No. 19-35473

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAYNA CROFTS,

Plaintiff-Appellant,

and

JEREMY SANDERS,

Plaintiff,

v.

ISSAQUAH SCHOOL DISTRICT NO. 411,

Defendant-Appellee,

and

MELISSA MADSEN and RON THIELE,

Defendants.

APPELLANT'S OPENING BRIEF

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We saw problems in kindergarten. . . . We expressed concerns in first grade. . . . And by this point, we're realizing that she has two years left in her elementary education. We're feeling a grave sense of urgency at this point. . . . I know what Student is headed towards. And it scares me to death. She is running headlong into a brick wall that she's not prepared to see or deal with.

-testimony of A.S.'s father[1]

I. INTRODUCTION

The Individuals with Disabilities Education Act ("IDEA") provides procedural and substantive rights to children with disabilities who need special education and related services. The cornerstone of the IDEA's entitlements is the development and implementation of an individualized education program ("IEP") for each child. The IEP must be reasonably calculated to deliver a free appropriate public education to each eligible child and must describe the specific educational services the child will receive. The IEP's content, in turn, flows from a comprehensive evaluation in all areas of suspected disability. The evaluation determines not only eligibility for special education, but also the child's unique educational needs and, critically, how those needs will be met.

This case involves A.S., a young student who has all the classic characteristics and educational limitations of dyslexia, a disorder that may render a child eligible for special education. The school district refused to evaluate A.S. for dyslexia and to determine how her dyslexia impacts her educational needs. The district had no staff with expertise or special knowledge of dyslexia. A child with dyslexia may require an educational program specifically tailored to the

[1] 12-ER-2382–84.

educational deficits dyslexia causes. Because these programs necessarily will differ from those given to children with other learning disabilities, the school district's failure to evaluate A.S. for her suspected dyslexia violated the IDEA. And because the evaluation process was deficient, A.S.'s IEPs, which failed to address her dyslexia, were also inadequate.

The district court erred in granting summary judgment in the district's favor. This Court should reverse the order granting summary judgment and remand with instructions that the district court enter an order directing the school district to provide an independent educational evaluation for A.S., after which the district court should determine an appropriate remedy.

II. JURISDICTIONAL STATEMENT

The district court had jurisdiction of this IDEA action under 20 U.S.C. § 1415(i)(2)–(3)(A). The district court entered its order granting summary judgment and final judgment on May 8, 2019. 1-ER-2–3, -67. In a civil case, the notice of appeal required by Federal Rule of Appellate Procedure 3 must be filed within 30 days after entry of judgment. Fed. R. App. P. 4(a)(1)(A). The plaintiff timely filed a notice of appeal on May 30, 2019. 2-ER-116. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW[2]

1. The Individuals with Disabilities Education Act requires school districts conducting eligibility evaluations for special education to assess children in "all areas of suspected disability." Where the school district was aware of reasonable suspicions that A.S. was dyslexic, did the district's refusal to evaluate A.S. for dyslexia and dysgraphia violate the IDEA and should the district provide an independent educational evaluation at public expense?

2. Where the school district failed to appropriately evaluate A.S., did it fail to provide a free appropriate public education to A.S?

IV. PERTINENT STATUTES

The relevant statutory and regulatory provisions are set forth verbatim in an addendum following this brief.

V. STATEMENT OF THE CASE

This case centers on A.S., an adorable little girl residing in Washington State who is—at a minimum—suspected by all her teachers and other school personnel of having dyslexia and dysgraphia.[3] 5-ER-694–95 (second grade teacher testifying she believes A.S. has dyslexia and has difficulty with spelling and writing), 5-ER-856 (describing A.S. as "[a]dorable" and [a] good girl, sweet girl"); 7-ER-1184, -1201 (special education teacher testifying she believed A.S. to have spelling and

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[2] Proceeding pro se, A.S.'s mother submitted a brief earlier in this appeal that raised a number of issues. At this time, however, she asks the Court to address only the issues set forth in this brief.

[3] Dyslexia and dysgraphia are conditions that may constitute specific learning disabilities under the IDEA, *see* 20 U.S.C. § 1401(30)(B). Dyslexia is categorized by difficulties with reading, and dysgraphia involves difficulties with spelling or writing. 5-ER-694; 8-ER-1582; 14-ER-2884. In this brief, the arguments apply equally to dyslexia and to dysgraphia, and to avoid unnecessary repetition, dyslexia will be used as shorthand for these arguments applying equally to A.S.'s dysgraphia.

writing issues), -1248 (special education teacher testifying "I would consider Student to be dyslexic"); 10-ER-1910 (special education teacher believes A.S. to have dyslexia and dysgraphia); 11-ER-2110 (third grade teacher believes A.S. to have dyslexia); 11-ER-2150 (third grade teacher noting A.S. "[s]truggles with spelling or writing"). Despite these suspicions, neither A.S. nor any other student in the district is evaluated in these areas of suspected disability. 6-ER-1023; 8-ER-1435.

A. Children with Dyslexia Are at Risk of a Widening Gap Between Them and Their Peers Without Intensive, Targeted Instruction

The National Institute of Child Health and Human Development and the International Dyslexia Association define dyslexia as follows:

> Dyslexia is a specific learning disability that is neurological in origin. It is characterized by difficulties with accurate and/or fluent word recognition and by poor spelling and decoding abilities. These difficulties typically result from a deficit in the phonological component of language that is often unexpected in relation to other cognitive abilities and the provision of effective classroom instruction. Secondary consequences may include problems in reading comprehension and reduced reading experience that can impede the growth of vocabulary and background knowledge.

9-ER-1664; 13-ER-2605; 14-ER-2812; *see also* Rev. Code Wash. § 28A.320.250 (defining dyslexia). Children with dyslexia usually have average or superior intelligence. 14-ER-2812. "Dyslexia is not due to either lack of intelligence or desire to learn; with appropriate teaching methods, people with dyslexia can learn successfully." 14-ER-2813. When given effective phonological training (i.e., training in the sound components of language, 9-ER-1672) in kindergarten and first grade, dyslexic students will have significantly fewer problems in learning to

read at grade level than those who are not identified or helped until third grade. 14-ER-2816. While there is no "cure," individuals with dyslexia can succeed "with proper diagnosis, appropriate instruction, hard work, and support" in school. 14-ER-2817. Critically, testing "is the only way to quantify how far below her potential the child is working." 14-ER-2823.

The importance of effective educational interventions for children with dyslexia has been increasingly recognized, including in Washington where A.S. attends school. Washington Governor Jay Inslee proclaimed October 2016 to be Dyslexia Awareness Month in recognition of the fact that "students who do not read at grade level by 3rd grade are four times less likely to graduate high school." 14-ER-3034. To rectify this discrepancy, the Governor sought to help teachers across the state "benefit from an increase in educational training and increased awareness about the early warning signs of dyslexia and evidence-based strategies for students with dyslexia." 14-ER-3034.

The Washington Legislature has also recognized that early identification and effective intervention are critical. Legislation requires the Superintendent of Public Instruction—the executive official with authority over education in Washington, Wash. Const. art. III, §§ 1, 22—to convene a dyslexia advisory council to recommend best practices for identifying and educating children with dyslexia, Rev. Code Wash. § 28A.300.710. The Office of the Superintendent of Public Instruction ("OSPI") is statutorily charged with "[d]evelop[ing] an educator training program to enhance the reading, writing, and spelling skills of students

with dyslexia" through research-based interventions. Rev. Code Wash. § 28A.300.530. Beginning in the 2021-22 school year, school districts must screen for dyslexia or areas of associated weakness, must employ evidence-based interventions, and must provide information relating to dyslexia to the student's parents. Rev. Code Wash. § 28A.320.260.

B. The District Fails to Evaluate A.S. for Special Education

A.S. was born prematurely, weighing only three pounds. 13-ER-2596; 14-ER-3004. Her language and physical development were delayed in comparison to her siblings' development. 13-ER-2596. Concerns about A.S.'s reading arose very early in her education. *See* 13-ER-2596.

When A.S. was in kindergarten, her parents notified her teacher that they believed A.S. had dyslexia and wanted "her to get help to make sure that she gets the education she needs." 3-ER-333. The district did not administer any assessments to determine whether A.S. had dyslexia or otherwise qualified for special education. 3-ER-335. Instead, A.S. was placed in a Learning Assistance Program, which was not effective. 4-ER-608–09; 13-ER-2584.

In fall of A.S.'s first grade year, her parents requested an evaluation for special education, specifically mentioning "concerns regarding [A.S's] reading skills" and "possible dyslexia." 13-ER-2584. Her parents "reported concerns regarding flipping letters while reading and writing, handwriting, speech, and attention," and the fact that A.S. "had not made progress in reading" over the year. 13-ER-2585. The district again refused to evaluate A.S., but stated that the parents

could independently have her evaluated at their own expense. 3-ER-350; 8-ER-1518–19 ("[W]e refused to initiate an initial evaluation at that time."); 14-ER-2999.

A.S. failed to make progress, and A.S.'s first grade teacher wrote to the principal stating that A.S. had not "moved up very much" in reading and "seems to skip over words she doesn't know, and has not really been applying the reading strategies we have learned and talked about in class to decode unknown words." 4-ER-423; 13-ER-2564 (stipulating to admission of Ex. P10, p. 66), -2759. Her teacher also stated that "[A.S.] approximates and mumbles through text when unsure" and "makes errors" while reading. 14-ER-3007. A reading assessment from February of her first grade year showed that A.S. scored below the average range. *See* 3-ER-320; 13-ER-2617.

In summer 2015, before A.S. started second grade, her mother emailed the principal to ask for an appointment regarding an IEP for A.S. and to explain that she had secured some independent educational testing. 13-ER-2580–81, 2584. Under state law, when a parent of a student requests an initial evaluation, the district must document the request and notify the parent that the student has been referred for a determination of whether to evaluate the student for special education. Wash. Admin. Code § 392-172A-03005.[4] Shortly before the school

[4] Citations to the Washington Administrative Code and Code of Federal Regulations refer to those regulations in effect in 2016, when the due process complaint was filed, and are reproduced in an addendum to this brief.

year began, the district notified A.S.'s parents that they could attend a meeting in early September regarding A.S.'s special education referral. 13-ER-2582–83.

C. A.S.'s Private Evaluation by School Psychologist Linda Gorsuch Notes Her Classically Dyslexic Profile

Before the meeting, A.S.'s parents furnished the district with an independent evaluation they had secured over the summer. 13-ER-2595–2609. The evaluation and report were completed by Linda Gorsuch, a retired school psychologist. 4-ER-517. A.S.'s oral reading fluency was well below the benchmark score and her accuracy was very poor. *See* 13-ER-2599, 2608. On the Woodcock-Johnson IV test of academic achievement, A.S.'s reading fluency, passage comprehension, sentence reading fluency, word attack, oral reading, and spelling scores were all below average or well below average. 13-ER-2603. A.S.'s scores for phonological memory and rapid symbolic naming were in the below average range. 13-ER-2600. A.S.'s scores on the phonological processing[5] subtest were well below average. 13-ER-2600–01. Despite these educational deficiencies, A.S.'s cognitive ability was in the average range. 13-ER-2600–01.

Ms. Gorsuch's report also observed that "[p]roblems with the mechanics of writing were evident and in agreement with the observations of [A.S's] mother" and that A.S. had trouble with letter reversals, difficulty with writing on the lines,

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[5] Phonological processing references the ability to work with sounds in words and mentally blend or delete portions of sounds, a skill that must be developed before a child can benefit from phonics instruction. 9-ER-1672; 13-ER-2605.

and did not keep spacing between letters uniform. 13-ER-2604. The report explained that the specific learning disability of dyslexia

> is characterized by impaired processing abilities that support the ease and efficiency of symbolic learning, which is required in tasks such as learning sound-symbol associations, memorizing multiplication tables, or writing letters of the alphabet quickly. Problems in any one of these areas can affect an individual's development and performance in the basic academic skills of reading, writing, and/or mathematics. In contrast to impairments in processing abilities, students with dyslexia often have intact reasoning and higher-order verbal abilities.

13-ER-2607.

Ms. Gorsuch's report concluded that A.S. "demonstrated a pattern of academic and cognitive strengths and weaknesses consistent with this classic profile of the specific learning disability of dyslexia," 13-ER-2607, and there were also "[o]ther reasons to suspect dyslexia," including A.S.'s low birth weight and family history of dyslexia. 13-ER-2608. Ms. Gorsuch recommended, based on A.S.'s educational difficulties, that A.S. be given an "in depth," as opposed to a "cursory," evaluation of her language abilities. 13-ER-2608. Ms. Gorsuch also recommended that A.S. receive specialized instruction in reading methods consistent with the Structured Literacy approach endorsed by the International Dyslexia Association, which is intensive, systematic, cumulative, and is based on explicit instruction and diagnostic teaching. 13-ER-2606, 2608.

D. After Receiving Ms. Gorsuch's Report, the District Does Not Evaluate A.S. for Dyslexia

A.S.'s evaluation case manager was school psychologist Devon Heras. 14-ER-2999. Ms. Heras administered the DAS-II, a test of cognitive ability, on which

A.S. scored in the average range for overall cognitive ability. 14-ER-3013. The school district officials found that A.S. had a severe discrepancy between her intellectual ability and reading fluency and reading comprehension. 14-ER-3026. The school district determined that A.S. qualified for specially designed instruction in reading comprehension, reading fluency, writing conventions, and writing process. 14-ER-3002.

The district's evaluation did not assess for dyslexia, nor did it make any findings relating to the educational implications of A.S.'s dyslexia. 14-ER-3017. The school's evaluation stated that A.S.'s parents reported that A.S. had dyslexia and that Ms. Gorsuch found she "demonstrated a pattern of academic strengths and weaknesses consistent with this classic profile of the specific learning disability of dyslexia." 14-ER-3004. Despite the parents raising repeated concerns—and despite Ms. Gorsuch's evaluation suggesting dyslexia—the district did not assess A.S. for dyslexia or evaluate how that disorder may impact her educational needs. *See* 13-ER-2615 ("Concerns included dyslexia, academics, and language."), 13-ER-2614 ("I understand that I have to give written permission in order for you to test [A.S.] for dyslexia and speech issues. Please consider this request as written permission."). Instead, school officials found that A.S. qualified for special education services under the category of specific learning disability. 14-ER-3000.

E. A.S.'s Second Grade IEP Leads to Minimal Progress

The school convened an IEP meeting on November 5, 2015. 14-ER-2888. Because the evaluation did not address A.S.'s likely dyslexia, there had been no

determination of whether A.S.'s dyslexia required a particular instructional program or related services in order to meet her unique needs. *See* 14-ER-2888.

A.S.'s goals related to improving her reading, comprehension, and writing skills. 14-ER-2897–99. Other accommodations were listed, including access to and use of a computer with word prediction software. 14-ER-2900. As for special education and related services, A.S. was to receive only 20 minutes of reading instruction and only 20 minutes of writing instruction delivered by a special education teacher in a separate class—a total of only 40 minutes per day of special education services to address her significant educational deficiencies. 14-ER-2903.

Implementation of A.S.'s IEP was stymied. The computer was not promptly set up in the classroom and, once it was, it frequently did not work. 12-ER-2392–93. A.S.'s parents followed up multiple times and volunteered to purchase a computer if that would be helpful. 12-ER-2391. They also offered to purchase supplies, programming, and training around dyslexia—offers which were all rebuffed. 12-ER-2391–92. Meanwhile, A.S. was not making progress. *See* 10-ER-2012.

Due to concerns that accommodations were not being implemented and that A.S. was not making educational progress, A.S.'s parents called an IEP meeting in February 2016, approximately halfway through A.S.'s second-grade year. 10-ER-2012; 12-ER-2396. At the meeting, a number of concerns were discussed, including aspects of A.S.'s program that seemed inconsistent with her suspected

dyslexia. *See* 12-ER-2396. A.S.'s parents requested that Orton-Gillingham curriculum, which is specifically geared toward dyslexic students, be used with A.S.—a request school officials summarily rejected. 10-ER-1959–60; 13-ER-2654–55.

In second grade, A.S. failed to meet the measurable annual goals designated by her IEP to show progress. *See* 34 C.F.R. § 300.320(a)(2); 10-ER-1960. While one of her two writing goals had been marked as "met," that was only because the teacher found that A.S. "met" the goal under criteria nowhere found in the IEP. *See* 13-ER-2672. This goal had been for A.S. to "use correct punctuation" 50 percent of the time (up from zero), as measured by weekly writing assignments. 14-ER-2898. But when measuring A.S.'s progress on this goal, her teacher would prompt her to reference the automatic corrections to punctuation generated by the computer. 10-ER-1923–24; 13-ER-2672 ("[A.S.] is at 50 percent in using correct punctuation in her writing when using a computer with teacher support."). Thus, A.S. had not learned to actually use punctuation herself. 12-ER-2421 ("[I]f [A.S.] were to sit down and write a story today, there would most likely be zero punctuation in it. She cannot do punctuation.").

At the end of her second grade year, A.S. was at an "instructional" level K in the curriculum being used with her, 5-ER-689, a curriculum which is not designed for children with dyslexia, 5-ER-896. This level meant that she was still significantly behind expectations, and significantly behind her peers. *See* 14-ER-3044.

F. A.S.'s Third Grade Year Was Marked by Continued Lack of Progress

Just before the start of A.S.'s third grade year (the 2016-17 school year), an IEP meeting was held with the help of an outside facilitator. *See* 13-ER-2627. At that meeting, A.S.'s parents again expressed concerns that A.S.'s dyslexia was not being addressed. 13-ER-2628 ("We see clearly that she needs … help and we know that there are a lot of dyslexia specific programs out there and I don't know if anyone here knows that or is trained in that but she's not getting that.").

At an IEP meeting held on October 27, 2016, the team increased A.S.'s instructional time by twenty minutes daily, so that she would receive only thirty minutes of daily reading instruction and only thirty minutes of daily writing instruction. 13-ER-2652. A.S.'s parents again requested that A.S.'s "disability category be changed from Specific Learning Disability to Dyslexia." 13-ER-2654, -2659. The district rejected this request on the ground that specific learning disability, and not dyslexia, serves as an eligibility category under the law. 13-ER-2654.

The district again refused to consider the parents' request for Orton-Gillingham methodology. 13-ER-2654–55, -2662. Instead, the district asserted that it "has programs and curricula for students with various learning disabilities, including dyslexia," and that the district does not "identify specific programs" in IEPs. 13-ER-2655, -2662 ("We don't identify curriculum[.]"). Even though A.S. had not met her second grade goals, the team proposed new goals but did not adjust educational methodology or type of instruction in the IEP. *See* 13-ER-

2652–53. A.S.'s parents indicated they did not agree with the proposed IEP. 13-ER-2641. As third grade progressed, A.S. made only minimal progress. *See* 4-ER-429, -556.

G. Administrative Proceedings Are Initiated

Dissatisfied with the district's refusal to evaluate A.S. for dyslexia, A.S.'s parents requested an independent educational evaluation of A.S. *See* 13-ER-2664. Under the IDEA, when a parent disagrees with the school district's evaluation and requests an independent educational evaluation, the district must provide the evaluation or file a due process complaint to request a hearing to show its own evaluation is appropriate. 34 C.F.R. § 300.502(b)(2); Wash. Admin. Code § 392-172A-05005. The district requested such a hearing on November 8, 2016. 13-ER-2576–78. Shortly thereafter, A.S.'s parents requested a hearing, alleging that "the district failed to evaluate [A.S.] in all areas of her suspected disability" and refused to provide A.S. with instruction to target her dyslexia. 13-ER-2571. The two administrative matters were consolidated, 13-ER-2566, and a ten-day hearing was held before an Administrative Law Judge ("ALJ") in March and April of 2017 on issues including whether the district failed to "appropriately assess [A.S.] given her dyslexia" in 2015 and 2016 whether the district failed to provide A.S. a FAPE. 1-ER-68, -69–71. At the time of the hearing, A.S. was in third grade at Sunny Hills Elementary in Issaquah School District. 1-ER-73; 3-ER-233; 14-ER-2999.

H. The District Suspected Dyslexia But Lacked Expertise in Evaluating for Dyslexia

A.S.'s likely dyslexia was confirmed by her teachers' testimony that they believed she had dyslexia. 5-ER-694 (second grade teacher answering "yes" when asked "[d]o you believe that Student has dyslexia?"); 7-ER-1184, (special education teacher answering "yes, I do" to same question); 11-ER-2110 (third grade teacher answering "yes" to same question). At the time the district evaluated A.S., they had Ms. Gorsuch's report stating that A.S. likely had dyslexia. 13-ER-2595–2609.

But school officials testified they never evaluate students for dyslexia. 6-ER-944, -1014; *see also* 7-ER-1214 ("We're not physicians. We don't diagnose children."); 10-ER-1897–98. School psychologist Devon Heras, A.S.'s evaluation case manager, testified that she had no expertise in dyslexia. 8-ER-1559 ("I do not consider myself an expert on dyslexia."); 14-ER-2999. She stated that she did not know whether special training or assessments were needed to appropriately assess a student with suspected dyslexia. 8-ER-1544. While characterizing dyslexia as a "reading disability," Ms. Heras was unable to say whether it was also a language-based disability. 8-ER-1438 ("I don't feel like I have enough knowledge of dyslexia in terms of being an expert on what the definition is to comment on it being a language-based disability[.]"). Ms. Heras explained that she "would never make a statement saying that I suspect dyslexia," 8-ER-1435, and that she does not diagnose, screen, or test for dyslexia, dysgraphia, or dyscalculia. 8-ER-1424–25.

The district witnesses' testimony was that A.S.'s teachers had neither training nor expertise on dyslexia. Melissa Madsen, the chief administrator overseeing special education in the district, 6-ER-944, acknowledged that the district has no in-house specialists in dyslexia, 6-ER-975 ("We do not have a dyslexic specialist."). A.S.'s special education teacher, Sue Schoot, testified she had no specific training around dyslexia. 7-ER-1178 ("Has the District given me training or guidelines specifically to dyslexia? Not specific to dyslexia."), -1181–82 ("Q: What is your training in dyslexia? . . . A: So I've taken classes in college and I've been trained in different curriculums. But specific to dyslexia I have not."). While Ms. Schoot claimed to have been trained on instructional approaches "for all students with disabilities," she admitted that she had not been trained on approaches specific to dyslexia. 7-ER-1205.

Similarly, Jessica Clark, A.S's first grade teacher, testified she had no specific training in dyslexia. 5-ER-718 ("I've not been trained in how to work with dyslexic students."); *see also* 5-ER-858 (claiming that despite lack of special training, she "felt that [her] reading background helped [her] to be able to confer with [A.S.] successfully"). Ms. Clark "did not believe that [she] needed to research dyslexia" to teach A.S. because she believed that what works for all students would work for A.S. 5-ER-858. Finally, Amy Van de Vord, A.S.'s third grade teacher, testified that A.S. was the first child she had taught with a dyslexia diagnosis. 11-ER-2110. She testified that she was given no training or

information around dyslexia to teach A.S., and did not believe training was needed. 11-ER-2114, -2116, -2285.

The district witnesses repeatedly stated that there was no need to evaluate A.S. for dyslexia, because A.S. qualified under the "umbrella category" of specific learning disability. *See* 6-ER-958 ("So the category that is allowed by the state is specific learning disability."). Ms. Madsen stated that the district would not consider evaluating any child for dyslexia:

> So the way that we identify students is based on … categories of special education. So we are limited to those categories as defined by the state. When we say identify or qualify her under a disability category, we have to do that under those categories as given to us by the State of Washington, one of which is specific learning disability. And so students that have dyslexia, dysgraphia, any other learning disorder, fall under the category of specific learning disability. . . . [S]he was qualified under the category of specific learning disability. And that took into account the outside information from Ms. Gorsuch, which suggested the possibility of dyslexia.

6-ER-1004. Ms. Madsen asserted that neither the Issaquah School District nor any other school district evaluates for dyslexia but "they are able to test for specific learning disabilities . . . which is how students with dyslexia are qualified in the state of Washington." 6-ER-1014; *see* 13-ER-2629. Ms. Heras, the school psychologist, concurred in this view. *See* 8-ER-1424–25, -1435.

Ms. Madsen claimed that the district uses curricula for students with "a variety of learning disabilities," but not one designed specifically for dyslexic students. 6-ER-1051. While Ms. Schoot believed the Read Well 2 curriculum, which was not introduced to A.S. until after administrative proceedings had been commenced, *compare* 7-ER-1311 (testifying Read Well was implemented in

December) *with* 13-ER-2576 (due process hearing request in November), "adopts some of the pieces" from Orton-Gillingham, she acknowledged she was not trained in dyslexia and did not testify that this partial "adoption" made it appropriate and research-based for a child with dyslexia, 7-ER-1181–82, -1269.

Finally, testimony established the district did not follow dyslexia guidance[6] provided by the Washington State Office of Superintendent of Public Instruction (OSPI), the state educational agency responsible for enforcing the IDEA in Washington.[7] 14-ER-2802. This guidance emphasizes that students with dyslexia may struggle to learn to read "despite conventional or intensified instruction," 14-ER-2809, and recommends a number of hands-on strategies to use with dyslexic students, 14-ER-2835. Ms. Schoot, A.S.'s special education teacher, did not incorporate the vast majority of these strategies in teaching A.S. 7-ER-1207–08; 14-ER-2835. She never had A.S. write letters in sand, salt, or rice while naming them, or trace over large patterns with her fingers while naming a letter, which the guidance recommends for dyslexic students. 7-ER-1207; 14-ER-2835. Ms. Schoot's instruction was not differentiated to account specifically for A.S.'s dyslexia. *See* 7-ER-1270.

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[6] This guidance is required to be published under state law. *See* Rev. Code Wash. § 28A.300.530(1)(b).

[7] *See* Rev. Code Wash. § 28A.155.020; Wash. Admin. Code § 392-101-010(2).

I. Dyslexia Expert Cheryl Anthony Testifies that A.S.'s Dyslexia Must Be Addressed

At the hearing, the parents called Cheryl Anthony, M.S. Ed., as an expert witness. 9-ER-1659; 14-ER-3045. Ms. Anthony provides educational screening for dyslexia and dysgraphia as well as intervention for individuals with dyslexia, including direct instruction in reading and handwriting. 9-ER-1657-59; 14-ER-3045. She is a certified teacher in Washington State and focused on curriculum and instruction in her graduate studies. 14-ER-3045. She was the past president of the Oregon chapter of the International Dyslexia Association, has trained others in dyslexia intervention, and has provided training for educators. 14-ER-3045. She has taught first through fourth grades in the classroom. 9-ER-1658.

Ms. Anthony testified that children with dyslexia require a multisensory approach to instruction that is explicit and direct, and that this is a different approach from that used with children with other specific learning disabilities. 9-ER-1665–67, -1754–55. She recommends Orton-Gillingham instructional methodology, which is research-based, and opined that "[i]t is absolutely imperative" that such proven methods addressing the unique needs of children with dyslexia be used to teach children with dyslexia. *See* 9-ER-1665, -1682–83. She explained that children with dyslexia, unlike children with other specific learning disabilities, have a deficit in the phonological component of language and need instruction in phonemic and phonological awareness (i.e., the ability to work with sound, such as by breaking apart a word into component sounds or blending sounds), followed by structured language instruction in phonics. 9-ER-1667, -

1672. She testified that teaching a dyslexic child sight words requires a multisensory approach engaging auditory, visual, and kinesthetic (sense of touch) senses and multiple exposures. 9-ER-1705–06. Children with dyslexia require specialized instruction based on their learning profiles, processing abilities, and areas of strength and weakness. 9-ER-1675.

Ms. Anthony testified that the educational services the school district provided A.S. were not appropriate for a child with dyslexia, and opined that A.S. was not given "the approach to instruction that a child with dyslexia needs." 9-ER-1722. She testified that the Fountas & Pinnell curriculum that had been used with A.S. does not employ the necessary multisensory approach and is heavily based on comprehension techniques, while a child with dyslexia needs to work on more foundational skills. 7-ER-1189 (A.S. was instructed with Fountas & Pinnell Level Literacy Intervention Program); 9-ER-1744–45. Ms. Anthony testified that this curriculum does not follow an instructional model that is explicit, multisensory, direct, and highly structured, which is what a child with dyslexia needs. 9-ER-1682. She testified that while the Read Well program, which was introduced to A.S. during her third grade year in December, 7-ER-1189, -1311–12, has some elements that could be helpful for a child with mild dyslexia, it fails to provide the depth and intensive practice in the area of phonemic awareness necessary for a child with more moderate to profound dyslexia, as she believed A.S. to be, 9-ER-1663 (opining that based on A.S.'s work product, her dyslexia appeared to be "severe to profound"), -1682–83.

Ms. Anthony further testified that using instructional levels as a means to monitor reading progress—as the district did with A.S.—is not appropriate for a child with dyslexia, and that true progress is indicated by improvement in independent reading levels. 9-ER-1684. Ms. Anthony explained:

> We're looking for what level can that child read independently. That's the goal is to have a child walk out of the school building understanding what independent level they can function at out in society. Teachers do not travel with their students into society . . . . So we need to know what is the independent reading level of a child to really understand what they're able to do.

9-ER-1684. In reviewing A.S.'s second grade report card, Ms. Anthony found a comment from her teacher disturbing. *See* 9-ER-1676. This comment reflected that "[A.S.] is working on looking through the whole word before making a guess," which, Ms. Anthony testified, showed that A.S. was being asked to simply guess the word based on surrounding context clues because she had not been taught to decode text. 9-ER-1676, 1678; 14-ER-2994.

Ms. Anthony testified that A.S.'s IEPs were not tailored to meet her unique needs and were not calculated to provide her with the progress she could otherwise achieve. *See* 9-ER-1710–11. Ms. Anthony concluded that A.S.'s second grade and third grade IEPs lacked necessary goals for improving her phonological awareness, or ability to recognize, isolate, and blend component sounds of words. 9-ER-1672, 1709, 1711 (testifying the second grade goals failed to "address[] the particular deficits and phonological awareness that need to be addressed"), -1712 (testifying that the third grade goals failed to adequately address decoding skills); 14-ER-2885–2907 (second grade IEP); 13-ER-2639–55 (third grade IEP). Ms.

Anthony said that A.S.'s IEPs inappropriately prioritized a fluency "words read per minute" goal even though A.S.'s decoding accuracy had not progressed much. 9-ER-1712 ("[I]t's my belief that it's not good to read wrong faster.").

Ms. Anthony testified that A.S. was not provided a FAPE in second grade because the IEP was not individualized to address A.S.'s dyslexia: "[T]he goals are primarily in fluency and reading comprehension without addressing the foundation that has to be in place for those other goals to be met. And I don't believe they were addressing the needs at hand sufficiently." 9-ER-1755. Ms. Anthony found the third grade IEP to be equally deficient. 9-ER-1756 ("[W]ere the goals written for her needs so that she could progress and receive an appropriate education? I believe the answer is no."). As Ms. Anthony put it, "they [i.e., the district] were not giving her the approach to instruction that a child with dyslexia needs." 9-ER-1722.

Ms. Anthony testified that in order for A.S. to catch up to her peers, she must receive year-round instruction in handwriting and in an Orton-Gillingham-based program delivered by a trained professional. 9-ER-1726–27, 1759. A.S. will require that level of help "at least until her skill levels are at grade level and an independent reading level." 9-ER-1759–60.

J. The ALJ's Order

On June 14, 2017, the ALJ issued her order. 1-ER-68–106. The ALJ found that A.S. had failed to meet her second grade goals. 1-ER-85 (findings of fact nos. 64–67). The order addressed Ms. Anthony's expert testimony but accorded it

"little weight" because, the ALJ stated, Ms. Anthony lacked a special education endorsement, had little experience with writing IEP goals herself (though she had reviewed many IEPs over the years), and, although she had examined A.S.'s educational records, 9-ER-1707, she had not personally evaluated A.S. 1-ER-89.

The order addressed the contention that A.S. was not appropriately assessed given her dyslexia. 1-ER-95. The ALJ concluded that there was no need to evaluate A.S. for dyslexia because the school district identified A.S. as having a specific learning disability, that dyslexia is but "one example of a larger group of specific learning disabilities," and that testing in dyslexia was not necessary to determine A.S.'s educational needs. 1-ER-95–96. The order concluded that A.S.'s evaluation was appropriate, that therefore A.S. was not entitled to receive an independent educational evaluation, and that the school district did not deny A.S. a FAPE. 1-ER-97, -105.

K. The District Court Affirms the ALJ's Order

A.S.'s parents then filed a complaint in federal district court.[8] 2-ER-111–115. Following cross-motions for summary judgment, the district court granted summary judgment in favor of the district, upholding the ALJ's order. 1-ER-4–67.

The district court concluded that the school district was not obligated to assess A.S. for dyslexia because dyslexia, as such, "is not a qualifying disability category" under the IDEA and is instead "but one example of various disabilities

[8] A.S.'s father was voluntarily dismissed as a plaintiff and is not a party on appeal. 2-ER-109–10.

falling within the eligibility category of Specific Learning Disability." 1-ER-45–46. Following the entry of judgment in the district's favor, A.S.'s mother timely appealed. 2-ER-116–22

VI. SUMMARY OF ARGUMENT

Under the IDEA, the school district was required to "ensure" that A.S. was assessed in all areas of her suspected disabilities. 20 U.S.C. § 1414(b)(3)(B). Under the facts and circumstances presented here, A.S.'s suspected disability clearly included her likely dyslexia. It was undisputed that A.S.'s teachers believed she had dyslexia, that her parents had informed the district of her likely dyslexia, and that a former school psychologist had concluded that A.S. likely had dyslexia. It was also undisputed that the school district refused to evaluate A.S. for dyslexia.

The school district argues, and the district court held, that because A.S. was found eligible for special education under the category of "specific learning disability," it had no obligation to separately assess for dyslexia. This "no harm, no foul" line of thinking fails to recognize that the evaluation determines not only eligibility for special education, but also determines the child's educational needs and, critically, how special education will meet those needs. Here, the only witness with substantial expertise in dyslexia—Cheryl Anthony—testified that children with dyslexia require a specialized educational program that differs from programs geared to other specific learning disabilities. Both the ALJ and the district court discounted her testimony for spurious reasons.

Equally legally flawed is the district's contention that it does not, as a matter of policy, evaluate for dyslexia because dyslexia is a medical or neurological condition that school psychologists cannot diagnose. The IDEA makes explicit provision for evaluating educationally relevant medical conditions; it does not exclude such conditions because they may require expertise to diagnose. Dyslexia is such an educationally relevant medical condition, particularly in the circumstances here, where A.S.'s own teachers suspected dyslexia as the source of her reading difficulties. Congress specifically listed dyslexia as a condition that may constitute a specific learning disability. 20 U.S.C. §1401(30)(A)–(B). The Department of Education has made clear that "the presenting difficulties related to reading" are "important in determining the nature and extent of the child's disability and educational needs." 14-ER-2996. Here, where A.S.'s parents furnished the district with an independent report indicating that A.S. "demonstrated a pattern" that was "consistent with the classic profile of the specific learning disability of dyslexia," 13-ER-2607, it was clear that A.S.'s suspected dyslexia was the presenting difficulty.

Therefore, the district was required to evaluate A.S. for dyslexia based on its obligation to assess in "all areas of suspected disability." 20 U.S.C. § 1414(b)(3)(B). The testimony from the only witness with substantial dyslexia expertise confirmed that an appropriate educational program for a student with dyslexia may differ from a program appropriate for a child with a different specific learning disability. *See* 9-ER-1659, -1666–67 (describing how children with

dyslexia are approached differently from children with other specific learning disabilities), -1671, -1704–06, -1754–55. Where, as here, a disability area has such educational relevance, the district must assess for it. The district's failure to assess A.S. for dyslexia amounted to a serious procedural violation.

This serious procedural violation deprived A.S. of a FAPE. The lack of information in the evaluations about A.S.'s dyslexia resulted in IEPs that failed to provide educational services targeting A.S.'s unique educational needs. This Court should remand with instructions for the district court to order that A.S. receive an independent educational evaluation consistent with the IDEA's requirements, after which the district court should determine an appropriate remedy.

VII. ARGUMENT

A. Standard of Review and Reviewability

The district court's findings of fact are reviewed for clear error when they are based on the written record of administrative proceedings. *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1310 (9th Cir. 1987). The Court reviews questions of law and mixed questions of fact and law de novo, "unless the mixed question is primarily factual." *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1207 (9th Cir. 2008). The question of whether a school district's IEP provided a FAPE is reviewed de novo. *Id.*

A.S. raised the issue of whether she was properly assessed given her suspected dyslexia and whether she was denied a FAPE before the ALJ, as reflected in the statement of issues. 1-ER-69–73 ("Whether the District … denied

the Student a [FAPE] by… [f]ailing to appropriately evaluate the Student … [by] [n]ot appropriately assessing her given here dyslexia.”). The district court ruled on these issues, which were raised by the parties. 1-ER-42 (“L.C. argues that the District failed to appropriately assess A.S. ‘around her disability of dyslexia.’”), 1-ER-45 (“L.C. asserts that the District’s initial evaluation of A.S. was deficient because the District did not specifically assess A.S. for dyslexia.”).

B. Requirements of the IDEA

1. The IDEA guarantees a free appropriate public education.

Under the IDEA, 20 U.S.C. §§ 1400–1482 (originally the Education of the Handicapped Act), states accept federal funds in exchange for their promise to comply with the law’s requirements. *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, __ U.S. __, 137 S. Ct. 988, 993 (2017). Congress enacted the IDEA “to bring previously excluded handicapped children into the public education systems of the States and to require the States to adopt procedures which would result in individualized consideration of and instruction for each child.” *Bd. of Educ. v. Rowley*, 458 U.S. 176, 189 (1982). The IDEA “ensure[s] that all children with disabilities have available to them a free appropriate public education [or ‘FAPE’] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” *A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1202 (9th Cir. 2016) (quoting *Mark H. v. Lemahieu*, 513 F.3d 922, 928 (9th Cir. 2008)). Special education consists of “specially designed instruction, at no

cost to parents, to meet the unique needs of a child with a disability." 20 U.S.C. § 1401(29). A FAPE is defined to encompass appropriate special education and related services that are provided at no cost and "in conformity with the individualized education program." *Id.* § 1401(9). Key to a FAPE is the child's IEP. *Id.* § 1414(d)(2)(A). The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children." *Honig v. Doe*, 484 U.S. 305, 311 (1988). It is a "written statement" outlining how special education and related services will be delivered to the child and describing the degree of success these educational services should provide. 20 U.S.C. § 1414(d)(1)(A).

2. The IDEA requires a comprehensive evaluation in all areas of suspected disability.

Under the IDEA, the process of identifying a child as eligible for special education and related services begins with the evaluation. This evaluation must be comprehensive enough "to gather relevant functional, developmental, and academic information, including information provided by the parent" that will assist in determining whether the child is eligible for special education and related services as well as "the content" of the child's IEP. *Id.* § 1414(b)(2)(A). Thus, an evaluation is not merely a determination of eligibility—it is a comprehensive assessment to determine a child's educational needs and what interventions and instructional methods are needed to meet those needs. These determinations must be made by the child's parent and "a team of qualified professionals," who must affirmatively ensure "the child is assessed in all areas of suspected disability." *Id.* § 1414(b)(3)(B), (b)(4)(A).

To be an eligible "child with a disability" under the IDEA, the evaluation must conclude the child has at least one qualifying disability, such as autism, a hearing impairment, or a specific learning disability, and "by reason thereof" need special education and related services. 20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a)(1); Wash. Admin. Code § 392-172A-01035(1)(a). The category of "specific learning disability" is a catch-all, and is defined to mean "a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations." 20 U.S.C. § 1401(30)(A). The statutory definition for specific learning disability excludes any "learning problem that is primarily the result of … environmental, cultural, or economic disadvantage." 20 U.S.C. § 1401(30)(C). The statutory definition explicitly embraces "such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia." 20 U.S.C. § 1401(30)(B). Thus—and importantly for this case—the IDEA recognizes that dyslexia is one of the disorders that may constitute a specific learning disability.

3. The IEP sets forth the child's educational program.

Following completion of the evaluation, the IEP is crafted by the IEP team, which consists of specified individuals that must include the child's parent, special and regular education teachers, a representative of the district, the child when appropriate, and—importantly—"an individual who can interpret the instructional

implications of evaluation results" from the child's initial eligibility evaluation or reevaluation. 20 U.S.C. § 1414(d)(1)(B). Additionally, the IEP team may include "other individuals who have knowledge or special expertise regarding the child." *Id*.

The IEP must set forth "a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum." *Id.* § 1414(d)(1)(A)(i)(I)(aa). Also included are measurable annual goals designed to meet each of the child's educational needs and "enable the child to be involved in and make progress in the general education curriculum." *Id.* § 1414(d)(1)(A)(i)(II). To facilitate achieving these goals, the IEP must state the special education and related services the child will be provided, which should be research based "to the extent practicable." *Id.* § 1414(d)(1)(A)(i)(IV).

4. The IDEA provides remedies for violations.

"[J]udicial review in IDEA cases differs substantially from judicial review of other agency actions, in which courts generally are confined to the administrative record and are held to a highly deferential standard of review." *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1471 (9th Cir 1993). In an action under the IDEA, the district court "shall grant such relief as the court determines is appropriate," while "basing its decision on the preponderance of the evidence." 20 U.S.C. § 1415(i)(2)(C)(iii).

"[A] state must comply both procedurally and substantively with the IDEA." *M.L. v. Fed. Way Sch. Dist.*, 394 F.3d 634, 644 (9th Cir. 2005) (citing *Rowley*, 458 U.S. at 206–07). The Court engages in a two-step inquiry to determine whether a child has received a FAPE. *Amanda J. ex rel. Annette J. v. Clark Cnty. Sch. Dist.*, 267 F.3d 877, 890 (9th Cir. 2001). First, the Court determines whether the IDEA's procedures were complied with, and second, whether district met its substantive obligation to provide a FAPE. *Id.*

The IDEA requires a school district to offer and implement an IEP "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. at 1001. This standard necessarily depends on a child's unique circumstances and potential because "[a] focus on the particular child is at the core of the IDEA." *Id.* at 999, *see also id.* at 1001 ("The adequacy of a given IEP turns on the **unique circumstances of the child** for whom it was created." (emphasis added)).

Procedural violations that "result in the loss of educational opportunity," substantially impair the parents' opportunity to participate in the IEP formulation process, or that "cause[] a deprivation of educational benefits," result in the denial of a FAPE. *Amanda J.*, 267 F.3d at 892 (citations omitted); *see also Rowley*, 458 U.S. at 205 ("[T]he importance Congress attached to these procedural safeguards cannot be gainsaid.").

C. Because Dyslexia Was Suspected, the District Was Obligated to Assess A.S. in this Area to Determine Her Educational Needs, Which It Failed to Do

The school district violated the IDEA by refusing to assess A.S. "in all areas of suspected disability"—namely, her dyslexia. *See* 20 U.S.C. § 1414(b)(3)(B). The district court erred in accepting the school district's argument that because A.S. was found eligible for special education under the "specific learning disability" umbrella, there was no need to assess her for dyslexia.

This argument ignores the IDEA's requirement that schools must assess a child not only to determine *eligibility* for services under the IDEA, but also to determine the child's *educational needs and how to meet those needs*. For this reason an evaluation must "gather relevant functional, developmental, and academic information" to determine "the content" of the child's IEP. *Id.* § 1414(b)(2)(A). Additionally, a school district must reevaluate a child whenever "the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation." *Id.* § 1414(a)(2)(A)(i).

1. A.S.'s suspected dyslexia impacts her educational needs.

In the circumstances here, the school district's affirmative obligation to assess for dyslexia clearly was triggered, and the district's failure to assess was unjustified. The school district knew or had reason to know—based on parent information, Ms. Gorsuch's evaluation, and A.S.'s teachers' suspicions—that dyslexia was suspected and could well impact A.S.'s educational needs and

progress. 5-ER-694–95 (second grade teacher testifying she believes A.S. has dyslexia); 7-ER-1248 (special education teacher testifying "I would consider Student to be dyslexic"); 10-ER-1910 (special education teacher believes A.S. to have dyslexia and dysgraphia); 11-ER-2110 (third grade teacher believes A.S. to have dyslexia); 13-ER-2607 (Ms. Gorsuch's evaluation report concluding that A.S.'s strengths and weaknesses were "consistent with the classic profile of … dyslexia").

There was ample testimony from Ms. Anthony—the only witness having expertise in dyslexia—that children with dyslexia require a different educational program than children with other learning disabilities. *See* 9-ER-1666–67, -1670, -1704–06 . Ms. Anthony testified that the curricula the school district used were not appropriate for a child with dyslexia. 1-ER-89–90; 9-ER-1681–83. The ALJ erroneously discounted Ms. Anthony's testimony on the grounds she lacked a "special education endorsement,"[9] had little experience with writing IEP goals herself, even though she had reviewed many IEPs over the years, and had not personally evaluated A.S. 1-ER-89. The school district, however, offered no evidence that any of those factors were necessary for an individual with Ms.

[9] The ALJ concluded that that the lack of a special education endorsement somehow undermined Ms. Anthony's testimony that it was "imperative" for educators to be trained in dyslexia. 1-ER-105. This conclusion failed to account for the fact that Ms. Anthony has ample experience providing instruction for many children and adults with dyslexia, helping them make gains beyond the progress they had achieved in special education classes, 9-ER-1659, -1669–70 ("I've been working with individuals with dyslexia for 13 years."), had experience remediating skills in students whose teachers were not trained, 9-ER-1669, and herself trained individuals to implement appropriate dyslexia interventions, 14-ER-3045.

Anthony's experience and training to opine on effective educational methods for dyslexic children, whether the curricula A.S. used were appropriate for dyslexic children, and whether children with dyslexia might catch up with their peers. Moreover, Ms. Anthony was familiar with writing IEP goals and was working under contract with a school district to write IEPs. 9-ER-1688.

The ALJ failed to recognize that other evidence did not undermine Ms. Anthony's expertise on these matters. The rejection of Ms. Anthony's testimony was baseless and arbitrary. The district court similarly erred in deferring to the ALJ's discounting of this testimony based on these factors. 1-ER-37–38.

The district court misplaced reliance on case law for the proposition that expert testimony may be given less weight where the expert had not observed the child; in those cases, observation of the child was relevant to the testimony. *See Hellgate*, 541 F.3d at 1212 (district court properly relied on testimony of school personnel relating to child's progress where school personnel had directly observed child's progress in school and discounted expert testimony of progress based on file review); *J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 611 F. Supp. 2d 1097, 1114 (E.D. Cal. 2009) (discounting contrary expert testimony on IEP goals); *B.V. v. Dep't of Educ., State of Haw.*, 451 F. Supp. 2d 1113, 1125 n.18 (D. Haw. 2005) (discounting expert testimony that the IEP did not help student's regressed behavior without seeing behavior).

Where, as here, there is no dispute as to the factual basis for the expert's conclusions, however, it is error to reject an expert's testimony on the ground that

the expert did not directly observe the student. *E.g.*, *M.P. v. Santa Monica Malibu Unified Sch. Dist.*, 633 F. Supp. 2d 1089, 1101 (C.D. Cal. 2008) (finding the failure to directly observe student was not a proper basis to reject the expert's conclusion that student's ADHD was influencing his social and academic development where expert's opinion was based on undisputed evidence that student was distracted at school, lacked focus, and had difficulty completing work). Ms. Anthony's testimony was based on her unchallenged expertise with instructional methods and curricula that are appropriate for dyslexic children, and her substantial experience providing instruction geared to dyslexia. 9-ER-1658–59, -1669–70 ("I've been working with individuals with dyslexia for 13 years."). Based on this testimony and this record, there is no question that A.S.'s suspected dyslexia had an educational impact.

Thus, determining whether A.S. has dyslexia—and what implications that disorder has for her education—is required as "relevant" information "that may assist in determining . . . the content of the child's [IEP]." 20 U.S.C. § 1414(b)(2)(A); *see also* 34 C.F.R. § 300.305(a)(2)(i)(A) (providing that the evaluation must determine the child's "educational needs").

2. A.S. should have been assessed for dyslexia, regardless of whether dyslexia is a medical diagnosis.

At the administrative hearing, district witnesses suggested that A.S. could not have been assessed for dyslexia because dyslexia is a medical, and not an educational, label. As Ms. Madsen, the district administrator responsible for special education, 6-ER-944, explained:

> So Issaquah School District or any other school district is not testing for dyslexia because dyslexia requires a formal diagnosis by a doctor of psychology, a neurologist, or another medical provider. So school psychologists are not able to diagnose dyslexia, although they are able to test for specific learning disabilities, which is what – which is how students with dyslexia are qualified in the state of Washington.

6-ER-1014; *see also* 7-ER-1214 ("We're not physicians. We don't diagnose children."); 10-ER-1897–98.[10]

These statements ignore the fact that some medical diagnoses, as here, are educationally exceedingly relevant. Indeed, the IDEA contemplates that the evaluation for some disabilities will fall outside the expertise of school district personnel. For this reason, the IDEA and state law provide that "psychological services" and "medical services for diagnostic or evaluation purposes" may be warranted for some children. 34 C.F.R. § 300.34(a); Wash. Admin. Code § 392-172A-01155(1). "Psychological services" include "administering psychological and educational tests," "interpreting assessment results," and "obtaining, integrating, and interpreting information about … conditions relating to learning." 34 C.F.R. § 300.34(c)(10); Wash. Admin. Code § 392-172A-01155(3)(j). "Medical services" means "services provided by a licensed physician to determine a student's medically related disability that results in the student's need for special

[10] This and other testimony suggests the district takes the position that it refused to assess A.S. for dyslexia as a matter of policy. 13-ER-2629 ("She wouldn't qualify in dyslexia, that's not a category one can qualify in and we don't diagnose dyslexia. With her diagnosis, she would qualify under SLD specific learning disability and that's what she's under."). But blanket policy or administrative convenience cannot be the sole basis for educational decisions under the IDEA, which requires consideration of the child's individual needs. *See, e.g.*, *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 177 (3d Cir. 1988).

education and related services." 34 C.F.R. § 300.34(c)(5); Wash. Admin. Code § 392-172A-01155(3)(e). Because such information is especially likely to be critically relevant in the context of specific learning disabilities, the documentation for an eligibility determination under this category must include a statement of any "educationally relevant medical findings." 34 C.F.R. § 300.311(a)(4).

If a school district lacks the expertise in-house to assess a child, it must contract with an outside provider who can assist, because the district is obligated to use "qualified professionals," 20 U.S.C. § 1414(b)(4)(A), to ensure that "the child is assessed in all areas of suspected disability"—including where medical or other professionals are needed to conduct that assessment, *id.* § 1414(b)(3)(B); *see Dep't of Educ., State of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1200 (D. Haw. 2001) (hospitalization costs that were necessary for evaluation and diagnostic purposes were recoverable under IDEA). The school district's excuse for refusing to evaluate A.S. because it may be "medical" is thus legally unsupportable.

3. This Court's precedents confirm A.S. should have been evaluated for dyslexia.

This Court's precedents confirm that the school district's affirmative obligation to "ensure" that a child is assessed "in all areas of suspected disability" encompasses a requirement to fully assess when the district is on notice of reasonable suspicions that a child may have a qualifying condition with an educational impact that can be addressed through special education and related services. *See* 20 U.S.C. § 1414(b)(3)(B).

In *Amanda J.*, this Court held that a failure to evaluate for a suspected disability deprived the child of a FAPE. 267 F.3d 877. When Amanda was three years old, she was evaluated and found eligible for special education due to her difficulties with receptive and expressive language, cognitive skills, self-help skills, and social or emotional abilities. *Id.* at 884. The district, however, did not evaluate for autism, which it reasonably suspected Amanda had. *Id.* The Court's conclusion that the district violated the IDEA was not altered by the fact that the district administered assessments in relevant areas of deficit including cognitive, language, social, adaptive, and emotional; doing so did not discharge the district's affirmative obligation to evaluate for the condition of autism itself, which was an area of suspected disability. *See id.* at 884, 894–95 ("The IEP team could not create an IEP that addressed Amanda's special needs as an autistic child without knowing that Amanda was autistic.").

The Court again considered the necessity for a complete evaluation in all areas of suspected disability in *Hellgate*, 541 F.3d 1202. There, school personnel referred the child's parents to a child development center ("CDC") where they could obtain a free autism evaluation. *Id.* at 1206. The fact that the school district "referred the parents to the CDC" and was aware of a prior evaluation by a physician describing an apparent "autistic component" to the child's behavior, showed the district knew that autism was suspected. *Id.* at 1205, 1209. This Court held that the district's decision to refer the parents to an outside agency—as opposed to "obtain[ing] critical medical information" about the child's condition

itself, or contracting with an outside provider to conduct the evaluation—constituted an unjustified abdication of the school's affirmative duties under the IDEA and denied the child a FAPE. *Id.* at 1210.

Finally, in *Timothy O.*, this Court held that a school district violated the IDEA when it identified a child as eligible for special education based on a speech or language impairment but failed to evaluate for autism, which it suspected. *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1114–15, 1123–24 (9th Cir. 2016). These suspicions were evidenced by the fact that the district had deployed a psychologist to observe the child for autism symptoms in the evaluation process but did not conduct any formal autism assessments, and, before the initial IEP meeting, had received a report from another agency diagnosing the child with a disorder on the autism spectrum and opining that he needed to receive appropriate interventions. *Id.* at 1114–15. The Court in *Timothy O.* observed that this Court's "precedent establishes that a disability is 'suspected,' and therefore must be assessed by a school district, when the district has notice that the child has displayed symptoms of that disability." *Id.* at 1119. Such notice may come from the "informed suspicions" of parents who have consulted with outside experts. *Id.* at 1120 (quoting *Pasatiempo by Pasatiempo v. Aizawa*, 103 F.3d 796, 802 (9th Cir. 1996)). This obligation is triggered even if the school disagrees with the parent's suspicions, because the assessment of children is designed to be a "cooperative and consultative process." *Id.* (quoting *Pasatiempo*, 103 F.3d 796 at 802).

Thus *Hellgate*, *Amanda J.*, and *Timothy O.* instruct that where a disability having an educational impact is suspected, the school must evaluate for that disability. The unpublished memorandum disposition in *Avila*—which the district court relied on, *see* 1-ER-46—does not alter this rule. *See Avila v. Spokane Sch. Dist. 81*, 686 F. App'x 384 (9th Cir. 2017). There, this Court held that a school district that "broadly assessed" a child for reading and writing inefficiencies did not need to also assess for dyslexia and dysgraphia. *Id.* at 384–85. But nothing in *Avila* indicates that the child was reasonably suspected of having dyslexia, or that evidence was put forth that a failure to evaluate for dyslexia could have had an impact on that child's educational program.

The record in this case is diametrically different from that described in *Avila*. Here, the evidence that A.S. likely has dyslexia is overwhelming and uncontroverted. The dyslexia expert, Ms. Anthony, testified that an educational program for a child with dyslexia would have differed in curriculum, duration, and intensity from the program A.S received. *See, e.g.*, 9-ER-1681–83, -1726–27, -1744–45. Where an educational approach may change significantly based on a fuller evaluation, assessment is certainly necessary, as *Amanda J.* teaches:

> This is a situation where … [information] would have changed the educational approach used for Amanda, increasing the amount of individualized speech therapy and possibly beginning the D.T.T. program much sooner. . . . No one will ever know the extent to which this failure to act upon early detection of the possibility of autism has seriously impaired Amanda's ability to fully develop the skills to receive education and to fully participate as a member of the community.

Amanda J., 267 F.3d at 893–94. As in *Amanda J.*, here, the district was affirmatively obligated to assess A.S. for her suspected condition, and its refusal to do so violated the IDEA.

4. The educational relevance of dyslexia is further shown by IDEA's specific identification of dyslexia as a condition constituting a specific learning disability.

The IDEA defines "specific learning disability" to mean "a disorder in 1 or more of the basic psychological processes involved in understanding or using language." 20 U.S.C. § 1401(30)(A). The IDEA specifies that the term "specific learning disability … includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia." *Id.* § 1401(30)(B). Congress's inclusion of "dyslexia" evidences legislative intent that such condition may, for an individual child, be educationally relevant.

The U.S. Department of Education has explicitly clarified that schools may evaluate for dyslexia in a recent "Dear Colleague" letter.[11] 14-ER-2995–98; DEAR COLLEAGUE LETTER, U.S. DEP'T OF EDUC, OFFICE OF SPECIAL EDUC. & REHAB. SERVS. (Oct. 23, 2015). The letter was issued in response to communications suggesting "that State and local educational agencies (SEAs and LEAs) are reluctant to reference or use dyslexia, dyscalculia, and dysgraphia in evaluations, eligibility determinations, or in developing the individualized education program (IEP) under the IDEA." *Id.* at 1.

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[11] "Dear Colleague" letters are "guidance documents" that are "intended to have future effect on the behavior of regulated parties," and are therefore should be accorded deference. 34 C.F.R § 9.13(a).

The Department's letter "clarif[ied] that there is nothing in the IDEA that would prohibit the use of the terms dyslexia, dyscalculia, and dysgraphia in IDEA evaluation, eligibility determinations, or IEP documents." *Id.* The letter explained that "information about the child's learning difficulties, including the presenting difficulties related to reading, mathematics, or writing, is important in determining the nature and extent of the child's disability and educational needs." *Id.* at 2. The letter specifically "encourage[d] SEAs and LEAs to consider situations where it would be appropriate to use the terms dyslexia, dyscalculia, or dysgraphia to describe and address the child's unique, identified needs through evaluation, eligibility, and IEP documents." *Id.* at 3.

Neither the district court nor the ALJ's decision cited to this "Dear Colleague" letter, despite its obvious import as policy guidance, *see* 34 C.F.R. § 9.13(a), and despite the fact that it was part of the administrative record, *see* 3-ER-199 (admitting Ex. 38); 14-ER-2995–98 ("Dear Colleague" letter at Exhibit 38). Instead, the ALJ cited "Letter to Unnerstall," a private letter that has no binding impact. *See* LETTER TO UNNERSTALL, U.S. DEP'T OF EDUC, OFFICE OF SPECIAL EDUC. & REHAB. SERVS. (Apr. 25, 2016), at 2 ("Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented."); 20 U.S.C. § 1406(e). The ALJ relied on this letter to hold that evaluating A.S. for dyslexia was not necessary. 1-ER-95–96 (conclusions of law 15, 16). The letter,

however, merely states that there is no global requirement under the IDEA for a disability "diagnosis" to be given to every child for *eligibility purposes*. LETTER TO UNNERSTALL, at 1 ("[W]hile IDEA does not prohibit the use of terms dyslexia, dyscalculia, and dysgraphia in eligibility determinations, there is no requirement under IDEA that a disability label or 'diagnosis' be given to each student receiving special education and related services.").

The absence of a global rule does not imply that such an evaluation may not be necessary in particular circumstances—such as those presented in this case. Indeed, the letter explicitly contemplates that a dyslexia evaluation must be provided when needed to determine the child's educational needs, as is necessary with respect to A.S.:

> [I]f a determination is made through the evaluation process that a particular assessment for dyslexia is needed to ascertain whether the child has a disability **and the child's educational needs**, including those related to the child's reading difficulties, then the public agency must conduct the necessary assessments. We also note that an evaluation for dyslexia could be an evaluation by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services.

Id. at 1–2 (emphasis added). The ALJ found this guidance inapplicable because the school district itself did not "determine" that such an evaluation was necessary. 1-ER-96 (conclusion of law no. 15). It may be that a school district has discretion to make such determinations in the total absence of evidence of a suspected disability that would impact the child's educational needs. But the IDEA is clear that a school district has an affirmative obligation to "ensure" that a child is assessed in *all* areas of suspected

disability. *See* 20 U.S.C. § 1414(b)(3)(B). That requirement was triggered here, where the district had reason to suspect A.S. had dyslexia. The contrary rule on which the school district here relies is at odds with "[o]ne of the purposes of the IDEA," which "is to free children and parents from total reliance on a school district's assessment of a child." *Meridian Joint Sch. Dist. No. 2 v. D.A.*, 792 F.3d 1054, 1060 (9th Cir. 2015). Thus, courts may not simply rubberstamp a school district's refusal to determine further assessment is required when such a refusal ignores evidence of a possible relevant and critical disability, and is therefore unjustified. *See id.*

In the circumstances here, the school's affirmative obligation to evaluate for dyslexia was triggered. The school district knew or had reason to know—based on parent information, Ms. Gorsuch's evaluation and the team's suspicions—that dyslexia was, based on empirical evidence, suspected and could impact A.S.'s educational needs. 5-ER-694–95 (second grade teacher testifying she believes A.S. has dyslexia); 7-ER-1184, -1248 (special education teacher testifying "I would consider Student to be dyslexic"); 10-ER-1910 (special education teacher believes A.S. to have dyslexia and dysgraphia); 11-ER-2110 (third grade teacher believes A.S. to have dyslexia); 13-ER-2607 (Ms. Gorsuch's evaluation report concluding that A.S.'s strengths and weaknesses were "consistent with the classic profile of … dyslexia"). The ALJ erred in failing to consider this evidence,

and the district court erred in granting summary judgment in the district's favor.

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In sum, the district's affirmative obligation to assess A.S. in all areas of suspected disability triggered an obligation to assess her for dyslexia, where the uncontroverted evidence showed that dyslexia was reasonably suspected. The school district's evaluation was therefore inadequate, and A.S. should have received an independent educational evaluation as requested. 1-ER-72, -105.

D. The Inadequate Evaluation Led to a Denial of FAPE

Because the school district failed to properly evaluate A.S., she was denied a FAPE. It is firmly established that when a "school district fail[s] to conduct the statutorily mandated assessment of 'all areas of suspected disability,' it necessarily deprive[s] [the child] of a free appropriate public education" required by the IDEA. *Timothy O.*, 822 F.3d at 1126. When a child is not assessed in an area of suspected disability, "the individual need not definitively show that his educational placement would have been different without the error" to show that a FAPE was denied. *Id.* at 1124.

When IEPs are crafted without "sufficient evaluative information" about a child's "individual capabilities," the goals in the IEP likely are inappropriate, as they will not take into account the progress the child is capable of as a child with a particular condition or the appropriate educational services necessary to achieve such progress. *Id.*; *see also Hellgate*, 541 F.3d at 1210 ("The failure to obtain

critical medical information about whether a child has autism 'render[s] the accomplishment of the IDEA's goals—and the achievement of a FAPE—impossible.'" (quoting *Amanda J.*, 267 F.3d at 894)); *Amanda J.*, 267 F.3d at 894 ("The IEP team could not create an IEP that addressed Amanda's special needs as an autistic child without knowing that Amanda was autistic."). Similarly, here the school district could not know whether A.S. would require a different program as a result of her dyslexia without even knowing whether she was dyslexic in the first place. This failure to properly assess denied A.S. a FAPE.

The district court's conclusion that A.S. received a FAPE because she made "meaningful educational progress," 1-ER-66–67, cannot be reconciled with the Supreme Court's holding in *Endrew F.* that whether progress is "meaningful" for an individual child depends on that child's unique capabilities. *See Endrew F.*, 137 S. Ct. at 1000–01 (an IEP must "**meet the unique needs**" of the child and be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" (emphasis added)); *see also* 34 C.F.R. § 300.320(a)(2). As the Supreme Court recently held, the fact that the degree of "progress contemplated by the IEP must be appropriate in light of the child's circumstances should come as no surprise." *Endrew F.*, 137 S. Ct. at 999. After all, "[a] focus on the particular child is at the core of the IDEA," and "[t]he instruction offered must be '*specially* designed' to meet a child's '*unique* needs' through an '[*i*]*ndividualized* education program.'" *Id.* (citing 20 U.S.C. §§ 1401(29), (14)).

A child's individual capabilities cannot be known, and an appropriate educational program cannot be crafted, until that child is properly evaluated. Ms. Anthony testified that children with dyslexia like A.S. can close the gap and catch up to their peers with appropriate educational services, which testimony was not refuted. 9-ER-1726, -1733. A.S. made some minimal progress; it is likely that she could have closed that gap more substantially with an IEP reasonably calculated to achieve progress appropriate to her needs and abilities.

Unfortunately, the teachers who worked with A.S. were unprepared to address her dyslexia. A.S.'s special education teacher, Ms. Schoot, admitted she had no training around dyslexia. 7-ER-1178 ("Has the District given me training or guidelines specifically to dyslexia? Not specific to dyslexia."), -1181–82 ("Q: What is your training in dyslexia? . . . A: So I've taken classes in college and I've been trained in different curriculums. But specific to dyslexia I have not."). A.S.'s regular education teachers similarly lacked such training. 5-ER-685 (Ms. Clark, A.S.'s second grade teacher, testifying she had no training relating to dyslexia); 11-ER-2114–15 (Ms. Van de Vord, A.S.'s third grade teacher, testifying she had no training on dyslexia or instructing children with dyslexia other than trainings in "multiple areas that could apply to dyslexia" such as "working with struggling learners"). The district could not possibly *address* the unique educational needs of A.S. when its own teachers had no background or training in such needs.

Because the failure to properly assess A.S. resulted in the loss of educational opportunity, interfered with parental participation due to inadequate information in

the evaluation, and deprived A.S. of educational benefits, the school district denied A.S. a FAPE during the 2015–16 and 2016–17 school years. *Amanda J.*, 267 F.3d at 892. The district court's contrary erroneous conclusions that the evaluation was appropriate, that A.S. was not entitled to receive an independent educational evaluation, and that the school district provided a FAPE should be reversed. 1-ER-66.

E. The Court Should Remand for Reevaluation and Further Proceedings

In sum, the procedural failure to assess A.S. for dyslexia as required by the IDEA also denied A.S. a FAPE during the 2015–16 and 2016–17 school years. The Court should remand for the district court to determine an appropriate remedy after ordering the school district to provide a comprehensive independent educational evaluation of A.S. in every area of suspected disability at public expense.

VIII. CONCLUSION

For all the above-stated reasons, this Court should reverse the district court's judgment and remand with instructions that the district court should (1) order the school district to provide an independent educational evaluation of A.S. consistent

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with the IDEA's requirements and (2) following the reevaluation, determine an appropriate remedy.

DATED this 24th day of March, 2021.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Certificate of Compliance for Briefs

9th Cir. Case Number 19-35473

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DATED this 24th day of March, 2021.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Statement of Related Cases Pursuant to Circuit Rule 28-2.6

9th Cir. Case Number 19-35473

The undersigned attorney states the following:

[X] I am unaware of any related cases currently pending in this court.

DATED this 24th day of March, 2021.

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DECLARATION OF SERVICE

I hereby certify that on March 24, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record who receives CM/ECF notification.

DATED: this 24th day of March, 2021, at Seattle, Washington.

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