

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

PARENT ON BEHALF OF STUDENT,

V.

ESCONDIDO UNIFIED SCHOOL DISTRICT.

CASE NO. 2024100187

DECISION

January 28, 2025

On October 3, 2024, Escondido Union School District filed a due process hearing request with the Office of Administrative Hearings, called OAH, naming Parent on behalf of Student. Escondido Union School District is called Escondido. The complaint contained expedited and non-expedited hearing claims. OAH set the expedited and non-expedited matters for separate hearings. At the October 21, 2024, prehearing conference for the expedited matter, Administrative Law Judge Deborah Myers-Cregar continued the non-expedited hearing to December 3, 2024. The Administrative Law

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Judge is called ALJ. ALJ Deborah Myers-Cregar heard the expedited matter by videoconference on October 29, and 30, and November 5, 6, and 7, 2024, and issued the Decision on November 22, 2024.

ALJ Deborah Myers-Cregar heard the non-expedited matter by videoconference on December 3, and 4, 2024. Attorney Deborah Cesario represented Escondido. Patrick Newton, Escondido's special education director, attended all hearing days as Escondido's representative. Attorney Michelle Wilkolaski represented Student. Parent attended all hearing days on Student's behalf. Student's great-aunt attended on the first day of hearing.

At the parties' request, OAH continued the matter to January 3, 2025, for written closing briefs. Escondido timely filed its written closing brief, and Student did not file a brief. The record was closed, and the matter was submitted for decision on January 3, 2025.

ISSUE

Did the September 12, 2024 and September 26, 2024 individualized education programs', called IEPs', offer of placement at the Social Emotional Academic Success program at Miller Elementary School, with related services including individual, group, and parent counseling, a one-to-one aide, and private transportation provide Student with a free appropriate public education, called a FAPE, in the least restrictive environment?

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JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and
- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

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, assessment, or educational placement of the child, or the provision of a free appropriate public education, referred to as FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 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, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Escondido had the burden of proof.

The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was five years old and in a special education transitional kindergarten social communication program at the time of hearing. Student resided within Escondido's geographic boundaries at all relevant times. Student was eligible for special education under the categories of autism, other health impairment, and speech or language impairment.

The November 22, 2024, Expedited Decision determined that maintaining Student's current educational placement in his mild moderate special day class would be substantially likely to result in injury to Student or others. The Expedited Decision also determined that Escondido's proposed placement at the Social Emotional Academic Success program at Miller Elementary School with door-to-door private transportation was an appropriate 45-day interim alternative educational setting.

SCOPE OF THE HEARING BASED UPON THE PARTIES' REPRESENTATIONS

At the November 25, 2024, prehearing conference, the parties discussed Escondido's request for the February 9, 2024, annual IEP, as amended by the September 12, and 26, 2024, IEP's, to be implemented without parental consent. The September 12, and 26, 2024 IEP's proposed a change in placement.

Student's counsel stated she was appearing in defense only of the change in placement offer. Student's counsel agreed and represented that Parent signed and consented to the February 9, 2024 IEP, which was implemented, but did not consent to

the September 2024 IEP amendments offering a change in placement. Student's counsel acknowledged she withdrew the complaint without prejudice in OAH case number 2024100609 on November 25, 2024. That complaint had alleged the February 9, 2024 IEP failed to offer appropriate supports and services including

- a one-to-one aide,
- speech therapy,
- parent training and counseling,
- occupational therapy,
- a mental health service assessment,
- adequate goals, and
- home applied behavior analysis therapy.

On December 3, 2024, at the beginning of the due process hearing, the parties, Parent, and Student's counsel also agreed and represented on the record that the September 12 and 26 2024, IEPs' offer of individual, group and parent counseling, private transportation, and a one-to-one aide were appropriate. The private transportation consisted of a private sedan driven by a single driver, with Student in a booster seat in the rear seat. This private transportation was already in place and being implemented during the expedited hearing.

Based on the ALJ's discussions and the parties' representations, the non-expedited hearing focused on whether the procedural and substantive elements of the September 12, and 26, 2024, IEP's were met such that the placement offer may be implemented without parental consent. However, the absence of the general education

teacher at both September 2024 IEP team meetings is deemed a structural procedural defect that denied Student a FAPE, and therefore, the appropriateness of the remaining portions of the IEP's are not analyzed.

ISSUE: DID THE SEPTEMBER 12, 2024, AND SEPTEMBER 26, 2024, IEPs' OFFER OF PLACEMENT AT THE SOCIAL EMOTIONAL ACADEMIC SUCCESS PROGRAM AT MILLER ELEMENTARY SCHOOL, WITH RELATED SERVICES INCLUDING INDIVIDUAL, GROUP, AND PARENT COUNSELING, A ONE-TO-ONE AIDE, AND PRIVATE TRANSPORTATION PROVIDE STUDENT WITH A FAPE IN THE LEAST RESTRICTIVE ENVIRONMENT?

Escondido contends Student's September 12, and 26, 2024, IEP's, which amended the February 9, 2024, annual IEP by offering the Social Emotional Academic Success program at Miller Elementary, complied with all procedural and substantive requirements and offered Student a FAPE in the least restrictive environment.

Student contends the proposed placement is not in the least restrictive environment because alternative placements were not discussed.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a), and 56363, subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. 386, 402 [137 S.Ct. 988, 1000].)

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].) Here, Escondido filed the complaint and has the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

If a parent will not consent to a proposed IEP component that the school district determines is necessary to provide a FAPE, the school district must initiate a due process hearing. (Ed. Code, § 56346, subd. (f).) Under that provision, the school district must file expeditiously once an impasse with the parent is reached, and cannot opt to hold additional IEP team meetings or continue the IEP process in lieu of initiating a due process hearing. (*I.R. v. Los Angeles Unified School Dist.* (9th Cir. 2015) 805 F.3d 1164, 1170 (*I.R.*).) Education Code section 56346, subdivision (f) provides, "a due process hearing shall be initiated in accordance with Section 1415(f) of Title 20 of the United States Code." "A decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education." (20 U.S.C. § 1415(f)(3)(E)(i).)

On February 9, 2024, Escondido held Student's annual IEP. For the 2024-2025 school year, Student's transition kindergarten year, the IEP offered placement in the mild/moderate social communication special day class at Central Elementary School with general education curriculum. He would participate in special education for 75 percent of his day, and in general education for 25 percent of his day in the "enrichment wheel" with specialized academic support. The enrichment wheel included recess and lunch opportunities with general education students. Student would receive speech and language, occupational therapy, counseling, and behavior intervention services. Parent consented to all parts of the February 9, 2024 IEP without exception.

On August 20, 2024, Student began his transition kindergarten mild/moderate social communication program at Central Elementary School. Student struggled with his behavior and engaged in multiple episodes of physical aggression, object aggression, and verbal aggression each day, especially when he was participating in recess, lunch, and the enrichment wheel with general education peers. Student did not have positive interactions with his peers.

On September 12, 2024, Escondido held an IEP team meeting to review the educationally related mental health services assessment and a special circumstance instructional assistant assessment results. The assessments and the IEP team recommended a one-to-one aide; individual, group, and parent counseling; and a more highly structured school program. On September 26, 2024, Escondido held an IEP team meeting to discuss Parent's tour of Miller Elementary's Social Emotional Academic Success transitional kindergarten program. Parent did not agree to the change in placement.

On October 1, 2024, Escondido advised Parent in writing it would be seeking a change of Student's placement to the Miller Elementary School program without Parent's consent. On October 3, 2024, Escondido filed a due process complaint with OAH to change Student's placement for 45 school days and to implement the September 2024 IEPs' placement offer without parental consent.

There are two parts to the legal analysis of determining whether a school district's IEP offer complied with the IDEA. First, the school district must have complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the IEP must have been designed to meet the child's unique needs and reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

STUDENT'S ANNUAL FEBRUARY 9, 2024 IEP AS AMENDED BY THE
SEPTEMBER 12, 2024 AND SEPTEMBER 26, 2024 IEP'S DID NOT HAVE
A GENERAL EDUCATION IEP TEAM MEMBER PRESENT WHICH IS A
STRUCTURAL PROCEDURAL DEFECT AND DENIED STUDENT A FAPE

Escondido established that it gave Parent adequate notice of the September 2024 IEP team meetings and notice of procedural safeguards. Parent attended each of the IEP team meetings.

The public education agency must ensure that the parent receives notice of the meeting early enough to attend, and schedule the meeting at a mutually agreeable time and place. The public agency must indicate the purpose, time and place of the meeting,

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and who will be in attendance. (34 C.F.R. §300.322; Ed. Code, § 56341.5) The public education agency must also provide parent with federal and state procedural safeguards. (Ed. Code, § 56500.1.)

All essential IEP team members were present at Student's annual February 9, 2024 IEP team meeting.

THE GENERAL EDUCATION TEACHER WAS AN ESSENTIAL
MEMBER TO THE SEPTEMBER 12, AND 26, 2024 IEP TEAM
MEETINGS BUT DID NOT ATTEND

A general education teacher was not present at Student's September 12, and 26, 2024 amendment IEP team meetings. The September 12, 2024 IEP team meeting notice did not include a general education teacher. The September 26, 2024, IEP team meeting notice did include a general education teacher.

Escondido argues that Student verbally excused the general education teacher, and Escondido would have called her back to the IEP team meeting immediately upon Parent's request. Student asserts the IEP teams on September 12, and 26, 2024, were incomplete because they did not include a general education teacher.

The IEP team must include not less than one general education teacher of the pupil, if the pupil is, or may be participating in, the regular education environment. The general education teacher of each student, to the extent appropriate, shall participate in the development, review, and revision of the student's IEP, including assisting in the determination of appropriate positive behavioral interventions and supports, and other

strategies for the student, and the determination of supplementary aids and services, program modifications, and supports for school personnel that will be provided to student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); Ed. Code, § 56341, subd. (b)(2).)

34 Code of Federal Regulations part 300.321(e) clarifies that the essential IEP team members who must be excused from the IEP team meeting by the parent are listed in 34 Code of Federal Regulations part 300.321(a)(2)-(5). A person with knowledge or special experience pursuant to section 34 Code of Federal Regulations part 300.321(a)(6) is not an essential member of the IEP team, unless they are also qualified to interpret evaluations, under 34 Code of Federal Regulations part 300.321(a)(5).

An IEP team member is not required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the local educational agency agree that the attendance of such member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting. (20 U.S.C. § 1414(d)(1)(C)(i); Ed. Code, § 56341, subd. (f).)

Additionally, an IEP team member may be excused from attending an IEP meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if the parent and the local educational agency consent to the excusal; and the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting. (20 U.S.C. § 1414(d)(1)(C)(ii); Ed. Code, § 56341, subd. (g).)

The parent's agreement under clause (C)(i) and consent under clause (ii) must be in writing. (20 U.S.C. § 1414(d)(1)(C)(iii); Ed. Code, § 56341, subd. (h).)

THE FAILURE TO INCLUDE A GENERAL EDUCATION TEACHER IN THE EVALUATION OF STUDENT'S NEEDS AT HIS IEP TEAM MEETINGS IS A STRUCTURAL PROCEDURAL DEFECT

Procedural violations of the IDEA deny a student a FAPE when it results in a loss of educational opportunity to the student or seriously infringes on the parent's opportunity to participate in the IEP process. (20 U.S.C. § 1415(f)(3)(E)(i)-(iii); Ed. Code, § 56505, subd. (f)(2); *Target Range School District, etc.* (9th Cir. 1992) 960 F.2d. 1479,1483 (*Target Range*).)

The lack of a general education teacher at an IEP team meeting standing alone is a structural defect that denies a disabled student a FAPE. (*M.L. v. Federal Way School Dist.*, (9th Cir. 2005) 394 F.3d. 634, at 648 (*M.L.*); *S.H. v. Mount Diablo Unified School Dist.*, (N.D.Cal. 2017) 263 F.Supp.3d. 746, at 767, 768 (*S.H.*).)

In *M.L.*, a student had attended three years of an integrated general education preschool classroom. His transition IEP recommended placement in an integrated general education kindergarten classroom. However, an evaluation recommended against that inclusion. The parents did not attend the IEP team meeting. There was no general education teacher present. The District Court found the absence of the general education teacher was harmless error.

M.L. determined that harmless error was an incorrect standard, reversed the ruling, vacated the District Court's judgment, and remanded instructions to direct the school district to select an IEP team that complies with the procedural requirements of the IDEA.

M.L. determined as long as the record supported a possibility for a student to participate in a regular education classroom, then participation of a regular education teacher in the IEP team was required by the IDEA to ensure meaningful parental participation. *M.L.* held that at least one regular education teacher had to be included in the development of the IEP, and that such a critical structural defect precluded the reviewing court from considering whether the IEP developed without the inclusion of at least one regular education teacher was reasonably calculated to enable the student to receive a FAPE. (*M.L. supra*, 394 F.3d. 634, at 636.)

M.L. held that a review of the merits of the substantive recommendations of an illegally constituted IEP team for clear error would provide a futile advisory opinion. (*M.L. supra*, 394 F.3d. 634, at 648.) By failing to ensure the participation of a regular education teacher in the evaluation of a student's educational needs, the structural defect compels reversal without considering the merits of the IEP developed without the evaluation of at least one regular education teacher. Even under the harmless error standard, the loss of an educational opportunity cannot be determined without the inclusion of a regular education teacher, and has a material and inherently harmful impact on the ability of the defective IEP team to develop a program reasonably calculated to enable the student to receive educational benefit. Therefore, the school district's procedural error was not harmless. (*M.L. supra*, 394 F.3d. 634, at 650.)

In this case, Student's February 9, 2024 IEP offered Student transitional kindergarten in a special education social communication program for 75 percent of his day, and participation in general education for 25 percent of his day in the enrichment wheel, lunch and recess, with specialized academic support. The September 2024 IEP's also offered Student the same ratio of participation in general education for

25 percent of his day with specialized academic support. However, the program was considered more restrictive because it included a therapeutic emotional component, and had a social worker and a school psychologist on site.

Escondido's assertion that a general education teacher was available to attend the September 12, and 26, 2024 IEP team meetings was not persuasive. The evidence supports a finding that a general education teacher was required to be present at the two September 2024 IEP team meetings and participate in the development of Student's program. Parent's excusal of the general education teacher was not in writing. The general education teacher did not submit written input into the development of Student's IEP before the meeting.

This failure denied Student a FAPE.

PARENT'S VERBAL EXCUSAL OF THE GENERAL EDUCATION TEACHER IS NOT SUFFICIENT TO WAIVE THE ESSENTIAL TEAM MEMBER FROM BEING PRESENT

Escondido argues the general education teacher's absence was not a procedural violation because the general education teacher was invited to the meetings, but did not attend because Parent did not want her to attend.

Escondido contends it had a general education teacher available to join the meetings, and Parent verbally excused the general education teacher at both meetings. It argues that Parent's excusal of the general education teacher was confirmed by her own testimony, documented in the IEP notes at both meetings, and was corroborated by several credible Escondido witnesses.

An IEP team member may be excused from attending an IEP meeting, if the parent consents in writing to the excusal; and the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting. (20 U.S.C. § 1414(d)(1)(C)(ii), (iii); Ed. Code, § 56341, subds. (g), (h).)

At hearing, Parent admitted that she excused the general education teacher and “left it as an option” to call her back into the IEP team meeting if she had any questions. Parent testified she did not have questions for the general education teacher and agreed the teacher could leave the meeting.

However, Parent’s testimony that she excused the general education teacher and did not have questions for her is not dispositive of this issue. The Ninth Circuit ruled the failure of the parents’ attendance at the IEP team meeting did not waive their right to object to the failure to include a regular education teacher at the IEP team meetings. (*M.L. supra*, 394 F.3d. 634, at 649.)

Additionally, in *S.H.*, the court determined the purpose of the student’s IEP team meeting was to review assessment results. The evaluation report discussed the difficulties the student was likely to encounter in general education classes, and the percentage of special education and general education was changed, with an increase in special education time. The court ruled that the parents’ written consent excusing the general education teacher did not modify the requirement that a general education teacher be present, even when the student did not have an assigned general education teacher, and even when the general education teacher’s expertise was beyond the scope of the evaluation report. (*S.H., supra*, 263 F.Supp.3d. 746, at pp. 765-767.)

Here, the purpose of the two September 2024, IEP team meetings was to review two assessments, the educationally related mental health services assessment and the special circumstance instructional assistant assessment, which recommended an aide and a change in placement. The two assessments discussed at the September 2024 IEP team meetings affected the potential placement of Student. As in *S.H.*, there is no way to determine whether the participation of a general education teacher would have changed the results of the IEP team recommendation.

Parent's excusal of the general education teacher was not in writing. Nor did the general education teacher submit written input into the development of Student's IEP before the meeting, as required. (20 U.S.C. § 1414(d)(1)(C)(i)-(iii); Ed. Code, § 56341, subds. (f)-(h).)

The September 2024 IEP's offered Student a more highly structured program to include therapeutic components, even though the overall percentages of special education and general education did not change.

Student's behavior intervention plan was not consistently successful because of his frequently escalated emotional state. Further, in the general education setting, Student ran around the cafeteria, jumped on and off tables, and hit other students. Student's special education teacher Delma Kells and behaviorist John Lieu discussed and limited Student's involvement in the enrichment wheel with general education peers for safety reasons by changing the lunch and recess location to be with special education staff and students in a separate playground setting. Escondido made this change and did not include a general education teacher regarding this change in the development and evaluation of Student's educational needs at his September 2024 IEP team meetings.

At the time of the September 12, and September 26, 2024 IEP team meetings, Student did not have an assigned general education teacher who provided academic or non-academic instructional services to him. Significantly, Student's behavior impeded his ability to benefit from inclusion with general education peers. Yet, a general education teacher did not submit written input into the development of Student's IEP before the meeting as required.

Therefore, Escondido denied Student a FAPE because it did not include a general education teacher as an essential IEP team member. A general education teacher was required to participate in the development, review, and revision of Student's IEP, assist in the determination of appropriate positive behavioral interventions and supports, the determination of supplementary aids and services, program modifications, and supports for school staff that would be provided to Student.

Escondido's failure to include a general education teacher in the development of Student's September 2024 IEP team meetings denied him a FAPE.

THE ABSENCE OF A GENERAL EDUCATION IEP TEAM MEMBER PRECLUDED MEANINGFUL PARENTAL PARTICIPATION AND IS A STRUCTURAL PROCEDURAL DEFECT AND NOT HARMLESS ERROR

Escondido contends that if the absence of a general education teacher is considered a procedural violation, it is not a denial of FAPE because it did not result in a loss of educational opportunity to Student, and did not seriously infringe on Parent's ability to participate in the IEP process.

Student contends the proposed placement was not the least restrictive environment because additional placements should have been discussed. Student contends the general education teacher should have been present in spite of Parent's verbal excusal.

Escondido asserts Parent meaningfully participated in both IEP team meetings.

Indeed, several credible Escondido witnesses and the IEP team notes established Parent and her advocate voiced their concerns and engaged in discussions about Student's behavior and the proposed placement with the IEP team.

The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (20 U.S.C. § 1414(d)(1)(B)(i)(vi); 34 C.F.R. § 300.501(b).) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP team meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693-5; *Fuhrmann v. East Hanover Bd. of Education* (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].)

Procedural violations of the IDEA deny a student a FAPE when it results in a loss of educational opportunity to the student or seriously infringes on the parent's opportunity to participate in the IEP process. (20 U.S.C. § 1415(f)(3)(E)(i)-(iii); Ed. Code, § 56505, subd. (f)(2); *Target Range, supra*, 960 F.2d. 1479,1483.)

When a school district fails to develop an IEP in accordance with the procedures in the IDEA, there is no need to address the question of whether the proposed partial IEP was reasonably calculated to enable a student to receive educational benefits. (*Target Range, supra*, 960 F.2d. 1479,1483.)

S.H. ruled that when assessment results affecting the potential placement of a student is discussed at an IEP team meeting, there was no way to determine whether the participation of a general education teacher would have changed the results of the IEP team recommendations. (*S.H., supra*, 263 F.Supp.3d. 746, at 768.) Here, two assessments were discussed and reviewed at the September 2024 IEP team meetings. The assessments resulted in the recommendation of an aide and a new placement offer, and necessarily affected the potential placement of Student. As in *S.H.*, there is no way to determine whether the participation of a general education teacher would have changed the results of the IEP team recommendation.

The observations of Student's special education teacher, program specialist, behaviorist, and the results of the educationally related mental health services assessment and a special circumstance instructional assistant assessment, were appropriate in leading the IEP discussions. However, the inclusion of a general education teacher could have changed the discussions or outcome of the IEP team meetings as to whether Student required a one-to-one aide, private transportation, counseling, and a different placement. For example, a general education teacher could have discussed with Parent how Student could participate with general education peers in the proposed placement. If properly excused in writing, a general education teacher could have provided written input into the development of the two September 2024 IEP offers in advance, but did not.

Escondido appears to rely on *Target Range, supra*, 960 F.2d. 1479, for the proposition that procedural violations of the IDEA deny a student a FAPE when it results in a loss of educational opportunity to the student or seriously infringes on the parent's opportunity to participate in the IEP process.

However, both *M.L.* and *S.H.* determined that because the failure to include a general education teacher on the IEP team was the sort of structural error that by itself denied a student a FAPE, and therefore the harmless error analysis was inappropriate. *M.L.* and *S.H.* further determined that even if the school district's failure to include the general education teacher was subject to harmless error analysis, then the error was not harmless in those cases.

Similarly, here, Escondido's defective IEP team discussed two evaluation results, a change in Student's participation with his general education peers, and a proposed change in placement to a more restrictive setting. Escondido's error was not harmless.

Student had a behavior intervention plan. A general education teacher's input would have been appropriate to participate in the development, review, and revision of Student's IEP, including assisting in the determination of appropriate positive behavioral interventions and supports, and other strategies for the student, and the determination of supplementary aids and services, program modifications, and supports for school personnel that would be provided to Student.

The absence of a general education teacher at Student's September 2024 IEP team meetings impeded meaningful parental participation. Although the evidence established that Parent and her advocate meaningfully participated in the September 12, and 26, 2024 IEP team meetings, and commented on and raised numerous questions and concerns about Student's behavior at home and school,

evaluation results, and placement recommendations, the absence of a general education teacher at the IEP team meetings seriously infringed on Parent's meaningful participation at those meetings.

As in *M.L.* and *S.H.*, the failure to include a general education teacher at Student's IEP team meetings was not harmless. (*M.L.*, *supra*, 394 F.3d. 634, at 650; *S.H.*, 263 F.Supp.3d. 746, at 768.) This critical structural defect precludes an analysis of whether the IEP developed without the inclusion of at least one regular education teacher was reasonably calculated to enable Student to receive a FAPE. (*M.L.* *supra*, 394 F.3d. 634, at 636.)

For these reasons, Escondido did not prove the September 12, and 26, 2024 IEP's offered Student a FAPE, such that it may implement the Social Emotional Academic Success program at Miller Elementary School without parental consent.

CONCLUSIONS AND PREVAILING PARTY

As required by California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided.

ISSUE:

Escondido denied Student a FAPE by failing to include a general education teacher in the development of his educational program and attendance at the September 12, and 26, 2024 IEP team meetings.

Student prevailed on the sole issue.

ORDER

Escondido's claims for relief are denied.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

DEBORAH MYERS-CREGAR

Administrative Law Judge

Office of Administrative Hearings