

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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CASE NO. 2020050103  
CASE NO. 2020010258

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THE CONSOLIDATED MATTER INVOLVING

PARENT ON BEHALF OF STUDENT, AND  
CAPISTRANO UNIFIED SCHOOL DISTRICT.

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DECISION

OCTOBER 6, 2020

On January 8, 2020, the Office of Administrative Hearings, called OAH, received a due process hearing request, referred to as a complaint, from Capistrano Unified School District, naming Parent on behalf of Student. On May 5, 2020, OAH received a complaint from Student, naming Capistrano Unified. On May 6, 2020, OAH consolidated both actions, making Student's case the primary matter. On June 17, 2020, OAH granted a continuance of the due process hearing for good cause. Administrative Law Judge Brian H. Krikorian heard this matter by video conference on September 1, 2, and 3, 2020.

Attorney Damian Fragoso represented Student. Parent attended all hearing days on Student's behalf. Attorney S. Daniel Harbottle represented Capistrano Unified. Kathy Purcell attended all hearing days on Capistrano Unified's behalf.

The matter was continued to September 24, 2020, for written closing briefs at the parties' request. Both parties filed closing briefs. The record was closed, and the case was submitted on September 24, 2020.

## ISSUES

A free appropriate public education shall be referred to as FAPE. An individualized education program shall be referred to as an IEP.

### STUDENT'S ISSUES

1. Did Capistrano Unified deny Student a FAPE by failing to offer appropriate placement, goals, accommodations, and services in the IEP dated February 12, 2020?
2. Did Capistrano Unified deny Student a FAPE by failing to appropriately assess Student in the areas of cognitive ability and academic performance, requiring independent educational examinations in those areas?
3. Did Capistrano Unified deny Student a FAPE by failing to offer updated assessments in the areas of behavior, speech, and occupational therapy?

### DISTRICT'S ISSUE

4. Did Capistrano Unified appropriately assess Student in the areas of intellectual development and academics, as outlined in its October 2019 Additional Assessment Report?

## JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The primary purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living, and
- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education, referred to as FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Both Student and Capistrano Unified have the burden of proof on their respective issues. The factual statements in this Decision constitute the

written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 13 years old and in eighth grade at the time of the hearing. Student resided within Capistrano Unified's geographic boundaries at all relevant times. Student was eligible for special education under the categories of autism and speech and language impairment.

#### ISSUE 1: DID CAPISTRANO UNIFIED DENY STUDENT A FAPE BY FAILING TO OFFER APPROPRIATE PLACEMENT, GOALS, ACCOMMODATIONS, AND SERVICES IN THE IEP DATED FEBRUARY 12, 2020?

Student asserted that he should be in a general education classroom based upon his progression over the last school years and that his current placement was not in the least restrictive environment. Student argued that Capistrano Unified's assessments were deficient because they demonstrated Student was further behind than Parent thought he was. Parent argued that Student was capable of doing mainstream schoolwork and achieved better results when working at home. In contrast, the evaluations conducted by Capistrano Unified showed Student underperforming at school.

Capistrano Unified claimed that Student's school performance required specific accommodations, instruction and special education services for him to succeed. Capistrano Unified also argued that Student's performance at home, under the tutelage of Parent, was not an appropriate indicator of his classroom abilities. Capistrano Unified asserted that Student was progressing in most of his goals and towards graduation. His

current goals and accommodations offered the necessary services to allow Student to progress.

A FAPE means special education and related services available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

In general, a child eligible for special education must be provided access to specialized instruction and related services individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. \_\_\_\_ [137 S.Ct. 988, 1000].)

The IEP must include appropriate objective criteria, evaluation procedures, and schedules for determining, on at least an annual basis, whether the annual goals are being achieved, and a statement of how the student's progress toward the goals will be measured. (*Jessica E. v. Compton Unified School Dist.* (C.D. Cal. 2017, No. CV16-04356-BRO) 2017 WL 2864945; see also Ed. Code, § 56345; 20 U.S.C. § 1414(d)(1)A(i).) An examination of the goals in an IEP is central to determining whether a student received a FAPE. "[W]e look to the [IEP] goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer ... a meaningful benefit." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

The IEP must include a statement of the program modifications or supports that will be provided to the student, to allow the student to advance appropriately toward attaining the annual goals; to be involved in, and make progress in the general education curriculum, and to participate in extracurricular activities and other nonacademic activities. (34 C.F.R. § 300.320(a)(4)(i)-(ii); Ed. Code, § 56345, subds. (a)(4)(A), and (B).)

The purpose of annual goals is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345, subd. (a).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56345; *Letter to Butler* (OSERS 1988) 213 IDELR 118.) The IEP team need not draft IEP goals in a manner that the parents find optimal, as long as the goals are objectively measurable. (*Bridges v. Spartanburg County School Dist. Two* (D.S.C. 2011, No. 7:10-cv-01873-JMC) 57 IDELR 128 [the use of percentages tied to the completion of discrete tasks was an appropriate way to measure student progress]). The IEP must contain a description of how the child's progress toward meeting the annual goals described will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided. 20 U.S.C.A. § 1414(d)(1)(A)(iii).

An IEP team develops an IEP. In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the results of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R.

§ 300.324 (a).). Whether an IEP offers a student, a FAPE is assessed in light of information available when the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP “is a snapshot, not a retrospective;” it must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Id.* quoting *Fuhrmann v. East Hanover Board of Education* (3rd Cir. 1993) 993 F.2d 1031, 1036.)

## MARCH 22, 2019 TRIENNIAL ASSESSMENTS

In March of 2019, Capistrano Unified referred Student for a triennial assessment, a three-year reevaluation for special education students required by law. At the triennial evaluation, Student was 11 years and six months old and in the sixth grade. Capistrano Unified assessed Student in the areas of psychoeducation, speech, language, and occupational therapy. Capistrano Unified assessed Student for functional behavior from January 28, 2019, to May 17, 2019. These assessments, and subsequent evaluation in October 2019, formed the basis for Student’s February 12, 2020 IEP.

## PSYCHOEDUCATIONAL ASSESSMENT

Lisa De Acutis conducted the psychoeducational portion of the triennial assessment. De Acutis held a bachelor’s and master’s degree and had a Pupil Personnel Services credential. She worked for Capistrano Unified for 18 years and had been in school psychology for 22 years. De Acutis testified at the hearing. De Acutis was familiar with Student, whom she had assessed in kindergarten and sixth grade. Before administering the 2019 assessment, she reviewed Student’s records and his third-grade evaluation from 2016. De Acutis administered standardized tests and rating scales in eight areas. The tests and rating scales measured cognitive ability, visual-motor integration, auditory processing, behavior, autism and adaptive skills.

De Acutis observed Student for approximately 20 minutes during class. When Student's aide moved on to another pupil, Student began to roll a squeeze ball back and forth with the boy that sat across from him. The aide quickly returned and redirected Student to start working. Whenever the aide stepped away, Student would start playing with the peer across from him and was continuously redirected back to the task, even when the aide sat next to him. De Acutis also observed Student during the administration of her tests. Student often complained about the tasks, but when reminded he would earn points, he would comply. His attention span was low, and he needed redirection often. Directions often needed to be repeated. Student appeared to give up easily and get frustrated quickly when the task became difficult. Student exhibited an inability to focus entirely, at times, during the administration of the tests. However, De Acutis provided Student with appropriate breaks and minimal distractions to get the best possible results.

Student scored from extremely low to average on cognitive ability skills. De Acutis opined that an evaluator should never look at one test or assessment but should examine all of the data and tests as a whole. Many components go into a child's learning process, but not necessarily a child's cognition. Cognition reflects the student's ability to process information and helps the evaluator determine the child's learning weaknesses.

In addition to the classroom observations and tests, De Acutis also relied upon input from Parent and Student's teachers and other behavioral specialists involved in providing Student services. De Acutis concluded that Student had some strong performance in fluid reasoning, but he showed significant weaknesses in verbal comprehension and visual-spatial tasks. Student also showed weakness in memory



tasks, which measures concentration and mental control. His non-verbal index scores were deficient, as were his cognitive scores.

### SPEECH AND LANGUAGE ASSESSMENT

Lori Steiner was a speech pathologist employed by Capistrano Unified since 1997. She had conducted “hundreds” of speech assessments and held a bachelor’s and a master’s degree. Steiner provided Student with speech therapy throughout the sixth grade and conducted the Student’s speech and language evaluation for his 2019 triennial. Steiner testified at the hearing.

Steiner administered six standardized tests assessing picture vocabulary, language fundamentals, pragmatics, word recognition, problem-solving, and articulation. Student scored far below average in his language skills, placing him in the first percentile. His receptive language skills were better than his expressive language skills. Student’s scores in the 2019 assessment were consistent with the scores of the prior triennial in 2016. Student made slight improvements in vocabulary and overall language skills, but his scores were remarkably low.

### OCCUPATIONAL THERAPY ASSESSMENT

Bobbie Burton of Orange County Therapy Services conducted the occupational therapy assessment portion of the triennial evaluation. Student demonstrated delays in fine motor and visual-motor integration skills according to standardized testing. He showed legible writing in the classroom and appeared to be functional in the school environment. Compared to the last triennial assessment, Student continued to demonstrate difficulties with attention, motivation, and avoiding behaviors affecting his

performance. Burton recommended that educational staff and Student continue to implement sensory strategies in the classroom to improve participation.

### FUNCTIONAL BEHAVIOR ASSESSMENT

De Acutis and John McCarthy conducted Student's functional behavior assessment and created a behavior intervention plan. McCarthy is an intensive behavior supervisor and autism specialist. He worked for Capistrano Unified for six years and held a bachelor's degree and a master's degree in special education. McCarthy was credentialed and working on his doctorate in educational leadership. He had a decade of training in autism. McCarthy provided services and evaluations for Student and testified at the hearing.

McCarthy and De Acutis observed and collected data on Student from January 28, 2019, to May 17, 2019, for a total of 50 school days. As part of the assessment, De Acutis and McCarthy interviewed Parent and teachers. De Acutis observed Student in school for purposes of the behavioral evaluation on three separate occasions. McCarthy observed Student in school on May 24, 2019, in his period four and period five classes, and at lunchtime.

De Acutis and McCarthy prepared a 10-page report dated March 31, 2019, which included a behavior intervention plan, and provided the report to the IEP team and Parent.

### MAY 22, 2019 ALTERNATIVE DISPUTE RESOLUTION AGREEMENT

On May 8, 2019, Parent and representatives of Capistrano Unified entered into a settlement agreement in which Student agreed to waive all claims known and unknown against Capistrano Unified through July 18, 2019. In exchange for the waiver,

Capistrano Unified provided educational reimbursement to Student for private tutoring services through October 2019. Capistrano Unified also agreed to conduct an additional assessment in the area of intellectual development.

## OCTOBER 23, 2019 ADDITIONAL ASSESSMENT REPORT

Amy Gritters was a school psychologist employed by Capistrano Unified and held a bachelor's degree in child development, a master's degree in educational psychology, and a Nationally Certified School Psychologist credential. Gritters testified at the hearing. Gritters evaluated Student in the area of intellectual development in compliance with the parties' settlement agreement. Gritters attended the October 23, 2019 IEP team meeting and prepared a report of the same date, which she provided to Parent and the IEP team.

Gritters opined that intellectual development is measured using standardized testing in different areas, including fluid reasoning, memory, and quantitative constants. Other than IQ tests, there are no other accepted evaluations to measure intellectual development. Gritters observed Student in the classroom, reviewed Student's records and past performance, and administered three tests. Gritters also considered the third-party academic testing results obtained by Parent but testified that it did not impact her findings.

When Gritters observed Student, he did not understand a prompt after the first explanation. For example, he named three friends rather than three separate character traits of what makes a good friend. Student required step-by-step assistance to write in his journal. Student would stop working when his aide would leave the table and then ask for help when she returned. Gritters observed Student using his highlighter like an airplane and was "flying" it around. When Student's aide left the room, Student began

making whining noises and quietly stomping his foot. When the aide returned and assured him that “you will be fine, you’re doing a good job,” Student calmed down and continued copying the notations in his packet.

Gritters administered the Universal Nonverbal Intelligence Test – Second Edition, a set of individually administered specialized tasks. These tasks measure individuals’ general intelligence and cognitive abilities from ages five through 21 years, 11 months. The test is used with individuals who may be disadvantaged by traditional verbal and language loaded measures. The test provides a fair assessment of intelligence for children and adolescents who have speech, language, or hearing impairments. The test is a standardized, norm-referenced measure. Student scored significantly delayed in memory, below average in reasoning, and below average in quantitative development.

Gritters administered the Leiter International Performance Scale-Third Edition, an individually administered nonverbal test designed to assess children’s and adolescents’ cognitive functions from age three to 75 plus years. It was developed to provide a reliable and valid nonverbal measure of intellectual ability that could be used to assess children who could not be reliably and validly tested using traditional intelligence tests. The test includes measures of nonverbal intelligence in fluid reasoning and visualization. Student achieved a nonverbal IQ score of 65, which fell within the very low range compared to similarly aged peers. Student demonstrated a personal weakness in his ability to make part-to-whole connections.

Lastly, Gritters administered the Wechsler Individual Achievement Test, 3<sup>rd</sup> Edition. This test was a comprehensive nationally standardized achievement test for students grades Pre-K through 12 and beyond, or ages four years, zero months through 50 years 11 months. It was used to identify the academic strengths and weaknesses of a

student and inform decisions regarding eligibility for educational services and educational placement. It can also be used to identify a specific learning disability, design instructional objectives, and plan interventions. Based on the scores, Student struggled with listening comprehension and oral expression and scored in the very low range for both listening comprehension and sentence repetition. Student could not answer questions after a short story was read and often did not attend to the entire prompt or description.

## FEBRUARY 12, 2020 IEP

The IEP team held an annual meeting on February 12, 2020, and a follow-up meeting on May 28, 2020. The IEP team relied upon the reports of Student's general education and special education teachers, the 2019 triennial evaluations, and Gritter's October 23, 2019 additional assessment. Parent provided the IEP team with Student's tutorial results from October 2019. Parent believed the proposed IEP goals were vague and not challenging enough for Student. She thought that Capistrano Unified was offering to place Student in a more restrictive environment, and that Student should be part of mainstream classes.

## GOALS

The February 12, 2020 IEP goals were reasonably developed based upon the information available to the IEP team at the February 12 and May 28, 2020 meetings. The proposed goals directly addressed Student's areas of need.

## SPEECH GOALS

Student had five speech goals for the 2019-2020 year. Student met his goal for correcting grammatical errors and starting a conversation. Student was progressing

towards meeting his goals in expressive language, identifying emotions, and the multiple meanings of words. Although Student learned 11 new multiple-meaning words with consistency and learned new words to describe emotions, Student often needed many prompts and encouragement to give more information when working in speech therapy. Student continued to become frustrated when he could not respond appropriately to his speech therapist or teachers' questions. Student would act out, walk away, grab his head, or slap his wrist when frustrated. His behaviors impacted his ability to be consistently successful. Student continued using improper grammar.

The February 12, 2020 IEP proposed three speech and language goals, which Capistrano Unified proved were necessary and appropriate. The first was for Student to identify emotions. It set forth a baseline that Student would identify various emotions outlined in the IEP. The goal contained benchmarks, with two target dates for measurement. Student would learn eight, and then ten, new emotion words with 70 percent accuracy over three sessions, with a specified time by which Student would meet the goal.

The second goal was for Student to describe 11 multiple-meaning words, such as bark, spring, or trunk. The IEP provided specific baseline words that would be used, and then set forth two benchmarks, with two target dates. Student would learn ten, and then 20, multiple-meaning words by giving two definitions for one word with varying accuracy over three sessions. Again, the IEP outlined two progress dates to meet the goal.

The third goal was for Student to work on his language and grammar, including correcting his omissions of proper words in a sentence. The IEP contained baseline examples such as "What time \_\_\_\_ the bell ring?" or "Why \_\_\_\_ you keep talking?"

The two benchmarks were that Student would correct his omission and use “does” or “doesn’t,” “did” or “didn’t” in a sentence with 60 percent, and then 70 percent accuracy in two of three opportunities, along with two progress dates to meet the goal.

The February 12, 2020 IEP kept the three unmet goals from the 2019-2020 IEP. The goals provided appropriate descriptions of how to measure Student’s progress toward meeting the annual goals. While Student met two out of five of his 2019-2020 goals, Student was only making progress on the remaining three goals. Steiner, the speech therapist, opined that Student’s strengths were that he was very kind and loving, and wanted to succeed and improve. However, Student became frustrated when he would have to undertake tasks that he was not skilled at and exhibited behavioral issues and avoidance. These behaviors impeded his ability to learn. Student also would become negative and blame himself for not moving forward at a fast-enough pace. Student tended to “drift off” during Steiner’s sessions with him. Student had verbal skills but also had difficulty reading and interpreting gestures. While he was improving his social skills, he was misinterpreting non-verbal cues.

Student did not prove that Student needed more challenging goals in speech and language. Parent’s primary argument was that Student was capable of doing the work when he was monitored and aided at home and that she believed that Capistrano Unified was intentionally “dumbing down” the goals because Capistrano Unified staff viewed Student as “incapable of doing things.” However, Parent’s perception of Student’s performance at home did not prove that the 2020-2021 goals for speech and language were not appropriate or that Capistrano Unified denied Student a FAPE by failing to design an appropriate educational program in speech and language, tailored to Student’s unique needs for the 2020-2021 school year. The speech

and language goals in the February 12, 2020 IEP were appropriately designed to allow Student to progress.

#### SOCIAL-EMOTIONAL, BEHAVIOR, MATH, READING, AND WRITTEN EXPRESSION

On March 23, 2020, and March 30, 2020, Parent provided conditional acceptance of the February 12, 2020 IEP goals in social-emotional behavior, math, reading, and written expression. Parent also consented to “the accommodated curriculums in all subjects.” Parent agreed to this after the first IEP team meeting due to her concern that the Covid-19 pandemic shutdown was impacting Student’s education and that she wanted something in place for the 2020-2021 school year.

Student had two social and emotional goals for the 2019-2020 year. Student met his goal for dealing with teasing. Student understood when his peers were only joking and not directly teasing him. Student was progressing towards meeting his goal for identifying the “size” of a problem and how to address it.

The February 12, 2020 IEP proposed two new social and emotional goals. The first was for Student to learn how to approach his peers. When Student wanted to gain peers’ attention, he would engage in appropriate attention-seeking behaviors instead of displaying targeted behaviors of concern. Student’s second goal continued to address Student’s ability to assess the magnitude of problems. When asked about the size of a problem, Student still needed guidance to come to a reasonable conclusion. The purpose of this goal was to allow Student to come to those conclusions independently. Both goals included a baseline, objectives, and a start and end date.



Student had two behavior goals for the 2019-2020 school year, attention-seeking and self-regulation. Student did not meet either goal but was progressing towards meeting each goal as of the February 12, 2020 IEP meeting. Student had a behavior intervention plan in place to allow for behavioral support. The IEP provided for two goals in 2020-2021. First, during small group or whole class non-preferred activities, Student would follow directions from staff in 80 percent of opportunities, with less than three (verbal, visual, or gestural) prompts within 15 minutes, over three weeks. The second goal was for Student to initiate a sensory strategy such as deep breathing, isometrics, TheraBand exercise, and stretches to help his self-regulation, with one verbal prompt by his aide on three of five opportunities for two consecutive weeks. Again, both goals included a baseline, objectives, and a start and end date.

Student had three mathematic goals for the 2019-2020 year. Those goals were fractions, letter variables, and order of operations. Student met his order of operations goal. Student was progressing towards meeting the other two goals as of the February 12, 2020 IEP meeting. Student was able to complete addition and subtraction word problems, use a formula to find an answer, and follow prompts to solve seventh-grade math problems. Student often required a prompt for each step of solving an equation. Student received accommodations for testing and still needed help in equivalent fractions, multiplication and division word problems, and letter variables. The February 12, 2020 IEP listed four goals for 2020-2021. Those goals were decimals, letter variable addition and subtraction, variable letter division, and word problems. All of those goals provided measurable benchmarks for Student and a specified time in which Student would meet the goal.

Student had two reading goals for the 2019-2020 year and met each one as of the February 12, 2020 IEP meeting. Student was reading and comprehending at a

fourth-grade level and could complete his writing with adult prompting. Student still had needs in the areas of academic vocabulary and reading comprehension. Student was given two additional goals for 2020-2021. The first was that when given a list of 10 sixth to seventh-grade level-appropriate academic vocabulary words, Student would, with no more than two adult prompts, determine the meaning of those words with an average of 80 percent accuracy. The second goal was in comprehension. After reading a passage at sixth-grade complexity, Student would demonstrate comprehension by answering ten comprehension questions about the passage with no more than two prompts with an average of 80 percent accuracy in three consecutive trials.

In the area of written expression, Student had two goals for the 2019-2020 year and progressed towards each one as of the February 12, 2020 IEP meeting. Student could write two to three sentences about a topic but struggled with appropriate writing conventions. Student knew how to refer to given sentence starters and transition words, but needed help in capitalization, punctuation, and writing a paragraph. The 2020-2021 IEP provided three new goals in capitalization, punctuation, and writing process, measurable benchmarks, and a specified time in which the goal should be completed.

During the February 12, 2020 IEP meeting, Parent expressed concerns for the math goals' appropriateness and asked that grade level be added. The IEP team discussed this, and the goal in mathematics was revised to include grade level instead of Student's current level. At Parent's request, the vocabulary and comprehension goals were altered to include grade-level appropriateness. Parent requested that the writing goal use more than one paragraph as a measure, and the IEP team agreed to revise the goal to two paragraphs. Parent asked that the occupational therapy goal be changed utilizing specific strategies. The IEP team agreed to revise the goal.

Although Parent consented to these goals with hesitation, Student presented no evidence that demonstrated he needed additional goals or that these goals were not sufficiently tailored for Student's needs. Despite being a loving and friendly child, Student needed other behavior supports and services to access his educational services, including a behavior plan. Student was not meeting all of his benchmarks. In all of the categories Parent consented to, other than in reading, Student met only a portion of those goals in the 2019-2020 school year but needed prompting and accommodations on the other goals. Although Parent testified that Student was capable of quickly doing work at home under her aid and supervision, the evidence established that Student was struggling in the school environment, both academically and behaviorally. There was no evidence Student was making sufficient progress toward meeting all of his goals at school.

The 2020-2021 annual goals in all categories were procedurally compliant and appropriate. Capistrano Unified did not deny Student a FAPE by failing to design appropriate goals in the areas of social and emotional behavior, math, reading, and written expression, tailored to Student's unique needs for the 2020-2021 school year.

## RELATED SERVICES, ACCOMMODATIONS, AND PLACEMENT

Student did not prove by a preponderance of the evidence that Capistrano Unified failed to offer services, accommodations, and placement reasonably calculated to meet Student's needs in the February 12, 2020 IEP.

### ACCOMMODATIONS AND SERVICES

Related services may be provided to individuals or small groups in a specialized area of educational need, and throughout the full continuum of educational settings.

(Cal. Code Regs., tit. 5, § 3051, sub. (a)(1).) Related services, when needed, are determined by the IEP team. (Cal. Code Regs., tit. 5, § 3051, sub. (a)(2).).

The IEP for the 2020-2021 school year provided for “an environment rich in language including verbal and nonverbal forms of communication, checking for comprehension of directions and instructions.” Student was provided learning situations involving multi-sensory stimuli, including auditory, visual, tactile, kinesthetic, and collaboration with service providers to ensure there is an opportunity to generalize skills. The IEP allowed for sensory strategies (including but not limited to heavy work activities, TheraBand on a chair, wiggle seat, trampoline, and time timer, and vestibular exercises) and sensory breaks as needed throughout the school day to improve and maintain alertness and attention to the task. The IEP listed 17 different accommodations for Students, including visuals, graphic organizers, token economies, positive reinforcements, adapted paper, calculators, and preferential seating.

Capistrano Unified provided Student with the following additional services:

- Speech and language services twice weekly, once in a group and once individually;
- Occupational therapy consult twice a month for 30 minutes;
- Intensive behavior intervention at lunch, once per week for 20 minutes;
- Intensive behavior intervention alone for 30 minutes, once per week;
- Aide support six times per week for 255 minutes;
- Direct math and English accommodations and co-taught classrooms in silence and social science.

Janette Morey was the Clinical Director and owner of Orange County Therapy Services. Orange County Therapy Services contracts with school districts and provides

therapy services for students at the district. Orange County Therapy Services contracted with Capistrano Unified, and Morey and her assistant provided occupational therapy services to Student. Morey held a bachelor's degree in occupational therapy and a certification in Sensory Integration. Morey reviewed Burton's triennial evaluation and participated at the February 12, 2020, and May 28, 2020, IEP meetings. Morey testified at the hearing.

During the occupational therapy sessions, Student showed inattention to tasks and was often distracted. Morey opined that this affected Student's ability to learn. Morey was involved in developing the goals and services in the February 12, 2020 IEP and believed those goals were sufficiently challenging for Student. Student made good progress to meeting his goals but was not initiating actions on his own. He needed to learn more strategies and perform them when asked.

McCarthy opined that Student had very mild behavior issues. Student was mildly disruptive during classes and needed a lot of redirection, re-teaching concepts, prompting to stay on task, and positive reinforcement. Based upon McCarthy's observations of Student, Student needed more breaks, prompting, and support than a student in a general education environment.

Brittany Bybee was an educational specialist employed by Capistrano Unified. She was Student's case carrier beginning in January 2020 and was previously his math teacher. She held a bachelor's degree and a master's degree in special education. Bybee was present at the February and May 2020 IEP meetings, and she testified at the hearing.

Bybee observed that Student made progress in his social and emotional behavior as of the February 12, 2020 IEP meeting. Student also progressed on many of his goals but did not meet all of them. He continued to need assistance from an aide. Bybee opined that Student could not do many of the problems at his grade level and needed a lot of prompting and one-on-one aide support to accomplish his goals. With the assistance of an aide, he could do the work, and the IEP team intended to have Student do more of the work without prompting.

During the two IEP team meetings, Parent requested several changes to the accommodations. The team made many of those requested changes. Bybee opined that Student's main problem in accessing his education was his behavior. With the use of the proposed services, accommodations, and a behavior intervention plan, they could redirect Student so he could progress. However, using those accommodations ate up a lot of learning time for Student. Bybee believed this impacted his ability to progress in a general education setting without accommodations or services.

The evidence established that the services and level of support were sufficient to enable Student to make progress appropriate in light of Student's circumstances and unique needs. The degree of services was not too restricting, and the IEP team members indicated their purpose was to help Student become more independent.

## PLACEMENT

Student argued that following the October 2019 additional assessment by Gritters, Capistrano Unified should have placed Student in a general education environment with supporting services. Capistrano Unified argued that Student would

not be able to progress in that environment. In determining the educational placement of a child with a disability, a school district must ensure that:

- The placement decision is made by a group of persons including the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the least restrictive environment;
- Placement is determined annually, is based on the child's IEP, and is as close as possible to the child's home;
- Unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled;
- In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or the quality of services that he or she needs; and,
- A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.)

California's implementing regulations define a "specific educational placement" as "that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs." (Cal. Code Regs., tit. 5, § 3042, subd. (a).)

To conclude whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit has balanced the following factors:

- "The educational benefits of placement full-time in a regular class";
- "the nonacademic benefits of such placement";

- "The effect [the student] had on the teacher and children in the regular class"; and,
- "The costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404.)

If a school district determines that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Education* (5th Cir. 1989) 874 F.2d 1036, 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction or instruction in the home, in hospitals, or other institutions. (Ed. Code, § 56361.)

At the February 12, 2020 IEP team meeting, Parent requested that the IEP team increase Student's mainstream education and asked that he be placed in collaborative social science or science. At the time, Student was in a more restrictive modified setting in English, math, social studies, and science. The IEP team discussed and shared that Student remained frustrated in his direct education classes and believed Student's behaviors, such as whining and staying off task, would only increase in a mainstream general education setting.

Student attended the beginning of the February 12, 2020 IEP team meeting. Parent asked Bybee to create two fraction questions for Student, and then Parent asked



Student to work on the two math problems. Student did so successfully and then was excused by Parent. Parent argued that Student's performance demonstrated he was meeting his goals, and the goals were not challenging enough. She claimed this reinforced her position that Student should be in more mainstream classes without accommodations.

Behavior specialist McCarthy attended the February 12, 2020 IEP team meeting. He was not surprised that Student could accomplish the problems with minimal prompting at the IEP meeting. He credibly opined that Parent should have more stimulus control over her child than his teachers and providers would have when Parent is not present. Based upon his classroom observations, without Parent's presence, Student would, in McCarthy's opinion, struggle in a general education setting.

Speech therapist Steiner opined that a full general education setting, which would consist of rapid questions and requirements that he follows along with the curriculum, would provide many challenges to Student. It would be difficult for him to keep up with the class. Student required excessive prompting and coaching to answer the typical questions asked in a general education setting. Steiner further opined that while Student showed progress, he still needed aid and assistance, as he had behavior problems and poor memory recall. She believed that the placement and services offered in the February 12, 2020 IEP were appropriate.

Gritters opined that Student's cognitive scores were relevant to the IEP team's placement decisions and were predictive of future academic achievement. Because Student had below average to low IQ scores, Student would likely have difficulty meeting academic demands. It is the IEP team's job to determine what services are most appropriate for him to access and progress. A review of her results and prior

results showed consistency across the years, and that Student's IQ scores fell within the low average to very low range.

Bybee was also against changing Student to a general education setting because he would not progress in those classes. Bybee did support the removal of Student in the modified setting in science and social science, and placement in a general education setting with accommodations in those areas. The IEP team agreed. The IEP team also decided to collect data to see if Student could ultimately transition to a general education classroom in the other two subjects. At the May 28, 2020 IEP team meeting, Parent asked why the IEP team provided accommodated general education classes in social studies and science but not math and English. The IEP team again discussed that going from direct modified instruction to all four general education classes would be overwhelming for Student.

Addressing the first two factors of *Rachel H.*, the evidence established that Student was progressing in the modified environment before the 2020-2021 school year and that Student would likely struggle in a less restrictive general education environment because he required continued prompting and aide support. Concerning the third factor of *Rachel H.*, a full-time move to general education would have created difficulties for Student, the general education teacher, and the other students. However, in response to Parent's concerns that the modified curriculum was too restrictive, the IEP team agreed to place Student in a less restrictive co-taught science and social science classroom. There was no evidence that a less restrictive environment in math or English could meet Student's needs. The evidence shows that the IEP team attempted to address Parent's concerns on almost every item, including placement. Finally, neither Capistrano Unified nor Student provided evidence that the cost of maintaining Student

in an accommodated environment significantly varied from a general education environment.

The teachers and staff at Capistrano Unified were attentive to Student's diverse educational needs, addressed those needs, and implemented his IEP. Capistrano Unified offered an appropriate placement in the least restrictive environment for Student in the February 12, 2020 IEP. The February 12, 2020 IEP presented a coherent, formal, written offer specifying the placement Capistrano Unified offered and the additional assistance to supplement a placement, consistent with the requirements of title 20 United States Code Section 1415(b)(1)(C). The placement and services Capistrano Unified offered Student in the February 12, 2020 IEP constituted a FAPE in the least restrictive environment.

## ISSUE 2: DID CAPISTRANO UNIFIED DENY STUDENT A FAPE BY FAILING TO APPROPRIATELY ASSESS STUDENT IN THE AREAS OF COGNITIVE ABILITY AND ACADEMIC PERFORMANCE, REQUIRING INDEPENDENT EDUCATIONAL EXAMINATIONS IN THOSE AREAS?

Student argued that Capistrano Unified did not conduct appropriate cognitive ability and academic performance assessments. Capistrano Unified alleged that it performed all assessments appropriately.

Federal law uses the term "evaluation" instead of the term "assessment" used by California law, but the two terms have the same meaning and are used interchangeably in this Decision. Assessments are required to determine eligibility for special education, what type, frequency, and duration of specialized instruction and related services are required. (20 U.S.C. § 1414(a); 34 C.F.R. § 300.303; Ed. Code, §§ 56043(k), 56381, subd.

(a).). Each public agency must ensure that assessments and other evaluation materials used to assess a child are, among other things, administered by trained and knowledgeable personnel and administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. § 1414(b) & (c); Ed. Code, §§ 56320, 56381, subd. (e); 34 C.F.R. § 300.304.) The personnel who assess the student shall prepare a written report. (Ed. Code, § 56327.) A school district's failure to conduct appropriate assessments may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2007) 464 F.3d 1025, 1031-1033.)

An assessment must be conducted in a way that that does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability. The assessments used must also be administered by trained and knowledgeable personnel and administered following any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).) The personnel who assess the student shall prepare a written report that shall include, without limitation, the relevant behavior noted during the observation of the student in an appropriate setting. (Ed. Code, § 56327.)

Capistrano Unified reevaluated Student in the fall of 2019 in the area of intellectual development. Gritters conducted the additional evaluation. Gritters was qualified to assess Student.

Gritters conducted her assessment in September and October 2019 and prepared a written report dated October 23, 2019. Gritters reviewed Student's relevant educational records and prior evaluations and administered three standardized tests. To ensure a variety of results, Gritters utilized tests not used by De Acutis in the triennial assessment of March of 2019. She observed Student in the classroom for 30 minutes on

September 6, 2019, and observed Student during testing over three weeks. Gritters also received feedback from four of Student's teachers and Parent.

Gritters provided a 12 page written report to Parent and the IEP team on October 23, 2020, within the timing requirements of the IDEA and California Education Code. Gritters presented a legally compliant, comprehensive assessment report. It set forth that Student needed special education and related services and the basis for making that determination. It noted the appropriate behavior, in detail, during her observation of the Student in a proper setting and the relationship of that behavior to the student's academic and social functioning. The assessment report contained the educationally relevant health, development, and medical findings, along with the record of implementing normed speech and language evaluation tests. Gritters updated the report to include Parent's information related to tutoring over the previous summer.

Student did not present any evidence from any witness or expert to support his contention that the October 23, 2019 intellectual development assessment was inappropriate and did not prove that the evaluation was deficient in any respect. As outlined in Issue 4 below, Capistrano Unified appropriately assessed Student in the area of intellectual disability.

### ISSUE 3: DID CAPISTRANO UNIFIED DENY STUDENT A FAPE BY FAILING TO OFFER UPDATED ASSESSMENTS IN THE AREAS OF BEHAVIOR, SPEECH, AND OCCUPATIONAL THERAPY?

Parent contended that although Student waived the right to request independent examinations in the areas of behavior, speech, and occupational therapy in the parties' settlement agreement, Capistrano Unified should have reassessed Student in those

areas. Parent requested independent examinations as a remedy. Capistrano Unified asserted that the 2019 triennials evaluations were valid and that there was no independent basis to reassess Student within one year of those evaluations. Capistrano Unified also argued that Parent did not request a district reevaluation.

Each local educational agency shall ensure that a child is assessed in all areas of suspected disability. (20 USC §1414(b)(3)(B)). A reevaluation will be conducted if the local educational agency determines that the educational needs of the child, including improved academic achievement and functional performance, warrant a reevaluation, or if the child's parents or teacher requests a reevaluation. However, a reevaluation may occur no more than once a year, unless both the district and Parent agree to do otherwise. (20 USC §1414(a)(2); 34 C.F.R. 300.303; Ed. Code § 56329(d))

On November 5, 2019, Parent sent an email to Capistrano Unified and requested independent educational evaluations for Student in behavior, speech, and occupational therapy. On November 13, 2019, Capistrano Unified provided Student with written notice that it would not offer independent examinations at public expense in those areas since Parents and Student had waived the right to do so in the 2019 settlement agreement. Parent's November 5, 2019 email requested only independent examinations, expressed Parent's disappointment with the district evaluations, and indicated Parent's evident reluctance to rely further on Capistrano Unified's evaluators. Student did not present evidence that Parent separately requested Capistrano Unified personnel "reassess" Student in the above areas. While Parent disagreed with the triennial review's results, Parent waived any objections to the assessments conducted in the triennial evaluation through that date. Accordingly, Parent no longer had a legal right to demand an independent educational examination in those areas.

The evidence also demonstrated that Capistrano Unified was not required to reevaluate Student's behavior, speech, and occupational therapy. Capistrano Unified conducted assessments in those three areas as part of the triennial review in March of 2019. Other than Gritter's October 2019 additional evaluation in the area of intellectual development, Capistrano Unified did no further evaluations. Under the statutory framework, Capistrano Unified could not reassess Student in the areas of behavior, speech, and occupational therapy until March of 2020—unless it felt that the assessments were warranted or both Parent and Capistrano Unified agreed to an early assessment.

Steiner, Gritters, McCarthy, Morey, and Bybee consistently opined that Student's behavior, tactile and communication issues remained constant from the March 2019 triennial to the February 12, 2020 IEP meeting. While Student presented reports to the IEP team showing his cognitive skills had improved over the summer, no witnesses testified at the hearing to the substantive foundation or basis of those reports. Nor did Student present any other evidence that his behavior or communication skills had significantly changed since the 2019 evaluations. On the contrary, Gritters' observations in her October 23, 2019 report demonstrated that Student continued to stay off-task and would be easily distracted. During her observations, Student routinely displayed behavioral issues that required prompting and redirection. Finally, other than the additional intellectual development assessment, Capistrano Unified disagreed with Parent that reevaluations were warranted and should occur sooner than the one-year requirement.

Student did not prove by a preponderance of the evidence that Capistrano Unified denied Student a FAPE by failing to reassess Student in the areas of behavior, speech, and occupational therapy.

#### ISSUE 4: DID CAPISTRANO UNIFIED APPROPRIATELY ASSESS STUDENT IN THE AREAS OF INTELLECTUAL DEVELOPMENT AND ACADEMICS, AS OUTLINED IN ITS OCTOBER 2019 ADDITIONAL ASSESSMENT REPORT?

Parent challenged Gritter's assessment and argued an independent educational evaluation at public expense was warranted. Capistrano Unified contended that Gritters' evaluation was appropriate and filed for due process to support its position.

Gritter's additional assessment was thorough and complete and met all of the statutory requirements. A student may be entitled to an independent educational evaluation if he or she disagrees with an evaluation obtained by the public agency and requests an independent evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. §300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an independent evaluation as outlined in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an independent evaluation].) In response to a request for an independent evaluation, an educational agency must, without unnecessary delay, either file a due process complaint to request a hearing to show that its evaluation is appropriate; or ensure that an independent evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria. (34 C.F.R. § 300.502(b)(2); see also Ed. Code, §56329, subd. (c) [providing that a public agency may initiate a due process hearing to show that its assessment was appropriate].) The determination of whether a public agency's delay in filing a due process complaint or funding an independent educational evaluation was "unnecessary" is a "fact-specific inquiry," foreclosing the existence of a strict deadline by



which the public agency must respond to satisfy its duties under § 300.502(b)(2). (*C.W. v. Capistrano Unified Sch. Dist.*, 784 F.3d 1237, 1247 (9th Cir. 2015); see also *L.C. v. Alta Loma Sch. Dist.*, 389 F. Supp. 3d 845, 864 (C.D. Cal. 2019)(app. pending).)

In the November 5, 2019 email from Parent to Capistrano Unified, Parent disagreed with the results of the October 23, 2019 additional assessment and requested an independent educational evaluation at public expense in the area of intellectual development. On December 16 and 18, 2019, Capistrano provided written notice to Parent that it would not fund an independent educational evaluation in the area of intellectual development. Upon receiving Parent's request for an independent educational examination, Capistrano Unified was legally obligated to either fund an independent educational evaluation or file to defend its assessments without unnecessary delay. On January 8, 2020, District filed its complaint to defend the October 23, 2019 additional assessment.

Capistrano Unified sent Parent prior written notice regarding its decision not to fund the requested assessment approximately six weeks after Parent's request. It timely filed for a due process hearing within three weeks of its prior written notice. Parent did not challenge the timeliness of Capistrano's due process filing concerning the request for an independent educational evaluation.

Capistrano Unified filed a due process request without unnecessary delay. Student did not prove by a preponderance of the evidence that the October 23, 2019 additional assessment was procedurally or substantively invalid. Accordingly, Capistrano Unified's October 23, 2019 additional assessment was appropriate, and Parent was not entitled to an independent educational examination at public expense.

## CONCLUSIONS AND PREVAILING PARTY

As required by 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.

Issue One: Capistrano Unified did not deny Student a FAPE by failing to offer appropriate placement, goals, accommodations, and services in the IEP dated February 12, 2020. Capistrano Unified prevailed on Issue One.

Issue Two: Capistrano Unified did not deny Student a FAPE by failing to appropriately assess Student in the areas of cognitive ability and academic performance, requiring independent educational examinations in those areas. Capistrano Unified prevailed on Issue Two.

Issue Three: Capistrano Unified did not deny Student a FAPE by failing to offer updated assessments in the areas of behavior, speech, and occupational therapy. Capistrano Unified prevailed on Issue Three.

Issue Four: Capistrano Unified appropriately assessed Student in the areas of intellectual development and academics, as outlined in its October 2019 Additional Assessment Report. Capistrano Unified prevailed on Issue Four.

## ORDER

1. Student's requests for relief are denied.
2. Student is not entitled to an independent educational evaluation in the area of intellectual development at public expense.

## RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

/s/

Brian H. Krikorian

Administrative Law Judge

Office of Administrative Hearing