Department of Education, State of Colorado
Due Process Hearing L2002: 112

[STUDENT], by and through her parents,
[PARENTS]

Petitioners

V.

Lewis-Palmer School District 38

Respondent

FINAL DECISION

Impartial Hearing Officer Decision
Impartial Due Process Hearing
Held on July 29 and August 3, 2002
At Lewis-Palmer School District 38
146 Jefferson Street
Monument, CO 80132

Note: For confidentiality, the Hearing Officer will refer To Petitioners as student, child, daughter, and Parents, mother, father, and to Respondent as School District.

GENERAL FINDINGS OF FACT AND INTRODUCTION

The student, nine years old, enters the fourth grade this school year 2002-2003. An Individualized Education Program (IEP) was formulated at a staff meeting February 5, 2002, and continued and updated at a later staff meeting April 9, 2002. The student qualified for special education services, with a primary physical disability of Attention Deficit Disorder (ADD/ADHD), and a secondary speech/language disability. The parents requested this Due Process Hearing on the grounds that the independent clinical evaluation they had presented for the IEP staff meeting, concluded their daughter had Dyslexia, Dyscalculia, and Dysgraphia, and that this current IEP should have classified her with a perceptual/communicative disability and provided a multi-sensory teaching methodology.

The parents also challenged their daughter's IEP previously in place since May 24, 2000. The School District failed to evaluate and identify her perceptual/communicative problem. Her ADD/ADHD did not qualify her for special education. The District provided the student with special services under a 504 plan and updated an Individualized Literacy Plan (ILP).

FACTS FROM WITNESSES AND EXHIBITS

1. The student has made some academic progress the past two years since the IEP of 5/24/00. This progress has not been commensurate with her peers.

2. The student is behind in grade level. The WJIII Compuscore and Grade Profile-Achievement Test, administered January 24, 2002, when the student was in grade 3.5, resulted in scores for broad reading 2.8, broad math 2.7, and broad written language 2.9.(Ex.10)

3. On February 18, 2002, the student's score on the reading test for grade level 3 students, the Colorado Student Assessment Program (CSAP), was unsatisfactory with below proficiency in all areas tested. The student did not take tests in other subject areas of CSAP. (Ex. 1)

4. The student has been behind in grade level the past two years. The report cards for grades two and three indicate this in reading, writing and math. (Ex.37)

5. The student had special needs with an IEP in preschool.

6. The team for the IEP of 5/24/00 did testing and evaluations found in the Documentation of Evaluation Data.

7. The Speech and Language Pathologist found the student had weak auditory memory skills and language ability slightly below average.

8. Dr. Gibbs diagnosed the student with ADD/ADHD.

9. The Team found the student of average intelligence, with a verbal IQ of 87.

10. An IQ of 87 is equivalent to a cut-off score of 72 on the discrepancy conversion table for identifying students with perceptual/communicative disability, found in the Guidelines of the Colorado Department of Education. (Ex.A,p.9)

11. The student's achievement scores were all above the regression cut-off score of 72, and the student did not qualify for p/c disability.

12. The IEP team determined the student could not receive educational benefit from general education alone, indicated in the Determination of Eligibility and Disability. (Ex.4)

13. The IEP Team qualified the student with a 504 accommodation plan, Section 504 of the Rehabilitation Act, because of an impairment of Attention Deficit Hyperactivity Disorder (ADHD), affecting learning, and provided a statement of needs in language arts, math, and access skills. (Exs.34,35) This Statement of Education Needs is incorporated into the IEP. (Ex.4)

14. The Team updated an Individual Literacy Plan (ILP), with the same date as the IEP, and continued this with the 504 Plan. (Ex.36)

15. The student's mother testified that the school psychologist should have recommended, two years ago,

that she take the student to a clinical or neuropsychologist for an independent evaluation.

16. In the current 4/9/02 IEP (Ex.3), the team considered an independent psychoeducational evaluation of the student that had been requested by her parents.

17. Dr. Stewart, Ms. Sunde, and technicians at NeuroConnection administered a battery of tests on November 6, 2001. (Ex.5)

18. Summarizing his findings, Dr. Stewart wrote a letter February 12, 2002, to Ms. Williams-Blackwell, Director of Special Education for the School District. (Ex.6)

19. Dr. Stewart administered the Intelligence Test for Children III, and reported a Verbal IQ of 100, in the average range. The IEP team included this evaluation in its documentation of evaluation data in the IEP, and used VIQ 100 as the student's IQ score.(Ex.3,30)

20. Dr. Steward found the student had significant processing difficulties, which included dyslexia, dyscalculia, dysgrafia, and Attention Deficit Hyperactivity Disorder-Inattentive type. He recommended special education for the student.

21. Ms. Sunde, the Director of NeuroConnection, was present at the IEP staff meetings of February 5 and April 9, 2002. (Ex.3,pp.2,4)

22. An informal assessment of classroom behavior by Dr. Manning, the school psychologist, indicated the student was on-task 63% of the time.

23. The IEP team did evaluations of the student, included evaluation data of Dr. Gibbs and summary of intelligence by Dr. Stewart, all in the documentation of evaluation data in the IEP. (Ex.3,pp.5-38)

24. In the Determination of Eligibility, the student was classified with disability, the primary a physical disability interfering with attention, the secondary a speech/language disability, with a dysfunction in auditory perception and processing, and receptive and/or expressive language difficulties. (Ex.3,42-46)

25. Special Education services provide 4.40 Hrs. by Special Education Coordinator Ms. Corr, one hour by the Speech/Language Therapist, one-half hour by the Occupational Therapist, a total of 6 hours 10 minutes per week of Special Education. (Ex.3,pp 47,48A)

26. The parents consented to these services, with the reservation that they were not enough to provide reasonable educational benefit, and the right to question the eligibility decision denying a p/c disability. (Ex.3,48C)

27. Using Dr. Stewart's VIQ of 100 to decide eligibility for p/c disability, the regression score found in the conversion table gives a cut-off score of 80, to compare IQ to achievement composite scores. (Ex.A,9)

28. Using this cut-off score, Dr. Stewart found from the tests administered, many of which are included in the p/c Manual, that the student's achievement composite scores were below the cut-off score, indicating a discrepancy between IQ and achievement.

29. Dr. Stewart also found that the student's processing difficulty impacted on her educational achievement.

30. Dr. Stewart concluded from the Manual that the student qualified for p/c disability, according to the two criteria in the Manual for p/c disability used by the Colorado Dept. of Education. (Ex.A,3)

31. Dr. Stewart acknowledged he has no training in applying these guidelines for determining p/c disability, is not a school psychologist, and is not knowledgeable in teaching methodology.

32. Dr. Manning, the school psychologist on the IEP team, explained why the student did not qualify for p/c disability according to the Manual guidelines, in a letter to Ms Williams-Blackwell, Special Education Director, and also through testimony. (Ex.C)

33. In the final analysis, the IEP team determined a physical disability, ADD/ADHD, was the primary disability, and this determination precludes p/c

disability, according to the eligibility table in the Manual. (Ex.A,20)

34. Ms Sunde, Director of NeuroConnection and a learning specialist focusing on dyslexia, educated in the various methodologies using multi-sensory teaching, and published author on cognitive retraining, recommended multi-sensory instruction for this student, at a minimum of three times per week in reading, and the same for math (touch-math).(CV Ex.31)

35. Ms. Sunde testified that the goals to improve auditory discrimination do not provide services to meet these goals, that accommodations/modifications for services do not teach reading. (Ex.3,45,47)

36. Mr. Sunde testified that some things in the current IEP benefited the student, and ADD contributed to the student's inability to stay focused.

37. Dr. Manning and Ms. Corr explained that the terms dyslexia, dyscalculia, and dysgraphia, are clinical and medical terms, and that educators use other terminology, as a speech/language disability or a perceptual/communicative disability, according to the Colorado Department of Education to classify disabilities. (Exs.C,D)

38. Ms. Corr, special education teacher, to provide 4.40 hours per week of special education to the student, under the current IEP, testified that she taught the student every school day beginning the middle of April, 2002, for a period of one and a half months.

39. Ms. Corr testified that she uses a multi-sensory approach, mentioning the Lindamood-Bell method.

40. The student's mother testified that she hired Ms. Brucker, who specializes in teaching children with dyslexia, to teach the student reading one-on-one.,

41. The parents had to pay Ms. Brucker because the District refused to do so.

42. Ms. Brucker used a multi-sensory approach to teach the student from January 15, 2002, 4 hours a week when

possible, through May 23rd, stopped for a month, then resumed the last week of June, and finished on June 28, for a total of 68 hours. (Ex.18-Teaching Calendar)

43. Ms. Brucker's fee for teaching is $3,347.50. (Ex.14)

44. The District permitted Ms. Brucker to teach the student in the school cafeteria 9:30-10:30 a.m.

45. The District permitted the student to be pulled out of her regular third grade class for private instruction with Ms. Brucker.

46. Ms. Brucker testified (by telephone) that the student needed at a minimum, three to four times a week, a multi-sensory approach to learn the phonological component for reading, and auditory discrimination of phonemes. She said the student was reading at a first and second grade level.

47. Ms. Brucker is an elementary school teacher, and now a teaching specialist for children with dyslexia. She has a private practice as educational specialist. (Ex.15-CV)

48. Ms. Brucker's Progress Report, teaching the student, indicates her teaching methods and progress of the student. (Ex.16)

DISCUSSION AND OPINIONS

As preliminary matters, the Hearing Officer has jurisdiction to hear this case under the Individuals with Disabilities Education Act (IDEA), and its Regulations, 34CFR300.507-509, and the Administration of the Exceptional Children's Education Act (ECEA), and its rule 2220-R-6.03, Due Process Hearings.

The parties agreed that the burden of proof to be applied is a preponderance of the evidence, that used in civil cases, evidence which is more probable than not. All exhibits were accepted into evidence. They speak for themselves. The Hearing Officer found the witnesses to be credible, expressing opinions according to experience and their professional backgrounds. The Hearing Officer's

opinions and decision are based on his understanding and interpretation of the law under IDEA and ECEA, and of the extent or limitations of a Hearing Officer's authority according to these laws and interpretations.

The Hearing Officer will restate the two issues and five requests for relief in the Petitioners Disclosure Statement. The Respondent's Answer to Petitioners Disclosure Statement, agrees that the issues are correctly stated. As the issues and requests for relief all must be decided, these are addressed in order, one through seven.

1. Did District 38 fail to appropriately evaluate, identify, and address [STUDENT]'s perceptual-communicative educational needs in its initial IEP evaluation which denied [STUDENT] special education services in April-May 2000, with the result that [STUDENT] has failed to receive appropriate multi-sensory instruction in reading and math and has failed to make reasonable educational progress the past two school years?

The record indicates that the student has made some progress the past two years, but that her progress has not been commensurate with her peers, and that she has fallen behind in grade level. When she took the WJIII Compuscore Profile Achievement Test on 01/24/2002 at 3.5 grade level, her grade levels were: broad reading 2.8, broad math 2.7, broad written language 2.9. On 02/18/2002, her score on the reading test for grade level 3 of the Colorado Student Assessment Program (CSAP), was unsatisfactory, with below proficiency in all three areas tested. She did not take the other tests of CSAP. The student was not at grade level in passing from second to third grade, and in passing from third to fourth grade. Her report cards in grades two and three indicate she was below grade level in reading, math and writing. The Director of Special Education indicated the student had special needs and had had an Individualized Education Program (IEP) in preschool.

An IEP staff evaluated her 05/24/00, the IEP now challenged by Petitioners to be flawed. The results of the Wechsler Intelligence Scale for Children III (WISC-III), administered by the School Psychologist, found the student to be of average intelligence with a verbal IQ score of 87.

The Documentation of Evaluation Data in the IEP indicates the team performed achievement tests (WJ-R), behavior assessment (BASC), physical assessment, vision perception (DTVP-2), motor proficiency (BOTMP), language development (TOLD-P), auditory perception (TAPS-R), auditory processing (SCAN), visual-motor integration (BVMGT), behavioral observations.

The student's achievement scores: broad reading, 95, broad math, 80, broad written language 94, did not qualify her for a perceptual/communicative disability (p/c), according to the requirement in the Manual- Guidelines for Identifying Students with Perceptual/Communicative Disabilities, Colorado Department of Education. The regression cut-off score for an IQ of 87 is 72, and the achievement scores were all above this number. There was no impact of a processing difficulty on educational achievement, required for a p/c disability.

In the Summary of Findings, it is noted Dr. Gibbs diagnosed the student with Attention Deficit Disorder (ADD), and ordered Ritalin daily. In the Determination of Eligibility and Disability, the IEP team determined the student did not qualify for special education services, but did qualify for 504 services (Section 504 Rehabilitation Act). A 504 plan was put into place, with a Statement of Educational Needs in language arts, math and access skills. These services were incorporated in the IEP. An Individual Literacy Plan (ILP), was continued and updated on 5/24/00, to coincide with the IEP.

The student's mother testified that the school psychologist should have recommended, two years ago, that she take the student to a clinical or neuropschologist, like Dr. Stewart, for an independent evaluation. The Hearing Officer is not of this opinion. A school psychologist is not expert in the field of clinical or neuropsychology. These fields are outside her competence. A school psychologist is not trained to use the Diagnostic and Statistical Manual of Mental Disorders, (DSM, part of which is an exhibit in this case), to the same extent as is a clinical psychologist, to classify learning disorders as dyslexia, or to classify mental illness, used by clinical and neuropsychologists and psychiatrists. If a school psychologist does make a recommendation for a clinical evaluation, this is done so gratuitously. There is no obligation. Otherwise, the school psychologist and the school district would be held to the unreasonable standard

of making clinical decisions outside their competence, and of being held accountable and liable to parents, if they failed to make these recommendations.

The Hearing Officer has gone into probably more detail than necessary to examine some of the procedures that the IEP team went through. He finds no procedural defects. The IEP contains the basic requirements in 34 CFR300.346-347. The Hearing Officer cannot substitute his judgment for the evaluations and determinations of the IEP team, that the team should have found a certain disability. He is not qualified to do so. The fact that a second IEP team almost two years later, having other evaluations, came to different determinations does not invalidate this IEP of 05/24/00.

As for addressing the student's needs, the Hearing Officer finds that the IEP team intended to address her needs with the 504 Plan and the ILP plan, that they benefited the student. Although the student failed to achieve passing marks, it is the Hearing Officer's opinion that the IEP was reasonably calculated to achieve this objective. Individual attention by the teacher is provided in the Statement of Educational Needs. The use of visual cues, presentation of material in small amounts, repetition of information, and so on, in the Needs Statement, all benefit the student, and address her needs.

Respondent relies on the Rowley case,458U.S.176(1982), in the Answer To Petitioners Disclosure Statement. This is often quoted by school districts. It is the Supreme Court's decision interpreting a free appropriate public education, (FAPE), now in the Individuals with Disabilities Education Act. 34CFR Part 104 effectuates Sec. 504, Rehabilitation Act: Sec 104.33 Free appropriate public education. The majority and prevailing opinion interpreted appropriate not as the best public education, but set a lesser standard.

> We therefore conclude that the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.
>
> 458US176,201

The Hearing Officer cannot determine by preponderance

of evidence, that this IEP failed to benefit the student, and failed to address her needs, as they were then known and identified at the time. The IEP meets substantive requirements, and there is no evidence of incompetence or bad faith on the part of the IEP team.

> 2. Has District 38 failed to develop an appropriate current IEP to address [STUDENT]'s learning disabilities, specifically her Dyslexia, Dyscalculia, and Dysgraphia?

The Hearing Officer finds that the criteria for an IEP set forth in the state rules 2220-R-4.02(3)and 4.02(4)ECEA, have been met. The IEP team has classified dyslexia, dyscalculia, and dysgrafia as a speech-language disability, defined in 2220-R-207(7). The Federal regulations use the term specific learning disability mentioning "an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disability, ... dyslexia ..." 34CFR300.7(c)(10). As clarified in testimony and exhibits, dyslexia is a clinical and medical term, while a specific learning disability as speech-language disability, is used in IDEA and ECEA terminology, applied in school districts.

The current IEP team used the criteria recognized for determination of a speech-language disability, noted in the Determination of Disability in the IEP, and evaluations by Ms. McCarthy, the Speech-language pathologist, and other evaluations noted in documentation of evaluation data. The speech-language disability calls for special services, goals and objectives for improving word knowledge for reading, improving auditory discrimination skills, and fine motor skills for writing. Special Education services are specified: 4:40 hours per week by the Special Education Coordinator, Ms. Corr, one hour weekly by the speech-language therapist, and a half hour by an occupational therapist. Ms. Corr began implementing these services, teaching the student every school day, from the middle of April for one and a half months. This special education provides for three and a half hours outside of class, and one hour inside class weekly. She uses a multi-sensory approach. She mentioned using for auditory discrimination, the Lindamood-Bell method.

The question posed by Petitioners is whether the current IEP addresses the student's specific learning disabilities. The Rowley case sets this standard for FAPE in the first part of its definition:

> ... a "free appropriate public education" consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child "to benefit" from the instruction.
>
> 458U.S.188-9(1982)

There is evidence from Ms. Sunde that, in her opinion, the goals to improve auditory discrimination do not provide services to meet these goals, and that accommodations for services do not teach reading. She admitted there were some things in the current IEP of benefit to the student.

Under the current IEP, the student is receiving services by a language speech pathologist to improve auditory discrimination, by a special language teacher to improve general language skills, math and auditory discrimination, by an occupational therapist to improve fine motor skills for writing, services reasonably calculated to benefit the student in addressing her learning disorders of dyslexia, dyscalculia, and dysgrafia.

The Hearing Officer cannot say by a preponderance of the evidence that this is not so, and considers the IEP to be substantively appropriate. The services may be revised and improved at a review IEP staffing. The student has not had passing grades the past two years, and she is behind in grade level in reading, writing, and math, as she enters the fourth grade. A great amount of effort will be required to help her just to catch up to grade level 4.0, let alone advance from month to month with her peers. But the law, as stated above, does not require a public school to provide the best services for a student with a disability to reach her maximum potential, an ideal standard rejected as the minority opinion, written by Justice Byron White in the Rowley case.

By advancing the student into a stressful classroom situation, to meet standards she is unprepared to meet, and create expectations she is unprepared to fulfill, the school district has a responsibility to the student and her

parents, not only to provide the special education services called for in the current IEP, but to review these services, in accordance with criteria of 2220-R-4.02(6) ECEA State Rules, and 34CFR300.346(b), Review and Revision of IEP, in the Federal Regulations, and to have this review IEP staff meeting as soon as possible after the first trimester's evaluations are completed.

3. [STUDENT]'s IEP be changed to identify her with perceptual-communicative disabilities.

This request for relief assumes that the Hearing Officer has the authority to change an IEP. Only an IEP team can formulate or change an IEP, according to the statutory laws of the IDEA Regulations or the ECEA Rules. The Hearing Officer found no procedural or substantive error in the current IEP. A difference of opinion during the Hearing does not mean an error. The IEP team determined the student was ineligible for a p/c disability, according to the Guidelines for identifying this disability. Considering that Dr. Stewart has no training in applying the guidelines, that he is not a school psychologist, a preponderance of the evidence is in favor of the IEP team's decision.

The Hearing Officer has no authority to dictate educational policy to a school district. This is a matter beyond his expertise. For this reason, the courts have avoided interfering with school decisions. In the case of Independent School District No.196, the U.S. Court of Appeals, Eighth Circuit,(1998)(27 IDELR 503), quoting from the Rowley case, said that the lower court, the District Court, should resist the impulse to "substitute its own notions of sound educational policy for those of the school authorities." Rowley 458 U.S.206

4. [STUDENT] be given multi-sensory 1:1 or small group instruction in reading.

5. [STUDENT] be given multi-sensory 1:1 or small group instruction in math.

As mentioned above, a hearing officer has no authority to dictate pedagogical policy to a school district. In the Bensalem Township School District case,(1990)(17EHLR90), the Secretary of Education in Pennsylvania, acting as the State Judicial Officer, reviewed an appeal of a Hearing Officer's decision, ordering one-on-one individualized training in word analysis, and reversed the Hearing Officer's order. The case states:

> We will not adopt the hearing officer's order to the extent that it requires the strategy be provided on a one-to-one basis. Our decision should not be taken to suggest that one-to-one instruction is not necessary. Rather, we believe that the choice of a specific methodology is best left to the discretion and expertise of the District.

Ms. Corr, the special education teacher, who provides three and a half hours outside class and one hour in class per week, testified that since the current IEP, she began teaching the student using multi-sensory instruction.

6. Mr. and Mrs. [PARENTS] be reimbursed for the services of Ms. Brucker this past school year. Ms. Brucker provided multi-sensory 1:1 reading instruction to [STUDENT] at the parents' expense following the District's refusal to do so.

The parents received the evaluation of NeuroConnection by January, 2002, indicating their daughter had dyslexia and other learning disorders, in addition to ADHD. The evaluation had taken place November 6, 2001. They hired Ms. Brucker, a teaching specialist for children with dyslexia. Ms. Brucker began her private lessons with the student on January 15, 2002. The mother testified the District refused to pay for the private lessons. She said she had no choice, and began the lessons. At the time the parents employed Ms. Brucker, the 5/24/00 IEP was still in effect, with a 504 Plan and an ILP, and no eligibility for special education services. The diagnosis at that time was ADHD, impairment in learning under Sec.504. By February 5, 2002, when the IEP team reconvened, they received the evaluation of NeuroConnection. Dr. Stewart also wrote a letter dated February 12, 2002, to Ms. Williams-Blackwell, Director of

Special Education, reporting the results of the evaluation, an exhibit in this case. The IEP team was to reconvene March 5, to consider the evaluation, and review the IEP then in place. The parents postponed the March meeting, (indicated on p. 3 of the current IEP), and finally the current IEP staff meeting took place April 9, 2002, with new evaluations and new results. Special education services were put into place, as already indicated in this opinion. Under the current IEP, Ms. Corr began teaching the student the middle of April, and saw the student every school day for six weeks, according to her testimony. Meanwhile Ms. Brucker was continuing her one-on-one teaching with the student. Ms. Brucker's calendar of instruction, an exhibit in this case, indicates she taught from January 15th to June 28th, 2002, with a month's break, a total of 68 hours. The bill for her services is $3,347.50, also an exhibit. The school Principal, Dr. Branine, and the student's third grade teacher, Ms. Socha, permitted the student to be pulled out of class, Mondays through Thursdays and be taught by Ms. Brucker in the school cafeteria during the 9:30-10:30 a.m. class time. This is acknowledged by Ms. Brucker in her Progress Report in teaching the student. The Report is an exhibit. The parents now seek reimbursement by the School District for Ms. Brucker's teaching. The Hearing Officer has outlined the facts in detail, according to his understanding.

The Hearing Officer has decided issues one and two, that both IEPs, that of 5/24/00 and the current one of 4/9/02, are procedurally and substantively adequate at the times they were performed, calculated to benefit the student, considering the evaluations which the IEP teams had at the time, and finds no legal justification for reimbursing the parents for private teaching services they began, knowing the District had refused to pay for them. The parents continued these private lessons, even after the current IEP of 4/9/02. It is understandable, from the parents viewpoint, that one-on-one teaching by an expert in teaching children with dyslexia, was the best instruction they could get at a time when a crash program was deemed essential to them. The School District also cooperated in their endeavor, by permitting this pull-out-of-class teaching. But this does not mean the District should pay for these private classes. The Hearing Officer cannot see that Ms. Brucker is an agent or a private contractor working for the School District. The parents hired her, and the District had refused to pay for her private lessons.

In the Arlington Central School District case, (2002), (36 IDELR 130), the U.S. District Court in New York heard an appeal by the parents of the Hearing Officer's and the State Review Officer's decisions. The parents had a child with dyslexia, and had pulled the child out of public school and placed him in a private school, specialized in teaching dyslexic children. They sought reimbursement from the School District for the year's private school tuition. The Court cited the Rowley case, the requirements of FAPE: (1) special education must meet the unique needs of the child, (2) special education services are reasonably calculated for the child to receive educational benefits. The Hearing Officer found that the School District did have teachers who used a multi-sensory methodology, and could meet the special education needs of the student to receive educational benefit. The District Court approved this decision, denying the parents tuition reimbursement.

Similarly, in this case, under the current IEP of April 9, 2002, the District has a special education teacher giving multi-sensory instruction to the student. Ms. Corr, and Ms. Brucker, were both teaching the student from the middle of April to the end of June. The parents continued the private lessons of Ms. Brucker, despite the current IEP providing for special education services for the student to receive educational benefits. The current IEP does not have to meet the ideal or best teaching methodology available, preferred by the parents, as long as educational benefits are conferred to meet the needs of the student. From the Arlington and Rowley cases, it is clear to the Hearing Officer, that when the special education services were approved by the School District, April 9, 2002, payment for the private classes of Ms. Brucker was the responsibility of the parents, who had hired her.

Prior to this time, the IEP of May 24, 2000, was in effect, when Ms. Brucker began teaching the student January 15, 2002. The IEP team began evaluating the student again in preparation for a new IEP staff meeting. They received the evaluation of NeuroConnection, and performed new evaluations in January, February, March, and April, 2002. The IEP team met February 5th for a preliminary staff meeting, which was reconvened to March 5th. The parents postponed the March 5th IEP meeting, indicated on page 3 of the current IEP, until finally the IEP staff meeting of

April 9th, put into effect the current IEP. During all of this time, Ms. Brucker continued to teach the student.

The Hearing Officer has found the IEP of May 24, 2000, to be procedurally and substantively correct to meet the educational needs of the student by conferring educational benefits under the 504 Plan and the Individual Literacy Plan, at the time those needs were then known, and from those evaluations, which indicated an impairment of ADD/ADHD, with language abilities slightly below average, and very weak short term auditory memory. A Statement Of Educational Needs for language, math and access skills was provided. There was no finding of a specific disability to qualify the student for special education at that time. This IEP was on the point of being updated and replaced by another IEP team with new evaluations in 2002, as described in the previous paragraph.

As previously indicated in this opinion, under these circumstances, the Hearing Officer cannot find fault with the School District. The parents, without waiting for all the new evaluation data that is required by an IEP team to formulate a new IEP for the student, acted unilaterally, on the basis of one evaluation by NeuoConnection, to hire Ms. Brucker. The Hearing Officer cannot find a reason why the School District should pay for this private instruction. The School District cannot act unilaterally, like the parents, and order special education services, without going through the IEP team process, of considering many evaluations. Meanwhile, it was acting under the IEP of May 24, 2000, to provide the services called for at that time. Because a subsequent IEP may provide special education services, not provided for in a prior IEP, does not mean that the parents can justify the payment for special education services, before the School District can put these services into effect, as in the present case.

7. Mr. and Mrs. [PARENTS] be reimbursed for the evaluation costs of Dr. Stewart and Ms. Sunde of The Neuro- Connection, Inc., for their independent evaluation of [STUDENT] following the District’s insufficient evaluations.

The statute governing an independent evaluation by the parents is 34CFR300.502 part(a), granting the parents of a child with a disability the right to obtain an independent

educational evaluation of the child, and part(b), that this educational evaluation be at public expense, if the parent disagrees with an evaluation by the public agency. If the parents request this evaluation, the School District must either initiate a hearing to prove its evaluation is appropriate, or must insure an independent evaluation is provided at public expense.

34CFR104, to effectuate Sec. 504 of the Rehabilitation Act, contains Sec. 104.35, Evaluation and placement, and does not mention an independent evaluation. 34CFR104.36 Procedural Safeguards, regarding evaluation, states that the parents have a right to an impartial hearing to review the evaluation.

The 504 Plan Statement of Needs, was incorporated into the student's IEP of May 24, 2000, the IEP then in place when NeuroConnection performed the independent evaluation of the student on November 6, 2001, at the parents request. The 504 Committee Meeting page, an exhibit, states that the student has an impairment, ADHD, that limits learning, and then continues, that this disability affects learning, and the disability was determined by a doctor's diagnosis. Turning to the IEP of May 24, 2000, the Determination of Eligibility and Disability, the IEP team determined that the student did not have a disability, and therefore did not check any of the disabilities indicated. The Hearing Officer concludes, therefore that at the time of this IEP, there was no disability to qualify for special education, but there was an impairment under Section 504.

However, when NeuroConnection did this independent evaluation in November of 2001, and later evaluated the results, by using the Diagnostic and Statistical Manual of Learning Disorders, the conclusions were that the student had dyslexia, dyscalculia, dysgrafia, and ADHD. The IEP team considered NeuroConnection's test measurements, as well as the new tests and evaluations performed by the IEP team, and concluded in the current IEP the student qualified for special education with the disabilities of ADHD and speech/language.

Whether we debate semantics, impairment or disability, it seems to the Hearing Officer, that the outcome of this dispute should be decided in favor of the parents. The IEP team used the evaluation of NeuroConnection. The team accepted Dr. Stewart's intelligence test results, and

adopted his standard for IQ, the verbal IQ of 100. His testing is incorporated into the IEP documentation of evaluation data on page 32 of the IEP. Dr. Stewart recommended special education services for the student, in a letter to Ms. Williams-Blackwell, Director of Special Education for the School District. The independent evaluation was useful to the IEP team, and benefited the IEP process in formulating the current IEP. The Hearing Officer notes from Ms. Corr's letter of April 7, 2002, to the Office of Civil Rights, her statement: "For my part, as the PCD teacher at L . .P . . Elementary, I found the information provided by NeuroConnection to be useful in the most part."

It is the Hearing Officer's opinion, that if the School District has used and has benefited from this independent evaluation, the parents should be reimbursed for it, however one may interpret or misinterpret the law. In the Arlington Central School District case, (2002), (36 IDELR 130), previously mentioned, the court stated:

> A district court may grant any relief it deems appropriate, and is required to take into account equitable considerations when fashioning such relief.

Equity is based on what is fair and just, rather than a strict interpretation of the law. If a party, the School District, receives a benefit from another party, the parents, then the benefit should be paid for, especially when the school district has an obligation to pay for an independent evaluation that is appropriate and useful, and legal procedures and standards are met. The Hearing Officer rejects a strict interpretation of the law and the technicalities of semantics, applies the principle of equity, and follows the intent of the law, that a school district pay for an independent evaluation which is useful to the school district, or, as in this case, when the school district incorporates a part of the independent evaluation into the documentation of evaluation data in an IEP.

The parents will request that NeuroConnection send a bill for the student's independent evaluation of November 6, 2001, to Ms. Williams-Blackwell, Director of Special Education for the School District, for verification and

accounting purposes, and that the School District will reimburse the parents for the evaluation.

As a final observation, after two days of hearings, the Hearing Officer has concluded that this nine-year old girl, has had more than her share of unhappiness in school. The words fear and anxiety have often been mentioned. It seems to the Hearing Officer, not an expert in the field, that this student distracts herself in the classroom, to escape work she does not understand and cannot do. Although the School District is obligated by law to provide only a minimal amount of benefits to accommodate her disabilities, it is hoped that the School District will give all that is possible, to help a special person have a happier learning experience. There is also the hope that the parents and the School District will be able to mediate their differences, outside of hearings and courts, of one adversary against another, and work together as an IEP team.

ORDER

1. The Respondent School District and Petitioners Parents will review the current IEP, as the Opinion instructs.

2. The Respondent School District will reimburse the Petitioners Parents for the independent evaluation by NeuroConnection, as the Opinion instructs.

3. Petitioners' other requests for relief are denied.

Either party may request an appeal of this Order by an Administrative Law Judge. A copy of appeal procedures, ECEA Rules, 6.03(9-12), Right to Appeal Decision of Impartial Hearing Officer, is enclosed with this Decision and Order.

August 16, 2002.

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Irving J. Kelsey
Independent Hearing Officer

CERTIFICATE OF SERVICE

I certify that on this 19th day of August, 2002, a true and correct copy of this Order was placed in the United States Mail, postage prepaid, addressed as follows:

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