

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT.

OAH Case No. 2017120674

DECISION

Parents on behalf of Student filed a request for due process hearing with the Office of Administrative Hearings on December 15, 2017, naming Capistrano Unified School District. OAH granted Student's request to amend the complaint on January 23, 2018.<sup>1</sup> On February 9, 2018, 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 May 16, 17, 18, 22, 23, and 24, 2018.

Timothy A. Adams and Lauren-Ashley L. Caron, Attorneys at Law, represented Student. Parents attended the hearing. Student did not attend the hearing.

Alefia E. Mithaiwala, Attorney at Law, represented Capistrano. Sara Young,

---

<sup>1</sup> District filed its response to Student's amended complaint on February 2, 2018, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir.) 858 F.3d 1189, 1199-1200.)

Executive Director, Kimberly Gaither, Legal Specialist, and Janelle Stevens, Program Director, attended the hearing at various times on behalf of Capistrano.

At the parties' request, OAH continued the hearing for the parties to file written closing arguments. The record closed on June 18, 2018, upon receipt of closing briefs from the parties.

## ISSUES<sup>2</sup>

1. Did Capistrano deny Student a free appropriate public education by failing to make an appropriate offer of placement and services in the individualized education program developed on December 18, 2015, in the areas of intensive behavioral intervention; one-to-to-one aide assistance; speech and language therapy; and social skills services, to address Student's pragmatic language and social skills needs?

2. Did Capistrano deny Student a FAPE by failing to file for due process to defend its IEP developed on December 18, 2015?

3. Did Capistrano deny Student a FAPE by failing to make an appropriate offer of FAPE in the annual IEP developed on May 23, 2016, and September 12, 2016, by failing to develop goals that addressed Student's needs in the areas of academics, social/emotional and anxiety?

4. Did Capistrano deny Student a FAPE by failing to make an appropriate offer of placement and services in the annual IEP developed on May 23, 2016, and September 12, 2016, in the areas of intensive behavioral intervention; one-to-one aide

---

<sup>2</sup> 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.)

assistance; speech and language therapy; and social skills services, to address Student's pragmatic language and social skills needs?

5. Did Capistrano deny Student a FAPE by failing to file for due process to defend its IEP developed on May 23, 2016, and September 12, 2016?

6. Did Capistrano deny Student a FAPE by failing to convene an annual IEP team meeting in May 2017, and failing to have a current IEP in place for Student at the beginning of the 2017-2018 school year?

## SUMMARY OF DECISION

Student did not sustain her burden of proof to establish that the December 18, 2015 IEP denied Student a FAPE by failing to make an appropriate offer of placement and related services. The December 18, 2015 IEP was an addendum to the April 30, 2015 annual IEP. As of December 18, 2015, Student was doing well and making progress on her goals. There was no information at that time to suggest Student required additional aide support or services or that changes were needed in the annual IEP.

Parents consented to the implementation of the December 18, 2015 IEP, but did not consent to the IEP as provision of FAPE. Student did not sustain her burden of proof to establish Capistrano denied Student a FAPE by failing to file for due process hearing. Capistrano provided Student with an appropriate placement and services under the December 18, 2015 IEP. As appropriate services were being provided, Capistrano's failure to provide Student with additional aide support, as requested by Parents, did not constitute a necessity; therefore, Capistrano was not required to file for due process hearing.

Student met her burden of proof to establish that the May 23, 2016, and September 12, 2016 IEPs failed to offer appropriate goals. While the areas of Student's unique needs were adequately identified, the data collected to determine Student's actual behavior and social/emotional needs was flawed. Further, the means for

measuring these goals was vague, inconsistent, and lacked sufficient definition of staff duties in measuring and implementing the behavior and social/emotional goals. Further, Capistrano's failure to include a transition plan, or timely discuss Student's known need for support with her transition to a new school site, deprived Student of educational benefit.

Capistrano's failure to seek a due process hearing for the May 23, 2016, and September 12, 2016 IEPs, denied Student educational benefit. Capistrano staff was aware the December 18, 2015 IEP goals were no longer appropriate for Student, as the goals were old, and most had been met. The lack of beneficial goals created a necessity for Capistrano to seek permission to implement the May 23, 2016, and September 12, 2016 IEPs without parental consent.

Finally, Capistrano maintained an obligation to convene an IEP team meeting to develop an IEP for the 2017-2018 school year. As there was no offer of placement and services made for Student, Student was denied educational benefit.

## FACTUAL FINDINGS

### BACKGROUND

1. Student was an eight-year-old girl who resided with her parents within Capistrano's boundaries during the applicable time frame. Student's school of residence was Oak Grove Elementary, however, she attended University California, Irvine Child Development School, a private school, since February 2017.
2. Student was initially diagnosed with autism by Regional Center of Orange County, which provided in-home services until Student reached age three; at which time she was offered special education and related services from Capistrano. Student has additional medical issues resulting from a metabolic disorder, which affect her brain, and ability to think. Student requires medication, and must remain well hydrated at all times.

During hearing, Mother expressed concern that Student required consistent support to monitor her water intake; Student did not recognize when she was over-stimulated and needed a break, and she did not know whom to ask for help. Mother was also concerned regarding Student's safety, and lack of a sense of direction, worrying that Student would wander away if not properly supervised.

3. Student has friends, participates in sports and girl scouts, but has trouble with transitions, focus, and multi-directions. Student also exhibits emotional issues, primarily panic and anxiety. Since 2012, Parents funded one hour per week of private speech and language therapy, and one hour per week of private occupational therapy for Student, provided by private agencies.

4. Capistrano first assessed Student in 2014, found her eligible for special education, and offered her an IEP for the 2014-2015 school year. Parents did not consent to the IEP. Student remained in a private preschool until the beginning of the 2015-2016 school year, when she enrolled in a kindergarten classroom at Community Roots Academy. Community Roots is a charter school which provides general education group based learning. It is a project oriented, interdisciplinary program. Social skills are embedded in the program. Student's kindergarten class contained 28 students, and was team taught by Tawnee Houses (now Keene) and Alexandra Jaspers. Pursuant to a contract with Community Roots, Capistrano provided special education and related services to eligible students attending Community Roots. The special education team at Community Roots consisted of Lindsay Carrucci, Capistrano's education specialist, and Myla Candelario, Capistrano's program specialist. Ms. Carrucci and Ms. Candelario were Capistrano employees, while the teachers and school administrators were charter employees. The team worked on the Community Roots campus and provided special education services, planned supports, and facilitated the teachers. Community Roots took part in the decision making process, but Capistrano was the ultimate decision

maker regarding Student's special education.

5. Prior to the beginning of the 2015-2016 school year, Parents wrote to Capistrano, reciting their concerns for the upcoming school year. Although Student did not have a full-time aide in her private preschool, Parents requested that Capistrano provide a full-time aide for Student, which her private service providers recommended. Parents requested an increase in goals and IEP expectations to meet development expectations of peers, and an increase in social activities with peers. Parents were concerned that if Student did not receive full-time aide support during her early education, she would lose ground as she got older.

6. Student started kindergarten without a full-time aide. However, on September 24, 2015, Capistrano entered into a settlement agreement with Parents and agreed to provide Student with additional program support in the form of an aide. This aide was described in the agreement as a staff member provided for the purpose of supporting and assisting Student in the educational setting, and monitoring and providing assistance to Student throughout the day for matters and activities such as Student's safety and recreation activities. This additional staff person, was not defined as a one-on-one aide solely assigned to Student, as the staff member could assist other students in the class, at times when Student did not have specific needs or not in need of support at the time. This agreement remained in effect until December 18, 2015, when an addendum IEP team meeting was scheduled to determine whether Student required continuing additional support.

7. As part of the settlement agreement, Parents consented to implementation of goals and services from the April 30, 2015 IEP, for the 2015-2016 school year and waived all educational claims from August 25, 2015, to December 18, 2015.

8. Capistrano held an informal Student progress meeting on October 19,

2015. During the meeting, Ms. Houses reported Student had made excellent progress since starting at Community Roots. Student's fine motor skills and task completion abilities had greatly improved. She established friendships and could be guided to play with those friends during unstructured time. She had fewer meltdowns and was able to ask for help if she needed a break. Ms. Houses successfully pushed Student a little harder during academic periods. Ms. Carrucci reported that Student required about 20 prompts a day for redirections for attention to task. She was more readily motivated to complete tasks and activities on her own. She responded well to positive reinforcements.

9. Parents asked if the full-time aide had helped Student make progress. Student's teacher commented she could not determine if Student's progress was solely based on her aide. Student made continual growth and matured a lot since the beginning of school. Student could have completed the work without the aide, but it might take her longer to complete as she can become distracted. Amy Meyers-Megartiy, Capistrano's autism specialist, and Ms. Carrucci, expressed their concerns of creating prompt dependency in Student.

10. Another informal Student progress meeting was held on November 17, 2015. Ms. Houses reported that Student continued to make excellent progress. Student was easily redirected and returned to task with relative ease. Student now required an average of 17 prompts per day for attention, and eight prompts for academics. Student would request a break if she became over-stimulated, however when Mother observed in the classroom, Student was more sensitive and had more emotional episodes than usual. The team noted Student's overall success thus far and stated her progress continued to excel on a daily basis.

11. An addendum IEP team meeting took place on December 18, 2015. Parents attended the IEP team meeting with their attorney. Parents were overall pleased

with Student's progress at Community Roots, with the inclusion of the additional program support; however they were concerned with consistency of aide support and training. Parents expressed concern that Student was not drinking enough water; she was not always focused in class and liked to daydream at school; she did not complete her classwork; and she needed to be facilitated with peer interactions. When overstimulated, Student could not recognize that she needed a break, and could wander away if not properly supervised. All of these concerns reinforced Parents' insistence that Student required a full-time aide to supervise her and facilitate with her peer interaction.

12. Ms. Carrucci, responded to Parents' concerns, conveying that Student was appropriately supervised. She reported Student accessed her water bottle, even though Parents claimed it came home full. Ms. Carrucci surmised it was being refilled at school or Student was putting her mouth to the bottle, but not drinking. Ms. Carrucci also explained Student's incomplete worksheets were due to increasing expectations being set for her. Student was being pushed to do more, as requested by Parents. With higher expectations, Student required more prompting. Ms. Carrucci noted that the balance between prompting and allowing independence was tricky. Parents agreed that Student would not do the work if not pushed, but Parents strongly preferred more prompting for Student at this early stage of intervention so she could learn the expectations for future development at higher grade levels. Parents were also dismayed that much of the aide support in the classroom was provided by parent volunteers rather than by trained staff.

13. The goals contained in the December 18, 2015 IEP were the same goals Parents had consented to in the September 24, 2015 Settlement Agreement, and were contained in the April 30, 2015 IEP. As of December 18, 2015, those goals were still in full force and implementation. Those goals included:

(1) Student could follow group directions and transition independently through

- the daily routines; however she experienced difficulty maintaining attention when distractions were present. A behavior goal was created to improve Student's attention while working independently when distractions were present;
- (2) Student liked school and enjoyed many activities. She had preferred peers whom she would play with during the day. Student would approach a group and play in proximity to her peers. She experienced difficulty seeking assistance and making social comments. A social/emotional goal was created to assist Student in problem solving and seeking assistance. A second social/emotional goal was crafted for Student to seek the attention of the person to whom she was speaking, and to make a comment about her skill, behavior or accomplishment.
  - (3) Parents reported Student needed constant reminders to use an appropriate grasp for scissor use, and writing. A goal was created to address Student's grasp and functional motor skills.
  - (4) Academically, during the reading of stories, Student would pay attention and listen, but experienced difficulty with making on-topic comments and predictions regarding the story. A reading goal was created for Student to make on-topic comments regarding what was read. A second reading goal was crafted for Student to make a reasonable prediction about what would happen next in a story.

14. Christine Lanners<sup>3</sup>, Capistrano speech and language pathologist, was

---

<sup>3</sup> Ms. Lanners holds a master's degree in speech and language pathology, and a bachelor's degree in communicative disorders. She holds a speech and language license and audiology board license from the State of California and also has a certificate of

assigned to Community Roots and provided Student's speech and language services during kindergarten and first grade. At the December 18, 2015 IEP team meeting, Ms. Lanners reported Student was doing well. She greeted her peers and participated in small group sessions, but struggled with a goal for following unrelated directions. Although Student's voice tone was not a concern at school, Parents were concerned about her "baby voice" at home, and in her private acting class. IEP team members determined Student could follow class instructions and routines well, and needed minimal prompts to complete tasks. On the other hand, Student continued to have difficulty and made little progress in engaging in reciprocal conversations. Student had difficulty with language concepts that did not have visual supports for her reference. She also continued to exhibit delays in receptive, expressive and pragmatic language. Ms. Lanners explained she was working on those areas.

15. The IEP offered goals for communication, including (1) answering "wh" questions; (2) asking "wh" questions; (3) following 3-part unrelated directions; (4) pragmatics to maintain eye contact and consistently greet and engage in social interactions; (5) pragmatics to stay on preferred and non-preferred topics for more than one-to-two exchanges; and (6) vocal volume. Overall, Student was still working on her annual goals created in April 2015, the goals were appropriate for Student's needs, and Student was making good progress on those goals.

16. Capistrano's offer of FAPE consisted of continued placement in the general education kindergarten at Community Roots, supported by 60 minutes per day of specialized academic instruction in a separate setting; 90 minutes per day of intensive behavioral intervention in the classroom for support and prompting; 30 minutes per

---

clinical competence from the American Speech and language Hearing Association. She was a speech and language pathologist at Capistrano for 18 years.

week of intensive behavioral intervention for recess support; 90 minutes per day of additional program support service in the classroom; 30 minutes, twice per week of group speech and language therapy; and 30 minutes, twice monthly, of individual occupational therapy.

17. In their professional opinions, Capistrano and Community Roots team members did not believe a full-time or one-to-one aide was beneficial for Student. Use of an aide was highly restrictive. It hindered Student's independence and encouraged prompt dependency. Capistrano's long term goal was to gradually fade Student's prompting so, by the third or fourth grade, Student would not need additional aide support. Capistrano prepared a chart to visually demonstrate the breakdown of time allotted to aide supervision offered in the December 18, 2015 IEP. In combination of all of Student's supports and services, Student would receive nearly full-time supervision.

18. Capistrano did not offer Student a full-time or one-to-one aide support, which was paramount to Parents. Parents consented to implementation of the goals and services contained in the December 18, 2015 IEP, however, they did not consent to the IEP as the provision of FAPE for Student.

19. Acronyms are often used by school districts to define their special education programs, but a common vernacular is not always utilized from school district to school district. For Capistrano, specialized academic instructions, sometimes referred to as "SAI," was defined as a program in which a student required a slower paced, small group instruction, and the use of specialized strategies that targeted specific skills development (academic, language, behavior) to access the general education curriculum and make progress towards goals. Specialized academic instruction was curriculum focused on grade level standards supported by special education staff.

20. Intensive behavioral intervention, or "IBI," had four different definitions at Capistrano. First, IBI was a system of strategies used for direct instruction of social skills.

These strategies included breaking each skill down into small steps, reinforcement of skills, prompting to ensure success until prompts were faded, shaping of social responses, repetition, and multiple opportunities to practice skills for mastery, generalization and maintenance. IBI also referred to group support within the school day to address language, social and behavioral deficits, in which data was taken on levels of independence throughout the day. A third definition of IBI was social recess support. Lastly, IBI, or an IBI tutor, was the title for the staff member who performed IBI related services. Additional program support, or "APS," was considered a SAI accommodation, and the acronym was interchanged throughout the hearing as an additional person support or aide, who was supported by special education staff inside the general education classroom. Any one of these acronyms as utilized by Capistrano could represent one-one-one support, but not necessarily. As a result, Parents were confused as to when Student was to be provided support, and by whom. Staff responsibilities in the classroom were not clear.

21. Capistrano began implementing the December 18, 2015 IEP in January 2016. The IEP contained no transition plan to scale back Student's one-to-one time. Mother reported Student was traumatized by this abrupt change. Parents understood Student's previous aide was scheduled to continue to provide additional support, but the IEP did not indicate a specific time for Student to receive one-to-one assistance. There was no continuity. Although the December 18, 2015 IEP called for IBI assistance, it was not one-to-one support. Instead, one or two IBI staff members remained in the back of the classroom observing and collecting data. Student was not introduced to the IBI team, nor did the IBI team provide assistance or prompting unless prompting of Student by the teacher had failed two-or-more times. Data collection was confusing, as the IBI staff did not record an initial prompt, until Student had been already been prompted twice by the teacher. Parents reported Student had not been introduced to her IBI

support team, and did not know who to ask for help if her aide was not present. This resulted in toileting and hydration problems. Since Student did not know who to ask to allow her to go to the bathroom, she did not drink her water, so she would not have to relieve herself. On occasion, Student asked her peers for bathroom assistance. Mother reported Student's emotional condition began to deteriorate. Student was having panic attacks and crying. She was bullied, lost friends, and did not eat her lunch. These problems also impacted her academically, as she was unable to finish classwork.

22. Mother tried to contact Ms. Carrucci to discuss Student's decline, but received no response. She spoke to Ms. Houses, but found her overwhelmed with her teaching duties, as her co-teacher, Ms. Jaspers, was out on medical leave. She sought assistance from Mr. Cavallaro, who, on more than one occasion, responded he had no power to assist her with special education. No one suggested convening an IEP team meeting to discuss Mother's concerns.

#### PARENTAL INFORMATION PREPARED FOR MAY 23, 2016 ANNUAL IEP

23. Prior to the May 23, 2016 IEP team meeting, Parents obtained a Speech and Language Therapy Progress Report, dated May 15, 2016, by Student's private speech and language therapist, Christine Essex. Ms. Essex is a licensed speech and language pathologist who provided Student with one hour per week of individual speech therapy services since 2012. Ms. Essex did not testify at hearing. The report, contained both formal and informal testing results, and was designed to report on Student's long-term goals of demonstrating language comprehension, language expression, and speech production skills within chronological age-level expectations, and demonstrating improvement in social communication and executive functioning skills. The report contained 14 short-term goals for Student, many of which were similar to those in the December 18, 2015 IEP; and many of which Student had already met. Ms. Essex reported Student demonstrated significant progress, particularly in expressive

language and speech production skills. Barriers to Student's progress included fluctuating attention and motivation, as well as increased length of time needed to complete tasks due to response effort. Ms. Essex recommended Student continue with her private speech and language program for an additional six months, with subsequent reevaluation. Parents presented the report to the May 23, 2016 IEP team.

24. Parents prepared a detailed outline of their concerns and points for discussion at the May 23, 2016 IEP team meeting. The outline spelled out what Parents saw going well at school, including Student's ability to make friends with proper support; ability to learn with proper support; improvement in reading ability with Ms. Carrucci's support; and improved understanding of more advanced language with Ms. Carrucci's support. Parents then outlined what was still hard for Student, including transitions and communication when things became hard; focus; going to restroom; and getting organized; safety, including hydration, toileting, nutrition and bullying; relationships with peers; and education and development, including focus, difficulty finishing work, and lack of interest in homework. The outline saved room to consider input from the IEP team regarding what they had seen going well, and input on whether team members felt Parents were missing anything.

25. The outline then presented parental comments on the IBI staff, including that the IBI staff only observed Student from the back of the classroom; IBI support was inconsistent and utilized three different individuals instead of one; and two teacher prompts were required before the IBI staff could approach or communicate with Student. Parents noted that IBI staff did not greet Student in the morning; was unable to assist Student getting organized or prepared for class; unable to assist Student with transitions; did not support Student when she needed a break; did not support Student when she was confused; did not assist with toileting; did not assist with Student's hydration or nutrition needs; did not communicate with the teacher when things were

hard for Student; did not intervene with Student and her peers when needed; and did not inform Student she could approach the IBI staff if she needed help. Parents also found the additional program support or aide ineffective. The aide was not permitted to support Student as had been explained to Parents at the December 18, 2015 IEP team meeting. The aide supported all of the students in the classroom, and was assigned to another child as a priority in lieu of Student.

26. The outline delineated Parents' requests and requirements for a successful IEP. Parental requests included 22 points which were primarily designed to correct the problems and ineffectiveness they observed in the December 18, 2015 IEP. Specifically, Parents requested only one IBI tutor be assigned to Student, and that person needed to be introduced to Student, and become actively involved with her. The IBI tutor needed to be able to observe and identify when Student needed a break, was headed towards a meltdown, or having trouble communicating. The IBI tutor needed to actively ensure Student remained hydrated and ate her lunch. Parents requested an additional program support person be assigned specifically to Student, and not the entire class. Parents then made several other requests regarding assignment to a specific first grade class, inclusion of several friends in Student's class, and scheduling of quarterly progress meetings.

27. Before the May 23, 2016 IEP team meeting, Parents obtained independent school observations conducted by Rosa Patterson<sup>4</sup> of Autism Behavior Services. Mother

---

<sup>4</sup> Rosa Patterson holds a bachelor's degree in psychology, and a master's degree in counseling. She obtained a doctorate in psychology in 2017. She is a board certified behavior analyst, and has a graduate certificate in behavior intervention in autism. Dr. Patterson is the Executive Director and owner of Autism Behavior Services, Inc., which provides applied behavior analysis programs, assessments and intervention

indicated Dr. Patterson was employed for a second opinion and to look at Student's behavior with new eyes. Dr. Patterson did not provide a formal evaluation of Student. She had limited access to background information but, based upon her level of experience, she observed Student, offered consultation, and appropriate recommendations for Student. Dr. Patterson prepared written notes and recommendations for the IEP team's consideration.

28. Dr. Patterson observed Student on March 22, 2016, and April 29, 2016. During the March 22, 2016 observation, Dr. Patterson was informed that the IBI staff only prompted Student after two prompts from the teacher had already been given. Dr. Patterson observed Student during morning snack time-recess, transition back to class, and group instruction. An IBI staff member supervised Student, however, Student did not interact with the IBI staff member. Student initiated her own contact with peers for the remainder of the recess. Although Student had several exchanges with different students, Dr. Patterson opined that Student was engaging in verbal stereotyping, rather than speaking directly to peers. Student appropriately transitioned back to the classroom for group study. Student attended appropriately during the group session and was prompted by the IBI tutors once to have Student look at the teacher. Student participated and raised her hand to answer a question. Student appropriately requested assistance from the IBI tutor and appropriately participated in small group activity with several peers.

29. The second observation took place on the afternoon of April 29, 2016. Capistrano's IBI supervisor accompanied Dr. Patterson. Staff reported that Student was

---

services for toddlers through adulthood. She teaches applied behavior analysis on a graduate level. She has also worked as a school autism specialist and regional center coordinator.

tired and weepier that day. Staff utilized more prompting than during the prior observation. Staff gave Student directions for the assignment, and she started work at her desk. Student said her Mother was coming soon. The teacher and IBI tutor provided Student positive reinforcement throughout the activity, and Student finished the assignment. Student volunteered to help the trash monitor, and then went back to coloring. When the teacher transitioned the class to another activity, Student did not want to stop coloring, and began to whine, asking when her Mother was arriving. Student was successfully redirected and transitioned the activity.

30. Based upon these observations, Dr. Patterson made four recommendations:

- (1) To continue IBI-aide support throughout the day, to work on skills and social-emotional and behavioral growth, both in and outside of the classroom. The IBI staff should be limited to two people and the role of the IBI staff and aide should be outlined to specify their functions and what each is working on.
- (2) For the IBI supervisor or autism specialist to provide weekly and/or monthly guidance and supervision to the IBI staff and aide.
- (3) To develop a communication system between home and school so Parents can support and generalize skills being taught at school and share school progress across providers.
- (4) Monthly, informal meetings with parents and service providers, both school and private, for consistency, and to share strategies across settings.

MAY 23, 2016, AND SEPTEMBER 12, 2016 IEPs (2016-2017 ANNUAL IEP)

31. Student's annual IEP team meeting began on May 23, 2016. Parents attended this IEP team meeting, along with their attorney. Dr. Patterson participated by telephone.

32. This IEP team meeting was scheduled for two hours and primarily covered

Parents' input and issues. Parents reported Student was successful in making friends and able to learn. Parents were pleased with Student's progress in the learning lab. Parents saw improvements in Student's ability to complete work, focus, and advanced language usage. Student was no longer saying she did not want to go to school. Student's teacher concurred, and indicated that Student had progressed academically and socially. Parents, however, felt Student's growth was due to the intensive support she received from her private providers, and were concerned they would need to continue this intensive support to ensure Student's continued progress.

33. Parents reported perceived flaws in Student's program, listed in their outline, focusing on the inconsistencies of support with the IBI staff and aide. Parents expressed frustration at a breakdown in communication with Capistrano and the Community Roots staff. They were not clear on what was happening at school, based upon their observations, information from school staff, and what Student reported. Capistrano was no longer providing informal progress meetings. Parents reiterated their preference for direct interaction and support, rather than observation and delayed prompting. They again requested a full-time aide to support Student. District responded to some of Parents' concerns, such as Student not receiving support in the morning before class. Student did not require that support as she was completing tasks independently, such as putting away her backpack. District also explained the delay in providing prompting until teacher prompts had been exhausted. All students in the class received a "two-prompt from the teacher" level of support. Capistrano and Community Roots IEP team members reported that Student had an extremely high rate of independence, and responded well to the teacher. Parents' remaining concerns were tabled for further investigation.

34. The IEP team also received Dr. Patterson's notes and discussed her observations and recommendations. Dr. Patterson reported Student exhibited emerging

social skills, but was still utilizing parallel play, not always responding to her peers. This was an area for improvement. She also indicated she would like to see Student more engaged, ask for help, and advocate for herself. Dr. Patterson shared that the teacher did a nice job providing positive reinforcement to Student. Based upon her expertise, Dr. Patterson opined that Capistrano staff could provide Student appropriate support and implement her recommendations. Her report indicated that IBI support should be limited to one-to-two people. Further, she concluded it would be helpful for Student to have support for the entire school day.

35. The IEP team noted that Community Roots was moving to a new location for the 2016-2017 school year. Although Parents raised concerns about transitioning Student to a new campus, the IEP team failed to address those concerns. The IEP team meeting ran over the allotted time, and the team agreed to reconvene at a later time. The team developed an agenda for the second meeting, which failed to include Parents' concern regarding the transition. Capistrano did not offer any changes to Student's IEP during the May 2016 meeting.

36. Capistrano convened part two of Student's annual IEP team meeting on September 12, 2016, following the start of the 2016-2017 school year. Capistrano failed to discuss Student's transition to the new campus, or provide Student a transition plan or supports to assist her transition to the new campus. Student was now in a first grade, general education classroom of 29-to-30 students. Rachael Adams<sup>5</sup>, Student's new first grade teacher, reported Student had difficulty transitioning into the classroom but, once

---

<sup>5</sup> Ms. Adams holds a master's degree in teaching, and a multiple subject teaching credential. Ms. Adams had no special education or autism training. The 2016-2017 school year was her first year as a teacher. As a general education teacher, Ms. Adams was an employee of Community Roots, not Capistrano.

in the classroom, Student was able to follow class routine with minimal direction. She was becoming more comfortable with the new setting, and interacting with adults. Student's preferred recess play was walking around the "yak" track, often talking with a friend. Ms. Adams reported that aide and IBI support was usually provided early to mid-day, when academic lessons occurred, rather than later in the day.

37. Parents shared their concerns about the new school year and transition to the new campus. Mother reported continuing difficulties with transitions and lack of supervision for Student. She described an extremely traumatic incident for Student on the first day of school. Student had no support or aide supervision at the end of the school day. She wandered off, became disoriented in her new surroundings, and was found curled up in a ball, hysterical. Student's anxiety levels remained high since that incident. Student reported to Parents that math was difficult and no one helped her. Student got nervous when asked about difficult school work. Father reported mornings were difficult for Student, and Student was increasingly nervous about the new campus. To alleviate her anxiety, Parents brought Student to school early to help her transition. Once other students began to arrive, and the campus got busier, Student became uncomfortable, her anxiety increased, and she wanted to go home. Father stayed with Student for approximately 15 minutes each day to calm her and get her to class. Parents also tried a later arrival time for Student, so she would not have time to build up anxiety, but her anxiety was still present when she arrived later. Parents reported that last year, the 2015-2016 school year, Student was excited to go to school. However, during the 2016-2017 school year, they had difficulty getting Student to go to school. Parents also indicated that the pick-up at the end of the school day was challenging. Student cried in the pick-up line. Every change at school was a challenge for Student. Parent's opined the environment and setting of the new campus was fine, but the resources supporting Student were not sufficient. Student needed consistency, and her IBI-aide support was

inconsistent. This was a significant problem for Student and her confidence diminished.

38. At hearing, Ms. Adams acknowledged that Student had wandered off on the first day of school. She reported Student sometimes had difficulty transitioning and cried, usually when being dropped off at school by Parents. Ms. Adams reported she and the IBI staff then helped Student transition into the classroom. Ms. Adams would hold Student's hand during transitions. She reported that Student cried approximately three times per week for various reasons, including transitions. Overall, Ms. Adams reported Student was working to grade level academically. She felt Student was comfortable in class, felt safe, and knew who to ask for help.

39. Dr. Patterson attended the IEP team meeting by telephone. She clarified her initial recommendation by providing an addendum to her May 22, 2016 report, as follows:

The recommendation [first overall recommendation in her report] should be understood to mean that the aide support provided to Student can be solely aide support daily. Student experienced success with the aide that was assigned to her at the beginning of the 2015-2016 school year and this individual was not designated as an IBI. It is not necessary that Student receive both IBI and aide support daily. The aide support provided to Student should continue to be limited to no more than two individuals to allow for consistency and to also provide Student an opportunity to generalize skills in a systematic manner daily. The role and responsibilities of the aide should be clearly articulated to the IEP team, parents, and even Student if necessary and appropriate to do so. The person assigned to Student should

be well-equipped to work with Student's unique needs and also have established rapport with Student.

Dr. Patterson felt the IEP team listened to her, but felt the tone of the meeting was a negative reception. She had hoped for more conversation about making changes to the IEP.

40. The IEP team moved on to a discussion of goals. In general, Student had made substantial progress in all areas. Ms. Lanners reviewed Student's communication goals, and proposed new goals in that area. Student had met four of six communication goals. On the goals not met, she was progressing towards mastery on asking "wh" questions. The auditory processing goal requiring Student to follow three-step unrelated directions had proven difficult for Student. The IEP team identified five areas of need for Student and constructed corresponding goals. Parents inquired about eye contact. Communication Goal One addressed non-verbal language, which focused on appropriate eye contact, body orientation, and proximity. Goal Two addressed oral sequencing and was designed to improve Student's oral grammar, particularly her use of past and future tense forms. Goal Three continued to address answering "why" questions, and sought to increase Student's abstract responses. Goal Four continued to address Student's audio processing regarding following three-step directions, seeking to increase her accuracy. Goal Five addressed non-preferred conversation, and was designed to increase Student's reciprocal conversations on non-preferred subjects. Ms. Lanners reviewed Ms. Essex's report and felt it validated her own work with Student. Ms. Essex was working with Student on goals similar to those crafted by Ms. Lanners, and the goals could be supported with 30 minutes, twice a week, of speech and language services.

41. Ms. Carrucci wrote Student's academic goals. She acknowledged there were not a lot of academics the first semester of kindergarten, but Student was capable

of working independently on preferred activities. Student could read fluently at above grade level as she read over 100 kindergarten sight words, and was starting to spell them consistently. Student, however, needed to improve her ability to comment and answer questions about what she had read. The IEP team developed a reading comprehension goal to increase Student's ability to answer questions about key details in a story at her independent reading level.

42. Although Student expressed difficulty with math, she was fluent with basic math facts through five, but needed some support to solve word problems and to decide which step to take (add or subtract). A math goal was crafted to address word problems and sought to increase her ability to solve word problems with no more than one prompt.

43. As Student met her occupational therapy goal for use of a functional grasp, no goal was needed.

44. The primary disagreement between Parents and the remainder of the IEP team centered around Student's areas of need involving behavior, social/emotional and attention, present levels of performance, how present levels and progress were measured, and how and who would measure progress on new goals.

45. Amy Meyers-Megarity<sup>6</sup>, Capistrano's autism specialist, reported that Student exhibited a behavior need in the area of attention. According to present levels of performance, based upon data collected by Capistrano staff, Student could stay on task for 15 minutes with prompting when there were distractions present. A goal was

---

<sup>6</sup> Ms. Meyers-Megarity holds a master's degree in special education and a bachelor's degree in psychology. She holds a level one credential in moderate special needs from California and an advanced standing intensive special needs certification in autism from Massachusetts.

created for behavior/attention, in which the baseline performance stated Student could attend to the teacher for 10 minutes, with no more than two prompts. The goal sought to increase Student's attention to 20 minutes with no more than two prompts.

Measurement of progress was proposed through observation and documentation by (1) education specialist; (2) occupational therapist; (3) general education teacher; and (4) support staff.

46. Student's present level of performance in social/emotional areas indicated needs in the areas of seeking assistance and social comments. Student met her social comment goal and could obtain peer or adult attention and make comments about her skill, behavior or accomplishment and least three times per day. Student did not meet her goal for seeking assistance, and she was only able to solve the problem 53 percent of the time measured.

47. A goal was created for conflict resolution. When faced with a conflict or problem, Student was not assertive, tended to cry or withdraw from the situation. The goal sought to have Student develop skills to appropriately react to stressful situations, and verbally suggest a strategy to help her solve problems, with no more than two prompts. The goal was measured in the same manner and by the same personnel as the above attention goal.

48. A peer resolution goal was created to increase Student's ability to solve peer problems. Student's present level of performance indicated she could verbally suggest a strategy for solving a peer problem on average with two-to-three prompts. The goal sought to increase Student's ability to solve problems with no more than one prompt. The goal was similar to the proposed conflict resolution goal, and was measured in the same manner and by the same personnel.

49. Student's present levels of performance indicated Student did not use the terms "expected and unexpected" related to behaviors observed in her presence nor did

she describe her own behaviors as expected or unexpected. A goal was created to increase Student's skill in using the terms "expected and unexpected" regarding behaviors in her presence as well as her own behavior. The evaluation methods and responsible personnel were the same as contained in the prior three goals.

50. When participating in a class discussion, Student often copied previous comments of her peers regarding the subject being discussed, and required at least one prompt to make a different comment. A "meaningful participation" goal was created which sought to have Student make her own relevant comments on subjects being discussed in class with no more than one prompt. The evaluation methods and responsible personnel were the same as contained in the prior goals.

51. Ms. Carrucci indicated the additional support aide collected data in addition to the IBI staff. Ms. Carrucci supervised the aide in collecting this data and reviewed it "every so often." The additional support aide's duties were different than those of the IBI staff. Student had an additional support aide more than three hours per day, which could be one-to-one support. IBI support was intended to collect data on behavior and social support, and to provide Student with prompts, after teacher's prompting.

52. Capistrano's FAPE offer for the 2016-2017 school year offered Student continuing placement in the Community Roots first grade, general education classroom, with the following supports and services:

- (a) Specialized academic instruction, 60 minutes per day, in a small group setting in the learning lab outside the classroom;
- (b) Specialized academic instruction, within a small group in the general education classroom, for two hours per day;
- (c) Speech and language group services, outside the classroom for 30 minutes, twice weekly;

- (d) Occupational therapy services for 60 minutes per month, in a push-in format to collaborate with the general education teacher regarding strategies to help with Student's self-regulation, and increase participation in the classroom, as well as monitor Student's fine motor skills;
- (e) IBI support consisting of 60 minutes each school day, to address language, social, and behavioral deficits, and collect data on Student's levels of independence throughout the day; and
- (f) IBI support consisting of 30 minutes per week of social recess support.

53. Capistrano's offer of FAPE did not include a full-time aide or the additional program support (aide) offered in 2015. Parents did not consent to the 2016-2017 IEP, or its implementation.

54. Ms. Carrucci opined the goals contained in the IEP were appropriate and the services offered provided adequate support for Student to be successful. Parents' non-consent did not result in a denial of FAPE, as Student received services in excess of what she required.

55. On September 28, 2016, Ms. Candelario<sup>7</sup>, sent Parents a prior written notice regarding their rejection of the 2016-2017 IEP.

#### STUDENT CONCERNS REGARDING GOALS

56. Parents disagreed with the behavior and social/emotional goals for several reasons. Specifically, Parents viewed Student's present levels of performance and

---

<sup>7</sup> Dr. Candelario holds a doctorate in instructional technologies, and a master's degree in special education. She holds a preliminary administrative services credential, education specialist credential for mild/moderate disabilities, and an autism certificate credential.

baseline skills as inaccurate and skewed, due to faulty data collection. The data collected was vague and confusing.

57. At hearing, Dr. Patterson did not question the IEP team's determination of the goal areas Capistrano sought to address. Most of the proposed goals comported with the recommendations she provided. Instead, she questioned the validity of Capistrano's data collection. More data collection was not necessarily better data collection. Dr. Patterson explained an important principle of behavior data collection required that everyone collecting data measured the same thing. In Student's program, at least six people were collecting data at various times. Operational data was needed for reference by the data collector, i.e., determination of what was being measured. This information was not consistently provided on the data collection materials supplied by Capistrano and reviewed by Dr. Patterson. Dr. Patterson found Capistrano's data collection was flawed, as it contained inconsistencies, and was therefore considered unreliable. Specifically, the data collection sheets interval data fluctuated, some data collection omitted the time collected altogether, and some data sheets contained reference to prompts, but also referred to Student as acting independently. If the data was incorrect, the analysis of the data was wrong as well. Additionally, the data collection sheets were used by the additional support aide to record information for her own use, as she was not qualified to collect IBI data.

58. The behavior and social/emotional goals indicated that progress would be measured by reducing prompting, from two-to-three prompts down one-or-no prompts. The goals, did not indicate which measurement of prompting was being used in each goal or whether prompts were being measured literally, from the first prompt administered, or measured commencing on the third prompt. Ms. Meyers-Megarity explained the IBI staff only recorded prompting after the second prompt from the teacher. The purpose of the IBI prompting was to direct Student's attention to the

teacher. If Student was redirected within the first two prompts, she was acting independently according to the IBI data collector. As a result, Capistrano reported Student worked with a 90 percent independence rate, a percentage acknowledged as being higher than the on task rate for same-age grade peers. Typical peers generally exhibit a 75 to 80 percent independence rate. Capistrano team members relied on these figures to determine Student no longer needed behavior supports, and was in danger of becoming prompt dependent. While 90 percent may have been an accurate measure of prompts, it was an accurate measure of Student's ability after receiving two prompts from the teacher. Dr. Patterson opined that waiting until Student required a third prompt before addressing Student's needs was too long. In the meantime, Student was off task or disconnected from the classroom instruction she needed. Dr. Patterson also noted that if Student was actually working with such a high rate of independence, the behavior goal addressing attention would be unnecessary.

59. This concern over reliability extended to the measurement of progress in the proposed behavior and social/emotional goals. The determination of measuring progress for the goals was vague, and responsibility for observations and the measuring of goals was split amongst five-to-six people, without delineation of individual responsibility. This all remained confusing and meaningless to Parents, as there was no continuity of support. They believed Student required direct support when she needed help, not data collection.

60. At hearing, Ms. Meyers-Megarity explained Capistrano's IBI services. Along with being Capistrano's autism specialist, Ms. Meyers-Megarity had been Capistrano's IBI supervisor since 2004. Ms. Meyers-Megarity had extensive experience with IBI services. At Capistrano, she supervised and managed 17 IBI tutors, and provided continuing training for Capistrano's IBI team. Ms. Meyers-Megarity presented as an excellent witness.

61. IBI tutors are full-time employees. Capistrano employs 17 IBI tutors who provide direct services and collect data. There are two additional senior tutors, with more training, who act as floaters and additional crisis support. Ms. Meyers-Megarity was aware Parents wanted full-time support for Student. Full-time IBI services were not provided as full-time support. If a student's intensity of need required full-time support, Capistrano would offer another type of service.

63. For Student, the IBI tutors collected data on whether Student was on or off task. The purpose was to seek independence through reduction of prompting. Independence did not mean independent of teacher assistance, only independence from IBI or additional support. Although Student's IEPs did not specify when in the day IBI tutor support would be provided, Ms. Meyers-Megarity explained the daily time frame for IBI support was based upon the teachers' recommendations, such as when Student was more inclined to have social issues, such as during carpet time. Data was generally collected on Student in the afternoon, when Student participated in large, group based activities and longer instruction periods were common. An IBI tutor is not a "Velcro aide" who sits next to the student throughout the day.

64. All kindergarteners need prompts. A student can be on task and still have prompts recorded. As example, a student can be doing what the class is doing but require a prompt to stop doing something, such as flicking a pencil. It is the IBI tutor's job to refrain from intervening, as the intent is to have the student seek directions from the teacher. Ms. Meyers-Megarity opined that children with autism can learn a skill, but have difficulty generalizing that skill with more than one person. A one-to-one aide would not promote generalization.

65. Ms. Meyers-Megarity reviewed data collected by the IBI tutors. Data drives the analysis of whether a service is still needed. Ms. Meyers-Megarity maintained consolidated tally charts of Student's data collected on a monthly basis, from January

through June 2016. Based upon this data, Student no longer required IBI support.

66. Stephanie Romberg,<sup>8</sup> took over for Ms. Meyers-Megarity as Capistrano's autism specialist and IBI supervisor in May 2016. At hearing, Ms. Romberg explained the difference between a private or clinical model for provision of IBI services versus a school or educational model for providing IBI support. A clinical IBI model will determine a student's functional skill levels by conducting a functional behavior assessment. Data is collected to determine behaviors and create a treatment plan. An educational IBI model is designed to determine if a student can access his/her education. IBI is a more restrictive support for a student, and intended as a temporary support to help generalize positive behavior. A functional behavior analysis is utilized only for extreme behaviors. Student did not exhibit extreme behaviors and did not require a behavior intervention plan.

67. There is also a difference in data collection. Although both models are similar in structure, a clinical model collects multiple trials data, while an education model utilizes time samples, in which data is collected at time intervals, looking at how a student performs in the classroom. Additionally, there are several methods of collecting data, with many nuances between collection styles. Each method is appropriate, as long as it is consistent.

68. Ms. Romberg attended the September 12, 2016 IEP team meeting, as

---

<sup>8</sup> Ms. Romberg holds a master's degree in clinical psychology and a bachelor's degree in psychology. Ms. Romberg is a board certified behavior analyst and has completed graduate level coursework in applied behavior analysis. Before her employment at Capistrano, Ms. Romberg was the clinical director of Behavioral Support Partnership, a non-public applied behavior analysis agency. Ms. Romberg received her BCBA training from Dr. Patterson.

Capistrano's autism specialist at the new Community Roots campus. She had discussed Student's transition with Ms. Meyers-Megarity over the summer, and reviewed Student's IBI data. Based upon this information, Ms. Romberg concluded Student possessed high independence levels, and the amount of IBI support needed to be reduced, and aide support faded out as Student was capable of responding directly to the teacher. At the IEP team meeting, she made the recommendation for one hour per day of IBI support, and 30 bulk hours of additional support, to support Student on first grade transitions. Ms. Romberg concurred with other Capistrano staff that the goal was to reduce Student's reliance on prompting and aide support. Ms. Romberg reported that complying with Parent's request for only one IBI tutor would not have been detrimental to Student, but, for purposes of strengthening generalization skills, two IBI tutors would be better. A full-time support aid would be detrimental in promoting independence. Further, an aide was not a teacher, and could not assist or support actual lessons as envisioned by Parents.

69. As of January 2017, data indicated Student's behavior was declining. Ms. Romberg opined the lower percentages were due to more difficult curriculum, which required more prompting, and Student had not been in class due to illness. Nevertheless, she felt Student got back on track, and was still on task.

70. Monica Navarro<sup>9</sup> provided pull-out SAI services to Student in the first grade until February 2017. She was also Student's case carrier. Ms. Navarro attended the September 12, 2016 IEP team meeting, as the incoming SAI teacher for the 2016-2017

---

<sup>9</sup> Ms. Navarro holds a master's degree in elementary education, and a bachelor's degree in communication studies. She holds a California teaching credential in elementary teaching, and a teaching credential as an education specialist for mild/moderate disabilities.

school year. She had consulted with the prior SAI teacher Ms. Carrucci, and aware Parents had not consented to the IEP. Ms. Navarro also collected data on Student's progress for her own use, and not as part of Student's data records. Ms. Navarro reported Student was progressing well and her behavior was improving. Student did not present as an emotionally explosive child. Student could sometimes get frustrated, but could resolve her behavior, and capable of really good resolutions.

71. Ms. Navarro did not believe Student needed more support. More support would make Student more dependent on prompting. Ms. Navarro did not observe the problems which concerned Parents. Student did not have trouble transitioning at school. Student always had water available and would drink it on her own.

72. Since Parents had not consented to the December 18, 2015 IEP, or the May 23, 2016, and September 12, 2016 IEPs, Capistrano continued to implement the services in the last agreed upon IEP, from 2015. As Student had progressed and met her 2015 goals, Ms. Navarro needed something to work on during SAI services. She implemented the 2016 goals where they were a natural progression of skills or embedded in the first grade curriculum.

73. On November 11, 2016, Student's attorney wrote Capistrano's attorney to address what was described as Capistrano's inconsistent provision of Student's aide and IBI support. The letter noted several lapses in aide and IBI support in October and November 2016, including the removal of Student's aide since kindergarten. Parents expressed great concern about these lapses in support because of Student's need to drink water and remain hydrated throughout the school day. During the periods of no aide or IBI support, Student came home with full bottles of water, and became ill with stomach and head aches, which resulted in severe digestive issues, difficulty sleeping and emotional distress due to no support at school. In turn, Student's illness and emotional distress resulted in her missing two days of school. Parents, through their

attorney, reminded Capistrano that consistency was important for Student to access and benefit from her education. Neither Student nor Parents were informed of the removal of the aide, and the lack of a transition plan was not appropriate, given Student's needs. Parents remained concerned that, since December 18, 2015 when the full-time aide was removed, Student exhibited an increased reluctance to attend school or participate during classroom activities; she stated she did not want to learn.

74. On November 28, 2016, Ms. Candelario responded to Parent's concerns expressed on November 11, 2016, in a letter of prior written notice. Ms. Candelario offered to add an additional accommodation for Student's IEP, prompts to remind Student to drink water from her water bottle throughout the day. The accommodation was offered to serve as a reminder for team members to be cognizant of Student's need to remain hydrated at school. As Parents had not consented to the 2016-2017 IEP, Capistrano would continue to provide Student with Student's last agreed to and implemented IEP.

75. On February 9, 2017, Student's attorney provided Capistrano a notice that Parent's did not believe Capistrano had offered Student a FAPE. Based upon this disagreement, Parents elected to unilaterally place Student, and seek reimbursement for the cost of the placement at University of California-Irvine Child Development Center School, along with all related program costs, related services, and transportation.

76. On Student's last day at Community Roots, Ms. Adams spoke with Father. Ms. Adams felt Student had been making excellent progress. Once Father left, Ms. Adams told another parent that the school could not give Student what she needed.

77. Ms. Candelario, testified that she mailed Parents a prior written notice on February 24, 2017, in response to the parental notice of unilateral placement and to notice an IEP team meeting on March 2, 2017. Mother testified neither she nor Father received this prior written notice. The prior written notice, however, was mailed to

Student's correct address, and was accompanied by an appropriate proof of service of mailing. Parents did not attend the March 2, 2017 IEP team meeting, or respond further.

78. Student's triennial IEP was due in May 2017, and Student had not been assessed since May 2014. No assessments or IEP meetings took place in 2017.

79. Capistrano made no further contact with Parents until January 10, 2018, subsequent to the filing of this request for due process hearing, at which time Capistrano provided Parents with another prior written notice to their February 9, 2017 notice of unilateral placement, along with a response to the complaint.

#### DR. SCHUCK'S TESTIMONY

80. Dr. Sabrina Schuck,<sup>10</sup> Director of the Child Development Center testified to explain why she accepted Student into the school, and reported on Student's emotional needs at that time.

81. Not all children are accepted into the Child Development Center. Each candidate is screened and must exhibit significant behaviors. For Student, her autism was comorbid with her depression and anxiety. When Student was accepted into the Child Development Center program, she had "hit the wall" at Community Roots. She was shutting down emotionally at Community Roots and not participating at school. As part of the admissions protocol, Ms. Adams filled out a questionnaire and rating scales

---

<sup>10</sup> Dr. Schuck has a doctorate degree in education, and master's and bachelor's degrees in psychology and has completed both a pre-doctoral internship and a post-graduate fellowship in developmental pediatric and neuropsychology. In addition to being the director of the Child Development Center School, Dr. Schuck is an assistant professor in the Department of Pediatrics in the School of Medicine at the University of California, Irvine.

regarding Student's participation in her class at Community Roots.

82. Ms. Adams responses in this document were more candid than her testimony. In rating Students behavioral problems Ms. Adams commented that Student cried easily and frequently; she cried if a routine was different; and she had difficulty moving through transitions to other activities. Student needed prompting when transitioning; she had difficulty following multiple step directions once a day and needed prompting at each step. Student had difficulty remaining on task several times a day; she needed support to complete assignments; and she had difficulty getting on task four times a day, requiring one-on-one support to begin tasks.

83. Ms. Adams also rated Student's behavioral competencies. Of 48 behaviors rated, Ms. Adams rated Student fair, fairly well, or good in 21 areas. She scored Student with excellent behavior in 14 areas. Ms. Adams rated Student's behaviors as very poor or not too well in the areas of: Paying attention when another person is speaking; tolerating tasks that require sustained mental effort; concentrating in the presence of distractions; staying on task for an entire class period; transitioning from one subject to the next; maintaining steady emotions; enduring frustrations; remaining cool and calm; and controlling the tendency to cry when provoked.

84. On the Swan Rating Scale, which rates a child's ability to focus attention, control, activity, and impulses, Ms. Adams rated Student average or above other same age children; except for organizing tasks and activities and engaging in tasks that require sustained mental effort. In those two areas, Student scored slightly below average.

85. Ms. Adams reported Student's positive strengths: Student was kind-hearted, enjoyed drawing, and being around friends. She could verbalize her feelings and let an adult know when she needed a break. She took turns in speaking and made improvement with her eye contact when speaking. On the other hand, Ms. Adams

reported Student's weaknesses: Student was easily upset and these emotions could quickly escalate. She was working on transitions, such as from class time to recess. With prompting, she could transition. Completing or complying with a non-desired task was also a concern.

86. Dr. Schuck commented that Student could no longer benefit from a general education classroom. There were too many kids and the lessons moved too fast. Student was sensitive to being singled out, and felt she was different from the other students. Dr. Schuck opined that this may have been an antecedent to her anxiety. In accepting Student into the Child Development Center program, Dr. Schuck concluded Student required small classes, with a high staff to student ratio who were trained in mental health. Capistrano's program under the 2016-2017 IEP was not reasonable for Student at that time. The school setting at Community Roots was an antecedent to Student's behaviors and the extensive pull-out services only emphasized Student's differences from her peers.

#### PROCEDURAL TESTIMONY

87. Dr. Gregory Endelman<sup>11</sup> testified on behalf of Student. Dr. Endelman has

---

<sup>11</sup> Dr. Endelman is a doctoral candidate in education. He has a master's degree in educational psychology and a master's degree in counseling, as well as a bachelor's degree in psychology. Dr. Endelman is a licensed educational psychologist. He has an administrative services credential, and pupil personnel services credentials in both school psychology and counseling. Dr. Endelman is currently the Regional Director of Special Services for Orange County School of the Arts, a charter school. He also has prior experience as a school principal, director of special education, and SELPA coordinator for the Orange County Department of Education

provided special education policy training to school districts, including Capistrano. At hearing, Dr. Endelman addressed the issue of special education administrator's responsibility when a student was unilaterally placed.

88. According to Dr. Endelman, a charter school or its contracted local educational agency has an obligation to hold an annual IEP team meeting unless the student has left the district. Even without an IEP, the child find obligation<sup>12</sup> remains if the student still resides within the boundaries of the school district.

89. When a parent provides a school district with notice of unilateral placement, Dr. Endelman considered it to be best professional practice to do the following: (1) set an IEP team meeting to discuss the problems leading to the unilateral placement; (2) send parents a prior written notice; (3) attempt to contact the family more than once; and (4) file a request for due process hearing to defend the offer of FAPE.

90. Dr. Endelman opined that a school district has an affirmative obligation to provide a student with a FAPE, and is obligated to defend its offer of FAPE. Therefore, when parental consent is withheld from an IEP, a school district is obligated to follow up and/or file for due process.

91. Sara Young<sup>13</sup>, Capistrano's executive director of special education,

---

<sup>12</sup> Child find is the continuing affirmative duty for a local educational agency to identify, locate, and evaluate all children suspected of having disabilities residing within its boundaries. (20 U.S.C. § 1412(a)(3).)

<sup>13</sup> Dr. Young has a doctorate of philosophy in education, bachelor's and master's degrees in special education, and a juris doctorate. She is licensed as an attorney in California and has previously practiced special education law.

explained Capistrano's practice when a parent fails to provide consent to an IEP and offer of FAPE. Dr. Young indicated when there is no consent to an IEP, she meets weekly with the program specialist and staff to determine what to do next. Usually, Capistrano will file for due process only when there is a major change in the IEP or the student is being overserved in the existing IEP. Dr. Young acknowledged Parents did not consent to the December 18, 2015 IEP. In this matter, Student's placement did not change, and Parents had consented to the implementation of the goals and services contained in the IEP.

92. Parents did not consent to the May/September IEP for the 2016-2017 school year. Instead, Parents filed for due process hearing on October 24, 2016, and FAPE issues regarding both the December 18, 2015, and the May 23, 2016 and September 12, 2016 IEPs. Shortly before hearing, over five months after filing, Student withdrew the complaint on April 18, 2017, after Student was unilaterally placed by Parents.

93. Pursuant to Dr. Young, Capistrano does not conduct IEPs of students who are privately placed unless the parents make a request for an IEP. Instead, Capistrano sends an annual notice to parents within its boundaries informing them of their right to an IEP. Dr. Young overlooked that Student was privately placed because of a FAPE dispute.

94. During hearing, Ms. Candelario incorrectly opined that Capistrano did not have a duty to offer an IEP to Student because she was privately placed. When presented with a Capistrano form, entitled Parent Certification of Intent, which was designed to advise parents of their rights to special education services when their child is privately placed, she indicated she did not send it to Parents, as it was usually sent to parents by Capistrano's private school liaison.

95. Student filed her request for due process on December 15, 2017. On

January 10, 2018, Dr. Young provided Parents with another prior written notice, denying Parents' request for Capistrano to fund placement at Child Development Center.

#### RELATIONSHIP BETWEEN CAPISTRANO AND COMMUNITY ROOTS

96. Pursuant to a memorandum of understanding between Capistrano and Community Roots, Capistrano remained the local education agency for purposes of providing special education and related services to students attending Community Roots. Capistrano staffed the entire special education program at Community Roots. Capistrano case carriers were responsible for all special education paperwork and management of student special education programs. Capistrano serviced 75 students with IEPs at Community Roots.

97. Mr. Cavallaro,<sup>14</sup> the school director at Community Roots, testified at hearing. As the administrator at Community Roots, Mr. Cavallaro attended IEP team meetings. He reported that Capistrano and Community Roots had a collaborative relationship. Mr. Cavallaro worked collaboratively with Capistrano through Ms. Candelario, Capistrano's special education program specialist. Ms. Candelario, however, testified that Mr. Cavallaro never reported Parent's concerns, or passed on Parents' request for an IEP team meeting.

98. Sharla Pitzen, Capistrano's director of special education during 2015-2017, testified at hearing. During her time as special education director, Ms. Pitzen, oversaw special education for Capistrano's preschool through fifth grade programs. She was also

---

<sup>14</sup> Mr. Cavallaro holds a master's degree in educational leadership, and a teacher certificate from New Jersey. His experience has primarily been in private school settings. He was actively involved in establishing Community Roots Academy as a charter school, and negotiated the charter approval process with Capistrano.

responsible for implementing special education and related services at Community Roots, as well as responsible for training special education teachers and staff assigned there. On February 18, 2016, Ms. Pitzen sent an email to several Capistrano administrators, including Sara Young, which set out her concerns regarding providing special education and related services to additional charter schools. In relevant part, the email states:

“...I have some deep concerns regarding the hiring and retaining of special education staff and support... I’m quite concerned that we would have to staff an additional school with all the spec ed [special education] resources that we currently are having a difficult time hiring for our own schools...It has been so difficult to monitor and hire staff for Journey and Community Roots. When you add in the different calendars, philosophies, training, IEP management from our Program Specialists, Compliance Dept., Office Manager/Special Education Office for monitoring timesheets, absences, and evaluations for all spec ed staff. It really takes away from trying to provide the level of support and personnel for our other schools....I’m truly a team player, but...I wanted you to know how difficult the spec ed demands are currently for our two K-8 Charters, and we are not even meeting those needs.”

99. At hearing, Ms. Pitzen acknowledged the email. In spite of the email, she felt Capistrano was meeting the needs of the special education students at Community Roots. The difficulty in working with the charter schools was related to the charter

school calendar and scheduling. The charter schools did not operate on the same school calendar as Capistrano, therefore staffing issues were challenging.

#### CHILD DEVELOPMENT CENTER

100. Dr. Schuck testified to explain the Child Development Center's operation. The Child Development Center is a private school, grades one-through-eight, overseen by UCI Medical Center. The school provides an intensive behavioral support program in the context of a classroom setting. It is a therapy placement designed to assist students with functional difficulties or neuro-deficits, and seeks to determine what impedes a student's access to education. Dr. Schuck explained behavior must be controlled before the student can access his/her education. There are approximately 70 students enrolled in Child Development Center, with 15 students in each class. All teachers hold multi-subject credentials, and the school follows California common core curriculum. In addition to the teacher, each class has a mental health professional, case manager, and two behavior specialist aides. The adults in the classroom act as a team. The school utilizes technology, and each student has an iPad. Academic enrichment or educational therapy goes beyond the scope of the academics in the classroom, and is designed to prevent a student from falling behind.

101. Child Development Center employs a number of psycho-social treatment strategies, including universal token economy, positive discipline, and daily group social skills training sessions. Behavior is tracked all day long to discover the antecedents to the behaviors. Behavior is measured every 30 minutes and feedback with the student is provided. Dr. Schuck noted that, as a child with autism, Student needed immediate and continuous feedback. At the end of the day, students can cash in their tokens. Students receive one hour per day of small group social skills therapy and physical education activities which implemented social skills. An eight week parent participation training was required, and twice monthly meetings thereafter are mandatory. Speech and

language services and occupational therapy services are not offered at the Child Development Center.

102. In grades one-through-five, Child Development Center's mission is to provide an intervention program to change a student's behavior to allow re-entry into the public school system. The school aims to complete this goal within one-to-two years of attendance. The average attendance lasts 19 months, however, for students with autism, attendance is usually for two years.

103. When Student began attending school at Child Development Center, she exhibited significant behaviors; she was unwilling to "buy into the program." Dr. Schuck noted that as with most students with behavior problems in a new environment, "things get worse before they get better."

104. While enrolled at Child Development Center, Parents continued to express concern about Student's water intake and Student's perception of being bullied. Parents complained the school was not academically challenging, and Student continued to present with anxiety. Student was still having meltdowns in the morning and did not want to go to school. Dr. Schuck explained they were working on Student's anxiety. It took until Thanksgiving 2017 to transition Student into second grade, with new kids in class and higher expectations. Dr. Schuck diplomatically testified that Child Development Center needed to work on both Student's and Parents' perceptions and assimilation into the program.

105. Academically, Student's progress report for February-June 2017 indicated Student's reading foundational skills were proficient. Her reading standards in literature indicated she could decode words and understand the basic meaning of what she was reading. She was working to expand her knowledge to higher level questions, and increase her reading comprehension. Student's writing skills ranged from developing to proficient. Student's writing was very clear, and she could express her ideas in written

form independently, but was more comfortable with teacher support. Student appeared to benefit from pre-writing strategies, such as word banks and graphic organizers, before beginning to write. Student's language, spelling and grammar skills were generally proficient. Student's math skills were developing. Student could work independently in math and appeared to have a strong base with math facts. She relied on her fingers, but could work from memory when prompted by the teacher. Word problems remained a weakness for Student. Student's consistency and progress in her social skills development increased.

106. Dr. Schuck opined that the Child Development Center was an appropriate placement for Student, and she maintained the continuing goal was to transition Student back into the public school system for the 2018-2019 school year, if an appropriate placement was available.

#### REQUESTS FOR REIMBURSEMENT

107. Parents requested reimbursement for Student's unilateral placement, educational supports and services, and transportation. Mother credibly testified to establish sufficient foundation to establish the following expenses were incurred and paid by Parents for the period of February 1, 2017, through April 2018:

(1) Program intake for Child Development Center	\$150.00
(2) Mandatory Parenting Techniques program	920.00
(3) Registration for 2016-2017	475.00
(4) Registration for 2017-2018	475.00
(5) Monthly program fee February 2017	1,175.00
(6) Monthly program fee March 2017	2,350.00
(7) Monthly program fee April 2017	2,350.00
(8) Monthly program fee May 2017	2,300.00
(9) Monthly program fee June 2017	,350.00

(10) Monthly program fee for July 2017	2,350.00
(11) Monthly program fee for August 2017	2,350.00
(12) Monthly program fee for September 2017	2,660.00
(13) Monthly program fee for October 2017	2,660.00
(14) Academic enrichment fee for October 2017	150.00
(15) Monthly program fee for November 2017	2660.00
(16) Academic enrichment fee for November 2017	150.00
(17) Monthly program fee for December 2017	2,660.00
(18) Academic enrichment fee for December 2017	240.00
(19) Monthly program fee for January 2018	2,660.00
(20) Academic enrichment fee for January 2018	330.00
(21) Monthly program fee for February 2018	2,660.00
(22) Academic enrichment fee for February 2018	390.00
(23) Monthly program fee for March 2018	2,660.00
(24) Academic enrichment fee for March 2018	330.00
(25) Monthly program fee for April 2018	2,660.00
(26) Academic enrichment fee for April 2018	330.00
(27) Educational therapy services for April 2018 (2 hrs. at100.00 per hr.)	
200.00	

108. Parents requested reimbursement for round-trip transportation to Child Development Center from their residence. The drivable distance between Student's residence and Child Development Center is 10.5 miles each way.

109. Parents requested reimbursement for services provided between March 2016 and November 2017, by Dr. Patterson through Autism Behavior Services, Inc., of \$2,199.00. These expenses correspond with Dr. Patterson's observations and reports.

110. Parents requested reimbursement for social skills and speech improvement obtained through enrollment in the Gary Spatz Film and TV Acting Conservatory, LLC., of \$3,950.00. Mother indicated Student was enrolled in this program to increase her social skills, and develop her speech, voice and memory, through acting exercises.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>15</sup>

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.<sup>16</sup>; 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.)

---

<sup>15</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided herein.

<sup>16</sup> All citations to the Code of Federal Regulations refer to the 2006 edition, unless otherwise noted.

“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. 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. 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 enacting the IDEA, 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 Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 “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.)

5. In *Andrew 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 *Andrew 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.)

6. 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.)

7. 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.)

8. 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.)

9. 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, Student had the burden of proof on each issue presented.

10. The statute of limitations for special education due process claims requires a party to file a request for a due process hearing within two years from the date the party knew or had reason to know of the facts underlying the basis for the request. (Ed. Code, § 56505, subd. (j); 20 U.S.C. § 1415(f)(3)(C).) The statute does not apply to claims filed by a parent who was prevented from requesting the due process hearing due to either of the following: (1) specific misrepresentation by the local educational agency

that it had solved the problem forming the basis of the due process hearing request; or (2) withholding of information by the local educational agency from the parent that was required to be provided to the parent. (Ed. Code, § 56505, subd. (1); 20 U.S.C. 1415 (f)(3)(D).) Student filed her initial complaint on December 15, 2017. Student did not raise any exceptions to the two year statute of limitations. Therefore, the applicable period of time in this matter is December 15, 2015, through December 15, 2017.

#### ISSUE ONE: DECEMBER 15, 2015 IEP AS APPROPRIATE OFFER OF SERVICES

11. Parents contend Capistrano failed to offer Student a FAPE in the December 18, 2015 IEP, by failing to provide appropriate goals and services in the areas of intensive behavioral intervention, one-to-to-one aide assistance, speech and language therapy and social skills services to address Student's pragmatic language and social skills needs. Parents preferred proactive aide services, believing if Student did not receive full-time aide support during her early education, she would lose ground academically as she got older. Capistrano, on the other hand, found full-time aide accommodations more restrictive and unnecessary where the ultimate target was to make Student independent and prompt free within a few years. Capistrano contends the December 18, 2015 IEP was appropriate and allowed Student to obtain educational benefit.

12. 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.*)

13. 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 F.3d 1141, 1142 (*Adams*), citing *Fuhrman v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

14. Although Student never received one-to-one aide support in preschool, Parents remained adamant that Student required full-time aide support upon entering kindergarten. Parents entered into a settlement agreement with Capistrano on September 24, 2015, which provided Student additional aide support through December 18, 2015. As part of this agreement, Parents agreed to the implementation of the April 30, 2015 IEP, and released and waived all educational claims for the period of August 25, 2015, through December 18, 2015. Any remaining disputes regarding the offer of FAPE contained in the April 30, 2015 IEP were waived by the settlement agreement, and were outside the statute of limitations in this matter.

15. The December 18, 2015 IEP was an addendum to the April 30, 2015 annual IEP. The provision of goals and services contained in the April 30, 2015 IEP were being implemented with parental approval, and intended to remain in effect until the next annual IEP in May 2016. As such, the December 18, 2015 IEP team meeting was designed to review Student's progress and determine if any changes to the annual IEP were necessary, primarily regarding full-time aide services.

16. No information was presented to suggest Student had regressed, or failed to make progress, prior to December 18, 2015. The information presented at hearing was to the contrary. Informal progress meetings held with Parents described Student as improving in task completion, having fewer meltdowns, and responding well to positive reinforcements. Ms. Houses' observations, as Student's general education teacher, were

persuasive. Ms. Houses successfully pushed Student harder during academic periods and reiterated Student was making excellent progress. When asked if the aide was responsible for Student's successes, Ms. Houses noted Student made continual growth and matured a lot since the beginning of school. Without the aide, Student could have completed her work, but it might have taken her longer to complete, as she could be distracted. Educationally, Capistrano staff, including the education specialist and autism specialist, reported they remained concerned that continuing additional aide support would unnecessarily render Student prompt dependent.

17. Parents voiced their concerns at the December 18, 2015 IEP team meeting. While Parents remained adamant that Student required a full-time aide, Student presented no evidence to suggest that Student had regressed, or failed to make progress at school; nor did the evidence suggest that Student's progress was significantly based on full-time aide support. As a kindergartener, Student could be easily distracted even with aide support. While Mother reported concerns about hydration and lack of socialization, the information presented at hearing was insufficient to prove a full-time aide was required to provide a FAPE, or that a change in the goals and services were necessary based upon Student's progress at the time. Parents argued that Student required a transition plan to transition from full-time aide support to combined aide and IBI tutor support. The evidence, at that time, did not suggest a need for a transition plan, but merely parental apprehension of the "what ifs" in the event Student did not receive full-time aide support.

18. The December 18, 2015 IEP was appropriate in light of Student's disability and circumstances. Consequently, Student failed to show that Capistrano denied her a FAPE by failing to offer her appropriate placement and services in the December 2015 IEP.

## ISSUE TWO: FAILURE TO DEFEND THE DECEMBER 18, 2015 IEP

19. Student contends Capistrano denied Student a FAPE by failing to file for due process to defend the December 18, 2015 IEP. Capistrano contends provision of a full-time aide was not a necessary component of the December 18, 2015 IEP, therefore Capistrano was not required to file for due process.

20. If the parents 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 parents have consented shall be implemented so as not to delay provide 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).)

21. Both parties cited *I.R. v. Los Angeles Unified School District* (9th Cir. 2015) 805 F.3d 1164, 1169 (*I.R.*) in support of their contentions regarding Capistrano's obligation to file for due process. Pursuant to *I.R.*, 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, 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 FAPE, to trigger a mandatory requirement for a school district to seek due process.

22. Applying *I.R.*'s two-pronged test, Capistrano's failure to seek due process was not required. The December 18, 2015 IEP was appropriate, and the omission of a full-time aide was not a necessary component of the IEP. For those reasons, Student failed to show by a preponderance of evidence that Capistrano denied her a FAPE by failing to defend the December 2015 IEP.

ISSUE THREE: MAY 23, 2016 AND SEPTEMBER 12, 2016 (2016-2017 ANNUAL IEP) OFFER OF APPROPRIATE GOALS

23. Student contends the annual IEP developed on May 23, 2016, and September 12, 2016, failed to develop goals that addressed Student's needs in the areas of academics, social/emotional and anxiety. Capistrano contends that the goals offered in the 2016 annual IEP were appropriate and comported to Student's identified unique needs.

24. 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).)

25. When developing an IEP, the team must consider the strengths of the child; the concerns of the parents for enhancing their child's education; information about the child provided by or to the parents; the results of the most recent assessments; the academic, developmental, and functional needs of the child; and any lack of expected progress toward the annual goals. (20 U.S.C. § 1414(d)(3)(A), (d)(4)(A); 34 C.F.R. § 300.324(a), (b); Ed. Code, § 56341.1, subds. (a), (d).) An IEP must include a statement of measureable annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability. Further, the IEP must specify the anticipated frequency, location and duration of educational services so

that the formal specific offer from the school district will assist parents in presenting complaints with respect to any matter relating to the educational placement of the child. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526, *cert. den.*, 513 U.S. 965 (1994) (*Union*).

26. Ms. Essex's speech and language progress report did not suggest the proposed IEP communication goals were inappropriate. Instead, the Essex report described the progress on Student's long-term goals of demonstrating language comprehension, language expression, and speech production skills within chronological age-level expectations, and demonstrating improvement in social communication and executive functioning skills provided in the private program. Of the 14 short-term goals contained in the report, many were similar to those contained in the December 18, 2015 IEP, and many had already been met by Student. Ms. Lanners considered the Essex report to validate her own work with Student, including the goals she drafted for the 2016 IEP.

27. Ms. Carrucci reported Student was able to read fluently at an above grade level, but needed to improve her ability to comment and answer questions about what she had read. Therefore, Capistrano offered a reading comprehension goal. Student was fluent with basic math facts through five, but needed some support to solve word problems. A math goal was crafted to address word problems and decrease prompts on this non-preferred activity. Additionally, Student had met her one occupational therapy goal, and had no residual need for another one. Theoretically, based on subject matter, none of these goals were inappropriate.

28. Dr. Patterson's observation notes and recommendations offered little to suggest Capistrano had not accurately identified Student's behavior and social/emotional needs. She did not indicate Student required a full-time aide; but opined that Student's behavior support needed to be consistent and limited to no more

than two IBI tutors.

29. Dr. Patterson's expert opinion regarding the reliability of Capistrano's collection of data, and the variance in measuring Student's progress on goals was persuasive. The behavior and social/emotional goals all comported to Student's unique needs. The problems with these goals laid not in their suitability, but rather in the manner in which they were measured. This data was used, in part, to determine Student's present levels, and to determine the content of the goals.

30. Dr. Patterson explained a fundamental premise of behavior analysis requires that data collection be consistent, and everyone collecting data measures the same thing. In Student's program, at least three people were collecting data at various time. The data needed for reference was not consistently provided on the data collection materials, and the data sheets do not reflect that the IBI tutors remained in sync. If the data collection was flawed and inconsistent, it was unreliable, and it skewed the data's analysis. The data sheets provided as exhibits were inconsistent. If the data was incorrect, the analysis of the data was wrong as well.

31. Ms. Meyers-Megarity is also well qualified in her profession and has extensive experience with IBI services. Ms. Meyers-Megarity explained away several of the inconsistencies reported by Dr. Patterson, and described a valid protocol for collecting data in her program. The purpose of Capistrano's program, and the educational philosophy behind it, is not in question here. Her testimony provided a description of Capistrano and IBI policy, but did not address specifics related to Student or her IEP. The collection of the data collected, was inconsistent, the IBI services provided to Student were inconsistent, and individual responsibilities were not clearly delineated in the IEP. Further, the Community Roots teachers and administrators exhibited limited understanding of special education services and procedures. There was a disconnect between Capistrano and Community Roots which only intensified the need

for delineation of responsibility and consistency in services.

32. Capistrano relied heavily on the chart prepared to indicate the amount of additional support Student would receive each day under the 2016-2017 IEP. The chart, however, did not define the responsibilities of the staff that would provide the support. This was further complicated by the various definitions of IBI utilized by Capistrano. Where more than one acronym definition is in usage, further definition is required in the IEP for clarity. It was not provided in the chart or the IEP.

33. To confuse things even further, the additional support aide collected data in addition to the IBI staff. Ms. Carrucci supervised the aide in collecting this data and reviewed it only "every so often." Capistrano witnesses emphasized the additional support aide's duties were different than those of the IBI staff. The support aide was available to Student more than three hours per day, which could entail one-to-one support. The specific time frame in which Student might need support varied based upon curriculum, activity preference, and/or environment. Regardless of when the services were to be provided, the IEP failed to indicate what type of services or interactions were to be provided. As an example, in addition to providing prompting, the aide was utilized as Student's primary go-to person, for such needs as breaks, hydration and toileting. IBI support was intended to collect data on behavior and social support, and only to intervene after two prompts. The recess support IBI's duties were altogether different.

34. As Dr. Patterson stressed, the role and responsibilities of the aides should be clearly articulated to the IEP team, Parents, and even Student if necessary. Student's need to know who to go to for assistance was important, and the person assigned to Student needed to be well-equipped to work with Student's unique needs and also develop rapport with Student.

35. There is a difference between the clinical provision of IBI services and

educational provision of IBI support, and many nuances in data collection styles. Each expert agreed that any method was appropriate as long as it was consistent. The evidence supported a finding that there were significant discrepancies in the data collection and provision of IBI services, which affected its analysis and IEP team members understanding of Student's needs. In addition, the data collected from an untrained aide, haphazardly reviewed, was also being considered by Capistrano. This lack of consistency comported with Ms. Pitzen's concern that Capistrano was unable to adequately monitor its staff at the charter school.

36. The concern over data reliability extended to the measurement of progress for the 2016-2017 goals. The means for measuring progress for the goals was vague. The behavior and social/emotional goals split the responsibility for observation and goal measurement amongst five-to-six people. Measurement of progress on each of these goals, used undefined documents, by six people, not all of whom were measuring the same thing, without delineation of individual responsibility. On the face of the IEP, the means of measuring the goals, and the individual responsibilities for doing so, split among so many people, some of whom were inexperienced, did not provide sufficient clarity to withstand the requirements of *Union*. Consequently, a preponderance of evidence showed that Capistrano denied Student a FAPE by failing to offer sufficiently clear goals.

#### ISSUE FOUR: MAY 23, 2016 AND SEPTEMBER 12, 2016 (2016-2017) ANNUAL IEP OFFER OF PLACEMENT AND SERVICES

37. Student contends the 2016-2017 annual IEP failed to provide her with appropriate placement and services. Capistrano contends the 2016-2017 annual IEP was appropriate for Student.

38. 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.)

39. 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 in order 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.)

40. Capistrano's failure to consider a transition plan for Student at the May 23, 2016 IEP team meeting significantly denied Student appropriate access to her education at the beginning of the 2016-2017 school year. During the May 23, 2016 IEP team meeting, Capistrano knew Community Roots was moving to a new campus at a different location. It knew from information collected from the teacher, education specialist and autism specialist, that Student had difficulties with most forms of transitions, regardless of whether from place-to-place or lesson-to-lesson. Capistrano knew from parental input at the IEP team meeting that transitions were hard for Student, and affected her ability to communicate when things became hard, and her ability focus and to get

organized. Parents also expressed concern for Student's safety in the unfamiliar surroundings of the new campus. When Parents asked the IEP team to consider a transition plan for the new school year and provide Student a full-time aide to help her successfully make the transition to the new school campus, the IEP team simply ignored this request. Capistrano was more concerned that the IEP team meeting had run overtime than it was with considering a transition plan for Student. Not only did the IEP team fail to consider a transition plan for a child with known transition difficulties at the May 23, 2016 IEP team meeting, it failed to convene the second part of the 2016-2017 annual IEP team meeting prior to the beginning of the school year to consider a transition plan. When the IEP team reconvened on September 12, 2016, Student already had suffered a traumatic incident due, in great part, to Capistrano's failure to provide appropriate supervision, and failing to allow Student to become acquainted with the unfamiliar layout of the new campus.

41. Student's anxiety levels remained high since her traumatic incident. Ms. Adams reported that, after the incident, Student would hold her hand during transitions. Student was increasingly nervous about the new campus. Student complained when math was difficult, no one helped her. Student did not want to go to school, while at the end of kindergarten Student looked forward to school. The transition from home to school became increasingly difficult, requiring Father to remain at school with Student each day to calm her and get her to class. Ms. Adams also reported Student had difficulties getting to class. Pick-up at the end of the school day was also challenging. Student cried in the pick-up line. Every change at school was a challenge for Student.

42. Student provided ample examples to support her contention that the behavior support provided to Student during the 2016-2017 was insufficient, and resulted in a significant decline in Student's behavior and emotional status. Information collected by Capistrano during the first semester of the 2016-2017 school year indicated

Student's behavior was declining. Capistrano acknowledged the curriculum was more difficult, and Student required more prompting.

43. While Ms. Adams played down Student's behaviors in her reports to Capistrano and Parents, her more candid reporting to Dr. Schuck bears more weight. Ms. Adams' questionnaire responses for Dr. Schuck, indicated Student had more significant and intense behaviors at school than previously reported, and much more than at the end of kindergarten. Student cried easily and frequently. She was easily upset and her emotions could quickly escalate. Student cried if a routine was different and she had difficulty moving through transitions to other activities. These behaviors should have also been apparent to the Capistrano staff collecting data and managing Student's behavior.

44. Dr. Schuck's expert testimony was the most persuasive. Child Development Center was selective in who it admitted into its program. Each candidate must exhibit significant behaviors. Dr. Schuck determined Student's autism was comorbid with her depression and anxiety. When Student was accepted into the Child Development Center program, she had hit the wall with Capistrano's program at Community Roots. She was shutting down emotionally and not participating at school. Capistrano was not providing Student with sufficient supports to access to her education. No one was listening. Capistrano's IBI team failed to recognize the antecedents to Student's meltdown.

45. For the foregoing reasons, Student proved by a preponderance of evidence that District denied her a FAPE by failing to offer her an appropriate and timely IEP for the 2016-2017 school year.

#### ISSUE FIVE: FAILURE TO DEFEND THE MAY 23, 2016 AND SEPTEMBER 12, 2016 IEP.

46. Student contends Capistrano denied Student a FAPE by failing to file for

due process to defend the May 23, 2016, and September 12, 2016 IEP. Capistrano contends that by continuing to implement the December 18, 2015 IEP, which Capistrano believed provided Student with services in excess of her needs, Capistrano was not required to file for due process.

47. The case law and statutes applied in Legal Conclusion paragraphs 19 and 20 are applicable here as well.

48. In applying *I.R.'s* two-pronged test to the May 23, 2016, and September 12, 2016 IEP, Capistrano was required to file for due process. Parents did not consent to any part of the May 23, 2016, or September 12, 2016 IEPs. Reliance on the December 18, 2015 IEP, which was essentially the April 30, 2015 IEP, was unreasonable and inappropriate. The goals contained in the 2015 IEPs were outdated. Ms. Navarro, Student's first grade special education teacher, testified that since Student had progressed and met her 2015 goals, she needed something to work on during SAI services. Goals are the backbone of special education services, and are required in an IEP. The absence of appropriate goals is a necessary component in determining whether to file for due process.

49. Second, Student's behavior had started to decline and her anxiety increased during the first semester of first grade. Data collected as of January 2017 indicated Student's behavior was declining. Ms. Romberg opined this decline was related to a more difficult curriculum in the first grade, which required more prompting. This, coupled with the outdated goals, supported a finding that new goals were needed which were more closely related to the first grade curriculum than those contained in the December 18, 2015 IEP. This also constituted a necessary component. Along the same line of analysis, Student's behavior and anxiety also suggested the December 15, 2015 IEP was no longer working for Student, and the new IEP needed to be implemented to provide Student a FAPE. All of these reasons indicate Capistrano had an

obligation to seek due process to allow it to implement May 23/September 1, 2016 IEP, without parental consent.

50. Capistrano sought to mitigate its obligation to file for due process by establishing that Student had filed a request for due process on October 24, 2016, alleging denial of FAPE in both the December 18, 2015 IEP, and the May 23, 2016, and September 12, 2016 IEPs. In response to that complaint, Capistrano was prepared to defend its IEPs. Student, however, withdrew the complaint on April 18, 2017, and waited another seven months to file this current complaint. Capistrano's reliance on Student's prior filing is misplaced. A school district's obligation to provide special education and related services to a student is not predicated on the parents' actions, procrastinations or failure to act. Capistrano had the obligation to affirmatively seek due process to implement what it considered an appropriate IEP to provide Student with the IEP while she attended Community Roots and services she required. By simply filing its own counter-complaint, Capistrano could have fulfilled its obligation to pursue implementation of the IEPs, as well as rendered Student's withdrawal of her complaint ineffective.

51. Based upon the foregoing, a preponderance of evidence showed that District denied Student a FAPE by failing to file for due process.

**ISSUE SIX: FAILING TO CONVENE AN IEP AND FAILING TO HAVE A CURRENT IEP IN PLACE AT THE BEGINNING OF THE 2017-2018 SCHOOL YEAR.**

52. Student contends Capistrano denied Student a FAPE by failing to convene an annual IEP team meeting in May 2017, and failing to have a current IEP in place for Student at the beginning of the 2017-2018 school year. Capistrano contends it had no obligation to do so as Student had been privately placed at Children's Development Center.

53. A school district must conduct an IEP team meeting for a special education

student at least annually “to review the pupil’s progress the [IEP], including whether the annual goals for the pupil are being achieved, and the appropriateness of placement, and to make any necessary revisions.” (20 U.S.C. § 1414(d)(4)(A)(i); Ed. Code, § 56343, subd. (d).)

54. A school district must have an IEP in place at the beginning of each school year for each child with exceptional needs residing within the district. (20 U.S.C. § 1414(d)(2)(A); Ed. Code, § 56334, subd. (c).)

55. An offer of placement must be made to a unilaterally placed student even if the district strongly believes that the student is not coming back to the district, or parents have indicated that they will not be pursuing services from the district. The requirement of a formal written offer should be enforced rigorously and provide the parent with an opportunity to accept or reject the placement offer. (*Union, supra* at p. 1526.) The IDEA does not make a district’s duties contingent on parental cooperation with, or acquiescence in the district’s preferred course of action. (*Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055.) Re-enrollment in the public school is not required to receive an IEP. It is residency, rather than enrollment, that triggers a district’s IDEA obligations.

56. Even when parents have already decided to place their child in private school, the school district is not excused from obtaining their participation in the IEP process. Failure to include parents in an IEP team meeting is a procedural violation that denies the student a FAPE in the following school year. (*D.B. ex. Rel. Roberts v. Santa Monica-Malibu Unified School District*, (9th Cir. 2015) 606 Fed. Appx. 359, 360-361.)

57. Parents may revoke consent for the continued provision of special education and related services under the IDEA at any time. (34 C.F.R. § 300.9(c).) If the parent of a child revokes consent in writing for the continued provision of special education and related services, the public agency will not be considered in violation of

the requirement to make a FAPE available to the child because of the failure to provide the child with further special education and related services and is not required to convene an IEP team meeting or develop an IEP for the child for further provision of special education and related services. (34 C.F.R. § 300.300(b)(4)(iii) & (iv).)

58. A school district must conduct an IEP meeting for a special education student at least annually “to review the pupil’s progress, the [IEP], including whether the annual goals for the pupil are being achieved, and the appropriateness of placement, and to make any necessary revisions.” (Ed. Code, § 56343, subd. (d); 20 U.S.C. § 1414(d)(4)(A)(i).) The statutes make no exception for the situation in which a parent has unilaterally placed his child in a private school and is demanding reimbursement because the District allegedly failed to offer or provide a FAPE. The duty of the District to hold annual IEP meetings continues during that period. (*Briere v. Fair Haven Grade School Dist.* (D.Vt. 1996) 948 F.Supp. 1242, 1254.)

59. Dr. Endelman’s testimony, although informative in describing “best practices” for school districts, was unnecessary to establish Capistrano’s obligation to provide Student with an IEP.

60. Capistrano responded to Parent’s notice of private placement with a letter of prior written notice on February 24, 2017. Parents denied receiving this letter, however, the address information was correct, and it was accompanied by a proof of service pursuant to California Code of Civil Procedure, section 1013, subdivision (a)(3). The letter acknowledged Student’s unilateral placement, and rejected Parent’s request for reimbursement. The letter also included a notice of IEP team meeting scheduled for March 2, 2017. Parents did not respond or attend the IEP team meeting. Dr. Young described her protocol where Parents do not provide consent to an IEP: she meets weekly with the program specialist and staff to determine what to do next. Further it is not Capistrano’s policy to conduct IEPs of students who are privately placed unless the

parents make a request for an IEP. Instead, Capistrano sends an annual notice to parents within its boundaries informing them of their right to an IEP. Ms. Candelario, Capistrano's program specialist at Community Roots, opined Capistrano had no duty to offer an IEP to Student as a private school student. Further, she did not provide Parents with any communications which informed Parents they had a right to an IEP. This also supports the claim that Capistrano was unaware of what was going on at Community Roots.

61. Regardless, District made no further attempts to contact Parents after February 24, 2017, although Student remained a student with an IEP. Capistrano did not hold an IEP team meeting, or attempt to hold an IEP team meeting for Student's annual IEP, due in May 2017. With no IEP team meeting, there was no offer of placement and services in place for the beginning of the 2017-2018 school year. Student continued to reside within Capistrano and Parents did not provide Capistrano a written notice of revocation of their consent to special education and related services. Therefore, Capistrano had the obligation to hold Student's annual IEP team meeting, and develop an IEP for implementation at the beginning of the school year. Capistrano's failure to do so resulted in a complete denial of educational opportunity for Student, and constituted a denial of FAPE. Consequently, Student proved by a preponderance of evidence that Capistrano denied her a FAPE during the 2017-2018 school year.

## REMEDIES

1. Courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*)). This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.*

(2009) 557 U.S. 230, 244, n. 11.)

2. An ALJ may order a school district to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524, citing *Puyallup, supra*, 31 F.3d at p. 1497.) The award must be fact-specific and be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Reid, supra*, 401, F.3d at p. 524.)

3. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and the private placement was appropriate. (20 U.S.C. § 1412(a)(10)C(ii); 34 C.F.R. § 300.148(c); see also *School Committee of Burlington v. Department of Ed.* (1985) 471 U.S. 359, 369-370 [105 S. Ct. 1996, 85 L. Ed.2d 385] (reimbursement for unilateral placement may be awarded under the IDEA where the districts proposed placement does not provided a FAPE).) The private school placement need not meet the state standards that apply to public agencies to be appropriate. (34 C.F.R § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 14 [114 S. Ct. 36, 1126 L. Ed. 284] (despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be

reimbursable where the unilateral placement had substantially complied with the IDEA by conducting quarterly evaluations of the student, having a plan that permitted the student to progress from grade to grade and where expert testimony showed that the student had made substantial progress.)

4. Student prevailed on Issues Three, Four, and Five, each of which determined that Capistrano denied Student a FAPE by failing to offer an appropriate IEP in the May 23, 2016, and September 12, 2016 IEPs. Further, by failing to file for due process to seek consent to implement the IEPs without parental consent, Capistrano left Student without an IEP for an unreasonable amount of time, thereby making Parents' decision to enroll Student in the Child Development Center appropriate. Parents notified Capistrano on February 9, 2017 of their intent to unilaterally place Student at Child Development Center and to seek reimbursement from Capistrano for Student's placement and related educational expenses.

5. Student also prevailed on Issue Six, by Capistrano failing to hold Student's May 2017 annual IEP, and failing to have an IEP in place at the beginning of the 2017-2018 school year. This failure to offer Student a placement required Parents to continue Student's placement at Child Development Center so she did not lose an educational benefit.

6. Dr. Schuck's testimony established that Child Development Center was an appropriate placement for Student. Although primarily a therapeutic placement, Child Development Center provided Student with behavioral and emotional supports which addressed Student's unique needs. Academically, Child Development Center provided Student with appropriate academics, based upon a grade level core curriculum.

7. Student provided sufficient documentation to support Parents' request for reimbursement for payment of the mandatory parenting program, registration fees for 2016-2017 and 2017-2018, and monthly enrollment fees for the period of February 2017

through June 2017, and September 2017 through March 2018, as those periods correspond to the periods of time Capistrano was responsible for Student's placement, based upon Capistrano's school year calendar. Although Child Development Center is a year-round school, no evidence was presented to support a finding that Student required remedial or retention programs during the summer to prevent regression. Likewise, Student failed in her burden of proof to establish that Student required academic enrichment programs or educational therapy. Therefore, Student's requests for program enrollment fees for July and August 2017, academic enrichment fees, and educational therapy are denied. Student is awarded parental reimbursement for Child Development Center in the amount of \$39,150.00.

8. Student is also entitled to travel reimbursement for one round-trip per day, home-to-school. Student established the drivable distance round-trip between Student's home and Child Development Center is 21 miles. Student's attendance records established Student attended Child Development Center for 180 days during the approved dates described in Paragraph Six above. Student is awarded parental reimbursement for travel reimbursement for 180 round-trips, for 21 miles per trip for a total 3,780 miles, reimbursable at the current federal income tax rate of \$ .0545 per mile, for a total of \$2,060.00.

9. Dr. Patterson persuasively testified that Student had difficulty with transitions. To avoid further disruption of Student's school year, or require additional transitions for the 2017-2018 school year, Parents are awarded reimbursement of enrollment fees at Child Guidance Center for April, May and June 2018, at the rate of \$2,660.00 per month, plus reimbursement for travel expenses one round-trip per day. Said reimbursement is conditioned on Parents providing Capistrano with proof of Student's attendance during this period.

10. Student requested parental reimbursement for services provided by Dr.

Patterson between March 2016 and November 2017, through Autism Behavior Services, Inc. Dr. Patterson was privately retained by Parents. The expenses listed on the invoice for Autism Behavior Services did not specify what services were provided. Student failed to prove Dr. Patterson provided any direct services to Student or that any such services were necessary, as Child Development Center was providing extensive behavior services. Although the dates of services rendered correspond to the dates of Dr. Patterson's observations and report, Student did not provide any evidence that Capistrano was obligated to pay for Dr. Patterson's reports as independent educational evaluations. Therefore, Student's request for reimbursement of Dr. Patterson's services is denied.

11. Lastly, Parents requested reimbursement for social skills and speech improvement obtained through enrollment in the Gary Spatz Film and TV Acting Conservatory, LLC. Mother indicated Student was enrolled in acting class to increase her social skills, and develop her speech, voice and memory, through acting exercises. Student failed to establish acting classes were necessary for Student or that Mr. Spatz was qualified to provide social skills or speech therapy to Student. Student's request for reimbursement for the acting class is denied.

## ORDER

1. Within 60 days of this decision, Capistrano shall reimburse Parents the amount of \$35,915.00 for Student's tuition and related educational expenses at the Child Development Center. The award of reimbursement for tuition and related expenses is a compensatory award and shall not constitute Student's stay put placement.

2. Within 60 days of this decision Capistrano is ordered to reimburse Parents for Student's educationally related transportation costs in the amount of \$2,060.00.

3. Capistrano shall reimburse Parents for monthly tuition at Child Development Center for April, May, and June 2018, in an amount not to exceed

\$2,660.00 per month. Capistrano shall reimburse Parents within 60 days of Parents presenting Capistrano with documentation of Student's enrollment and attendance during said period. The award of reimbursement for tuition is a compensatory award and shall not constitute Student's stay put placement.

4. Capistrano shall reimburse Parents for transporting Student to the Child Development Center, one round trip per day, from April 2018 through June 2018, at \$.0545 per mile, within 60 days of Parents providing Capistrano documentation of mileage and Student's attendance during that period.

5. All other requests for reimbursement are denied.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d) the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. In this matter, Capistrano prevailed on Issues One and Two. Student prevailed on Issues Three, Four, Five, and Six.

## 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: July 25, 2018

\_\_\_\_\_  
*/s/*

JUDITH L. PASEWARK

Administrative Law Judge

Office of Administrative Hearings