

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CAPISTRANO UNIFIED SCHOOL DISTRICT, OAH Case No. 2019020293

v.

PARENT ON BEHALF OF STUDENT.

DECISION

Capistrano Unified School District filed a request for due process hearing with the Office of Administrative Hearings on February 7, 2019, naming Student. On February 20, 2019, OAH granted the parties' joint request to continue the due process hearing.

Administrative Law Judge Judith L. Pasewark heard this matter in San Juan Capistrano, California, on March 20, 21, and 26, 2019.

Ernest B. Bell and Ashley Turner, Attorneys at Law, represented Capistrano. Kim Gaiter, Sarah Cassidy, Legal Specialists, and Kathleen Purcell, Alternative Dispute Resolution Executive Director, attended the hearing at various times as Capistrano's representatives.

Mother attended the hearing on behalf of Student each day. Father attended the hearing briefly on March 26, 2019. Student did not attend the hearing.

At the parties' request, OAH continued the hearing for the parties to file written closing arguments. The record closed on April 8, 2019, upon receipt of District's closing brief. Mother did not file a closing brief on behalf of Student.

ISSUES¹

1. Did Capistrano's November 8, 2018 individualized education program constitute Student's free appropriate public education in the least restrictive environment so that Capistrano may implement the IEP without parental consent?

SUMMARY OF DECISION

Capistrano sustained its burden of proof establishing the November 8, 2018 IEP made an appropriate offer of special education placement and services in the least restrictive environment for Student. Student's maladaptive behaviors at school, including frequent elopements and self-injurious behaviors, required the full-time assistance of several aides and staff members, disrupted the classroom on a daily basis and resulted in significant safety issues for Student, which could not be appropriately addressed on an open, comprehensive high school campus. The preventative measures necessary to ensure Student's safety at Dana Hills High School, required Capistrano to modify Student's curriculum to the extent Student could not make educational progress. Therefore, District's offer of special education placement in the more restrictive setting of Orange County Department of Education's Special Schools program was appropriate, and Student's goals and related services could be easily implemented in the county placement.

¹ The issues pleaded in the complaint have been combined, reorganized and rephrased for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

FACTUAL FINDINGS

BACKGROUND

1. Student is a 15 year-old who resides with his parents within the jurisdictional boundaries of Capistrano. He is a ninth grader attending Dana Hills High School, a comprehensive high school campus in Capistrano. Student is non-verbal and qualifies for special education and related services under the primary category of autism and secondary category of intellectual disability. While attending Dana Hills, Student received specialized academic instruction in a moderate/severe special day class for all academic subjects as part of Capistrano's Structured Teaching, Educating Prepared Students or STEPS program.

STEPS PROGRAM

2. Prior to transitioning to Dana Hills, Student attended the STEPS program throughout middle school, commencing in the 2016-2017 school year. STEPS provided functional academics, focusing on the development of skills for post-secondary life and included many community-based learning opportunities.

3. Capistrano's vision statement for STEPS indicated that for students deemed appropriate for secondary level program, STEPS provided life skills training, social skills development and job skills acquisition, and training. Small classes were designed to provide specialized academic instruction on three comprehensive high school campuses. STEPS students were integrated within the general education program to the maximum appropriate to their individual needs. Related special education services were available to students based upon their individual IEPs.

4. Additional components of STEPS included use of a variety of teaching strategies and positive behavioral interventions, as well as, community based instruction to provide application and generalization of functional skills learned in the classroom.

5. Capistrano described its community based instruction as the regular and systematic instruction in meaningful, functional, age-appropriate skills in integrated community settings, using naturally occurring materials and situations, designed to help the student to acquire and generalize life skills that enhance his/her opportunities for meaningful experience and relationships within the general community. Community based instruction was not a program but an instructional strategy designed to target the development of functional skills in natural, non-school environments. It was the next level of instruction after classroom instruction had taken place. Classroom instruction needed to be intensive and explicit. Skills learned in the classroom were then generalized and taught in the community. Community based instruction is not a field trip; it does not stand alone, and it must be linked to on-going instruction. Classroom instruction was driven by individual strengths and needs, using consistent teaching strategies, as well as, accommodations designed to enhance the student's participation in typical activities.

6. During the 2016-2017 school year, Student demonstrated extensive maladaptive behaviors, which caused Capistrano to conduct a functional behavior assessment. Capistrano's functional behavior assessment report, dated January 25, 2017, relayed observations of significant targeted behaviors. Student self-stimulated his genital area. Student demonstrated self-injurious behaviors by biting parts of his body and forcing himself to vomit by putting his hand/fingers down his throat. Student tantrumed by screaming, yelling, hitting, grabbing adults, and dropping to the floor. Student eloped from the classroom. Observers noted that a behavior chain, which ended in eloping, usually began with verbal stimulation, then the breaking of objects, pushing away from the table, and finally running out of the classroom. Escalation of these behaviors increased when multiple staff members were needed to assist in the de-escalation process and/or where Student needed to be removed from other students

and/or the classroom.

7. Student presented with delayed cognitive and reasoning skills, significantly below the average. The functional behavior assessment report noted Student could be redirected with multiple prompts and "first/ then" strategies involving preferred activities. When not interested or when presented with a non-preferred activity, Student exhibited his displeasure by looking away or eloping. Student's disruptive behaviors and aggressive escalations impeded his social and emotional development, and his prolonged elopements and other identified behaviors often required substantial instructional time to de-escalate Student back to task. Capistrano determined Student exhibited an extreme need for behavior intervention. When engaged in target behaviors, Student's attention was not on learning, and he missed critical information from the teacher and/or staff. Positive behavior interventions were attempted, but Student was inconsistent with his responsiveness, as at times the interventions and strategies were effective, other times not. Environmental factors, such as changes in weather, changes in staff, or changes with other students, triggered Student's maladaptive behaviors. Student tended to become anxious and agitated with extra voices and noise. Transitions or any type of change in his school day triggered self-injurious behavior. Loud noises or activities outside the classroom triggered elopement. Student tantrumed and/or eloped when faced with non-preferred demands. Student vomited after he first exhibited other behaviors, such as biting and/or eloping.

8. In January 2017, Capistrano developed a behavior intervention plan, which provided replacement behaviors for Student, along with environmental supports, such as a calming area in which Student could calm down or take a break. Student transitioned to the ninth grade STEPS program at Dana Hills with this behavior intervention plan in effect.

9. Dana Hills is a comprehensive high school with approximately 2500

students. It is a large, open campus, spanning many acres. STEPS is not segregated from the general education campus. Its classroom is located towards the center of the campus, subjecting Student to constant student transitions, noises, i.e., class bells, announcements, student assemblies, and other student activities. The Dana Hills campus is not gated and busy traffic on facing and surrounding streets created safety concerns for Student.

STUDENT'S UNIQUE NEEDS

10. Mother described Student as a teenager with strong athletic abilities who loves physical activity.² He navigated his world through his senses. Student had difficulty with focus and self-regulation. He cried when not focused and became emotional when he was not listening to instructions. On the other hand, at home when focused on a preferred activity, Student sat while being read to for more than 30 minutes at a time. Mother believed Student's lack of understanding of what was expected of him resulted in his noncompliance. At home Student responded well to "first/then" behavior strategies and front-loading tactics put everyone on the same page regarding what was expected of him.

11. Mother noted Student's behaviors escalated due to frustration if his cues were not noted at home, especially regarding his restroom needs. Student's behaviors also increased when he was left out of activities; Mother opined Student became "P-ed off" when excluded from community based instruction.

² Mother preferred to testify in a conversational manner. Her testimony was generally a stream-of consciousness narrative which was difficult to follow. To maximize Mother's ability to participate in the hearing, Mother was sworn in at the beginning of the hearing to allow the narratives and responses she wished to convey to the ALJ act as her testimony.

12. Student experienced health problems during the first part of the 2018-2019 school year, which Mother believed contributed to his behaviors. When Student had a fever, it affected his self-regulation, and he was more prone to meltdowns. He bit his hand and attempted to make himself vomit when really upset. Mother reported Student did not escalate often at home, no more than once or twice a month. When escalation occurred, it took about 30 minutes to calm him down. At home, Mother calmed Student by placing him in the shower. Student also eloped from home, usually seeking to go to the Jacuzzi spa, a preferred activity.

13. Mother discontinued Student's applied behavior analysis services at home. She felt the one-to-one service provider was inexperienced and insufficiently trained. Mother indicated she would return to applied behavior analysis services in the home if she felt it could work for Student, and if it could be worked into the family's home schedule. Mother relied upon her "sixth sense" as a mother, to determine whether an aide was properly trained and whether a program was working for Student. Similarly, Mother opined that Student's program at Dana Hill was contributing to Student's behaviors and could be appropriately modified. Specifically, there were too many people around Student, including staff. Student became anxious or frustrated when people did not understand him, and he went into sensory overload. Only one aide should be assigned to Student and that aide should be more in-sync with Student. She suggested the aide read more to Student. Mother concluded Capistrano should provide Student with an appropriate placement on a district campus. She stressed Capistrano could modify the Dana Hills STEPS program for Student and/or allow Student to attend STEPS on a different high school within Capistrano.

14. Capistrano's experiences with Student were markedly different from those described by Mother. Nicole Godfrey,³ a speech and language pathologist in the

³ Ms. Godfrey holds both a bachelor's degree and master's degree in

moderate/severe STEPS program at Dana Hill, provided Student with speech and language services in individual sessions, twice a week and group session, once a week. At hearing Ms. Godfrey described her therapy sessions with Student, which took place in the sensory room and allowed Student to seek sensory input. Student's interactions with Ms. Godfrey were unpredictable depending on Student's day. Student's relative strength was his ability to identify when he was uncomfortable. His weaknesses lay in his behaviors and lack of communication skills. Negatively, Student removed himself from non-preferred activities. When Student became agitated, he shut down quickly. When faced with non-preferred goals, Student became increasingly agitated, his breathing became erratic, he stimmed, and he wanted to get away, or elope.

15. Ms. Godfrey described Student as non-verbal with limited gesture communication, which required interpretation by the listener. Student attempted to communicate, but required prompting. If interested or motivated, Student could, if prompted, use Proloquo software on his iPad to communicate. Ms. Godfrey noted Student had very limited interaction with typical peers. Peers who came to the STEPS classroom attempted to interact with Student, but Student did not reciprocate.

16. Student exhibited maladaptive behaviors during individual speech therapy sessions. When pushed to work on goals, Student became agitated. Ms. Godfrey then stopped the speech session, because she worried Student's behavior would further escalate, resulting in his elopement. Ms. Godfrey expressed serious concern about Student's safety. There were always staff members posted at the doors to thwart

communication disorders. She holds a Certificate of Clinical Competence in speech-language pathology, Professional Clear Clinical or Rehabilitative Services credential, California Speech-Language-Hearing Association license, and Assistive Technology Applications Certificate.

Student's elopements, because the doors led outside to the campus. Ms. Godfrey expressed fear that Student would break through the doors and get out to the parking lot or busy street. When Mother asked if there was another, safer room to conduct Student's services, Ms. Godfrey indicated there was another room available. However, this room was not a practical solution for Student, as it required him to go out onto the general campus among the general student population and upstairs to a small room with no sensory supports.

17. Student had group speech therapy sessions with Student's classmates in the STEPS program. Student refused to participate in the group sessions. Instead, he removed himself to the sensory room. Based upon her experiences with Student, Ms. Godfrey ultimately opined Student could not satisfactorily meet his goals on the Dana Hills campus due to his behaviors.

18. Jenna Young⁴ provided Student's occupational therapy services at Dana Hill. Ms. Young described Student as having needs in the areas of attention, impulsivity, and sensory overload. Student did not meet his classroom goals. The non-preferred portions of Student's goals led to his self-injurious behaviors and elopement.

19. Erin Pegan,⁵ a Capistrano school psychologist, worked with the STEPS

⁴ Ms. Young holds a bachelor's degree in kinesiology and a master's degree in occupational therapy. As an occupational therapist for Capistrano, Ms. Young treats children with attention deficit disorders, autism, speech and language impairments, cerebral palsy, and intellectual disabilities.

⁵ Ms. Pegan holds an Educational Specialist degree in school psychology, a master's degree in educational psychology, and a Pupil Personnel Services credential. Her job included acting as a behavior case manager and creating and monitoring behavior intervention plans.

program teachers and staff. She was familiar with Student's 2017 functional behavior assessment and corresponding behavior intervention plan. She provided the behavior intervention plan review for the November 8, 2018 IEP team meeting. At hearing, Ms. Pegan expressed continuing concerns regarding Student's behaviors and safety. Student's non-verbal status and intellectual disabilities, coupled with his continuing elopements and self-injurious behaviors, made it impossible for Student to be successful in the STEPS program. Student met only one of his 2017 behavioral goals. His success was not based upon significant increase in utilizing replacement behaviors. Rather, staff had been forced to decrease their demands of Student and increase their supervision to two adults with Student at all times. As a result, Capistrano teachers and staff could not make non-preferred demands of Student, fearing for his safety, which reinforced Student's maladaptive behaviors. Student required a small, self-contained and structured educational environment. The comprehensive high school campus at Dana Hills could not adequately manage Student's sensory environment, nor could it effectively provide Student a safe educational site.

20. During cross-examination, Mother pointed out the daily data reports collected by Capistrano staff did not reflect the significant behaviors described by Ms. Pegan. Ms. Pegan explained that the data was not flawed, but the seemingly decreased behaviors was due to the decrease in non-preferred demands placed upon Student. Further, the data reported only successful elopements, not attempted elopements, where Student was thwarted before getting out the door. Nevertheless, even with a decrease in behaviors, Student elopements were still occurring approximately 25 times per week.

21. Joel Tapper⁶, Student's special education teacher in the STEPS program at

⁶ Mr. Tapper holds a master's degree in special education and held Clear Level II Education Specialist Instruction credential in both mild/moderate and moderate/severe

Dana Hill, was the most persuasive witness at hearing. Mr. Tapper emotionally testified with credibility and genuine concern for Student.⁷ Mr. Tapper provided photographs and maps to describe his classroom and its relationship to the general high school campus. His classroom had 15 desks and four doors exiting out of the room. One door entered/exited to the sensory room, known as “the cave,” which had equipment and other articles for sensory breaks or sensory decompression. The other doors led outside to other classrooms and an athletic field. Neither the campus, nor Student’s classroom are gated, and the campus is surrounded by busy streets.

22. Student’s school day was highly structured. Two staff members greeted Student when he got off the bus and escorted him to the classroom. Dana Hill has approximately 2500 students and is very active in the morning, which affected Student’s sensory issues. Student had difficulty with the continuity in class. General education classes at Dana Hill were fluid and created anxiety for Student. Bells and announcements

disabilities. He holds a credential in Crisis Prevention Intervention Training.

⁷ Normally a witness curricula vitae provides little insight into its author. Mr. Tapper’s CV was an exception which personified the teacher testifying at hearing. Mr. Tapper wrote: “School should be a wondrous adventure. I humbly believe teaching is a quiet act of courage, something one human does that creates change and growth in another. I will never be afraid to try new ideas or strategies, because it’s the evolving process of education that feeds my soul. Even though in today’s climate, the regard for teachers has eroded somewhat, I am proud to be an educator. It is not only my chosen profession, but my calling. No day is ever the same, and I rejoice in each small educational victory. Regardless of the speed, forward is forward. My passion is special education; my purpose is to enrich each child who comes into my class.” Mr. Tapper’s mission statement, echoed the demeanor in which he testified at hearing.

made noise throughout the day. Students continually walked the hallways. Activities occurred outside the classroom. To avoid sensory meltdowns, Mr. Tapper tried to frontload Student's day, but it was difficult, often unsuccessful, given the number of activities going on throughout the campus at any given time. Student would still escalate.

23. Mr. Tapper emphasized that Student's elopement remained his biggest problem. Even during bathroom breaks, two staff members accompanied Student to avoid elopement. He was not always successful in his escapes, but his intent was there. Student tried to escape work demands in the classroom. In spite of all of the precautions taken, i.e., two aides, doors guarded and blocked, preferential seating facing away from doors, and access to the sensory room, Student still successfully eloped on a regular basis, at least once or twice a week. Mr. Tapper described Student as very fast and able to dart from the classroom. When staff attempted to stop Student, other behaviors escalated. Successful elopements took over 60 minutes to gather Student and de-escalate his behaviors. This required the complete attention of Mr. Tapper, the classroom aides, and other school staff members, usually four to five people, each time Student eloped.

24. Student's elopements were connected to his desire to escape working on non-preferred activities. Staff used a variety of de-escalation techniques. Additional staff was assigned to watch Student and guard the doors. There was always a one-to-one aide with Student and a second aide when Student was working on non-preferred activities. Mr. Tapper emphasized Student required two aides to lessen the risk of a successful elopement.

25. Mr. Tapper expressed both sadness and frustration that Student could not meet his 2017 IEP goals. Student could not access his education due to his safety risks. To reduce Student's elopements and other maladaptive behaviors, expectations were

modified and demand reduced on non-preferred activities. As with Ms. Pegan, Mr. Tapper explained that the daily data reports which went home to Mother indicated Student worked on his goals each day, but it did not mean he was successful. A designation of "no elopement," meant no successful elopement, not that Student did not attempt elopement.

26. Mr. Tapper also reported Student did not access any social benefit available to him at Dana Hill. Student did not participate in the Best Buddies program with typical peers. When general education students came to the STEPS classroom, the sensory issues were too much for Student, and he would retreat to the sensory room. Student could not participate in community based instruction, due to safety concerns.

27. In response to Mother's questions, Mr. Tapper did not dispute Student may have acted out when not allowed to participate in community based activities. Student, however, was not functionally ready for such activities, and his behaviors were too great a safety risk. Mr. Tapper explained that while Student may participate in community activities outside of school with Mother, those activities, such as church, are primarily preferred activities. In the school setting, Student needed to first learn the academics of functional skills in the classroom before generalizing in the community. Student's behaviors impeded his ability to acquire necessary foundational skills. Mr. Tapper also disagreed with Mother's contention that Student's illness(es) contributed to his escalation of behaviors. To the contrary, Mr. Tapper reported that when Student was not feeling well, he was not up to acting out. Further, when ill, non-preferred demands were not made upon Student pursuant to his medical protocol.

28. Mr. Tapper was both poignant and sad when describing his inability to provide Student with education benefit. Ultimately, he concluded that limiting demands on Student was not successful in controlling Student's elopements. Student's behaviors were already limiting his access to his education. Each time Student eloped, it took time

away from the education of the other students in the classroom. Each time Student escalated, it was necessary to remove Student from the classroom. This took Mr. Tapper's time away from teaching Student and the others for lengthy periods of time each week.

NOVEMBER 8, 2018 IEP

29. Capistrano held Student's annual IEP team meeting on November 8, 2018. The following people attended the meeting and made up the IEP team: Erin Pegan, school psychologist; Dean Ford, program specialist; Luci Coppola, administrator; Nicole Godfrey, speech and language therapist; Melissa Goldbeck, school nurse; Joel Tapper, education specialist/case carrier; Jenna Young, occupational therapist; Jacqueline Shamrock, Regional Center of Orange County service coordinator; and Mother. Mother waived the presence of a general education teacher.

30. Mother shared her concerns and priorities with the IEP team. Specifically, Mother requested that community based instruction be part of Student's school experience and academics. Mother expressed concern Student was not getting enough physical activity. She also reported that illness had impacted Student's ability to get into the school rhythm.

31. The IEP team reviewed Student's 2017 progress on goals and offered new goals for 2018. On 2017 academic goals (math) addressing matching shapes or objects and identifying numbers, Student only met 20 percent of each goal and showed a 30 percent decline from his prior baselines established in middle school. The IEP team crafted new goals to again address matching and numbers. The IEP team noted Student did not have the word recognition skills (reading) to complete his Pre-Primer sign words. To assist in developing Student's visual literacy, the IEP team developed two 2018 reading goals to identify functional words and matching them to pictures.

32. On the 2017 self-care goal addressing signing personal needs, Student

met only 20 percent of the goal of signing when he needed to use the restroom. The IEP team created a 2018 goal to increase the number of times Student would independently sign his need to use the restroom.

33. On the 2017 Alternate Augmentative Communication goal, Student met only 20 percent of his goal. His present level of progress indicated his communication intent remained limited, inconsistent and difficult to interpret, and he required models or hand-over-hand prompting to use his alternate communication device with consistency. On the 2017 goal addressing communication of cessation, Student's ability to independently use symbolic communication, i.e., sign, to request cessation of non-preferred activities remained limited. Student met his 2017 goal addressing requesting preferred activities and maintaining attention for at least one minute. For 2018, the IEP team developed a new goal to increase Student's ability to request preferred activities with an alternate communication device; a new goal was crafted to address identifying symbols and photographs with an alternate communication device; and a pragmatics goal was created to have Student initiate social greeting with an alternate communication device.

34. The IEP team developed a 2018 social emotional goal to increase Student's ability to follow simple verbal directions with prompting.

35. Student's present levels of performance on 2017 behavior goals indicated Student still frequently displayed a heightened sense of anxiety and distress. Due to the severity of these behavioral outbursts and self-injurious behaviors, continuing behavior reduction goals were required and two staff members were needed for transitions to ensure safety. Student met his eloping-reduction goal by reducing his elopement by 20 percent. Although Student achieved 80 percent progress on his self-injury goal, the goal only required a 20 percent reduction in self-injurious behaviors in order to be met 100 percent. Likewise, Student met 50 percent of his replacement behavior communication,

but Student was only required to display accuracy in three-out-of-five opportunities. The IEP team created six new behavior goals for 2018.

36. Since the beginning of the school year at Dana Hills, Student experienced an average of 35 self-stimulation/inappropriate self-touching occurrences per month. The first 2018 behavior goal sought to reduce Student's self-stimulation by 16 percent over 12 months. Student experienced an average of 20 mild self-injurious incidents per month, such as biting and slapping himself. The second behavior goal sought to reduce Student's mild self-injurious behaviors by 20 percent. Student engaged in six-to-seven moderate self-injurious outbursts per month, such as repeated or multiple biting. The third behavior goal sought to reduce moderate self-injurious behaviors by 20 percent. Student experienced an average of 10-to-12 incidents of severe self-injury per month, such as serious biting, destroying classroom materials, and self-inflicted regurgitation. A fourth behavior goal sought to reduce severe self-injurious behaviors by 20 percent. The IEP team developed a fifth corresponding behavior goal to create a reduction in self-injurious behaviors by teaching Student to point to his break picture card when frustrated by academic demands. Although Student's elopements reduced 20 percent since 2017, since the beginning of the 2018-2019 school year, Student still attempted to elope approximately ten times per month, which included running out of the classroom and running towards the parking lot. The sixth behavior goal sought to reduce eloping by having Student point to his break card when he wanted a break.

37. Student met 72 percent of his 2017 vocation goal, in which Student completed one of five simple classroom jobs each day with supervision and no more than two prompts. The IEP team created a 2018 vocation goal to assist Student to further continue engaging in a variety of functional tasks and vocational skills. The goal sought to increase Student's ability to attend to the teacher in small group activities and academic tasks for one minute with maximum prompting. The IEP team developed a

functional task goal to assist Student with completing three-step task boxes, such as sorting, matching or assembling, with maximum prompting. Another vocational goal for requesting assistance, sought to have Student approach staff and make a request for assistance by tapping on person's shoulder no less than twice a day.

38. The IEP team provided Student with assistive devices and services consisting of a dynamic display high-tech device with voice output. Sensory accommodations were offered, such as visual schedules, access to sensory strategies (music, therapy ball, weighted lap item, weighted backpack, tooth brush, rocking chair, fidgets, etc.), multi-modal communication strategies, including access to visual supports and picture symbols and longer response time. Student was allowed to regroup in a quiet area. Sign language was utilized in the classroom to understand Student's communications.

39. The IEP included observations and consultations, which would be conducted by a program specialist, autism specialist, speech and language pathologist, augmentative and alternative communication specialist, assistive technology specialist, and/or school district autism consultants on an as needed basis.

40. The IEP team reviewed the behavior intervention plan and discussed modifications of the 2017 behavior intervention plan. Additional information was provided regarding replacement behavior strategies, however it was noted that the use of replacement behaviors did not consistently decrease Student's behaviors. Modifications were suggested for the reinforcement system to include additional sensory items, which were included as accommodations in the IEP. The proposed behavior goals supported the behavior interventions. Reactive strategies did not require modification.

41. The IEP team conducted a discussion of placement alternatives for Student. Capistrano members of the IEP team considered Student's continuing

placement in the STEPS program at Dana Hill to be inappropriate and unsafe. The team members emphasized the need to maximize Student's independence and provide him with both functional and academic opportunities, which were not available at Dana Hills due to safety concerns. Mother disagreed that Student required two aides, nor did she feel two aides advisable as it impacted Student's ability to make friends. Mr. Tapper shared that the additional staff was necessary for Student's safety due to his eloping, as Dana Hills was not a gated or secured campus. The IEP team considered Tesoro High School, another comprehensive high school with the STEPS program. The Dana Hills STEPS students were higher functioning than those at Tesoro. Mother felt Tesoro was a safer environment for Student and had more options available for Student than the county Special Schools program. Mother did not want to restrict Student's environment further. Tesoro, however, had many of the same safety concerns as Dana Hills and was considered inappropriate for Student by the remaining members of the IEP team. Capistrano members of the IEP team recommended placement in the county program.

42. Mother visited several non-public schools, but ultimately none were available for Student. Mother continued to disagree with placement county program. She had previously viewed the Special Schools campus and did not believe it was the best program for Student. Mother objected for several reasons: (1) Student would not know anyone in that program; (2) the drive was too far; (3) the other students in the program were lower functioning than Student; and (4) Student would not be exposed to higher functioning students and typical peers.

43. After full discussion, Capistrano made the following offer of placement at the Special Schools program and services for Student:

- a. Specialized academic instruction, six hours per day, in a moderate/severe classroom;
- b. Additional program support (one-to-one aide) six hours per day;

- c. Individual speech and language services 40 minutes per week;
- d. Occupational therapy services 30 minutes per month;
- e. Extended school year and related services; and
- f. Curb-to-curb transportation with safety vest.

44. Concurrent with the November 8, 2019 IEP, Capistrano created an individualized transition plan, which identified Student's post-secondary as (1) employment; (2) education and training; (3) independent living; and (4) community/social activity. The plan addressed each of Student's areas of need, supported by his IEP goals. Primarily Student would continue to work on functional goals and behavior management during class time.

45. Mother did not consent to Capistrano's offer of placement in the Special Schools program. She did not sign the November 8, 2018 IEP until January 11, 2019, when Mother signed the IEP, indicating in her own handwriting that she consented to the IEP except for placement in the county program. Mother also requested a copy of the revised behavior intervention plan at that time.

46. In her testimony at hearing, Mother expressed dissatisfaction with the Dana Hill's STEP program and agreed it was probably not an appropriate setting for Student. She acknowledged that Student's safety was a factor in Capistrano's offer of the county program, but she maintained Student's maladaptive behaviors were largely due to his recent illness; his fevers and medication triggered the behaviors. Additionally, she agreed with the behavior intervention plan discussed at the November 8, 2018 IEP team meeting and acknowledged Student still demonstrated these maladaptive behaviors with behavior strategies in place.

47. Mother emphasized that the STEPS program would be appropriate for Student if things were working in class. As implemented by Capistrano, the program did not strike a balance for Student. Sports and community based instruction did not take

place for Student. She surmised that if Student was taking part in sports and community based instruction, things he really liked, his behavior would improve. Mother opined that community based instruction needed to be increased for Student, and he would benefit from it. She found community based instruction critical to Student's education and socialization. Mother believed Student could participate in community based instruction, but he was not given the opportunity to do so. Based upon her own experiences with Student, Mother found Capistrano's safety concerns speculative. Student's elopement had decreased and he would be successful on community outings with appropriate accommodations. Student was already successful with family outings, especially church related activities.

48. Mother's descriptions of Student's behavior in the community were supported by Mercedes Wagner, who testified on Student's behalf. Ms. Wagner frequently observed Student as part of a church program, which instructed special needs children in sharing in the sacraments. Student participated in the program twice a month for 90 minutes during the noon mass. Three children with autism participated in the program with the assistance of an aide or "Big Buddy." Big Buddies were typical high school students who modeled appropriate behaviors for the kids. The program taught lessons and provided individualized instruction. Student did not elope from class, as he was enticed with the snacks provided in the classroom. Student did not self-stimulate and transitioned well. Ms. Wagner described Student as pretty sedate. She also observed Student participating in other activities and enjoyed his interaction with typical peers.

49. At hearing, Mother repeated her consent to the November 8, 2018 IEP with the exception of the offer of placement in Special Schools program and the lack of community based instruction opportunities in the IEP. Specifically asked, Mother indicated she agreed with the related services offered, the one-to-one aide, each of the

goals, the individualized transition plan, offer of extended school year and related services, and offer of transportation.

COUNTY SPECIAL SCHOOLS PROGRAM

50. Lucy McDonald⁸ from the Orange County Department of Education testified at hearing to describe the county's Special Schools program. Ms. McDonald was the Principal at Special Schools. Special Schools program is intended to support significant needs and maladaptive behaviors, which were referred to the county from school districts. To be accepted into Special Schools, it must first be determined that the student's needs cannot be met on a local school campus. The ultimate objective of Special Schools is to remediate a student's problem behaviors and transition him/her back to a school district program. Capistrano referred Student to Special Schools due to his cognitive delays, non-verbal status, and maladaptive behaviors, including tantrums, screaming, self-injury, and elopement.

51. Special Schools is located in self-contained setting. The site is gated with only one entrance/exit, which is supervised at all times. The site itself is located in a quiet neighborhood, away from busy streets. The neighborhood is described as welcoming and safe. Neighbors and community members are involved with the students. There is a large, fenced field for exercise and athletics, such as soccer. The field is also available for power walking to address sensory issues. There is also access to tennis courts.

⁸ Ms. McDonald holds a bachelor's degree in bilingual/bicultural education and master's degree in psychology. She also holds a Pupil Personnel Service credential, School Psychologist credential, and Administrative credential/Tier 1. Ms. McDonald is a certified behavior intervention case manager and is trained in crisis intervention prevention.

52. Special Schools has 33 students divided among four classrooms. Each classroom has a highly qualified special education teacher and two para-educators. Additionally, some students have a one-to-one aide pursuant to their individual IEPs. Resources available on site include, school psychologists trained in behavior, including elopement and self-injury. All special education services are available in Special Schools. Ms. McDonald reviewed the November 8, 2018 IEP and reported Student's goals could be easily implemented and proposed services and accommodations could be provided in Special Schools program. They were, as Ms. McDonald stated, typical of what was provided at Special Schools. Based upon her experience and review of the November 8, 2019 IEP, Ms. McDonald opined Special Schools was appropriate for Student and he could learn in that placement.

53. At hearing, Mother presented Ms. McDonald with questions and concerns about the community based instruction, and the November 8, 2018 IEP lack of such goals or instruction for Student. Ms. McDonald explained in detail. The ultimate goal of Special Schools program was to involve Student in community based instruction, but the primary goal was safety first. Not all students were initially ready for community based instruction. Foundational skills needed to be developed before community based instruction could be implemented. Student needed to first learn functional skills before he could generalize them at home or outside of the educational setting. The learning of skills was built into the daily classroom routine. As an example, Special Schools utilized a mock store in the classroom to teach functional academic skills, i.e. sorting and money, before a student transitioned into the community to generalize these skills in an actual store. Additionally, once Student attained the appropriate skill set, including behavior, his IEP could easily be modified to include more community based activities.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁹

1. 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.¹⁰; Ed. Code, § 56000 et seq.; Cal Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child’s IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) “Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) “Related services” are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v.*

⁹ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided herein.

¹⁰ All citations to the Code of Federal Regulations refer to the 2006 edition, unless otherwise noted.

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.)

4. In *Endrew F. v. Douglas County School District* (2017) 580 U.S. [137 S.Ct. 988], the Supreme Court reconsidered the meaning of the phrase “some educational benefit” for a child not being educated in a general education classroom. The court rejected the contention by the school district that the IDEA was satisfied by a program providing “merely more than *de minimis*” progress, as well as parents’ contention that school district’s must provide an education that is substantially equal to one afforded to children without disabilities. “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (*Id.*, 580 U.S. ___, 137 S. Ct. at p. 1001.) The Court retained its earlier holding in *Rowley* that any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. While *Endrew F.* does not require an IEP to maximize educational benefit, it does require that “a student’s educational program be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.” (*Id.*, 580 U.S. ___, 137 S. Ct. at p. 1000.)

5. In so clarifying “some educational benefit,” however, the Court stated that it would not attempt to elaborate on what appropriate progress will look like from case to case. “It is in the nature of the Act and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” (*Id.*, 580 U.S., 137 S. Ct. at p. 1001.) *Andrew F.* does not create a new legal standard for what constitutes a FAPE, but is a clarification of *Rowley*. (*K.M. v. Tehachapi Unified School Dist.* (E.D. Cal. Apr. 5, 2017, 1:15-cv-001835 LJO JLT) 2017 WL 1348807,**16-18.)

6. The Ninth Circuit further refined the standard delineated in *Andrew F.* in *M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. 2017), 858 F. 3d 1189), where the Court stated that an IEP should be reasonably calculated to remediate and, if appropriate, accommodate the child’s disabilities to enable progress to commensurate with non-disabled peers, taking into account the child’s potential. (*M.C.*, *supra*, at p.1201.) The Ninth Circuit affirmed that its FAPE standard before the *Andrew F.* decision comports with *Andrew F.* (*E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535.)

7. An educational agency in formulating a special education program for a disable pupil is not required to furnish every special service necessary to maximize the child’s potential. (*Rowley*, *supra*, 458 U.S. at p. 199.) Instead, an educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. (*Park v. Anaheim Union High School* (9th Cir. 2006) 4654 F. 3d 1025, 1033.)

8. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502,

56505; Cal. Code Regs., tit. 5, § 3082.) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, Capistrano had the burden of proof on the issue presented.

ISSUE: DOES THE NOVEMBER 8, 2018 IEP PROVIDE STUDENT A FAPE

9. Capistrano contends the November 8, 2018 IEP offer constitutes a FAPE for Student in the least restrictive environment. Student requires a more restrictive educational setting than his current classroom due to his maladaptive behaviors and concerns for his safety. Mother contends Student's placement in the county's Special Schools program is unnecessary, as Student's IEP can be implemented in a lesser restrictive placement on a Capistrano high school campus. Mother further contends the IEP does not constitute a FAPE because it fails to include community based instruction for functional skill development and socialization.

10. 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.*)

11. 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 hindsight. "An IEP must take 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 F3d 1141, 1142 (*Adams*), citing *Fuhrman v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

12. An IEP is a written document which details the student's current levels of academic and functional performance, provides a statement of measurable academic and functional goals, a description of the manner in which goals will be measured, a statement of the special education and related services that are to be provided to the student and the date they are to begin, an explanation of the extent to which the child will not participate with non-disabled children in a regular class or other activities, and a statement of any accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments. (20 U.S.C. § 1414(d); Ed. Code, § 56345, subd. (a).)

13. An educational agency in formulating a special education program for a disabled pupil is not required to furnish every special service necessary to maximize the child's potential. (*Rowley, supra*, 458 U.S. at p. 199.) Instead, an educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. (*Park v. Anaheim Union High School* (9th Cir. 2006) 4654 F. 3d 1025, 1033.) To determine whether a district offered a student a FAPE, the analysis must focus on the adequacy of the district's proposed program and not on the family's preferred alternative. (*Gregory K., supra*, at p. 1314.) An IEP need not conform to a parent's wishes to be sufficient or appropriate. (*Shaw v. District of Columbia* (D.D.C. 2002) 238 F. Supp.2d 127, 139 [IDEA does not provide for an "education...designed according to the parent's desires"], citing *Rowley, supra*, 458 U.S. at p. 207.) Nor does the IDEA require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, 458 U.S. at pp. 198-200.) Hence, if the school district's program meets the substantive *Rowley* factors, then that district

provided a FAPE, even if the child's parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefit. (*Gregory K., supra*, 811 F.2d at 1314.)

14. Mother consented to all aspects of the November 8, 2018 IEP with the exception of placement and the lack of community based instruction. At hearing Mother reiterated her agreement with the goals, services, and accommodations contained in the November 8, 2018 IEP. Mother agreed Student should be placed in a small, structured classroom for moderate/severe students. The IEP team, including Mother, fully discussed Students present levels of performance and progress, or lack thereof, on each goal.¹¹ The proposed goals supported Student's unique needs and were measureable, and were developed to allow Student to take advantage of his educational opportunities and based on accurate present levels of performance. Therefore, further consideration of the appropriateness of the IEP, subject to the exceptions of placement and community based instruction, is unnecessary and moot. The goals and services constitute a FAPE for Student, and the content of the IEP can conceptually be implemented at both the STEPS program at Dana Hill and the county's Special Schools program. The problem lies in the practical ability to safely implement the proposed IEP in the lesser restrictive environment of Dana Hills without over-modifying educational content to allow Student to access his education in a real sense. Capistrano listened to Mother's concerns about the county's Special Schools program, but disagreed with her contentions about the program and severity of Student's maladaptive behaviors.

15. Every member of the Capistrano staff who testified at hearing, detailed Student's daily behavioral problems, which prevented each of them from teaching

¹¹ Capistrano established that the IEP team contained the required team members.

Student or providing his support services in a manner which prevented chaos in the classroom and provided Student with actual educational value. Capistrano staff expressed heart-felt concern for Student's safety. They exhausted behavior strategies and behavior reinforcements to curtail Student's maladaptive behaviors, but Student was non-responsive on a regular basis. Student's physical surroundings in the classroom were supported with sensory equipment and the sensory cave. Speech services were provided in the sensory room to facilitate Student's sensory needs. Multiple aides and staff members guarded the exits from the classroom to prevent Student from eloping. Regardless of whether or not positive strategies were used, when pushed to work on non-preferred activities, Student's maladaptive and self-injurious behaviors continued to routinely escalate. As an example, Ms. Godfrey described her need to terminate Student's individual speech sessions when he became agitated, for fear he would elope. Ms. Young reported the non-preferred portion of Student's occupational therapy goal led to Student's self-injury and elopement. Mr. Tapper felt the necessity to reduce academic demands placed on Student to maintain his safety. In essence, Capistrano teachers and staff were prisoners of their daily fears that Student would successfully elope from the campus and/or seriously injure himself. Student's lack of progress with self-regulation and his continuing maladaptive behaviors prevented him from learning; and the avoidance of non-preferred activities guaranteed that continued placement at Dana Hills would prevent Capistrano from providing Student with an appropriately ambitious educational program or offer Student the challenging objectives sought under *Andrew F, supra*, 580 U.S. ___, 137 S. Ct. at p. 1000

Least Restrictive Environment

16. In addition to providing a FAPE, a school district must ensure that "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled." (20 U.S.C. § 1412(5)(A); see also 34 C.F.R. § 300.114; Ed. Code, §

56342, subd. (b).) This “least restrictive environment provision reflects the preference by Congress that an educational agency educate a child with a disability in a regular classroom with his or her typically developing peers. (*Sacramento City School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1403 (*Rachel H.*).

17. 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 fulltime placement in a regular classroom; (3) the effects 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. (*Rachel H., supra*, 14 F.3d at p. 1404.)

18. Capistrano has demonstrated that Student’s severe behaviors requires placement in the Special Schools program because education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (Ed. Code, § 56040.1, subd. (b).) Capistrano’s offer of placement meets all of the *Rachel H.* criteria. According to Mr. Tapper, Student is receiving no educational benefit at Dana Hills. Student is ill-suited for the crowded and noisy general education high school campus, which results in sensory overload, and elopement, thusly depriving Student of learning time. Student’s behaviors require cessation of non-preferred activities to protect his safety, resulting in little, if any, academic progress. Student spends little, if any time, interacting with typical peers. When provided the opportunity to socialize, Student retreats to the sensory room. Encouraging Student to participate in non-preferred activities results in anxiety and escalating behaviors. Student’s tantrums, meltdowns, and elopements are exhausting to the teacher and staff. As reported by Mr. Tapper, Student attempts to elope from the classroom 20-to-25 times each week. When Student successfully elopes, it takes 60 minutes on average to de-escalate Student and requires

four-to-five people, including Mr. Tapper and aides, to calm him. This continuing activity not only takes away from Student's education, but interferes with the education of classmates on a regular basis. The cost of the county program is not at issue. Simply put, Student is deriving no educational or social benefit in his current placement, and his behaviors disrupt the classroom and education of others on a daily basis, necessitating removal to a more restrictive placement such as Special Schools. Placement in the safer environment of Special Schools will assist in thwarting elopement, and allow the educational staff to instruct Student on non-preferred activities and goals he needs to make meaningful educational progress, and lessen the continuing and extreme concerns for Student's safety.

Community Based Instruction

19. Mother's contention that community based instruction was not available to Student is inaccurate. Community based instruction is available at Special Schools and may become appropriate for Student once his safety issues have been addressed. There is no disagreement from Capistrano or the county that participation in community based instruction will be beneficial in assisting Student to generalize what he learns in the classroom. Due to his behaviors and aversion to non-preferred activities, Student has not yet learned the basic functional skills and behaviors necessary to safely participate in community based instruction. Nor has Student learned sufficient functional academic skills to generalize in a meaningful way. Once Student has developed functional skills in the classroom, he will be ready to participate in community based instruction. At the time of the November 8, 2018 IEP team meeting, it was ill-advised to specifically include community based instruction in Student's IEP given his behaviors. Nevertheless, as indicated by Ms. McDonald, Student's IEP would be reviewed 30 days after enrollment in Special Schools, and the IEP could be amended anytime thereafter to include community based instruction if appropriate and safe for

Student.

20. In recap, Capistrano's offer of special education services to Student constituted a FAPE under the IDEA. The November 8, 2018 IEP was designed to meet Student's unique needs, the goals and services contained in the IEP were measurable and supported his needs, and the IEP was reasonably calculated to provide Student some educational benefit. The offer of placement in the more restrictive setting of the county's Special Schools complied with the criteria of *Rachel H.*, therefore the Special Schools constitutes placement as Student's least restrictive environment.

ORDER

1. Capistrano Unified School District's requested relief is granted. Capistrano may implement Student's November 8, 2018 individualized education program without the consent of Parents, if Parents want Student to continue receiving special education and related services.

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. In this matter, Capistrano prevailed on the one issue presented.

RIGHT TO APPEAL DECISION

This Decision is the final administrative determination and is binding on all parties. (Ed. Code § 56505, subd. (h).) The parties in this case have the right to appeal this Decision by bringing a civil action in a court of competent jurisdiction. (20 U.S.C. § 1415(i)(2)(A); 34 C.F.R. § 300.516(a); Ed. Code, § 56505, subd. (k).) An appeal or civil action must be brought within 90 days of the receipt of this Decision. (20 U.S.C. § 1415(i)(2)(B); 34 C.F.R. § 300.516(b); Ed. Code, § 56505, subd. (k).)

Dated: May 7, 2019

/s/

JUDITH L. PASEWARK

Administrative Law Judge

Office of Administrative Hearings