

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT.

OAH Case No. 2018070818

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on July 18, 2018, naming Capistrano Unified School District. OAH granted Student's request for a continuance on August 29, 2018.

Administrative Law Judge Alexa J. Hohensee heard this matter in San Juan Capistrano, California on December 4, 5, 6, 18, 19 and 20, 2018.

Tania L. Whiteleather, Attorney at Law, appeared on behalf of Student. Mother and Student attended the hearing on behalf of Student.

Ernest L. Bell, Attorney at Law, appeared on behalf of Capistrano. Various district administrators attended the hearing on behalf of Capistrano.

At the parties' request, OAH granted a continuance until January 10, 2019, for the parties to file written closing arguments. Upon timely receipt of written closing arguments, the record was closed, and the matter was submitted for decision.

ISSUE

Did Capistrano fail to meet its Child Find obligation, from July 18, 2016 to June 1,

2018, by failing to find Student eligible for special education and related services prior to Student reaching 18 years of age?

SUMMARY OF DECISION

Capistrano did not fail to meet its child find obligation by not finding Student eligible for special education and related services before she turned 18 years of age. A child with exceptional needs does not qualify for special education unless, in addition to having one of the defined disabilities, the child requires instruction and services that cannot be provided with modification of the regular school program. Student's educational needs could be met utilizing the resources of the regular education program.

Student did not have convergence insufficiency or any other visual impairment that adversely affected her educational performance, and was not eligible for special education under the category of "visual impairment." Student did not have dyslexia or any other related reading dysfunction, and although she had attention deficit hyperactivity disorder (ADHD), her attention deficits did not manifest in a severe discrepancy between intellectual ability and achievement within the definition of "specific learning disability." Student's ADHD caused a heightened alertness to environmental stimuli that resulted in limited alertness with respect to the educational environment and adversely affected her educational performance within the definition of "other health impairment, but her educational needs could be adequately addressed with general education accommodations. Student was not eligible for special education under any disability category because she was able to access the curriculum with regular education accommodations, and without the need for special education or related services. Capistrano prevailed on the sole issue presented.

FACTUAL FINDINGS

1. Student turned 18 years of age on June 1, 2018. She attended school within Capistrano boundaries at all relevant times pursuant to a school of choice application approved by Capistrano.

2014-2015 SCHOOL YEAR - NINTH GRADE

2. During the 2014-2015 school year, Student was enrolled in ninth grade at JSerra Catholic High School, a private parochial school. In the summer 2014 semester, Student earned a grade of B in History, and an A in Freshman Success.

3. While attending JSerra, Student participated in the Student Educational Resource Program (SERP). SERP provided students at JSerra with a study hall period in which students could study or complete homework. Approximately 20 students attended the SERP period, supervised by two to three proctors. The proctors were not credentialed special education teachers, but could provide some homework assistance.

4. In September 2014, Parents privately obtained a psychoeducational assessment of Student from Dr. Mark Katz, Ph.D., and Dr. Gretchen Gillingham, Ph.D. Parents were concerned that Student's academic performance did not reflect the amount of time and effort invested in her studies, and that she struggled with reading comprehension.

5. In that assessment, Student's cognitive abilities or how she learned, were in the average to high average range. Her highest ability scores were in verbal comprehension and working memory, with average perceptual reasoning, visual spatial processing and visual motor processing. In academic achievement, or what had already been learned, Student scored in the average range for reading and math, and in the superior range for writing.

6. On the Nelson Denny Reading Test, Student's reading rate was extremely

low, and her comprehension was at the low end of average. On the basis of the Nelson Denny results, Drs. Katz and Gillingham diagnosed Student with a reading disorder, with weakness in reading fluency and comprehension under timed conditions.¹

7. On other measures, Student demonstrated weakness in attention and executive functioning. Her teachers reported to Drs. Katz and Gillingham that Student did not pay close attention, made careless mistakes, and was easily distracted. On this basis, Student was also diagnosed with ADHD – predominately inattentive type.

8. Drs. Katz and Gillingham recommended several educational accommodations: preferential seating to improve Student’s focus and attention; additional time on in-class exams and tests to accommodate attention, poor executive functions and a slow reading rate; a distraction-free environment for tests to obtain a better measure of Student’s abilities; teacher coaching a few minutes before or after school a few days per week to assist with planning, organization and time management; copies of lecture notes so Student wouldn’t be required to switch back and forth between listening and writing; and homework reduction to a fewer number of items to avoid the difficulty of long and repetitious tasks. In addition, they reported that Student might benefit from: a reader for exams, tutoring in reading, a reading remediation program, and audio recordings in lieu of written materials. Drs. Katz and Gillingham also recommended that Student learn to advocate for herself, and to request strategies and accommodations to compensate for learning weaknesses.

9. During the 2014-2015 school year, Student earned mostly A’s and B’s, with

¹ Drs. Katz and Gillingham erroneously scored the Nelson Denny results, and Student had earned an average score in both reading rate and reading comprehension. However, that error was not discovered until 2018.

C's in Algebra I and Religion. Student was also on the junior varsity golf team, and golfed for 10 hours per week.

2015-2016 SCHOOL YEAR - TENTH GRADE

10. For the 2015-2016 school year, the SERP department recommended that Student receive preferential seating and a copy of teacher notes. It recommended that Student take tests in the Testing Center to limit distractions, receive 50 percent extended time, that staff explain or clarify instructions, and that Student have a reader for test questions when staff was available.

11. During the first semester of tenth grade, Student was approved through SERP to take an online Spanish III Honors class from a virtual school. Student needed assistance with her online course, and Parents hired a credentialed bilingual teacher, Gayle Weinand, to tutor Student in Spanish and History. Ms. Weinand did not observe that Student had any difficulty with reading, although Student went through the material slowly when reading it to herself. Ms. Weinand had Student read the material out loud, because Student understood the material better that way. Ms. Weinand regularly checked Student's understanding of the lessons, but it was her opinion that Student understood the material on her own. During online tests, Ms. Weinand read the questions to Student, and once the questions were read aloud, Student knew what to do. Ms. Weinand opined at hearing that Student could read independently with effort, and that Student did better when someone read material out loud to her and clarified it. Student earned an A in her online Spanish III Honors class.

12. During the first semester of the tenth grade, Student earned B's in her academic classes at JSerra, and A's in Study Skills and Dance. She received credit for participating in Professional Golfers' Association golf tournaments.

13. In the spring semester of tenth grade, on February 26, 2016, Mother contacted Capistrano about enrolling Student at San Juan High School (San Juan) the

following year. Mother was concerned about Student's B grades. Mother believed, erroneously, that public school was less rigorous, and reasoned that Student would earn better grades in public school. Mother also erroneously believed that one of Capistrano's educational programs, California Preparatory Academy (Cal Prep), was identical to SERP and provided a supervised study hall with approval for online courses.

14. In fact, Cal Prep was a separate school campus within Capistrano, with its own principal and credentialed teachers. Students were required to attend class once a week, or once a month, depending on the course. Each course had an online component, but some teachers delivered a significant amount of course material during class lectures. Some tests and quizzes were conducted in the classroom. The Cal Prep teachers are on the Cal Prep campus, and students can meet with their teachers more frequently if they need extra help. Cal Prep's format was challenging for some students, as it required them to exercise the discipline to work steadily and independently.

15. Mother spoke with Capistrano psychologist Erin Masters, and explained that Student required the accommodations authorized at JSerra by SERP. Ms. Masters explained that Capistrano had two programs to assist students who had difficulty accessing the curriculum: (1) section 504 accommodation plans or (2) special education with individualized education programs, or IEP's.² Ms. Masters followed up with an email

² "Section 504" is commonly used to refer to section 504 of the Rehabilitation Act of 1973. Under section 504, school districts have a duty to provide "regular or special education and related aids and services that are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met." (34 C.F.R. § 104.33.) Although section 504 and IDEA eligibility may overlap, the eligibility criteria, services and procedures under the IDEA are distinct.

to Mother stating that section 504 plans did not change the academic expectations that students were required to demonstrate, but that special education provided more intensive and restrictive interventions, and that IEP's were for students having difficulty meeting basic graduation requirements and needing a higher level of intervention. This information was incorrect, as IEP's are available to students on a diploma track if they otherwise meet special education eligibility criteria. Soon afterwards, Ms. Masters left Capistrano, and another school psychologist, Loren Thurston, Psy.D, assumed responsibility to meet with Mother and Student to review the information from JSerra and private testing results.

16. On April 15, 2016, Capistrano convened a student study team meeting to discuss supports for Student when she entered Capistrano. The meeting was attended by Mother, Dr. Thurston, and administrators Darrin Jindra and Jenna Jordheim.

17. Mother informed the team that Student was feeling academic pressure at JSerra, had been diagnosed with ADHD, had a tutor after school, and that Parents wanted Student dual-enrolled at San Juan and Cal Prep. Mother stated that she would seek an IEP if Student was required to qualify for intensive supports to be dual-enrolled.

18. Dr. Thurston explained the difference between a section 504 accommodation plan and an IEP, and that students on a diploma track could be eligible for section 504 accommodations or special education. After Dr. Thurston's explanation, Mother requested a section 504 assessment, as she did not believe her daughter required more than the accommodations she was receiving at JSerra. Capistrano agreed to conduct the assessment and hold a meeting to review its results within 60 days.

19. Dr. Thurston holds a doctorate in school psychology and has been a credentialed school psychologist conducting assessments for Capistrano for over 10 years. Dr. Thurston testified at hearing, and demonstrated a thorough understanding of both section 504 and special education eligibility, particularly relating to attention

disorders, processing disorders and learning disabilities. She readily found scoring errors and unexplained discrepancies or insufficiencies in assessment reports by other assessors. Dr. Thurston's demeanor was professional, and she demonstrated an interest in understanding and explaining Student's learning differences and challenges. Her responses to questions were thoughtful, and displayed remarkable insight. Her testimony was credible and persuasive. It is reasonable to infer that Dr. Thurston's explanation of the difference between section 504 accommodation plans and IEP's, and the program supports available, would have been accurate and thorough, and clarified any confusion Mother may have had concerning eligibility for special education and related services.

20. Capistrano approved Student for dual enrollment at San Juan and Cal Prep for the 2016-2017 school year prior to completion of the section 504 assessment.

21. Dr. Thurston collected section 504 assessment information from Student's teachers at JSerra in the form of rating scales. The teachers generally responded that Student was a good student, but was inattentive, easily distracted, did not pay attention to detail, made mistakes, had trouble with sustained attention, had trouble getting started, forgot things she had learned, needed instructions explained, was easily sidetracked, and often did not understand what she read. The Biology teacher was concerned that Student had listening comprehension or visual/auditory processing problems. The English teacher wrote that Student was passing expectations, but frequently needed extended time and struggled to process what she heard and read. The Conceptual Biology teacher wrote that Student needed extra time on tests and quizzes, and did better when test questions were read to her. The SERP administrator wrote that Student occasionally needed extended time, and that the SERP class was itself an accommodation. All teachers responded that Student put in good effort and exhibited excellent behavior.

22. Mother's response was consistent with Student's teachers. She wrote that Student had ADHD, inattention, and worked best with extended time and a reader as accommodations.

23. Outside of school, Student had requested accommodations from ACT, a publisher of tests whose results can be included in applications for admission to college. On April 26, 2016, Student was approved for 50 percent extended time during ACT testing. Student's request to the ACT for a test reader was deferred and required additional documentation.

24. Mother requested that Student's Biology teacher revise his response to Dr. Thurston to add that Student did much better with a reader for her tests, which he did on May 16, 2017.

25. On May 17, 2016, at Mother's request, SERP approved Student for a test reader during finals.

26. On May 24, 2016, Dr. Thurston prepared a section 504 assessment report. She reviewed Student's educational records, attendance history, behavior records, recommended interventions, health history, private evaluations, State standardized test results, grades and transcripts, progress reports, teacher rating scales and data collection forms, and conducted a parent interview. Dr. Thurston interviewed Student, and learned that she liked school and her classes, particularly Science and English. Student found lengthy reading assignments and geometry difficult to understand. She liked music, playing golf and working out, and looked forward to attending college, where she hoped to prepare for a career in developmental research or science.

27. Dr. Thurston administered to Student a standardized test of processing skills, or how well a person processes information presented visually and auditorally. Student scored in the superior range for visual processing and auditory processing, in the high average range for recall of information, and in the average range for word fluency.

28. The JSerra teachers' rating scales had placed Student in the average range for most patterns of behavior, with elevated scores (more concerns than are typically reported) in inattention, hyperactivity/impulsivity, and learning problems/executive functioning. Dr. Thurston determined that, according to Student's teachers, Student was not able to learn and perform well on a consistent basis due to her ADHD. Dr. Thurston concluded that Student qualified for an accommodation plan under section 504, because her ability to learn as a major life function was substantially limited.

29. On May 26, 2016, Capistrano convened a section 504 plan meeting to review the assessment results. The meeting was attended by Mother, Mr. Jindra, Ms. Jordheim and Dr. Thurston.

30. After Dr. Thurston presented her assessment report and answered questions regarding the results, the team found Student eligible for 504 accommodations due to the impact of her ADHD. In keeping with the accommodations recommended by the teachers and administrators at JSerra, where Student was performing well, the team adopted accommodations for Student, including: preferential seating, copies of class notes as requested by Student, 50 percent extra time on tests, and that Student take tests in a smaller environment.

31. In the spring 2016 semester at JSerra, Student earned B's in Religion, English, Geometry and Biology, and A's in Study Skills, Spanish Honors III, and World History.

2016-2017 SCHOOL YEAR - ELEVENTH GRADE

32. Student began eleventh grade at Capistrano on August 15, 2016. She was dual-enrolled at San Juan for English, Drama, Algebra 2 and Physics, and at Cal Prep for United States History and Physical Education. Student obtained permission to take Physics concurrently with Algebra 2, although Algebra 2 was a prerequisite to the math-heavy Physics course.

33. On September 14, 2016, Mother emailed Ms. Jordheim to request a meeting to discuss a reader for Student. By “reader,” Mother meant “tutor,” or someone to discuss and explain concepts to Student as her private tutors had. Mother thought that if Student had a reader, she would do better in History and Physics.

34. On September 16, 2016, Mother emailed Ms. Jordheim that Student wanted to drop Physics at San Juan and transfer into Chemistry at Cal Prep. She also wanted to discuss having Student switch her United States History class to San Juan.

35. Student struggled with Physics. Mother panicked when she looked at the daily grades on Capistrano’s school student information page, called Loop, because it showed Student failing Physics on September 5, 2016. The Loop pages were not accurate representations of students’ grades. As teachers input grades for individual assignments and homework, Loop might count an assignment that was received, but not yet recorded, as a zero. Loop often did not account for the different weight teachers assigned to written assignments, projects, quizzes and tests. A failing grade on Loop on September 5, 2016 did not establish that Student was failing Physics at that time. Nonetheless, Mother began contacting multiple administrators at Capistrano to transfer Student out of Physics at San Juan, and into Chemistry at Cal Prep.

36. Deborah Marsing taught Chemistry at Cal Prep. She spent the first six weeks of her Chemistry class laying the foundation for the rest of the semester. Ms. Marsing met with Student and Mother to discuss the requested transfer, and was worried that Student would not be able to catch up. Student promised to see Ms. Marsing one extra time per week to get help, and the course change was ultimately approved. Student began attending Ms. Marsing’s Chemistry class six weeks into the fall 2016 semester.

37. Ms. Marsing’s demeanor at hearing was professional, and she answered

questions thoughtfully and completely. Her opinions of Student's abilities and achievement, based upon her observations and interactions with Student, as well as her education, training and experience as a credentialed teacher of high school science for over 30 years, were persuasive and given substantial weight. Student visited Ms. Marsing one or two extra days per week for help, which was provided one-to-one or in a small group. Student was a quick learner, and she retained and demonstrated what she learned. Student read well when working with Ms. Marsing, and understood what she read. Student asked for clarification of concepts, not the reading, and clarification questions were the way that all of Ms. Marsing's students learned. In Ms. Marsing's opinion, Student was an average science student earning a solid C in the class.

38. Ms. Marsing arranged for Student to complete only a few of the homework assignments from the first six weeks of the class for concept reinforcement, and exempted her from quizzes and tests given during that time, so Student's Loop page reflected many zeros in those categories. Ms. Marsing and Student were aware that those zeros would not be counted in her final grade, but the zeros were calculated by Loop and Loop reflected a grade worse than Student was actually earning. Student's grade was based on her knowledge and performance of what she mastered during the semester. Student was given preferential seating, extra time on tests, and lecture notes if requested.

39. After Student was transferred into Ms. Marsing's class, Mother hired Sterling Merritt to tutor Student in chemistry and in preparation for the ACT, for one to two hours, once or twice a week. Mr. Merritt had a bachelor's degree in mathematics, and had taught in private schools, but was not a credentialed teacher. At hearing, his demeanor was professional, he had good recall of his time tutoring Student, and he testified credibly regarding his observations of Student. Student understood the material better when he read it to her. Student sometimes had difficulty understanding

chemistry concepts and trouble reading instructions. Mr. Merritt observed that Student learned best by discussing concepts and getting clarification, although she was capable of doing chemistry assignments on her own. Student demonstrated the same mistakes that Mr. Merritt's other chemistry students made, and learned like his other students by discussing instructions and concepts and reasoning out problems.

40. On Friday, September 23, 2016, Mother provided San Juan with a letter from her doctor excusing her from school for the day. No reason was given. At hearing, Mother and Student testified that she had rashes that were exacerbated by stress, but no evidence was produced that Mother or Student relayed this information to Capistrano staff. In fact, Mother made affirmative attempts to hide from Capistrano staff that Student experienced anxiety.

41. On September 28, 2018, Capistrano convened a section 504 team meeting, attended by Mother, Mr. Jindra and San Juan administrators.

42. Mother complained that the United States History teacher at Cal Prep was not following the 504 plan, which made the class difficult for Student, and wanted Student to transfer into the United States History class at San Juan. The team recommended that Mother speak with the principal of Cal Prep, who enforced 504 accommodations at Cal Prep. There was not a United States History class available at San Juan that would fit into Student's schedule.

43. Mother also requested that test questions be read out loud to Student. Student's math teacher reported that Student declined when asked if she wanted the Algebra 2 test questions read out loud. Student's English teacher reported that there had been no tests in English, but that Student had an A+ at that time. The Drama teacher reported that she had not seen Student struggling in her class. Capistrano team members did not agree that Student needed test questions read out loud to access the curriculum, and did not add that to the section 504 accommodation plan.

44. On October 6, 2016, Mother advocated for a test reader by emailing Ms. Jordheim with information on the SERP program, a copy of the accommodations Student received at JSerra, and a copy of the letter from ACT providing Student with extended time.

45. On October 20, 2016, Capistrano convened a section 504 team meeting, attended by Mother, Father, Mr. Jindra, Ms. Jordheim, and Mr. Elenes.

46. At the time of the meeting, Student was receiving two C's and an A in her classes at San Juan. Mother again requested that Student transfer to United States History at San Juan, and the team told her that there was not a class available to fit Student's schedule. Mother requested that Student move to San Juan full-time, so the schedule would be easier to accommodate, but San Juan declined to do so because a mid-semester change of multiple classes was neither practical nor reasonable.

47. Mother asked again for a reader for test questions to be added to Student's section 504 plan. Student's teachers reported that they did not see a need for that, and Student's Algebra 2 teacher again reported that Student declined to have the test questions read when offered. A test reader was not added to Student's section 504 accommodation plan at that time.

48. On December 22, 2016, Mother emailed the assistant principal at San Juan that Student's English and Algebra 2 teachers at San Juan had offered to read test questions for Student when Student requested, but the United States History and Chemistry teachers had told her that they could not do that unless Student had a test reader on her section 504 accommodation plan. Mother requested that the section 504 accommodation plan be amended to add that Student be read every question on every test. The assistant principal responded the next day that Ms. Jordheim would work with Parents on section 504 accommodations, and that the need for a reader might indicate that Student required special education.

49. Mother was upset because Student's December 23, 2016 Loop page calculated Student's Chemistry score at 63 percent, or D, in Ms. Marsing's class. Mother incorrectly interpreted the Loop page, which included assignments, quizzes and tests in its calculation that Ms. Marsing did not include in Student's grade.

50. By the end of the fall semester in December 2016, Student earned an A in Drama and physical education, B's in English and Algebra 2, and C's in United States History and Chemistry.

51. Student enrolled at San Juan for all of her classes in spring 2016. She took English, Health, United States History, Chemistry and Algebra II.

52. Mother was not happy with Student's fall semester grades, and believed that Student would perform better if someone read class materials to Student and discussed it with her. To that end, in early 2017, Mother asked Student's tutors to write letters about Student learning faster when the material was read to her.

53. Mr. Merritt, the chemistry tutor, wrote a letter stating that Student was an auditory learner and learned best when concepts were verbally repeated and explained to her multiple times.

54. Bill Anderson, a new tutor Parents hired to tutor Student for the second semester of Algebra 2, wrote a letter stating that Student responded well to verbal explanations of material, and would benefit from having a reader for her studies. He speculated that in the classroom, Student would have trouble recording what was on the board and listening to the teacher at the same time. Mr. Anderson did not testify at hearing, and his speculation was given no weight.

55. On January 18, 2017, Ms. Weinand wrote that Student did her best work with verbal repetition, and that Student preferred to hear her assignments given orally, to hear text written aloud, and to discuss concepts she did not understand.

56. Mother also asked Drs. Katz and Gillingham to write an addendum to their

September 2013 psychoeducational assessment report. On January 24, 2017, they wrote that a test reader had served Student well in the past and recommended a reader as an accommodation. Drs. Katz and Gillingham expressly limited their recommendation, stating: "Please note that we are *not* requesting that a reader be available to help [Student] with *all* exam questions, but rather those exam questions that she is unable to effectively comprehend, despite her best efforts." (Italics added). Drs. Katz and Gillingham did not re-assess Student, or correct the erroneous scores on the Nelson Denny, and the reader recommendation was apparently based on a Parent report and the erroneous Nelson Denny score.

57. Capistrano convened a section 504 team meeting on January 26, 2017, at Parents' request, attended by Mother, Father, Mr. Jindra, Ms. Jordheim and Dr. Thurston.

58. Mother explained that Parents were worried about Student's grade point average, and presented the letters from Student's tutors and the addendum from Drs. Katz and Gillingham. Capistrano team members noted that Student received two A's, two B's and two C's the previous semester, and was currently earning three A's and two B's. They also noted that the ACT had only approved extended time, and not a reader, for the ACT tests. Capistrano team members explained the difference between having a reader, who only read questions, and obtaining clarification about a question, which could be provided by the teacher. Father wrote a proposed accommodation that was adopted by the team and added to Student's section 504 accommodation plan:

"Teachers to provide verbal clarification to written instructions or test questions when student does not understand and asks. Teacher may not give information that may reveal the answer to a question."

59. At hearing, Mother produced a letter from her, dated February 10, 2017,

addressed to three members of Capistrano and San Juan staff, requesting that Student be evaluated for special education eligibility, and requesting that an assessment plan be provided within 15 days. Each of the addressees testified at hearing, and appeared genuinely surprised by the content of the letter. One was the director of student support programs who oversaw instruction for English language learners and language immersion programs, and did not know Student personally. Another was the principal of San Juan, and did not recall receiving emails from Mother beginning until summer 2017. Another was a student study team coordinator, who recalled emails from Mother, but never a letter. Each of these witnesses worked in different departments, had marginal contact with Mother, and were not members of Student's section 504 team. Each of them testified credibly that they had never seen the letter before. Mother did not send the letter by registered or certified mail, or send the addressees emails with the letter attached, so Student could not prove that the letter had been received. Dr. Thurston testified that if San Juan staff had received the letter, they would have forwarded it to her for follow-up. Mother had a history of frequently emailing and meeting with Student's teachers and section 504 team members regarding her concerns about her daughter, yet she did not email the addressees or have follow-up conversations with them, or any of the section 504 team members, to inquire about her request or the assessment plan. Mother did not send a copy of this letter to any member of Student's section 504 team, although the team members had indicated a willingness to assess Student for special education eligibility upon parent request. At hearing, Mother seemed flustered when responding to questions about why she had mailed, rather than emailed the assessment request, and why she had not made any attempts to follow-up on the request, and her testimony on this point was not credible. Accordingly, the preponderance of evidence showed that no written request for special education assessment was made to any member of Capistrano or San Juan administration or staff by letter dated February 10, 2017.

60. On February 23 and 28, 2017, Mother took Student to see a psychologist and her doctor, respectively, about her anxiety and rashes. Student obtained doctors' notes excusing her from class, although no reasons for the visits were given.

61. During the spring 2017 semester, Student's Chemistry class was taught by David Hall. Mr. Hall is a credentialed teacher with over 25 years of experience teaching high school level science, and judging the anxiety level of his students. The second semester of Chemistry required a mathematical approach, and was challenging because it was very conceptual; students could not see the chemical reactions, and needed to take information down in numbers to compare and explain the processes. His students worked in class in small groups, filling in blanks on worksheets or practice problems. Students could take classwork home if they did not finish, and were graded on completion, not whether the result was correct. Students read assignments from the textbook, and had to read lab directions during experiments. Mr. Hall read the tests out loud to his students, so no test reading was required. The tests were half multiple choice and half work problems, and extra points could be earned by showing work. He walked around the classroom daily to see which students were having difficulty and to provide assistance. He also provided clarification during lectures, and was available during lunches on Tuesdays and Thursdays to assist students. He often had students come up to him to ask for clarification, in the classroom and privately, as he taught a difficult class.

62. Mr. Hall recalled that Student participated successfully in class, and was an average student. Student earned C grades on lab scores and test results. He did not recall her asking questions in class, and he also did not observe her demonstrating anxiety or headaches, or any other signs of illness.

63. On March 1, 2017, Mother emailed Mr. Hall that Student was struggling in

his class due to ADHD and asked for suggestions, and whether he thought Student should be assessed for other disabilities. Mr. Hall's response was not offered into evidence, but it is reasonable to infer that Mr. Hall would have assured Mother that Student was doing well in his class, that he was available twice a week to assist with learning concepts, and that he could respond to any questions Student might have in class or privately. Student did not question Mr. Hall about his response at hearing, so there is no reason to believe that he would have suggested that Student be assessed for special education.

64. On March 1, 2017, Student obtained a doctor's letter excusing her from a class. No reason was given. After that visit, Student's physician wrote a letter that Student had ADHD, reading disorder, reading fluency and reading comprehension weaknesses under timed conditions, and that due to those conditions had difficulty concentrating in school and finishing timed work, as documented by Drs. Katz and Gillingham. He wrote that she was experiencing hives and rashes due to stress and anxiety from school work and testing. He added that Student "has the aptitude to do very well in school and achieve high grades," that her 504 plan was not working, and recommended that Student be assessed for special education eligibility. Mother did not send or email that letter to anyone at Capistrano.

65. At hearing, Student presented an unsigned letter from Parents to Dr. Thurston, dated March 5, 2017, asking for reevaluation of Student's section 504 accommodation plan and the need for a special education IEP. Mother testified that she hand-delivered the letter to San Juan office staff in an envelope addressed to Dr. Thurston, and delivered a copy to Dr. Thurston herself. However, Dr. Thurston testified that she had not seen the letter until after Student's due process complaint was filed. Mother's testimony was less credible than that of Dr. Thurston for several reasons. Dr. Thurston testified convincingly that office staff would have given her any envelope

dropped off with her name on it, and that she would have promptly sent Parents an assessment plan if she had received that letter. Mother did not obtain a time- and date-stamped copy of the letter from San Juan staff to document delivery, and despite sending emails to Dr. Thurston before and after March 5, 2017, did not email Dr. Thurston to inquire about a response to the letter. A reasonable parent would have followed up on such an important letter, and Mother's testimony that she had personally delivered the letter was not credible. The preponderance of evidence showed that the March 5, 2017 letter was not received by Dr. Thurston, and she was not aware of it before the instant matter was filed.

66. On March 10, 2017, Mother emailed Student's math teacher that Student was struggling in class and worried about her math scores, and asked if Student could meet with him the next afternoon. Mother also asked if he thought Student should be tested for other disabilities. Student's teacher responded that he had observed Student's increasing anxiety about math, but that her performance was not as poor as Student feared, and that he would meet with Student. He did not recommend additional disability testing for Student.

67. On March 17, 2017, Mother withdrew Student from San Juan and placed her at Fusion, a private school that used a one-to-one model of instruction. Teachers at Fusion were not required to have teaching credentials, and only minor learning disabilities could be accommodated. The instructors met with the students two times per week (three times per week if the student wanted to cover the material faster), and were otherwise available to informally meet with the students in the campus "homework café."

68. Student took courses at Fusion in Algebra 2, Chemistry, English, Health, US History, and Studio Arts to make up for the classes she had not completed at San Juan.

69. Nancy Kington taught Student English at Fusion. Ms. Kington was not a

credentialed teacher. Student took classes three times per week, rather than two times per week, to get through the course faster. Student listened to the assigned book on audio, charted events in the book on the board, and analyzed them. Student was not required to read, but wrote well-written analyses. Ms. Kington played the audio book and went over homework instructions, and Student always turned in her work, so Ms. Kington never had an opportunity to observe Student reading. She did observe that Student wore glasses. Student did not ask for clarification of instructions on class assignments, and did not display test anxiety. Ms. Kington did not proctor her tests, so she was unaware if Student had any test accommodations at Fusion.

70. Ms. Kington also taught Student college testing preparation. She read the materials for Student, as she did with all students. In Ms. Kington's experience, all students are anxious about college testing, and about college acceptance, but she did not perceive that Student was any more anxious than other students. She did not review the writing section of the college tests with Student, because Student was already strong in writing.

71. Student enjoyed working with teachers one-on-one at Fusion, because she could ask her teachers questions outside the presence of other students, and could talk through concepts with them. Student did not need tutors when she attended Fusion, because the teachers themselves provided clarification for Student. Fusion classes met twice per week. Outside of class, Student looked things up on the internet and used other sources to better understand what she read, so that by the time she was in class, she knew the material.

DR. STEPHEY'S VISION THERAPY ASSESSMENT

72. On March 20, 2017, Mother took Student to be evaluated by optometrist Douglas Stephey for vision therapy. Dr. Stephey conducted an assessment to determine if Student was suffering from a functional vision problem that was affecting her school performance.

73. Dr. Stephey is an optometrist who specializes in neuro-optometry and vision therapy. He testified at hearing, and his demeanor was arrogant and dismissive. His responses to questions were unnecessarily complicated and technical, opaque, and often seemed designed to direct attention to the research of others and away from Student's own needs.

74. Dr. Stephey is a self-described "developmental or behavioral" optometrist, and was derisive of conventional optometrists, who he opined were committing malpractice. His vision assessments looked at the "developmental ladder," to see if patients could "deal with" straight, curved and angle lines that represent letters, numbers, and abstract symbol systems. He purported to assess eye focusing, eye tracking and eye teaming, but also assessed in areas generally assessed by professionals in other fields; for example, he administered tests typically used by psychologists in psychoeducational assessments, and interpreted bloodwork results of nutrition and hair analysis typically interpreted by internal medicine doctors. Dr. Stephey bragged about going to the library and finding decades-old articles on obscure optometric tests and practices that he adopted as superior to current optometric assessment standards.

75. In optometric practice, measurable physical signs of eye dysfunction are referred to as "signs" of dysfunction. Signs are measured by the optometrist. Subjective symptoms of eye dysfunction, such as headaches or tiredness, are referred to as "symptoms." Symptoms are reported by the patient.

76. Dr. Stephey purported to assess Student for convergence insufficiency. Convergence insufficiency results when a person's eyes do not properly turn inward to focus and provide binocular vision and a single image, which could affect a child's ability to read, and therefore, the child's educational performance. Three tests are standard for diagnosing convergence insufficiency, which look for signs of a tendency of the eyes to

deviate outwards, whether the eyes lose fusion at a specific point, and the extent to which the eyes can maintain binocular single vision when demands are placed on one or more eyes. Each test measures quantitative signs of eye dysfunction, and certain measurements are required for a diagnosis of convergence insufficiency. Dr. Stephey failed to administer tests for physical signs of convergence insufficiency. Instead, he had Student complete the Convergence Insufficiency Symptoms Survey, or CISS, which is a questionnaire about symptoms consistent with convergence insufficiency. Dr. Stephey concluded from Student's CISS report, including symptoms such as headaches and tiredness when reading, that Student had convergence insufficiency. It is Dr. Stephey's opinion that a student who has convergence insufficiency is *de facto* eligible for special education, and he has written a form letter for parents to that effect.

77. Dr. Stephey testified for over three hours, with half of that under extensive cross-examination. Although he opined that Student had convergence insufficiency, which was the focus of much of his testimony, he never mentioned that he had performed any of the standard tests for physical signs of convergence insufficiency. No results of tests for signs of convergence insufficiency were included in his assessment report, although other test results were documented. Dr. Stephey issued a document several months after his initial assessment purporting to show that Student's convergence insufficiency was much improved by vision therapy, but that document also failed to report tests for signs of convergence insufficiency. Two optometrists later testified that convergence insufficiency should be diagnosed with tests for signs, rather than symptoms. Dr. Stephey was called back as a witness and testified that he had tested for signs of convergence insufficiency, but failed to document it in his report or to mention it during his earlier testimony. The testimony that he had performed a crucial test and failed to mention it in his report or during three hours of testimony was not credible.

78. Dr. Stephey also testified that he did not begin reporting results of tests for signs of convergence insufficiency until he read guidance from the U.S. Office of Special Education Programs (OSEP) in May 2017, which explanation was nonsensical. Reporting test results is a basic standard of optometric assessment, and the May 2017 OSEP guidance made no reference to convergence insufficiency test scores. Further, review of guidance in 2017 did not explain why Dr. Stephey failed to mention test results during testimony in December 2018, or to provide a copy of Student's test results for signs of convergence insufficiency to Student prior to the exchange of evidence or when first called as a witness.

79. Dr. Stephey also displayed an extreme bias in favor of advocating on behalf of students generally, and Student in particular. Dr. Stephey wrote in many places throughout his report, in bold type, his conclusion that Student's outcomes affected her ability to access the curriculum. Dr. Stephey testified that he had "researched" special education eligibility by reading the law and OSEP guidance, and written a document for parents of students diagnosed with convergence insufficiency explaining how to qualify for and obtain special education services funded by school districts. As discussed below, he included in his assessment report a conclusion that Student was eligible for special education, and included language for an IEP. He even wrote his post-therapy update on Student in the form of a special education report of "present levels of performance" for an IEP, rather than the vision therapy update that it was. Dr. Stephey reported improvements in Student's vision after providing vision therapy himself, and recommended that Capistrano continue to fund vision therapy by his offices, which although not barred by legal or ethical prohibitions, gave him a financial stake in the outcome of this proceeding.

80. In his Vision Therapy Report, Dr. Stephey found Student's eyesight to be 20/20 at near and far distances, but cautioned that visual acuity did not measure if Student could see fast and effortlessly, or derive meaning from what she read.

81. Dr. Stephey performed a screening for “magnocellular visual pathway function,” or how fast Student’s brain could use vision. The report noted that the visual “pathway” to the brain played a significant role in how the brain moves the body through space and sustains attention. Student scored poorly on that screening, which Dr. Stephey reported caused Student visual stress, impacted her ability to sustain attention, raised her anxiety, and contributed to an inability to regulate her emotions and behavior.

82. Dr. Stephey tested Student’s ability to cross and uncross her eyes, as a way to determine if both her eyes could work together. Student was uncomfortable crossing her eyes multiple times for the test, and could not do it without effort, which Dr. Stephey concluded would make it uncomfortable for Student to read up close or do other desk work.

83. Dr. Stephey tested Student’s ability to focus by having Student look through lenses to stimulate the brain to focus in one eye and inhibit the brain from focusing in the other eye. Student did not perform well, and her eyes blurred in and out of focus, which Dr. Stephey concluded meant that she might experience headaches, difficulty copying from the board at school, slow laborious reading, poor attention to detail, and poor ability to sustain attention and might cause her to skip through materials.

84. Dr. Stephey attempted to track Student’s eye movements while she read a passage through a special pair of goggles, but reported that he could not obtain a valid result. He testified that it was important for a student not to fix their eyes on too many points during reading, or it slowed them down.

85. Dr. Stephey showed Student a binocular “dissonance grid” that she found uncomfortable to look at. He then showed her a column of print and asked if her eyes

were attracted to the print or the white spaces, and Student responded that she was “of course” looking at the white spaces. Dr. Stephey concluded that Student had difficulty visually engaging with print, which would be relieved by colored prism glasses.

86. Though he lacked proper training to interpret results, Dr. Stephey administered several standardized measures of Student’s cognitive processing abilities. Student’s working memory was average to superior. Her decoding skills were average, from which he concluded that Student “cognitively gets reading” although her visual system “detests looking at print.” Her reading and word fluency were very good. Her phonological processing skills ranged from below average to superior, and her reading test scores were in the average range for reading rate, reading accuracy and fluency. Her comprehension score was low, but Dr. Stephey opined that Student would notice an immediate difference in her reading speed and comprehension with her new glasses, and further improvements with vision therapy. He also had Student perform a series of physical activities timed to a metronome, and concluded that her motor planning and sequencing was not of concern.

87. Dr. Stephey concluded in his assessment report that Student was a good reader, with good decoding skills, but “visually miserable” and “detests the visual aspects” of reading. He opined that Student’s brain was so busy trying not to look at print that she could not easily remember what she read. To address deficiencies in the magnocellular pathway, eye teaming skills, focusing skills, and eye tracking, he prescribed colored prism glasses, blood tests and hair analysis, rigorous exercise to improve mood and behavior, nutritional counseling, an assistive technology assessment, and vision therapy for magnocellular vision and convergence insufficiency. As accommodations at school, he recommended: no scantron sheets (test sheets requiring test takers to choose answers from rows and columns of dots to be filled in); distraction-free testing; extra time on tests; breaks from written material and copying from the

board; a reader for test questions; written notes before lectures in large font; less time pressure; and not calling on Student in class. Dr. Stephey added in a notes section at the end of his report:

[Student] is suffering from a condition known as convergence insufficiency and as such is eligible for an IEP as a student with a visual impairment. See attached OSEP letter.

88. The notes continued that "once an IEP or 504 plan is in place, vision therapy may be approved and funded by the district," and recommended \$2,400 dollars of vision therapy services. He also wrote that the IEP should include language that Student would be getting magnocellular and convergence therapy from Dr. Stephey, and returning to Dr. Stephey for monthly progress exams. Lastly, he proposed three goals to earn specified scores on three tests: a magnocellular vision program, a vergence facility (eye crossing) test, and binocular accommodative facility (eye focusing) test.

89. Dr. Stephey's disdain for conventional optometric assessment norms, his willingness to venture opinions in fields outside his area of expertise, his failure to provide clear and insightful responses to questions, his failure to perform tests for signs of convergence insufficiency and other lazy assessment practices (such as relying on a symptoms checklist when physical tests are the practice standard, or purportedly failing to report the results of tests performed), his nonsensical explanation for failing to report a test for convergence insufficiency, the unlikelihood that he could have performed tests for signs of convergence insufficiency and forgotten to mention that during many hours of testimony and in two written reports, his blatant bias in favor of finding Student eligible for special education, and his conflict in finding his own services effective, adversely affected his credibility and persuasiveness. Although Dr. Stephey performed

the actual assessment of Student, his opinions on the reported assessment results, and Student's educational needs based upon those results, were given less weight than those of Capistrano's expert optometrist Dr. David Kirschen. Dr. Stephey's opinions regarding Student's vision processing, visual integration and visual motor processing, which are brain, not eye, functions, and which were the subject of testimony by licensed and credentialed psychologists, were given little weight because they were outside his area of expertise.

90. Student received her new colored prism glasses from Dr. Stephey and began wearing them at Fusion. On May 10, 2017, Student's math teacher at Fusion wrote a "to whom it may concern" letter that stated Student used to make careless mistakes, which he assumed were caused by rushing through problems or not understanding concepts, but Student no longer made mistakes after wearing glasses, which made a "world of difference." He wrote that Student's glasses enabled her to follow along with notetaking and working on practice problems from lecture, and her grades were excellent.

91. Student's Digital and Fine Arts teacher at Fusion also wrote a "to whom it may concern letter." She observed that Student was adamant about wearing her glasses at the start of class, when on the computer, when reviewing project grading rubrics, and when working on the fine details of her art projects to better control the art medium.

92. At the end of the spring 2017 semester, Capistrano awarded Student partial credit for each of the classes from which she had withdrawn (2.5 units of 5.0 units per class), but no grades. Student earned all A's at Fusion.

DR. MAJORS' NEUROPSYCHOLOGICAL ASSESSMENT

93. In July 2017, Parents retained Christine Majors, Psy.D, to conduct a neuropsychological assessment of Student. Dr. Majors testified telephonically at hearing, and gave calm and complete responses. She was very forthcoming about having

incorrectly scored the Nelson Denny reading test, and admitted a lack of truthfulness by deleting the social emotional functioning section from a copy of the assessment report to be given Capistrano at Mother's request. Dr. Majors' interpretation of special education eligibility criteria appeared strained, particularly when comparing cognitive scores. For example, she focused on the two highest (superior range) scores and characterized the other cognitive scores (average or low average range) as "significantly below expectations," although these were measures of Student's innate cognitive functions, and not measures of acquired skills. Cognitive functions explain how students learn, and when Dr. Majors' testimony went beyond explaining that Student had relative strengths and weaknesses in how she processed information, and veered into Dr. Majors' own subjective expectations of how Student should have been found to function intellectually, her opinions were speculative, illogical and unpersuasive. In addition, Dr. Majors' refusal to change her opinion on Student's reading skills, despite all average scores after the Nelson Denny score was corrected, seriously and adversely affected her credibility regarding Student's reading skills.

94. Dr. Majors administered a series of standardized tests of cognitive ability. Student scored in the superior range on the working memory and processing speed indexes. She scored in the above average to average range in all other categories, including attention, executive functioning, visual-spatial skills, language functioning, and learning and recall of visual and verbal information. Student had the strongest cognitive ability in auditory working memory, visual attention and visual-motor integration. She was weakest, but still within the average range, in verbal fluency, expressive vocabulary, recall of paragraph-length information and rote memory skills. Her full scale intelligence score was 117.

95. Dr. Majors administered a series of standardized tests for academic achievement, or what Student could already do. Student scored in the average to high

average or average range in all categories, with standard scores from 104 to 124, except for an extremely low score in the first percentile on the Nelson Denny test of reading skills.³

96. Dr. Majors obtained responses to rating scales to assess Student's behavior and anxiety. Student's teachers at Fusion reported that Student never or only occasionally demonstrated problems that affected her school work, but she did exhibit symptoms of depression, such as being tired and having low energy. Mother reported many symptoms of ADHD inattentive type. Mother and teachers both reported that Student's mind often drifted in class, and that she expressed stress about manageable tasks, was easily sidetracked, lost track of where she was in reading assignments, had trouble grasping main concepts, was easily frustrated or impatient, procrastinated, froze when taking tests, needed extra time for assignments, frequently felt discouraged, tended to be a loner, and needed reminders to start tasks and finish them.

97. Dr. Majors diagnosed Student with a mild specific learning disorder with reading impairment based on the (incorrect) Nelson Denny score, and with ADHD predominately inattentive type. Dr. Majors reasoned that Student's ADHD adversely affected Student's educational performance, and qualified her for special education under the category of "other health impairment" because a review of Student's grades showed that Student did better at JSerra and Fusion, which Mother reported had accommodated Student's ADHD while San Juan had not. Dr. Majors also concluded that Student qualified for special education eligibility as having a "specific learning disability" because her reading achievement score on the Nelson Denny was so far below her cognitive ability.

³ Dr. Majors erroneously scored Student's results on the Nelson Denny, but did not become aware of that until 2018. When correctly scored, Student received a score in the average range on the Nelson Denny.

98. Dr. Majors recommended that Student receive the following accommodations in general: preferential seating; extended time on assignments and tests; testing in a distraction-free environment; no scantron cards; provision of a note taker; teacher clarification on Student request; and an ADHD coach to address difficulties with planning, organization and time management. For Student's reading disorder, Dr. Majors recommended: test to speech versions of textbooks; that Student not be required to read in front of the class; extra time on tests; and a reader during tests.

99. On August 12, 2017, Parents retained audiologist Dr. Catherine Fabian to test Student for central auditory processing disorder. Student tested well within normal limits in all areas except dichotic listening, or recall of the order words were told to her, which may have been affected by her ADHD. Dr. Fabian concluded that Student exhibited normal central auditory processing development.

100. During summer 2017, Parents contacted Capistrano about registering Student for one class at San Juan for the 2017-2018 school year. Parents informed Capistrano that Student needed the one-to-one instruction at Fusion, and that Student would take the remainder of her courses at Fusion.

101. Parents had not previously requested a special education assessment, Capistrano teachers all reported that Student was a good student, and Student had earned passing and better grades at San Juan, demonstrating to Capistrano staff that Student was accessing the curriculum with the support of her 504 accommodations. Nonetheless, Capistrano decided to assess Student for special education eligibility in light of Parents' recent report of Student's need for one-to-one instruction, and sent Parents an assessment plan on August 25, 2017.

102. Parents consented to the assessment plan on September 13, 2017, but refused to make Student available for testing until the following spring 2018 semester.

2017-2018 SCHOOL YEAR

103. For the fall semester of the 2017-2018 school year, Student registered at Fusion for classes in English, Economics, Government, Pre-Calculus, Life Skills and Studio Arts. Student registered at San Juan for a Forensic Science class, taught by Debra Miyamoto.

104. Ms. Miyamoto taught Student for two semesters. Ms. Miyamoto holds credentials to teach math, science and career technical education. She has been a teacher for 16 years, and a high school teacher at San Juan for 10 years. Ms. Miyamoto had a professional demeanor at hearing, and recalled Student very well. Her observations of Student were detailed and informative, and her testimony was credible.

105. Ms. Miyamoto's class was taught with PowerPoint presentations at the beginning of each unit. Students were given assignments for reading at home, but no other homework, and were expected to bring notes from the reading to class. Students were allowed to use those notes during quizzes, and were given a study guide before each test. Ms. Miyamoto explained each reading assignment to the class and demonstrated its content. Tests were multiple choice. The class was divided into groups to conduct labs to demonstrate their skills, such as calculating the density of glass, bullet trajectories, and speed of blood splatter. Each student was given lab sheets that showed the technique, materials to use, and data tables to collect data for analysis. Students demonstrated their understanding by answering the analysis questions. Ms. Miyamoto walked around the classroom during labs to check for understanding and to answer questions. Lab analysis required math and elementary trigonometry to calculate angles and distances, but Ms. Miyamoto taught the necessary math and no math course was a prerequisite for taking her class.

106. Student seemed to enjoy Forensic Science, and performed well throughout

two semesters, in group labs and on quizzes and tests. Ms. Miyamoto did not observe that Student had any problems understanding the lectures or demonstrations, and Student never told her that she was having trouble. Student participated in the class like the other students, and did not stand out in any negative way.

107. On September 20, 2017, Mother emailed Ms. Miyamoto for permission for Student to use a page magnifier during a test to increase font size, which Ms. Miyamoto approved.

108. Student earned all A's during the fall 2017 semester at Fusion. She also earned an A in Ms. Miyamoto's class. San Juan retroactively removed the partial credits from Student's transcript, and replaced them with the full credits Student had earned by re-taking classes at Fusion in spring 2017.

109. In spring 2018 semester, Student left Fusion and enrolled in four classes at San Juan: Expository Reading and Writing, Forensic Science, Ceramics, and School Service. She concurrently enrolled in a college-level World History class at Saddleback College.

110. At San Juan, Student attended the Expository Reading and Writing class taught by Eric Noble, a credentialed English teacher and the English department chair. His course was designed by the California State University system, and focused on informational text, rather than fiction, such as newspaper and magazine articles applicable to college and professional life. Students read a non-fiction text, developed their own opinions, and were assigned writing tasks from short answers to multi-page assignments. Assignments were primarily completed in class. Mr. Noble had a professional demeanor at hearing. He remembered Student well and was credible. He described Student as performing well, on top of her work, focused, and contributing to class conversations with good ideas. He did not recall her having any difficulty with reading in class. Student told him she was anxious about the tests, and he let her take

them in a quiet room. Student earned an A in the class, and could not have achieved that grade without performing well on the tests. Student did not use private tutors for English, and did not use tutors during the 2017-2018 school year for anything other than an occasional test review or preparation for the ACT.

111. Student testified at hearing that she took a lot of English classes that allowed her to turn in written essays and projects, because she excelled at writing. Writing was easy for her, and she could complete large written assignments quickly.

112. On February 27, 2018, Dr. Stephey issued an update on Student's progress in vision therapy, which he titled "Current Levels of Performance," suggesting it was part of an IEP. The update did not report any tests for improvements in signs of convergence insufficiency, and Student had not completed a new CISS survey. Student achieved scores in the normal range in two areas, and Dr. Stephey recommended that she stop binocular therapy. However, Student still had a low score on magnocellular vision, and Dr. Stephey recommended Student continue magnocellular pathway therapy and get new glasses to further relieve visual stress/visual aliasing (misreading symbols).⁴ He then recommended that Student begin primitive reflex therapy and a "Safe and Sound" program.

113. Parents made Student available for special education testing by Capistrano at the beginning of the spring 2018 semester, and which took place from January 10, 2018 through March 12, 2018. Mother provided Capistrano with copies of the assessment reports by Dr. Stephey, Dr. Majors and Dr. Fabian. Mother had Dr. Majors create an assessment report without social emotional functioning test results and recommendations. Mother did not want Capistrano to know that Student had anxiety.

⁴ Dr. Kirschen testified persuasively that visual aliasing (resulting disturbance in visual engagement with print) is not a standard part of an optometric assessment.

114. Dr. Thurston performed the psychoeducational portion of Capistrano's multidisciplinary assessment. As a school psychologist, she evaluated students for eligibility for section 504 accommodations and special education, and assessed them for both aptitudes for learning and acquired academic skills. She had completed over 800 psychoeducational assessments on students in all 13 disability categories for special education eligibility.

115. Dr. Thurston reviewed the reports by Drs. Katz and Gillingham, Dr. Stephey, Dr. Majors and Dr. Fabian. During her testimony, Dr. Thurston demonstrated a keen insight in understanding how the information in various assessments worked together to create a detailed picture of Student's abilities and achievement. She immediately noticed inconsistencies in reading and visual processing test results, and uncovered incorrect Nelson Denny scoring by Student's private psychologists. Dr. Thurston understood that the underlying conditions Dr. Stephey was purporting to address were double vision and blurriness, which was inconsistent with Student's visual acuity scores and reading fluency. She understood that Dr. Stephey had diagnosed Student from a list of patient-reported symptoms, such as headaches and tiredness after reading, which were attributable to any number of causes.

116. During rebuttal testimony, Dr. Stephey was derisive of Dr. Thurston's reference to double vision and blurriness as symptoms of convergence insufficiency, implying that because she was not an optometrist she misunderstood the symptoms of that condition. However, Dr. Stephey recommendations for vision therapy in vergence facility and accommodative function addressed exactly double vision and blurriness, indicating that Dr. Thurston had understood the gist of Dr. Stephey's recommendations. As described in Dr. Stephey's own assessment report, vergence facility referred to the brain's dislike for seeing double, and accommodative function was a measure of how the eyes focus in space, like the lens of a camera, to achieve clarity and avoid blur. Dr.

Thurston's understanding of the crux of various assessment results, including those reported in other fields of expertise, did not demonstrate a lack of nuance, but an ability to perceive and focus on important information without being deflected. The proof of Dr. Thurston's insight was her discovery of scoring errors, assessment misreporting, and lack of diagnostic testing by other assessors. Dr. Thurston's responses to questions at hearing were thoughtful and thorough, with clear and logical explanations, and supported by reference to documentary evidence. Her testimony was credible and persuasive, and accorded significant weight.

117. Dr. Thurston noticed immediately that the Nelson Denny score in the Katz and Gillingham assessment was inconsistent with Student's high average score in other reading skills. Dr. Thurston contacted the publisher of the Nelson Denny and discovered that Dr. Katz and Gillingham had incorrectly scored the Nelson Denny, and that Student had scored in the average range on that reading test. Once the correct Nelson Denny score was inserted into the assessment report, the data no longer supported the diagnosis of a reading disorder.

118. Dr. Thurston discovered that Dr. Majors had also incorrectly scored the Nelson Denny, and that Student had also performed in the average range for Dr. Majors. Dr. Majors had diagnosed a mild reading impairment based upon an incorrect Nelson Denny score, with all other visual processing and academic scores in the average to high average range, and Dr. Thurston considered Dr. Majors' diagnosis to be in error, and unsupported by the test results.

119. Dr. Thurston called Dr. Stephey and spoke to him at length about his findings. She understood that Student had passed her vision test, that her visual functioning was average, and that Dr. Stephey had concluded that Student was a good reader, and wondered why Dr. Stephey had diagnosed Student as having convergence insufficiency, or double vision and difficulty focusing, based upon symptoms such as

headaches. In general, she found that his reasoning was not linear, that his conclusions were not supported by his findings, and that he appeared to be looking for something that the data did not show was there. All of Student's prior assessments demonstrated that she had good vision and visual processing in the average range, and the only thing out of range were headaches as mentioned in Dr. Stephey's report.

120. Dr. Thurston administered a series of cognitive ability tests to Student. Student's cognitive scores were in the average to high average range, with memory in the superior range. Student scored in the average range in all subtests of visual processing, including processing, sequencing, visual memory and complex processing. Student had average scores on tests of visual-perceptive skills, including visual discrimination, visual memory, spatial relations, sequential memory and visual closure. Student's overall cognitive standard score, or fluid-crystal index, was 100. For educational purposes, these test results indicated that Student was not struggling with processing what she took in visually.

121. A credentialed special education teacher, Rachel Page, administered a series of standardized tests to measure Student's academic achievement. Student scored in the average to superior range in all academic tests, with standard scores of 96 to 128, commensurate with or better than her cognitive abilities. The academic scores obtained by Dr. Thurston were consistent with those obtained by Drs. Katz and Gillingham, and Dr. Majors, demonstrating that Student was making steady educational progress each year, and had been making such progress without vision therapy. A review of Student's grades similarly showed average to high average grades consistent with Student's scores in cognitive ability and academic achievement.

122. Dr. Thurston tested Student's social emotional functioning by interviewing Student and obtaining anxiety rating scales from Student, Parents and Student's teachers. Although Mother rated Student as elevated in many areas, Student rated

herself as elevated in only a few areas common to typical teenagers, and Student's teachers rated her as a typical student. According to the publisher's manual, Mother's elevated ratings had to be interpreted with high caution due to inconsistent responses. Student's scores were average for anger and disruptive behavior, above average for self-concept, mildly elevated for depression and moderately elevated for anxiety. Neither Parent nor Student reported that she suffered from headaches. Dr. Thurston concluded that Student was getting ready for graduation and looking towards next steps in life, and was experiencing reasonable levels of the excitement and fears that many twelfth grade students experience.

123. Dr. Thurston concluded that Student's academic achievement was commensurate with her average to high average cognitive ability. Student scored in the average range on the basic processing and sequencing indexes, including visual perceptual skills. Students with visual integration deficits struggle with memory, writing, and being able to see letters on the page, but Student tested in the average range in all of these subtests and modalities. Academically, Student scored in the high average range in broad reading skills, with average scores for reading comprehension, passage comprehension and reading recall. She scored in the superior range for written language. Although Student had a medical diagnosis of ADHD, her teacher ratings, work samples, grades and classroom performance with section 504 accommodations demonstrated that ADHD was not adversely affecting her educational performance with the section 504 accommodations in place.

124. On March 17, 2018, Dr. Majors prepared, at Mother's request, an addendum to her neuropsychological assessment report. The addendum, which was provided to Dr. Thurston, revealed that Dr. Majors had not earlier reported administration of a social emotional functioning inventory in October 2017, on which she diagnosed Student with adjustment disorder with mixed anxiety and depression.

The addendum stated that Student would benefit from: psychotherapy with a seasoned clinician; being permitted to register early for classes; and being called on in class only when she volunteered. Student attended a few counseling sessions at Dr. Majors' recommendation.

125. Dr. Thurston had administered that same social emotional inventory as part of the multidisciplinary assessment, and the results showed a reduction in Student's symptoms of depression and anxiety.

126. On April 12, 2018, Capistrano convened an IEP team meeting to review the district's multidisciplinary assessment. The meeting was attended by Mother, Student, Student's advocate, Dr. Thurston, Ms. Page, Mr. Jindra, and Mr. Noble.

127. At the meeting, Dr. Thurston presented the multidisciplinary assessment report and discussed and answered Parent and Student questions regarding the results and recommendations. Dr. Thurston explained the scoring errors on the Nelson Denny by Drs. Katz and Gillingham and Dr. Majors. Dr. Thurston found no discrepancy between Student's intellectual ability and achievement. Although Student struggled to sustain attention, her strengths and weaknesses in the area of cognition were commensurate with her academic achievement scores and classroom performance. With a section 504 accommodation plan, Student did not require special education to access the curriculum.

128. Based on the results of the multidisciplinary assessment, the Capistrano IEP team members concluded that Student did not qualify for special education under the categories of either "other health impairment" or "specific learning disability."

129. At the end of the spring 2018 semester at San Juan, Student earned A's in Forensic Science, Expository Reading and Writing, Ceramics and School Service. Student earned a B in World History at Saddleback College. Student did not receive tutoring during that semester.

DR. DAVID KIRSCHEN

130. David Kirschen, O.D., Ph.D., testified at hearing for Capistrano. Dr. Kirschen earned his Doctor of Optometry in 1972, and his doctorate in Physiological Optics in 1977, both at the University of California Berkeley. He taught for 30 years at the Southern California College of Optometry, was an Assistant Professor of Ophthalmology at the prestigious Jules Stein Eye Institute at the University of California, Los Angeles, School of Medicine for nine years, and has lectured at the Jules Stein Eye Institute for over 30 years. His specialty is in binocular vision problems, and he has extensively published both articles and book chapters, and has given numerous lectures and presentations on diagnosis and treatment of eye disorders. Dr. Kirschen's demeanor was professional and helpful, and he answered all questions completely, with clear and logical explanations and examples. Dr. Kirschen was credible and persuasive, and his opinions were accorded significant weight.

131. Dr. Kirschen explained that assessment in all areas of visual function, including visual acuity, the aiming system, the focusing system, and the stereo system, are done as part of a standardized visual examination. Convergence insufficiency is a medical condition that cannot be diagnosed with a checklist of patient-reported symptoms, but requires measurement of physical signs.

132. Dr. Kirschen had multiple persuasive criticisms of Dr. Stephey's report. Dr. Stephey had recommended treatment for convergence insufficiency without clinical testing. The report's conclusion did not expressly diagnose convergence insufficiency, although it recommended treatment for it, and concluded that convergence insufficiency qualified Student for special education. His testimony established that the recommendation for vision therapy was not supported by the data in the report. Dr. Stephey included tests in his assessment that were not standard to an optometric assessment, such as visual aliasing, myocellular functioning, and biochemical features

requiring hair analysis. Dr. Kirschen was critical of Dr. Stephey's test for the number of fixations, explaining that optometric practice no longer considered reducing the number of fixations during reading to be necessary. Dr. Kirschen testified persuasively that conventional science was very unclear about how the magnocellular system interacted with the way people see. He explained that there is some research that magnocellular functioning can be improved, but no proof that increased magnocellular function improves the functions of reading, math or perception.

133. Dr. Kirschen was critical of Dr. Stephey's failure to make a differential diagnosis, that is to look at possible alternatives for Student's headaches and other reported symptoms. For instance, Student had a diagnosis of ADHD, and could be expected to lose track of reading due to her attention issues. ADHD has many of the same symptoms as convergence insufficiency, and a patient can have both, so clinical testing is necessary to determine if convergence insufficiency, or multiple conditions, such as ADHD, are the cause of those symptoms.

134. Dr. Kirschen explained persuasively that above average word reading efficiency scores, such as Student's, did not suggest symptomatic convergence insufficiency. Writing is also a near-point task, and if Student had convergence insufficiency, that would be expected to impact writing as well, but Student's writing scores were in the superior range. Convergence insufficiency would affect both fluency and comprehension, and a low reading comprehension score coupled with a high reading fluency score would not suggest convergence insufficiency. In any event, Dr. Kirschen opined that a competent optometrist would first measure signs to determine if the patient has convergence insufficiency before looking to determine if other factors were contributing to vision difficulties.

DR. JOHN DAVID TASSINARI

135. Dr. John David Tassinari, O.D., testified on behalf of Student. He earned his

Doctor of Optometry from the Southern California College of Optometry in 1987. He is a fellow of several optometry academies and has been an associate professor at Southern California College of Optometry for five years. He has published many articles, including on behavioral optometry, vision therapy practices, and treating oculomotor dysfunction. He lectures and presents at conferences frequently, and is an active member of community organizations. Dr. Tassinari estimated that he had completed 800 to 900 vision assessments of school-aged children with learning problems.

136. Dr. Tassinari testified, consistent with Dr. Kirschen, that the optometric standard is to diagnose convergence insufficiency with the three standard tests identified by Dr. Kirschen, and that results of such testing were absent from Dr. Stephey's report. Dr. Tassinari noted that there are additional tests for indirect signs of convergence insufficiency, none of which were reported by Dr. Stephey. He testified that an optometrist should put information on all tests performed in an assessment report. Dr. Tassinari commented that every optometrist works up a patient for vision therapy differently, and that he would have done a developmental eye movement test instead of counting fixations, administered the three standard tests for convergence insufficiency, and generally would have administered tests that were different from those chosen by Dr. Stephey. Nonetheless, he opined that Dr. Stephey's assessment was "fine." In light of Dr. Tassinari's confirmation of Dr. Kirschen's testimony that convergence insufficiency should be diagnosed, at a minimum, with tests for physical signs, that it is not good practice to perform assessment tests and not reference them in the assessment report, and that he himself would have done different testing to determine if Student had visual deficits, his conclusion that Dr. Stephey assessment report was fine was neither credible nor convincing.

STUDENT'S TESTIMONY

137. Student testified that even when she knew material well, she blanked

during tests, which caused her stress. At JSerra, the homework and classroom group work was easy, and she could do homework and listen to music to help her focus during the SERP period. She never sought out, or received, help with reading at JSerra, although she sometimes had test questions read to her. Student explained that it was physically hard to read, she skipped lines and then had difficulty understanding what she read, looked at white spaces, and became distracted. She was tired of reading when she came home after school.

138. Student said that she began having trouble at San Juan because she did not understand Physics and Chemistry, and the teachers did not make the material clear enough. She asked questions of the teachers at the beginning of the semester, but was too embarrassed to ask questions later. In Chemistry, she asked other students questions rather than asking the teacher. She did much better in English, because she spoke to her teacher about what she needed. Student preferred having tutors to help her understand the material, and because when she had tutors, she did not need to ask the teachers questions. She was able to do her schoolwork on her own, but liked to wait until she could go over it with her tutor before turning it in.

139. Student believed that the vision therapy helped her to be more calm and less stressed when reading. However, Student opined that she still read slowly, and that the vision therapy had not helped with comprehension, which was still a problem. She felt that the new glasses took the stress out of her eyes.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA⁵

1. This hearing was held under the Individuals with Disabilities Education Act,

⁵ Unless otherwise indicated, the legal citations in the introduction are

its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006) et seq.;⁶ Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

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

incorporated by reference into the analysis of each issue decided below.

⁶ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. The Supreme Court revisited and clarified the *Rowley* standard in *Endrew F. v. Douglas County School Dist.* (March 22, 2017) 580 U.S. __ [137 S.Ct. 988] (*Endrew F.*). It explained that *Rowley* held that when a child is fully integrated into a regular classroom, a FAPE typically means providing a level of instruction reasonably calculated to permit advancement through the general education curriculum. (*Id.*, 137 S.Ct. at pp. 1000-1001, citing *Rowley, supra*, 458 U.S. at p. 204.) As applied to a student who was not fully integrated into a regular classroom, the student’s IEP must be reasonably calculated to enable the student to make progress appropriate in light of his or her circumstances. (*Endrew F., supra*, 137 S.Ct. at p. 1001.) The Ninth Circuit has affirmed that its FAPE standard comports with *Endrew F. (E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535 [nonpub. opn].)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast*

(2005) 546 U.S. 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].) In this matter, Student had the burden of proof on the issues decided.

CHILD FIND

5. School districts have a general affirmative and ongoing duty to actively and systematically seek out, identify, locate, and evaluate all children with disabilities residing within their boundaries who may be in need of special education and related services. (20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a); Ed. Code, §§ 56171, 56300 et seq.) This ongoing duty to seek and serve children with disabilities is referred to as “child find.” California law specifically incorporates child find in Education Code section 56301. (Ed. Code, § 56301, subds. (a) and (b).)

6. A school district’s child find obligation toward a specific child is triggered when there is knowledge of, or reason to suspect, a disability and reason to suspect that special education services may be needed to address that disability. A disability is “suspected,” and a child must be assessed, when the district is on notice that the child has displayed symptoms of that disability or that the child may have a particular disorder. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1120-21 (*Timothy O.*); *Department of Educ., State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp. 2d 1190, 1194 (*Cari Rae S.*)) That notice may come in the form of concerns expressed by parents about a child’s symptoms, opinions expressed by informed professionals, or other less formal indicators, such as the child’s behavior. (*Timothy O., supra*, 822 F.3d at 1119-1120 [citing *Pasatiempo by Pasatiempo v. Aizawa* (9th Cir. 1996) 103 F.3d 796, and *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202].)

7. The threshold for finding that a child is eligible for special education is higher than that for suspecting that a child has a disability. (See *Cari Rae S., supra*, 158 F.Supp.2d at p. 1195.)

8. A student is eligible for special education and related services if he or she is a "child with a disability" such as intellectual disability, hearing impairment, speech or language impairment, visual impairment, emotional disturbance, orthopedic impairment, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and as a result thereof, needs special education and related services that cannot be provided with modification of the regular school program. (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a)(1); Ed. Code, § 56026, subds. (a) & (b).)

9. California law, which refers to students with disabilities as "individuals with exceptional needs," defines an individual with exceptional needs as one who, because of a disability, requires instruction and services which cannot be provided with modification of the regular school program to ensure that the individual is provided a FAPE. (Ed. Code, § 56026, subd. (b).) A pupil shall be referred for special education instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized. (Ed. Code, § 56303.) Special education is "specially designed instruction...to meet the unique needs of individuals with special needs...." (Ed. Code, § 56031.) Related services means transportation and such developmental, corrective, and other supportive services "as may be required to assist an individual with exceptional needs to *benefit from special education*." (Ed. Code, § 56363 (emphasis added).)

10. California law recognizes that ADHD may be an underlying processing deficit for eligibility under the categories of other health impairment and specific learning disability. A student "whose educational performance is adversely affected by a suspected or diagnosed attention deficit disorder or attention deficit hyperactivity disorder," and who also meets the eligibility criteria for other health impairment or specific learning disability is entitled to special education and related services. (Ed. Code, § 56339, subd. (a).)

VISUAL IMPAIRMENT

11. Student contends that Dr. Stephey identified Student as having a visual impairment. Capistrano argues that Student did not meet the eligibility criteria for vision impairment.⁷

12. The IDEA defines a child with a disability as a child with delineated disabilities, including "visual impairments," who, by reason thereof, needs special education and related services. (20 U.S.C. §1401(3)(i) and (ii).) Federal and State regulations interpreting the IDEA define "visual impairment, including blindness, as "an impairment in vision that, even with correction, adversely affects a child's educational performance." (34 C.F.R. §300.8(c)(13); Cal. Code Regs., tit. 5, § 3030, subd. (b)(13).) The impairment must require instruction and services which cannot be provided with modification of the regular school program. (Ed. Code, § 56026, subds. (a) and (b).))

13. Student did not prove that she had convergence insufficiency, or any other visual impairment.

14. Dr. Stephey's testimony that he tested Student for physical signs of convergence insufficiency but failed to report it was not credible, and would have constituted a failure to meet the standard for vision assessment. It is implausible that he would have measured Student for signs of convergence insufficiency, yet failed to mention it during hours of direct and cross-examination. His testimony that he did not report the results of tests for physical signs of convergence insufficiency until after he

⁷ "Specific learning disability" is the only eligibility category argued in Student's closing brief. However, Dr. Stephey identified Student as having a visual impairment, and an analysis of that eligibility category is included in this Decision.

had read the May 22, 2017 OSEP guidance was illogical. His rebuttal testimony that he tested for physical signs of convergence insufficiency contradicted both his original testimony, and the absence of such testing from his assessment report, which he testified was true and correct. The assessment report did not even diagnose convergence insufficiency, but recommended vision therapy without the support of physical signs or an express diagnosis. The weight of the evidence did not establish that Student had convergence insufficiency.

15. More importantly, if Student had documentary evidence that Dr. Stephey had tested for physical signs of convergence insufficiency, she should have timely produced it during the evidence exchange.⁸ It can reasonably be inferred from Student's failure to produce documentary evidence of tests of physical signs of convergence insufficiency that, had such tests been done, the results would not have shown that Student had physical signs of convergence insufficiency. (See *Williamson v. Superior Court of Los Angeles County* (1978) 21 Cal.3d 829, 836, fn. 2 [If a party does not produce evidence that naturally would have been produced, he must take the risk that the trier of fact will infer, and properly so, that the evidence, had it been produced, would have been adverse].)

16. Student's evidence also fell short of establishing that Student had problems with her magnocellular pathway that affected her ability to read. Dr. Kirschen's testimony regarding the magnocellular pathway was more persuasive than that of Drs.

⁸ Student did not have test results available during Dr. Stephey's rebuttal testimony, or move to admit such results into evidence. If she had, Capistrano had the right to prohibit the introduction of any evidence at hearing that had not been disclosed to Capistrano at least five business days before the hearing. (34 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (e)(8).)

Stephey and Tassinari. Dr. Stephey's testimony was difficult to follow, circular, and unpersuasive. The gist of Dr. Stephey's testimony appeared to be that Student showed improvement on a magnocellular vision program, and so she must have had required vision therapy, which fell short of establishing that improvements in Student's magnocellular pathway affected her ability to read. Dr. Tassinari testified that the magnocellular pathway is related to motion, periphery and spatial information, and did not explain its relevance to educational performance. However, Dr. Kirschen persuasively explained that there was no research that proved that improvements in the magnocellular pathway translated to improved vision or the ability to read.

17. Student's reading fluency and comprehension scores remained consistent before and after vision therapy. Dr. Stephey did not credibly tie the increased scores obtained after magnocellular vision therapy, or binocular vision/convergence insufficiency therapy, to any improvements in Student's reading ability. Although Student testified that her eyes felt less tired after reading post-vision therapy, Student and her teachers at Fusion attributed improvements in reading and reading comprehension to her new glasses. Student did not prove that being less tired while reading, or being "calmer" while reading, were attributable to vision therapy in general, or magnocellular vision therapy in particular. Student's ADHD was another explanation for her distraction during reading, and Student herself testified that vision therapy did not improve her comprehension. The evidence also failed to establish that Student's prior tiredness, tendency to skip through reading, and visual stress were not attributable to such common factors as factors such as her failure to wear correct prescription glasses, her dislike for certain academic work (such as standardized testing), or her ADHD. (See *Pennsbury School District* (SEA PA 1997) 26 Individuals with Disabilities Education Law Report (IDELR) 1208.)

18. Student did not establish that a visual impairment adversely affected her

educational performance. She also failed to establish that she qualified for special education without regard to whether she required special education or related services to access the general education curriculum.

19. Dr. Stephey wrote in the notes of his assessment report that Student was eligible for special education under the category of visual impairment because she had convergence insufficiency. Dr. Stephey is not a lawyer, and it is understandable that he incorrectly interpreted the OSEP guidance. Nothing in the OSEP memoranda suggests that a student with a visual impairment is automatically eligible for special education and related services.

20. OSEP guidance issued in 2014 reasoned that the IDEA's use of the term "visual impairment" was broad enough to encompass any impairment in vision, regardless of severity; therefore, States could not exclude from the definition such conditions as convergence insufficiency "which *could* affect a child's ability to read, and therefore, the child's educational performance". (*Letter to Kotler* (OSEP Nov. 12, 2014) 65 IDELR 21, p. 2 (italics added).) OSEP guidance issued in 2017 reiterated that States could not exclude particular vision conditions from the definition of visual impairment. (*Eligibility Determinations for Children Suspected of Having Visual Impairment Including Blindness under the IDEA* (OSEP May 22, 2017) OSEP 17-05; 70 IDELR 23, p. 2.) The 2017 OSEP memorandum instructed States to have a group of qualified professionals and the parent draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher's recommendations to determine whether the child requires special education or related services. (*Id.* at p. 3.) OSEP stressed that evaluations of a child's vision status should be thorough and rigorous, include data-based media assessment, and be based on a range of learning modalities (including auditory, tactile and visual), in addition to a functional visual assessment. (*Ibid.*) The assessment should include the nature and extent of the child's visual impairment and its

effect on the child's ability to learn to read, write, do mathematical calculations and use computers and other assistive technology, as well as the child's ability to be involved in and make progress in the general curriculum. (*Ibid.*)

21. Dr. Stephey's vision therapy assessment, which did not include tests for signs of convergence insufficiency, fell short of being data-based, or a thorough and rigorous evaluation of Student's vision functioning. A diagnosis of convergence insufficiency, had Dr. Stephey actually included one in his assessment report, could only have resulted from a single score, or product of scores, and would not alone support a finding of special education eligibility under the category of visual impairment. Whether convergence insufficiency, or magnocellular pathway deficits, affected Student's ability to access the curriculum was a determination to be made by Student's IEP team, not Dr. Stephey. (See *Marshall Joint School Dist. No. 2 v. C.D.* (7th Cir. 2010) 616 F.3d 632, 640-641 [a physician cannot simply prescribe special education, rather, the IDEA dictates a full review by an IEP team]).

22. The OSEP 2017 memorandum also reiterated that, for eligibility under visual impairment, an additional analysis of any visual condition needed to be taken to determine whether the impairment, even with correction, adversely affected the child's educational performance such that the child required special education and related services. (*Ibid.*) There was a plethora of observational reports and data-based information, gathered by a group of qualified professionals with Parent input, establishing that Student did not have a visual impairment that, with correction, adversely affected her educational performance. Student stated that her new glasses reduced visual stress, and her Algebra 2 teacher at Fusion reported that the new glasses eliminated Student's careless mistakes. With or without glasses, before and after vision therapy, Student consistently scored in the average to above average range in visual-motor integration and processing capability, and scored in the average range in reading

fluency and comprehension. Section 504 modifications short of special education were also sufficient to enable Student to earn solid A, B and C grades, which were consistent with her cognitive ability. (See *D.R. v. Antelope Valley Union High School Dist.* (C.D. Cal. 2010) 736 F.Supp. 2d. 1132, 1142-43 [provision of extra time, extra books, and special seating constituted modifications rather than special education].) On this information, the weight of the evidence did not establish that Student had visual impairments that affected her educational performance to the degree that she required special education and related services to access the general education curriculum.

23. The OSEP guidance acknowledged that States are not only responsible for implementing procedures to ensure that all eligible children with disabilities are identified, evaluated, and provided with a FAPE; but that States are responsible for ensuring that IDEA special education funds are not used to serve children who do not meet the definition of a "child with a disability." (*Letter to Kotler, supra*, 65 IDELR 21 at p. 3.) The IDEA does not require that school districts provide vision therapy to every student who may benefit from it. Here, where Student's visual processing abilities, reading skills and reading comprehension consistently tested in the average to above average range from year to year, and Student was earning good grades with 504 accommodations, Student did not qualify as a child with a visual impairment who needed special education and related services to access the curriculum. Even if Student would benefit from vision therapy, a need for related services, without special education, is insufficient to qualify her as a child with exceptional needs.

24. Student did not meet her burden of proving by a preponderance of the evidence that she was eligible for special education, from July 18, 2016 through the filing of her complaint, under the eligibility category of visual impairment.

SPECIFIC LEARNING DISABILITY

25. Student contends that she was eligible for special education under the

category of “specific learning disability” because she could not access the curriculum without individualized services, such as tutors and one-to-one instruction at Fusion, to address an inability to read and comprehend. She contends that her convergence insufficiency constituted a disability within the function of vision that resulted in visual perceptual or visual motor dysfunction, and that she had dyslexia. Capistrano contends that Student did not establish that she had visual perceptual or visual motor dysfunction, and never required special education and related services to earn average to above average grades.

26. A student has a specific learning disability if he or she has “a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or perform mathematical calculations.” (Ed. Code, § 56337, subd. (a).) Basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, and cognitive abilities including association, conceptualization and expression. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10).) A specific learning disability may also include disability within the function of vision which results in visual perceptual or visual motor dysfunction. (Ed. Code, § 56338.)

27. A child who is assessed as being dyslexic, and otherwise meets the eligibility criteria of specific learning disability, is entitled to special education and related services. (Ed. Code, § 56337.5, subd. (a).) If a student who exhibits the characteristics of dyslexia or another related reading dysfunction is not found eligible for special education and related services, the student’s instructional program must be provided in the regular education program. (Ed. Code, § 56337.5, subd. (b).)

28. A school district may determine whether a student has a specific learning disability by taking into consideration “whether a pupil has a severe discrepancy between *achievement* and *intellectual ability* in oral expression, listening

comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning.” (Ed. Code, § 56337, subd. (b) (emphasis added).) The decision as to whether or not a severe discrepancy exists must take into account all relevant material which is available on the pupil, and no single score or product of scores, test or procedure shall be used as the sole criterion for the decisions of the IEP team as to the pupil’s eligibility for special education. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(B).)

29. When standardized tests are considered to be valid for a specific student, a severe discrepancy is shown by measuring mathematical differences between ability and achievement scores on standardized testing. (*Id.* at subd. (b)(10)(B)(1).) California regulations provide a formula for determining a severe discrepancy:

When standardized tests are considered to be valid for a specific pupil, a severe discrepancy is demonstrated by: first, converting into common standard scores, using a mean of 100 and standard deviation of 15, the achievement test score and the ability test score to be compared; second, computing the difference between these common standard scores; and third, comparing this computed difference to the standard criterion which is the product of 1.5 multiplied by the standard deviation of the distribution of computed differences of students taking these achievement and ability tests. A computed difference which equals or exceeds this standard criterion, adjusted by one standard error of measurement, the adjustment not to exceed 4 common standard score point, indicates a severe discrepancy when such discrepancy is corroborated by other assessment data

which may include other tests, scales, instruments, observations and work samples as appropriate.

(Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(B)(1).) This severe discrepancy formula is typically interpreted as requiring a difference in cognitive and achievement scores of 22 points.

30. A student with a disability in a basic psychological process and a discrepancy between cognitive ability and academic achievement, must also demonstrate that the degree of impairment requires special education. (20 U.S.C. § 1401(3)(A); Cal. Code Regs., tit. 5, § 3030, subd. (a); *M.P. v. Santa Monica Malibu Unified School District* (C.D. Cal. 2008) 633 F.Supp.2d 1089, 1103 (*M.P.*))

31. Student did not establish that she had impairment in the basic psychological process of visual processing. In particular, she did not establish that she had a disability within the function of vision which resulted in visual perceptual or visual motor dysfunction. As discussed above, Student did not prove that she had convergence insufficiency, magnocellular pathway deficits, or any other visual impairment that affected her visual processing. On standardized tests performed by Drs. Katz and Gillingham, Student's visual spatial and visual motor processing scores were in the average to above average range, leading them to conclude that Student's visual-spatial perception and visual motor-integration were intact. Dr. Majors' testing also showed that Student's ability to quickly scan, discriminate between, and sequentially order information was in the superior range, with average to above average recall of visual information and visual attention. On tests of visual perceptual skills administered by Dr. Thurston, Student scored within the average range in visual discrimination, visual memory, visual-spatial relationships, visual form constancy, visual-sequential memory, and visual closure.

32. Student did not prove that she had dyslexia. She was not diagnosed with

dyslexia by Drs. Katz and Gillingham, Dr. Majors, or Dr. Thurston. None of Student's experts testified regarding dyslexia, and the evidence did not identify the characteristics of dyslexia, let alone establish that Student exhibited the characteristics of dyslexia or any other related reading dysfunction. Once the Nelson Denny scores were corrected for Drs. Katz and Gillingham and Dr. Majors, Student scored in the average range in all tests of reading skills, including reading fluency and reading comprehension. On tests administered by Dr. Thurston, Student scored in the superior range in reading fluency, the high average range for broad reading and basic reading skills, and the average range for comprehension. Student testified that she subjectively disliked reading, grew tired when reading, and could not focus on reading, and her tutors testified that Student read slowly and sometimes needed to re-read materials to understand them, but Dr. Thurston testified persuasively that each of these could be explained as symptoms of her ADHD. Dr. Stephey opined in his assessment report that Student's visual stress and dislike of visually engaging with print would be relieved by her new glasses. He included dyslexia in a long list of deficits that can be seen with magnocellular visual pathway dysfunction, but did not expressly diagnose her with dyslexia, and it was not established that Dr. Stephey possessed the education, training or experience to diagnose for dyslexia if he had. The evidence did not establish that Dr. Stephey was educated, trained or experienced to administer and interpret standardized tests of reading skills, but on multiple reading tests administered by him, Student tested in the average range for reading fluency, phonological processing, reading rate, reading accuracy and reading fluency, and in the low average range for reading comprehension, and Dr. Stephey concluded that Student was a "good reader." There was no quantitative data in evidence, other than incorrectly scored Nelson Denny results, that Student exhibited a reading disorder, or any other disability in the function of vision that resulted in visual perceptual or visual motor dysfunction.

33. Student had a disorder in the basic psychological process of attention due to her ADHD, as diagnosed by Drs. Katz and Gillingham in 2013 and by Dr. Majors in 2017. As reported by Student's teachers at JSerra to Dr. Thurston for Capistrano's first section 504 assessment, Student's ADHD manifested as an inability to maintain attention and focus, and this distractibility interfered with Student's ability to listen and learn in the classroom.

34. Student did not prove that her disorder in a basic psychological process resulted in a severe discrepancy between her cognitive ability and academic achievement. Dr. Majors found a severe discrepancy between Student's above average full scale intelligence score and the very low Nelson Denny score, but that score did not support a finding of severe discrepancy after correction. Dr. Majors measured Student's full scale intelligence score at 117, and her achievement scores on tests of academic skills other than the Nelson Denny ranged from 104 to 124, demonstrating academic skills consistent with cognitive ability. Student's score on the Nelson Denny test of reading rate and reading comprehension administered by Dr. Majors was also in the average range when corrected. When tested by Dr. Thurston, Student had an average general cognitive ability score, and scored in the average to superior range in tests of academic achievement, demonstrating academic skills equal to or better than her cognitive ability. Dr. Thurston found, and persuasively established at hearing, that Student did not have a discrepancy between intellectual ability and achievement in oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, mathematics calculation, or mathematics reasoning.

35. Student argued that with several superior cognitive processing scores, the merely passing grades of C demonstrated a discrepancy between cognitive ability and achievement. However, when standardized tests are considered valid for a specific pupil, a severe discrepancy is demonstrated by a 22-point difference between intellectual

ability test scores and scores on achievement and ability tests, which was not present here. Student also argued that she had discrepancies between her cognitive ability scores, which is not a part of the definition of specific learning disability. Per *Rowley*, a school district is not obligated under the IDEA to maximize the performance of every child with a learning disability. The Ninth Circuit has rejected the argument “that the law guarantees a learning-disabled child of superior ability enough individualized attention and services – likely financed by the school’s special education budget – to elicit optimum performance from the child,” if the child did not qualify for special education. (*Hood v. Encinitas Union School District* (9th Cir. 2007) 486 F.3d 1099, 1108.) The Ninth Circuit stated that “clearly no such requirement exists for children without disabilities, gifted or not.” (*Ibid.*) Student did not meet the definition of a student with a specific learning disability and was meeting grade-level standards. Therefore, she was not entitled to special education and related services to optimize her grades.

36. Student may have had difficulties with reading and comprehending what she read due to her ADHD, along with headaches and fatigue after reading. However, she did not prove that the disorder manifested as a severe discrepancy between her intellectual ability and achievement, or that her attention deficit affected her to such a degree that she required special education to access the curriculum.

37. The weight of the evidence did not establish that Student required special education to access the curriculum, in the form of one-to-one assistance, from a teacher, a tutor, or a classroom reader.

38. During the first two years of high school, Student earned passing grades of A’s, B’s and C’s at JSerra without special education supports, and without one-to-one instruction. The SERP accommodations of preferential seating, extended time on tests, staff clarifying instructions, and a reader for test questions and teacher notes, did not rise to the level of special education, and were sufficient for Student to access the

curriculum and obtain grades commensurate with her abilities. The SERP study hall provided a quiet place to do homework, with non-credentialed adult proctors to assist as requested, and also did not rise to the level of specialized instruction or services constituting special education. None of these accommodations constituted one-on-one specialized academic support. Without one-on-one support, Student was accessing the ninth and tenth grade curriculum, earning average and above average grades, and generally attaining adequate knowledge of the course material. This type of progress through the school system is what our society generally means by an "education," (*Andrew F., supra*, at 137 S.Ct. p. 999), and Student was accessing an education without the need for special education or related services.

39. Student did have a tutor for one class in tenth grade, Spanish III Honors. However, a tutor for a difficult honors-level class, taken online without a teacher, did not establish that Student could not have done equally well in a general education classroom with a teacher to provide clarification of course materials. Ms. Weinand was not a credentialed special education teacher, and she did not perform any service for Student that could not have been performed by a classroom teacher. Ms. Weinand clarified instructions and materials, checked for understanding, and provided the same supports that Student's general education teachers provided in the general education classroom. Parents' choice to have Student take an online course with the help of a tutor rather than a classroom teacher did not demonstrate that Student required one-to-one instruction. There are many reasons Student could have taken an online class, for example, if the class was not offered by JSerra, or if the school's class schedule conflicted with another class Student wanted or needed to graduate. Ms. Weinand testified that Student could do the honors-level work on her own, and that once Student read the materials, particularly out loud, Student grasped the materials. Ms. Weinand helped Student maximize her performance, but was not necessary to a basic

understanding of the course curriculum. Capistrano was not required to maximize Student's educational progress. (*Rowley, supra*, 458 U.S. at p. 200). Student's use of a tutor in a difficult honors-level course also failed to demonstrate that Student required one-on-one instruction to access the general education curriculum in her other courses, which she clearly did not.

40. Parents obtained a private psychoeducational assessment from Drs. Katz and Gillingham at the beginning of Student's ninth grade year, and based on an erroneous Nelson Denny score, Drs. Katz and Gillingham diagnosed Student with a reading disorder. They suggested that Student might benefit from a tutor, but that recommendation was intended to address a reading disorder that did not exist. Drs. Katz and Gillingham did not recommend special education, but suggested that Student might benefit from educational accommodations, such as additional time for assignments and tests, a reader for exams. Indeed, with these types of accommodations, typically seen in a section 504 plan rather than special education, Student thrived for four semesters during her ninth and tenth grade years.

41. Student did not require one-to-one instruction, or other special education interventions, during the fall 2016 semester. Student earned an A in English that semester without a tutor. Student was struggling in Physics, but the evidence did not establish that she was failing when she transferred to Ms. Marsing's Chemistry class, as the Loop printouts were not accurate representations of Student's grades at the time. Student had also enrolled in Physics prior to taking Algebra II, and her difficulty with that class demonstrated a lack of prerequisite knowledge rather than the need for one-on-one instruction. Evidence that Student was using a tutor to catch up to six weeks of missed Chemistry class was not persuasive that Student would have required a tutor for Chemistry had she entered Ms. Marsing's class at the beginning of the semester. It also did not establish that Student could not have received the same assistance from Ms.

Marsing if she had been willing to take advantage of the additional assistance Ms. Marsing offered to her students on campus at Cal Prep. Student's use of a Chemistry tutor did not demonstrate the need for one-to-one instruction so much as a need to take any steps necessary to learn the Chemistry materials twice as fast as her peers to make up for the choice to enter a difficult class late in the semester. Mr. Merritt was not a credentialed special education teacher, or even a credentialed general education teacher, and his work with Student did not rise to the level of specialized academic instruction. Student's failure to take advantage of Ms. Marsing's availability to explain class material, because a tutor was easier or more convenient, did not establish that Student needed any more one-to-one or small group instruction than any student in Ms. Marsing's class could receive.

42. In fall 2016, Ms. Weinand was tutoring Student in United States History. Ms. Weinand observed that Student could do the work on her own, and that once Student read the materials she understood them. Student's preference for tutors because she did not like to ask questions in class did not establish that she required one-to-one instruction. Student admitted at hearing that she did better in English than Physics or Chemistry because she spoke to the English teacher about what she needed. Any of Student's teachers could have provided the clarification of course materials, concepts and instructions that Student needed. Student's tutors did no more than provide the clarification that Student could have received from her teachers if she had asked, or a sounding board for discussion of materials Student grasped on her own.

43. The letters Ms. Weinand and Mr. Anderson wrote in January 2017 were not persuasive evidence that Student required a reader, let alone one-on-one instruction, in spring 2017. Student earned A's, B's and C's in her classes at the end of the fall 2016 semester. When Parents removed Student from Capistrano on March 17, 2017, she was earning passing grades in all of her classes with the section 504 accommodations in

place. Student was no longer receiving tutoring from Mr. Merritt, except in preparation for SAT and ACT college application tests. Student was receiving tutoring in Algebra II and History, but Student admitted that she preferred having tutors to asking her teachers for assistance. Mr. Hall provided clarification to his Chemistry students in class, and Student was able to participate successfully. Mr. Hall was available to assist his students during lunch every Tuesday and Thursday, and often had students approach him to clarify questions outside of class. The evidence established that Parents moved Student to Fusion not because she required one-to-one instruction in addition to the supports available at San Juan, which she did not, but because they wanted to improve Student's grades and believed that one-to-one instruction in a school with flexible curriculum demands would accomplish that. However, per *Rowley*, Capistrano was not required to maximize Student's grades.

44. Student preferred, but did not need, tutors to clarify concepts in lieu of asking her teachers. Student's enjoyment of learning in a small one-on-one setting, and her higher grades at Fusion, did not establish that she required one-on-one instruction to access grade level curriculum. Student only met with her teachers at Fusion once or twice a week, and did not have tutors while attending Fusion, so had to learn most of the material on her own. She could meet with Fusion teachers at the homework café, but this was the equivalent of obtaining assistance from the teachers at San Juan at lunch, and did not demonstrate that Student needed one-on-one instruction during actual class time. In fall 2017, Student was concurrently taking Ms. Miyamoto's Forensic Science class at San Juan, and actively participated and earned an A without the assistance of a tutor or one-to-one instruction. Student could access the curriculum and understand the Forensic Science materials by checking with Ms. Miyamoto for understanding. In spring 2018, Student earned A's in demanding academic classes at San Juan in Forensic Science and in Expository Reading and Writing, without one-on-

one instruction or the assistance of a tutor. She also earned a B in college-level World History at Saddleback College without a tutor or one-on-one instruction.

45. Student did not prove that she required a reader to read materials to her due to her ADHD. Student consistently tested with average scores in reading fluency and reading comprehension, over a four-year period and testing by multiple psychologists, including testing by Dr. Majors that included multi-paragraph passages. Student did not require tutoring or a reader in any of her English classes, and could write pages of essays. Student also declined having test instructions read to her in Algebra II and during other tests. Even were a test reader necessary, that is a common section 504 accommodation, and does not rise to the level of special education.

46. Student's test anxiety did not establish a need for one-on-one instruction. Student testified that she froze during tests, and became anxious about tests, even when she knew the material well. Mother took intentional, affirmative steps to hide the extent of Student's test anxiety from Capistrano, but even if she had not, there was substantial evidence that Student performed well on tests when her section 504 accommodations were in place. For example, Student earned an A in Mr. Noble's Expository Reading and Writing class when she took tests in a quiet room. Student even performed well during testing at Fusion, although there was no evidence that Fusion provided testing accommodations.⁹

47. The degree of Student's ADHD did not require special education in the

⁹ Student does not argue in her closing brief that Dr. Majors' diagnosis of Student with mild anxiety and moderate depression qualified her for special education under the category of "emotional disturbance." Dr. Majors did not consider emotional disturbance as a possible eligibility category for Student, and Dr. Thurston's subsequent assessment demonstrated no significant social emotional functioning concerns.

form of one-on-one instruction, in the form of a teacher, tutoring or a reader.

48. Student did not meet her burden of proving by a preponderance of the evidence that she was eligible for special education, from July 18, 2016 through the filing of her complaint, under the eligibility category of specific learning disability.

OTHER HEALTH IMPAIRMENT

49. Student did not argue in her closing brief that she should be found eligible for special education under eligibility category of "other health impairment." However, as Student's expert witness, Dr. Majors, found Student eligible for special education under the eligibility category of other health impairment, that eligibility category is analyzed here. Capistrano argues that Student's ADHD did not have a significant adverse effect her educational performance to the degree that she required special education.

50. For eligibility purposes, "other health impairment" is defined, in relevant part, as "having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that...is due to chronic or acute health problems such as...attention deficit hyperactivity disorder...and [a]dversely affects a child's educational performance." (34 C.F.R. § 300.8(c)(9); see also Cal. Code Regs., tit. 5, § 3030, subd. (f).) As with other eligibility categories, a student within the definition of other health impairment must demonstrate that the degree of their impairment requires special education. (Cal. Code Regs., tit. 5, § 3030, subd. (a).)

51. Student had ADHD, inattentive type, which limited her strength, vitality or alertness by making her easily distractible, unable to sustain attention, and as a result affected her educational performance. Accordingly, she had a disability within the definition of other health impairment. However, even with a qualifying health impairment, Student was required to prove that she also needed special education and

related services. (20 U.S.C. § 1401(3)(A); Cal. Code Regs., tit. 5, § 3030, subd. (a); *M.P., supra*, 633 F.Supp.2d at p. 1103.)

52. As discussed at length under “specific learning disability,” the degree of Student’s ADHD did not require special education. Student’s ADHD was adequately accommodated from the beginning of the 2016-2017 school year through Student’s graduation from high school with section 504 accommodations such as preferential seating, extended time on assignments and tests, testing in a distraction limited environment, copies of classroom notes, and teacher clarification of assignment and test questions. The weight of the evidence did not demonstrate that Student needed special education in the form of one-on-one instruction to access the curriculum. Therefore, Student did not require special education as a result of her ADHD, and did not qualify for special education as a student with other health impairment.

53. Student did not meet her burden of proving by a preponderance of the evidence that she was eligible for special education, from July 18, 2016 through the filing of her complaint, under the eligibility category of other health impairment.

54. In summary, Student failed to meet her burden of proving that Capistrano failed to meet its child find obligation, during the two years preceding the filing of Student’s complaint, by failing to find Student eligible for special education prior to Student reaching 18 years of age.

PROCEDURAL VIOLATIONS

55. Student argues in her closing brief that Capistrano committed procedural violations in discharging its child find obligations. These issues were not separately pled in Student’s complaint, were not raised at the prehearing conference, and at no time did Capistrano consent to amending the complaint to add them. Accordingly, the ALJ is barred from addressing these issues. (Ed. Code, § 56502, subd. (i) [party requesting the due process hearing may not raise issues at hearing that were not alleged in the complaint unless the respondent party agrees].)

56. In addition, as this Decision finds that Student was not eligible for special education and related services, and therefore Student did not suffer a substantive harm from any procedural violations, and issues of procedural violation need not be analyzed. (See Ed. Code, § 56505, subds. (f)(1) and (2).)

57. A child ineligible for IDEA opportunities in the first place cannot lose those opportunities merely because a procedural violation takes place. (*Nack ex rel. Nack v. Orange City School District* (6th Cir. 2006) 454 F.3d 604, 612) [procedural violation denies a FAPE "only if such violation causes substantial harm to the child or his parents"]; See also *R.B. v. Napa Valley Unified School District* (9th Cir. 2007) 496 F.3d 932, 942 ["In other words, a procedural violation cannot qualify an otherwise ineligible student for IDEA relief....Because we affirm the district court's acceptance of the [Special Education Hearing Office's] determination that R.B. does not qualify for IDEA relief, we hold the District's procedural violation in the composition of R.B.'s IEP team is harmless error."].)

ORDER

All of Student's requests for relief are denied.

PREVAILING PARTY

Pursuant to 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. Here, Capistrano prevailed on the sole issue at hearing.

RIGHT TO APPEAL THIS DECISION

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to

a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

Dated: February 4, 2019

/s/

ALEXA J. HOHENSEE

Administrative Law Judge

Office of Administrative Hearings