

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS OF BEHALF OF STUDENT,

v.

EAST WHITTIER CITY SCHOOL
DISTRICT.

OAH CASE NO. 2010050196

DECISION

Administrative Law Judge Adrienne L. Krikorian, Office of Administrative Hearings (OAH), State of California, heard this matter on August 17, 18, and 19, 2010, at Whittier, California.

Student was represented by Jennifer Guze Campbell, Attorney at Law. Parent's advocate Jim Campbell and Student's mother (Mother) were present on all hearing days. Student's father (Father) was present during the morning session of each hearing day. Mother and Father are sometimes referred to as Parents.

Darin W. Barber, Attorney at Law, represented East Whittier City School District (District). Attorney Jeremy Rytky and Linda Lowe, Assistant Superintendent of Student Services, were also present on behalf of District on all hearing days.

On May 4, 2010, Student filed a request for due process hearing. On May 26, 2010, Student filed an amended request for due process hearing (complaint), resetting all timelines. The matter was continued on June 30, 2010. At hearing, oral and documentary evidence were received and admitted. At the end of the hearing, a continuance was granted until September 7, 2010, to allow parties time to file closing briefs. The parties submitted their closing briefs within the time allowed, and the record was closed on September 7, 2010.

ISSUES

1. Did District deny Student a free and appropriate public education (FAPE) during the 2009-2010 school year because:

a. District failed to conduct a timely scotopic sensory sensitivity evaluation as recommended in Student's September 16, 2009 Individualized Education Plan (IEP); and

b. District failed to provide Student's parents (Parents) with prior written notice in September and October 2009, regarding the scotopic sensory sensitivity evaluation.

2. Did District deny Student FAPE during the 2009-2010 school year because:

a. District failed to timely conduct the assessments in a January 21, 2010 assessment plan; and

b. District failed to provide Parents with prior written notice regarding the January 21, 2010 assessment plan.¹

FACTUAL FINDINGS

Background and Jurisdiction

1. Student is a nine year-old girl who, at all relevant times, resided with Parents within the District and was eligible for special education services under the classification of language or speech disorder. Student attended a general education fourth grade class in the 2009-2010 school year at District's Ocean View Elementary School (Ocean View) and she received related services in speech language therapy (SL) and counseling.

September 16, 2010 IEP – Scotopic sensory sensitivity Screening

2. On September 16, 2010, Student's IEP team convened for Student's annual IEP. Those in attendance included Parents, Ocean View principal Katherine Tryon, a school psychologist, District resource specialist Daniel C. Parsons (Parsons), Student's fourth grade general education teacher Amy Cronin (Cronin), Student's speech therapist, a district program specialist, a school counselor, and Student's private clinical psychologist, Dr. Stephen Meyer.

3. Dr. Meyer, who testified at hearing, is a licensed clinical psychologist. He has a Ph.D. in clinical psychology, a master of arts in theology, and a bachelor of arts in earth science. He has been in private practice for more than 30 years. Although Dr. Meyer is not a licensed educational psychologist, 40 percent of his practice addresses educational psychology issues. Dr. Meyer conducted a psychological assessment of Student in July 2009, which included a battery of tests that are not relevant to the issues in this Decision. He did not observe Student in the classroom or interview Student's general education teachers as part of the assessment. Dr. Meyer acquired additional information about Student's

¹ The issues in the due process complaint have been restated for purposes of organizing this Decision.

educational performance at the IEP team meeting. He reported to the IEP team that Student reasoned well but processed very slowly, her skills in word reading and comprehension were average, she had a high lexile reading score, and her reading of pseudo-words was lower than average. Dr. Meyer also reported that, in his opinion, Student had weakness in the left brain hemisphere, had difficulties with word recognition and spelling, and that he viewed Student as having an expressive written language disorder with spelling dyspraxia, as well as a mild form of dyslexia.

4. Parents reported to the IEP team that Student struggled with spelling and association of letters when forming words. According to Parents, Student had difficulties with associating a sound with a letter when attempting to spell a word, with word formation, and took longer to process sounds into the written word. Parents reported that Student spent a significant amount of time on homework, including spelling, reading and writing.

5. Parsons, who did not testify at the hearing, conducted an academic evaluation on Student on June 17, 2009. Parsons administered the Woodcock-Johnson III, including reading, writing and math subtests. Student's standard scores were 102 in reading, 99 in written language, and 114 in math. Student's scores were in the high average range in broad mathematics and written expression; and average in broad reading, math calculation skills and broad written language. Parsons found no significant strengths or weaknesses among the scores for a selected set of Student's achievement areas. Student was cooperative, yet somewhat restless during the test, and during the spelling subtest she was singing, rather than speaking, as she sounded out words. Student appeared concerned about accuracy, and did an excessive amount of erasing and rewriting on the writing subtest.

6. Parsons summarized Student's test results in a written report, and reported his findings and made recommendations to Student's September 16, 2009 IEP team. He recommended that Parents: 1) have Student medically evaluated due to behaviors suggesting inattentiveness, hyperactivity and impulsiveness; and 2) consider having Student "screened" to determine whether she was affected by Irlen Syndrome. As explained by Dr. Meyers, Irlen Syndrome, also known as scotopic sensory sensitivity, is thought to be a brain-based sensitivity to light which results in visual distortions on the printed page, causing a person to expend considerably more effort on reading and writing tasks than his or her peers. Scotopic sensory sensitivity is often treated with the use of colored paper, or colored film placed over written pages. Scotopic sensory sensitivity associated with dyslexia is a controversial issue that has not yet been universally recognized by experts.

7. The IEP team recommended that Student should be screened for scotopic sensory sensitivity. Parents requested that Dr. Parsons complete the Irlen Scotopic Screening on Student.

8. At the conclusion of the IEP meeting, District offered related services in SL and counseling for the 2009-2010 school year. Parents signed the September 16, 2009 IEP, consenting to the services offered.

9. Dr. Parsons, who was the responsible District staff member, never followed through with the assessment for scotopic sensory sensitivity on Student. District did not send an assessment plan to Parents, did not send Parents prior written notice, and the assessment was never performed.

10. In December 2009, Parents contracted with the Prentice School for a private tutor, Monique Gerber (Gerber), to assist Student with articulation, reading, writing, blending and segmenting of words, and reading comprehension, using the Slingerland multisensory method. Gerber, who testified at the hearing, has a bachelor's degree from San Francisco State University in communicative disorders, and is working on a master's degree in speech therapy. She has been certified in the Slingerland method since May 2009. She has specialized training in reading, writing and spelling. Gerber worked with Student twice weekly, focusing on Student's difficulty in distinguishing between sounds, decoding words and having them understood by others, handwriting, letter formation, symbol sound relationship, and reading comprehension. On approximately four occasions, Gerber worked with Student on vocabulary lists provided by Student's general education teacher Cronin. Gerber observed that Student made progress in her spelling tests and reading comprehension while working with her. Student offered no evidence that Gerber implemented any techniques or strategies designed to address Student's possible scotopic sensory sensitivity.

11. Cronin is a credentialed teacher with a bachelor's degree in business and finance and a master of arts in education from California State University Fullerton. Cronin testified at the hearing. At the beginning of the 2009-2010 school year, Mother reported to Cronin that Student might have dyslexia and that Student had problems with spelling in third grade. Cronin implemented accommodations for Student, including providing her with a reduced number of spelling words on homework and seating her in the front of the class. Student benefited from the modifications and accommodations implemented by Cronin in the classroom.

12. Student was one of two top academically performing students in Cronin's fourth grade class of 30 students. Student occasionally required additional time to complete written assignments. Her scores on the California Standardized Testing and Reporting (STAR) Program testing given in Spring 2010, which was not timed, were 507 out of 600 possible in English-Language arts and 462 out of 600 possible in Mathematics. Student's scores were within the advanced level. She completed the STAR testing within the average time range of all of Cronin's students who took the exam with Student and did not require additional time. Student performed at grade level in the classroom in all areas except spelling and memorization of math facts, where her test scores were "basic" throughout the 2009-2010 school year, meaning she needed improvement. She reacted quickly in class when asked for a response, and was good at recognizing word patterns and misspelled words. Student knew her math facts, but took longer to process them during timed tests. Student interacted socially with her peers, both in class and during recess; she got along well with other students; and she did not seek solitary activity on the playground.

13. Student's performance on spelling tests improved during the 2009-2010 school year. Cronin learned in the spring of 2010, that Student was working with a tutor. She had no direct contact with Gerber, did not know the extent of Gerber's work with Student, or to what extent Gerber's work with Student impacted Student's grades. Cronin observed Student making progress in all subjects during the fourth grade.

14. Mother testified at hearing. She spent a considerable amount of time with Student working on homework during the 2009-2010 school year. She reported that Student was very conscientious and was meticulous about her school work. Mother often emailed Cronin about the work Mother was doing with Student at home, about her concerns about Student's processing speed and about Student's progress in reading comprehension. Cronin regularly responded to Mother's communications about Student's homework schedule, and made modifications and accommodations to Student's homework assignments in response to Mother's concerns. Mother offered no testimony that established that the District's failure to conduct the scotopic sensory sensitivity assessment after the September 16, 2009 IEP team meeting significantly impeded Parents' ability to participate in Student's IEP.

15. On January 12, 2010, Student's attorney notified District's counsel that all correspondence and communications relating to Student's special education matters be directed to Student's attorney. Elisa Yasutomi (Yasutomi) has been Director of Special Education for the District since 2008. She credibly testified that she interpreted the January 12, 2010 directive from Student's counsel to mean that District staff should not directly communicate with Parents regarding Student's special education issues.

January 16, 2010 IEP Team Meeting

16. Student's IEP team met on January 6, 2010, to discuss District's recent assessments of Student in occupational therapy (OT) and adaptive physical education (APE), which are not at issue in this matter. Parents, Tryon, Cronin, student's school psychologist, student's speech therapist, an APE teacher, an occupational therapist, a program specialist, District's attorney, Parents' two advocates and Student's attorney were present.

17. After discussion regarding District's OT and APE assessments, Parents' advocates raised additional concerns, including Student's social behaviors at school, whether informal scotopic screening had been completed, whether any form of assistive technology evaluations had been completed, extensive time spent by Student at home on homework, and whether Student was receiving school-based counseling.

18. The IEP team agreed that a formal scotopic screening would address Parents' concerns over whether Student had dyspraxia, as opined by Dr. Meyer at the September 16, 2009 IEP. Parents' advocate requested a psycho-social assessment, to which the IEP team agreed. The IEP team also agreed to Student's advocates' request to conduct an assessment for assistive technology.

19. During January 2010, Cronin reviewed Student's homework habits based upon Parents' concern that Student was spending too much time at home on homework because of her weakness in processing speeds. Cronin modified Student's homework by prioritizing each week's homework so Student would spend no more than one hour on homework. Student's grades were not penalized or affected if she did not complete all of her homework because of lack of time. Student continued to academically perform at the top of her class.

January 21, 2010 Assessment Plan

20. On January 21, 2010, District's counsel sent an assessment plan (Assessment Plan) to Student's counsel accompanied by a letter requesting that Parents provide written consent to the Assessment Plan. The Assessment Plan identified Student's name, and checked boxes for evaluation areas in social/emotional/adaptive behavior, assistive technology, and scotopic sensory sensitivity. The Assessment Plan identified that the social/emotional/adaptive behavior assessment would be performed by a school counselor. The assistive technology assessment would be performed by an assistive technology specialist, and the scotopic sensory sensitivity screening by a special education teacher.

21. Mother required clarification and more detail regarding the District's proposed assessments after she received the Assessment Plan from the District. On January 25, 2010, Student's counsel wrote to District's counsel requesting that additional details, including a description of the battery of tests, be added to each of the three proposed assessments, and that the description of the scotopic sensory sensitivity "screening" be changed to scotopic sensory sensitivity "assessment."

22. On February 18, 2010, District's counsel wrote to Student's counsel, responding to her January 25, 2010 letter. He offered clarification of the assessment batteries that may be utilized, reserving District's right to add additional tests as warranted by the test results. He also requested that Parents reconsider "providing consent to the January 21, 2010 Assessment Plan, along with the information set forth in the letter concerning the assessment battery proposed by the District for Student." District's counsel requested that Parents sign, date and check the section indicating consent on the Assessment Plan, without modification, and return it to the District Special Education Office. District's counsel enclosed another copy of the Assessment Plan with his letter.

23. On March 1, 2010, Student's attorney responded to the February 18, 2010 letter by stating "[w]e hereby consent to the [District] Assessment Plan for [Student], as modified by your letter of February 18, 2010 (the "Amended Assessment Plan")." The letter also stated that "[w]e hereby reserve all rights and remedies with regard to the Amended Assessment Plan." The letter was signed by Student's attorney. The letter did not enclose a signed copy of the Assessment Plan. Mother, who testified at the hearing, believed that she had consented to the Assessment Plan through her attorney's March 1, 2010 letter. Student offered no evidence that Parents ever signed the Assessment Plan.

24. On March 3, 2010, Yasutomi sent a letter to Student's advocate advising that District had received Parents consent to the Assessment Plan, and that a tentative IEP team meeting scheduled for March 15, 2010, was cancelled and would be rescheduled upon completion of the assessments called for in the Assessment Plan. Yasutomi's March 3, 2010 letter was written for the sole purpose of re-scheduling the post-assessment IEP team meeting because the three proposed assessments had not yet been completed. At the time she wrote the letter, Yasutomi believed that the District had received from Parents a signed Assessment Plan. However, after causing the letter to be mailed, she learned from District's counsel on the same day that the District had not received a written consent on the Assessment Plan, but instead the District had received the March 1, 2010 letter from Student's counsel.

25. After reviewing the March 1, 2010 letter from Student's counsel, Yasutomi did not have a clear understanding of the extent and scope of Parents' consent from the March 1, 2010 letter. She did not understand what the term "first amended assessment plan" referred to. District's custom and practice was to move forward with an assessment only after parents agreed with what the scope of the assessment will be. Typically, Yasutomi would have clarified Parents intent regarding consent by talking to Parents. However, here, Yasutomi reasonably understood Student's counsel's January 12, 2010 directive to mean that all communication regarding Student's special education needs must go through the attorneys. Therefore, after consulting with District's counsel, on March 3, 2010, Yasutomi requested District's counsel to send a letter requesting clarification on whether Parents consented to the Assessment Plan.

26. On March 3, 2010, District's counsel sent a letter to Student's counsel acknowledging receipt of the March 1, 2010 letter granting consent to the "amended assessment plan" and requesting confirmation of the scope of consent. District also declined permission for Student to video or audio record assessments offered in the January 21, 2010 assessment plan, for Parents to observe the assessments, or to conduct the assessments using observation methods requested by Parents.

27. District received no written response to District counsel's March 3, 2010 letter requesting confirmation of Parents' consent to the Assessment Plan. No evidence was offered by either party that any face-to-face or telephonic conversations took place between the parties' attorneys or Student's advocates and District regarding Parents' consent. At no time did Parents sign the Assessment Plan and return it to the District. District did not perform assessments on Student in the areas of in social/emotional/adaptive behavior, assistive technology, and scotopic sensory sensitivity.

28. On May 4, 2010, Student filed a request for due process alleging that District failed to conduct the assessments called for in the September 16, 2009 and January 6, 2010 IEP team meetings. Yasutomi followed up with a letter scheduling a resolution session, which took place on or about May 19, 2010. Mother and two advocates attended on behalf of Student. Yasutomi asked Mother and her advocates whether Mother would consent to the Assessment Plan. Mother and the two advocates declined to provide written consent to the

Assessment Plan. Mother's recollection of the May 19, 2010 resolution session was that Yasutomi asked Parents to re-grant consent to the Assessment Plan. Mother did not have documents in her possession at that time to confirm that she had already given consent to the Assessment Plan and therefore declined to give a new consent.

29. On May 26, 2010, Student filed an amended request for due process, alleging that District failed to conduct the assessments recommended in the September 16, 2009 IEP and proposed in the Assessment Plan.

LEGAL CONCLUSIONS

1. In Issue One, Student contends that District denied her a FAPE after the September 16, 2009 IEP team meeting, because District failed to perform a scotopic sensory sensitivity assessment on Student as recommended by the IEP team and District failed to provide Parents with prior written notice. Student contends that as a result of District's failure to provide Student with a scotopic sensory assessment, Parent hired a private tutor for Student to assist with reading and writing; and District denied student related services to address her unique needs. Student also contends in the complaint that District's failure to assess Student in scotopic sensory sensitivity seriously impeded Parents' ability to make decisions regarding Student's IEP. Student seeks compensatory damages, including reimbursement for private tutoring expenses, related services and assistive devices. In Issue Two, Student contends that District denied her a FAPE after the January 6, 2010 IEP team meeting because District failed to conduct the assessments in the Assessment Plan and failed to provide prior written notice. Student contends that as a result of these failures, District denied Student a FAPE by not providing related services to address her unique needs in assistive technology, social/emotional behavior, and scotopic sensory sensitivity.

2. As to Issue One, District contends: 1) that although it inadvertently neglected to perform a scotopic sensory assessment on Student after the September 16, 2009 IEP, it agreed to do so, and therefore prior written notice was not required, particularly after it agreed to do so again at the January 6, 2010 IEP; 2) that Student was academically performing at grade level with high scores throughout the 2009-2010 school year; 3) that Parents and their attorney and advocates meaningfully participated in Student's 2009-2010 IEPs; and 4) that Student was not deprived of an educational benefit or a FAPE as a result of District's failure to conduct the scotopic sensory screening. As to Issue Two, District contends that Parents did not provide clear and unconditional written consent to the Assessment Plan, and that District could not perform assessments in assistive technology, social/emotional behavior and scotopic sensory sensitivity without written parental consent. District contends that, if the March 1, 2010 letter from Student's counsel constituted parental consent, District did not deny Student a FAPE because, notwithstanding District's failure to assess Student in accordance with the Assessment Plan, Parents along with their attorney and advocates meaningfully participated in Student's 2009-2010 IEPs, Student received an educational benefit during the 2009-2010 school year and was one of the two top performing students in Student's fourth grade classroom.

Applicable Law

3. As the petitioning party, Student has the burden of proof on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

4. A child with a disability has the right to a FAPE under the Individuals with Disability Education Act (IDEA). (20 U.S.C. § 1412(a)(1)(A); Ed. Code, §§ 56000, 56026.) FAPE means special education and related services that are available to the student at no cost to the parent or guardian, meet the state educational standards, and conform to the student's IEP. (20 U.S.C. § 1401(9); Ed. Code, § 56031; Cal. Code Regs., tit. 5, § 3001, subd. (o).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29).) The term "related services" (in California, "designated instruction and services"), includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a).)

5. In *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204, 207; *Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1031.)

6. A local educational agency must assess a special education student in all areas of suspected disability. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304 (c)(4) (2006)²; Ed. Code, § 56320, subd. (f).) A local educational agency must ensure that a reevaluation of each child with a disability is conducted if the child's parent or teacher requests a reevaluation. 34 C.F.R. § 300.303(a)(2). In order to assess or reassess a student, a school district must provide proper notice to the student and his or her parents. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental and procedural rights under the IDEA and state law. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must be understandable to the student, explain the assessments that the district proposes to conduct, and provide that the district will not implement an IEP without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).) The proposed written assessment plan must contain a description of any recent assessments that were conducted, including any available independent assessments and any assessment information the parent requests to be considered, information about the

² All citations to the Code of Federal Regulations are to the 2006 edition.

student's primary language and information about the student's language proficiency. (Cal. Code Regs., tit. 5, § 3022.)

7. A public agency must obtain informed written parental consent prior to conducting any reevaluation of a child with a disability. 34 CFR §300.300(c)(1)(i). A school district must give the parents and/or the student 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

8. In matters alleging a procedural violation, a due process hearing officer may find that a child did not receive a FAPE only if the procedural violation did any of the following: impeded the right of the child to a FAPE; significantly impeded the opportunity of the parents to participate in the decision-making process regarding the provision of a free appropriate public education to the child of the parents; or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484 (*Target Range*).) The hearing officer "shall not base a decision solely on nonsubstantive procedural errors, unless the hearing officer finds that the nonsubstantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian to participate in the formulation process of the individualized education program." (Ed. Code, § 56505, subd. (j).)

9. If a procedural violation is found to have significantly impeded the parents' opportunity to participate in the IEP process, the analysis does not include consideration of whether the student ultimately received a FAPE, but instead focuses on the remedy available to the parents. (*Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892-895 [school's failure to timely provide parents with assessment results indicating a suspicion of autism significantly impeded parents right to participate in the IEP process, resulting in compensatory education award]; *Target Range, supra*, 960 F.2d at pp. 1485-1487 [when parent participation was limited by district's pre-formulated placement decision, parents were awarded reimbursement for private school tuition during time when no procedurally proper IEP was held].)

10. IDEA and federal regulations require a school district to provide written notice to parents before they initiate or refuse a change in a student's identification, evaluation, or educational placement. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503.) Specifically, the written notice must contain: (A) a description of the action proposed or refused by the agency; (B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; (C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; (D) sources for parents to contact to obtain assistance in understanding the provisions of this subchapter; (E) a description of other options considered by the IEP Team and the reason why those options were rejected; and (F) a description of the factors that are relevant to the agency's proposal or refusal.

Analysis of Issue One – Scotopic sensory sensitivity assessment

11. Here, Student met her burden of establishing that District committed a procedural violation of IDEA when it failed to conduct the scotopic sensory sensitivity assessment following the September 16, 2009 IEP. The facts are undisputed that District neglected to follow through with Student's September 16, 2009 IEP team recommendation for a scotopic sensory sensitivity screening. District agreed to conduct the assessment, special education teacher Parsons neglected to send Parents an assessment plan, and the assessment never occurred before the January 6, 2010 IEP team meeting. On January 6, 2010, upon discovering that Parsons had not performed the scotopic sensory sensitivity assessment on Student, District again agreed to conduct the assessment.

12. However, Student failed to meet her burden of demonstrating, by a preponderance of the evidence, that either 1) the procedural violation significantly impeded Parents' opportunity to participate in the IEP process; 2) that Student was deprived of an educational benefit, or 3) that Student was deprived of the right to a FAPE.

13. Parents actively participated in Student's September 16, 2010 IEP, including requesting that District assess Student for scotopic sensory sensitivity. Thereafter, Mother regularly emailed Student's teacher about Student's homework and Student's progress in school and her concerns about Student's processing speed in reading and spelling. Mother received regular feedback from Cronin regarding Student's progress. Student offered no evidence that established that Parents' ability to participate at the January 6, 2010 IEP was impeded because District did not conduct the scotopic sensory sensitivity screening. On the contrary, Parents and their attorney and advocate actively participated in that meeting.

14. Student similarly offered no evidence that she was deprived of an educational benefit or the right to a FAPE. The evidence showed that District provided Student with a program that was reasonably calculated to provide some educational benefit during the 2009-2010 school year, which is all the IDEA requires. Although Parents hired Gerber as a tutor for Student to help with her reading and spelling homework, Student offered no evidence that Gerber observed symptoms of scotopic sensory sensitivity in Student, that Gerber worked with Student to alleviate the effects of suspected scotopic sensory sensitivity, or that District's failure to perform the scotopic sensory sensitivity assessment negatively impacted Student's education. To address Student's slow processing time in reading comprehension, Cronin modified Student's homework schedule after Student's January 6, 2010 IEP. Student suffered no negative impact on her grades or report card as a consequence of the homework modification. Student continued to perform above average in most subjects and made progress in her reading and spelling. By the end of the school year, Student was one of the top two academically performing students in her fourth grade class of 30 students, she scored in advanced levels in both parts of the STAR testing in the spring of 2010, she performed at grade level in most of her subjects, and she made progress throughout the year in all subjects, including spelling.

15. Student has not met her burden of establishing that District denied Student a FAPE in the school year 2009-2010 by failing to conduct an assessment for scotopic sensory sensitivity after the September 16, 2009 IEP team meeting. (Factual Findings 1-14, 16, 18, 19; Legal Conclusions 3-15.)

Analysis of Issue Two – January 21, 2010 Assessment Plan

16. Here, a dispute exists over whether or not Parents consented in writing to the Assessment Plan. Student contends that Student’s attorney’s March 1, 2010 letter constitutes written consent. District contends that the March 1, 2010 letter did not provide unconditional consent to the Assessment Plan, and that Parents never signed the Assessment Plan.

17. Student has failed to establish by a preponderance of evidence that Parents consented to the Assessment Plan. On the contrary, the Assessment Plan as offered was adequate and complied with statutory requirements. Parents attempted to modify the Assessment Plan and Parents never signed the Assessment Plan. Therefore no consent to the Assessment Plan, as offered by the District, actually occurred. Under the IDEA, District could not proceed with the assessments absent clear and unambiguous consent.

18. In particular, on January 25, 2010, through counsel, Parents requested clarification regarding the scope and battery of tests that District was proposing to conduct. Parents requested that the Assessment Plan be modified per counsel’s letter. District responded through counsel, clarifying the battery of proposed tests and again requesting that Parent sign the Assessment Plan form, without modifications.

19. Student’s counsel responded in a letter dated March 1, 2010, purportedly consenting to the Assessment Plan, but conditioning consent on inclusion of modifications referenced in District’s February 21, 2010 letter. Yasutomi credibly testified that, after reading Student’s counsel’s March 1, 2010, she did not understand to what terms Parents were consenting. She requested clarification, through District’s counsel’s March 3, 2010 letter.

20. Student’s contention that its March 1, 2010 counsel letter was clear and unambiguous consent to the Assessment Plan was not supported by the evidence. Student’s counsel’s March 1, 2010 letter was ambiguous as to what terms were included in the purported consent. It referred to the term “as modified” by District’s February 21, 2010 letter from District’s counsel but did not provide specifics. In addition, the letter referred to an “amended assessment plan,” the terms of which were unspecified. Student’s counsel never responded to District’s counsel’s March 3, 2010 letter which asked for clarification of the terms of consent. From March 1, 2010, until filing a complaint for due process on the Assessment Plan in early May 2010, Parents’ advocates and Student’s attorney did not communicate with District staff or counsel regarding the Assessment Plan or to clarify the scope of Parents’ consent. Parents similarly did not communicate with District staff regarding the Assessment Plan, instead relying upon their attorney’s communications. As a result, Student was not assessed. At the May 19, 2010 resolution session on the original

complaint filed in this matter, Yasutomi asked again for unconditional written consent to the January 21, 2010 Assessment Plan. Mother and her two advocates refused to provide written consent or to confirm that Parents had consented unconditionally to the Assessment Plan as offered on January 21, 2010.

21. Even without the assessments, Student made progress during the 2009-2010 school year, scored above average on STAR testing without the need for additional time, performed academically at the top of her class, and received an educational benefit at Ocean View. Student did not establish that, if the assessments had been performed, Student's educational program would have been different. Student received an educational benefit in the 2009-2010 school year.

22. In sum, because Student failed to meet her burden of establishing that the Assessment Plan was inappropriate, or that Parents had consented to it, Issue Two has no merit. The District was not required to provide the assessments or prior written notice for an assessment plan to which Parents never consented. (Factual Findings 1, 11-13, 15-29; Legal Conclusions 3-10, 16-22.)

ORDER

All of Student's claims for relief are denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. District prevailed as to all issues that were heard and decided in this case.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety days of receipt.

Dated: October 1, 2010

/s/

ADRIENNE L. KRIKORIAN
Administrative Law Judge
Office of Administrative Hearings