

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

EAST WHITTIER CITY SCHOOL DISTRICT  
AND WHITTIER AREA COOPERATIVE  
SPECIAL EDUCATION PROGRAM.

OAH CASE NO. 2010010568

DECISION

June R. Lehrman, Administrative Law Judge (ALJ), Office of Administrative Hearings, heard this matter on March 30, and April 1, 2010 in Whittier, California.

Jennifer Guze Campbell, Attorney at Law, of the Special Education Law Firm, represented Parent on behalf of Student. Parent attended the hearing on all days.

Darin Barber, Attorney at Law, represented Respondents East Whittier City School District (District) and Whittier Area Cooperative Special Education Program (WACSEP). Linda Low, Assistant Superintendent for Student Services for District, attended the hearing on all days. Sherri Mudd, Executive Director of WACSEP, attended the hearing on March 30, 2010. Jacqueline Bikov, School Psychologist and Program Specialist, attended the hearing for WACSEP on April 1, 2010.

Parent filed the Due Process Hearing Request (complaint) on January 12, 2010. On February 24, 2010, OAH ordered the hearing continued for good cause on Student's motion. At hearing, the parties were granted permission to file written closing arguments by April 15, 2010. Upon receipt of the written closing arguments, the matter was submitted and the record was closed.

At hearing, WACSEP moved to be dismissed as a party, arguing that no allegations were raised against it. The ALJ took the motion under submission, and now finds that the motion is well taken. No evidence was presented that WACSEP participated in District's decision-making. The sole issue in this matter relates to District only. The motion to dismiss WACSEP as a party is therefore granted.

## ISSUE

Did District deny Student a free and appropriate public education (FAPE) for the 2009-2010 school year by denying Student a central auditory processing disorder (CAPD) assessment, as requested by Parent?<sup>1</sup>

## FACTUAL FINDINGS

### BACKGROUND

1. Student is a nine-year-old girl who resides with both parents within the District's boundaries. She qualifies for special education and related services under the speech and language impairment eligibility category. Currently she attends fourth grade in the general education classroom at a District elementary school, with accommodations and Speech/Language services, consisting of individual and group speech therapy once per week.

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<sup>1</sup> Parent also seeks a finding on an issue not raised in the complaint: "Did District protract the final resolution of Petitioner's complaint by bringing inappropriate participants to the March 15, 2010 Resolution Session?" At hearing, the ALJ allowed this to be stated as an issue and took evidence pertaining to it. However, on deliberation, the ALJ finds this issue to be outside the complaint. Pursuant to Education Code section 56502, subdivision (i), it is therefore not within the scope of this hearing.

2. Student's initial assessments and IEP took place in December 2007, during second grade. Christine Dedmon, District Speech and Language Pathologist, testified that Parents were concerned at that time that Student was shy and had trouble with speech sounds. Ms. Dedmon felt Student was age-appropriate, but evaluated her. Student was found eligible under the category of speech and language impairment because she had trouble with articulation of the "sh," "ch" and "r" sounds.

3. Student's third grade teacher for the 2008-2009 school year, Lorilyn Quinn, considered Student to be bright, capable and a high-achiever, who worked hard and attained good grades. In her fourteen years as a teacher, Ms. Quinn has worked with students who had auditory processing difficulties. She does not have the expertise necessary to determine whether or not Student should be evaluated for CAPD. However, Student never appeared to Ms. Quinn to have difficulty understanding what was being said to her. Student could follow directions, conversations and instructions. Ms. Quinn believed that Student was a perfectionist, a hard-worker, diligent and meticulous.

4. Student's third grade report card reflected "proficient" marks in all trimesters in all areas except spelling and math, where she scored "basic" for the second trimester in math, and the second and third trimester in spelling. Overall these reflected an A- average for the year. About one-third of all Ms. Quinn's students have difficulty with spelling. Ms. Quinn's "teacher comments" on the third grade report card reflected that: Student asked the meaning of words she did not understand rather than using contextual clues to figure it out, and that she struggled with spelling.

5. Student's STAR report from the Spring 2009 semester, while she was in third grade, indicated a score of 422 in Language Arts, where scores between 402-600 indicate "advanced" achievement. The STAR exam "content areas" reflected that Student scored 100% in word analysis and vocabulary development; 87% in reading comprehension; 100% in literary response and analysis; 92% in written conventions; and

67% in written strategies. The STAR report defined "written strategies" as: "Students write clear, coherent sentences and paragraphs that develop a central idea. Their writing shows they consider the audience and purpose. Students progress through the stages of the writing process (e.g., prewriting, drafting, revising, editing successive versions)." Student also got a perfect 600 on her STAR report in Mathematics. School Principal Katheryn Tryon testified that of the 580 students at the school who took the STAR exams last year, only six, including Student, received a perfect score in math.

6. Parents believe Student has disabilities that keep her from excelling. Mother testified that Student struggled with spelling and math. Mother testified that unidentified teachers have expressed concern that Student had difficulty following directions. Mother explained Student's good grades as being the result of tremendous effort on Student's part, supplemented by Parent and tutor support. She stated that the STAR exams are multiple-choice and are untimed. Student does well if given enough time but her difficulties increase when under time pressure. Mother interpreted this as being a result of Student's "processing problems." Mother insisted that Student is "not a good reader." Mother works with Student on her reading every night. She pointed to the facts that Student's overall 422 STAR score in Language Arts was "just barely" advanced, and that Student scored only 67% on "written strategies."

7. Mother further stated that Student has difficulties with her abilities to retain information just heard, recently heard and heard in the past. For example, when asked to define the word "green," Student may say "she cannot remember but it is like the grass." Student may complain that she cannot recall words "when she needs them for later." She cannot find words she is searching for. She may ask her mother to explain a word that was just said, but the word Student asks about is a nonsense word and not the word that was actually just said. In the only testimony Mother offered regarding

what services might be provided to address her concerns, Mother simply stated that she did not feel Student had received all the services to which she may have been entitled.

8. In spring 2009, during Student's third grade year, Parents requested comprehensive assessments specifying, among other concerns, the area of auditory processing. On May 6, 2009, Parents consented to a comprehensive triennial assessment for Student, including assessments for communication skills and auditory perceptual skills, to be conducted by a speech/communication specialist and a psychologist.

9. School psychologist Dr. Jean Nielsen performed a psycho-educational assessment on May 20, 22 and 26, 2009, resulting in a report dated June 28, 2009. Dr. Nielsen was not called to testify concerning her report. The report stated that its purpose was to address Parents' concerns about Student's spelling and auditory processing. Dr. Nielsen interviewed Student and performed the following assessments and diagnostic procedures: Comprehensive Test of Phonological Processing (CTOPP); Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV); Bender II Test of Visual-Motor Integration; Connors' 3 Rating Scales; and Behavior Assessment Scale for Children (BASC-2). The CTOPP and WISC-IV instruments are pertinent to the auditory processing issue.

10. CTOPP is a measure of phonological processing, defined as "the type of auditory processing that is most strongly related to mastering reading and written language." Student's CTOPP scores were above average, except her "memory for digits" score was below average. Student was able to remember only 4 digits in forward order and 3 digits in reverse order. She was able to retain numbers up to 5 digits, but not in the correct sequential order.

11. The WISC-IV assesses cognitive functioning, including verbal functions divided into Verbal Comprehension and Auditory Working Memory. Verbal Comprehension is defined as the ability to reason with previously-learned information.

Student scored above average on Verbal Comprehension. Auditory Working Memory is defined as a measure of short-term memory that represents Student's ability to apprehend and hold or transform information in immediate awareness, and then to use it within a few seconds. Student scored average overall on Auditory Working Memory. The Auditory Working Memory Index was further divided into two subtests: Arithmetic (solving oral arithmetic problems), on which Student scored average, and Digit Span (repeating numbers in forward and backward order) on which she scored low-average, specifically because she was only able to repeat a sequence of up to 4 numbers in forward order and 3 numbers in reverse order.

12. From these results, Dr. Nielsen concluded that Student scored high-average in verbal comprehension, and average on phonological processing. Dr. Nielsen concluded that Student's arithmetic computation skills are "better when she can see the math problems and does not have to rely on her auditory memory;" Student's "weaker area, which was low-average, was in rote repeating number sequences read to her." Student was also reported to have difficulty with the sounds "sh," "ch" and "r," but no difficulty listening to words and omitting certain sounds from them, for example by saying "winter," then removing the "t" and saying "winner." Student was reportedly of average ability in repeating nonsense words back correctly.

13. The Nielsen report Summary states: "[Student] has more difficulty with auditory Sequential Processing. [Student] is able to repeat and sequence only up to 4 digits forward and 3 digits in reverse order. She can remember up to 5 numbers but not order them in the correct sequence. She has difficulty hearing some sounds in words and sequencing the sounds correctly." The report did not recommend a CAPD assessment. It recommended "[c]onsultation with the family doctor regarding suggestions for attention deficits with high activity levels and distractibility."

14. Parents pursued a psychological assessment through a private clinical psychologist, Stephen G. Meyer, Ph.D. (Dr. Meyer), who performed the assessment on July 6, 13, 20, 21, 27 and 30, 2009. The assessment resulted in an undated report, which Parents received in late August of 2009. The report indicated that Parents sought an augmentation of the Nielsen report "in order to gain a fuller understanding of academic and social difficulties."

15. Dr. Meyer was not called to testify concerning his report, which indicated that Dr. Meyer observed Student, and administered the following tests: Wechsler Individual Achievement-II (WIAT-II) and Halstead Reitan Neuropsychological Test Battery for Older Children (including Aphasia Screening Test (AST); Trail Making (TM); Category Test-Mid Range (CT); Tactual Performance Test (TPT); Reitan-Klove Sensory Perceptual Exam (RSKP); Tactile Finger Recognition (TFR); Finger Tapping Test (FTT); Speech Sounds Perception Test (SPT); and Seashore Rhythm Test (SRT)). Dr. Meyer also noted the results of the prior assessments conducted by Dr. Nielsen.

16. The WIAT-II measures basic academic skills. Student scored average in reading and low-average in math and written language.

17. The neuropsychological test battery and its subtests are used to detect brain injury or mild forms of dysfunction within the brain. On the TFR subtest, which evaluates the posterior or parietal area of the brain through tactile perception, Dr. Meyer found a "moderate dysfunction in the parietal area as a whole with relatively more dysfunction in the left versus the right hemisphere." On the SPT subtest, which measures auditory perception and concentration related to the temporal areas of the brain, Dr. Meyer found a "mild dysfunction." In his report, Dr. Meyer opined that Dr. Nielsen's test results on the WISC-IV "mask a significant difference between reasoning ability and the processing of oral verbal and symbolic information." Dr. Meyer relied on the Nielsen results pertaining to Working Memory Index, on which Student scored low-

average in the Digit Span test. Dr. Meyer opined that while Student “reasons very well, it is very difficult for her to track oral instruction and the processing and writing of written symbolic information is very slow.” His recommendations included: “4. Evaluation of a central auditory processing disorder (CAPD) that is hindering phonemic discrimination in the parietal-temporal area [in] the brain.”

18. In September 2009, Ms. Dedmon performed a battery of tests. Ms. Dedmon has known Student since kindergarten and describes her as “very fun, quiet, careful, thoughtful, not frivolous, a very hard worker” and “bright, smart, just a great little girl.” Ms. Dedmon has a bachelor’s degree in speech and hearing sciences; a master’s degree in speech and language pathology; a California state license in speech and language pathology; a certificate of clinical competence from the American Speech Language Hearing Association; and 26 years of experience in the field including the conduct of numerous assessments. Her education, training and experience qualify her as an expert in the definition of CAPD and its symptoms, although only an audiologist can actually diagnose the condition.

19. Ms. Dedmon testified that CAPD involves the transmittal of auditory signals to the brain such that, although the ear itself may be functioning normally, a distorted message is received. The symptoms include difficulty following directions; mistaking which ear sound is coming through; problems distinguishing words like “pass” from “past,” “dime” from “time,” and the like; and problems understanding tone of voice. Some professionals also include language processing disorders within the definition of CAPD.

20. One of the tests Ms. Dedmon administered was the Differential Screening Test for Processing (DSTP). DSTP is a relatively new test, first published in 2006. It was standardized on over 500 children and is used to determine if there is reason to suspect a disability in the area of auditory processing. It is divided into subtests that measure:

brain processing of auditory information from the left and right ears; recognition of acoustic patterns; ability to analyze differences among speech sounds; phonemic and phonic manipulation (sound recognition and sound-symbol association); and the ability to recognize antonyms, omissions and tone of voice. The results showed no areas of deficit in auditory processing. Student scored well above the cutoff scores in each subtest.

21. Ms. Dedmon's qualifications were appropriate to administer the test; she read the manual and followed the prescribed testing protocols; and she scored the test correctly using the age-appropriate raw scores. Ms. Dedmon is not aware of the "miss rate" of the DSTP but acknowledged that all tests do have a "miss rate." However, Ms. Dedmon was not concerned that Student's deficits were missed by the DSTP because Student's performance is above average in the classroom, and her teachers do not indicate auditory processing as an area of any concern.

22. Of the three reports (Dr. Nielsen's, Dr. Meyer's and Ms. Dedmon's), Ms. Dedmon was the sole author to be called to testify, and the sole witness with qualifications sufficient to opine on the others.

23. At hearing, Ms. Dedmon was plausibly critical of Dr. Meyer's report in many respects, including: no standardization used; incorrect rate on one subtest and correct rate on another; no comparison with other members of Student's age group; and no normative data or standardized scores. Overall, Ms. Dedmon opined that Dr. Meyer's report showed that he did not have a depth of knowledge in this area or that he was justified in his recommendation that Student should be referred for CAPD assessment.

#### SEPTEMBER 16, 2009 IEP MEETING

24. The three reports were presented and discussed at an IEP team meeting on September 16, 2009. Parent attended the meeting and expressed concern over

Student's spelling. Dr. Meyer attended the meeting, explained his views and presented his report. Dr. Meyer opined that Student reasoned well, but processed slowly and had difficulty tracking oral instruction, processing and writing of symbolic information. He stated that from his academic assessments, Student's math, reading and word comprehension were average but spelling was low-average. Dr. Meyer shared the results of his neuropsychological assessments, which found that Student was bright, had weakness in the left hemisphere, and had difficulties with word recognition and spelling. He diagnosed her with expressive written language disorder and dyspraxia.

25. Ms. Dedmon, also in attendance, explained her test results, and explained her disagreement with Dr. Meyer. Ms. Dedmon reported the results of the DSTP screening and expressed that Student had scored above the cutoff in all areas for further referral for central auditory processing disorder. Ms. Dedmon reported that Student had also performed well on test measures of receptive and expressive language, and on listening comprehension.

26. Student's fourth grade teacher for the 2009-2010 school year, Amy Cronin, was a member of the IEP team at the September 19, 2009 meeting. Ms. Cronin saw Dr. Meyer's report recommending a CAPD assessment. She supported the team's decision to deny a CAPD assessment.

27. Except for Mother and Dr. Meyer, the IEP team as a whole did not feel that auditory processing was an area of suspected disability. The team offered placement in the general education classroom with weekly speech and language instruction, and classroom accommodations including extra time for classroom projects.

28. Mother consented to the September 16, 2009 IEP; however the issue of a CAPD assessment was not resolved.

## JANUARY 6, 2010 IEP AMENDMENT MEETING

29. An IEP amendment meeting took place on January 6, 2010. Parents were represented by an IEP advocate and two attorneys. The meeting lasted over five hours.

30. Ms. Cronin, Dr. Nielsen and Ms. Dedmon attended. In response to Parent's concern that Student lacked speech fluency, Dr. Nielsen stated that Student used language precisely and had good vocabulary. Ms. Dedmon stated that Student was receiving sufficient speech services to meet her needs. Ms. Cronin shared that Student was not slow in her oral delivery in the classroom. At hearing, Ms. Cronin testified confidently, forcefully and credibly, that Student had no difficulty reading or understanding what was read to her. Student did very well on oral problems and directions, and never needed to have things repeated. Student was a highly-motivated learner, very detail-oriented and meticulous; a perfectionist, who achieved high academic performance in almost all areas of the curriculum. Student was one of Ms. Cronin's highest performing students. Student scored "basic" or "proficient" in all academic areas on her report card for the first trimester of the fourth grade, where Ms. Cronin noted Student's outstanding progress in reading comprehension and written language. Student scored 891 out of 900, at the top of the fourth grade range, on her "lexile level" quizzes, which are reading comprehension tests. Student could follow oral directions and understand conversations; she did what she was told in class. Ms. Cronin has in the past had, and still has, other students who cannot follow directions, but Student is not among these. Ms. Cronin does not think nor suspect that Student has an auditory processing disorder, although she does acknowledge that Student has difficulty with spelling.

31. At the meeting, Parents stated that they felt Student needed a CAPD assessment based on Dr. Meyer's recommendation. District formally declined, finding that Student did not demonstrate the need. Relying on Ms. Dedmon's DSTP screening,

Student's records and teacher input, the team found that Student was not a candidate for a CAPD assessment.

32. District's offer of a FAPE was placement in the general education classroom with weekly speech and language instruction, counseling services, and classroom accommodations. Parents did not consent to the January 6, 2010 IEP.

33. On January 22, 2010, District sent Mother a letter declining the CAPD assessment request.

### SUBSEQUENT REPORTS

34. Two subsequent reports were prepared by private providers after the IEP meetings at issue here. The first is a Pediatric Audiological Evaluation by clinical audiologist Hsin-Yi Yang, undated but regarding a testing date of December 23, 2009. This report indicated that Mother reported Student as "having difficulty with reading, writing and following/understanding verbal instructions," as well as "slow processing speed and difficulty interpreting verbal messages." This audiologist found normal hearing in both ears, some normal acoustic reflexes, and some absent acoustic reflexes. The report included the following recommendation: "Due to academic difficulty and reported symptoms, a battery of Auditory Processing tests by a specialized audiologist is recommended to rule out Auditory Processing Disorder."

35. The second report was a Speech and Language Evaluation dated February 23, 2010, conducted by Samantha McComb, a private speech and language pathologist. This report recommended an audiological evaluation to rule out CAPD due to "difficulty with phonemic discrimination." The report did not define the term "phonemic discrimination" or state what data indicated Student as having difficulty in that area. The report did note Student's high-average ability to listen to and repeat sentences of increasing length and above-average functional levels in following directions. The report showed Student's above-average ability "to follow multi-step directions involving

various linguistic concepts without difficulty. As the directions became more complex she independently employed strategies to help her complete the tasks accurately . . . She only asked for repetition of the direction in 2 out of 30 instances.” The report noted impairment in working memory (forward number repetition), but specifically noted that Student was able to compensate for any impairment of working memory.

36. Parent offered no testimony about these reports. It is undisputed that prior to this due process hearing, these reports had never been presented to District.

## LEGAL CONCLUSIONS

1. Parent contends that at IEP meetings on September 16, 2009, and January 6, 2010, she asked for, and was denied, a CAPD assessment for Student. Parent contends CAPD was an area of suspected disability for which District was legally required to assess Student. District contends that, according to Student’s classroom performance, teacher observations and the DSTP screening conducted by Speech and Language Pathologist Dedmon, Student was not a candidate for a CAPD assessment because this is not an area of suspected disability. Further, District contends that even if its failure to assess constituted a procedural violation, Student is required to, and cannot prove a substantive denial of a FAPE in order to prevail at due process. For the reasons set forth below, Student did not meet her burden of proof, and was not denied a FAPE.

## BURDEN OF PROOF

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

## DEFINITION OF A FAPE

3. Under both State law and the federal Individuals with Disabilities Education Act (IDEA), students with disabilities have the right to a FAPE. (20 U.S.C. §1400; Ed. Code, § 56000.) A FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's Individualized Education Program (IEP). (20 U.S.C. § 1401(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29).) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a) [In California, related services are called designated instruction and services].)

4. 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 "sufficient to confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

## ASSESSMENTS<sup>2</sup>

5. After a child has been deemed eligible for special education, reassessments must be performed if warranted by the child's educational or related services needs. (20 U.S.C. § 1414 (a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) Absent an agreement to the contrary between a school district and a student's parents, reassessments must not occur more than once a year, or more than three years apart. (20 U.S.C. § 1414 (a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) Upon parent request, the local educational agency must conduct a reassessment, even when the school determines that no additional data is needed to determine the student's educational needs. (20 U.S.C. § 1415 (a)(2)(A)(ii); Ed. Code, § 56381, subds. (a)(1) & (d); 34 C.F.R. § 300.303 (a)(2).)

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); Ed. Code, § 56320, subd. (f).) A local educational agency must use a variety of assessment tools and strategies to gather relevant information, (20 U.S.C. § 1414(b)(2)(A)), and shall not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2)). Assessments must be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category of the child. (34 C.F.R. § 300.304 (c)(6).) The school district must use technically sound testing instruments. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304 (b)(3).) The screening of a student by a teacher or specialist to determine appropriate instructional

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<sup>2</sup> The IDEA refers to "evaluations" where California law and regulations refer to "assessments." Except when quoting federal statutes and regulations, this Decision will use the term "assessments."

strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services. (20 U.S.C. §1414 (a)(1)(E); 34 CFR § 300.302.)

## PROCEDURAL VIOLATIONS AND DENIAL OF A FAPE

7. Notwithstanding these detailed procedural requirements for assessments and reassessments, the decision of a due process hearing officer shall be made on substantive grounds based on a determination of whether the child received a FAPE. (20 U.S.C. § 1415 (f)(3)(E); Ed. Code, § 56505, subds. (f)(1).) 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, subds. (f)(2).) 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).)

## ANALYSIS

8. Due process matters alleging procedural violations of the IDEA require a two-pronged inquiry. The first prong of the inquiry is whether a procedural violation has been established. If a procedural violation has been established, the second prong of the inquiry requires a determination of whether the procedural violation 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. (Legal Conclusion 7.)

9. Here, Parent has demonstrated a procedural violation. The law requires a local educational agency to conduct a reassessment upon parent request, even when the district determines that no additional data is needed to determine the student's educational needs. Here, District did not perform a CAPD assessment after Parent requested it. Thus District failed to follow the procedural requirements for reassessments upon parent request. (Factual Findings 8 through 33; Legal Conclusions 5, 6.)

10. However, once a procedural violation has been established, the parent has the remaining burden of demonstrating that the violation impeded the right of the child to a FAPE, caused a deprivation of educational benefits, or that it significantly impeded the opportunity of the parents to participate in the decision-making process. Parent did not establish any of these elements of the second prong of the inquiry. (Factual Findings 3 through 5, 30; Legal Conclusion 7.)

11. First, Parent did not present any evidence that Student was impeded or deprived of educational benefit. To the contrary, the evidence established that Student is achieving educational benefit. Student's third grade report card showed "basic" or "proficient" performance in all academic areas; she scored a perfect 600 in Math and "advanced" in Language Arts on her third grade STAR exams. Student's fourth grade, first trimester report card, which was her most recent report card at the time of the January 10, 2010 IEP meeting, scored her as "basic" or "proficient" in all academic areas including math and spelling, and noted her outstanding progress in reading comprehension and written language. According to her classroom performance at that time, her fourth grade teacher considered Student to be one of the top performers in

the fourth grade class. Student scored 891 out of 900 on her lexile level reading comprehension quizzes. Student used precise language and good vocabulary, was not slow in her oral delivery of questions, had no difficulty reading or understanding what was read to her, did very well on oral problems and directions, never needed to have things repeated, could follow oral directions and understand conversations, and did what she was told in class. Parent's concerns about Student's perceived difficulty repeating words and following directions, were not corroborated at hearing by Student's teachers or the records of her academic performance, and were not persuasive. (Factual Findings 3 through 5, 30; Legal Conclusion 7.)

12. Thus, the evidence established that Student was receiving a FAPE, the requirements of which are met under the IDEA when a child receives access to an education that is "sufficient to confer some educational benefit" upon the child. (See *P.P. v. West Chester Area School Distr.* (3d Cir. 2009) 585 F.3d 727, 732-33, 738-39 [Where parents disagreed with district's evaluation of student because it did not identify a specific learning disability in math computation, the Hearing Officer, Appellate hearing panel and Third Circuit all found that this was not an area of suspected disability because student had performed at average level on math during evaluation process, and was not doing poorly in math at school].) (Factual Findings 3 through 5, 30; Legal Conclusions 3, 4.)

13. Moreover, Dr. Meyer's report, recommending a CAPD assessment, is unpersuasive that this is an area of suspected need, when viewed in conjunction with Student's other testing results. At the September IEP meeting, Dr. Meyer stated that from his academic assessments, Student's math, reading and word comprehension were average. Overall, the Meyer report's statement that "it is very difficult for [Student] to track oral instruction, and the processing and writing of written symbolic information is very slow" was not corroborated at hearing, and is not persuasive. Student scored above

average on the CTOPP instrument administered by Dr. Nielsen, which measured phonological processing, defined as “the type of auditory processing that is most strongly related to mastering reading and written language.” Her WISC-IV Verbal Comprehension, which measured her ability to reason with previously-learned information, was above-average. Her WISC-IV Auditory Working Memory, a measure that represented Student’s ability to apprehend and hold information in immediate awareness, and then to use it within a few seconds, was average. Student also scored well above the cutoff for indications of CAPD on the DSTP screening test. Although this test is not a full assessment for eligibility for special education and related services, it is persuasive when viewed in conjunction with the teachers’ perceptions of Student, and Student’s demonstrated educational progress, which carry great weight in establishing that Student’s auditory processing is not an area of suspected need. (See *Park v. Anaheim Union High School District* (9<sup>th</sup> Cir. 2006) 464 F.3d 1025, 1030-32 [Where district’s special education consultant performed vision tests and concluded that student’s vision was not hindering his education, there was no procedural violation in not assessing for double vision and optic nerve damage despite Parents’ suspicion of disability in these areas].) (Factual Findings 3 through 5, 8 through 27, 30; Legal Conclusions 5, 6.)

14. Parent’s case is also not aided by the two subsequent reports, both of which were prepared after the IEP meetings that are at issue here, and presented to the District for the first time at hearing. Thus, they bear no relevance to what the IEP teams decided in September 2009 and January 2010, when the teams decided that auditory processing was not an area of suspected disability requiring assessment. (Factual Findings 34 through 36; Legal Conclusion 4.)

15. In sum, Parent has failed to establish the second prong of the inquiry that is required when a procedural violation has been established. Parent failed to show that

the violation impeded the right of the child to a FAPE or caused a deprivation of educational benefits. (Factual Findings 3 through 5, 30; Legal Conclusion 7.)

16. The second prong of the inquiry can, alternatively, be established if Parent can show that the procedural violation “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.” Parent has also failed to establish this alternate element. Parent failed to demonstrate that District’s refusal to further assess Student for an auditory processing disorder deprived Parent of an opportunity to participate in the decision-making process, either at the September 2009 or January 2010 IEP meetings. (Factual Findings 24 through 33; Legal Conclusion 7.)

17. Parent attended the September 2009 meeting and expressed her concerns. She brought Dr. Meyer to the meeting. Dr. Meyer explained his views, presented his report, and shared the results of his neuropsychological assessments. Ms. Dedmon, also in attendance, explained the results of the DSTP screening and expressed that Student had scored above the cutoff in all areas for further referral for central auditory processing disorder. After discussion, except for Mother and Dr. Meyer, the IEP team as a whole did not feel that auditory processing was an area of suspected disability. The IEP team had a full opportunity to explore Dr. Meyer’s opinions, as well as Mother’s concerns, and to consider the impact of the Nielsen and Dedmon findings as well. There was no deprivation of Parent’s right to participate where, as here, she attended the IEP meetings, discussed the child’s problems, expressed disagreement regarding the IEP team’s conclusions, and requested revisions in the IEP. (See *N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036 [Parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].) (Factual Findings 24 through 33; Legal Conclusion 7.)

18. The same conclusion also holds true for the January 2010 IEP meeting. Parent was represented by an IEP advocate and two attorneys at that January meeting, which lasted in excess of five hours. Ms. Cronin, Dr. Nielsen and Ms. Dedmon also attended. The team discussed Parent's concerns regarding Student's speech fluency, language, vocabulary, and oral delivery. Parent stated that she felt Student needed a CAPD assessment, based on Dr. Meyer's recommendation. District formally declined, finding that Student did not demonstrate the need. Relying on Ms. Dedmon's DSTP screening, Student's records and teacher input, the team found that Student was not a candidate for a CAPD assessment. There was no deprivation of Parent's procedural right to participate where, as here, Parent had the opportunity to discuss a proposed IEP, and her concerns were considered by the IEP team. She participated in the IEP process in a meaningful way. (Factual Findings 24 through 33; Legal Conclusion 7.)

19. Under these facts, Student failed to meet her burden of proof on the sole issue presented.

## ORDER

All of Student's requests 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 on the only issue that was heard and decided in this case.

## RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety (90) days of receipt of this Decision. (Ed. Code, § 56505, subd.(k).)

Dated: May 17, 2010

\_\_\_\_\_/s/\_\_\_\_\_  
JUNE R LEHRMAN  
Administrative Law Judge  
Office of Administrative Hearings