

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 633 17 th Street, Suite 1300 Denver, Colorado 80202	▲ COURT USE ONLY ▲
JEFFERSON COUNTY SCHOOL DISTRICT R-1, Appellant/Petitioner, vs. [STUDENT], through his parents, [PARENT] and [PARENT], Appellee/Respondent.	
DECISION UPON STATE LEVEL REVIEW	

This matter is before Administrative Law Judge (ALJ) Robert Spencer upon Appellant's appeal of a decision by an Impartial Hearing Officer (IHO). This state level review is governed by the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.*; implementing federal regulations at 34 CFR § 300.510; and state regulations at 1 CCR 301-8, §§ 2220-R-6.03(9) to (12).

Following briefing by both parties, oral argument was held at the Office of Administrative Courts December 21, 2007. Alyssa C. Burghardt, Esq. of the law offices of Caplan and Earnest LLC, represented the Jefferson County School District (the District). The Appellee and his parents were represented by Kate Gerland, Esq. of the Law Offices of Louise Bouzari, LLC. For purposes of confidentiality, the Appellee ([STUDENT]) will be referred to by his initials throughout this decision.

Background

[STUDENT] is an [AGE] year-old boy diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and Bipolar Disorder. The District identified [STUDENT] as a child with a disability under the IDEA and has been providing him with special education and related services pursuant to an individualized education program (IEP).

Despite the IEP, [STUDENT]'s parents allege that he has not achieved his academic goals. [STUDENT]'s parents became dissatisfied with the District's approach to their son's education, and particularly with the fact that the District has not currently identified [STUDENT] as having a learning disability in addition to his other disabilities. Therefore, following a meeting of the IEP team in February 2007, [STUDENT]'s parent's requested an Independent Educational Evaluation (IEE). Pursuant to 34 CFR § 300.502, parents may request an IEE at public expense if they disagree with the school

district's evaluation of their child's educational needs. Following such a request, the school district must either provide the evaluation, or request a hearing to show that the school district's evaluation is appropriate.

Instead of an IEE, the School District offered to perform an evaluation of [STUDENT] by its multi-disciplinary Central Assessment Team (CAT). The parents agreed to postpone action on their request for an IEE pending the results of the CAT evaluation. The CAT conducted its evaluation, which was considered by the IEP team on May 1, 2007. Although the CAT identified certain cognitive deficits, it found [STUDENT]'s testing scores did not warrant labeling [STUDENT] as having a learning disability (also known as "perceptual or communicative disorder" or PCD).¹ Not satisfied with this evaluation, [STUDENT]'s parents renewed their request for a publicly funded IEE. While their request was pending, the parents arranged, at their own expense, for an evaluation by a child neuropsychologist, John Kirk, Ph.D. Based upon this evaluation, Dr. Kirk opined that [STUDENT] does have a PCD not identified by the CAT and inadequately addressed by the IEP.

Notwithstanding Dr. Kirk's opinion, the District remained convinced that its own evaluation was appropriate, and therefore did not agree to the parents' request to pay for Dr. Kirk's evaluation. On July 9, 2007, the District filed a request for a due process hearing before an IHO. The IHO conducted a hearing on August 29, 2007 and issued his decision September 14, 2007. The IHO concluded that the District's evaluation was not appropriate because the CAT incorrectly relied upon a "discrepancy model" standard mandated by the Colorado State Board of Education to determine whether or not [STUDENT] suffered a PCD. Using that model, the CAT determined that although [STUDENT] suffers deficits in working memory and information processing speed, the differences between his measured intellectual potential and his actual achievement were not sufficient to find a PCD.

In concluding that the District improperly employed the discrepancy model standard, the IHO relied upon 34 CFR § 300.307 which states that "criteria adopted by the State ... [M]ust not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability." The IHO thus concluded that by improperly relying upon the discrepancy model, the School District wrongfully failed to consider a PCD and thus improperly limited itself to only recommending an educational program based on accommodating [STUDENT]'s physical disabilities (ADHD and Bipolar Disorder). The IHO therefore directed the district to reimburse [STUDENT]'s parents for the cost of Dr. Kirk's IEE.

The School District filed its appeal October 12, 2007. The parties agreed to waive all statutory deadlines and, on November 6, 2007, the ALJ entered an order establishing a schedule for written briefs and oral argument. By agreement of the

¹ While federal regulations use the term "specific learning disability" (34 CFR § 300.307), state regulations refer to the same concept as a "perceptual or communicative disability" or PCD (1 CCR 301-8, § 2220-R-2.02(6)). Hereafter, the ALJ will use the term "PCD."

parties, no new evidence was received as part of this review. Oral argument was held December 21, 2007 and the matter is now ripe for decision.

Issue

The basic issue is whether the IHO correctly determined that the District's CAT evaluation was not appropriate. The District argues that although federal regulations prohibit states from mandating the use of the discrepancy model, school districts are nonetheless free to use it if they choose. Therefore, the District's use of the discrepancy model was not improper, and under that model [STUDENT] was correctly assessed as not having a PCD. [STUDENT] responds that the discrepancy model has been discredited as an evaluation standard, and that the IHO properly applied the federal regulation prohibiting states from mandating its use. As a consequence of the District's improper use of the discrepancy model, it failed to identify [STUDENT]'s PCD and thus did not identify all his special education and related services needs, as required by the IDEA.

Having carefully considered the record below, the IHO's report, and the arguments of the parties, the ALJ reverses the IHO's decision.

Scope of Review

The ALJ is to issue an "independent" decision. 20 U.S.C. Section 1415(g). In the context of a district court review of a state level decision, such independence has been construed to require that "due weight" be given to the administrative findings below. *Board of Education v. Rowley*, 458 U.S. 176, 206 (1982). In reviewing the decision of the IHO, the ALJ is in a position analogous to a district court reviewing a state level decision. Therefore, it is appropriate for the ALJ to give deference to the IHO's findings of fact and thus accord the IHO's decision due weight, while at the same time reaching an independent decision based on a preponderance of the evidence.

Burden of Proof

As the party that filed for the due process hearing, the School District bears the burden of proving that its evaluation was appropriate. *Schaffer v. Weast*, 546 U.S. 49 (2005); 34 CFR § 300.502(b)(2)(i)(when a parent requests an IEE, the school district may request a due process hearing "to show that its evaluation is appropriate.")

Findings of Fact

The record supports the IHO's findings of fact 1 through 19 and the ALJ adopts them as his own. The ALJ supplements those findings, as follows:

1. [STUDENT] was born [DOB]. At the time of the hearing he was [AGE], and had just started [GRADE].
2. When [STUDENT] was [AGE], he was initially evaluated by the District's Child Find service. No formal cognitive evaluations were performed at that time, but

because [STUDENT] had a medical diagnosis of ADHD and Bipolar Disorder, he was identified as a child with a disability eligible for services under the IDEA.

3. [STUDENT] has been receiving special education and related services from the District pursuant to an IEP since approximately December 2000.

4. Re-evaluations are performed approximately every three years after a student initially qualifies for special education. The District performed its first triennial review of [STUDENT]'s IEP in October 2002, when [STUDENT] was in the [GRADE]. At that time he was administered a *Wechsler Intelligence Scale for Children – Third Edition (WISC-III)* by the school psychologist. The WISC-III is a measure of a child's intellectual ability. On this evaluation, [STUDENT] rated a full scale IQ of 126. He scored in the highly gifted to superior ranges in a number of subtests, and in the high average to average range in a number of others. Only his short-term memory subtest was in the low average range. [STUDENT] was also administered tests to assess his actual level of performance (the *Woodcock-Johnson III Tests of Achievement* and the *Comprehensive Test of Phonological Processes*). Based upon the test results, the District found weaknesses in [STUDENT]'s rapid naming and reading skills that were not equivalent to his cognitive abilities.

5. As a result of the October 2002 evaluation, [STUDENT] was identified as having a secondary PCD in addition to his other disabilities.

6. The District performed another Triennial Review in January 2005, when [STUDENT] was in the [GRADE]. At that time, [STUDENT] was again administered the WISC-III and Woodcock-Johnson tests. Based upon the results of these tests, the District identified [STUDENT] as having a disability related to his ADHD and Bipolar Disorder diagnoses, but for reasons not clearly explained in the record, no longer identified a PCD.

7. An annual review of [STUDENT]'s IEP was conducted in February 2007, but the IEP could not be agreed upon due to the parents' concern that [STUDENT] had not made adequate progress on his IEP goals. In fact, [STUDENT] experienced a steady decline in his writing skills since his first evaluation in 2002 (Tr. p. 125), lags behind in reading speed and comprehension (Tr. p. 103), and regularly fails to turn in reading, writing and math assignments (Tr. pp. 103-04). The parents believed the IEP team was not responding appropriately to [STUDENT]'s lack of progress. Specifically, [STUDENT]'s parents disagreed with the District's decision to drop the PCD classification during the Triennial Review in 2005. In the parents' opinion, [STUDENT]'s academic skills had stagnated, in turn exacerbating his emotional and behavioral challenges. The parents therefore requested an IEE but agreed to postpone their request pending an assessment by the District's multidisciplinary Central Assessment Team (CAT).

8. The CAT has four full time members, including a school psychologist, an educational diagnostician, a speech-language pathologist, and a social worker. The CAT assessment was performed during March and April 2007, and used a variety of

assessment tools.

a. The CAT's school psychologist assessed [STUDENT]'s cognitive function. To do so, she administered the *Wechsler Intelligence Scale for Children - Fourth Edition* (WISC-IV). On this test, [STUDENT] rated a 108 in Verbal Comprehension (70th percentile), a 108 in Perceptual Reasoning (70th percentile), an 80 in Working Memory (9th percentile), and a 75 in Processing Speed (5th percentile). His General Ability Index (GAI), which is calculated from the Verbal Comprehension and Perceptual Reasoning scores, was 110 (75th percentile). The WISC-IV is a common and reliable tool to assess intellectual potential. Of all the WISC-IV scores, the GAI is the most accurate measurement of the student's learning potential. [STUDENT]'s GAI is in the high average range. Tr. pp. 48-49.

The low score in working memory and processing speed represents areas of weakness or educational need (Tr. p. 49), and resulted in an IEP finding that "Cognitive processing deficits do appear evident at this time in the areas of working memory and processing speed." Ex. 1, p. 18.

b. The CAT's educational diagnostician assessed [STUDENT]'s educational achievement. To do so, she administered the Woodcock-Johnson test, which is a recognized tool to assess actual academic performance in reading, writing and math. Although [STUDENT]'s standard scores were in the average range for all three categories tested, Broad Reading (96), Broad Math (99) and Broad Written Language (89), his subtest scores in Reading Fluency (85), Math Fluency (60) and Writing Fluency (84) were all in the low to very low average range. The fluency tests assess the student's ability to perform academic tasks within time constraints. [STUDENT]'s poor scores in these areas are consistent with the deficits in processing speed identified by the WISC-IV.

c. The WISC-IV and Woodcock-Johnson tests are well-recognized and reasonably reliable assessment tools. The CAT members who administered these tests were appropriately qualified and there is no evidence the tests were inappropriately administered. The ALJ therefore finds the test results reliable.

d. The parents' expert, Dr. Kirk, challenges the reliability of a third test administered by the CAT, known as the *Delis-Kaplan Executive Functioning System* (D-KEFS). In Dr. Kirk's opinion, the CAT member who administered the test was not qualified to do so and made errors in administering and scoring the test. Although [STUDENT]'s scores on this test were in the average range, the District's decision to not identify a PCD did not rely upon the D-KEFS results. It is therefore unnecessary for the ALJ to make a finding as to whether the evaluator was appropriately qualified or whether the test properly administered.

e. The CAT administered a number of other assessment tests that confirmed [STUDENT]'s higher-level thinking skills were average or above, but that his working memory and processing speed skills were weak or inconsistent.

9. In determining whether a student has a PCD, the CAT team used a “discrepancy model” standard prescribed by State Department of Education regulation 1 CCR 301-8, § 2220-R-2.02(6)(b). That regulation requires, among other things, a showing of a “significant discrepancy between estimated intellectual potential and actual level of performance.” To assess [STUDENT]’s estimated intellectual potential, the District relied upon [STUDENT]’s WISC-IV GAI of 110, from which it derived a “regression cut-off score” of 87.² To determine whether there was a significant discrepancy between [STUDENT]’s intellectual potential and his actual level of performance, the District compared his “broad” Woodcock-Johnson test scores of 96 in reading, 99 in mathematics, and 89 in written language to the cutoff of 87. Because all of [STUDENT]’s broad scores exceeded the cutoff, the District determined there was no significant discrepancy between his intellectual potential and his actual performance.³

10. Dr. Kirk is an experienced and well-qualified child neuropsychologist. He performed an assessment of [STUDENT] in June 2006, during which he administered a battery of tests similar, but not identical, to those administered by the CAT. Based upon his evaluation, he found that [STUDENT] does have a PCD in reading and writing fluency.

11. The ALJ finds that [STUDENT] does have a PCD that was not identified by the CAT evaluation. The ALJ bases this finding upon the following evidence:

a. Dr. Kirk is an extremely well qualified clinical psychologist. The ALJ finds his detailed explanation of his evaluation and reasons for finding a PCD convincing.

b. The District identified [STUDENT] as having a PCD in 2002, and then dropped that identification at its 2005 assessment. The record does not adequately explain why the PCD was dropped. The ALJ finds credible Dr. Kirk’s opinion that it is unlikely [STUDENT]’s PCD suddenly went away. Tr. p. 293.

c. The District’s own testing demonstrated significant deficits in [STUDENT]’s working memory and processing speed. The deficits in processing speed were reflected in his very low academic fluency scores on the Woodcock-Johnson test. These scores (Reading Fluency – 85; Writing Fluency 84; and Math Fluency – 60) were all below the regression cut-off score of 87, and therefore indicated significant discrepancies in these subtest areas. Although the District presented testimony that it would be inappropriate to compare the subtest scores to the cutoff, the record does not adequately disclose the rationale for this limitation. In any event, the evidence is convincing that [STUDENT]’s consistently low academic fluency significantly interferes with achievement of his intellectual potential.

d. Tests performed in March 2007 by the District’s speech-language

² The record does not describe how the regression cut-off score is calculated.

³ See the IEP “Discrepancy Worksheet,” Exhibit 1, p. 43.

pathologist disclosed that [STUDENT] was two to two-and-a-half years behind grade level in critical reading rate, accuracy and fluency skills. Tr. pp. 171, 175.

e. The ALJ finds credible Dr. Kirk's testimony that the discrepancy model, though "the most traditional way" to assess a student for a PCD, is "not the best way" due to its tendency to miss a PCD when, as here, the child's IQ changes over time. Tr. pp. 226, 280, 292-93.

f. The ALJ also finds credible Dr. Kirk's testimony that the Woodcock-Johnson test, when used in the discrepancy model as the sole measure of academic achievement, is prone to overlooking a PCD because deficits in subtest scores are often averaged out when calculating the broad range scores. Thus, it is very difficult to meet a discrepancy cut-off using the Woodcock-Johnson test. Tr. pp. 285-86.

g. Dr. Kirk supplemented the District's Woodcock-Johnson testing which his own battery of tests, including the GORT-4, TOWRE, and TOWL-3 tests. The first two, GORT-4 and TOWRE, test the child's reading skills, while the TOWL-3 tests his writing skills. Dr. Kirk's own testing, appropriately normed to [STUDENT]'s age at the time of testing, confirmed significant discrepancies in [STUDENT]'s reading and writing fluency versus his intellectual potential.

12. The District used the discrepancy model because it was mandated by State Department of Education regulation. Tr. p. 211. Although the District's educational diagnostician testified that the CAT nonetheless considered many factors including [STUDENT]'s academic history, classroom performance, and other test scores (Tr. p. 126), the evidence shows that the District's finding was based exclusively upon a strict mathematical calculation involving only [STUDENT]'s WISC-IV and Woodcock-Johnson scores. Specifically, the IEP "Discrepancy Statement" stated:

The standard scores from achievement testing in reading, math, and/or written language *must* be equal to or below the standard cutoff as determined by the regression formula. [[STUDENT]] is currently achieving at a level that is commensurate with his measured abilities. Thus, according to the results of this assessment and Colorado's procedures and regression formula, [[STUDENT]] does not meet the criteria for a Perceptual Communicative Disability."

Ex. 1, p. 18 (*italics added*).

Furthermore, reference to the "Discrepancy Worksheet" contained in the IEP confirms that the determination was based exclusively on [STUDENT]'s Woodcock-Johnson "broad" range scores and the regression cut-off score derived from the WISC-IV test. Ex. 1, p. 43.

13. [STUDENT] has a long history of attention deficit problems. Tr. p. 147. His attention deficit problems and consequent difficulty staying "on-task" highly

impacted his processing speed as reflected in his poor fluency subtest scores.⁴

14. State and federal regulations preclude finding a PCD if the student's learning problems 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.⁵ However, the CAT did not identify [STUDENT] as having any of these conditions. Tr. pp. 135-36.

15. Although the District did not identify a PCD, it did identify the deficiencies in [STUDENT]'s working memory, processing speed, and his reading and writing fluency. Specifically, as a result of the CAT's evaluation, the IEP recites that "Cognitive processing deficits do appear evident at this time in the areas of working memory and processing speed," and that his identified needs include improving "his strategies for memory" and improving his "fluency and automaticity in reading and writing." Ex. 1, pp. 18 and 35.

16. To address the needs identified, the CAT made numerous recommendations, including "small group instruction in a structured setting with limited distractions and with implementation of the modifications and accommodations suggested." The suggested "modifications and accommodations" included emphasis of quality over quantity in [STUDENT]'s work, shorter assignments, extensions of time to complete work, instruction in keyboarding skills, exposure to computerized writing programs such as Co-Writer or Write Out Loud, use of a scribe on standardized tests, close monitoring of his work, entry into a program in phonemic decoding, and multisensory instruction.⁶ These interventions were similar to the recommendations made by Dr. Kirk,⁷ and many were incorporated into the IEP. Ex. 1, pp. 35-38.

17. One of Dr. Kirk's recommendations was a course of remedial education in reading and writing, which he believed essential to address [STUDENT]'s needs. In Dr. Kirk's opinion, the District's IEP provided only "accommodations and modifications," not remedial education, and was therefore inadequate. Tr. p. 239-42. For reasons explained in the discussion portion of this decision, the ALJ makes no finding as to the adequacy of the IEP.

18. The IEP Team and its CAT evaluators reviewed [STUDENT]'s previous assessments, his educational history, his teacher's and related service providers' observations, and his parents' input. Ex. 1, pp. 2-3, 11-14 and 19-22. In addition to this background data, the CAT members administered a significant battery of well-recognized tests. Ex. 1, pp. 3-10, 14-16, 23-26, etc. The parents do not allege that any additional test should have been administered, and the ALJ finds none. The tests administered and the information reviewed was therefore adequate to provide the data

⁴ Testimony of Marti McKinley, Educational Consultant/Diagnostician, Tr. pp. 105, 114, 117, and IEP "Summary and Discussion," Ex. 1, p. 16.

⁵ 1 CCR 301-8, § 2220-R-2.02(6)(a) and 34 CFR § 300.309(a)(3).

⁶ See Tr. pp. 76-77, 112-17, 120, 122-25, 168-69 and Ex. 1, pp. 17-18.

⁷ Dr. Kirk's recommendations are found at Ex. 6, pp. 11-14.

necessary to determine [STUDENT]'s special education and related services needs.

Discussion and Conclusions of Law

The Requirement of an Evaluation

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)(A). A school district satisfies the requirement for a FAPE when it provides personalized instruction with sufficient support services to permit the child with a disability to benefit educationally from that instruction. *Rowley*, 458 U.S. at 203. To determine whether a child has a disability, and if so what educational and related services are required, the school district must perform an evaluation. 20 U.S.C. § 1414(a).

If a parent disagrees with the school district's evaluation, federal regulations give the parent the right to an IEE at public expense, if the parent so requests. 34 CFR § 300.502(b). If the school district disagrees with the request, then the district must request a hearing to show that its evaluation was appropriate. 34 CFR § 300.502(b)(2)(i). To be "appropriate," the school district's evaluation must comply with all the evaluation requirements specified at 20 U.S.C. § 1414(b) and 34 CFR §§ 300.304 and 300.305. At issue in this case is the requirement of § 300.304(c)(6) that,

In evaluating each child with a disability ... the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.

Also at issue is § 300.305(a)(2)(iv), which states that the evaluators must identify any additional data needed to determine "[W]hether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum."

Although the federal regulations do not specify the tools or formula to be used to identify a PCD, the regulations do require each state to adopt its own criteria that the school district then "must use." 34 CFR § 300.307(b). The regulation, however, prohibits states from requiring "the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability." 34 CFR § 300.307(a). Despite this prohibition, the Colorado State Board of Education regulations in effect at the time of [STUDENT]'s evaluation required a finding of a "significant discrepancy between estimated intellectual potential and actual level of performance" as a condition of finding the existence of a PCD. 1 CCR 301-8, § 2220-R-2.20(6)(b)(i).

The IHO found that the CAT evaluation was inappropriate because it required use of a discrepancy formula in violation of 34 CFR § 300.307(a)(1). Furthermore, the

IHO found the use of a discrepancy model particularly inappropriate in this case because it failed to identify the PCD found by Dr. Kirk. According to the IHO, because the District failed to identify [STUDENT]'s PCD, it also failed to identify necessary additions and modifications to the IEP as required by § 300.305(a)(2)(iv). Although the ALJ agrees with the District that its use of a discrepancy model was not necessarily prohibited, the ALJ agrees with the IHO that as used in this case the discrepancy model was not adequate to identify [STUDENT]'s learning disabilities.

The Criteria for Finding of PCD

Pursuant to state regulation, a PCD is 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.” 1 CCR 301-8, § 2220-R-2.02(6). The regulation goes on to say that a PCD may “manifest itself in an impaired ability to listen, think, attend, speak, read, write, spell or do mathematical calculations.” § 2220-R-2.02(6)(a). Finally, the regulation specifies that to qualify as a PCD, there must be:

1. a significant discrepancy between estimated intellectual potential and actual level of performance,
2. difficulty with perceptual, cognitive and/or language processing, and
3. significantly impaired achievement in one or more of the following areas: prereading and/or reading skills, reading comprehension, written language expression, such as problems in handwriting, spelling, sentence structure and written organization, or comprehension, application and retention of math concepts.

There is no material dispute that the second element is satisfied because the IEP clearly finds “cognitive processing deficits” in the areas of working memory and processing speed. Finding of Fact #8.a.

Although the parties dispute the third element, the ALJ has little difficulty concluding that [STUDENT]'s academic achievement is significantly impaired in one or more of the areas identified. The District's own witnesses acknowledge that [STUDENT] is two to two- and-a-half grade levels behind in critical reading skills, and has had a steady decline in his writing skills since 2002. Findings of Fact #7 and #11.d.

The material dispute is with the first element, whether there is a significant discrepancy between [STUDENT]'s intellectual potential and his actual level of performance. In this regard, the parties do not dispute that the WISC-IV test is a reasonably accurate measure of [STUDENT]'s intellectual ability and that his intellectual ability is in the high-average range. Finding of Fact #8.a. Rather, the dispute focuses on whether the requirement of a discrepancy in intellectual ability versus actual performance is appropriate, and if so, whether such a discrepancy exists in this case.

Use of the Discrepancy Model Is Not Necessarily Prohibited

The parties agree that the state regulation requiring a finding of a significant discrepancy between the student's intellectual potential and his actual performance is not in compliance with 34 CFR § 300.307(a)(1). However, though the federal regulation precludes a state from requiring the use of a "severe discrepancy" model, it notably does not *prohibit* a school district from doing so. "[T]he State ... *must not require the use of a severe discrepancy...*"⁸ 34 CFR § 300.307(a)(1)(*italics added*). Thus, although the state regulation requiring the use of a discrepancy formula is not in compliance with federal law, that fact alone does not necessarily make the District's use of the discrepancy model inappropriate. As noted by Dr. Kirk, the discrepancy model is the most traditional way to identify a PCD, and the ALJ cannot conclude from the evidence that the discrepancy model is always an inappropriate way to identify a PCD.

*The Discrepancy Formula Used by the District
Was Not Adequate to Identify [STUDENT]'s PCD*

Although the discrepancy model is not a categorically inappropriate method to identify learning disabilities, it was inadequate in this case because it overlooked substantial collateral evidence of a significant discrepancy between [STUDENT]'s estimated intellectual potential and his actual level of performance. As noted in Finding of Fact #11, those indications included his prior history of a documented PCD, his uniformly low academic fluency subtest scores on the Woodcock-Johnson tests, and his observed poor classroom performance which was not commensurate with his average to above average intellectual potential. Although the District contends that it took these factors into account, the evidence shows that it relied upon a strict mathematical formula that ruled out finding a PCD simply because [STUDENT]'s "broad" range scores on the Woodcock-Johnson tests were above the regression cut-off. Finding of Fact #12. In addition to overlooking the collateral evidence of a significant discrepancy, the District also overlooked limitations in the Woodcock-Johnson test's ability to detect a PCD when used as the sole indicator of academic achievement in the discrepancy model.

As noted in Finding of Fact #14, state and federal regulations preclude the finding of a PCD if the student's learning problems are primarily the result of one of a specified list of other conditions. 1 CCR 301-8, § 2220-R-2.02(6)(a) and 34 CFR § 300.309(a)(3). Presently, however, [STUDENT]'s learning problems are not due to any of those specified conditions. Although [STUDENT]'s ADHD no doubt does impact his learning problems, neither ADHD nor any form of attention deficit is included in the list of conditions specified by regulation that excuse the finding of a PCD.

Having concluded that sufficient evidence of a discrepancy between [STUDENT]'s intellectual ability and actual performance exists to warrant finding a PCD,

⁸ The parties agree that, for purposes of this appeal, the term "severe discrepancy" as used in the federal regulation is synonymous with the term "significant discrepancy" as used in the state regulation.

the ALJ must now turn to the issue of whether the District's evaluation was "sufficiently comprehensive to identify all of [STUDENT]'s special education and related services needs."

The District Has Proven That It's Evaluation Was Adequate to Identify [STUDENT]'s Special Education and Related Services Needs

The IHO found that the District's evaluation was inappropriate because it did not comply with two regulatory requirements of an appropriate evaluation. Each regulation will be addressed in turn.

34 CFR § 300.304(c)(6)

The evidence presented at the hearing was in conflict as to whether the CAT evaluation, by failing to identify [STUDENT]'s PCD, nonetheless identified his special education needs. In resolving this issue, it is critical to note that 34 CFR § 300.304(c)(6) requires the evaluation to be "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified." This language shows that the focus of the evaluation is to accurately identify the disabled child's *needs*, regardless of the label attached to the child's disability. Because it is undisputed that [STUDENT] has a disability qualifying him for special education, identifying the precise nature of that disability is less important than identifying the needs created by that disability.⁹

The evidence shows that the CAT evaluation, though not identifying a PCD, did identify the cognitive weaknesses that needed to be addressed, specifically [STUDENT]'s deficits in working memory and processing speed. It also identified the link between these deficits and [STUDENT]'s shortfalls in reading and writing fluency, and made many recommendations to address those needs. Finding of Fact #15 and #16. Thus, the CAT evaluation was sufficiently comprehensive to identify [STUDENT]'s needs within the meaning of 34 CFR 300.304(c)(6).

34 CFR § 300.305(a)(2)(iv)

The IHO also concluded that because the CAT evaluation failed to identify a PCD, "the District's evaluation could not adequately determine whether additions or modifications to the special education and related services were needed" to meet the IEP goals. Therefore the IHO concluded that the evaluation requirement of 34 CFR § 300.305(a)(2)(iv) was also not met. The ALJ cannot agree with the IHO's interpretation of this regulation.

The full text of the regulation in question reads, in pertinent part:

⁹ Although Dr. Kirk was asked, "Does it make a difference in educating [[STUDENT]] that he also has specific learning disabilities [in addition to ADHD and Bipolar Disorder]," his response did not adequately explain why the label applied to [STUDENT]'s disability is important if the child's needs are correctly identified. Tr. pp. 238-39.

(a) *Review of existing evaluation data.* As part of ... any reevaluation under this part, the IEP Team and other qualified professionals, as appropriate, must –

(1) Review existing evaluation data on the child, including –

(i) Evaluations and information provided by the parents of the child;

(ii) Current classroom-based, local, or State assessments, and classroom-based observations; and

(iii) Observations by teachers and related services providers; and

(2) On the basis of that review, and input from the child's parents, *identify what additional data, if any, are needed* to determine –

• • • •

(iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

Italics added.

Reading this section as a whole, and paying particular attention to the italicized words, it becomes evident that the evaluation is not required to determine what “additions or modifications” to the IEP are needed, but rather to review all the appropriate background data and “identify what additional data, if any” are needed to enable that decision to be made by the IEP Team.

The District's evaluation did not fail to meet this requirement because the IEP Team and its CAT evaluators reviewed all the appropriate background data, considered the parents' input, and on the basis of that input administered an additional battery of tests sufficient to identify [STUDENT]'s needs and the additions or modifications to the IEP necessary to meet those needs. Finding of Fact #18. Whether, based upon that data, the IEP modifications and additions proposed by the IEP Team are adequate to address [STUDENT]'s identified needs, is not an issue presently before the ALJ.¹⁰

Summary

Although the discrepancy model is not a categorically inappropriate approach to determining the existence of a PCD, it was inadequate in this case. Nevertheless, the CAT evaluation was sufficiently comprehensive to identify [STUDENT]'s educational needs, and provided sufficient data to address those needs. Whether the IEP in fact

¹⁰ The parents have not, at this juncture, requested a due process hearing to challenge the adequacy of the IEP.

does meet those needs is not an issue presently before the ALJ.

Because the District has shown that its CAT evaluation was appropriate, the parents are not entitled to a publicly funded IEE.

DECISION

The ALJ reverses the IHO's decision that the District's evaluation was not appropriate, and reverses the IHO's order that the District must reimburse [STUDENT]'s parents for the cost of the IEE submitted by Dr. Kirk.

This decision is the final decision on state level review. Any party has the right to challenge this decision in an appropriate court of law, either federal or state.

Done and Signed

December 28, 2007

ROBERT N. SPENCER
Administrative Law Judge