

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ESCONDIDO UNION SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2018120837

DECISION

Escondido Union School District filed a due process hearing request with the Office of Administrative Hearings on December 20, 2018, naming Parent on behalf of Student. OAH continued the matter for good cause on January 7, 2019.

Administrative Law Judge Linda Johnson heard this matter in Escondido, California, on March 19, and 20, 2019.

Deborah Cesario, Attorney at Law, represented Escondido. Kelly Prins, Escondido's Assistant Superintendent, and Meggan Lokken, Escondido's Director of Special Education, attended each day of the hearing on behalf of Escondido.

Student's Mother and Father represented Student and attended all days of the hearing. Student did not attend the hearing.

On March 20, 2019, OAH granted Escondido's request for a continuance to allow the parties to file written closing briefs. The record closed on April 3, 2019, upon receipt of written closing briefs.

ISSUES

- (1) Did Escondido's October 2018 psychoeducational assessment meet all legal requirements such that Student is not entitled to an independent educational evaluation at public expense?
- (2) Did Escondido's October 23, 2018 individualized education program offer Student a free appropriate public education in the least restrictive environment such that it may be implemented without parent consent?

SUMMARY OF DECISION

Escondido proved that its October 2018 triennial psychoeducation evaluation met all legal requirements such that Student is not entitled to a psychoeducational independent evaluation at public expense. The assessment was administered by qualified assessors using a variety of valid and reliable instruments, tools, and strategies.

Escondido also proved that the October 23, 2018 IEP offered Student a FAPE in the least restrictive environment. The IEP met all procedural requirements, addressed Student's unique needs, and offered Student appropriate goals, supports, and services. Escondido may implement the October 23, 2018 IEP without parental consent.

FACTUAL FINDINGS

BACKGROUND AND JURISDICTIONAL MATTERS

1. At the time of the hearing Student was a 10-year-old boy who resided with Parents within Escondido's boundaries. Student moved into Escondido's boundaries during the 2015-2016 school year while he was in second grade. Student qualified for special education as a student with a specific learning disability in 2014. Student's IEP identified his native language as Spanish, however all instruction was provided in English.

2. During the summer of 2017 Student's aunt started tutoring him in English language arts using the Orton Gillingham method. Student's aunt continued to work with him through January 2018. In addition to the tutoring, while at school, Escondido provided Student 360 minutes weekly of pullout specialized academic instruction focused on reading decoding and fluency, reading comprehension, writing, and mathematics. By Student's annual IEP team meeting in October 2017, he made two years growth in reading decoding and fluency.

3. On September 6, 2018, Student's mother requested an early triennial evaluation specifically for evaluating dyslexia. Parents were concerned by Student's difficulties in reading, spelling, and writing, and suspected that Student had dyslexia.

4. On September 13, 2018, Escondido proposed a triennial assessment plan to assess Student in the areas of academic achievement, health, intellectual development, and language and speech communication development. The assessment plan was written in English, the language Parents used to communicate with Escondido. The plan described the possible tests and procedures to be conducted. It also explained the information being sought through the evaluation of the various areas. The plan was written clearly and in terms understandable by the general public. The plan was clear in that no special education services would be provided to Student without Parents' written consent. The school psychologist was responsible for evaluating the areas of intellectual development; the specialized academic instructor would assess Student's academic achievement; the school nurse would evaluate Student's health needs; and the speech and language pathologist would evaluate Student's language and speech communication development. Student's Mother signed the assessment plan.

THE OCTOBER 23, 2018 TRIENNIAL PSYCHOEDUCATIONAL EVALUATION AND IEP TEAM MEETING.

5. Escondido held Student's triennial IEP team meeting on October 23, 2018,

to review the results of the evaluation and convene Student's annual IEP team meeting. Parents attended the meeting along with Student's aunt. Luana Rasmussen, school psychologist; Heidi Paxton, Student's specialized academic instructor; George Williams, Student's general education teacher; and Kimi Kusunose, speech and language pathologist, attended the meeting; along with a program specialist and district representative. Escondido offered Parents a copy of procedural safeguards at the beginning of the meeting.

Triennial Psychoeducational Evaluation

6. Ms. Rasmussen conducted the psychoeducational evaluation, Ms. Kusunose conducted the speech and language assessment, and Ms. Paxton conducted the academic achievement portion of the triennial evaluation.¹ Ms. Rasmussen has a Bachelor of Arts in psychology, a Master of Arts in education, a pupil personnel services credential, and was a school psychologist for over ten years. In addition to her education, Ms. Rasmussen attended a dyslexia training with Pam Cline in September 2017, and attended a Feifer Assessment of Reading training in August 2017, regarding conducting assessments using Dr. Steven Feifer's assessment.

7. In conducting her assessment, Ms. Rasmussen reviewed records, interviewed Student's Parents and teachers, observed Student in multiple settings, and administered six standardized tests. Ms. Rasmussen administered the Woodcock-Johnson Test of Cognitive Abilities, Fourth Edition; the Comprehensive Test of

¹ Student did not disagree with the speech and language or academic achievement portions of the assessment and did not request independent educational evaluations in those areas. Therefore, this decision does not address the speech and language or academic achievement portions of the triennial evaluation.

Phonological Processing, Second Edition; the Test of Auditory Processing Skills, Bilingual Edition; the Feifer Assessment of Reading; the Kaufman Assessment Battery for Children, Second Edition; and the Test of Nonverbal Intelligence, Fourth Edition. Ms. Rasmussen was a credentialed school psychologist and had administered all of the assessments, with the exception of the Feifer, hundreds of times. The Feifer assessment was a newer assessment that Ms. Rasmussen had only administered five times. However, she received training regarding the assessment prior to administering it. Ms. Rasmussen followed all testing protocols and administered the tests according to the publishers' instructions. Ms. Rasmussen administered all the assessments except the Test of Auditory Processing in English instead of Spanish as Student was more comfortable using English and Spanish was a non-preferred language. Ms. Rasmussen used a bilingual technician to administer the Test of Auditory Processing which is consistent with the testing manual.

8. The Woodcock-Johnson assessed Student's processing speed and visual processing. Student's processing speed was in the average range, as was his perceptual speed for patterns, visual short-term memory, and picture recognition. Student's ability to mentally solve problems was in the below average range.

9. The Comprehensive Test of Phonological Processing assessed Student's processing speed, but focused on Student's phonological skills. Student scored in the below average or poor range in all of the subtests. Student had poor abilities in blending individual segments into whole words as well as difficulty isolating phonemes. Student also had difficulty decoding new words and rapidly naming words from memory.

10. The Test of Auditory Processing, Bilingual Edition, assessed Student's auditory perception in Spanish. Student scored in the below average or well below average range on all of the subtests.

11. The Feifer assessment measured Student's reading ability; specifically looking at phonemic awareness; nonsense word decoding; isolated word reading fluency; oral reading fluency; positioning sounds; rapid automatic naming; verbal fluency; visual perception; irregular word reading; orthographic processing; semantic concepts; word recall; morphological processing; and silent reading fluency. Student scored in the significantly below average range for all subtests except rapid naming, in which he scored below average; word recall and morphological processing in which he scored moderately below average; and verbal fluency in which he scored average. Ms. Rasmussen opined that Student presented with overall reading skills below age and grade level and exhibited a global reading delay. However, Ms. Rasmussen did not specify that Student exhibited a specific subtype of dyslexia.

12. The Kaufman assessed Student's processing and cognitive abilities. Student's scores indicated that his overall cognitive abilities fell in the below average range. However, Ms. Rasmussen found that inconsistent with previous test scores which indicated Student's cognitive abilities and full scale intelligence quotient was in the average range.

13. The Test of Nonverbal Intelligence measured Student's intelligence. Student's score fell in the average range which was consistent with previous assessments.

14. Mr. Williams reported to Ms. Rasmussen that he did not have any concerns for Student. Student participated in class discussions when prompted, had friends, and socialized with his peers. Student performed below basic in reading, math, and writing; he had access to the fifth grade curriculum, yet worked at his own pace. Student was frequently distracted but not a disruption to the class. Ms. Rasmussen's observations of Student in the classroom were similar. She observed Student during mathematics instruction. Student was seated at a table with several other peers working on a different

assignment than the rest of the class. The teacher redirected Student once as he was talking with his peers about an unrelated topic. On a different day Ms. Rasmussen observed Student take a mathematics test; again Student's test was modified and the teacher redirected him once during the 15-minute observation. Parents reported their concerns to Ms. Rasmussen regarding Student's limited progress and transition to middle school. Parents were also concerned that Student did not have an evaluation indicating he had dyslexia.

15. The IEP team discussed the results of the assessment during the October 23, 2018 IEP team meeting. Parents did not disagree with the results of the assessment although they wanted more specificity as to the type of dyslexia Student had and what strategies should be used to help him learn. Escondido agreed to revise the triennial evaluation report to include that information.

Eligibility

16. The IEP team discussed eligibility and agreed that Student still met the eligibility category of specific learning disability due to a processing disorder in phonological processing. No changes were made to eligibility as a result of the triennial assessment.

Present Levels Of Performance And Academic Progress

17. Ms. Paxton used the results of the triennial assessment, progress on goals, classroom performance, and observations to draft Student's present levels of performance. Student's instructional reading level was beginning third grade. He did not meet his reading decoding and fluency goal of reading 40 correct words per minute with 90 percent accuracy as he could not meet both the accuracy and fluency consistently; however, he was able to read 38 correct words per minute with 93 percent accuracy and 40 correct words per minute with 85 percent accuracy. When Student

started school in Escondido he was reading at a kindergarten level, three and a half years later he had made three years growth and was reading at a third grade level. Mother was concerned that Student could not decode, but instead he memorized words.

18. Student could comprehend at grade level and could retell a story from the beginning, middle, and end when he read at his independent level. He met his reading comprehension goal, to answer questions based on an expository text and distinguish between cause and effect and fact with 80 percent accuracy.

19. Student could write a topic sentence with two to three supporting sentences but his writing often lacked a conclusion. He consistently used beginning capital letters but did not always use ending punctuation and struggled with spelling. Student did not meet his writing goal, to compose a single paragraph with a topic sentence, supporting sentences, and a concluding sentence with 80 percent accuracy. Student was able to use a graphic organizer to generate a topic sentence and two to three supporting sentences. Student used beginning capital letters 80 percent of the time and ending punctuation 75 percent of the time.

20. Mathematics was a relative strength for Student. He could solve two step word problems for addition, subtraction, multiplication, and division using a variety of strategies and could solve addition and subtraction problems without regrouping. Student met his mathematics goal to solve ten mathematics problems requiring both single and multiple step solutions and could break problems into steps.

21. Escondido used this information to draft new goals for Student. Escondido proposed an additional reading fluency and decoding goal, an additional mathematics goal, and a new spelling goal.

Proposed Goals, Supports, Services, And Placement

22. Escondido proposed seven new goals for Student: two reading fluency and

decoding goals; a reading comprehension goal; a writing goal; two mathematics goals; and a spelling goal. Student's first reading decoding and fluency goal was to read a fourth grade passage, with 50 correct words per minute, and 90 percent accuracy. Student second reading decoding and fluency goal was to read 10 mixed multisyllabic words with 80 percent accuracy. Student's reading comprehension goal was to state the main idea of the text and identify at least three statements within the text to support the main idea with 80 percent accuracy. Student's writing goal was to compose a single paragraph with a topic sentence, supporting sentences, and a concluding sentence with 80 percent accuracy. Student's first mathematic goal was to solve 10 multiple digit subtraction number sequences with regrouping. Student's second mathematic goal was to use a variety of strategies to solve single digit by single digit multiplication problems. Student's spelling goal was to spell 10 long vowel words with 80 percent accuracy. Parents agreed that the goals were appropriate and addressed Student's needs.

23. Student's IEP team added accommodations and modifications to his IEP that were not previously included. Escondido provided Student access to word prediction software and allowed mathematics problems to be read aloud. Escondido also allowed Student to have spelling graded separately from the content he produced; allowed Student to rework problems for a better grade; provided Student alternative books with similar content but at a lower reading level; and shortened Student's assignments to focus on mastery of concepts. Escondido continued to offer 10 minutes monthly of consultation between Student's specialized academic instructor and his general education teacher and access to a multiplication chart.

24. Escondido continued to offer Student 360 minutes of specialized academic instruction in a separate classroom for the duration of the 2018-2019 school year. Ms. Paxton worked with student during his specialized academic instruction, which included working on goals and reading strategies. Ms. Paxton used a variety of methods to teach

reading decoding and fluency, including strategies from Orton Gillingham, Project Read, Step Up to Writing, Nancy Fetzner, and Phonics Pathways. Ms. Paxton used multisensory strategies and Student progressed as a result of his IEP services. Although progress was not consistent, Student increased in reading level by three years in the three years she worked with him.

25. For the 2019-2020 school year Escondido's offer changed as Student would matriculated to middle school. Escondido offered 454 minutes weekly of specialized academic instruction in a separate classroom for reading and writing support and 300 minutes weekly of specialized academic instruction in the general education classroom for mathematics, social studies, and science. Ms. Paxton opined that the IEP offered Student FAPE in the least restrictive environment because he was making progress with his specialized academic instruction while still accessing grade level curriculum with his peers. Parents did not think the services Student received were specific enough to allow him to make progress. Parents opined that the reason Student progressed was because his aunt worked with him using specific Orton Gillingham strategies. Parents saw a decline in Student's progress and were concerned that if specific dyslexia strategies were not written into the IEP that Student would continue to decline. Ms. Paxton was Student's specialized academic instructor for three years and she worked with him consistently during that time. Ms. Paxton's testimony thoughtful and persuasive. Although Student's progress was not always consistent he did not stop making progress when his aunt stopped tutoring him. Nor were there any times when the progress he made, or lack thereof, caused Ms. Paxton to be concerned that he was not progressing as he should be.

26. Escondido sent Parents a revised copy of the triennial psychoeducational evaluation on October 25, 2018. The revised report included more detailed information regarding dyslexia. In the updated report Ms. Rasmussen explained that Student's

orthographic and phonological processing deficits were consistent with a mixed form of dyslexia. Ms. Rasmussen revised the report because Parents' expressed concern that they did not have specific information regarding Student's dyslexia.

27. On December 5, 2018, Ms. Lokken sent Parents a prior written notice explaining that Escondido would not be funding an independent psychoeducational educational evaluation for Student. Ms. Lokken asked Parents if the revised triennial psychoeducation evaluation addressed their concerns and if they were still requesting an independent educational evaluation. Ms. Lokken also requested that Parents consent to the October 23, 2018 IEP. Ms. Lokken provided a deadline of December 14, 2018, to respond otherwise Escondido would file for a due process hearing to defend its assessment and prove the appropriateness of the IEP. On December 20, 2018, Escondido filed its complaint for due process.

LEGAL AUTHORITIES AND CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA²

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)³ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them

² Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

³ All subsequent references to the Code of Federal Regulations are to the 2006 version.

for further education, employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and nondisabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School Dist. 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.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 (*Mercer Island*) [In enacting the IDEA, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The Supreme Court recently clarified and expanded upon its decision in *Rowley*. In *Endrew F. v. Douglas County School Dist.*, the court stated that the IDEA guarantees a FAPE to all students with disabilities by means of an IEP, and that the IEP is required to be reasonably calculated to enable the child to make progress appropriate in light of his or her circumstances. *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988]. The Ninth Circuit recently affirmed that its FAPE standard comports with *Endrew F.* (*E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535.)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. §

1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; *see* 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) By this standard, Escondido, as the petitioning party, had the burden of proof for the issues alleged in this matter.

ISSUE 1: ESCONDIDO'S OCTOBER 2018 PSYCHOEDUCATIONAL ASSESSMENT

6. Escondido contends that its psychoeducational assessment was appropriately administered by qualified assessors and met all statutory requirements. For that reason, Escondido asserts that it is not obligated to fund an independent psychoeducational assessment of Student. Student contends that the assessment report was not specific enough because it did not detail the specific strategies to use with Student regarding his dyslexia.

7. Under certain conditions, a student is entitled to obtain an independent educational evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329]; *see also* 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an IEE].) "Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." (34 C.F.R. § 300.502(a)(3)(i).) To obtain an independent educational evaluation, the student must disagree with an evaluation obtained by the public agency and request an independent educational evaluation. (34 C.F.R. § 300.502(b)(1), (b)(2).)

8. When a student requests an independent educational evaluation, the public agency must, without unnecessary delay, either file a request for due process

hearing to show that its assessment is appropriate or ensure that an IEE is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).)

9. Before any action is taken with respect to the initial placement of a special education student, an assessment of the student's educational needs shall be conducted. (Ed. Code, § 56320.)⁴ Thereafter, a special education student must be reassessed at least once every three years, or more frequently if conditions warrant, or if a parent or teacher requests an assessment. (Ed. Code, § 56381, subd. (a).) No single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414 (b)(2)(B); Ed. Code, § 56320, subd. (e).)

10. If a district decides to assess a student, it must give the parent a written assessment plan within 15 calendar days of referral, not counting calendar days between the pupil's regular school sessions or terms or calendar days of school vacation in excess of five schooldays, from the date of receipt of the referral, unless the parent or guardian agrees in writing to an extension. (Ed. Code, §§ 56043, subd. (a); 56321, subd. (a).) The plan must explain, in language easily understood, the types of assessments to be conducted. (Ed. Code, § 56321, subd. (b).) The parent then has at least 15 days to consent in writing to the proposed assessment. (Ed. Code, §§ 56043, subd. (b), 56321, subd. (c)(4).)

11. Tests and assessment materials must be used for the purposes for which they are valid and reliable, and must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(b)(3)(A)(iii)-(v); Ed. Code, § 56320, subd. (b)(2), (3).) In California, a test must be

⁴ An evaluation under federal law is the same as an assessment under California law. (Ed. Code, § 56302.5.)

selected and administered to produce results “that accurately reflect the pupil’s aptitude, achievement level, or any other factors the test purports to measure . . .” (Ed. Code, § 56320, subd. (d).) A district must ensure that a child is assessed “in all areas related to” a suspected disability. (Ed. Code § 56320, subd. (c), (f).)

12. Assessments must be conducted by individuals who are both “knowledgeable of [the student’s] disability” and “competent to perform the assessment, as determined by the school district, county office, or special education local plan area.” (Ed. Code, §§ 56320, subd. (g), 56322; see, 20 U.S.C. § 1414(b)(3)(A)(iv).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324, subd. (a).) School districts are required to ensure that the assessment tools and strategies provide relevant information that directly assists persons in determining the educational needs of a child. (34 C.F.R. § 300.304(C)(1)-(7).)

13. Tests and assessment materials must be selected and administered so as not to be racially, culturally, or sexually discriminatory; and must be provided and administered in the student’s primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(3)(A)(i)-(iii); Ed. Code, § 56320, subd. (a).)

14. An assessor must produce a written report of each assessment that includes whether the student may need special education and related services and the basis for making that determination. (Ed. Code, § 56327, subds. (a), (b).)

15. Once a student has been referred for a reassessment, a determination of eligibility and an IEP team meeting shall occur within 60 days of receiving parental consent for the assessment. (See 20 U.S.C. § 1414(a)(1)(C); Ed. Code, § 56302.1, subd. (a).)

16. Escondido timely filed a request for due process hearing to show that its assessments were appropriate. Parents requested an independent educational evaluation during the IEP team meeting on October 23, 2018. Escondido emailed an amended report to Parents on October 25, 2018, and followed up with a prior written

notice on December 5, 2018. Escondido's prior written notice notified Parents it declined to fund independent educational evaluations and that if Parents did not respond by December 14, 2018, it would file for a due process hearing to defend the assessment. Parents did not respond to Escondido's prior written notice and Escondido filed for a due process hearing on December 20, 2018. Escondido's filing to defend its assessments within 60 days of Student's request for independent educational evaluations does not constitute an undue delay.

17. Escondido's October 23, 2018 psychoeducational assessment report, and the IEP team meeting when the report was reviewed, were timely and appropriate. Parents requested that Escondido conduct an early triennial assessment for Student on September 6, 2018. Escondido prepared an assessment plan and gave the plan to Parents on September 13, 2018. The assessment plan met all legal requirements. The assessment plan was written in English, the language Parents used to communicate with Escondido. The plan described the possible tests and procedures to be conducted. It also explained the information being sought through the evaluation of the various areas. The plan was written clearly and in terms understandable by the general public. The plan was clear in that no special education services would be provided to Student without Parents' written consent. Escondido timely conducted and presented its psychoeducational assessment findings and recommendations to the IEP team within 60 days of receiving parental consent to assess.

18. Escondido established that its assessor, Ms. Rasmussen, was appropriately trained and competent to perform the assessments. Ms. Rasmussen had over 10 years of experience conducting assessments and was a licensed school psychologist. Escondido also showed that Ms. Rasmussen competently conducted the assessment. Ms. Rasmussen did not rely on any one procedure as the sole criteria for determining Student's eligibility for services. The test instruments she used were employed for valid

and reliable purposes, were not racially, culturally, or sexually discriminatory, and were administered according to their instructions. Ms. Rasmussen also prepared a written report that detailed the assessments she conducted and her findings.

19. Student argued that the assessment did not appropriately address his dyslexia because the report did not mention dyslexia until Parents brought up the topic during the IEP team meeting. Student also argued that the information Ms. Rasmussen later added to the report was not valid because she did not administer additional tests. However, Ms. Rasmussen thoroughly evaluated Student for a learning disability and specifically looked at dyslexia. Ms. Rasmussen administered six assessments, observed Student multiple times in both his general education classroom as well as during his specialized academic instruction time, and interviewed his teachers and Parents. Ms. Rasmussen determined that Student continued to meet the eligibility criteria for specific learning disability as he presented with a phonological processing deficit. Although Ms. Rasmussen's initial report did not contain specific information related to dyslexia, she did determine that Student presented with overall global reading delays but not necessarily a specific subtype of dyslexia. Ms. Rasmussen determined that the assessment results were consistent with previous assessments indicating that Student had phonological processing delays. At Parents' request, Ms. Rasmussen revised her report to include more information regarding dyslexia. In the updated report Ms. Rasmussen explained that Student's orthographic and phonological processing deficits were consistent with a mixed form of dyslexia. For those reasons, Escondido showed that its assessment sufficiently assessed Student in his areas of suspected deficit, including learning disorders.

20. For the foregoing reasons, Escondido met its burden of proving that the psychoeducational assessment was legally compliant.

ISSUE TWO: ESCONDIDO'S OCTOBER 23, 2018 INDIVIDUALIZED EDUCATION PROGRAM

21. Escondido contends its October 23, 2018 IEP offered Student a FAPE in the least restrictive environment such that Escondido should be allowed to implement the IEP without Parents' consent. Student contends the IEP is not specific and does not offer strategies to address his dyslexia.

22. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit in light of his or her circumstances. (*Endrew F., supra*, (2017) 580 U.S. __, [137 S. Ct. 988].)

23. Federal and State law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882.) Accordingly, at the meeting parents have the right to present information in person or through a representative. (Ed. Code, § 56341.1.)

Parental Participation And IEP Team Participants

24. An IEP team must include at least one parent; a representative of the local educational agency; a regular education teacher of the child if the child is, or may be, participating in the regular education environment; a special education teacher or provider of the child; an individual who can interpret the instructional implications of assessment results, and other individuals who have knowledge or special expertise regarding the pupil, as invited at the discretion of the district, the parent, and when appropriate, the student. (20 U.S.C. § 1414(d)(1)(B)(i), (iv-vi); Ed. Code, § 56341, subds. (b)(1), (5-6).)

25. A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement with the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schs.* (6th Cir. 2003) 315 F.3d 688, 693.) A 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. (*Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036.)

26. Here, all required IEP team members were present at the October 23, 2018 IEP team meeting. Escondido had Student's general education teacher, special education teacher, school psychologist, speech and language pathologist, and an administrative designee present. In addition, both Parents were present along with Student's aunt. Escondido showed that Parents meaningfully participated in the IEP team meeting as they asked questions, made suggestions, and requested revisions to the IEP and assessment. The IEP team discussed dyslexia in the context of reviewing the report and agreed that Student shows characteristics of a student with dyslexia.

Proposed Goals, Supports, And Services

27. In general, an IEP is a written statement for each child with a disability that

is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, §§ 56032.)

28. The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) It is the "modus operandi" of the IDEA, "a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." (*School Comm. of Town of Burlington, Mass. v. Department of Educ.* (1985) 471 U.S. 359, 368 [105 S.Ct. 1996].)

29. An IEP is a written statement that includes a statement of the present performance of the student, a statement of measurable annual goals designed to meet the student's needs that result from the disability, a description of the manner in which progress of the student towards meeting the annual goals will be measured, the specific services to be provided, the extent to which the student can participate in regular educational programs, the projected initiation date and anticipated duration, and the procedures for determining whether the instructional objectives are achieved. (20 U.S.C. § 1414 (d)(1)(A)(i),(ii); 34 C.F.R. § 300.320(a)(2), (3); Ed. Code, § 56345, subds. (a)(2), (3).) In *Union School Dist. v. Smith* (1994) 15 F. 3d 1519, cert. den., 513 U.S. 965 (*Union*), the Ninth Circuit held that a district is required by the IDEA to make a clear, written IEP offer that parents can understand.

30. The IEP shall also include a statement of the program modifications or supports for school personnel that will be provided to the student to allow the student to advance appropriately toward attaining the annual goals, to be involved and make progress in the general education curriculum, and to participate in extracurricular activities and other nonacademic activities. (34 C.F.R. § 300.320(a)(4)(i), (ii); Ed. Code, § 56345, subds. (a)(4)(A), (B).)

31. In developing an IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the results of the most recent evaluations of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324 (a).) The "educational benefit" to be provided to a child requiring special education is not limited to addressing the child's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.) A child's unique needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle School Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500.)

32. The October 23, 2018 IEP included all the content required by law. It identified accurately Student's present level of academic performance, identified reading fluency, reading comprehension, spelling, writing, and mathematic as areas of weakness. Escondido developed goals in all areas of weakness. The IEP established various accommodations, modifications, supports and related services necessary to adequately address Student's needs and academic performance, which included access to word prediction software, mathematics problems read aloud, spelling graded separately from content, the ability to rework missed problems for a better grade, alternative books with similar content but at a lower reading level, shortened assignments, and specialized

academic instruction. It set forth measurable annual goals designed to meet Student's unique needs, which included reading fluency and decoding, spelling, writing, and mathematics. The IEP appropriately determined the extent to which Student could participate in regular educational programs, and concluded that because Student had been making progress pullout specialized academic instruction was appropriate.

Methodology

33. The choice of methodology is left to the expertise of the school and its employees. (*R.P. ex rel. C.P v. Prescott Unified School Dist.* (9th Cir. 2011) 631 F. 3d 1117, 1122. "The IDEA accords educators the discretion to select from various methods for meeting the individualized needs of a student, provided those practices are reasonably calculated to provide him with educational benefit."; *G.D. ex rel. Dien Do v. Torrance Unified School Dist.* (C.D. Cal. 2012) 857 F.Supp.2d 953, 965.)

34. Student contends that he only made progress when his aunt was working with him using the Orton Gillingham method. Escondido proved that Student made progress throughout the time he received specialized academic instruction from Ms. Paxton, not just the time period when his aunt tutored him. Ms. Paxton used a variety of teaching methods with Student which included strategies from Orton Gillingham. The methodologies Ms. Paxton used with Student provided him with educational benefit.

Least Restrictive Environment

35. To determine whether a school district substantively offered a student a FAPE, the focus must be on the adequacy of the district's proposed program, not parent's preferred program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1313-1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, comported with the student's IEP, and was in the least

restrictive environment, then the school district provided a FAPE, even if the student's parents preferred another program, and even if the parents' preferred program would have resulted in greater educational benefit. (*Ibid.*) School districts need to "offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." (*Andrew F., supra*, (2017) 580 U.S. __ , [137 S. Ct. 988].)

36. Both federal and state law require a school district to provide special education in the least restrictive environment appropriate to meet the child's needs. (20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a); Ed. Code, § 56040.1.) This means that a school district must educate a special needs pupil with nondisabled peers "to the maximum extent appropriate," and the pupil may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii); Ed. Code, § 56040.1; see *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398,1403; *Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1136-1137.)

37. Placement in the least restrictive environment is not an absolute. In an appropriate case, it must yield to the necessity that a student receives a FAPE: The IDEA does not require mainstreaming to the maximum extent possible or to the maximum extent conceivable. It requires mainstreaming to the maximum extent appropriate. Mainstreaming is an important element of education for disabled children, but the IDEA does not permit, let alone require, a school district to mainstream a student where the student is unlikely to make significant educational and non-academic progress. (*D.F. v. Western School Corp.* (S.D.Ind. 1996) 921 F.Supp. 559, 571 [citation omitted].)

38. The IDEA recognizes that some students should not be placed in general education. Despite this preference for "mainstreaming" disabled children, that is,

educating them with nondisabled children, Congress recognized that regular classrooms simply would not be a suitable setting for the education of many disabled children. The Act expressly acknowledges that “the nature or severity of the disability [may be] such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” § 1412(a)(5). The Act thus provides for the education of some disabled children in separate classes or institutional settings. (*Rowley, supra*, 458 U.S. at p. 181, fn. 4 [citation omitted].)

39. Consequently, in appropriate cases, courts have approved placements outside of general education. When it is clear that a student cannot benefit academically or socially from general education, the Ninth Circuit has interpreted its decision in *Rachel H., supra*, 14 F.3d 1398, to approve placements for all or part of a school day in other than general education settings. (See *Ms. S. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1118, 1136-1138 [approving temporary placement of student with Down syndrome and IQ between 50 and 70 in self-contained special education classroom]; *Clyde K. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 35 F.3d 1396, 1398, 1400-1402 [approving placement of student with Tourette’s Syndrome in private school for disabled].)

40. In *Rachel H., supra*, 14 F.3d 1398, the Ninth Circuit Court of Appeal set forth four factors that must be evaluated and balanced to determine whether a student is placed in the least restrictive environment: (1) the educational benefits of full-time placement in a regular classroom; (2) the non-academic benefits of full-time placement in a regular classroom; (3) the effects the presence of the child with a disability has on the teacher and children in a regular classroom; and (4) the cost of placing the child with a disability full-time in a regular classroom. (*Id.*, 14 F.3d at p. 1404.)

41. Here, the evidence established that the IEP team evaluated the *Rachel H.* factors in developing the October 23, 2018 IEP, and properly determined that Student’s

continued placement in the general education classroom with pullout specialized academic instruction was appropriate. Student could participate in group discussions, he was able to follow along during whole group instruction, and although he required prompting to stay on task he could complete his work. Additionally, Student received both academic and non-academic benefit from the general education classroom. Student had grade level peers and although some of his assignments were modified, he had access to grade level curriculum. Accordingly, Escondido's offer of placement in a general education class with specialized academic instruction in a separate setting was appropriate.

Clear Written Offer

42. In *Union, supra*, 15 F.3d 1519, the Ninth Circuit held that a district is required by the IDEA to make a clear, written IEP offer that parents can understand. *Union* emphasized the need for rigorous compliance with this requirement, finding that the requirement of a formal, written offer creates a clear record which helps to eliminate subsequent factual disputes regarding when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any.

43. The October 23, 2018 IEP was based on the triennial assessment and Student's progress on goals. The IEP identified Student's present levels of academic achievement and functional performance, established goals which addressed Student's needs, and offered services and supports which were appropriate. The IEP team discussed the assessments during the meeting, Parents and Student's aunt had the opportunity to ask questions and Escondido made changes to the assessment report as a result of those questions.

The IEP team discussed Student's present levels of performance, progress on goals, and drafted new goals. The IEP team added accommodations and modifications

to support Student in the classroom. The IEP team discussed Student's transition to middle school at the end of the 2018-2019 school year and made changes to the level of specialized academic instruction he would receive for the 2019-2020 school year.

44. Accordingly, the October 23, 2018 IEP offered Student FAPE in the least restrictive environment.

ORDER

1. Escondido's October 2018 triennial psychoeducational evaluation met all legal requirements such that Student is not entitled to an independent educational evaluation at public expense.

2. Escondido's October 23, 2018 IEP offered Student a free appropriate public education in the least restrictive environment such that Escondido may implement the IEP without parental consent.

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. Escondido prevailed on both issues heard and decided in this matter.

RIGHT TO APPEAL

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 90 days of receipt.

Dated: April 26, 2019

/s/

LINDA JOHNSON

Administrative Law Judge

Office of Administrative Hearings