

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

D.O., By and Through His Guardian  
Ad Litem Sonya Walker,  
*Plaintiff-Appellee,*

v.

ESCONDIDO UNION SCHOOL  
DISTRICT,  
*Defendant-Appellant.*

No. 21-55498

D.C. No.  
3:17-cv-02400-  
BEN-MDD

OPINION

Appeal from the United States District Court  
for the Southern District of California  
Roger T. Benitez, District Judge, Presiding

Argued and Submitted July 13, 2022  
Pasadena, California

Filed January 31, 2023

Before: Mark J. Bennett and Gabriel P. Sanchez, Circuit  
Judges, and Elizabeth E. Foote,\* District Judge.

Opinion by Judge Bennett;  
Partial Concurrence and Partial Dissent by Judge Sanchez

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\* The Honorable Elizabeth E. Foote, United States District Judge for the  
Western District of Louisiana, sitting by designation.

**SUMMARY\*\***

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**Individuals with Disabilities Education Act**

The panel reversed the district court's summary judgment in favor of student D.O. in his action under the Individuals with Disabilities Act against Escondido Union School District.

An administrative law judge ruled that Escondido's delay in assessing D.O. for autism was neither a procedural violation of the IDEA nor a denial of a free appropriate public education, or FAPE. The district court reversed the ALJ in part, holding that Escondido's four-month delay in assessing D.O. constituted a procedural violation of IDEA and that this procedural violation denied D.O. a FAPE by depriving him of educational benefits.

The panel held that it had jurisdiction because Escondido timely appealed the district court's final judgment, and there was no indication that the district court lacked jurisdiction.

Reviewing de novo, the panel reversed the district court's determination that Escondido's delay in proposing to assess D.O. was a procedural violation of IDEA. The panel concluded that Escondido's duty to propose an assessment in an area of suspected disability was triggered on December 5, 2016, when Escondido was put on notice that D.O. might be autistic by Dr. Margaret Dyson, who had completed an assessment and report. The panel concluded that Escondido's subsequent four-month delay in proposing an

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\*\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

autism assessment plan did not violate any California statutory deadlines or any federal statutory timeline. The panel held that Escondido's delay did not constitute a procedural violation of IDEA because Escondido did not fail to assess D.O., and some delay in complying with IDEA's procedural requirement is permissible. The panel held that the district court erred in determining that Escondido's delay was due, at least in part, to the subjective skepticism of its staff. Distinguishing *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105 (9th Cir. 2016), the panel concluded that Escondido staff's skepticism was based on substantial and scientific reasons. The panel held that the district court also erred in finding that Escondido's efforts to obtain Dr. Dyson's report from D.O.'s mother were "minimal," and Escondido properly pursued the report as useful to its own assessment.

The panel also held that even if the delay were a procedural violation of FAPE, it did not deny D.O. a FAPE. The panel concluded that Escondido's delay did not deprive D.O. of educational benefits, and D.O.'s individualized education program, or IEP, was reasonably calculated to provide D.O. educational benefits. Further, Escondido's delay did not deprive D.O. of educational opportunity, and it did not seriously infringe on D.O.'s mother's opportunity to participate in the IEP formulation process.

The panel held that the appeal was not moot, regardless of whether Escondido could recoup the \$3,500 it paid to D.O. as reimbursement for an independent psychological evaluation.

The panel reversed the district court's judgment and remanded, directing the district court to enter judgment in accordance with this opinion.

Concurring in part and dissenting in part, Judge Sanchez concurred in the majority's holding that Escondido's delay in proposing to assess D.O. for autism did not deny him a FAPE. Judge Sanchez dissented, however, from the majority's conclusion that Escondido's failure to act for four months was nonetheless reasonable under the IDEA because D.O.'s mother was uncooperative. Judge Sanchez wrote that this court's precedent is clear that the school district has an independent legal obligation to promptly assess a child for a suspected disability, even when the parent does not cooperate in full or makes promises they do not keep. Judge Sanchez wrote that he would affirm the district court's determination that Escondido's four-month delay in initiating the process to assess D.O. for autism constituted a procedural violation of IDEA, and he would reverse its determination that this procedural violation resulted in the denial of a FAPE.

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### COUNSEL

Deborah R.G. Cesario (argued) and Molly E. Thurmond, Hatch & Cesario, San Diego, California, for Defendants-Appellants.

Matthew H. Storey (argued) and Jennifer W. Holzman, Law Office of Matthew Storey APC, San Diego, California; David G. Greco, RMO LLP, Los Angeles, California, for Plaintiff-Appellee.

Summer D. Dalessandro and Tiffany M. Santos, Fagen Friedman & Fulfrost LLP, Carlsbad, California; Robert Tuerck and Michael Ambrose, California School Boards Association's Education Legal Alliance, West Sacramento, California; for Amicus Curiae California School Boards Association's Education Legal Alliance.

### OPINION

BENNETT, Circuit Judge:

Escondido Union School District (“Escondido”) appeals the district court’s ruling that Escondido denied D.O. a Free Appropriate Public Education (“FAPE”) by failing to timely assess him for autism. On December 5, 2016, Dr. Margaret Dyson, an external clinical psychologist retained by D.O.’s mother, notified Escondido that she had completed an assessment of D.O. and, based on the assessment, D.O. appeared to meet the criteria for autism spectrum disorder. That day, Escondido asked D.O.’s mother to provide Dr. Dyson’s report evaluating D.O. once she received it, which D.O.’s mother agreed to do. Escondido needed to review the report before conducting its own assessment of D.O. for autism because certain tests for autism would return invalid results if administered more than once in a year.

Even though D.O.’s mother stated that she received the report “shortly after” December 5, 2016, she did not give the report to Escondido until July 5, 2017. Counsel for D.O. and his mother conceded that Escondido had no way of getting Dr. Dyson’s report without D.O.’s mother’s consent. Transcript of Oral Argument at 14:15–14:52. In April 2017, Escondido again requested a copy of Dr. Dyson’s

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