dysgraphia. These are medical and mental disorders recognized by the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (“DSM-IV”). The DSM-IV defines these as learning disorders and identifies them as Reading Disorder, Mathematics Disorder and Disorder of Written Expression. Dyslexia is a dysfunction of the brain which interferes with its ability to take a written word, convert it to a sound or symbol and comprehend it. Dyscalculia involves the ability to manipulate numbers and symbols. Dysgraphia is an impairment in visual and spatial drawing skills and affects the ability to set up math problems, understand visual and spatial components, to organize and convey written material in an understandable and meaningful way. The parties agree that these diagnoses do not necessarily mean that a child qualifies for special education services.

9. [STUDENT]’s parents paid for the NeuroConnection evaluation, which cost \$700, and for Ms. Sunde to attend the IEP meetings which eventually occurred on February 5 and April 9, 2002, to present the psychoeducational evaluation, for which she charged \$100.

10. [STUDENT]’s parents provided the NeuroConnection psychoeducational evaluation to the District in January, 2002, and requested that [STUDENT] again be considered for special education services. The record contains no evidence that [STUDENT]’s parents initiated the NeuroConnection evaluation in response to dissatisfaction with any evaluation conducted by the District, that [STUDENT] requested that the District conduct an independent evaluation, or that the District had an opportunity to initiate a hearing regarding any request by the parents for an independent evaluation. The record is further silent on whether the District knew that the parents intended to obtain or were obtaining the NeuroConnection evaluation of [STUDENT] at any time before they received a copy in January, 2002.

11. 2002 IEP. At the request of [STUDENT]’s parents, [STUDENT] was again considered for eligibility for special education services at the beginning of 2002. The District administered a new battery of evaluations of [STUDENT], with the exception of cognitive/intelligence testing, which [STUDENT]’s mother requested not be administered

again by the District. The District testing and evaluation to determine [STUDENT]'s performance and needs covered the following areas: educational; social/emotional/adaptive behavior; physical/motor and physical health; communicative; and cognitive.

12. During the time period from [STUDENT]'s testing for her first special education referral in 2000 until her referral in February, 2002, her progress was very slow in reading, written language in mathematics. [STUDENT]'s composite reading score had fallen from average to low average; her written language score has fallen from average to borderline; and her math score had stayed at borderline. She had therefore lost significant ground in relation to her peers despite accommodations which had been made in her instruction by means of her Section 504 Plan and despite significant extra assistance in and outside her classroom.

13. The District, through Toni McCarthy, a speech language therapist with a master's degree in communication disorders, administered testing regarding language skills, the Clinical Evaluation of Language Fundamentals-3, with subtests in receptive language and expressive language.<sup>3</sup> [STUDENT]'s test scores reveal a moderate speech language disability. This is not in dispute.

14. IEP meetings were held on February 5 and April 9, 2002.<sup>4</sup> The IEP finalized on April 9, 2002, reflects a determination of a primary physical disability of ADD and a secondary disability of speech/language. At IEP meetings, the team considered information from [STUDENT]'s parents, doctors, the NeuroConnection testing, and the evaluations and assessments conducted by District personnel.<sup>5</sup>

15. On April 16, 2002, [STUDENT]'s mother [PARENT] gave her consent for the services outlined in the IEP to begin, although she still had reservations about the level of services being provided and the District's failure to identify [STUDENT] with a perceptual/communicative disability. [STUDENT] then began receiving special education services for about 1 ½ months at the end of third grade.

16. The IEP identifies several annual goals, with delineated objectives under each. The goals are improving her understanding and completion of classroom assignments, improving her word knowledge in order to read and understand a variety of materials,<sup>6</sup> learning compensatory strategies for auditory processing skills to address the

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3 Receptive language refers to whether one understands what one hears and requires nonverbal responses while expressive language deals with expressing oneself with verbal responses.

4 The formulation of the IEP began at a meeting on February 5, 2002, but the parties agreed to continue to the meeting until March and again until the April 9 meeting date.

5The determination that [STUDENT] had an ADD physical disability was based on her previous diagnosis, the Behavior Assessment for Children testing conducted, the NeuroConnection data, indications of attention problems, anxiety, and teachers' reports. In addition, an informal classroom assessment was conducted in January, 2002, by Dr. Manning, who observed [STUDENT] to be on-task 63% of the time, as compared with a target student who was on-task 85% of the time.

6 This goal specifically addresses [STUDENT]'s speech/language difficulties. It includes objectives of

access skill of communication and basic language,<sup>7</sup> and improving auditory discrimination skills to address the access skill of communication and basic language.

17. The IEP delineates the special education services the District will provide [STUDENT]. These services are generally described as follows: “Instruction and support in auditory memory and discrimination, support for weak organization and attention skills. Instruction and support in completion of grade level classroom assignments. Fine motor skills to focus on the mechanics of writing to be provided outside the regular classroom. When cursive writing is legible, her program will then be provided within the regular classroom.”

18. [STUDENT]’s IEP specifically provides for 4 hours and 40 minutes each week of services from the special education services coordinator, who is Laura Corr ; 1 hour of speech and language services and 30 minutes/week of occupational therapy. The occupational therapy services are for the mechanics of [STUDENT]’s handwriting. Of the special education services, 3 ½ hours are direct services outside the classroom, meaning in a one-on-one or small-group setting. Likewise, 15 minutes of the speech/language and half the occupational services are in such settings.

19. Laura Corr, the special education teacher who provides services to [STUDENT], has had training in and uses some strategies of the Lindamood-Bell methodology for teaching reading,<sup>8</sup> as well as other specific methodologies in this area, and uses a multisensory approach with [STUDENT]. This multisensory approach involves using a variety of different educational and teaching modalities.

20. The IEP also provides accommodations or modifications necessary for [STUDENT], including modified assignments, preferential seating near the teacher, word banks for content area tests, a number line on her desk, no timed tests, the opportunity to use books on tape, avoidance of extensive copying, and credit for phonetic spelling. These address her ADD and speech/language issues.

21. The District considered the NeuroConnection testing data and the psychoeducational evaluation supplied by [STUDENT]’s parents and relied on it, as well as its own evaluation data, in the formulation of [STUDENT]’s 2002 IEP. It incorporated some of the NeuroConnection test results in the IEP.

22. [STUDENT]’s Eligibility for Perceptual/Communicative Disability. At the February 5 and April 9 IEP meetings, [STUDENT]’s mother [PARENT] made clear her position that she considered [STUDENT] to be most appropriately identified as having a perceptual/communicative disability. In general terms, such a disability requires a severe discrepancy between achievement and intellectual ability in certain enumerated areas caused by a psychological processing disorder.

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explaining similarities and differences between words and knowing synonyms and antonyms.

8 This is one of the reading methodologies preferred by Rhonda Sunde of NeuroConnection.

23. In August, 2001, the Colorado Department of Education issued Guidelines for Identifying Students with Perceptual/Communicative Disabilities, a document which both parties have used as authoritative in defining such disabilities (“Colorado Guidelines”).<sup>9</sup> These guidelines address the issue of when a significant discrepancy between estimated intellectual potential and actual level of performance exists due to a psychological processing disorder.

24. After conducting the psychoeducational evaluation of [STUDENT], Dr. Stewart concluded that [STUDENT] has a severe discrepancy between achievement and intellectual ability in written expression, basic reading skill and mathematics calculation caused by a psychological processing disorder. Dr. Stewart offered his expert opinion that [STUDENT] qualifies for a perceptual/communicative disability in all three of these areas. Dr. Stewart believes that the impact on [STUDENT]’s educational achievement is most significant in the area of word decoding and comprehension. In Dr. Stewart’s view, [STUDENT] would benefit from a multisensory approach with a focus on phonemic awareness skills, which involves breaking down written words into the sounds they represent.

25. Dr. Stewart has a Ph.D. in clinical psychology with expertise in assessment and treatment of children with neurological and learning disorders, including ADHD. He is not, however, a school psychologist and has only a general knowledge of IDEA and ECEA and their regulations.

26. In order to determine the existence of a severe discrepancy, the Colorado Guidelines identify certain appropriate tests for determining intellectual potential (including the WISC-III) and others for determining achievement, which include all the tests relied on by the parties below. The Colorado Guidelines then use a regression formula to determine significant discrepancy between ability and achievement to create a Discrepancy Conversion Table. This table indicates, for example, that if a child’s IQ score is 100, the corresponding achievement test cutoff score is 80, meaning that the achievement test scores must be at or below 80 to meet this eligibility criterion.

27. After considerable discussion, the IEP team agreed to use an IQ score of 100 for [STUDENT]. This score is in the average range. This was the highest possible score available for [STUDENT] and thus gave her the benefit of the doubt, as a higher IQ score dictates a higher achievement test cutoff score and therefore sets a higher bar to which [STUDENT]’s actual achievement will be compared in determining the existence of any significant discrepancy between ability and achievement.<sup>10</sup> This means that in the

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9 [STUDENT] urges that the Colorado Guidelines provide useful guidance and contends that they dictate her identification with a perceptual/communicative disability but argues alternatively that they lack the force of law and, if unresponsive to her position, should be disregarded.

10 [STUDENT] received a Verbal IQ score of 100, a performance IQ score of 89 and a full scale IQ score of 94. The performance IQ tests visual information, while the verbal IQ is auditorally mediated information. The full-scale IQ is a rough average. Stewart recommended use of the verbal IQ score for [STUDENT] as a better predictor of her overall potential for academic achievement and also noted that the District has used it in its special education staffing of [STUDENT] in 2000. [STUDENT]’s 2002 WISC-III scores were higher than her

achievement test cutoff score of 80 was used in determining the existence of significant discrepancy between ability and achievement.

28. The Colorado Guidelines include recommendations and best practice regarding reliance on one subtest: “Students should not be determined eligible for special education services based upon the results of one subtest. A composite score reflecting a minimum of two subtests from a standardized instrument are needed to document achievement in the area(s) of concern.” The Colorado Department of Education has interpreted this language to mean that when a composite achievement score falls below the established cutoff score due to one subtest pulling it down, the existence of a problem in that subtest area must be documented by the administration of another subtest in that area.

29. In interpreting all test scores, it is important to consider that scores may differ depending on the test instruments, the examiner, or environmental factors. Psychologists must therefore apply their own judgment, evaluations and opinions to the test data. Different evaluators can reach different conclusions given the same data. Likewise, in general, composite score provide a better overall view of a child’s functioning rather than looking at a discrete subtest in a limited subject area.

30. In determining whether a child qualifies for a perceptual/communicative disability, test scores do not automatically determine eligibility but must be interpreted and considered along with other information. The Colorado Guidelines provide the following: the regression formula “must be supplemented with informal assessment, classroom observations, and family interviews before any conclusions about impact on education can be made. In addition, evidence of a processing difficulty must be documented.”

31. In general, the approach used by Dr. Stewart in evaluating test scores differed from that used by District personnel, particularly Linda Williams-Blackwell, District’s Director of Special Education with a master’s degree in that area focusing on learning disabilities, and Dr. Anita Manning, a 20-year school psychologist with a Ph.D. in psychoeducational studies. In general, Dr. Stewart believes that it is important to single out a student’s lowest scores as indicative of his greatest weaknesses, while Ms. Williams-Blackwell and Dr. Manning review all scores and at times “explain away” or disregard a lowest score as being unrepresentative of a student’s overall performance.

32. [STUDENT] asserted at hearing that her achievement scores evidence a significant discrepancy with her IQ in three areas: written expression, basic reading skills, and mathematics calculation. Each of these will be addressed separately:

33. Perceptual/Communicative Disability in Written Expression. [STUDENT] relies on the Woodcock Johnson-III (“WJ-III”) test administered by the District in January,

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2000 WISC-III scores (Verbal IQ of 87, Performance IQ of 79, and Full Scale IQ of 81) and may have reflected test familiarity, such that using the 2002 highest verbal IQ score gave her the benefit of the doubt. Deference to Dr. Stewart’s recommendation is, however, in line with each psychologist examiner’s being responsible for determining the IQ score most representative of the test taker’s intelligence.



2002, which reflects a composite written language score of 80, to support her contention that she has a perceptual/communicative disability in the area of written expression. This composite score reflects three subtests: writing samples (104), spelling (76), and writing fluency (80).

34. Viewing [STUDENT]'s writing scores and information as a whole, the ALJ finds that [STUDENT] has not established that she has a perceptual/communicative disability in the area of written expression due to a significant discrepancy between achievement and intellectual ability in this area. [STUDENT]'s composite score of 80 is depressed by her spelling score of 76. Absent spelling, [STUDENT]'s composite score would be above regression score in broad written language. The spelling score should not determine the existence of a perceptual/communicative disability for a variety of reasons. First, spelling difficulties alone do not establish a perceptual/communicative disability. Second, according to the Colorado guidelines, the low spelling subtest score was not duplicated on a second subtest in this subject area. In fact, on the WIAT spelling subtest administered by NeuroConnection, [STUDENT] received a score of 82, as reflected below. Even if the Colorado Guidelines are not followed, it is not reasonable to establish a disability based on a spelling subtest when the scores on a different subtest call into question the student's poor performance on the lower-scoring test. Third, [STUDENT]'s borderline score of 80 in fluency can be addressed by providing her extra time, as is done in her IEP, and is likely impacted by her language difficulties.<sup>11</sup>

35. The written language composite score for the WIAT administered by NeuroConnection was 83, which is above the regression score of 80. It is composed of two subtests: writing samples (97) and spelling (82).

36. Perceptual/Communicative Disability in Basic Reading Skills. [STUDENT] relies on the GORT-3 test administered by NeuroConnection in November, 2001, which reflects a score of 7<sup>th</sup> or 8<sup>th</sup> percentile, to support her contention that she has a perceptual/communicative disability in this area. This score falls below the achievement test cutoff score of 80 established in the Colorado Guidelines. GORT-3 is a composite test reflecting a minimum of two subtests. It only relates to reading oral passages.

37. Other more specific tests administered by NeuroConnection also support [STUDENT]'s deficits in reading. NeuroConnection administered a phonological processing test, on which [STUDENT] scored 6, which is roughly equivalent to 80, and a speeded naming test, on which [STUDENT] scored 5, the rough equivalent of 75. These tests evaluate the reader's ability to break down words by their sounds. While these specific subtest scores are helpful, they are not as representative of [STUDENT]'s overall reading functioning as composite scores.

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<sup>11</sup> For example, when [STUDENT] was given three words to rearrange in a sentence (e.g., time, clock, tells ) she had great difficulty rearranging the words to write a sentence and was painstakingly slow. She did not have these difficulties on the writing samples portion which did not require arranging a list of words, which is a language task.

38. The District also administered the WJ-III reading test, which yielded a composite score of 84, above the regression cutoff of 80. This composite score is comprised three subtests: passage comprehension, *i.e.*, [STUDENT]'s understanding of what she reads) (85); word identification, *i.e.*, sounding out words (89);<sup>12</sup> and reading fluency, *i.e.*, speed (83).

39. NeuroConnection also administered the WIAT reading test, which yielded a composite reading score of 90, including the subtests of passage comprehension (92) and word identification (85).

40. In reviewing these assessments, the ALJ finds that [STUDENT] has failed to establish that she has a perceptual/communicative disability in the area of basic reading due to a significant discrepancy between achievement and intellectual ability in this reading area. [STUDENT]'s composite scores on the WIAT and WJ-III reflect no such discrepancy and are generally better indicators of her overall functioning than the more specific GORT-3, phonological processing, or speeded naming tests on which she relies.

41. Perceptual/Communicative Disability in Mathematics. [STUDENT] relies on her composite mathematics score of 68 on the WIAT testing conducted by NeuroConnection in November, 2001, which represents the 2<sup>nd</sup> percentile, to support her contention that she has a perceptual/communicative disability in mathematics. This composite score includes a score of 80 in applied problems and a calculation score of 66, which is extremely low.

42. [STUDENT]'s extremely low calculation score of 66 was not supported by her score in the calculation subtest of the WJ-III, when she scored 82. Given this fluctuation, in explaining these inconsistent scores, Ms. Williams-Blackwell and Ms. Corr both explained these inconsistent math scores as being attributable primarily to attention problems and possibly also language problems. These explanations are persuasive. In addition, the calculation subtest score of 66 is the only WIAT subtest which clearly falls out of range of IQ scores, so under the Colorado Guidelines described above and by sound testing practices, one would be required to administer an additional subtest to substantiate or discount that single subtest. In addition, given the extreme anxiety which [STUDENT] exhibited on the applied problems math subtest, as testified to by Ms. Corr, her score on the calculation subtest may reflect math anxiety or perhaps situational interference such as loss of concentration, rather than inability. In addition, viewing [STUDENT]'s math skills as a whole, her single subtest score of 66 in calculation is suspicious since calculation is a lower skill which is necessary as a building block for the higher level skill of applied problems, where [STUDENT] scored considerably higher. When these factors are taken together, [STUDENT]'s single calculation score of 66 does not establish a significant discrepancy between her actual level of performance in math concepts and her estimated intellectual potential in this area such that it supports a perceptual/communicative disability in this area.

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12 The test administrator Laura Corr believes that the word identification score of 89 might be inflated due to retesting and also reflected the 85 score from the January 2000 Woodcock Johnson Revised testing.

43. The District also administered mathematics testing through the WJ-III. This testing yielded a composite math score of 83, significantly higher and above the cut-off score of 80. The subtests within this composite score included applied problems (86), calculation (82), and (math fluency (70). Fluency refers to the speed with which one completes math problems.

44. Miscellaneous Findings. The Section 504 Plan adopted for [STUDENT] in May 2000 provides that the SCAN testing, a screening test for auditory processing disorders, needed to be repeated in a year, on February 28, 2001. This was not done. The record does not establish the relationship between this SCAN testing and the testing which was done by NeuroConnection in November, 2001.

45. The District offers a specific multisensory reading course to its teachers. Multisensory refers to the use of a variety of teaching modalities and is not a term limited to the subject area of reading. No teachers at [STUDENT]'s elementary school have signed up for this specific training, although in general teachers in the District are encouraged to use a multisensory approach.

## **DISCUSSION**

### **I. Scope of Review**

Pursuant to IDEA and ECEA, the ALJ must conduct an impartial review of the IHO's decision, examine "the entire hearing record," and make an "independent" decision on state level review. 20 U.S.C. § 1415(c); 34 C.F.R. § 300.510; and Section 2220-R-6.03(11)(b)(v) (1 CCR 301-8). [STUDENT] presented additional evidence, as is permitted by 34 C.F.R. § 300.510(b)(2)(iii). In reviewing the Final Decision of the IHO, the ALJ must give "due weight" to the factual findings of the IHO. See *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206 (1982); *Burke County Board of Education v. Denton*, 895 F.2d 973 (4th Cir. 1990); *Roland M. v. Concord School Committee*, 910 F.2d 983 (1st Cir. 1990).

The Tenth Circuit Court of Appeals, in the context of a judicial review of a final administrative proceeding, has addressed the standard for conducting an independent review while giving due weight to factual findings. Since that standard is analogous to that of the ALJ reviewing the IHO's decision, it is instructive:

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

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

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

## **II. General Legal Background**

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

## **III. District’s Obligation to Reimburse Parents for Cost of NeuroConnection Independent Evaluation**

IDEA rules address a parent’s right to obtain an independent education evaluation at public expense and outline several prerequisites which must be met before the public agency, here the District, is obligated to bear that expense:

Independent educational evaluation.

(a) General. (1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency shall provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in paragraph (e) of this section.

...

(b) Parent right to evaluation at public expense. (1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either--

(i) Initiate a hearing under Sec. 300.507 to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing under Sec. 300.507 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency initiates a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

### 34 C.R.F. § 300.502.

These rules contemplate that before a District is obligated to pay for an independent evaluation, it must have conducted an evaluation itself with which the parent is dissatisfied, the parent must make known to it his dissatisfaction with that evaluation, and then the District has a choice of whether to initiate a due process hearing to try to prove the propriety of its evaluation or insure that an independent educational evaluation is provided at public expenses. The record does not establish that [STUDENT]'s parents complied with these prerequisites. There is no evidence that [STUDENT]'s parents notified the District in advance that they wanted an evaluation, that there was any District evaluation with which they were dissatisfied,<sup>13</sup> and thus that the District had any opportunity to do its own evaluation or request a due process hearing on the issue. IDEA rules therefore preclude an order requiring the District to reimburse [STUDENT]'s parents for the cost of the NeuroConnection evaluation.

The IHO fashioned an equitable principle to the effect that since the District found parts of the NeuroConnection testing useful and incorporated part of it into [STUDENT]'s IEP, it must in fairness reimburse [STUDENT]'s parents for the cost of this evaluation. In light of the specific IDEA rules prescribing the circumstances under which public agencies must bear the costs of an independent evaluation, however, resort to such general equitable principles is not appropriate. The IDEA rules are designed to allow a school district the first opportunity to address a parent's request for an independent evaluation. Here, for example, the District found useful the WISC-III testing performed by NeuroConnection, and thus under the IHO's equitable standard should have to pay for it. There is no evidence however, that such testing needed to be done by means of an independent evaluation or that the District even had the opportunity to do such testing in

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11 The last round of assessments had occurred in connection with the Spring 2000 referral for special education evaluation, and no new referral had yet occurred.

2002, as [STUDENT]'s mother requested that the District not repeat this testing.

It is also important to recognize that the standard enunciated by the IHO would likely lead to school districts uniformly being required to reimburse parents for the costs of unilaterally arranged independent evaluations because they are required to consider such evaluations in the IEP staffing. This result is directly contrary to the IDEA rules and it itself inequitable. School districts must consider and therefore reflect in IEPs independent evaluations procured by parents, as well as other available information presented by parents. 34 C.F.R. §§ 300.502(c) and .535(a); 2220-R-4.02(6). School districts would therefore always be required to pay for evaluations obtained by parents, even though the regulatory scheme does not contemplate that school districts uniformly bear these costs.<sup>14</sup>

[STUDENT] also asserts that the ALJ has an independent ability to award equitable relief when a child is falling father behind and a school district does not on its own initiate testing. The ALJ is unaware of such authority and declines to exercise it in the face of explicit regulatory direction on this issue.

[STUDENT] also asserts that the ALJ has authority under Section 504 of the Rehabilitation Act to award reimbursement to [STUDENT]'s parents for the cost of the NeuroConnection evaluation. [STUDENT] relies on the language in her Section 504 Plan adopted in May 2000 providing that her SCAN testing be redone in a year. [STUDENT] asserts that because the testing was not done, she was entitled to undertake at District expense the entire psychoeducational evaluation conducted by NeuroConnection. Apart from the unsupported factual contention that the NeuroConnection tests were the follow-up contemplated in [STUDENT]'s 504 plan, [STUDENT] cites no legal authority for the proposition that the ALJ has authority to enforce the provisions of a 504 Plan. This proceeding arises under the IDEA and ECEA, not Section 504. While the IHO did cite Section 504 rules in his discussion of this issue, he did not appear to rely on them to support any relief granted, and to the extent that he did, he was in error.

The IHO's award to [STUDENT]'s parents of the costs of November 6, 2001 independent evaluation by The NeuroConnection, Inc., is therefore overturned.

#### **IV. [STUDENT]'s Qualification for Perceptual/Communicative Disability as Primary Disability in the 2002 IEP**

[STUDENT]'s primary issue on appeal is her assertion that the 2002 IEP improperly failed to qualify her a primary disability of perceptual/communicative in the areas of reading, written expression and math. She contends that the IEP's failure to reflect this disability therefore deprives her of the specific services needed to address her needs in these areas.

While IDEA rules define the criteria for determine the existence of a specific learning

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<sup>14</sup> The IDEA rules specifically refer to parent-initiated evaluations at private expense. 34 C.F.R. § 300.502(c).

disability,<sup>15</sup> ECEA rules are more comprehensive and provide a better starting point for analysis:

2.02(6) A child with perceptual or communicative disability shall have a disorder in one or more of the psychological processes involved in understanding or in using language which prevents the child from receiving reasonable educational benefit.

2.02(6)(a) A basic disorder in the psychological processes affecting language and/or learning may manifest itself in an impaired ability to listen, think, attend, speak, read, write, spell or do mathematical calculations. The term perceptual/communicative disability does not include students who have learning problems which are primarily the result of visual, hearing, or motor handicaps, or limited intellectual capacity or significant identifiable emotional disability, or who are of environmental, cultural, or economic disadvantage.

2.02(6)(b) Criteria for a perceptual or communicative disability preventing a child from receiving reasonable educational benefit from regular education shall include documentation of both.

2.02(6)(b)(i) A disorder in the psychological process which affects language and learning as evidenced by:

- Significant discrepancy between estimated intellectual potential and actual level of performance, and
- Difficulty with perceptual, cognitive and/or language processing.

2.02(6)(b)(ii) And significantly impaired achievement in one or more of the following areas:

- Prereading and/or reading skills.
- Reading comprehension.

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15 34 C.F.R. § 300.541 provides as follows:

Criteria for determining the existence of a specific learning disability.

(a) A team may determine that a child has a specific learning disability if--

(1) The child does not achieve commensurate with his or her age and ability levels in one or more of the areas listed in paragraph (a)(2) of this section, if provided with learning experiences appropriate for the child's age and ability levels; and

(2) The team finds that a child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas:

- (i) Oral expression.
- (ii) Listening comprehension.
- (iii) Written expression.
- (iv) Basic reading skill.
- (v) Reading comprehension.
- (vi) Mathematics calculation.
- (vii) Mathematics reasoning.

- Written language expression, such as problems in handwriting, spelling, sentence structure and written organization.
- Comprehension, application and retention of math concepts.

1 CCR 301-8, 2220-R-2.02(6)

The primary dispute between the parties regarding whether [STUDENT] qualifies for a perceptual/communicative disability is whether there is a significant discrepancy between her estimated intellectual potential and actual level of performance and what the cause of any such discrepancy may be. The ECEA rules do not describe how the determination of a significant discrepancy is to be made.

The Colorado Department of Education's Guidelines for Identifying Students with Perceptual/Communicative Disabilities, adopted in August, 2001, do address this issue. While these Colorado Guidelines do not have the force of law, they provide valuable guidance. Both parties have relied on them heavily and have referred to them as authoritative.<sup>16</sup> Using [STUDENT]'s 100 verbal IQ and analyzing her 2002 achievement scores against the 80 achievement test cutoff score derived from the discrepancy conversion table in the Colorado Guidelines, the ALJ finds from a review of the record as a whole, giving due weight to the factual findings of the IHO, that the record does not support a determination of a primary disability of perceptual/communicative disability for [STUDENT]. The record does not supports a finding of a significant discrepancy between estimated intellectual potential and actual level of performance in one of the three areas identified.

One subtest score in the each of the areas of math, reading the written expression does fall below the achievement test cutoff score of 80. Nonetheless, the ALJ finds convincing the explanations of Ms. Williams-Blackwell, Ms. Corr and Dr. Manning that these selected scores were likely explained by attention and/or language problems rather than being indicative of a perceptual/communicative disability. The fact that these selective scores were not duplicated on other subtests, when those were available, also tends to undercut their weight as evidence of perceptual/communicative disability. Even the Colorado Guidelines, which use intelligence and achievement scores as part of the analysis for determining eligibility for perceptual/communicative disability, do not provide that scores alone determine eligibility for a perceptual/communicative disability, and this approach is sensible.

In addition, while the fact of [STUDENT]'s slow progress in math, reading and written expression is undisputed, there remains a professional difference of opinion between District expert personnel and parental experts regarding the cause of that slow progress. In

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<sup>16</sup> [STUDENT] urges that the Colorado Guidelines provide useful guidance and contends that they dictate her identification with a perceptual/communicative disability but argues alternatively that they lack the force of law and, if unresponsive of her position, should be disregarded.



the context of this appeal, [STUDENT] has failed to discharge her burden of establishing that the conclusion reached during the 2002 IEP process regarding the primary disability of ADD as the reason for that slow progress was incorrect. [STUDENT] has failed to establish on appeal that she qualifies for a perceptual/communicative disability in written expression, basic reading, or mathematics.

### **V. Multisensory One-on-One and Small Group Instruction**

[STUDENT] contends that the special education services required by the IEP are inadequate because they do not specify a multisensory approach in a one-on-one or small group setting in reading, math and written expression. [STUDENT]'s dispute with the services as prescribed in the IEP appears to be both that the IEP does not require a multisensory one-on-one or small group approach and that the actual services which have been provided pursuant to the IEP do not meet these criteria.

[STUDENT] faults the multisensory methodology used by Laura Corr with [STUDENT] as generic and as not meeting the standard that it be taught with "proven methods of teaching and learning" and based on "replicable research," as required by 20 U.S.C. § 1400(c)(4). She contends that she is entitled to instruction by a teacher trained in the methods offered in the District's multisensory training program in reading. The evidence establishes, however, that the District is currently providing [STUDENT] services in a multisensory approach and that these services are provided to her in a one-on-one or small group format. In light of this evidence, [STUDENT]'s request essentially amounts to one for a particular educational methodology.

[STUDENT]'s rights under IDEA do not extend to prescribing the particular educational methodology to be used by the District in the special education services provided to her. Rather, in relation to the IEP, she may legitimately challenge whether the services outlined are reasonably calculated to enable her to receive educational benefits. *Rowley* at 207. It is the local school district, in consultation with [STUDENT]'s parents, which has the primary responsibility for choosing the educational methods which best suit her needs. The IDEA intentionally left this decision not to the courts but to those with educational expertise. *Rowley* at 207-208. The Supreme Court in *Rowley* specifically cautioned that "courts lack the 'specialized knowledge and expertise' necessary to resolve 'persistent and difficult questions of educational policy.'"<sup>17</sup>

[STUDENT] has failed to establish on appeal that the IHO's findings should be set aside or that the services outlined in the IEP are not reasonably calculated to enable her to receive educational benefits. Her request for multisensory one-on-one or small group instruction in reading, mathematics and written expression must be denied.

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<sup>17</sup> The Court cited in *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973),

## CONCLUSIONS OF LAW AND DECISION

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

2. The IHO's order that the District reimburse [STUDENT]'s parents for the cost of the independent evaluation performed by The NeuroConnection, Inc., is overturned. No reimbursement is ordered.

3. [STUDENT] has failed to establish that her 2002 IEP improperly fails to identify her primary disability as perceptual/communicative disability, rather than as Attention Deficit Disorder, or that it should specify that she is entitled to multisensory one-on-one or small group instruction in reading, written expression and math. The appeal filed by [STUDENT] is dismissed in its entirety.

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

### **DONE AND SIGNED**

March \_\_\_\_\_, 2003

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NANCY CONNICK  
Administrative Law Judge

## CERTIFICATE OF MAILING

I certify that a true and correct copy of the above **DECISION UPON STATE LEVEL REVIEW** was placed in the U.S. Mail, postage prepaid, at Denver, Colorado, to:

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and via Interoffice Mail to: Charles Masner, Director, Special Education, Colorado Department of Education, 201 E. Colfax Ave., No. 300, Denver, CO 80203-1704, on March \_\_\_\_\_, 2003.

Secretary to Administrative Law Judge