

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA  
IN THE CONSOLIDATED MATTER OF  
PARENT ON BEHALF OF STUDENT  
v.  
CAPISTRANO UNIFIED SCHOOL DISTRICT,  
OAH CASE NUMBER 2019020637  
AND  
CAPISTRANO UNIFIED SCHOOL DISTRICT  
v.  
PARENT ON BEHALF OF STUDENT  
OAH CASE NUMBER 2019011184

DECISION

Capistrano Unified School District filed a request for due process hearing with the Office of Administrative Hearings, State of California, on January 30, 2019, in OAH Case Number 2019011184, naming Student. Student filed a request for due process hearing on February 19, 2019, in OAH Case Number 2019020637, naming Capistrano. The matters were consolidated on February 20, 2019. On April 8, 2019, OAH continued the consolidated matters. Capistrano filed its response to Student's case on March 4, 2019, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

Administrative Law Judge Judith L. Pasewark heard this matter in San Juan Capistrano, California, on May 14, 15, 16, 21, 22, and 23, 2019. S. Daniel Harbottle, Attorney at Law, represented Capistrano. Kathleen Purcell, Executive Director for Informal Dispute Resolution and Compliance, attended the hearing for Capistrano. Kim Gaither, Legal Specialist, attended the hearing for Capistrano when Ms. Purcell was not present.

Mother attended the hearing each day on behalf of Student. Student did not attend the hearing.

At the request of the parties, OAH granted a continuance to 5:00 p.m. on June 10, 2019 to file written closing briefs. The parties filed timely written closing briefs. On June 10, 2019 the record was closed and the matter submitted for decision.

## ISSUES

The issues set forth below have be redefined in accordance with *J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443. No substantive changes have been made. All issues are posed within the statute of limitations, commencing February 18, 2017.

The issues in Student's Case Number 2019020637 are:

Did Capistrano deny Student a FAPE by:

1. Failing to assess Student in all areas of suspected disability;
2. Failing to consider medical documentation and reports of non-district assessors;
3. Predetermining Students special education placement, goals, and, services;
4. Denying Mother appropriate parental participation in the IEP process;
5. Failing to provide Mother with timely and or sufficient prior written notice;
6. Failing to file for due process hearing when Mother disagreed with IEPs and privately placed Student;
7. Failing to have a general education teacher attend the March 10, 2017 IEP team meeting;
8. Failing to offer Student a FAPE at each of the IEP team meetings.

The issue in Capistrano's case OAH Case No. 2019011184 is:

Was the evaluation administered by Dr. Bejarano and its written report dated August 20, 2018 were conducted according to all legal requirements, thereby preventing Student from obtaining an individual educational evaluation at public expense.

## SUMMARY OF DECISION

Student raised numerous issues alleging Capistrano failed to provide Student a FAPE from February 18, 2017, through February 18, 2019, events commencing two days after the last IEP team meeting addressed in Student's two prior requests for due process and the subsequent OAH decision issued June 14, 2017. Consideration of several of Student's issues in this complaint were barred by collateral estoppel, as the factual findings and determination of issues were contained in the June 14, 2017 decision. Many of Student's issues in this current request for due process are a continuation of Student's previous contentions.

Student's complaint revolves around four main issues. First, Student contended Capistrano failed to change Student's special education category from emotional disturbance to traumatic brain injury resulting from a series of concussions received by Student while participating in sports activities. Second, Student contended that although she continued to access the A-G curriculum in a general education placement and had no academic deficits, that to access her education she required a modified class schedule of four classes per day and a summer program to make up the missing credits from the modified schedule, as well as one-to-one instruction. Third, Student contended Capistrano had no appropriate programs for Student within the school district, therefore she requested placement and/or reimbursement for classes taken through Halstrom Academy, a private school, and requested Capistrano waive school board policy limiting the number of outside credits Student could attain each year from Halstrom. Fourth, Student alleged a series of procedural violations, including predetermination, failure to provide prior written notice, and impairment of parental participation in the IEP process, among other things.

Student failed to present sufficient evidence to sustain her burden of a preponderance of the evidence with regard to each and every one of her contentions.

Student failed to establish that Student qualified for special education under the eligibility category of traumatic brain injury, that she required a modified class schedule as part of her IEP or required one-to-one instruction, or that Capistrano had no appropriate programs or services that would provide her a FAPE. Although Student identified several procedural violations demonstrating predetermination and failure to provide prior written notice, she failed to establish that these procedural violations resulted in a loss of educational opportunity for Student or significantly impaired Mother's ability to participate in the IEP process. Lastly, Student failed to establish that Halstrom constituted an appropriate program for Student in the least restrictive environment, and that Capistrano was not prohibited from offering or funding Halstrom programs as part of Student's IEP.

Capistrano presented the issue of whether the psychoeducational assessment conducted by Dr. Crystal Bejarano in August 2019 was legally sufficient under state and federal law thereby preventing Student from obtaining an independent educational evaluation. Dr. Bejarano's assessment as well as the subsequent IEP team meeting to review the assessment report was conducted pursuant to a District Court order issued on Student's current appeal of the OAH June 14, 2017 decision. Based on how the District Court order set up this assessment, the assessment was an anomaly that did not qualify as a school district assessment. Student's last psychoeducational assessment conducted by Capistrano occurred in 2016, to which Capistrano consented to Student's request for an independent educational evaluation conducted by Dr. Julia Johnson in 2016. Student's current triennial assessments were due in January 2019. Mother has refused to provide consent for further assessments conducted by Capistrano. Student may not request an independent psychoeducational assessment until such time when Mother consents to a psychoeducational assessment conducted by Capistrano.

## FACTUAL FINDINGS

### PROCEDURAL BACKGROUND

#### Prior Case History

Student is a seventeen-year old high school student who resides with her mother within Capistrano boundaries. Student became eligible for special education and related services in February 2016. The IEP team found Student eligible under the category of emotional disturbance, based upon her initial assessments conducted in early 2016. During the 2016-2017 school year, Student filed two due process requests with OAH. Student's cases, OAH Case Number 2016100466 and OAH Case Number 2017030402, were consolidated and heard in April and May 2017. Student's allegations in these consolidated cases covered the period of 2015 through February 16, 2017. OAH issued its decision on June 14, 2017.

Several of Student's issues in OAH Case Number 2019020637, this case, contain the same issues as determined in the June 14, 2017 decision. The primary difference is the issues in the current case commenced as of February 17, 2017, one day after the period considered by the June 14, 2017 decision. Many of the factual findings and legal conclusions in the June 14, 2017 decision are res judicata and remain applicable to current issues, and must act as a starting point for the decision at hand.

#### Rulings on subpoenas duces tecum

On May 6, 2019, Capistrano issued subpoenas duces tecum which were requests for Student records to rebut issues raised in Student's complaint. Capistrano requested Student's educational records from Halstrom Academy. Capistrano requested Student's psychological and medical records from Dr. Claudia Avina, Dr. Michael Linden, Dr. Katherine Williamson, Dr. Charles Grob, and the Children's Hospital of Orange County. On May 6, 2019, Mother filed a motion to quash each of the subpoenas. On May 14,

2019 prior to the commencement of the hearing, the sealed documents arrived at the hearing site. The hearing judge took possession of the documents and orally ruled on Student's motion to quash.

The ALJ denied Student's motion to quash each of the subpoenas because Student had placed Student's educational, medical, and psychiatric history as primary issues in her complaint. The records from Halstrom Academy were released to Capistrano's attorney as they directly related to Student's education and requested remedies. The ALJ determined the remaining sealed medical and mental health documents would remain in the ALJ's possession and only released to Capistrano's attorney for rebuttal purposes based upon evidence presented by Student. Mother remained resistant to the possibility that Capistrano would see Student's medical and mental health records.

The ALJ delayed the commencement of the hearing to May 17, 2019, to allow Mother additional time to decide how she wished to proceed on Student's issues which focused on Student's physical and mental health. On May 17, 2019, Mother filed a Motion for Reconsideration of the ALJ's denial of her Motion to Quash the subpoenas. After receiving Capistrano's opposition to the Motion for Reconsideration on May 20, 2019, the ALJ denied Mother's Motion for Reconsideration, on the grounds that Mother did not present any new factual information or law to support her request.

Testimony commenced on May 17, 2019. Mother proceeded on all issues without introducing any testimony or exhibits which would be subject to rebuttal by the subpoenaed records. The sealed medical and mental health records were not released to Capistrano, and were destroyed by the ALJ upon completion of the hearing.

## BACKGROUND

Student sustained a series of concussions due to sports injuries. She began experiencing emotional difficulties at home and was hospitalized three times between

May 2015 and October 2015, and again in 2016. Capistrano found Student eligible under the category of emotional disturbance in February 2016. Mother contended Student's primary category of eligibility was traumatic brain injury, and secondarily, emotional disturbance. The June 14, 2017 decision found Capistrano's determination of emotional disturbance eligibility appropriate and its 2016 IEP offered Student a FAPE.

## 2017 ANNUAL IEP

### February 1, 2017 IEP Part One

Student's 2017 annual IEP took place over three meetings on February 1, 2017, February 16, 2017, and March 20, 2017. Capistrano convened Student's annual IEP team meeting on February 1, 2017. Capistrano gave Parent sufficient notice of the meeting. Parent, Student, a special education teacher, Intervention Specialist, Assistant Principal, and the general education teacher from the college preparedness class attended.

The February 1, 2017 IEP team meeting reviewed Student's progress on her goals and her current levels of performance. Student was doing well in all her classes. Student continued to access her specialized academic instruction class. She went to the class on an as-needed basis to check in with the teacher, and wanted to continue to do so. The IEP team reviewed Student's progress on her goals. Student did not participate in the counseling sessions offered, and discontinued meeting with the Intervention Specialist. Student met three goals, and made progress on two other goals.

Capistrano proposed new goals addressing Student's anxiety, depression, peer interaction and positive thought. The goals were clear, measurable, and met Student's social-emotional needs.

Student needed a math course for graduation. Graduation requirements under the A-G for four-year colleges required even more math classes. The IEP team discussed several options for math classes within Capistrano. Mother did not agree to any of them.

As determined in the June 14, 2017 decision, Mother searched for alternative math classes Student could access off-campus. Her research led her to Halstrom Academy, now part of Fusion Academy, a private school that offered one-on-one instruction in a variety of academic subjects. Halstrom was accredited by the Western Association of Schools and Colleges, but not certified by the California Department of Education as a nonpublic school.

Mother requested Capistrano fund Student's math class at Halstrom. Mother believed Student required the structure of a one-on-one class and the flexibility of a private school.

#### February 16, 2017 IEP Team Meeting Part Two

Capistrano re-convened Student's annual meeting for Part Two on February 16, 2017, to complete its offer of FAPE. A special education teacher, resource teacher, assistant principal, intervention specialist, general education teacher, Student's case carrier, and Mother attended the meeting. Student did not attend.

The general education teacher reviewed how Student was doing in class. Student was polite and interacted well with others. Student could work independently and requested assistance when needed. This teacher also coached Student in track and field. She reported Student was very athletic and was participating in three track events, including pole vaulting and long jump. Other members of the IEP team were concerned about the risk of further head injuries in Student's chosen sports. Student had been medically released to participate in sports. Mother reported Student needed to remain active to combat her depression.

Student lacked math course credits needed to graduate. Additional math was required for college prep curriculum. Despite her special education and related services eligibility, Student remained in a general education placement, with only resource and counseling support, and accommodations on her IEP. Capistrano members of the IEP



team revisited several options to assist Student in completing a math course. The IEP team offered a collaborative Algebra One class which provided additional support. Mother felt Student did not require additional support. Further, Mother did not want to change Student's fourth period class, because Student had friends in her class. The IEP team offered a standard general education Algebra One class during second period. The IEP team offered Cal Prep, an online math class. Mother reported Student had not been successful working independently. The IEP team discussed extended school year math, but Student did not need remedial support. Mother would only consider a private one-to-one math class taught through Halstrom where Student could work at her own pace during the summer.

Capistrano members of the IEP team informed Mother the IEP team could not fund or place Student at Halstrom, because it was not a certified non-public school. Mother rejected all options for math class. Mother previously brought up Halstrom during the annual IEP team meetings on February 1, 2017, and February 16, 2017. Capistrano informally told Parent that it could not fund the math class because Halstrom was not certified as a nonpublic school and Capistrano could not contract with it. Capistrano also told Mother it would not fund the class because Student did not require one-on-one instruction to receive a FAPE. Further, Capistrano had several alternative math classes in which Student could make meaningful progress in math.

The June 14, 2017 decision determined Halstrom was not a Capistrano general education program or class. It was a private school where students received individualized instruction in a very restrictive environment. Student's attendance at Halstrom would decrease the amount of time she spent in general education. Therefore, her attendance at Halstrom would have been a change of placement that required Capistrano to provide prior written notice explaining its denial of Mother's request.

As stated in the June 14, 2017 decision, "There is no evidence that the failure to

provide the prior written notice denied Student a FAPE or prevented her from gaining any educational benefit. Student did not require the class and Capistrano proved at hearing that it offered several alternatives that would have met her academic needs in math. However, the failure to provide the notice significantly impeded Parent's participation in Student's IEP process. The lack of notice resulted in Parent not fully understanding why Capistrano refused to fund a class she felt necessary for her child. The lack of formal notice caused Parent to raise the issue on multiple occasions because she did not have a clear idea of why Capistrano refused to fund the class." (*Student v. Capistrano Unified School District* (2017) OAH Case Numbers 2016100466 and 2017030402, p. 65.)

At the February 16, 2017 IEP team meeting Capistrano made its offer of FAPE. Capistrano offered continued enrollment in specialized academic instruction for fifteen minutes once a week for Student to check-in with her case manager, along with specialized academic instruction in the resource class for two hundred fifty-two minutes per week. Capistrano offered individual counseling three times a week for thirty-five minutes a session. Mother declined the counseling and asked that Capistrano continue providing counseling on an as-needed basis as an accommodation rather than as a related service.

Capistrano continued to offer Student accommodations. The IEP offered Student extra time to finish assignments. Student had permission to have her cell phone with her at all times to access her private therapists. Student used a predetermined signal to her teachers to leave class at any time to go to either a counselor's office or the school psychologist's office when she felt overwhelmed.

As determined in the June 14, 2017 decision, Student provided no evidence that Capistrano's offer of FAPE was insufficient, failed to meet her needs, or should have been modified in any way. Mother rejected every alternative for math offered by

Capistrano. Since Student was a student on regular diploma track and needed to have a math class, Capistrano enrolled Student in a second period Algebra One class as of the February 16, 2017 IEP meeting. Student never attended the class, and Student received a zero in the class. Capistrano considered Student truant as a result of her failure to attend the class.

#### Dr. Johnson's 2017 Independent Educational Evaluation

Mother requested an independent educational evaluation after Capistrano's 2016 psychoeducational assessment. In March 2016, Capistrano agreed to fund an independent psychoeducational evaluation. The independent assessment was administered and reported by Dr. Julia Johnson. Dr. Johnson did not testify at this hearing, nor the prior hearing between the parties. Her written report indicated she was a licensed educational psychologist and a member of the American Board of School Neuropsychology. The purpose of the assessment was to assess whether Student qualified for special education and related services under the category of traumatic brain injury. Dr. Johnson interviewed Mother and Student, reviewed Student's records, including prior assessments, and administered several testing instruments.

Although Dr. Johnson's assessment and report were reviewed at the March 20, 2017 IEP team meeting, the assessments and report were completed in January 2017. The June 14, 2017 decision made significant findings and provided legal analyses that remain valid in this decision. As determined in the June 14, 2017 decision, Dr. Johnson reported Student had difficulty problem solving, with school skills, with attention at school, with memory and learning, with motor skills and coordination, and had vision problems. However, Dr. Johnson failed to observe Student at school and failed to either interview Student's teachers, or get any written input from them. Dr. Johnson's findings regarding Student's attention, abilities, and concentration at school were based solely on input from Student and Mother. Her findings as to Student's needs in school were unpersuasive.

Dr. Johnson's report acknowledged Student's academic abilities were commensurate with her cognition, and Student's depression and fluctuating moods did not negatively affect her schoolwork. Conversely, Dr. Johnson concluded that Student had a traumatic brain injury and qualified for special education primarily under that category. Dr. Johnson based this conclusion on Student's low score in story recall, which was only one sub-section of one cognitive assessment. She also stated that Student had difficulty with attention, following verbal directives, and with recall, and that she could not remember information unless it was presented visually or kinesthetically. Dr. Johnson concluded Student had deficits in auditory processing, attention/memory, language acquisition and retrieval, sensory motor processing speed, and in other undefined areas. However, Student's results on the assessment report did not indicate deficits in those areas. Other than her score on story recall, Student's only other below average score was an eighty-seven in visualization on the Woodcock-Johnson Cognition test, which was in the low average range. All of Student's other scores on previous assessments, including those in an assessment from Children's Hospital in June 2016, which Dr. Johnson referenced in her report, placed Student in the average to high average range.

Even though Dr. Johnson concluded Student was eligible for special education under category of traumatic brain injury, she did not recommend further medical testing of Student. Dr. Johnson did not recommend dialectical behavior therapy. Instead, she recommended cognitive behavioral therapy and cognitive retraining strategies, which were the most common type of therapy utilized by therapists in treating people with mental health issues, such as those Student suffered.

The assessment report made several recommendations for accommodations. Many were already included in Student's IEP, such as extra time for assignments, leaving

class when stressed, and allowing for immediate access to her therapist. There was no support for many of the Dr. Johnson's other recommended accommodations, such as the need for an audio recorder in class. The recommendations were made without speaking with any of Student's teachers to determine if such an accommodations were necessary. Assuming eligibility of traumatic brain injury, Dr. Johnson made no specific recommendations for goals, specialized academic instruction, related services, programming, or placement she believed Student required to receive a FAPE.

### March 20, 2017 IEP Part Three

At hearing Mother introduced the audio recording of each IEP team meeting, along with a printed transcript of each meeting. The recordings and transcripts were admitted into evidence for consideration as part of Student's case. In making the factual findings in this decision, identification was made by referencing Capistrano members of the IEP team, rather than specific individuals. This was due to two factors. First, multiple members of the IEP team participated in each conversation, thereby providing truly team discussions. Second, it was difficult to recognize each voice on the audio recording, and as noted by both parties at hearing, the written transcript, in part, incorrectly identified individual speakers.

Part Three of the 2017 annual IEP was held on March 20, 2017. The purpose of the meeting was to review and discuss the independent educational evaluation administered and prepared by Dr. Johnson. Dr. Johnson attended via telephone conferencing. Sally Clanin, administrator, Sam Bartaluzzi, intervention specialist, Shari Rempe, education specialist, Davine Jones, Student's case carrier, and Shari Devine, education specialist, attended on behalf of Capistrano. A general education teacher was not present, nor did Mother waive the attendance of the general education teacher.

Dr. Johnson reviewed her independent assessment. The transcript of the March 20, 2017 IEP team meeting reflected that Dr. Johnson considered Student's diagnosis of

post concussive syndrome as classic symptomology of mild traumatic brain injury. Dr. Johnson reported it was much easier for the brain to be reinjured when it was not quite rehabilitated. The brain could recover, and symptoms could disappear, but return later. As of December 2016, Student had fluctuating difficulties with attention, memory, and organization. Student was frequently frustrated which led to anger and depression. Dr. Johnson considered Student's emotional disturbance connected to her concussions. For Student, the concussion piece was going on internally, and made it difficult for her to self-regulate. This resulted in her becoming anxious and depressed. Dr. Johnson admitted she knew nothing about Student's high school classes or programs. She indicated it was important for Student to have an alternative schedule or environment available when she had difficulty accessing the curriculum or could not function in the larger group environment. Dr. Johnson reported accommodations were at the core of her considerations. She expressed that classroom accommodations, class size and environment were important in determining where Student could learn to avoid reaching her anxiety threshold. Dr. Johnson explained Student was smart, but needed opportunities to take more breaks and go at a slower pace, if needed.

Dr. Johnson recommended Student consider Irlen lenses to help filter light or obtain a light filter for her computer, which she anticipated should be covered by Student's medical insurance. Student needed to see an ophthalmologist to obtain Irlen lenses. Dr. Johnson made these vision recommendations without testing Student's visual processing. Instead, she merely suggested that visual issues were typical with traumatic brain injury.

Student's failure to attend a math class required for graduation remained to be addressed at this IEP team meeting. The IEP team considered their prior IEP team discussions held in February 2017, and the information provided by Dr. Johnson. Ms. Rempe facilitated Capistrano's therapeutic behavior intervention classes or TBIC. She

attended the IEP team meeting to describe the TBIC math class to Mother and explain how the program could meet Student's needs. The TBIC was not a special education placement or related service. It was an entire program which offered a therapeutic component to the general education curriculum. The TBIC program allowed students to progress at their own pace in a more individualized setting with therapeutic supports and access to the math curriculum. Ms. Rempe was also experienced with dialectic behavioral therapy, which was Mother's preferred methodology used in Student's private therapy program.

Much of what Dr. Johnson said resonated with Ms. Rempe and was found in her design of the accommodations for the TBIC math class. The class was very small and quiet. There were five students in the class, all very high functioning intellectually. Two aides in the class assisted the teacher, who provided close to one-to-one support. The students in the TBIC math class functioned very similarly to Student as described by Dr. Johnson. Some of the students went out to general education classes. If they became anxious they could come back to the TBIC room, take a break or do their work at their own pace. Mother expressed concern the class work might be modified. Ms. Rempe collaborated with the general education teachers. It was not lower level math. The program sought to have students learn what they needed to learn to graduate from the course successfully. Ms. Rempe was also available as the education specialist for Student's resource class as added support.

Mr. Bartaluzzi attended the IEP team meeting as Capistrano's mental health representative. Mr. Bartaluzzi held a Master's degree in clinical psychology and was a licensed marriage and family therapist. He also held a pupil personnel services credential in school psychology. Mr. Bartaluzzi provided counseling at Capistrano Valley. Mr. Bartaluzzi implemented Student's counseling accommodation, which relied upon Student's desire to seek him out. He was unable to provide Student weekly school

counseling sessions, as Mother rejected school counseling as a related service. From a mental health standpoint, Mr. Bartaluzzi found the IEP team's recommendation for the TBIC math class appropriate for Student. Dr. Avina provided Student with dialectic behavioral therapy. Ms. Rempe was trained in that therapeutic methodology.

Mother expressed concern that Student had missed almost a year of math instruction and needed to catch up. Ms. Rempe conducted a baseline math skills assessment of each student upon entering the class to determine their present levels. Mother remained unconvinced Student could meet course requirements in the remainder of the school year.

Mother renewed her request for Halstrom's math class. Once again the Capistrano members of the IEP team informed Mother that Halstrom was not accredited for graduation credits. To obtain a diploma from Capistrano, a student needed to meet certain graduation requirements. Those requirements could not be met through additional courses at Halstrom. Mother continued to belabor the denial of Halstrom. Capistrano repeated to Mother that Halstrom was not a district school, nor was it a certified non-public school. Therefore, the IEP team could not place a student at Halstrom. The school board would not authorize additional credit transfers for Halstrom for graduation.

Capistrano's offer of FAPE consisted of the provision of specialized academic instruction for one class in the TBIC math program. Sixty minutes of in-home parent counseling was offered twice per month with a contracted counselor. Sixty minutes per week of in-home individual counseling for Student with a contracted counselor was offered. Individual counseling three times per week for thirty-five minutes was offered in a separate setting with a Capistrano counselor.

Capistrano IEP team members explained that the offer of in-home counseling was intended to provide cognitive behavioral and cognitive retraining therapy, as



suggested by Dr. Johnson. Further, the medical component for healing the brain did not address those supports required for Student to receive educational benefit. Capistrano offered to support Student to cope emotionally and socially so she could access her education. Mother did not want additional cognitive therapy because Student was already receiving outside therapy and did not need two therapists doing the same thing.

Mother did not agree to enroll Student in the TBIC math class. Instead, Mother wished to delay committing to a math class until Student's present math skills were determined in the assessment described by Ms. Rempe. That informal assessment, to develop benchmarks for Student in the class, would be administered once Student was enrolled in the TBIC class. Mother again brought up Halstrom. Mother expressed concern that she needed additional information.

Mother did not agree with the offer of FAPE. She did not feel the offer addressed the brain injury itself. The school psychologist asked what Student's neurologists recommended. Typically, when someone had a traumatic brain injury the medical professionals would advise the person what to do and what to avoid. Mother indicated Student was no longer seeing the neurologists because they cleared her to return to school and sports.

At hearing Mother introduced the Acute Concussion Evaluation care plan completed after Student's December 2016 concussion. This short evaluation was completed in 2016, and was factually addressed in the June 14, 2017 decision. Of note however, was the Concussion Information Sheet, prepared by the California Interscholastic Federation, attached to the concussion evaluation. The Concussion Information Sheet echoed the Education Code and defined concussions as they pertained to sports activities. A concussion was defined as a brain injury. Most concussions got better with rest, and over ninety percent of athletes fully recovered. All concussions were serious and might result in serious problems including brain damage

and even death if not managed correctly. Even though a traditional brain scan might be normal, the brain still was injured. Studies showed that a second blow before the brain had recovered could result in serious damage to the brain and prolong recovery. There was an increasing concern that head impact exposure and recurrent concussion contributed to long-term neurological problems. The information sheet suggested a modified schedule might be needed upon a return to school along with educational accommodations. To return to participation in sports, students were required to return to a complete school day before beginning any sport or physical activities. A return to athletics could only occur with medical clearance from a medical doctor trained in the evaluation and management of concussions. Concussion symptoms needed to be completely gone before returning to athletic completion. Mother's reliance on Dr. Johnson's determination of traumatic brain injury did not comport with the other information she presented at hearing. Student was no longer under the care of a neurologist. Her neurologist medically released her to resume participation in athletics. Student's return to athletic activities supported Capistrano's determination that Student's brain injury symptoms had dissipated, and Student could complete a full day of classes.

Mother did not present any evidence at hearing to suggest the Part Three March 20, 2017 IEP was inappropriate. The Part One February 1, 2017 and Part Two February 16, 2017 portions of the IEP offered Student a FAPE pursuant to the June 14, 2017 decision. The Part Three March 20, 2017 IEP continued to offer the goals crafted during the first two parts of the IEP team meeting. The accommodations were crafted with Mother's input and reflected the accommodations recommended by Dr. Johnson. The offer of the TBIC math class addressed Dr. Johnson's educational concerns. While she did not want counseling services, Mother offered no alternatives to address Student's needs other than her preferred classes at Halstrom.

Even assuming Dr. Johnson's determination of traumatic brain injury was valid, nothing presented to the IEP team supported a change of placement from general education with specialized academic and counseling supports. No evidence was presented to suggest Student required a more restrictive environment than could be provided by Capistrano. Nor did Student require one-to-one teaching in order to be successful academically. The February 2017 annual IEP, in its totality offered Student a FAPE.

## 2018 ANNUAL IEP

Capistrano held Student's 2018 annual IEP team meeting in three parts, on February 9, 2018, March 2, 2018, and March 23, 2018.

### February 9, 2018 IEP Team Meeting, Part One

All required parties, including Mother and Student, attended the February 9, 2018 IEP team meeting Part One. Capistrano members of the IEP team included Scott Schepens, general education teacher, Adam Ochart, administrator, Sonia Eatmon, psychologist, Mr. Bartaluzzi, Ms. Devine, and Ms. Bratcher. Mother again requested a change in eligibility from emotional disturbance to traumatic brain injury. She wanted the IEP team to understand how Student's history of concussions and brain injuries impacted her education. Mother felt six periods a day was too much for Student. Mother wanted the IEP team to consider a modified school day consisting of five periods which she believed would help alleviate Student's anxiety. Mother wanted summer classes for Student to allow her to access the A-G curriculum classes she needed to complete for graduation.

The health and medical information portion of the IEP indicated medical diagnoses of asthma, insomnia, depression and anxiety. Student's medications were reported. In March 2018, Capistrano's nurse confirmed with Dr. Williamson that Student

had symptoms of traumatic brain injury. No individual health plan had been created or requested.

The IEP team reviewed Student's first semester grades and present levels of performance. The general education teacher reported Student had passing grades in all classes except honors English. Student's attendance issues were impacting her educational progress. Student's failing grade in English was due to missing school, but she could make up assignments which would raise her grade. The general education teacher reported that Student's accommodations were in place.

Student's present levels of academic achievement and functional performance noted Student was a sweet and respectful student. She established a good relationship with her teachers and peers. Student would seek out the educational specialist when she was feeling anxiety in the general education classroom. Student could identify coping skills and could identify enjoyable activities to engage that helped to lessen feelings of depression. On the other hand, Student continued to internalize her emotions within the school environment which leads to feelings of hopelessness, anxiety, and depression. Student continued to talk about death or suicide and engaged in self-injurious behaviors. The Capistrano members of the IEP team identified Student as needing to continue working on identifying positive attributes regarding her view of self-appearance, personal strengths, and accomplishments to improve her positive thoughts. She needed to continue to improve and demonstrate a number of ways to decrease personal anxiety. Of her five social-emotional goals, Student met her anxiety and coping goals. Student also met her study goal.

Capistrano proposed social-emotional goals covering Student's needs in the areas of anxiety, depression, positive thought, and self-advocacy. A study goal was also proposed.

Mother had questions regarding Student's baselines in relation to the prior goals.

Capistrano explained to Mother that since she had not provided consent to the 2017 annual IEP Capistrano could only continue work on the goals contained in the 2016 IEP, which was the last IEP to which Mother consented. The concept of Education Code, section 56505, subsection (d), also known as Stay Put, was explained to Mother. Student's progress on goals was also limited by Mother's rejection of the counseling services offered by Capistrano.

Draft goals which were prepared in advance of the IEP team meeting were discussed. Mother posed questions regarding the percentage measurements contained in the goals. The IEP team agreed to reword the goals to address Mother's concerns.

Mother inquired whether previous assessments or Dr. Johnson's independent evaluation were considered in developing the goals. Capistrano members of the IEP team explained the assessments were utilized to determine Student's eligibility for special education and related services in initial and triennial years. Student's goals in annual IEPs were based upon her academic progress and goal benchmarks. The 2018 annual IEP was not a redetermination of eligibility. The goals were developed based upon information received as teacher input, classroom performance, grades, tests, quizzes, and self-reporting. Student was scheduled for a triennial IEP in 2019. New assessments would be completed in 2019 and eligibility re-determined. Mother was concerned that the goals were not assessment based and were only based upon Student's social-emotional needs. The Capistrano members of the IEP team explained that Student did not have an identified deficit in any academic areas, such as reading comprehension, so the IEP team would not need to write goals in those areas. Student's academic needs were based upon her social-emotional levels that impacted her within the educational setting. The goals addressed areas like anxiety and work completion. Capistrano members of the IEP team noted that the definition of assessment in an educational setting was broader than Mother's understanding of a comprehensive or

standardized evaluation. To the educators, an assessment could be a quiz or a test, or an oral presentation in the classroom, which indicated Student's progress. In the drafting of Student's goals, there was input from each of Student's teachers. Capistrano members of the IEP team asked Mother if there were any other goals she wished the IEP team to consider. None were presented.

The IEP team discussed accommodations. The accommodations included extra time to finish assignments, allowing Student to have her cell phone on her at all times to have access to her private therapist. Mother requested preferential seating, but Student did not think it was needed. Mother indicated she needed more time to think about the accommodations.

As part of the individualized transition plan or ITP, the IEP team discussed Student's transcript and graduation credit requirements. Student participated in the A-G curriculum for graduation, including Spanish, advanced placement history, and honors English. Completion of A-G classes was required for enrollment in a four-year college, not for graduation with a diploma.

Mother requested Capistrano remove the failing grade in Algebra One because Student never attended the class. Instead, Mother had enrolled Student in Algebra One at Halstrom. Student was receiving an A in the class. Unfortunately, if Student had previously been enrolled a Capistrano math class, it would show up on her transcript. Whatever grade Student earned, including a zero for non-attendance, would be reported on the transcript as well. Mother disagreed because she did not consent to Student's enrollment in the Capistrano math class. Ms. Clanin, Capistrano Valley assistant principal, explained that a change in a general education class schedule or a modified schedule in general education is not a change of Student's placement. Student's enrollment in Algebra One was only a class change. It remained a general education placement, and it remained a requirement for graduation.

The IEP team entertained a discussion of Student's health and medical needs. Mother requested the IEP team provide Student with other health impairment special education eligibility due to her asthma. Student had been hospitalized for five days in January 2018. The IEP team requested Mother provide a release of information for to allow Capistrano staff to communicate with Student's doctor.

Mother argued Student required a flexible schedule and modified class schedule of five classes instead of six classes. She contended Student's anxiety and insomnia contributed to Student's fatigue, and her need to decompress. Mother requested that Student be allowed to make up her sixth class during the summer. Mother found no program other than Halstrom appropriate for Student during the summer. Capistrano could not fund the program, nor could Capistrano accept more than ten transfer credits per year from Halstrom. Capistrano again offered the TBIC program, which Mother refused. Capistrano suggested that a full class period of resource class could provide Student with extra time to work on her assignments, as well as provide Student with time to rest and decompress. Student could not drop a core class, but could exchange her elective Spanish class for an hour of elective resource class.

#### March 2, 2018 IEP Team Meeting, Part Two

Capistrano held the second part of Student's 2018 annual IEP on March 2, 2018. All required members of the IEP team attended. Kelly McNeil, general education teacher, Erica Malone, school nurse, Ms. Clanin, Ms. Eatmon, Ms. Bratcher, Mr. Bartaluzzi, and Ms. Devine attended the IEP team meeting on behalf of Capistrano. Dr. Williamson attended the IEP team meeting via telephone. Student did not attend this meeting.

The IEP team reviewed the revised work completion goal. Mother agreed to the new goal. The IEP team removed the accommodation of extra time for testing because Mother and Student did not believe it necessary. It remained unclear if Mother accepted the resource class in lieu of Student's Spanish class in an email, prior to this IEP team

meeting. Mother provided conditional consent to the switch in writing on March 3, 2018.

The IEP team discussed Mother's requests for changes in Student's eligibility to traumatic brain injury and an additional eligibility of other health impairment due to Student's asthma. Mother provided the IEP team with letters from Dr. Claudia Avina, Student's private therapist and Dr. Williamson for consideration of her requests.

LETTER FROM DR. AVINA, PH.D., DATED FEBRUARY 15, 2018

Mother presented a letter from Dr. Claudia Avina, Ph.D., Student's private therapist. The letter indicated Student received psychotherapy and psychiatric medication, and management services at the Child and Adolescent Psychiatric Clinic at Harbor-University of California, Los Angeles, Medical Center since October 2015. Student continued to receive services from Dr. Avina, and Dr. Charles Grob, M.D., due to their expertise in treating suicidal and self-harming adolescents. Student reported increased anxious distress during the 2016-2017 academic year. Student reported experiencing multiple panic attacks per week and consistently high anxiety during the week. Her anxiety resulted in several medical emergency room visits and hospitalizations, and exacerbated medical illnesses based upon reporting by Student and Mother. They reported a decline in Student's academic performance as well. Given evidence from Mother and Student that Student could manage a reduced academic schedule and successfully complete a course over the summer, Dr. Avina recommended this accommodation should be strongly considered. Due to Student's absences related to medical evaluations and treatments, Dr. Avina recommended accommodations related to turning in missing assignments and missed work and exams to reduce academic stress and anxiety symptoms.

Student continued to present with chronic and severe depressed mood, chronic suicidal ideation, chronic urges to self-harm and recurrent self-harm occurring several



times per month. Her symptoms of insomnia did not respond well to psychiatric medication. She regularly reported difficulty falling asleep as well as staying asleep, at times resulting in only a few hours of sleep per night. Student continued to be at high risk of engaging in suicidal behavior given the presence of depressed mood and thoughts, suicidal ideation, recurrent self-harm and insomnia.

LETTER FROM DR. WILLIAMSON, DATED FEBRUARY 23, 2018

Mother presented a letter from Dr. Williamson, Student's pediatrician. Dr. Williamson wrote the letter on Student's behalf to request that she be accommodated at school for her chronic health issues that impacted her academic success. Dr. Williamson described Student as a very bright girl who continued to suffer from multiple medical complications. These complications resulted in multiple missed days from school, and continued to impact Student's academic performance when she was in school.

Student suffered from severe anxiety and depression. She was followed by multiple specialists and was on medication. A symptom of her anxiety and depression was insomnia that caused her lack of sleep at night and impacted her ability to focus at school. Student's insomnia was severe, and continued to be a significant issue for her.

Student also had a history of severe asthma. She was recently hospitalized in the intensive care unit at Children's Hospital of Orange County. She missed multiple days of school from this hospitalization, and was still working on making up what she missed over one month later.

Student had a history of traumatic brain injury after sustaining three concussions. Dr. Williamson reported Student continued to struggle with symptoms of poor focus and fatigue likely due to concussion syndrome.

Dr. Williamson recommended Student be considered for a lighter load of daily classes, and be given accommodations to help her catch up on missed work. Dr.

Williamson reported that six classes a day in large classrooms was presently overwhelming and overstimulating to Student. Dr. Williamson indicated she was aware Student attended one-to-one classes offsite from the school, and excelled. She believed it would be in Student's best interest medically and academically to pursue more classes like the one-to-one she previously had, as much of the school was able to offer.

Mother provided these letters at the IEP team meeting, yet would not provide an authorization for Capistrano's nurse to speak with the doctors directly regarding their letters. Mother also blocked review or introduction of Student's medical records from these doctors at hearing. As a result, the credibility of their letters is limited. The doctors did not testify at hearing. The letters did not establish what the doctors knew about Capistrano's educational options, such as TBIC classes, and educational requirements, aside from what information was provided to them by Mother.

Ms. Malone reviewed the doctor's letters. She did not recommend other health impairment eligibility based upon Student's asthma. She explained that Student's asthma was not affecting her access to her education. Student was absent from school for ten days due to asthma. Capistrano members of the IEP team did not consider absences a sufficient period of time to qualify Student as other health impaired. The other health impaired category was adopted for more chronic conditions such as daily seizures or diabetes, which impacted the student on a constant or daily basis. Student's asthma was controlled at school with access to her inhaler.

Capistrano members of the IEP team asked Mother what accommodations she felt would help Student in her academic setting with her asthma. The team was willing to include additional accommodations. Mother requested a tutor to work with Student to review lessons missed when out of school. Capistrano offered the resource class to Student.

Mother felt the IEP team was not considering Student's traumatic brain injury in

developing her IEP. She felt the letters from the doctors sufficiently established traumatic brain injury eligibility. The letters acknowledged traumatic brain injury but made no recommendations regarding special education eligibility. Instead, they only addressed Student's symptoms of poor focus and fatigue in making recommendations for accommodations. Capistrano members of the IEP team reviewed the eligibility requirements for traumatic brain injury eligibility with Mother, and explained they wished to communicate directly with Student's doctors to better determine how to support Student's needs and requested Mother to sign a release of information for such communications. Mother was unwilling to allow Capistrano staff to communicate with Student's doctors and mental health care providers. Ultimately, she provided conditional authorization to communicate with the doctors, requiring that Mother be a party to any interview or telephone call, which Capistrano agreed.

The Capistrano members of the IEP team asked Mother, assuming eligibility of traumatic brain injury, what additional accommodations she felt were needed to allow Student to access her education. The IEP team asked Mother what symptoms Student was currently exhibiting from the traumatic brain injury. Once the team knew those symptoms, then they would know what accommodations to put in place. The IEP team debate regarding traumatic brain injury resulted in a stalemate.

The general education teacher provided input about Student. Student's absences from school were taking their toll. Student was not taking the initiative to make up her assignments. Mother attributed this to Student's brain injury as reported by Dr. Johnson. The IEP team stressed this was a big reason why they were proposing the addition of the resource class. Resource would be a class where Student could connect with the education specialist to find out what she was missing and what she needed to catch up on. The resource class had a built-in time for Student to catch up and organize things. The education specialist worked very closely with the teachers and knew what was going on in the classroom.

Mother felt Student needed more supports in her general education classes, which went against the recommendations of some Student's doctors who felt that the size of general education classes stressed Student. The IEP team discussed possible placement in collaborative classes rather than in a solely general education placement. Mother deemed that moving Student to a collaborative setting would not be in Student's best interests. Student was capable of completing the general education curriculum.

The IEP team offered additional accommodations of a copy of teacher's notes, audio books on tape, use of graphic organizers, and peer notes from class. These were intended to assist Student with focus and making up her missed assignments.

Mother inquired about the recommendations in Dr. Johnson's independent evaluation regarding an educational therapist, cognitive therapy, and the Irlen lenses. Mother inquired about cognitive therapy. It was pointed out that Mother had declined Capistrano counseling supports. Based upon the transcript of the March 2, 2018 IEP team meeting, Mother sought additional supports more related to brain retraining, which were nearer to neuroscience than to educational support. Mother suggested Student would benefit from year-round classes. Mother equated that since Capistrano could not provide Student with summer classes which would allow her to take fewer classes during the school year, Student should be allowed to take summer classes at Halstrom.

Capistrano members of the IEP team pointed out that under the proposals for the IEP, Student would take only four academic classes, which would be supported by the resource class. The resource class would provide no pressure at all. Student's sixth period would be physical education which Student enjoyed. Student continued to participate in strenuous sport activities, such as pole vaulting and long jump. Mother

acknowledged Student had been medically cleared to return to participation in sports.

### March 23, 2018 IEP Team Meeting, Part Three

Capistrano held Part Three of the 2018 annual IEP on March 23, 2018. Gary Marzolo, general education teacher, Ms. Clanin, Ms. Eatmon, Ms. Bratcher, Mr. Bartaluzzi, Ms. Devine, and Ms. Malone attended the IEP team meeting on behalf of Capistrano. Student did not attend this meeting.

Student had recently broken her nose while pole vaulting. Student's athletic clearance was confirmed by her doctor and she was cleared to return to athletics. Mother reported the broken nose did not intensify Student's traumatic brain injury symptoms.

The IEP team discussed a report from Student's academic advisor which proposed several ways for Student to complete her A-G requirements over her remaining two years of high school. Primarily it was proposed that Student take four academic classes, one sport, and one elective. Capistrano members of the IEP team recommended Student take one semester of resource class followed by her missing second semester of Spanish. Mother indicated Student would be taking Spanish at Halstrom in April 2018. Mother requested reimbursement from Capistrano for the Halstrom classes. Student did very well in her Algebra Two class, and reportedly did not feel she required any accommodations in that class. A collaborative geometry class was available for Student in her junior year, which would provide additional support. Mother indicated that taking geometry during Student's junior year would be an embarrassment for Student. Mother wanted it provided during the summer. Capistrano's summer geometry class was only offered online. Further, geometry was an A-G class, not required for graduation with a diploma. Capistrano again proposed the TBIC math class for the extended school year.

Once again Mother requested Capistrano change Student's primarily eligibility

category to traumatic brain injury, and add other health impairment in addition to Student's current eligibility category of emotional disturbance.

Again the Capistrano members of the IEP team explained a new assessment needed to be conducted to consider a change in Student's eligibility. Simply because there was a medical diagnosis did not mean a student was going to qualify for special education under a certain label. Capistrano could not simply mark the eligibility box based upon the medical diagnosis. The medical diagnosis needed to be followed by an assessment to determine educational impact and if Student required special education services due to her medical condition. Capistrano members of the IEP team offered to do an early triennial assessment of Student to address the eligibility issue. To do so, Capistrano would require a release of information from Mother to contact the doctors. In the meantime, additional accommodations could be added if Student required additional support.

Mother questioned how would a new assessment be different. It was explained that emotional disturbance was all social-emotional related. Assessment of traumatic brain injury primarily looked at areas of processing weaknesses. The IEP team remained at a stalemate over the addition of traumatic brain injury as an eligibility category without further assessment.

Mother requested changes in the medical diagnoses contained on the medical and health history portion of the IEP to include traumatic brain injury, asthma, insomnia and an eating disorder. Capistrano made the additions requested. Mother requested that an outside consultant who specialized in traumatic brain injury be utilized to consult with Capistrano staff. Capistrano declined to do so.

Mother requested Student's present levels of performance be changed to reference Student becoming fatigued and overstimulated. Capistrano IEP team members would not make this change without completing an assessment, and noted

Student participated in after school sports. Mother requested several other language changes that were based on Mother's preferences, such as that Student prefers to learn in one-to-one classes. Capistrano declined to make further changes to Student's present levels.

Capistrano offered Student pull-out counseling services for thirty minutes per week. The transcript reflects Mother felt Student's issues were so severe that thirty minutes per week was not enough. At the same time, Mother did not want a specified time designated for counseling. Mother wanted Student to have access to school counseling anytime she wanted. Capistrano members of the IEP team explained that when services were stated on the IEP document, the IEP team was required to be specific regarding amount and type of the service. To accommodate Mother's desire for unlimited and undefined access to the school counselor, the IEP team left the counseling as an accommodation rather than a service.

Mother did not present any evidence at hearing to suggest that the 2018 annual IEP was inappropriate. Mother's request for a change in eligibility to traumatic brain injury was not supported in the medical and mental health information presented to the IEP team. To the contrary, this information continued to support eligibility of emotional disturbance, and suggested no areas of additional need which were not appropriately addressed in the 2017 annual IEP or the proposed 2018 annual IEP.

Based upon all three parts of the 2018 IEP, Capistrano offered Student individual specialized academic instruction as an accommodation in the resource classroom for fifteen minutes, once per week, which was designed to support Student with organization and making up missed assignments. Capistrano offered two hundred fifty-two minutes per week for individual specialized academic instruction as an accommodation in the resource classroom to provide Student with a slower pace and small group instruction and support her in accessing the general education curriculum.

Capistrano offered group specialized academic instruction in the TBIC program for one hour, five days a week during the extended school year. Commencing in the 2018-2019 school year Capistrano offered group specialized academic instruction as an accommodation in the general education classroom for two hundred fifty-two minutes per week, in a collaborative classroom. Individual counseling was offered for thirty minutes per week, but declined as a service by Mother.

The five goals offered were based upon Student's identified social-emotional needs in the areas of anxiety, depression, positive thought, and self-advocacy. Student did not require academic goals. The IEP team developed a study goal to assist Student in completing assignments and classwork. Mother's concerns regarding benchmark measurements and goal completion were addressed, and the IEP suitably amended. Mother did not request any additional goals.

The IEP team created accommodations which continued to address the recommendations of Dr. Johnson. New accommodations, such as XXX, were added in response to the recommendations of Dr. Williamson, Dr. Avina, and Mother. Mother did not consent to the 2018 annual IEP.

#### Prior Written Notice to March 23, 2018 IEP

On April 16, 2018, Amanda Bratcher, program specialist at Capistrano, sent a letter to Mother which provided Capistrano's prior written notice of its denial of Mother's requests made at the March 23, 2018 IEP team meeting. The prior written notice identified Mother's request for change of Student's primary eligibility to traumatic brain injury and the addition of other health impairment. Capistrano explained its denial of Mother's request and indicated an assessment plan designed to complete an early triennial assessment and IEP, had been presented to Mother and remained unsigned.

Capistrano prepared an assessment plan on March 30, 2018. It provided for a full



psychoeducational assessment. The assessment plan offered a comprehensive assessment in the areas of academic achievement, speech and language, intellectual development, social-emotional and adaptive behavior, perceptual processing, health and physical status, gross and fine motor development, and career and vocational areas. Another copy of the assessment plan was included with the prior written notice.

The prior written notice identified Mother's request for Capistrano to fund Student's summer classes to access courses she needed to graduate. Capistrano denied Mother's request, indicating Student did not require one-to-one instruction. Student could access her education at Capistrano Valley in classes with her peers and special education support in particular areas. Student was on course to graduate on time, and not credit deficient.

On April 25, 2018, Ms. Bratcher sent Mother a second letter of prior written notice in response to Mother's contention Capistrano had not fully responded to all of her requests. Specifically, Mother believed she had requested reimbursement from Capistrano for Student's courses at Halstrom during the summer of 2017 as well as the summer of 2018. Capistrano denied Mother's requests for reimbursement and repeated the reasons for doing so.

#### STIPULATION FOR ASSESSMENT

Mother filed an appeal of the June 14, 2017 OAH decision in the United States District Court, Central District of California, Southern Division, Santa Ana, in Case Number SACV 17-1585-DOC. On July 16, 2018, Mother, on behalf of Student, and Mr. Harbottle, on behalf of Capistrano, appeared before the Honorable David O. Carter, United States District Judge, and entered into an agreement in which Capistrano would fund an assessment of Student to be conducted by non-district personnel. Capistrano would use its best efforts to have the assessment completed within thirty days, rather than the statutory sixty days allowed in special education.

Upon completion of the assessment, Capistrano would convene an IEP team meeting to develop Student's IEP for the 2018-2019 school year. Mother was free to invite any traumatic brain injury other specialists of her choice to provide input to the assessment team for consideration. The transcript from the District Court's discussion with the parties indicated that if Capistrano wished to conduct another assessment, such as the triennial assessment which was due in February 2019, the court ordered assessment would not preclude Capistrano from conducting its own comprehensive assessment.

Crystal Bejarano, Psy.D. an outside assessor from Braintree Learning was contracted to complete the psychoeducational assessment.

#### DR. BEJARANO'S PSYCHOEDUCATIONAL ASSESSMENT

Dr. Bejarano assessed Student over the period of August 6 through August 20, 2018. Her written report was completed August 20, 2018, and edited on August 27, 2018. Dr. Bejarano was a licensed educational psychologist and Diplomate of the American Board of School Neuropsychology.

The stated reason for the referral was to conduct a psychoeducational assessment, including academic evaluation, for Student's triennial, pursuant to court order. The referral questions for the evaluation were:

1. What were Student's current academic skills?
2. What were Student's cognitive skills as noted via review of records, observation, and standardized assessment?
3. What were Student's processing skills?
4. What were Student's social-emotional and adaptive behavior skills?

Dr. Bejarano's assessment report addressed each of these questions.

The assessment materials and procedures used in the evaluation were selected and administered so as not to be racially, culturally, or sexually discriminatory. The

effects of environmental, cultural or economic disadvantage were considered in the selection and administration of the instruments used. The materials and procedures were administered in Student's primary language and validated for the specific purpose for which they were used. No single procedure was used as the sole criterion for determining eligibility, unique need, or educational recommendations. Dr. Bejarano considered the assessment to be a valid reflection of Student's current level of cognitive, academic, emotional and behavioral functioning.

Dr. Bejarano reviewed Student's records, including health, developmental, and relevant medical information. Behavioral observations were completed during the testing dates. Dr. Bejarano was unable to complete a classroom observation because school was not in session during the court ordered time constraints.

Dr. Bejarano interviewed Mother on three separate occasions. She interviewed Student on four occasions. Dr. Bejarano also interviewed Sherri Devine, Student's teacher, Dr. Avina, and the Director of Student Success at Halstrom.

In her review of available medical records, Dr. Bejarano referenced Student's Acute Concussion Evaluation care plan from Children's Hospital of Orange County, dated December 19, 2016, after Student's last concussion. The Acute Concussion Evaluation reported Student's symptoms included headaches, sensitivity to light, irritability, sleeping less than usual, and trouble falling asleep. Recommendations for school included providing extra time to complete assignments and tests, lessening homework load by thirty percent, allowing blue light blockers, forgiving finals if it would not impact grades, delaying any necessary testing until after January 1, 2017, and providing a gradual return to sports with no contact until cleared.

Dr. Bejarano reviewed a letter from Dr. Avina, and Dr. Grob, dated June 28, 2018. The letter reported Student had been treated by Drs. Avina and Grob since October 2015 for numerous conditions, including post-traumatic stress disorder, anxiety

disorder, eating disorders. Student had three hospitalizations due to suicidal ideation and recurrent self-harm. Student presented with multiple head traumas resulting in prolonged concussions with possible psychological consequences. Their recommendations included that Capistrano conduct an evaluation to determine appropriate accommodations due to deterioration of psychological functioning as Student continued to engage in suicidal behavior, anxiety attacks, depressed mood and thought, recurrent self-harm and insomnia.

Educational records for the 2017-2018 school year reported Student had multiple class period absences, including ten unexcused class period absences, and six reported truancies.

Student's transcript for the 2017-2018 school year indicated Student passed all of her classes except honors English. Grades ranged from an A minus in chemistry to a D minus in advanced placement world history. Student remained on track for graduation in 2020.

Student reported almost daily headaches at school, which occurred when she spent a lot of time looking at something. She did not usually take medication for her headaches. The headaches began shortly after her first concussion.

Student reported she found she needed frequent breaks and would become fatigued which caused her to fall behind in class. She reported having a hard time in lecture based classes. Student expressed difficulties when the class moved on and she did not yet understand the information. She wanted to work at her own pace.

Student had not been treated by a neurologist since her last concussion in December 2016. Dr. Bejarano interviewed Dr. Avina in a three-way conference with Mother to report on Student's ongoing therapy. Student's current diagnostic impressions continued since 2015. Student consistently suffered from depression, anxiety and eating disorders. Depression contributed to self-harm and suicidality.

Student's anxiety remained in the severe range with brief episodes, but had been more persistent over the last year. Student reported chronic anxiety and was always concerned about her success in school and in her personal life. She appeared to have difficulty preparing for life. Dr. Avina was trying to determine specific environmental or cognitive triggers, but Student did not have insight into those areas yet. Student's insomnia became much worse last year. Dr. Avina was trying to better understand the causes for this. Student presented as a complex case, due to multiple diagnoses and concussions.

Neither Dr. Avina nor Dr. Grob made a diagnosis of neurocognitive disorder due to traumatic brain injury. However, Student's history, presentation, symptoms, and therapy with lithium tended to be consistent with post-concussion syndrome.

Dr. Avina reported that Student's treatment goals included developing coping strategies and expressing emotions. They were using cognitive brain training strategies and working with Student to restructure or modify cognitive distortions and developing coping skills for Student to use to induce a more relaxed state.

Dr. Avina reported that a year ago, Student could carry the standard course load. Over the last six to eight months, she watched Student struggle academically. Student's self-worth was impacted by her lack of ability to complete the work. In the midst of all of these psychological issues, Student excelled in the alternate program at Halstrom. Student complained the supports at school felt more like a study hall and did not help her with keeping up in her classes.

Dr. Bejarano interviewed the Director of Student Success at Halstrom. Student attended the program once or twice a week for one to two hours per session. Sometimes she stayed and worked after her session to get some help. All of Halstrom's instruction is one-on-one with a teacher directly interacting with the student. The Director noted that Student received a lot of help from her teacher with Spanish.

Student had trouble navigating the Spanish class which used Rosetta Stone online software. The teacher went above and beyond to make sure Student could log onto the computer and complete the work.

Dr. Bejarano utilized a series of standardized assessment instruments. Student was assessed on three occasions. Student missed one appointment due to illness, and arrived late at another appointment and was sent home due to anxiety and increasing stress. When asked questions about her emotions, school, and family Student became physically agitated. Her signs of distress varied from none, to moderate to bordering on severe. Dr. Bejarano administered the Developmental Test of Neuropsychological Assessments, Second Edition, selected subtests, to assess Student's neuropsychological development in five functional domains: attention and executive function, language, sensory motor functions, visuospatial processing, and memory and learning.

She used the Delis-Kaplan Executive Function System, selected subtests, to obtain a comprehensive assessment of Student's executive functioning.

Dr. Bejarano utilized the Kaufman Test of Educational Achievement, Third Edition, to obtain core measures of Student's reading, math, and written language skills, with supplemental measures of reading-related and oral language skills, and cross-domains in comprehension, expression, orthographic processing and academic fluency.

Dr. Bejarano administered the Reynolds Intellectual Assessment Scales, Second Edition to measure Student's cognitive skills, for both verbal intelligence and non-verbal intelligence. These scales included subtests in the areas of memory and processing speed.

Dr. Bejarano conducted the Wechsler Intelligence Scale for Children, Fifth Edition with selected subtests to assess Student's cognitive ability and problem-solving processes.

Dr. Bejarano utilized several behavior and social-emotional measures, which were

rating scales completed by Student, Mother and teacher. The Child Depression Inventory-Two, a self-rating scale considered symptoms associated with major depressive and dysthymic disorders. Subscales measured negative mood, interpersonal problems, ineffectiveness, anhedonia, and negative self-esteem.

The Comprehensive Executive Function Inventory rating scales measured executive function strengths and weaknesses.

The Connors Comprehensive Behavior Ratings Scales was used to obtain observations about Student's behavior from multiple perspectives.

The Multidimensional Anxiety Scale for Children, Second Edition, comprehensively assessed Student's anxiety dimensions.

Based upon Student's scores on these standardized tests, interview, observation and record review, Dr. Bejarano determined Student's overall academic skills were within the average range. Student exhibited some weakness in interpreting inferential and narrative questions on listening comprehension tasks, which was also observed and reported by Student. Student might need some support for academic concepts, especially those presented primarily orally. She might benefit from information repeated or explained further for improved understanding and learning.

Student's cognitive skills were within normal limits. Student's visual motor integration and visual scanning skills were normal. She performed within the average range in phonological processing. Student's visuospatial perception and reasoning skills were in the average range. Verbal memory was within normal limits. Nonverbal memory was well within the average range, and appeared to be Student's preferred learning modality. Student's listening comprehension was within normal limits.

In the area of cognitive flexibility and executive functions, Mother reported significant concerns with mental flexibility and emotional regulation. Student presented with strength in her ability to inhibit responses, shift between stimulus, produce

semantic categories and shift on both visual and verbal tasks. Her sequencing was also within expected limits. On response inhibition tasks, Student could apply cognitive control on her ability to inhibit her responses and adjust her response based upon the change in criteria. In fluid reasoning, Student had solid visual and verbal reasoning skills, including problem solving, concept formation and generalizing concepts.

Student presented with adequate short term auditory capacity. In measures of cognitive efficiency which required quick and accurate retrieval and production of verbal and visual stimuli, Student's scores fell within the average range, but she sometimes sacrificed accuracy for speed.

Student's overall intelligence fell within the average range with high average performance on memory tasks. Dr. Bejarano noted Student could complete many of the tasks within the expected time limits, but she required regular breaks or required the sessions to end. In each session Student reported an increase of headaches, especially for tasks using iPad administration. After ninety minutes, her headaches became moderately painful and breaks were provided. This was consistent across all testing session. Student reported that this was typical for her.

Overall, all of the behavioral rating scale participants reported significant concerns regarding Student's social-emotional and behavioral functioning. There was a high level of consistency between the raters on several scales. Dr. Bejarano found Student significantly elevated for emotional distress by all raters, and each reported a significant impact on educational and functional behavior. There was a high consistency for diagnostic impression of Major Depressive Episode and Generalized Anxiety Disorder.

Dr. Bejarano determined Student's current functioning was significantly impacted by her symptoms of anxiety, depression and poor situational perception of self and others. She presented with high lability and unstable mood. She cycled with negative



thinking and irritability. Student tended to use avoidant strategies to escape uncomfortable or stressful experiences. She lacked coping strategies including techniques to deescalate herself when approaching non-preferred tasks or situations. Student struggled with trust and limited engagement with adults or peers unless she was motivated, interested, or connected with the individual or in an increased state of relaxation.

Dr. Bejarano determined Student did not qualify for special education and related services under the category of traumatic brain injury. Instead she adopted a diagnosis of post-concussion syndrome, which was defined in the International Classification of Disease as “the organic and psychogenic disturbance observed after closed head injuries. Post-concussion syndrome included subjective physical complaints, such as headache or dizziness, cognitive, and emotional and behavioral changes. The disturbance could be chronic, permanent, or late emerging.”

From a diagnostic perspective, Student’s case was complex. She began presenting with unstable mood and poor coping prior to the concussions, yet she was able to appropriately cope in school. Student maintained above average grades. After significant concussions, Student experienced significant changes beyond what was previously observed in her personality, behavior, mood, headaches, light sensitivity and sleep disturbance. Many of these symptoms have persisted.

Dr. Bejarano reiterated Dr. Avina’s diagnostic impressions of depression, anxiety, and eating disorder. Neither Dr. Avina nor Dr. Grob diagnosed Student with a neurocognitive disorder due to traumatic brain injury, although her medications and therapy were consistent with that diagnosis. Still, Student’s continuing physical symptoms after the first major concussion suggested there might be long-term or chronic effects resulting from the diagnosed Post-Concussion Syndrome.

Dr. Bejarano recommended Student’s IEP team consider eligibility for special

education and related services under the category of other health impairment due to Student's limited strength and vitality, which might be attributed to her post-concussive symptoms along with her intensified dysregulated emotional status and diagnosed conditions of depression and anxiety disorders. Dr. Bejarano recommended the IEP team maintain Student's eligibility for special education services under emotional disturbance due to her inappropriate behaviors or feelings under normal circumstances, general mood of unhappiness or depression, and tendency to develop physical symptoms or fears associated with personal or school problems.

Dr. Bejarano made seven recommendations for the IEP team. First, due to Student's poor coping strategies, increased anxiety, insomnia, and mood lability, she recommended Student's educational setting and schedule be modified to include decreased stressors while she stabilized and built improved coping skills. Due to her inconsistent attendance, Student fell behind in her classes, and required support and re-teaching of course material. Options included a smaller setting, modified school day with a later start time, co-taught classes, and increased instructional support.

Second, Dr. Bejarano suggested the IEP team consider a reasonable course load for increased success.

Third, Student might require extended time to complete homework, projects and exams. Due to the reported difficulties Student experienced with electronic devices with lit backgrounds, the IEP team might consider screen adaptations to filter light and or decreasing reliance on sustained activities on a computer.

Fourth, the IEP team might review additional written work samples to determine whether Student exhibited a unique need which required specialized academic instruction for written expression.

Fifth, due to elevated symptoms of anxiety, Student would benefit from cognitive behavioral based therapy to support restructuring of negative thought patterns leading

to anxious thinking and risk of overstimulation. Student would benefit from continued work on applying coping strategies within the educational context. Her IEP team should be aware of reinforcing avoidant behaviors and have a clear plan of how to support adaptive and functional responses. Dr. Bejarano considered collaboration with Dr. Avina as beneficial to create a system of support and generalize implementation across settings, including distress tolerance techniques.

Sixth, due to difficulties with anxiety and the effect on her school attendance, the IEP team might consider whether Student required wraparound supports to build skills within the home setting to support increased skills across settings.

Lastly, Student's stressors tended to be cumulative which led to escalation as a result of lack of self-advocacy skills, poor perception of self and others, and processing of the interpersonal exchanges. Dr. Bejarano recommended that Student would benefit from cognitive based therapy including problem-focused strategies to address this area of need.

Dr. Bejarano referenced her evaluation as a triennial assessment. It was contracted by Capistrano, and she did not consider it to be an independent educational evaluation.

August 22, 2018 Court Ordered IEP Team Meeting and Part Four of Student's 2018 Annual IEP.

Pursuant to the District Court order, Capistrano convened an IEP team meeting to review assessments which were completed within the thirty-day timeline. Ms. Malone, Ms. Eatmon, Ms. Devine, and Ms. Clanin attended the IEP team meeting on behalf of Capistrano. The IEP did not reflect the attendance of a general education teacher. Dr. Bejarano attended to review her assessments and report. Abby Rosenberg, the independent speech and language pathologist attended by telephone to report on her findings and Student's speech and language needs. Ms. Rosenberg presented an oral

report only. Capistrano's attorney, Mr. Harbottle, attended the IEP team meeting as facilitator, on behalf of Capistrano as its attorney in the District Court appeal.

The primary purpose of the meeting was to review the assessment reports and discuss courses and placement for the 2018-2019 school year.

Ms. Rosenberg reported that based upon Student's test scores. Student scored in the average range except in the area of sentence recall. Ms. Rosenberg had no concerns regarding Student's language skills. Task design was an area where Student had more problems. Some of Student's scores were low, but pragmatically appropriate. Ms. Rosenberg determined that Student had more difficulty when explanation was needed. Student wanted to get the testing done quickly. Independent work was more difficult for her. Student did not qualify for special education under the category of speech and language disorder. Ms. Rosenberg did not recommend any speech services or supports. At best, Ms. Rosenberg suggested development of study skills strategies to address Student's immediate memory, and for the IEP team to address organizational issues, which did not fall within the realm of speech and language. Mother did not question the validity of Ms. Rosenberg's presentation.

The IEP team reviewed Dr. Bejarano's assessment report. Mother asked about Student's working memory and her ability to recall oral assignments. Dr. Bejarano explained that Student's difficulty with oral information was not necessarily a deficit, but Student could benefit from an accommodation for repeating directives as a skill and to help with self-advocacy.

Mr. Harbottle asked about Dr. Bejarano's concern regarding enabling issues. He inquired if Capistrano was making things worse by allowing Student to not attend school or by not making her do things she did not want to do. Mother contended it was not a negative reinforcement because Student wanted to go to school and do well. Student did not get what she wanted by staying home. Dr. Bejarano indicated it was not

that Student got what she wanted by staying home. Rather, Student got what she wanted by avoiding the stressor. Dr. Amino had also reported that rather than push through a difficult emotional experience, Student's response was flight. She would rather leave, as she could not tolerate her feelings. That was an area of need, because Student's avoidance was not functional.

Due to time constraints, Mr. Harbottle moved the discussion to Dr. Bejarano's findings and recommendations. Dr. Bejarano did not find Student eligible for special education and related services under the category of traumatic brain injury. In her testimony she detailed the difference between "might be related to" and "caused by" or "directly related to." Based upon the information presented by Dr. Johnson, Dr. Avina and Dr. Williamson, Student presented with murky issues, medically. Instead, Dr. Bejarano suggested adding other health impairment eligibility in addition to emotional disturbance. Mother disagreed and expressed her opinion that Student met the entire definition under traumatic brain injury.

Mother clarified the reasons for her insistence on traumatic brain injury eligibility to the IEP team. As stated by Mother, a certain part of Student's brain was damaged. Her brain was still developing, and while it might not be evident right now, the brain injury might become apparent later as she developed, and her frontal lobe started developing. Because Student had not reached that stage of development, the assessment would not identify the brain injury because it was not relevant at the time. Since the assessment did not document somewhere that there was a brain injury, events that happened years down the line in her development were not going to be attributed to the brain injury, or might even go unrecognized. Traumatic brain injury was not on the IEP because it was not identified. Mother thought that happened the first time Student was assessed for her initial eligibility. Brain injury was not looked at, and Student changed along the way. So many things changed, for better and worse.

Mother continued, that with brain injuries, it was extremely important to document it because Student might not receive all the services she needed. Traumatic brain injury was added as an eligibility category for a reason, because other categories were not effective enough to really show all of Student's needs.

Mr. Harbottle interjected that regardless of what had happened in the past, there was no doubt now that Capistrano was documenting the concussions, the medical records, and Mother's concerns. The documentation of traumatic brain injury, however, was a separate question from whether Student needed, in the IEP team's opinion, eligibility under traumatic brain injury.

Dr. Bejarano completed the review of her assessment. She relied heavily on Dr. Avina and Dr. Grob's findings that Student had not been diagnosed with a neuro-cognitive disorder due to traumatic brain injury. As she stated in her assessment report, based upon the education code definition of traumatic brain injury, Dr. Bejarano could not causally link the head injury to adverse effects on educational performance. Dr. Bejarano stated it was currently not possible for her to say the traumatic brain injury directly resulted in the adverse effects to Student's education. Dr. Bejarano did not have a hard diagnosis or hard science from the medical community to say that Student currently had a brain injury that was tied to the manifestations of her symptoms which were adversely impacting her education. Student's most obvious difficulties were her emotional challenges.

Dr. Bejarano agreed with Mother regarding long-term effects. She agreed that the story needed to be told regarding Student's functioning, regarding the changes, the effect of all of this, because it was a real difference in who Student is today as a result of a lot of different circumstances. Connecting the concerns between what had occurred to what to do next in her treatment was critical. Dr. Bejarano emphasized that everyone needed to adapt, and really needed to be thinking about how to make Student's treatment go forward.

Mother persistently argued about the traumatic brain injury eligibility, which continued to take up a considerable amount of the IEP team's scheduled meeting time. To move the conversation along, Ms. Rosenberg offered that the IEP team had acknowledged there had been a traumatic brain injury as well as emotional issues. Now it was time to clarify and pinpoint the areas of deficits that existed today, and figure out what programmatic changes would address those specific deficits in the school setting.

The IEP team discussed the 2018-2019 classes for Student and what type of schedule Capistrano could offer her. Although school started on August 21, 2018, Student did not register and did not go to school. Capistrano wanted to discuss what Student's program would look like if Student returned to school.

The IEP team reviewed a continuum of placements, starting with placement full-time in general education with accommodations. The IEP team agreed that was not an appropriate placement. Capistrano anticipated the full class schedule for Student would include U.S. history, dance, geometry, physics, resource and English. The core classes consisted of history, physics, English and geometry. Mr. Harbottle sought Mother's input to determine what classes Student would attend. Mother indicated history, dance and physics, which meant Student would not be taking core classes in geometry and English. Mother repeated her preference for full-time at Halstrom, because it had been effective for Student. Student did not want to take geometry on campus. Student considered it a lower level math class, which would make her feel stupid, and increase her anxiety.

The IEP team explored other options off campus, other than Halstrom. Independent study was available, but had proven inappropriate when Student attempted Capistrano's online Cal-Prep class for algebra. The IEP team discussed Capistrano's Bridges Community School program. Bridges was a special education program not housed on a comprehensive high school campus. The program contained

between ten to twenty students, many with emotional disturbance eligibility, divided between two classrooms. The program was developed in collaboration with Orange County Mental Health and worked with many community support groups. The program was diploma track. The program was individualized and she could move on to another class if she completed a class early. On a practical level, Student would be required to attend school six hours per day.

Dr. Bejarano asked about possible placement at J Serra, Capistrano's alternative school. Dr. Bejarano's reference to J Serra was incorrect. J Serra was a private school in San Juan Capistrano. Serra was the proper reference to Capistrano's continuation school. Serra was taught by credentialed teachers, on a quarter system, rather than by semesters, which allowed students to complete more classes and potentially graduate early. Serra, however only provided special education services in the form of an English class.

Mr. Harbottle asked Mother if it was possible to get Student to begin attending Student's three preferred classes at Capistrano Valley, so she would not fall so far behind. Mother would not agree because the question remained unanswered regarding the other two classes. Mother wanted Student to take English and geometry at Halstrom. Mr. Harbottle informed Mother that he had verified that Capistrano was not permitted under the Education Code to make an offer of placement at Halstrom. Mother continued to disagree. Consensus of opinion was, even if available, Halstrom was not the least restrictive environment for Student. A one-on-one setting did not provide the socialization opportunities Student needed. Mother disagreed noting that Student's anxiety increased when she was around peers and felt she did not fit in. The Capistrano members of the IEP team asked Mother how Student could successfully attend advanced placement history and physics on a comprehensive high school campus with twenty to thirty student in the classroom if she required one-to-one assistance.



Additional options were briefly discussed. The IEP team considered Capistrano's Fresh Start program and additional TBIC courses. Mother rejected the programs as they did not lessen the amount of time Student attended school each day. Dr. Bejarano returned to consideration of Serra as a temporary solution. Mother did not like the student demographics, the amount of time spent at school daily, and questioned whether Student would receive A-G curriculum in those placements. She only wanted Halstrom where Student had proven herself successful with one-on-one instruction.

Capistrano IEP team members and Dr. Bejarano attempted to convince Mother to have Student begin a modified school day at Capistrano Valley. Dr. Bejarano suggested adding wrap-around counseling at home, to assist Student's transition back to school. Capistrano members of the IEP team also wanted Mother to consider consenting to school based counseling. Capistrano had a new intervention specialist to provide counseling services. Student might positively relate with her. Mother did not agree to the counseling, believing Student would not participate.

Dr. Bejarano offered another idea which conceptually was similar to home-hospital instruction, where the student had a tutor that was the extension of the teachers in the classroom and one-on-one instruction was provided. Dr. Bejarano indicated she did not think this was a solution, but it was something creative to consider to help Student build her skills. The home-hospital program however did not even provide lesson packets to the Student. It was only a bridge for courses. It did not continue a student's education, it merely sustained it.

Mother would not commit to a partial or interim agreement to have Student begin attending school. Mother feared Student would not handle attending school without understanding the entire program. Capistrano members of the IEP team suggested Student come to school the next day and meet with her case carrier and the assistant principal to informally discuss things. This would allow Student to participate in

the decision making process. Mother resisted this idea.

Mother commented that the IEP team did not discuss whether Halstrom was an appropriate placement. Mother contended that if Student was capable of taking a full load of classes in a different environment, such as Halstrom, then why would Capistrano deny Student the ability to take a full load successfully. The IEP team just needed to agree to modify the environment and the way in which Student's instruction was delivered. Capistrano was required to consider less restrictive options. Mother was convinced she needed only to consider lesser restrictive options, but did not need to actually try any before moving to a more restrictive environment, such as Halstrom.

At the conclusion of the IEP team meeting, Mr. Harbottle recapped Capistrano's proposals. Capistrano wanted Student to start attending her academic classes on a modified schedule. Mother would investigate Bridges and Serra. Mr. Harbottle would further investigate the legal availability of Halstrom. Capistrano would attempt an independent meeting with Student, but could call another IEP team meeting if needed.

No changes were made to Student's 2018 annual IEP at this meeting.

#### DECEMBER 7, 2018 IEP TEAM MEETING

Capistrano convened another IEP team meeting on December 7, 2018. David Ricci, general education teacher, Laura Phillips, intervention counselor, Mary Lohman, academic advisor, Ms. Malone, Ms. Eatmon, Ms. Devine, and Ms. Clanin attended the IEP team meeting on behalf of Capistrano. Student also attended this meeting. The IEP team met to review Student's academic progress and teacher reports for Student's modified class schedule as Student eventually began attending Capistrano Valley on December 7, 2018. Absences from school continued to affect Student's progress. Student missed a week of school due to illness, and had a difficult time accessing the lessons she had missed. The IEP team agreed to expand Student's accommodations to allow her to obtain copies of PowerPoint materials as well as teacher notes from daily classes.

Student was adequately accommodated, and each teacher accepted late work. Tutorials were also available to all students several times each day for extra help with lessons.

A written progress report of Student's progress on 2018 IEP goals was given to Mother. Student progress on the goals indicated Student was on target to meet each goal by the 2019 annual IEP team meeting. Student did not participate in the individual counseling services offered by Capistrano.

The IEP team spent a significant amount of time discussing Student's graduation checklist to determine what remaining classes she needed to complete to graduate in 2020. The IEP team discussed what classes could be switched and what classes remained mandatory for graduation. A problem existed with credits completed. Capistrano only allowed ten credits per year to be transferred from Halstrom. Mother enrolled Student for a full year of English and a semester of geometry. Not all of these credits could transfer to Capistrano. Additionally, Student needed to complete elective courses.

The general education teacher discussed Capistrano's Fresh Start program. Fresh Start would allow Student to work at her own pace, quickly or more slowly, to complete courses. In Fresh Start, Student would meet with a teacher. They would go over the material to be covered and Student would be given a week's worth of work to be completed independently. The work would be book work and online materials, basically reading and written work. Each week Student would review the completed work with her instructor. After review, Student would be tested on the materials, and the next week's assignments would be made. Mother and Student felt Fresh Start was merely independent study, and Student would not be successful.

Ms. Bratcher testified at hearing regarding Halstrom's programs. Ms. Bratcher holds a Master's degree in special education, and is credentialed in administrative service. Ms. Bratcher observed the Halstrom program on more than one occasion. She described a program in which students worked with an instructor once a week in a

cubicle. Students then took work home or utilized materials online and returned the next week. The description of Fresh Start was similar to that of Halstrom. Both had direct access to the instructor, both utilized online materials, and assigned homework. Student's Spanish class at Halstrom used Rosetta Stone, an online language program. Halstrom provided no counseling. Fresh Start had counseling available

To additionally support Student in the Fresh Start program, Capistrano offered to make it a blended program with an elective period of resource class. Capistrano intended to provide Student with additional academic support to complete missing assignments and reteach if necessary. Resource class could also be utilized as a safe haven for Student to rest and decompress when cognitively fatigued or anxious. Further, resource class would provide Student with ten easy elective credits towards graduation. Student did not like the idea of resource class, as she felt she would have to get a lot of work done. It was pointed out that both Fresh Start and resource were flexible. She could take frequent breaks if needed. But, as stated by the teacher, there was still a lot of work that Student needed to complete to graduate.

Mother requested more specific reasons for why the school board would not accept more than ten credits per year from Halstrom. Capistrano members indicated that Board decisions and Board policies were outside the power of special education and the IEP team. Mother refused to accept this explanation and wanted to know why the IEP team could not tell the Board that Student was doing well at Halstrom, and it would be in Student's best interests to continue to attend Halstrom. Mother equated the IEP team's position to allowing the Board's policy to trump Student's needs.

Mother rejected the blended Fresh Start and resource option. She reiterated that resource was not direct instruction, but more like study hall. Student could sit there doing her homework, but she would still be self-teaching. Mother expressed her other concern that she had already paid Halstrom and signed Student up for the year-long

program. The resource class was not a new addition to Student's schedule, as her last implemented IEP already provided it., as Mother previously consented to implementation of the resource class as contained in the 2018 annual IEP. Nothing had changed. Further, Dr. Bejarano's assessment did not recommend one-on-one teaching for Student.

Mother indicated she did not agree with Dr. Bejarano's assessment. She considered Dr. Bejarano biased for Capistrano. Dr. Bejarano previously worked for Capistrano. Mother voiced her opinion that the only programs Dr. Bejarano recommended were the ones Capistrano had. Mother did not believe Dr. Bejarano assessed Student's brain injury, and ignored the obvious medical information available to her.

Much discussion and confusion ensued for Capistrano members of the IEP team regarding whether Dr. Bejarano's assessment was an independent educational evaluation or a school district assessment. There was further confusion as to whether the assessment was an early triennial assessment for Student. Capistrano members of the IEP team did not consider Dr. Bejarano's assessment to be Student's triennial assessment. Capistrano did not assess Student, nor were Capistrano staff consulted about the assessment process or areas of need. The decision to assess Student was made as part of the District Court appeal.

Mother provided the IEP team with a quantitative electroencephalography report, dated October 23, 2018. Quantitative electroencephalography is referred to as QEEG. The QEEG assessment report was under the letterhead of Donald F. Deering, Ph.D. Dr. Deering did not attend any of Student's IEP team meetings to explain his assessments or recommendations, and he did not testify at hearing. The assessment was extremely complicated and the report was not intended for layman or judicial understanding. Mother indicated the report was written for one doctor to another to assist in

identifying appropriate treatment. It was not written for application in an educational setting. Mother obtained this assessment to refute Dr. Bejarano's determination she could not recommend traumatic brain injury eligibility due to no hard evidence. Mother considered Dr. Deering's report to be the gold standard of traumatic brain injury definition. Mother requested Capistrano adopt Dr. Deering's recommendation that Capistrano provide Student with sixty biofeedback sessions.

Mother informed the IEP team that Student's eating disorder was evolving, and she was going to attend the Bulimia and Anorexia Nervosa Clinic at Children's Hospital of Orange County. Mother informed the IEP team members that Student was experiencing heart issues due to her stress. Mother also mentioned that Student had suffered another head injury, but would be medically released to participate in pole vaulting.

The QEEG report needed to be reviewed by the school nurse. The IEP team agreed to continue the IEP team meeting one week to December 14, 2018, to allow Capistrano to review the QEEG and have the school nurse available to discuss the report. Mother expected Capistrano members of the IEP team to challenge the Board policy regarding transfer credits.

### QEEG ASSESSMENT AND REPORT

The QEEG assessment report was difficult to understand without an extensive understanding of neurology and the accompanying medical etymology. The report provided a clinical interpretation of attention-deficit hyperactivity disorder or ADHD, and determined Student's brain function appeared to be similar to people with borderline ADHD. Student's QEEG may show deviations from normal neurophysiological parameters that evidence linked to other conditions. The deviations noted in the study were described, but were meaningless to the layperson.

The report identified possible neuro-functions which may have been affected.

The list included verbal retrieval and memory, auditory working memory, language comprehension, visual working memory, visual processing, short and long term memory and numerous other items which were comprehensively assessed by Dr. Bejarano. Other possibly affected areas included impulse control, emotional processing, poor response inhibition and behavioral inhibition. Anxiety, excessive ruminations, worry and sleep pathology were also possible.

The assessment report indicated Student's QEEG was consistent with QEEGs with an established diagnosis of head trauma or related sequelae. Her QEEG was consistent with an established diagnosis of learning disorder or related sequelae.

Based upon these inexplicable assessments, Dr. Deering offered his clinical summary, and made the following recommendations which were intended as clinical hypotheses to be considered in light of other data collected during the course of the ordering provider's comprehensive assessment. Michael Linden, Ph.D. was listed on the assessment report as the provider. It remains unknown who Dr. Linden was or whether he had any connection to Student. The lack of context for the QEEG assessment severely limited the assessment report's credibility.

Dr. Deering reported the following possibilities:

1. Affect Disorder, anxiety, eating disorder, unspecified. Student had symptoms consistent with anxiety related disorder, which might contribute to a host of other symptoms including cognitive and sleep related issues.
2. Traumatic Brain Injury or Post Concussive Syndrome, unspecified. Student had symptoms consistent with traumatic brain injury and or post concussive syndrome as evidenced by her QEEG profile.
3. Mood Disorder, depression, unspecified. Student had symptoms consistent with mood related disorder which might contribute to a host of other symptoms, including cognitive, mood, and sleep related issues.

The assessment report ruled out attention-deficit hyperactivity given its borderline status, and indicated there might be other contributory factors to Student's inattentive symptoms, such as anxiety or mood disorder. Learning disorder was ruled out.

Appendix A to the assessment report contained recommendations for neuro-feedback which included the following:

1. Five sessions of introductory relaxation training to help with preparedness for improving sleep hygiene and improved problem solving.
2. Twenty to twenty-five sessions of sensory motor rhythm training. There was no explanation as to what this training provided. It appeared it was intended to increase focus and attentional skills, in an effort to drive more synchrony between regions of the brain.
3. Fifteen sessions of Theta-Beta training, which remained undecipherable as to what it was and what it intended to accomplish.
4. Twenty to twenty-five sessions of coherence training, which also remained unexplained.
5. Repetition of the QEEG after completion of the proposed 60 sessions of neuro feedback to determine maximum benefit before moving forward with additional, more specific protocols.

The QEEG assessment report indicated Student might likely benefit from individual and family supportive counseling in an effort to address reported symptoms. Student might benefit from testing and assessment for diagnostic and treatment planning purposes. Lastly, Student might benefit from a psychopharmacological approach to treating mood and attentional problems if the neuro feedback recommendations did not provide adequate results.

The QEEG report, on its face, presented little information to establish traumatic



brain injury to the extent required under the education code. The report in many parts was entwined with so much medical language, references, and assumptions of understanding to make it unintelligible without further explanation from experts. Dr. Deering did not present his report to the IEP team. He did not testify at hearing to explain what the assessment meant, or indicate the purpose of the neuro feedback recommendations. As a result, the report lacked credibility and was of little use to discredit Dr. Bejarano's findings.

#### DECEMBER 14, 2019 IEP TEAM MEETING

The IEP team reconvened on December 14, 2018. The school nurse attended to discuss the QEEG assessment report. Dr. Deering did not attend to explain the QEEG or his recommendations. Mother wanted Student's eligibility changed to traumatic brain injury on the basis of the QEEG assessment. The nurse indicated that a lot of the report was a repeat of what Dr. Williamson already told Capistrano. The only new information ruled out attention-deficit hyperactivity disorder. Dr. Deering did not determine whether the concussion had caused the emotionality. The nurse clarified, that as a registered nurse, she could not make a diagnosis. She could only take the doctor's findings and present the information to the IEP team to help determine how the IEP team should move forward given the information. The transcript of the IEP team meeting suggested that no one, including the nurse or Mother, actually understood the QEEG assessment or report. The nurse referenced her previous conversation with Dr. Williamson and Mother. Medically, Dr. Williamson diagnosed Student with a traumatic brain injury. The purpose of that discussion had been to find out if the concussions caused Student's emotionality. Dr. Williamson concluded she could not really decipher or make the distinction of whether the concussions came before Student's emotional disturbance. Capistrano team members suggested the QEEG report could more thoroughly be addressed in the 2019 triennial assessments and IEP team meeting.

Mother requested the IEP team utilize Dr. Williamson's report from 2016, rather than Dr. Bejarano's assessment report from 2018, in spite of the input from the nurse. Notably, Mother ignored the fact that Dr. Williamson's report had been considered in the June 14, 2017 decision, and it determined that Capistrano's determination of eligibility and IEPs were appropriate. Capistrano members of the IEP team once again explained that a school district assessment would be needed to change Student's eligibility to traumatic brain injury. Mother requested an independent educational evaluation in response to Dr. Bejarano's assessment, as Mother did not sign an assessment plan. Mother did not select Dr. Bejarano as the assessor. Mother only agreed to allow Capistrano to assess Student as part of the District Court case. Mother did not agree that Dr. Bejarano assessed Student in all areas of suspected need.

Capistrano members of the IEP team offered to prepare another assessment plan for the triennial assessment. Mother did not want Capistrano to do another assessment of Student. She would not sign for a Capistrano assessment of Student. She wanted an independent educational evaluation.

Mother complained that without eligibility under traumatic brain injury, Capistrano was not looking at Student as a whole. Mother contended thirty minutes of counseling relating to school was not appropriate mental health services for someone with this intense of emotional issues. Capistrano members of the IEP team indicated Capistrano's obligation was to support Student academically, and Capistrano offered Student counseling services. Capistrano changed Student's counseling to a new school psychologist, hoping Student could connect with her.

In contrast Mother reported Student was no longer seeing Dr. Avina. Student found the travel distance and time too demanding. In addition to her classes at Capistrano and Halstrom, Student also had a part-time job.

No changes were made to the 2018 annual IEP.

## PRIOR WRITTEN NOTICES FOR DECEMBER 2018 IEP TEAM MEETINGS

On January 10, 2019 Capistrano sent Mother a letter indicating it would respond to Mother's request for an independent educational evaluation at the December 14, 2018 IEP team meeting by January 21, 2019. A copy of Capistrano's procedure for obtaining an independent educational evaluation was enclosed with the letter.

On January 10, 2019, Capistrano sent Mother a letter of prior written notice for her requests made at the December 14, 2018 IEP team meeting. Capistrano denied Mother's request for a waiver of Capistrano's school board policy, BP 6146.1(e), which limited a transfer of course credits from an accredited non-district institution to ten credits annually. Capistrano indicated Student had successfully completed one hundred-five credits in the least restrictive environment at Capistrano Valley, and ten credits from Halstrom had been credited during the 2016 to 2017 school year. Student had demonstrated the ability to succeed in general education classroom setting with accommodations, services, and supports written into her IEP to support her access her education.

Capistrano denied Mother's request for Capistrano's funding of neuro feedback treatment, recommended in the QEEG assessment and report as Capistrano concluded neuro feedback treatments were training in self-regulation. Capistrano members of Student's IEP team felt Student's 2018 IEP goals addressed self-regulation strategies and her identified area of need. The individualized counseling services offered to Student provided access to a therapist that utilized multiple methodologies when providing counseling services. Mother refused the counseling service contained in the IEP.

The prior written notice letter continued to offer the 2018 IEP as a FAPE for Student. Since Mother had not consented to the 2018 IEP, Capistrano intended to continue implementing the services to which Mother had previously provided consent for implementation as follows: individual specialized academic instruction in a separate

environment with accommodations once per week for fifteen minutes, group specialized academic instruction in a separate environment with accommodations once per week, for two hundred fifty-two minutes, and individual counseling once per week for thirty minutes.

On January 17, 2019, Capistrano sent Mother a letter of prior written notice regarding her December 14, 2018 request for an independent educational evaluation at public expense. Capistrano denied Mother's request. Capistrano determined an appropriately qualified assessor completed a comprehensive assignment aligned with assessment questions, and considered Student's needs, which provided the IEP team with meaningful data. The assessment met all legal requirements. The prior written notice also indicated Capistrano intended to file a due process request to defend the appropriateness of the psychological assessment.

#### JANUARY 31, 2019 TRIENNIAL IEP TEAM MEETING

On January 16, 2019, Capistrano sent Mother an email confirming the triennial IEP team meeting scheduled for January 31, 2019. Capistrano agreed to forgo additional formal assessment, and utilize a records review only, with Dr. Bejarano's assessment guiding the triennial review. An assessment plan providing a records review only was forwarded to Mother, along with a release of information from Halstrom. Mother did not sign the assessment plan.

The 2019 triennial IEP team meeting was held on January 31, 2019. Ms. Eatmon, Ms. Devine, Mr. Ricci, Ms. Clanin, Ms. Bratcher, and Ms. Malone attended the IEP team meeting on behalf of Capistrano. Student did not attend this meeting. The Capistrano members of the IEP team explained to Mother that parental consent to the assessment plan was required even if the assessment consisted only of a review of records and observations. Mother disagreed and argued that consent was not warranted because Capistrano should have been reviewing records and observing Student throughout the year.

The IEP team reviewed Dr. Bejarano's assessment report as part of their determination of eligibility. Mother again requested special education eligibility under the category of traumatic brain injury, based upon the medical information she had provided to Capistrano in the QEEG assessment. Capistrano members of the IEP team informed Mother that had she consented to the records review, the medical documentation submitted in December 2018 would have been considered for the triennial determination of eligibility. Dr. Bejarano's assessment report recommended eligibility of other health impairment secondary to emotional disturbance. Parent disagreed with Dr. Bejarano's assessment, and requested an independent educational evaluation. She would not sign a Capistrano assessment plan. Mother repeated that she felt Student had cognitive fatigue and inability to sustain attention. Capistrano members of the IEP team explained that those symptoms were identified under the category of other health impairment.

The general education teacher reviewed Student's academic progress. Student's attendance still impacted her grades in general education classes. Fifteen absences were reported since December 14, 2018. Mother indicated Student had emotionally improved and had been off her psychiatric medicines since November 2018. Mother had not seen Student this happy in a long time.

Capistrano members of the IEP team reviewed Student's progress on previous goals. Due to Student's continuing anxiety, she required frequent breaks from class. Student's case carrier reviewed draft goals in the social-emotional areas. The proposed goal was modified to include attendance and participation in counseling sessions to continue working on decreasing personal anxiety associated with school activities and peer interaction.

The IEP team proposed a goal which addressed anxiety. Student did not meet her

previous anxiety goal because she refused to participate in school counseling. Anxiety was still a major issue impacting Student's access to her education.

A second goal addressed Student's depression. Student made progress in her ability to identify enjoyable activities, but she still did not seek support from a trusted adult. Student still isolated herself when she was upset. The new goal sought to have Student continue to work on seeking help from a trusted adult.

A third social-emotional goal addressed self-advocacy. Student could self-advocate with teachers with whom she was comfortable. The goal sought to have Student continue working on self-advocacy. Mother expressed that when Student was distressed, she was unable to speak up for herself. She had made progress because she was doing better emotionally. Student met her positive though goal, and it was not a continuing area of need.

The IEP team drafted a goal to support study skills. Student made progress on her prior study skills goal, with a baseline of seventy-five percent. Mother did not think Student had achieved anything on this goal. Teachers reported Student lost interest and motivation to complete missing assignments. Mother indicated Student became overwhelmed, and motivation was not the problem. The IEP team revised the proposed study skills goal to one hundred percent and sought to have Student take responsibility by asking for help on content and or on assignments that she missed while absent.

The IEP team discussed accommodations. Mother inquired as to whether teacher notes were being provided to Student. The IEP team discussed Student asking for notes and discussing it with her teachers.

The individualized transition plan was discussed. Notably, Student indicated she was now interested in considering community college instead of a four-year university upon graduation.

The IEP team reviewed Student's transcript. Capistrano members of the IEP team

discussed a recommended schedule of classes for the current semester along with the courses needed to meet graduation requirements. Student lacked elective course credits. Mother reported Student was taking English and geometry at Halstrom. Mother requested reconsideration of the school board policy and disputed the Board decision to limit Student's non-district credits to ten per year. Mother disputed the prior written notice letter sent earlier in January 2019, and questioned who had actually made the decision to deny the credits. The Capistrano members of the IEP team told Mother the decision was based upon general education criteria, and was not within their powers in special education to change the policy. They were not privy to Board decisions made in closed sessions, and they were unable to answer her questions.

Kathleen Purcell, Capistrano Executive Director of Alternate Dispute Resolution and Compliance, testified at hearing to explain the prior written notice issued January 10, 2019. Ms. Purcell usually reviews prior written notices to be sent to parents as part of her compliance duties. She researched whether the Board would deny Mother's request to allow additional Halstrom credits. The question was not put to the Board directly, but to the Assistant Superintendent. The issue of transferable credits was not within the dominion of special education. It was a general education issue, not subject to waiver based upon a special education claim.

Mother claimed Capistrano did not understand Student's need for one-on-one instruction. The Capistrano members of the IEP team noted that Student was employed outside the home with a part-time job. She participated in track and field activities. Her emotional well-being had improved, which was documented by Mother and teacher input. She was progressing in her general education classes and on her goals. The Capistrano members of the IEP team no longer recommended a modified class schedule for Student. The modified schedule was intended to stabilize Student's emotionality to allow her to transition back into full-time classes within Capistrano. Mother disagreed.

She contended Capistrano had not taken Student's cognitive fatigue into consideration. Further, Student was already taking English and geometry at Halstrom. Mother again inquired about a waiver of Board policy, refusing to accept that the Board had made its decision.

Capistrano members of the IEP team made recommendations for services, and asked Mother for her input. Specialized academic instruction was still proposed for Student. Mother disagreed. She believed the resource class did not benefit Student. Mother requested information on general education summer school options that were not online. Mother reported Student would complete her math requirements at Halstrom. Capistrano IEP team members responded that the resource class and collaborative math setting were designed to support Student when excessive absences required re-teaching of missed instruction and missing assignments. At Mother's request, the IEP team removed the IEP reference to Student needing a slower pace.

The IEP team discussed the least restrictive environment for Student. Capistrano members of the IEP team proposed Student remain in the general education setting on the comprehensive high school campus at Capistrano Valley, where she currently attended class. Student had been successful in the general education setting with the accommodations identified in the IEP and the supports offered in goals and services.

The IEP team again discussed the Fresh Start program which would provide Student with flexibility through dual enrollment with Capistrano Valley. The independent work in Fresh Start could be supported by the resource class. Mother declined an offer to tour the Fresh Start campus and program.

Mother presented no evidence to support her theory that Student required one-to-one instruction in order receive educational benefit. Instead, Mother argued she had already paid for Student's Halstrom classes, and she continued to request a Board waiver of credit transfer limitations. Mother's remaining arguments regarding



Capistrano's failure to review records or re-consider medical information was precluded by her own refusal to provide Capistrano with consent to re-assess Student, even for a records review.

Based upon the information available to Capistrano at the time, Capistrano's offer of FAPE at the 2019 triennial IEP team meeting consisted of the determination of eligibility for special education and related services under the primary category of emotional disturbance and secondary category of other health impairment.

Four new goals addressed Student's social-emotional needs in the areas of anxiety, depression, positive thought, and self-advocacy. A study goal continued assisting Student with work completion which resulted from her falling behind in classes due to her absences. These goals were supported by the accommodations which had been previously discussed and modified in accordance with Dr. Bejarano's recommendations and Mother's input. The goals were supported by the offer of specialized academic instruction utilized in the resource classroom. The resource class provided Student with additional support to complete her work and independent study in Fresh Start. Student could utilize the resource classroom for rest periods and breaks due to cognitive fatigue. The resource class counted as an elective class which Student required for graduation. Capistrano continued to offer Student thirty minutes of school counseling to support her social-emotional goals.

#### MOTHER'S ADDITIONAL TESTIMONY

As a self-representing parent, Mother was allowed to testify in a narrative form rather than in question-answer format. Capistrano viewpoints and policies did not make sense to Mother, which resulted in her demands for clarifications and re-examination of particular issues of importance to her at each IEP team meeting. Mother identified a series of procedural glitches. As example, Mother indicated she did not receive the first page of IEP team meeting notice scheduled for February 16, 2017. Mother nonetheless

attended the February 16, 2017 IEP team meeting and fully participated as evidenced by the February 16, 2017 IEP team meeting recording and transcript.

A general education teacher attended the February 1, 2017, part one, and February 9, 2017 part two of the annual IEP team meeting. The general education teacher was not present for the February 16, 2017 discussion of Dr. Johnson's independent educational evaluation. Mother did not waive the appearance of the general education teacher as a required member of the IEP team. The IEP team intended to discuss Dr. Johnson's report and recommendations. Student was a general education Student and, Mother wanted Capistrano to consider a modified school day for Student based upon her understanding of Dr. Johnson's recommendations. Capistrano members attending the IEP team meeting did not agree to a modified schedule. Instead they offered the resource class as an elective in lieu of Student's Spanish class.

Mother did not consent to the 2018 annual IEP as FAPE. Instead, in March 2017, Mother signed her consent to replace Student's Spanish class with resource class only. Her consent to the resource class was conditional upon Capistrano offering Student access to a Spanish class during the summer. Capistrano did not offer a summer Spanish program. The 2017 annual IEP team had offered Student a Spanish class during her second semester of the 2017-2018 school year. Mother had disagreed with this offer at the IEP team meeting. Mother requested a one-to-one summer program. Mother then enrolled Student at Halstrom for a Spanish class which Student completed during summer 2017.

Mother contended Capistrano predetermined its offers of FAPE. Mother opined Capistrano only offered Student programs based on what Capistrano had available, not on what Student needed. Mother felt Capistrano members of the IEP team discussed only what they wanted to discuss, not what Mother wanted to discuss, especially when Mother wanted answers. Specifically, Mother became frustrated when Capistrano IEP

team members diverted discussions by indicating they would get back to Mother, but never did. Mother acknowledged she asked the same questions over and over again. She felt she was not getting complete answers from Capistrano. She expressed that Capistrano's prior written notices did not sufficiently explain Capistrano's reasons for denying her requests. Mother considered this an example of Capistrano's predetermination of Student's special education placement and program. Capistrano made minor changes to the IEPs requested by Mother. Capistrano, however, continually refused to make the real changes she wanted, specifically, the change in eligibility to traumatic brain injury, and dual enrollment for Student at Halstrom.

Mother considered Ms. Rempe's attendance at the March 20, 2017 IEP team meeting to present the TBIC math program another form of Capistrano's predetermination of placement. Mother viewed Ms. Rempe's presence as an attempt to sway her to TBIC, when she already made it clear to Capistrano that she wanted year-round classes for Student, not the TBIC or online classes.

The IEP team often got off track and did not discuss all agenda items at the IEP team meetings. As example, Mother felt the IEP team failed to appropriately discuss goals. The goals for Student remained essentially the same each year. Student's present levels of performance remained the same each year. Mother equated this to nothing being measured, which resulted in no changes in Student's baselines. She also opined the goals were predetermined to fit Capistrano's programs and services.

In her presentation at hearing, Mother asked several Capistrano IEP team members about staff meetings prior to IEP team meetings and draft IEPs, in an attempt to establish predetermination. Mr. Bartaluzzi reported that staff meetings took place before the IEP meeting to discuss Student's needs to draft goals. Parents were not involved in the staff meeting, but parents' known input and concerns were considered. Davine Jones, Capistrano program specialist, reported Capistrano usually prepared for

an IEP meeting in advance in a staff meeting. These meetings did not discuss placement. Ms. Bratcher agreed. Placement was not discussed at staff meetings. Ms. Clanin, described staff meetings as a common practice prior to IEP meetings. Staff members met to get updates on how students were doing. Options were discussed, however, FAPE was not determined until the IEP meeting.

Mother presented no evidence to contradict Capistrano's determination of Student's present levels of performance, or need for additional services. Mother often expressed that Student needed more services and support, but failed to establish or even suggest what Capistrano failed to include in the IEPs.

Mother expressed confusion as to what exactly constituted Student's annual IEP and offer of FAPE versus the Part One, Part Two and Part Three of each IEP. To Mother, the IEPs were ambiguous. She did not know what she could hold Capistrano responsible for in each part of the IEP. As example, Mother did not understand the ramifications of her consent to implementation of the resource class, which allowed Capistrano to keep Student in a resource class without further parental consent.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

In the discussion herein, unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below. Further, all references in this discussion to the Code of Federal Regulations are to the 2006 version.

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The Individuals with Disabilities Education Act is often referred to

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

A FAPE, which is an acronym for "free appropriate public education," 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, or "IEP," is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel. This statement describes the child's needs, and academic and functional goals related to those needs. It also provides a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

*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. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.)

The 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 Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases

mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

In *Andrew F. v. Douglas County School Dist.* (2017) 580 U.S. \_\_\_\_ [137 S.Ct. 988, 1000] (*Andrew F.*), the Supreme Court held that a child's "educational program must be appropriately ambitious in light of his circumstances." "[E]very child should have a chance to meet challenging objectives." (*Ibid.*) *Andrew F.* explained that "[t]his standard is markedly more demanding than the 'merely more than de minimis' test . . . . [¶] . . . The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." (*Id.* at pp. 1000-1001.) However, the Supreme Court did not define a new FAPE standard in *Andrew F.*, as the Court was "[m]indful that Congress (despite several intervening amendments to the IDEA) has not materially changed the statutory definition of a FAPE since *Rowley* was decided, we decline to interpret the FAPE provision in a manner so plainly at odds with the Court's analysis in that case." (*Id.* at p. 1001.) The Court noted that "[a]ny review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal." (*Id.* at p. 999 [italics in original].) The Ninth Circuit affirmed that its FAPE standard comports with *Andrew F.* (*E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535.)

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

(2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387] (*Schaffer*); see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Student requested the hearing in this matter on all issues, except whether Dr. Bejarano's evaluation and report was legally appropriate under State and federal law, to which Capistrano has the burden of proof. Student has the burden of proof on all other issues.

To assist courts and administrative tribunals, the Supreme Court established a two-part test to determine whether an educational agency has provided a FAPE for a disabled child. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 947 (*Mercer Island*).) "First, has the State complied with the procedures set forth in the Act? Second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" (*Rowley*, supra, 458 U.S. at pp. 206-207.) "If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." (*Id.* at p. 207.)

In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Ibid.*) Whether a student was offered or denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed, not in hindsight. "An IEP must take into account what was, and



what was not, objectively reasonable . . . at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*), citing *Fuhrman v. East Hanover Bd. of Education* (3rd Cir.1993) 993 F.2d 1031, 1041.)

## FAILURE TO ASSESS

### Res Judicata and Collateral Estoppel

Federal and state courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel. (*Allen v. McCurry* (1980) 449 U.S. 90, 94 [101 S.Ct. 411, 66 L.Ed.2d 308]; *Levy v. Cohen* (1977) 19 Cal.3d 165, 171 [collateral estoppel requires that the issue presented for adjudication be the same one that was decided in the prior action, that there be a final judgment on the merits in the prior action, and that the party against whom the plea is asserted was a party to the prior action]; see 7 Witkin, *California Procedure* (4th Ed.), Judgment § 280 et seq.) Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties or their agents from re-litigating issues that were or could have been raised in that action. (*Allen, supra*, 449 U.S. at p. 94.) Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude re-litigation of the issue in a suit on a different cause of action involving a party to the first case. (*Ibid.*; *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341; see also *Migra v. Warren City School Dist. Bd. of Ed.* (1984) 465 U.S. 75, 77, n. 1 [104 S.Ct. 892, 79 L.Ed.2d 56] [federal courts use the term "issue preclusion" to describe the doctrine of collateral estoppel].) While collateral estoppel and res judicata are judicial doctrines, they are also applied to determinations made in administrative settings. (See *Pacific Lumber Co. v. State Resources Control Board* (2006) 37 Cal.4th 921, 944, citing *People v. Sims* (1982) 32 Cal.3d 468, 479; *Hollywood Circle, Inc. v. Department of Alcoholic Beverage Control* (1961) 55 Cal.2d 728, 732.)

The IDEA, however, contains a section that modifies the general analysis with regard to res judicata and collateral estoppel. The IDEA specifically states that nothing in the Act shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed. (20 U.S.C. § 1415(o); 34 C.F.R. § 300.513(c) (2006); Ed Code, § 56509.) Therefore, although parties are precluded from re-litigating issues already heard in previous due process proceedings, parents are not precluded from filing a new due process complaint on issues that could have been raised and heard in the first case, but were not.

Student contends that Capistrano failed to assess her in all areas of suspected disability because it did not specifically assess her in the area of traumatic brain injury. Student contends Capistrano withheld or ignored the medical information which should have been utilized by Capistrano and the IEP team in determining Student was a child with traumatic brain injury. By failing to identify Student's traumatic brain injury, Capistrano failed to assess Student in all areas of suspected need, which, in turn, resulted in Capistrano's erroneous determination of Student's eligibility for special education and related services under the category of emotional disturbance, rather than traumatic brain injury.

For special education purposes, traumatic brain injury means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. Traumatic brain injury applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. Traumatic brain injury does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma. (34 C.F.R. § 300.8(c)(12); Cal.

Code Regs., tit. 5, § 3030, subd. (b)(12).)

Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational program:

- A. an inability to learn that cannot be explained by intellectual, sensory, or health factors;
- B. an inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- C. inappropriate types of behavior or feelings under normal circumstances;
- D. a general pervasive mood of unhappiness or depression; and or
- E. a tendency to develop physical symptoms or fears associated with personal or school problems.

(34 C.F.R. § 300.8(c)(4)(i); Cal. Code Regs., tit. 5, § 3030, subd. (b)(4).)

To qualify for special education under the categories of traumatic brain injury or emotional disturbance, both state and federal statutes and/or regulations require that the condition adversely affect the child's educational performance.

Student's assessment contentions were raised and litigated in Student's prior filings for due process and June 14, 2017 OAH decision. In that matter, Capistrano's 2016 initial assessment of Student, along with Capistrano's determination of emotional disturbance eligibility were found appropriate. Student's contentions in this case are a continuation of the same argument, and to the extent the June 14, 2017 decision decided Student's failure to assess issue, Student is estopped from re-litigating Capistrano's 2016 assessment, and Capistrano's determination of emotional disturbance eligibility rather than traumatic brain injury as determined in Student's initial IEP and maintained in Student's 2017 annual IEP through February 16, 2017, and has burden to show that Capistrano failed to adequately assess from February 17, 2017 forward.

## Assessment Requirements

Prior to making a determination of whether a child qualifies for special education services, a school district must assess the child in all areas of suspected disability. (20 U.S.C. § 1414(a), (b); Ed. Code, §§ 56320, 56321.) The school district must assess a student in all areas, including, *if appropriate*, health and development, vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social and emotional status. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304 (c)(4); Ed. Code, § 56320, subd. (f).)

A reassessment of the pupil shall be conducted if the local educational agency determines that the educational or related service needs, including improved academic and functional performance, of the pupil warrant a reassessment, or if the pupil's parents or teachers request a reassessment. (Ed. Code., § 56381 subd. (a)(1).) A reassessment shall occur not more frequently than once a year, unless the parent and the local educational agency agree, in writing, that a reassessment is unnecessary. (Ed. Code § 56381, subd. (a)(2).)

A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park, ex rel. Park v. Anaheim Union High School Dist.*, 464 F.3d, 1025, pp. 1032-1033 (*Park*); *Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1120-22 (*Timothy O.*))

A procedural violation does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation:

1. impeded the child's right to a FAPE;
2. significantly impeded the parent's opportunity to participate in the decision-making process; or

3. caused a deprivation of educational benefits.

(20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).

Based upon her questions and testimony at hearing, Mother applied a very limited definition to the term assessment, and had extremely high expectations of what an educational assessment should entail. She perseverated on traumatic brain injury eligibility with an expectation that the eligibility label alone would provide Student with additional supports and services beyond what was provided by Capistrano. Other than her insistence on a modified school day and one-to-one instruction from Halstrom, Mother offered no other suggestions of what was to be gained by further assessment for traumatic brain injury, or what had changed from Capistrano's previous assessment that the prior decision between the parties upheld.

Student relied heavily upon Dr. Johnson's independent assessment to establish her contention that Capistrano failed to assess in all areas of suspected disability. Dr. Johnson concluded Student qualified for eligibility under traumatic brain injury based upon her determination that Student suffered from concussion-induced brain injury or post-concussion disorder. Aside from a recommendation that Student's eligibility label be changed to traumatic brain injury, Dr. Johnson made no recommendations for further assessment in any area. Her recommendations for accommodations and counseling were similar, if not the same, to those being offered by Capistrano.

Dr. Johnson recommended Student consider Irlen lenses to help filter light or obtain a light filter for her computer, which she anticipated should be covered by Student's medical insurance. Student needed to see an ophthalmologist to obtain Irlen lenses. Dr. Johnson made these recommendations without correlating Student's testing results to her opinions. Instead, she merely suggested visual issues were typical in

traumatic brain injury case. Likewise, Dr. Johnson's recommendation for an audio recorder was made without any factual determination that Student's audio processing skills required such an accommodation. This appears to be the basis for Student's contention that Capistrano failed to assess Student for assistive technology. Student presented no evidence to suggest a need to assess or provide assistive technology other than Dr. Johnson's reference to an audio recorder.

As previously determined, Dr. Johnson's credibility was successfully challenged. She did not observe Student's general education classrooms or speak with any of Student's Capistrano teachers. Her recommendations for the audio recorder and Irlen lenses were not supported by any evidence other than her own assumption that vision and hearing were areas often affected by concussion or brain injury. Nothing presented in Dr. Johnson's assessment indicated a need for further visual or audio processing assessment beyond what had already been assessed, nor did Student present any additional evidence to support a need for additional assessment in any area.

On numerous occasions Capistrano staff and IEP team members explained the purpose of special education assessments to Mother. Capistrano initially assessed Student to determine if she qualified for special education and related services. Once eligibility was established, regardless of the category, Capistrano was required to reassess every three years to determine if Student continued to qualify for special education and related services.

Mother insisted Capistrano's failure to find Student eligible for special education and related services under traumatic brain injury resulted from Capistrano's failure to assess specifically for traumatic brain injury. This contention was misguided. The assessments conducted by Capistrano were multi-faceted and appropriately selected to determine Student's areas of need, including those areas which might have been impacted by traumatic brain injury. The assessments were based upon information

regarding Student's suspected areas of need, including both traumatic brain injury and emotional disturbance. Utilizing the assessment information, the IEP team determined what educational supports and services Student needed to access and receive benefit from her education. The areas of suspected need assessed by Capistrano did not marginalize the possibility of traumatic brain injury. The assessment results, along with the medical and mental health information provided to Capistrano indicated that even if Student suffered a traumatic brain injury, she did not require academic support or remediation related to that disability. Student's special needs and weaknesses remained clearly identified in the social emotional areas aligned with continuing mental health issues of anxiety and depression.

Educational assessments are not intended to diagnose or medically treat a child's physical disability. The convergence of a medical diagnosis with an educational assessment occurs in identifying what symptoms of the medical condition, if any, require special education and related services to support or provide the child with access to education. As explained to Mother on numerous occasions, the existence of a disability does not automatically make a child eligible for special education and related services. The disability must affect the child's ability to access her education or prevent the child from receiving more than de minimus benefit from her education.

Further, Capistrano's obligation to assess Student in *all* areas was not never-ending, excluding Capistrano's obligation to conduct triennial assessments or a change in Student's condition. The statutory areas including health and development, vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social and emotional status were guidelines and utilized, if appropriate, based upon suspected disability. Capistrano was not obligated to assess in each and every area, absent a suspicion a deficit actually existed. In her quest

for a specific traumatic brain injury assessment, Mother presented no evidence to establish that a specific traumatic brain injury assessment even existed.

California special education law does not require that a child be classified by his or her disability, as long as each child who has a listed disability and needs special education and related services as a result of the disability receives the special education and related services he or she needs to access her education. (Ed. Code, § 56301, subd. (a).) Assuming Mother unequivocally established that Student's concussions resulted in traumatic brain injury, the assessments administered by Capistrano would not have changed. Assuming further, that Student was eligible for special education and related services under traumatic brain injury, there was no evidence presented by any party, assessor, or medical or mental health provider which established that Student's needs required anything more than the social and emotional goals and accommodations offered by Capistrano at each IEP team meeting. Student's situation is different than the student in *Timothy O.* as the student there demonstrated how his educational program could change if found eligible under the category of autism, while Mother did not do so in this case.

#### CONSIDERATION OF NON-DISTRICT ASSESSORS AND MEDICAL OR MENTAL HEALTH DOCUMENTS

##### Withholding of medical documents

Student's contentions that Capistrano withheld medical documentation of Student's traumatic brain injury arose out of Mother's allegation that in February 2016, Capistrano claimed it did not have medical documentation of Student's traumatic brain injury, which Mother had provided to Capistrano to establish Student's traumatic brain injury. Mother also alleged that in December 2016, Capistrano's suppressed medical documentation of Student's most recent concussion which further supported determination of eligibility under traumatic brain injury. The appropriateness of



Capistrano's actions in 2016 were determined in the June 14, 2017 decision and are subject to res judicata and collateral estoppel. Additionally, any new allegations which arose prior February 18, 2017, are barred by the statute of limitations. As a result, Student's 2016 contentions are not determined in this decision.

#### Failure to Consider Non-Capistrano Assessments and Reports

Student contends Dr. Johnson's independent assessment and the QEEG assessment provided to the IEP team were ignored and not considered by the IEP team.

If a parent obtains an independent assessment at public expense, or shares with the school district an evaluation obtained at private expense, the results of the evaluation must be considered by the school district, if it meets agency criteria, in any decision made with respect to the provision of a FAPE. (34 C.F.R. § 300.502(c); Ed. Code §§ 56341, subd. (b)(1) and 56381, subd. (b).)

Mother fails to accept the distinction between ignoring or disregarding an assessment and disagreeing with an assessment. Capistrano devoted an entire IEP team meeting on March 20, 2017, to the review and discussion of Dr. Johnson's independent assessment. For the reasons previously established in the June 14, 2017 decision, as well as the reasons adopted in this decision, Dr. Johnson's independent assessment was flawed. Capistrano was not required to adopt her findings regarding traumatic brain injury eligibility. Capistrano did not disregard Dr. Johnson's findings. Capistrano simply disagreed with her. Dr. Johnson did not testify at hearing to indicate otherwise. Further, both the 2017 and 2018 annual IEPs contain accommodations which were largely based upon Dr. Johnson's recommendations.

Similarly, Capistrano considered the reports from Dr. Avina and Dr. Williamson. None the letters submitted on behalf of Student established eligibility for special education under the category of traumatic brain injury. To the contrary, Dr. Avina's February 15, 2018 letter primarily reported on ongoing mental health services and

psychiatric medications provided to Student due to ongoing and serious mental health issues. The letter ironically served to corroborate Capistrano's determination of Student's eligibility as emotional disturbance.

Dr. Avina's recommendations related to Student's academic performance were based upon information provided by Mother and Student. Dr. Avina did not testify at hearing. Her credibility was limited, as Student did not present any evidence to establish that Dr. Avina had any information or expertise regarding Capistrano's educational settings or programs to qualify her educational recommendations. Certainly Student had been successful in the courses she completed during the summer in a one-to-one setting. Dr. Avina, however, did not take into account that Student was also successful in a general education classroom, while taking A to G curriculum and advanced placement courses. Further, Dr. Avina's recommendations, other than dual placement, were clearly considered by Capistrano in the creation of Student's accommodations

Dr. Williamson's letter dated February 28, 2018, also documented Student's emotional and mental health issues. Dr. Williamson acknowledged Student had a history of traumatic brain injuries after sustaining three concussions. She concluded, however, that Student's struggle with symptoms of poor focus and fatigue were likely due to concussion syndrome, which is different than traumatic brain injury. As with Dr. Avina, Dr. Williamson knew Student had been successful in one-to-one instruction. Dr. Williamson expressed that such instruction would assist in reducing Student's stress and anxiety. Her recommendation for a program such as Halstrom, however, was limited by the caveat that "it be provided as much as the school was able to offer." She was unaware Capistrano could not legally provide Student off-site dual enrollment or that the one-to-one credits completed in such a program would not all transfer to Capistrano to fulfill Student's graduation requirements.

Dr. Williamson's report on Student's asthma was also considered by Capistrano.

The school nurse inquired about the frequency and duration of Student's asthma attacks, and whether Student could control her asthma at school with the use of an inhaler. There was no dispute that Capistrano accepted Dr. Williamson's diagnosis of Student's asthma. Capistrano disagreed with Mother's request for a change in eligibility to other health impairment based upon Student's asthma. Student's asthma did not qualify as a chronic medical condition and did not impede her education on a regular or daily basis. Student's asthma was controlled at school with access to her inhaler.

Finally, Mother obtained the private QEEG assessment, which she submitted to the December 7, and December 14, 2018 IEP team. Mother's purpose in obtaining the QEEG assessment was to provide solid neurological evidence and a medical diagnosis of traumatic brain injury. Very simply, the assessment report, as presented to Capistrano, and to the ALJ in hearing, offered no intelligible information for consideration. Dr. Deering did not attend the IEP team meetings to explain the QEEG assessment. Dr. Deering did not testify at hearing to explain what the imaging and assessment results meant in an educational setting. Mother testified that the assessment report was not intended for laymen, but rather was a report to be reviewed doctor to doctor. It cannot be said that Capistrano ignored the QEEG assessment. Capistrano convened the December 14, 2017 IEP team meeting to discuss the assessment and report. Without further assessor presentation at the IEP team meeting, however, Capistrano acted reasonably in discounting the information and refusing Mother's request to change Student's eligibility to traumatic brain injury.

#### PRIOR WRITTEN NOTICE

Student contends Capistrano failed to provide appropriate prior written notices in a timely fashion thereby denying Mother the ability to meaningfully participate in the IEP process.

Prior written notice must be given by the public agency to the parents of an

individual with exceptional needs “upon initial referral for assessment, and a reasonable time before the public agency proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the pupil, or the provision of a free appropriate public education to the child.” (Ed. Code, § 56500.4, subd. (a); *see also* 20 U.S.C. § 1415(b)(3), (4) & (c)(1); 34 C.F.R. § 300.503.)

The notice must contain:

1. a description of the action refused by the agency;
2. an explanation for the refusal, along with a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the refusal;
3. a statement that the parents of the disabled child are entitled to procedural safeguards, with the means by which the parents can obtain a copy of those procedural safeguards;
4. sources of assistance for parents to contact;
5. a description of other options that the IEP team considered, with the reasons those options were rejected, and
6. a description of the factors relevant to the agency’s refusal.

(20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b); Ed. Code, § 56500.4.)

An IEP document can serve as prior written notice as long as the IEP contains the required content of appropriate notice. (71 Fed.Reg. 46691 (Aug. 14, 2006).)

The notice must be given “a reasonable time before” the district actually changes the student’s placement or the provision of FAPE to the student. (34 C.F.R. § 300.503(a).) This is to ensure that the parents have enough time to assess the change and voice their objections or otherwise respond before the change takes effect. (*C.H. v. Cape Henlopen School Dist.* (3rd Cir. 2010) 606 F.3d 59, 70.) When a failure to give proper prior written notice does not actually impair parental knowledge or participation, the violation is not

a substantive harm under the IDEA. (*Ibid.*)

Student contends Capistrano failed to provide her with prior written notice indicating its reasons for denying Mother's requests at the 2017 annual IEP. While the February 1, and February 16, 2017 IEP team meetings occurred prior to the statute of limitation in this case, Capistrano's obligation to provide Mother with prior written notice addressing the issues raised in the 2017 IEP continued after the statute of limitations commenced. Thusly, it is appropriate to consider whether Capistrano provided sufficient prior written notice as it applied to the February 2017 IEP in its entirety.

Throughout the February 1, and February 16, 2017 IEP team meetings and the March 20, 2017 IEP team meeting, Mother disagreed with Capistrano's determination of eligibility under emotional disturbance. Capistrano rejected Mother's request to find Student eligible under traumatic brain injury. Capistrano rejected Dr. Johnson's conclusions regarding eligibility, and rejected Dr. Johnson's recommendations for the Irlen lenses, cognitive retraining, and the suggestion to further pursue assistive technology for Student. Mother requested a modified school day, supported by summer courses of one-to-one instruction obtained from Halstrom. These requests were also rejected by Capistrano.

The nature of Mother's demands made during the 2017 annual IEP team meetings qualified as requests to initiate or change the identification, evaluation, or educational placement of the pupil, or the provision of a free appropriate public education to the child. Capistrano was statutorily obligated to provide Mother with a prior written notice explanation of its refusal to initiate the changes proposed by Mother and Dr. Johnson.

Mother testified Capistrano did not provide her with prior written notice in response to any of her demands made in the 2017 annual IEP. No evidence was

presented to contradict Mother's claim. No record of any prior written notice having been sent to Mother in response to her rejected demands was produced at hearing. By failing to provide Mother with prior written notice, Capistrano denied Mother a written explanation and basis for its refusal to grant Mother's demands. This constituted a procedural violation of the IDEA.

A procedural violation does not deny a FAPE per se. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits for the child. (20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2); see also, *W.G. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1483-1484).

Student failed to sustain her burden of proof to establish that Capistrano's failure to provide prior written notice denied Student a FAPE or prevented her from gaining any educational benefit. As previously determined, the February 2017 annual IEP provided Student a FAPE. Student presented no evidence to support a determination that Capistrano's refusal to provide Student a modified school day, one-to-one instruction, or any other denial of parental requests had any impact on Student's education. Student continued in her general education placement, and continued to successfully complete A-G curriculum without one-to-one instruction.

The crux of Student's contention lies in the argument that Capistrano's failure to provide prior written notice significantly impeded Mother's participation in the IEP process. Capistrano's contention that Mother's participation in the IEP process was not impeded has merit. The IEP notes, and transcript of the February and March 2017 IEP team meetings reflect that the IEP team thoroughly discussed all aspects of the IEP. Mother actively participated in the discussions, requested changes, and received oral

explanations of Capistrano's rejection of Mother's requests. Capistrano's mistake was that its explanations were not in writing, thereby complying with the statutory requirements for prior written notice. Based upon the factual determinations contained in the June 14, 2017 decision, however, Mother's contentions that she did not fully understand the information presented at the February 1, and 17, 2017 IEP team meetings rings somewhat disingenuous. Mother simply did not agree with Capistrano's explanation. As example, there is not much more to understand in the statement: An IEP team cannot legally fund your private school placement. Further, as will be discussed later on, once Capistrano began providing Mother with prior written notices in 2018, Mother continued to make the same allegations regarding lack of understanding and resulting denial of parental participation.

Failing to provide specific prior written notice in 2017 did not impede Mother's participation in the IEP process. She continued to actively participate in each IEP team meeting. In a worst case scenario, Capistrano's failure to put things in writing provided Mother the opportunity to continue perseverating over traumatic brain injury, one-to-one instruction, and funding of private school programs at each and every subsequent IEP team meeting.

Student contends Capistrano failed to provide Mother with prior written notice in a timely fashion after the 2018 annual IEP conducted on February 9, March 2, and March 23, 2019. On April 16, 2018, Capistrano sent Mother prior written notice in response to her specific requests at the March 23, 2018 IEP team meeting. Capistrano identified the parental requests as changing Student's special education eligibility to traumatic brain injury with the addition of other health impairment, in addition to her current eligibility of emotional disturbance, and requesting funding of Student's Halstrom classes.

Capistrano provided its written response and basis for its proposed response, including alternative options and relevant factors considered. Capistrano offered a full

psychoeducational assessment plan to assist in making a team determination of whether Student was eligible for special education under the eligibility categories requested by Mother. Capistrano also provided a full explanation of its reasons for denying the request to fund Halstrom. The prior written notice also provided Mother a copy of Procedural Safeguards, and complied with all statutory requirements. Mother provided no evidence to support her claim that this prior written notice was insufficient as a matter of law or that she was unable to meaningfully participate in the IEP process in any manner. Further, at hearing, Mother did not pursue the timeliness aspect of her contention.

Student contends Capistrano's May 10, 2018 prior written notice did not identify all the issues which required explanation and failed to accurately describe its proposed actions or refusals. The May 10, 2018 prior written notice was in response to Mother's multiple correspondences indicating Capistrano had not responded to all of Mother's requests. Capistrano identified fifteen items to which Mother had requested further explanation, ranging from continuing issues, such as eligibility under traumatic brain injury, to the items never addressed in the 2017 annual IEP, to issues discussed in subsequent IEP team meetings, such as further explanation of counseling supports. Capistrano provided a three-page response to each identified parental request. At hearing, and in her closing statement, Mother provided a chart in which she compared her questions to the responses from Capistrano, along with her perceived inconsistencies of the responses. In essence, Mother considered the prior written notice insufficient because it did not rehash each item discussed at prior IEP meetings.

Prior written notice is intended to provide parents with information to help them understand why a school district makes a decision or refuses a parent's request. The prior written notice does not require the parties to see eye-to-eye with regard to their recollection of factual information, nor does it require consensus of opinion as to a



school district's explanations. The prior written notice represents the school district's viewpoint, not the parent's. It is an informational tool, intended to assist parents working their way through the IEP process. Prior written notice is not a primer on special education law. It is not an outline for debate. Nor is it intended to recount a minutely detailed description of all prior interactions between the school district and the parent. Capistrano's May 10, 2018 prior written complied with statutory requirements, and provided sufficient explanation of its reasoning in making its decisions pertaining to each of the fifteen issues identified.

Student did not present any evidence regarding alleged insufficiencies contained in the prior written notices sent to Mother on January 10, 2019, and January 17, 2019.

#### Predetermination and denial of parental participation

Student contends that Capistrano predetermined the placement and services it offered at each of Student's IEP team meetings convened between March 23, 2017, and January 31, 2019, which prevented Mother from having a meaningful role in developing Student's IEP.

Predetermination of a student's placement is a procedural violation that deprives a student of a FAPE in those instances where placement is determined without parental involvement in developing the IEP. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840; *Bd. of Educ. of Township High School Dist. No. 211 v. Lindsey Ross* (7th Cir. 2007) 486 F.3d 267.) Predetermination occurs "when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." (*H.B., et al. v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 239 Fed.Appx. 342, 344-345; see also, *Ms. S. ex rel G. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131 (superseded on other grounds by statute))["A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, then simply

presents the IEP to the parent for ratification.” (citing *Target Range, supra*, 960 F.2d at p.1484)].)

Additionally, school districts, as part of a special education local plan area, must have available a continuum of program options to meet the instructional and service needs of special education students. (34 C.F.R. § 300.115(a); Ed. Code, §56360.) In determining placement, a school district must consider a continuum of alternative placements. (34 C.F.R. § 300.116; Ed. Code, § 56342, subd. (b).) A school district is only required to consider those placements in the continuum that may be appropriate for a particular child. There is no requirement that the IEP team members discuss all options, so long as alternative options are available. (*L.S. v. Newark Unified School Dist.*, (N.D.Cal, May 22, 2006, No. C 05-03241 JSW) 2006 WL 1390661, \* 6.)

Student’s contentions focused on two main issues. Capistrano refused to change Student’s special education eligibility to traumatic brain injury. Capistrano refused to consider Halstrom as an appropriate placement for Student, only considering placement, programs, and services available within Capistrano.

Student’s eligibility for special education was determined in 2016 and was addressed in the June 14, 2017 decision. As explained the assessment analysis above, special education eligibility is based upon assessment information. Student was assessed and found eligible under emotional disturbance in 2016. The June 14, 2017 decision found the assessment and determination of eligibility appropriate. Once Student was initially assessed and found eligible, Capistrano was only required to revisit eligibility every three years, absent some change that required an earlier reassessment. Subsequent to the 2016 determination of eligibility, Student continued to request a change of eligibility in spite of the findings contained in the June 14, 2017 decision.

Annual IEP team meetings do not by themselves require reconsideration of eligibility, regardless of the category. None of the medical information presented to the

annual IEP teams provided sufficient information to justify a reassessment prior to Student's scheduled triennial IEP. As Student's eligibility for special education and related services was not scheduled to be reassessed or revisited until the 2019 triennial and the IEP teams had not been presented with information necessary to consider changes in eligibility without further assessment, Capistrano's decision to maintain Student's eligibility as emotional disturbance as initially determined was within the perimeters of special education law, and thusly cannot be considered predetermined. Further, to accommodate Mother's quest for a change in eligibility, Capistrano offered to conduct an early triennial assessment as early as May 2018, but Mother refused to sign the assessment plan.

A local educational agency shall not be required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if the local educational agency made a FAPE available to the child and the parent of the child elected to place the child in the private school or facility. (Ed. Code, § 56174). This education code section prevents the IEP team and local educational agency from offering placement in a private school.

Student's contention that Capistrano's refusal to consider placement at Halstrom was predetermined is misguided. An IEP team may not recommend or fund a student's placement in a private school. Funding a non-certified private school is prohibited at the IEP team level as part of an offer of FAPE. On that basis alone, Capistrano's refusal to consider an unlawful placement cannot be construed as a predetermination.

Independent of Capistrano's inability to offer a private school placement, Capistrano's IEP team discussions of the continuum of placement options were not predetermined. Student assumed Capistrano predetermined Student's placement by failing to consider placement options outside of those within Capistrano programs. As indicated above, a school district is only required to consider placements in the

continuum that may be appropriate for a particular child. There is no requirement that the IEP team members discuss all options, so long as alternative options are available. Based upon federal mandate, Capistrano was also required to analyze placement options within the context of the least restrictive environment for Student.

School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114 (a)(2); Ed. Code, §§ 56031, 56033.5, 56040.1, subd. (b), 56342, subd. (b).)

Pursuant to least restrictive environment requirements, discussion of the continuum requires consideration of potential placement options to begin with full-time placement in a general education setting, before considering more restrictive options. By legal definition, placements outside of the general education setting are more restrictive placements. Further, the least restrictive environment requires the discussion of the continuum to exhaust possible school district placements before considering non-public schools or residential placement. As a result, school district placements must always be considered before non-district placements. Once an appropriate placement that complies with the least restrictive environment is identified, the IEP team is not required to consider more restrictive placements, even if another option is preferred by the student's parents.

All parties, assessors and health care providers acknowledge Student is a diploma bound general education student. She successfully completed A-G curriculum classes in a general education setting with supports and accommodations which address her special needs. Once the IEP team established her continuing placement in a general education setting was Student's least restrictive environment, the search for placement

options terminated. The IEP team was not required to continue discussion of more restrictive placement options, nor was the IEP team's obligated to consider more restrictive non-district placements.

Student also confused the offer of placement in general education with the offer of programs within the general education setting offered to provide Student with additional supports and accommodations. Capistrano considered many programs within Student's general education placement, ranging from collaborative classes, resource class, the TBIC program, and Fresh Start, all of which were designed to provide Student with the extra support and accommodations she needed. Consideration of this variety of programs negates the idea of predetermination.

Student contends Capistrano's staff meetings prior to each of Student's IEPs evidenced Capistrano's intent to predetermine Student's placement and services.

The IDEA does not prohibit school districts from discussing a child's special education needs, as well as potential services and placements in advance of the IEP team meeting. However, district employees must arrive at the IEP team meeting with an open mind and be willing to consider parental input. (*See, e.g., T.P v. Mamaroneck Union Free Sch. Dist.* (2d Cir. 2009) 554 F.3d 247). Nor does the IDEA prohibit the preparation of a draft IEP in advance of the IEP team meeting. The draft IEP, however, may be used solely for the purposes of discussion and development of the child's complete IEP, and may not be represented to the parent as the completed IEP. (*Letter to Helmut* 16 IDELR 503 (OSEP 1990).)

Student's contention relied upon the premise that staff meetings held by members of the Capistrano special education prior to the IEP team meeting constituted predetermination. At the hearing, Mother established through the testimony of Ms. Jones and Mr. Bartaluzzi that the Capistrano special education team met in advance of the IEP meeting to discuss Student's upcoming IEP. Their testimony, however, failed to

establish anything more than a description of reasonable preparation and discussion of Student's current needs. As Mr. Bartaluzzi explained, parents were not involved in the staff meeting, but parents' concerns were considered. Both witnesses independently reported Capistrano did not discuss placement at the staff meetings. The IEP team discussed a variety of general education programs for Student. The IEP team discussed the potential of a modified school day, and considered its feasibility. The IEP team considered whether blended programs were available and appropriate. Student was unable to meet her burden of proof to establish Capistrano predetermined Student's IEP at staff meetings prior to the IEP team meeting.

Student suggested Ms. Rempe's attendance at the March 20, 2017 IEP team meeting further evidenced Capistrano's predetermination of its offer of FAPE. This contention remains unfounded. Ms. Rempe attended the March 20, 2017 IEP team meeting to describe the TBIC program to Mother and answer any questions Mother might have regarding the program. Ms. Rempe was also familiar with dialectic behavioral therapy, Mother's preferred therapeutic methodology, and willing to consider incorporating the methodology into the TBIC math class and/or the resource class. Ms. Rempe's attendance at the IEP meeting inspired team discussion with Dr. Johnson and Mother, and provided answers to Mother's questions regarding the TBIC program.

#### Failure to have a general education teacher present at the March 10, 2017 IEP team meeting

Student contends Capistrano failed to have a general education teacher in attendance at the March 20, 2017 IEP team meeting in which Dr. Johnson presented her independent assessment report to the IEP team. Capistrano contends the omission of a general education teacher was at best, a procedural violation which did not deny Student a FAPE. A general education teacher attended each IEP team meeting in February 2017, and provided input. Capistrano further contends it made an offer of

FAPE at the February 16, 2017 IEP team meeting, which was found to be appropriate in the June 14, 2017 decision.

An IEP team shall meet whenever any of the following occur:

1. A student has received an initial formal assessment. The team may also meet when a student receives any subsequent formal assessment;
  2. The student demonstrates a lack of anticipated progress;
  3. The parent or teacher requests a meeting to develop, review, or revise the IEP;
- or
4. At least annually, to review the student's progress and the IEP, including whether annual goals are being achieved, the appropriateness of placement, and to make any necessary revisions.

(Ed. Code § 56343.)

The annual IEP team meeting shall review the student's IEP to determine whether the annual goals for the student are being achieved, and revise the IEP program as appropriate, to address, among other matters, the following:

1. A lack of expected progress toward the annual goals and in the general education curriculum, where appropriate;
2. The results of any reassessment;
3. Information about the student provided to or by the parents;
4. The student's anticipated needs; and
5. Any other relevant matters.

(Ed. Code, § 56341.1, subd. (d)(1)(2)(3)(4)(5).)

Each meeting to develop, review or revise the IEP of a student shall be conducted by an IEP team. The IEP team shall include not less than one regular education teacher of the student, if the student is, or may be, participating in the regular education environment. The regular education teacher shall participate in the development, review,

and revision of the student's IEP, including assisting in the determination of appropriate positive behavioral interventions and supports, and other strategies for the student. (Ed. Code § 56341, subds. (a) and (b)(2).)

The general education teacher was a required member of the March 20, 2017 IEP team. Mother did not waive the general education teacher's attendance. Capistrano knew from the February 16, 2017 IEP team meeting that the March IEP team meeting was necessary to review and discuss Dr. Johnson's independent educational evaluation. Student's placement under the February 16, 2017 IEP was exclusively in the general education setting. Therefore, the review and discussion of Dr. Johnson's recommendations statutorily required the attendance of the general education teacher. Capistrano's failure to have a general education teacher present at the March 20, 2017 IEP team meeting constituted a procedural violation of the IDEA.

Again, a procedural violation does not automatically require a finding that a FAPE was denied. Student offered no evidence to suggest the absence of the general education teacher impeded Student's right to a FAPE or caused a deprivation of educational benefit. There was no disagreement that academically, Student's placement in general education was appropriate. This was further evidenced by Mother's rejection of collaboration classes and the TBIC program, which she considered beneath Student's academic abilities. Student still obtained educational benefit from her education, and continued to participate in general education classes, including advanced placement and honors programs.

Student's contention that the absence of the general education teacher impeded Mother's opportunity to participate in the decision making process bears some discussion. In assessing Capistrano's arguments on this issue, it is noted that Capistrano correctly identified that the June 14, 2017 decision validated the February 16, 2017 IEP offer of FAPE. That decision also noted the IEP team would reconvene at a later date to



discuss Dr. Johnson's independent assessment, as Dr. Johnson was not available to attend the February 16, 2017 IEP team meeting. Dr. Johnson's independent assessment was relevant to further consideration of Student's placement and related services. To accept Capistrano's premise that the February 16, 2017 IEP offer of FAPE was invincible due to the June 14, 2017 decision overlooks or minimizes the purpose of the general education teacher's attendance in the IEP process. Instead, Capistrano's contention relates directly to Student's claim that Capistrano predetermined the outcome of the March 20, 2017 IEP team meeting. In other words, the general education teacher's presence was not required on March 20, 2017, because Capistrano had already determined it would not change its February 16, 2017 offer of FAPE. Either way, whether predetermined or not, the omission of the general education teacher remained a procedural violation which had the potential to impair Mother's participation in the March 20, 2017 IEP team meeting.

However, Student did not establish any impairment of Mother's ability to participate in the IEP process in any real sense, and certainly not to a significant extent. Mother's primary goal at the March 20, 2017 IEP team meeting was to obtain a change in Student's eligibility to traumatic brain injury, a decision which would involve little, if any, relevant input exclusive to the general education teacher. Mother's secondary goal was to obtain funding for Student's enrollment in the classes at Halstrom. The general education teacher's consideration of Halstrom would have been immaterial. First, the general education teachers at the two prior meetings had been steadfast that Student could make meaningful educational progress with general education classes with the appropriate accommodations. No evidence exists that Dr. Johnson's assessment would change Student's general educational teacher's opinions, or that they would provide any relevant information as to whether Student qualified for special education services as a student with a traumatic brain injury.

Regardless of the general education teacher's opinion, the IEP team was prohibited from funding the Halstrom classes or placing Student in a private school. In reality, Mother actively participated in the IEP team discussions, and vigorously advocated for her preferred resolutions. Her dissatisfaction was simply based on Capistrano's failure to capitulate to her demands regarding Student's educational program.

### Parental Participation in the IEP Process

Student contends Capistrano significantly impaired Mother's participation in the IEP process.

Special education law places a premium on parental participation in the IEP process. School districts must guarantee that parents have the opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(1).) The United States Supreme Court has recognized that parental participation in the development of an IEP is the cornerstone of the IDEA. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904].) Parental participation in the IEP process is also considered "(A)mong the most important procedural safeguards." (*Amanda J. v. Clark County School* (9th Cir. 2001) 267 F.3d 877, 882.)

An educational agency must therefore permit a child's parents "meaningful participation" in the IEP process. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131-1132 (*Vashon Island*)). The standard for "meaningful participation" is an adequate opportunity to participate in the development of the IEP. Although a student's parents have a right to meaningful participation in the development of an IEP, a district "has no obligation to grant [a parent] a veto power over any individual IEP provision." (*Ibid.*)

Parents have an adequate opportunity to participate in the IEP process when they are “present” at the IEP meeting. (34 C.F.R. § 300.322(a); Ed. Code, § 56341.5, subd. (a).) An adequate opportunity to participate can include participation at the IEP meeting by outside experts retained by the parents, and the incorporation of suggestions made by such experts into the IEP offer. (*D.S. v. Bayonne Board of Educ.* (3rd Cir. 2010) 602 F.3d 553, 565; see also *W.T. v. Board of Educ. of the School Dist. of New York City* (S.D.N.Y. 2010) 716 F.Supp.2d 270, 288 [reports from child’s private school].) An adequate opportunity to participate can occur when parents engage in a discussion of the goals contained in the IEP. (*J.G. v. Briarcliff Manor Union Free School Dist.* (S.D.N.Y. 2010) 682 F.Supp.2d 387, 394.) A parent has meaningfully participated in the development of an IEP when she is informed of her child’s problems, attends the IEP meeting, expresses her disagreement regarding the IEP team’s conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools.* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann, supra*, 993 F.2d at p. 1036.)

Merely because the IEP team does not adopt the placement, services, or goals advanced by parents, does not mean that the parents have not had an adequate opportunity to participate in the IEP process. (*B.B. v. Hawaii Dept. of Educ.* (D. Hawaii 2006) 483 F.Supp.2d 1042, 1051.)

In essence, Student contends Capistrano thwarted Mother’s meaningful participation at every step of the IEP process. Student’s contentions regarding procedural violations involving predetermination, prior written notice, and required attendance at IEP meetings have already been discussed at length in this decision. Student’s remaining contentions represent a mish-mash of allegations which center around Mother’s relationship with Capistrano, rather than Student’s educational need. These contentions require analysis nonetheless.

Student contends Capistrano denied Mother was meaningful participation in the

IEP process during 2017-2018 school year by failing to provide Student with sufficient academic supports. Mother failed to adequately explain or pursue this contention. Student displayed no academic deficits and remained a general education student. She was capable of obtaining educational benefit in a standard general education classroom, as was demonstrated by her participation in at least three core A-Z curriculum classes each semester. Student's only academically related special education goal addressed Student's need to complete classwork missed because of numerous excused absences from class due to illness, stress and anxiety. Further, when offered additional accommodations, such as preferential seating, Student declined the offers as unnecessary. Although Student's private assessors and doctors indicated Student would likely benefit from one-to-one academic instruction, there was no evidence to suggest that such individualized teaching was necessary for Student to access her education. Further, Student's successful completion of general education in a larger group setting disproved Student's assumption she required one-to-one instruction to make meaningful educational progress. Disagreement with a parental request does not equate to a denial of parental participation. Student made no attempt to establish a nexus between her preferred teaching methodology and an impairment to her participation in the IEP process. Beyond the request for one-to-one instruction, Mother made no other requests for additional academic supports.

Student contends Capistrano failed to appropriately construct Student's goals to be measurable and failed to provide Mother with progress reports which would allow Mother to monitor Student's progress, resulting in Capistrano's denial of Mother's meaningful participation in the IEP process.

An annual IEP must contain a statement of measurable annual goals designed to:

1. meet the individual's needs that result from the individual's disability, to enable the pupil to be involved in and make progress in the general curriculum; and

2. meet each of the pupil's other educational needs that result from the individual's disability.

(20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345, subd. (a)(2).)

Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. (*Letter to Butler*, 213 IDELR 118 (OSERS 1988); Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 regulations).) The purpose of goals is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345.) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344.)

The goals contained in the 2017 annual IEP were deemed appropriate in the June 14, 2017 decision and shall not be re-litigated herein.

Capistrano reported Student's progress on goals to Mother at the 2018 annual IEP team meeting. Student's progress on goals was also presented in written form as part of the IEP document. Mother's questions regarding Student's progress, or lack thereof, were addressed. The goals contained benchmarks to determine progress. Mother's questions regarding how the goals were developed were addressed. Capistrano once again explained that annual IEP goals were not based upon assessment or eligibility category. The IEP team drafted goals based upon current information obtained from teacher input, class performance, tests, grades, and Student's self-reporting. The persons responsible for tracking Student's progress were noted on each

goal. Student did not require academic goals. The goals addressed Student's social-emotional needs and work completion. Student's progress on work completion was measured by the amount of homework and class assignments she completed, and did not require formal data collection to measure progress.

Mother's concerns about goal measurement percentages were thoroughly discussed and modified based upon Mother's input.

Collectively, the IEP team discussion of goals was appropriate and provided Mother sufficient information to actively participate in the IEP process.

Student did not establish that Mother was entitled to additional reports of Student's progress on goals. This information was contained in the IEP document provided to Mother each year. No evidence was offered to indicate Capistrano was obligated to provide Mother with specific communications, such as service logs containing data collection records, assignment calendars, or weekly communication logs with teachers. Student's class calendars and assignments were available at Capistrano's website. Student's grades and report cards were provided several times each year.

Student contends Capistrano denied Mother meaningful participation in the IEP process by failing to provide Student with home-hospital instruction. Student did not establish a factual basis for providing Student with home-hospital care. At best, Mother established that Student was occasionally hospitalized which resulted in her absence from school. This, as expected, contributed to Student falling behind with her lessons and class assignments. At hearing, Mother remained very secretive about Student's hospitalizations and medical treatment, and failed to produce a letter from Student's doctors requesting home-hospital services. The only other reference to potential home-hospital services resulted from the IEP team's brainstorming of creative ideas to support Student on a potentially modified school day. Home-hospital service was briefly considered, but rejected because home hospital services did not provide ongoing

academic lessons. Home-hospital service was not designed to continue a student's education. It merely sustains education until the student can return to school. At no point in the discussion did Mother seek further consideration of this inappropriate support, nor was she prevented from inquiring further.

Student contends Capistrano denied Mother meaningful participation in the August 22, 2018 court ordered IEP team meeting by allowing Capistrano's attorney, Mr. Harbottle to participate in the IEP team meeting.

Attorneys are not required parties for IEP team meetings. (Ed. Code, § 56341, subd. (b).) However, nothing in the IDEA or Education Code prohibits a school district from including its attorney at an IEP meeting, any more than it prohibits parents from having an attorney attend the IEP meeting on a student's behalf. A school district can be represented by attorneys at an IEP team meeting. Although the attendance of attorneys at IEP team meetings is disfavored, nothing in the IDEA expressly prohibits a school district from exercising its discretion to bring an attorney to an IEP team meeting, even in those circumstances where the parents themselves attend unrepresented or give no indication that they intend to pursue due process. (*Letter to Diehl*, 22 IDELR 734 (OSEP 1995).)

As will be discussed later in this decision, Dr. Bejarano's assessment and the August 22, 2018 IEP team meeting represents an anomaly arising from Student's appeal of the June 14 2017 OAH decision to the District Court. The District Court issued an order for the completion of the assessment and IEP team meeting pursuant to the stipulation of Mother and Mr. Harbottle as Capistrano's legal representative in Mother's consolidated District Court cases.

Mr. Harbottle did not appear at the August 22, 2018 IEP team meeting as a member of the IEP team. Instead, Mr. Harbottle attended to facilitate the meeting, as the meeting itself was subject to the District Court order. Further, neither the assessment

nor the IEP team meeting were subject to IDEA mandates as evidenced by the shortened timeline for assessment and the excused omission of assessment tools required under the IDEA and Education Code, such as observation of Student in her educational setting. Mother may have felt intimidated by Mr. Harbottle's presence to manage the IEP team meeting, especially as the assessment recommendations did not coincide with Mother's expectations regarding traumatic brain injury or her preferred educational setting for Student. However, disagreement with Capistrano and its legal representative does not equate to denial of meaningful participation in the IEP process.

Student contends Capistrano denied Mother meaningful participation in in the January 31, 2019 triennial IEP by:

1. failing to develop an IEP that addressed all of Student's unique needs;
2. failing to discuss medical information in developing the IEP;
3. failing to consider or discuss Student's need for vision therapy or assistive technology in developing the IEP;
4. failing to provide goals and services to address Student's attention, focus and cognitive fatigue;
5. failing to keep data on Student's goal progress; and
6. developing an IEP that was substantially the same as the IEP offered in February 2018.

These contentions more closely relate to the substantive denial of FAPE than they do to a procedural violation of impairment of parental participation in the IEP process. At hearing Mother proffered these contentions through the introduction and admission of documents, particularly the January 31, 2019 IEP and accompanying audio recording and transcript, without further testimony to indicate how Mother's participation in the IEP was impaired. Clearly Mother disagreed with Capistrano's inability to conduct a triennial assessment through a record review and with the resulting offer of FAPE. The



entire January 31, 2019 triennial IEP team meeting was unreasonably limited due to Mother's refusal to provide consent to a triennial assessment, even in the form of a record review assessment. Mother's refusal to consent created its own impairment of participation in the IEP team meeting. As example, Mother complains Capistrano failed to consider Student's need for vision therapy or assistive technology. This was a direct result of Mother's refusal to consent to assessment, thereby precluding Capistrano from obtaining the information which would have been useful for meaningful discussion at the triennial IEP team meeting. Mother cannot claim she was prevented from participating the IEP team meeting when she created the void herself.

#### DISTRICT FAILURE TO FILE FOR DUE PROCESS

Student contends District was required to file a due process complaint when Mother disagreed with Capistrano's IEPs and private placement of Student;

If the parent of the child consents in writing to the receipt of special education and related services for the child but does not consent to all of the components of the IEP, those components to which the parent has consented shall be implemented so as not to delay providing instruction and services to the child. (Ed. Code, § 56346, subd. (e).) However, if the public agency determines that the proposed special education program component to which the parent does not consent is necessary to provide a free appropriate public education to the child, a due process hearing shall be initiated by the public agency. (Ed. Code, § 56346, subd. (f).)

The Ninth Circuit, in concurrence with the Education Code, recognized a two-prong test to determine a school district's obligation to file for due process. First, the parent was required to have refused to consent to a component of the IEP. Second, the component in issue must be necessary to the provision of a FAPE to trigger a mandatory requirement for a school district to seek due process. (*I.R. v. Los Angeles Unified School District* (9th Cir. 2015) 805 F.3d 1164, 1169.) (*I.R.*)

Applying *I.R.*'s two-pronged test, Capistrano's was not required to seek a due process hearing to validate the 2017 and 2018 annual IEPs. Mother consented to the implementation of the 2017 annual IEP in March 2017. As indicated in this decision, the 2017 annual IEP, in its totality of all three parts, provided Student with a FAPE. Mother did not consent to the 2018 annual IEP in any of its parts between March 23, 2018, and December 14, 2018. As a result, the 2017 annual IEP continued to be implemented. Student did not require any academic goals, and remained placed in general education classes. Student's goals and services as contained in the 2017 annual IEP, though a year old, continued to address Student's areas need in the categories of social-emotional as well as work completion. Student failed to present any evidence to suggest any mandatory component of the IEP was missing from the 2018 annual IEP. Nor did Student establish Student was denied a FAPE or any educational benefit whatsoever. Capistrano was not required to file for due process on either IEP.

#### SUBSTANTIVE PROVISION OF A FAPE AT EACH OF THE IEP TEAM MEETINGS

A student's unique educational needs are to be broadly construed to include academic, social, health, emotional, communicative, physical, and vocational needs. (*Seattle School Dist., No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1501, abrogated in part on other grounds by *Schaffer v. Weast, supra*, 546 U.S. at pp. 56-58.) In addition, educational needs include functional performance. (20 U.S.C. § 1414 (d)(1)(A)(i)(I); Ed. Code § 56345, subd. (a)(1).) The "educational benefit" to be provided to a child requiring special education is not limited to addressing the child's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467 (*San Diego*).

The IEP must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d

1083, 1089.) A school district is required to provide educational instruction specially designed to meet the unique needs of a child with a disability, supported by such services as are necessary to permit the child to benefit from the instruction. (*Rowley, supra*, 458 U.S. 176, 188-189; *Andrew F., supra*, 137 S.Ct. 988, 997-1002; *San Diego, supra*, 93 F.3d at p. 1468.)

#### 2017 Annual IEP

The 2017 annual IEP encompasses the IEP team meetings which occurred on February 1, February 16, and March 20, 2017. Capistrano made its offer of FAPE at the February 16, 2017 IEP team meeting. Capistrano offered placement in the general education setting at Capistrano Valley with specialized academic instruction for fifteen minutes once a week for Student to check-in with her case manager for emotional support, if needed. Counseling was offered three times per week for thirty-five minutes per session. The four new goals were clear, met Student's needs, and were measurable. The accommodations offered supported Student's emotional needs and provided her with extra time to complete assignments.

Mother did not prove by a preponderance of the evidence that the March 20, 2017 IEP was inappropriate. In fact, Mother rejected Capistrano's offer to increase Student's counseling services. The February 1, 2017 and February 16, 2017 portions of the IEP offered Student a FAPE pursuant to the June 14, 2017 decision. The March 20, 2017 IEP continued to offer the goals crafted during the first two parts of the IEP team meeting. The accommodations were crafted with Mother's input and reflected the accommodations recommended by Dr. Johnson. The offer of the TBIC math class addressed Dr. Johnson's educational concerns. While she did not want counseling services, Mother offered no alternatives to address Student's needs other than her preferred classes at Halstrom. Nothing presented to the IEP team supported a change of placement from general education with specialized academic and counseling supports.

No evidence was presented to indicate Student needed more supports or services than were being offered. No evidence was presented to suggest Student required a more restrictive environment than could be provided by Capistrano. Nor did Student require one-to-one teaching to be successful academically. The February 2017 annual IEP, in its totality, offered Student a FAPE.

#### 2018 Annual IEP

Student's 2018 annual IEP was also held in three parts on February 9, 2018, March 2, 2018, and March 23, 2018. The IEP team considered the information provided by Dr. Avina and Dr. Williamson, which included Student's social-emotional needs due to anxiety and depression, as well as Student's continuing absences from school due to illness and anxiety. Neither Dr. Avina nor Dr. Williamson confirmed a diagnosis of traumatic brain injury, but each referenced Student's social-emotional issues as likely associated with post-concussion disorder.

Capistrano considered information regarding Student's symptoms related to her concussions and utilized several of Dr. Avina and Dr. Williamson's recommendations in crafting the IEP. Capistrano's 2018 annual IEP offered Student continuing placement in the general education setting.

The IEP presented appropriate goals to address Student's needs in the areas of anxiety, depression, positive thought, and self-advocacy. A study goal supported Student's need to make up class assignments due to absences.

The services offered to Student supported these goals. Student's fifteen minutes per week of specialized academic instruction supported Student's need to organize and make up missed assignments. Specialized academic instruction in the resource class was designed to support Student's need for an alternate classroom setting in which Student could rest, decompress, and work on making up missed assignments. Resource class also addressed Student's need for re-teaching in some areas due to her absences.

Capistrano honored Mother's request to forego counseling as a service and instead offer it as an accommodation on an as needed basis.

Additional accommodations, such as providing teacher notes, were added to assist Student in understanding missed lessons and in completing missed assignments.

As with the 2017 annual IEP, nothing presented to the IEP team required a change of placement from general education with specialized academic and counseling supports. No evidence was presented to indicate Student needed more supports or services than were being offered. Student rejected some offered accommodations as unnecessary. Mother rejected the offer of counseling as a service to support Student's goals. No evidence was presented to suggest Student required a more restrictive environment than could be provided by Capistrano. Nor did Student require one-to-one teaching to make meaningful educational progress. The 2018 annual IEP, completed on March 23, 2018, in its totality offered Student a FAPE.

The determination has been made herein this decision that the August 22, 2018 court ordered IEP team meeting constituted a meeting separate from Capistrano's 2018 annual IEP, conducted under terms and conditions set by the District Court. Capistrano special education staff had no control or input into the development of the assessment. Capistrano's special education team was not involved in determining the considerations presented to the District Court, and did not create the statutory limitations on the mandated assessment or IEP team. Therefore, any offer of FAPE presented at the August 22, 2018 IEP team meeting was made pursuant to a federal court order unrelated to this case.

#### December 7, 2018 and December 14, 2018 IEP Team Meetings

The IEP team meeting held on December 7, 2018, was intended to discuss Student's progress under her temporarily modified class schedule. The information presented at hearing did not include a written modification of the 2018 annual IEP. No

other documents were presented at hearing which memorialized a change in the 2018 annual IEP or which modified Student's class schedule. At some point after the commencement of the 2018-2019 school year, Student began attending Capistrano Valley on a modified class schedule. Even though Student's class load had been modified, she still attended general education classes at Capistrano Valley pursuant to her general education placement according to the 2018 annual IEP.

The modification of Student's class schedule did not impact the implementation of the 2018 annual IEP in any manner. The IEP team discussions were more in line with determining Student's needs as a diploma bound general education student. Student's progress on her IEP goals and utilization of her accommodations were reviewed in relation to Capistrano's intent to terminate the modified class schedule, which would allow Student to complete the remaining classes required for her graduation in 2020. Capistrano members of the IEP team offered general education course credit options which would allow Student to complete her graduation requirements in appropriately supported settings. The resource class could provide electives credits. The Fresh Start program could allow Student to work at her own pace in a setting similar to that of Halstrom.

The discussion of units required for graduation led to further debate of Capistrano school board policy of limiting the number of non-district transfer credits obtained by dual enrollment. Mother maintained her focus on Student's Halstrom courses and her request to have the Board provide a waiver to its credit limitation policy.

Capistrano did not attempt to change the 2018 annual IEP at this time. The discussions of the IEP team did not directly relate to Capistrano's offer of FAPE. Instead, the transcript of the IEP team meeting suggests that this meeting merely acted as precursor for the anticipated disagreements ahead at Student's triennial IEP in January 2019. No evidence was presented to suggest the December 7, 2018 IEP team meeting

made any changes in the 2018 annual IEP. The IEP team discussions directed at returning Student to a full class schedule, Student's general education graduation requirements, and school board policy regarding general education course transfer credits, or waivers of school board policy, which are not subject to OAH review. The school board policies are not related to the provision of special education and related services to Student under state or federal law. Rather, these issues remain under the exclusive powers of the California Department of Education and the Capistrano Board of Education to determine curriculum content and course credits required for all students who intend to graduate with a diploma.

The only special education related information presented at the December 7, 2018 IEP team meeting were:

1. Capistrano's request for parental consent to conduct its triennial assessment;
2. Mother's refusal to provided consent to the triennial assessment;
3. Mother's request for an independent educational evaluation based upon her disagreement with Dr. Bejarano's August 22, 2018 assessment; and
4. Mother's untimely delivery of the QEEG Assessment Report to the IEP team in support of her recurring request for traumatic brain injury eligibility.

No changes were requested and no changes were made to the 2018 annual IEP.

The content of the QEEG assessment required additional time for Capistrano to review its contents and provide the school nurse's attendance to report on the QEEG assessment at a later IEP team meeting. The IEP team meeting was continued one week to December 14, 2018.

Mother submitted to QEEG assessment and report to definitively determine Student suffered from traumatic brain injury. Dr. Deering did not attend the December 14, 2018 IEP team meeting to explain his report or recommendations for neuro-feedback therapy. Ms. Malone presented a truncated report about the QEEG. As a nurse,

Ms. Malone could not make a medical diagnosis from the QEEG, and could only decipher that the report ruled out attention-deficit hyperactivity disorder. Without further explanation from Dr. Deering or other qualified professional experienced with the QEEG, the full content and implications of the QEEG report remain a mystery, and it does not credibly support an unequivocal determination of traumatic brain injury as claimed by Mother.

Capistrano convened Student's 2019 triennial IEP team meeting on January 31, 2019. As indicated elsewhere in this decision, the triennial IEP team met its statutory obligation to re-visit the issue of Student's eligibility for special education and related services. To determine whether Student continued to be eligible for special education and to determine if any change in eligibility category was merited, Capistrano was required to reassess Student, generally provided in a comprehensive triennial assessment.

A reassessment may not be conducted unless the written consent of the parent is obtained prior to the reassessment, except where informed parental consent has been overridden pursuant to subdivision (e) of Section 56506, in which the local educational agency prevailed in a due process hearing relating to the assessment. If the parent refused to consent to the reassessment, the local educational agency may, but is not required to pursue reassessment. (Ed Code, § 56381, subd. (f)(1) and (3).)

It is well settled that parents who want their children to receive special education services must allow reassessment by the district, with assessors of its choice. (*Johnson v. Duneland Sch. Corp.* (7th Cir. 1996) 92 F.3d 554, 558; *Andress v. Cleveland Indep. Sch. Dist.* (5th Cir.1995) 64 F.3d 176, 178-79; *Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315; *Dubois v. Connecticut State Bd. of Educ.* (2d Cir. 1984) 727 F.2d 44, 48.)

Capistrano offered to conduct an early triennial assessment of Student and



forwarded an assessment plan to Mother. Mother failed to provide consent to an early triennial assessment. Subsequently, to comply with statutory timelines for school district assessments and triennial IEP team meetings, Capistrano presented Mother with another assessment plan. This assessment plan conceded to Mother's request that a comprehensive assessment not be undertaken, as Dr. Bejarano had completed her assessment of Student only a few months earlier. Capistrano agreed to conduct a records review assessment only. Given that the records review was the triennial assessment, Capistrano still legally required parental consent to utilize the records as the basis for its assessment conclusions and recommendation, and to generate the written report for the triennial IEP team's consideration in making its determination of eligibility and offer of FAPE. Mother refused to provide written consent and further indicated she would not consent to any further Capistrano assessments until her request for an independent educational evaluation was resolved. Mother also refused to consent to a release of information for Halstrom, which prevented Capistrano from independently obtaining relevant information about Student's performance in their programs.

Mother's refusal to consent to further Capistrano assessment was within her legal rights. Her refusal, however, limited the information available for consideration at the IEP team meeting. Her refusal to consent to further assessment, or provide a current release of information severely compromised her ability to successfully change Student's eligibility to traumatic brain injury, which remained Mother's quest since Student's initial determination of eligibility in 2016. Regardless of Mother's disagreement with Capistrano regarding the necessity of her consent to assess, Capistrano could only proceed with Student's triennial IEP team meeting and make all necessary findings, including eligibility and offer of FAPE, based upon available information. As a result, Capistrano was limited to consideration of Student's current academic progress at Capistrano Valley as reported by her teachers, Student's attendance records, and the

information provided by Mother and Student.

Based upon the information available for consideration by the IEP team, Capistrano maintained Student's emotional disturbance as her primary eligibility for special education and related services. The IEP team added other health impairment as secondary eligibility based upon Student's asthma, and cognitive fatigue based on information presented to it regarding Student's health.

Capistrano continued to offer Student placement in the general education setting, with supports and accommodations. Appropriate goals, similar to those contained in the 2018 IEP, were drafted and continued to support Student's social emotional disorders as well as her work completion needs as reported by her teachers and service providers. Capistrano offered Student the Fresh Start program, which it considered similar in instruction methodology to that provided by Halstrom. The Fresh Start program was designed to allow Student to obtain her remaining credits necessary for graduation while allowing her to work at her own pace. The resource class was offered in collaboration with Fresh Start to assist Student with the independent study components of the Fresh Start program. The resource class would also accommodate Student's needs for rest periods and periodic breaks, due to anxiety and/or cognitive fatigue. Appropriate accommodations were offered. Capistrano continued to offer Student counseling, which she continued to decline.

Although not in issue in this matter, the 2019 triennial IEP also provided the individualized transition plan for Student as required by law.

Based upon the limited information available to the IEP team without parental consent to assess Student, the January 31, 2019 triennial IEP met all requirements to comport Student's goals and services to her current needs as evidenced by her present levels of performance. The IEP team discussed a continuum of placement offers, once again rejecting Halstrom as a prohibited and unnecessary placement. Least Restrictive Environment

The final consideration for a determination the appropriateness of a placement offer is least restrictive environment. School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114 (a)(2); Ed. Code, §§ 56031, 56033.5, 56040.1, subd. (b), 56342, subd. (b).)

When determining whether a placement is the least restrictive environment for a child with a disability, four factors must be evaluated and balanced:

1. the educational benefits of full-time placement in a regular classroom;
2. the non-academic benefits of full-time placement in a regular classroom;
3. the effect the presence of the child with a disability has on the teacher and children in a regular classroom; and
4. the cost of placing the child with a disability full-time in a regular classroom.

(*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*))

A school district is required to have a continuum of program options available for a child. (Ed. Code, § 56360.) The continuum of placement options includes, but is not limited to, regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction; and instruction using telecommunications in the home or hospitals or institutions. (Ed. Code, § 56361.)

The first two factors of *Rachel H.* are relevant here. Student received both

academic and non-academic benefit from full-time placement in the general education setting. None of the evidence, including Dr. Johnson's independent assessment, the court ordered assessments of Dr. Bejarano and Ms. Rosenberg, the information provided by Dr. Avina and Dr. Williamson, or the QEEG assessment report determined Student required placement in anything less than a general education setting. A determination of traumatic brain injury eligibility would not have changed the appropriateness of the general education placement because Student had no academic deficits, and her social-emotional needs could be met in general education classes with the goals, services, and accommodations Capistrano offered.

Student erroneously contended that Capistrano is required to accept and fund and Mother's choice of general education curriculum and methodology for Student, because she made significant educational progress at Halstrom. Student's success at Halstrom is immaterial. The question is not whether the program Mother wanted was better than what Capistrano offered. Neither *Rowley* nor *Endrew F.* requires a school district to provide a program that maximizes a child's educational progress. Rather, the inquiry is whether Capistrano's proposed program was designed to address Student's unique educational needs, was reasonably calculated to provide Student with some educational benefit, and comported with Student's IEP.

Halstrom has never been a viable placement option for Student, even if qualified as a credentialed non-public school. Halstrom provided Student with individualized instruction in a very restrictive environment. Her attendance at Halstrom would unnecessarily decrease the amount of time she spent in general education. This violates both State and federal mandates which require Capistrano to educate Student in the least restrictive environment. Even assuming the IEP team could consider Halstrom as part of the continuum of placement options, Halstrom failed to meet least restrictive environment standards, and continues to represent an inappropriate placement for Student.

Student's main focus throughout this matter asserts that her emotional disturbance was the result of a traumatic brain injury. Even if true, Student failed to put on any evidence of how her goals, placement, programming, services, and/or accommodations contained in the 2017, 2018 and 2019 IEPs would have or should have been different had Capistrano found her eligible under the classification of traumatic brain injury. Each of the IEPs offered Student a FAPE in the least restrictive environment.

#### DETERMINATION OF FAPE

Student continues to maintain that her emotional disturbance is the result of a traumatic brain injury. Capistrano does not contest Student's medical diagnosis of post-concussion disorder due to traumatic brain injury. The medical determination of traumatic brain injury however, does not over-ride the educational definition of traumatic brain injury necessary to establish traumatic brain injury as an eligibility category for special education and related services. Neither Mother nor any of the subsequent assessors or doctors established Student met the educational definition of traumatic brain injury. No one could definitively establish which came first, emotional disturbance or traumatic brain injury; this finding, though, remains immaterial to the determination of what special education and related services Student requires, if any. Even assuming traumatic brain injury was the controlling reason to assess Student for special education and related services, Capistrano's comprehensive assessments considered and assessed all areas of suspected disability which might have been caused by Student's recurring concussions. Student's emotional disturbance eligibility did not reject Student's concussions or traumatic brain injury. Capistrano merely determined that Student's demonstrated social-emotional disturbance represented the primary issues impacting Student's ability to benefit from her education, regardless of whether these issues were caused by her concussions or traumatic brain injury. Even if the

opposite was true, and she established that traumatic brain injury caused her social-emotional disturbance, neither the assessments, nor the outcome would necessarily have changed. Student failed to put on any evidence of how her goals, placement, programming, services, and/or accommodations would have or should have been different had Capistrano found her eligible under the classification of traumatic brain injury.

Capistrano's offer of specialized academic instruction was not based upon any academic deficit Student demonstrated, as the issues Student had in accessing the general education curriculum were related to her social-emotional deficits tied to her qualifying disability. Nor was the specialized academic instruction in response to any demonstrated need for an instruction methodology different from those used in her general education classes as Student succeeded in class with the accommodations Capistrano provided to address her social-emotional deficits.

It remains undisputed that Student excelled academically when provided one-to-one instruction at Halstrom. Student also successfully completed her core curriculum in general education based large group instruction, and continued to make progress towards graduation with a diploma. Arguably, Student may have performed better with one-to-one instruction, but special education law neither requires Capistrano to maximize Student's progress nor provide the instruction methodology or placement of Mother's choice.

Mother's devotion to one-to-one instruction was contradicted on many levels. Student demonstrated her competency in large group instruction. She attended general education A-G core curriculum classes at Capistrano Valley. In the discussion of alternate programs for Student, Mother consistently discarded any program that offered Student more support in the form of smaller classroom size, additional teacher support, and therapeutic support. As example, the TBIC math class offered a student-to-teacher/aide

ratio of nearly one-to-one. The Fresh Start program offered a Capistrano program which was almost identical to Halstrom in application. Mother's contention that Student could not receive educational benefit in independent study or computer learning was contradicted by Student's use of Rosetta Stone, a self-learning program, in the Halstrom Spanish class.

Capistrano offered numerous alternative general education programs and classes Student could have attended without resorting to a private school. Each of the programs offered by Capistrano could appropriately address Student's unique social-emotional needs and provide appropriate support to Student in a Capistrano based placement. Mother rejected each alternative because none of the alternatives met her preference for a reduced class load supplemented by summer Halstrom courses which provided one-to-one instruction methodologies.

Student's position was that Capistrano was required to accept and fund Mother's choice of general education curriculum and methodology for Student, because Student made significant educational progress at Halstrom. Student's success at Halstrom is immaterial. The question is not whether the program Mother wanted was better than what Capistrano offered, but whether Capistrano's offer permitted Student to make meaningful education progress in the least restrictive environment. Neither *Rowley* nor *Endrew F.* require a school district to provide a program that maximizes a child's educational progress, which Mother wanted.

Mother insisted on a modified school day based upon Student's limited focus and cognitive fatigue. Capistrano offered abundant accommodations and programs to support Student in a full-day class schedule. The TBIC program operated in a therapeutic setting. The resource class offered individualized time for Student to rest or reduce her stress and anxiety. Student objected to the resource class as no more than a study hall. A study hall, perhaps, was exactly what Student needed to rest, relax, catch

up on her missing assignments, and seek relearning or lesson reinforcement from the resource teacher.

Of great contradiction to Student's reliance on a modified school day was her return to athletic competition. Mother submitted the Acute Concussion Evaluation form into evidence. Interscholastic athletic programs, as well as the Education Code, require a release from a doctor skilled in treating concussions before a student may return to competitive sport activities. Part of this release also required the Student to show no signs of concussion, and return to his/her full-time class schedule. Student was released to participate in sports and participated strenuous track and field events. In addition to her athletic commitments, Student also had a part-time job. None of these factors supported a determination that Student permanently required a modified school day.

Student had average to high average academic abilities. She had no unique needs in the general education core curriculum which required special education programming, placement, services, accommodations, or modifications. Student presented no persuasive evidence that she required one-to-one teaching or a private school course to receive FAPE.

## CAPISTRANO'S ISSUES

### Appropriateness of Dr. Bejarano's Evaluation and Written Report

Student requested an independent educational evaluation in response to Dr. Bejarano's federal court ordered evaluation. Mother's primary concern was Dr. Bejarano's failure to unequivocally determine traumatic brain injury as Student's qualifying eligibility category. Without that determination of eligibility, Mother concluded Dr. Bejarano was biased as a former Capistrano employee, and predetermined her recommendations based only on what programs were available through Capistrano. Capistrano contends Dr. Bejarano's assessment was appropriate



and complied with all state and federal law, thereby refuting Student's request for an independent educational evaluation at public expense.

In conducting an assessment, a school district must follow statutory guidelines that prescribe both the content of the assessment and the qualifications of the assessor or assessors. The district must select and administer assessment materials in the student's native language and that are free of racial, cultural, and sexual discrimination. (20 U.S.C. § 1414(b)(3)(A)(i); Ed. Code, § 56320, subd. (a).) The assessment materials must be valid and reliable for the purposes for which the assessments are used. (20 U.S.C. § 1414(b)(3)(A)(iii); Ed. Code, § 56320, subd. (b)(2).) They must also be sufficiently comprehensive and tailored to evaluate specific areas of educational need. (20 U.S.C. § 1414(b)(3)(C); Ed. Code, § 56320, subd. (c).) Trained, knowledgeable, and competent district personnel must administer special education assessments. (20 U.S.C. § 1414(b)(3)(A)(iv); Ed. Code, §§ 56320, subd. (b)(3), 56322.)

In performing an assessment, a school district must review existing assessment data, including information provided by the parents and observations by teachers and service providers. (20 U.S.C. § 1414(c)(1)(A); 34 C.F.R., § 300.305; Ed. Code, § 56381, subd. (b)(1).) Based upon such review, the district must identify any additional information that is needed by the IEP team to determine the present levels of academic achievement and related developmental needs of the student, and to decide whether modifications or additions in the child's special education program are needed. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subd. (b)(2).) The district must perform assessments that are necessary to obtain such information concerning the student. (20 U.S.C. § 1414(c)(2); Ed. Code, § 56381, subd. (c).) In performing an assessment, an educational agency cannot use a single measure or evaluation as the sole criteria for determining whether the pupil is a child with a disability and in preparing the appropriate educational plan for the pupil. (Ed. Code, § 56320, subd. (e); see also 20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. §

300.304(b)(2).) Persons who conduct assessments shall prepare a written report, as appropriate, of the results of each assessment. (Ed. Code, § 56327.)

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

The IDEA unequivocally requires that a parent seeking an independent evaluation at public expense disagree with an assessment "obtained by the public agency." (34 C.F.R. § 300.502(b)(1).) Where no assessment was performed, or the school district refused to initiate an assessment on request, the parent's recourse is to file for due process (Ed. Code, § 56501, subd. (a)(2)), as a result of which the parent may be awarded an independent assessment as an equitable, rather than statutory, remedy. (See *Los Angeles Unified Sch. Dist. v. Student* (C.D. Cal 2008) 548 F.Supp.2d 815, 821-822.)

To legitimize Student's request for an individualized educational evaluation, Dr. Bejarano's assessment must first be determined a Capistrano assessment. Based upon the transcripts of the December 7 and December 14, 2018 IEP team meetings, it was apparent both Capistrano members of the IEP team and Mother were confused as to the status of Dr. Bejarano's assessment and August 22, 2018 IEP team meeting. Dr. Bejarano's assessment was not the result of a Capistrano reassessment. Capistrano

special education professionals were not involved in conducting or participating in the assessment procedures. Capistrano had no control over compliance with the statutory guidelines for appropriate school district assessments.

Instead, Dr. Bejarano's assessment constitutes an anomaly within this current case. Dr. Bejarano's assessment was conducted in compliance with the July 16, 2018 District Court order which related only to the issues presented in that preexisting federal case. While the assessment was useful in answering relevant questions regarding Student ability to access her education, it was generated pursuant to another legal proceeding unrelated to the current case. The District Court was under no obligation to supervise assessment standards created by the IDEA in its acceptance of the stipulation of the parties.

The District Court order required the parties to obtain an assessment conducted by non-Capistrano personnel and complete the assessment in thirty days, rather than the sixty days required under the IDEA. Although the District Court order required the parties to convene an IEP team meeting to develop an IEP for Student's 2019-2020 school year, Capistrano's special education team was not party to the stipulation, nor was consent to any proposed IEP required by either party. Due to the thirty-day timeline which transpired during summer vacation, an integral part of an appropriate assessment went missing. It was impossible for the assessment to assess or observe Student's participation in her general education classes at Capistrano Valley. It was also impossible for Dr. Bejarano to observe Capistrano's other programs being offered to Student. Additionally, Dr. Bejarano failed to communicate with Student's medical providers, though it remains unknown if Mother provided a release of information for such communication.

Had this been an authentic school district assessment, it would be considered sufficiently flawed to validate Student's request for an independent educational

evaluation. The District Court record however, specifically indicated Dr. Bejarano's assessment would not be considered Student's triennial assessment and would not preclude Capistrano from conducting another comprehensive assessment of Student. Accordingly, Capistrano's request that Dr. Bejarano's court ordered assessment be deemed appropriate shall be denied.

#### Request for Independent Educational Evaluation

The IDEA unequivocally requires that a parent seeking an independent evaluation at public expense disagree with an assessment "obtained by the public agency." (34 C.F.R. § 300.502(b)(1).)

As stated above, Dr. Bejarano's assessment represented an anomaly. Although the assessment was conducted by a qualified non-Capistrano assessor, it did not constitute a Capistrano special education assessment nor did it qualify as an independent educational assessment. It was an assessment conducted pursuant to court order in another legal proceeding. Therefore, any request for additional independent assessment in response to Dr. Bejarano's assessment must be addressed to the District Court which issued the order for assessment.

The last Capistrano assessment of Student occurred in 2016. Student was not scheduled for Capistrano reassessment until her triennial in 2019. Student, however, sought and received an independent educational evaluation conducted by Dr. Johnson in 2017. She is not entitled to another independent educational evaluation until and unless Capistrano is allowed to comprehensively reassess Student. Thus far, Mother has refused to provide consent to Capistrano's reassessment of Student. Accordingly, Student's request for an independent educational evaluation is denied.

## ORDER

1. Student's request for relief is denied in its entirety.
2. Capistrano's request for relief is denied is denied in its entirety.

## 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, neither party prevailed on their respective issues.

## RIGHT TO APPEAL

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: July 15, 2019

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Judith Pasewark

Administrative Law Judge

Office of Administrative Hearing