

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

PARENTS ON BEHALF OF STUDENT,

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT.

CASE NO. 2022120076

DECISION

October 16, 2023

On November 30, 2022, Student filed a request for due process hearing with the Office of Administrative Hearings, called OAH, naming Capistrano Unified School District. On May 18, 2023, OAH granted Student's motion to amend the complaint. Administrative Law Judge Deborah Myers-Cregar heard this matter by videoconference on June 27, 28, and 29, July 12, 13, 25, 26, and 27, and August 1, 2023. The Administrative Law Judge is called an ALJ.

Parents represented Student and attended all hearing days on Student's behalf. Student did not attend the hearing.

Attorney Daniel Harbottle represented Capistrano Unified School District, called Capistrano. Kathy Purcell, Capistrano's Executive Director of Alternative Dispute Resolution Compliance, attended all hearing days except June 28, 2023. Deborah Aufill, Legal Specialist, attended on June 27, and 28, 2023, on Capistrano's behalf.

At the parties' request, the matter was continued to September 5, 2023, for written closing briefs with a 40 page limit, excluding the table of contents and case law citations. The record was closed, and the matter was submitted on September 5, 2023.

On September 7, 2023, Capistrano filed objections and a motion to strike portions of Parent's written closing brief, which was 77 pages and exceeded the page limit the ALJ ordered by over 30 pages. Student's brief also referenced evidence which was not admitted during the hearing, and Capistrano asks that it be stricken. Student included links to transcripts of individualized education program, called IEP, team meetings, which were not introduced or admitted into evidence at hearing, including an IEP team meeting not at issue in this case.

On September 13, 2023, Student filed his response and argued the ALJ added four issues for special briefing which required additional pages. Student also argued Parent compiled the new tables and figures from the evidence admitted at hearing.

The ALJ will not consider any new evidence not presented and admitted at hearing, including Parent's compilation of data, Student's grades, and secondary source material. Those documents will be stricken from the record. Student's closing brief concluded on page 38 without those documents, and only that part of the brief will be considered.

On September 21, 2023, OAH set a telephonic status conference for September 25, 2023, to discuss the impact of the ALJ's medical emergency on the completion of the decision. Both parties filed written briefs agreeing to a two-week continuance of the decision due date to October 16, 2023, to allow the ALJ to recover and complete the decision.

ISSUES

At the start of the hearing, the parties and the ALJ clarified issues based upon the amended complaint, the parties' motions on the statute of limitations and tolling agreements, and a September 2022 settlement agreement. The remaining issues have been rephrased and reorganized for clarity, as set forth in the June 28, 2023 Order Clarifying Issues for Due Process Hearing. 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.)

1. Did Capistrano deny Student a free appropriate public education, known as a FAPE, by failing to convene an annual IEP team meeting in December 2020?
2. Did Capistrano deny Student a FAPE, by failing to hold an IEP team meeting in response to January 2021 emails from Parents regarding their concerns?
3. Did Capistrano deny Student a FAPE by failing to include comprehensive assessments, excluding cognitive assessments, of Student in its February 1, 2021 assessment plan?

4. Did Capistrano deny Student a FAPE by failing to file for due process when Parents did not consent to the February 1, 2021 assessment plan?
5. Did Capistrano deny Student a FAPE by failing to hold an IEP team meeting in response to the September 10, 2021 letter from Parents' counsel regarding their concerns?
6. Did Capistrano deny Student a FAPE by failing to include appropriate assessments, excluding cognitive assessments, of Student in its September 22, 2021 assessment plan?
7. Did Capistrano deny Student a FAPE by failing to file for due process when Parents did not consent to the September 22, 2021 assessment plan, excluding cognitive assessments?
8. Did Capistrano deny Student a FAPE by failing to convene an annual IEP team meeting in December 2021?
9. Did Capistrano deny Student a FAPE by failing to develop an interim IEP pursuant to Parents' request on August 17, 2022?
10. Did Capistrano deny Student a FAPE by using a modified discrepancy model in the September 2022 assessment plan, excluding cognitive assessments, such that it failed to address all areas of unique need?

11. Did Capistrano deny Student a FAPE in the November 15, 2022 and December 16, 2022 IEPs by failing to offer appropriate:
 - a. Goals;
 - b. Accommodations;
 - c. Services; and
 - d. Placement?
12. Did Capistrano deny Student a FAPE by failing to facilitate meaningful parent participation in the November 15, 2022, IEP process?

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 main 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 FAPE 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 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).) In this case, Student had the burden of proof. 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 15 years old and in ninth grade at the time of hearing. Student resided within Capistrano's geographic boundaries at all relevant times. On December 11, 2018, and February 5, 2019, Capistrano held an initial IEP team meeting for Student and found him eligible for special education under the categories of other health impairment for attention deficit hyperactivity disorder, specific learning disability, and speech or language impairment. Parents did not consent to the initial provision of special education and related services.

On August 20, 2019, Parents disenrolled Student from Capistrano's Don Juan Avila Middle School and enrolled him in Discovery Prep Middle School, a private school in Aliso Viejo, California, within Capistrano's boundaries. From August 22, 2019 to August 2, 2022, Parents continued Student's private placement. Parents did not request Capistrano develop an IEP while Student was privately placed.

On August 22, 2022, Parents reenrolled Student in Aliso Niguel High School, a Capistrano school. Student attended Aliso Niguel in the ninth grade at the time of the hearing.

Student was privately cognitively assessed by Dr. Dudley Wiest in February and March 2016, and achieved with scores in the gifted range. Capistrano's policy was to not give standardized intelligent quotient tests or standardized cognitive tests in an effort to not administer assessments that could be deemed racially discriminatory on African Americans, in accordance with California Department of Education guidance, based on case law and *Larry P. v Riles*, (9th. Cir. 1984) 793 F.2d 969 (upholding the injunctive remedy in *Larry P. v. Riles* (N.D.Cal. 1979) 495 F.Supp. 926). Instead, Capistrano's policy was to use alternative measures to assess Student. Student is African American and Caucasian.

ISSUE 1: DID CAPISTRANO DENY STUDENT A FAPE BY FAILING TO CONVENE AN ANNUAL IEP TEAM MEETING IN DECEMBER 2020?

Student contends Capistrano had an obligation to convene an annual IEP team meeting in December 2020 because his special education eligibility continued after Parents disenrolled Student from Capistrano. Student asserts his Parents made a de-facto request for an IEP team meeting when they engaged Capistrano in correspondence and litigation to resolve the cognitive assessment prohibitions of the *Larry P.* case.

Capistrano contends it did not have an obligation to convene an IEP team meeting because Student was a parentally-privately placed school student and therefore, it was not obligated to convene an IEP team meeting unless Parents requested one. Capistrano also contends Parents did not request an IEP team meeting.

A FAPE means special education and related services that are 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 which are 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. 386 [137 S.Ct. 988, 1000].)

PARENTALLY-PLACED PRIVATE SCHOOL CHILDREN ARE NOT ENTITLED TO FAPE

The laws pertaining to privately placed students directly impacts Student's claims.

Private school children with disabilities do not have an individual entitlement to a FAPE. (34 C.F.R. § 300.137; *Capistrano Unified Sch. Dist. v. S.W.*, 21 F.4th 1125, 1138 (9th Cir. 2021), cert. denied, (*Capistrano*).)

In *Capistrano*, the parents of a disabled first grade student withdrew her from public school and enrolled her at a private school. Student remained privately placed

during the rest of first grade and all of second grade. The parents filed two complaints seeking reimbursement for the private placement. The Ninth Circuit held that if a student has been enrolled in a private school by their parents, then the school district is only required to develop an IEP, when the parent asks for one. This applies even when reimbursement has been requested or if a complaint has been filed. Once the parents request an IEP, then the school district must develop one. Otherwise, there is no freestanding requirement that IEPs be conducted for privately placed students. (*Capistrano, supra*, 21 F.4th at pp. 1138-40).)

Parentally-placed private school children with disabilities are defined as children with disabilities enrolled by their parents in private, including religious, schools or facilities. (20 U.S.C. § 1412(a)(10)(A), 34 C.F.R. § 300.130). "No parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." (*Capistrano, supra*, 21 F.4th at pp. 1138-40); 34 C.F.R. § 300.137(a).) These regulations and statutes do not distinguish between private school students who are privately placed as a result of a dispute over an IEP or those privately placed as a matter of preference. There are only two kinds of private school students: those placed by the parents and those placed by the school. (*Capistrano, supra*, 21 F.4th at pp. 1138-40; 20 U.S.C. § 1412(a)(10)(A),(B).)

Once a parent unilaterally enrolls the student in private school, the student meets the definition of a private school child with a disability and does not have an individual entitlement to special education and related services. (*Capistrano, supra*, 21 F.4th at pp. 1138-40.)

Parentally-placed private school children with disabilities are entitled to child find, an evaluation, and if eligible, a private school service plan. Private school students may request the district to develop a private school service plan. (34 C.F.R. § 300.138.) Due process complaint procedures for parents and children do not apply, except for child find. (34 C.F.R. §§ 300.140.) Parents of private school students are limited to child find claims during the period of private school enrollment. Under child find laws, the local educational agency where the private school is located is responsible for ensuring the private school student is evaluated for a qualifying disability, subject to parental consent (Office of Special Education Programs [OSEP] QA 22-01 February 28, 2022, Question A-2; 34 C.F.R. §§ 300.00-300.111(a), 300.9.)

STUDENT WAS A PARENTALLY-PLACED PRIVATE SCHOOL CHILD FROM AUGUST 20, 2019 THROUGH AUGUST 21, 2022

During the hearing, Parent confirmed that between August 20, 2019 and August 21, 2022, Parents kept Capistrano informed that Student was privately placed. Parents did not request Capistrano develop an IEP while Student was privately placed. When Capistrano offered to hold IEP team meetings, Parents responded they were not asking for IEP team meetings. Parents did not de-facto ask for an IEP by litigating assessment issues. Parents did not request a private school service plan. (34 C.F.R. §§ 300.130 through 300.144.) Thus, between August 20, 2019 and August 21, 2022, Student was a parentally-placed private school child as defined by the IDEA. Student's claims are therefore limited to child find.

Student raised a child find argument in his closing brief but did not allege it in his due process request. Child find is a locating and screening process used to identify those children who are potentially in need of special education and related services.

Before finding a child eligible for special education and related services, a school district is tasked with conducting a full and individual initial evaluation. Child find does not guarantee eligibility for special education and related services under the IDEA. (20 U.S.C. § 1414(a)(1); 34 C.F.R § 300.301; Ed. Code, §§ 56320, 56302.1.) Child find is not an issue in this hearing because it was not raised in the due process request and was not litigated during the hearing. Further, Capistrano did not consent at any time to amending the issues for hearing. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i) [the party requesting the hearing may not raise issues at the due process hearing that were not raised in the complaint unless the other party agrees].)

Student also asserts that *Capistrano, supra*, 21 F.4th 125, should not be followed because it conflicts with child find law. Student asserts child find obligations required Capistrano to identify, locate, and evaluate all children with disabilities. Therefore, Student asserts Capistrano was required to hold an IEP team meeting, in violation of the *Capistrano* holding. That argument is not persuasive.

Parent signed several certifications of intent confirming Student was a parentally-placed private student, and authored numerous emails between August 20, 2019, and August 21, 2022. Parents re-enrolled Student in Capistrano on August 22, 2022, and Student became a public school student.

- On August 20, 2019, Parents withdrew Student and informed Capistrano they were privately placing Student at Discovery Prep, a private school.
- By December 2019, Parent enrolled Student in Futures Academy, a private school within Capistrano's boundaries.

- During the COVID-19 school closures, between March 13, 2020 through at least January 21, 2021, Parent hired a combination of private agencies and private tutors for Student.
- By September 2021, Parent enrolled Student in a private home school program called Zone 2e Academy and hired private agencies and tutors for Student.
- On August 22, 2022, Parents reenrolled Student in Aliso Niguel High School within Capistrano for ninth grade.

Parents did not request for Capistrano to develop an IEP between August 20, 2019, through August 21, 2022, and therefore Capistrano was not obligated to offer Student a FAPE or convene an annual IEP during this period.

Student failed to prove by a preponderance of the evidence that Capistrano denied him a FAPE by failing to convene an annual IEP team meeting in December 2020.

ISSUE 2: DID CAPISTRANO DENY STUDENT A FAPE, BY FAILING TO HOLD AN IEP TEAM MEETING IN RESPONSE TO JANUARY 2021 EMAILS FROM PARENTS REGARDING THEIR CONCERNS?

Student alleges Capistrano had an obligation to hold an IEP team meeting when it learned Parents had concerns about Capistrano's January 2021 offer to hold an IEP team meeting and its December 2018 FAPE offer.

Capistrano asserts it was not required to hold an IEP team meeting when Student was parentally-placed in private school because Parents did not request an IEP team meeting. Capistrano alleges that it responded to Parents' concerns in January 2021 by offering to hold an IEP team meeting, but Parents did not want one.

During January 2021, Parent and Capistrano exchanged email messages about Parents' concerns:

- On January 14, 2021, Parent asked for alternate dispute resolution and clarified he was not asking for an IEP team meeting.
- On January 21, 2021, Purcell, Capistrano's Executive Director of Alternative Dispute Resolution, asked Parents if they were interested in Capistrano holding an IEP team meeting, or an early three year review assessment. Parent responded he was not interested in another IEP team meeting. Parent did not accept the offer for an early three year review assessment.
- On January 25, 2021, Purcell provided another certification of intent with procedural safeguards. On January 25, 2021, Parent signed the certification of intent which confirmed Student was a parentally-placed private school student. Parent asked for prospective funding for Bridges Academy, a private school in Aliso Viejo within Capistrano's boundaries. Parent did not request an IEP team meeting.
- On February 4, 2021, Purcell responded to Parents' concerns and offered to provide an early assessment plan and IEP team meeting to determine if

Student continued to qualify for special education, and if so, develop an IEP. Parent declined the offer to assess Student for eligibility and hold the three year review assessments and IEP team meeting early.

Student did not request an IEP team meeting in January 2021. Student raised concerns about prospective funding for private school, but explicitly stated Parents were not requesting an IEP team meeting. Despite this, Capistrano still offered to hold an IEP team meeting in February 2021. Parents' declined Capistrano's offer. Further, as discussed in Issue 1, Capistrano had no obligation to hold an IEP team meeting or offer Student a FAPE in January or February 2021, because Student was a parentally-placed private school student.

Therefore, Student failed to prove by a preponderance of the evidence that Capistrano denied him a FAPE by failing to hold an IEP team meeting in response to Parents' concerns in January 2021 emails.

ISSUE 3: DID CAPISTRANO DENY STUDENT A FAPE BY FAILING TO INCLUDE COMPREHENSIVE ASSESSMENTS, EXCLUDING COGNITIVE ASSESSMENTS, OF STUDENT IN ITS FEBRUARY 1, 2021 ASSESSMENT PLAN?

Student alleges Capistrano's proposed assessment plan was not comprehensive because it did not include cognitive testing or standardized intelligence quotient, called IQ, testing. For purposes of this Decision, standardized IQ assessments, cognitive assessments, and intellectual development assessments mean the same thing and are used interchangeably. Student alleges Capistrano's proposed assessment plan was not comprehensive because it did not offer a racially matched assessor with experience with

twice-exceptional students. Student asserts that, therefore, the resulting assessments would not accurately evaluate Student's 'twice-exceptional' profile and unique patterns of strengths and weaknesses. Student alleges the assessment should have included his strengths of gifted cognition.

Student further alleges the proposed February 1, 2021 assessment plan should have included additional assessments for dyslexia, expressive language disorder, and a language and literacy based program.

Capistrano alleges the issue of cognitive assessments was settled by the September 2022 settlement agreement. Capistrano alleges the February 1, 2021 assessment plan was comprehensive and appropriate.

The parties settled the issue of cognitive assessments in a September 2022 settlement agreement. Thus, it is not addressed in this Decision.

For purposes of evaluating a child for special education eligibility, the district must ensure that "the child is assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School Dist.* (N.D.Cal. 2001) 211 F.Supp.2d 1150, 1157-1158.) Capistrano's policy was to not give standardized intelligent quotient tests or standardized cognitive tests to African Americans in an effort to not administer assessments that could be deemed racially discriminatory on African Americans, in accordance with California Department of Education guidance, based on case law and *Larry P.* Instead, Capistrano's policy was to use alternative measures to assess African American students.

Federal courts have held that a parent who insists on placing conditions on assessments may be regarded as having refused consent to the assessments. In *R.A. v. West Contra Costa Unified Sch. Dist.* (9th Cir. 2017) 696 Fed.Appx. 171, affirming N.D.Cal., Aug. 17, 2015, Case No. 14-cv-0931-PJH) 2015 WL 4914795 [nonpub. opn.], a parent consented to an assessment plan on the modest condition that she be allowed to observe the assessment when conducted. The Ninth Circuit affirmed the District Court found that minor condition eliminated the parent's consent, finding this request amounted to the imposition of improper conditions or restrictions on the assessments and thereby eliminated the school district's obligation to assess the student. (*Id.* at p. 3.)

A school district's failure to conduct appropriate assessments or reassess in all areas of suspected disability may constitute a procedural denial of FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2007) 464 F.3d 1025, 1031-1033 (*Park*).) A school district's failure to appropriately assess a student constitutes a procedural violation of the IDEA. (*R.B., ex rel. F.B. v. Napa Valley Unified Sch. Dist.* (9th Cir. 2007) 496 F.3d 932, 940.)

A procedural violation of the IDEA constitutes a denial of a FAPE if the violation:

1. impeded the child's right to a FAPE;
2. significantly impeded the parent's opportunity to participate in the decisionmaking process; or
3. caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).)

Although Student's claim alleged he was denied a comprehensive assessment plan, the IDEA standard is whether he was offered an appropriate assessment plan. (*Park, supra*, 464 F.3d 1025, 1031-1033) Student failed to prove by a preponderance of the evidence that Capistrano denied him a FAPE by failing to offer an appropriate assessment plan.

On February 1, 2021, Capistrano offered Student an assessment plan to assess him in the following areas:

- Academic achievement assessments by its school psychologist to determine Student's current levels of academic achievement. The assessment would include formal and informal measures for reading, written expression, and math skills. The assessment would also include work samples, classroom observation, and teacher interviews.
- Intellectual development assessments by the school psychologist to evaluate general intellectual functioning, including overall verbal and nonverbal cognitive abilities. The assessment would include alternative cognitive measures such as tests of memory and learning. Standardized IQ tests would not be used to assess Student, under *Larry P v. Riles*.
- Speech and language assessments by a qualified speech and language pathologist to determine Student's present functioning levels in receptive, expressive, and pragmatic language skills.
- Social emotional adaptive behavior assessments by the school psychologist to determine Student's current social emotional and adaptive classroom

behavior. The assessment would include formal and informal measures including classroom observation, review of reports from outside agencies, interviews, checklists, and rating scales.

- Perceptual processing assessments by the school occupational therapist and school psychologist to evaluate how Student processed classroom instruction. The assessment would include formal and informal measures of Student's strengths and weaknesses in the learning process. It could include auditory processing, visual processing, sensory-motor skills, attention, association/conceptualization, and expression.
- Health and physical state assessments to be conducted by the district nurse to determine his growth and development patterns and his current physical condition. Vision and hearing assessments would be screened, and doctors' reports would be reviewed.
- Gross and fine motor development assessments to be conducted by the school occupational therapist, to determine Student's level of large and small muscle coordination. The assessment would include walking, running, sports, and cutting, drawing, and writing.
- Career vocational assessments would be performed to evaluate Student's career interests.

The purpose of the assessment plan was to determine if Student still qualified as a student with disabilities. Capistrano proposed to assess Student in a variety of areas by qualified assessors, including academics, intellectual development, speech and language, social emotional, behavior, perceptual reasoning, and health. Capistrano proposed to use a variety of assessment measures and scores to evaluate Student's eligibility for special education, and to develop an appropriate program. (20 U.S.C. § 1414(b)(2)(B); Ed. Code, § 56320, subd. (e), Cal. Code Regs., tit. 5, § 3030, subd. (a).)

Parent did not consent to the proposed assessment plan. Instead, Parent requested Capistrano use standardized cognitive assessments on Student, when its policy was to not conduct those assessments which could be deemed discriminatory against African American students. Parent also requested a racially matched assessor with experience in gifted students who also have concurrent disabilities. However, when statutory requirements for evaluation procedures have been met, Parent may not put conditions on assessments.

Parents' issue with the assessment plan was the lack of cognitive assessments. However, all cognitive assessment claims were resolved with the September 2022 settlement agreement.

Student did not establish what was not appropriate about the non-cognitive assessments Capistrano selected. Student's claim that the assessment plan was not appropriate because it did not include assessments for dyslexia, expressive language disorder, and language and literacy, was not supported by the evidence. Parent's opinion that the assessment plan was not comprehensive enough is a lay opinion. Parent is not a professional in the psychology or education fields, and his testimony was not convincing.

Capistrano's school psychologist, and other IEP team members, convincingly testified the February 2021 assessment plan was appropriate. Megan Parrett, Capistrano's school psychologist, opined the assessment plan was comprehensive enough to identify disabilities which affected Student's involvement and progress in the general education curriculum. She persuasively established the assessment plan was appropriate to determine whether Student was eligible for special education by evaluating other health impairment disabilities with characteristics similar to attention deficient hyperactivity disorder, and a specific learning disability with characteristics similar to dyslexia. Parrett credibly explained the assessment plan was comprehensive enough to integrate his unique needs to succeed in the general education environment. Parrett also established the assessment plan covered several assessments and batteries of tests that could identify dyslexia, expressive language disorder, and dyslexia, such as the Comprehensive Test of Phonological Processing, Second Edition, referred to as CTOPP-2, the Children's Psychological Processes Scale, referred to as CPPS, and the Weschler Individual Achievement Test, referred to as WIATT-4. Finally, she opined the assessment plan was appropriate to determine Student's reading fluency accuracy.

Student's expert witness Dr. Marta Shinn, a private educational psychologist, testified a comprehensive assessment should assess in all areas of suspected disability, and would involve known domains of functional, social emotional, academic, sensory motor, and speech and language. Dr. Shinn did not criticize Capistrano's assessment plan. Her opinion that the multidisciplinary report was not appropriate is not relevant because the appropriateness of an assessment report is not an issue in this case.

Although Student examined Dr. Shinn as an expert witness in the area of twice-exceptional students, Dr. Shinn was not available for cross-examination during several weeks of hearing. Student agreed to rest his case without rescheduling her. Because Dr. Shinn did not complete her testimony, she left many questions unanswered and documents unauthenticated. While Capistrano did not object to her testimony, the ALJ finds Dr. Shinn's testimony is incomplete and has limited value without the opportunity for Capistrano to cross-examine her. Accordingly, her testimony was given little weight.

Here, the preponderance of the evidence showed Capistrano's February 1, 2021 assessment plan was appropriate. Capistrano offered to assess in all areas of suspected disability. Capistrano attempted to ensure Student was evaluated, subject to parental consent. (34 C.F.R. §§ 300.00-300.111(a), 300.9.) Capistrano located and attempted to screen Student to identify his potential need for special education and related services. Capistrano attempted to conduct a full and individual initial evaluation of the Student's eligibility for special education. (20 U.S.C. § 1414(a)(1); 34 C.F.R § 300.301; Ed. Code, §§ 56320, 56302.1.)

Student failed to prove Capistrano denied him a FAPE by failing to offer comprehensive assessments, excluding cognitive assessments, in the February 1, 2021 assessment plan.

(This space intentionally left blank. Text continues on following page.)

ISSUE 4: DID CAPISTRANO DENY STUDENT A FAPE BY FAILING TO FILE FOR DUE PROCESS WHEN PARENTS DID NOT CONSENT TO THE FEBRUARY 1, 2021 ASSESSMENT PLAN?

Student alleges Capistrano was required to file for due process when Parents did not consent to the proposed assessment plan.

Capistrano alleges it was not required to file for the consent override procedures when Parents refused consent to the assessment plan.

If the parent of a child enrolled in public school or seeking to be enrolled in public school does not provide consent to the evaluation, the district may, but is not required to, pursue the evaluation by using the consent override procedures described in Subpart E, in the special education procedural safeguards. The district does not violate its obligation if it declines to pursue the evaluation or reevaluation. Notably, this applies to both initial and reevaluations. (34 C.F.R. §§ 300.300(a)(3)(i), (ii), and (c).)

If a parent of a child who is home schooled or placed in a private school by the parents at their own expense does not provide consent for the initial evaluation or the reevaluation, or the parent fails to respond to a request to provide consent, the public agency may not use the consent override procedures and the public agency is not required to consider the child as eligible for services. (34 C.F.R. § 300.300 (d)(4).)

Capistrano was not required to use the consent override procedures to assess Student when Parent did not consent to the February 1, 2021 proposed assessment plan, (34 C.F.R. § 300.300(a)(3)(i), (ii), and (c).) School districts may, but are not required

to, file for due process to obtain consent to an evaluation. Here, Student did not present any evidence or relevant law that proved Capistrano was required to file for due process when Parents did not consent to the February 1, 2021 assessment plan. Therefore, Capistrano did not deny Student a FAPE by failing to file for due process when Parents did not consent to the February 1, 2021 assessment plan.

ISSUE 5: DID CAPISTRANO DENY STUDENT A FAPE BY FAILING TO HOLD AN IEP TEAM MEETING IN RESPONSE TO THE SEPTEMBER 10, 2021 LETTER FROM PARENTS' COUNSEL REGARDING THEIR CONCERNS?

Student alleges Capistrano was required to hold an IEP team meeting in response to Parents' counsel's September 10, 2021 letter in which Student wanted to resolve the *Larry P.* assessment issue.

Capistrano alleges it was not required to hold an IEP team meeting because Parents did not request one.

Parents' counsel's September 10, 2021 letter to Purcell did not ask for an IEP team meeting. Rather, it confirmed:

- Student was privately placed at Zone 2e Academy, described as a strength based 2e home school program.
- Student claimed the February 1, 2021 assessment plan would not comprehensively identify Student's needs.
- Student requested to use a comprehensive evaluation of Student's cognitive abilities to ensure he received a FAPE.

- Parents waived the applicability of *Larry P.* which prevented Capistrano from using certain standardized tests.
- Student requested to use a racially matched assessor with experience with twice-exceptional students.
- Student requested strength-based goals.
- Parents claimed they never disenrolled Student from Capistrano.
- Parents did not sign the certification of intent which would have confirmed which school Student was attending as a parentally-placed private school student.

On September 21, 2021, Capistrano responded to Parents' counsel's September 10, 2021, letter and offered a proposed assessment plan and to hold an IEP team meeting to analyze and consider whether Student continued to meet eligibility requirements for special education.

Capistrano did not agree with Parents' counsel's request to assess Student using standardized IQ testing and cognitive assessments and measures which could be deemed racially discriminatory and prohibited by the California Department of Education's guidance and case law following *Larry P.* Capistrano did not agree to assess using a racially matched assessor.

Parents' counsel's September 10, 2021 letter did not ask for an IEP team meeting or ask to reenroll Student in Capistrano. Capistrano's September 21, 2021 response offered a full assessment and an IEP team meeting. Parent did not consent. As discussed in Issues 1 and 2, Capistrano was not obligated to hold an IEP team meeting because Parents did not request one.

Student failed to prove by a preponderance of the evidence that Capistrano denied him a FAPE by failing to hold an IEP team meeting in response to Parents' counsel's concerns in a September 10, 2021 letter. That letter was not a request for an IEP team meeting.

ISSUE 6: DID CAPISTRANO DENY STUDENT A FAPE BY FAILING TO INCLUDE APPROPRIATE ASSESSMENTS, EXCLUDING COGNITIVE ASSESSMENTS, OF STUDENT IN ITS SEPTEMBER 22, 2021 ASSESSMENT PLAN?

The parties' contentions regarding the September 22, 2021 assessment plan are identical to their contentions in Issue 3 regarding the February 1, 2021 assessment plan. Again, Student's claims regarding cognitive assessments were resolved in a September 2022 settlement agreement.

Student failed to prove by a preponderance of the evidence that Capistrano denied him a FAPE by failing to offer an appropriate assessment plan.

On September 22, 2021, Capistrano offered an assessment plan almost identical to the February 1, 2021 assessment plan, to see if Student still qualified as a student with disabilities. This assessment plan clarified the two areas requiring alternative assessments under *Larry P.* The content of the assessments offered did not change because Capistrano did not offer to use standardized IQ tests.

- Intellectual Development assessments by the school psychologist to evaluate general intellectual functioning, including overall verbal and nonverbal cognitive abilities. The level and quality of his skills could be determined by standardized cognitive tests, school performance, work samples, academic history, standardized achievement tests, and

development history. As per *Larry P.*, Student would not be cognitively assessed using standardized IQ tests. The assessment would include alternative cognitive measures such as tests of memory and learning.

- Speech and Language assessments by a qualified speech and language pathologist to determine Student's present functioning levels in receptive, expressive, and pragmatic language skills. As per *Larry P.*, the results of standardized tests will be used in combination with alternative means of assessment to ensure the most appropriate evaluation of Student.

The purpose of the assessment plan was to determine if Student still qualified as a student with disabilities. Capistrano proposed to assess Student in a variety of areas by qualified assessors, including

- academics,
- intellectual development,
- speech and language,
- social emotional,
- behavior,
- perceptual reasoning, and
- health.

Capistrano proposed to use a variety of assessment measures and scores to evaluate Student's eligibility for special education, and to develop an appropriate program. (20 U.S.C. § 1414(b)(2)(B); Ed. Code, § 56320, subd. (e), Cal. Code Regs., tit. 5, § 3030, subd. (a).)

Parent did not consent to the proposed assessment plan. Instead, Parent requested Capistrano use standardized cognitive assessments which could be deemed racially discriminatory and prohibited by *Larry P.* Parent also requested a racially matched assessor with experience in gifted students who also have concurrent disabilities. However, as stated in Issue 3, when statutory requirements for evaluation procedures have been met, Parent may not put conditions on assessments. (*R.A. v. West Contra Costa Unified School District.*, *supra*, at 696 Fed.App. 171.)

As with the February 2021 assessment plan, Parents' issue with the assessment plan was the lack of cognitive assessments. However, Student did not establish the non-cognitive assessments Capistrano selected in the September 2021 assessment plan were inappropriate.

Parrett and Capistrano's other IEP team members convincingly testified the assessment plan was appropriate. Parrett established the assessment plan was comprehensive to identify Student's areas of weakness, determine Student's eligibility for special education, and draft goals appropriate for him to make progress in the general education curriculum.

Student's expert witness Dr. Shinn did not critique Capistrano's assessment plan. Also, Dr. Shinn's testimony was given little weight because she did not appear for cross-examination.

Parent's opinion that the assessment plan was not comprehensive enough is a lay opinion. Parent is not a professional in the psychology or education fields, and his testimony was not convincing.

Here, the preponderance of the evidence showed the September 2021 assessment plan was appropriate. Capistrano offered to assess in all areas of suspected disability. Capistrano attempted to ensure Student was evaluated, subject to parental consent. (34 C.F.R. §§ 300.00-300.111(a), 300.9.) Capistrano located and attempted to screen Student to identify his potential need for special education and related services. Capistrano attempted to conduct a full and individual initial evaluation of the Student's eligibility for special education. (20 U.S.C. § 1414(a)(1); 34 C.F.R. § 300.301; Ed. Code, §§ 56320, 56302.1.)

Student failed to prove Capistrano denied him a FAPE by failing to include comprehensive assessments, excluding cognitive assessments, in the September 22, 2021 assessment plan.

ISSUE 7: DID CAPISTRANO DENY STUDENT A FAPE BY FAILING TO FILE FOR DUE PROCESS WHEN PARENTS DID NOT CONSENT TO THE SEPTEMBER 22, 2021 ASSESSMENT PLAN, EXCLUDING COGNITIVE ASSESSMENTS?

Student alleges Capistrano was required to file for due process when Parents did not consent to the September 22, 2021 proposed assessment plan.

Capistrano alleges it was not required to file for the consent override procedures when Parents refused consent.

For the same reasons discussed in Issue 4, Capistrano was not required to use the consent override procedures to assess Student when Parent did not consent to the September 22, 2021 proposed assessment plan, (34 C.F.R. § 300.300(a)(3)(i), (ii), and (c).) Here, Student did not present any evidence or relevant law that proved Capistrano was

required to file for due process when Parents did not consent to the September 22, 2021 assessment plan. Therefore, Capistrano did not deny Student a FAPE by failing to file for due process when Parents did not consent to the September 22, 2021 assessment plan.

ISSUE 8: DID CAPISTRANO DENY STUDENT A FAPE BY FAILING TO CONVENE AN ANNUAL IEP TEAM MEETING IN DECEMBER 2021?

Student alleges Capistrano was required to hold an IEP team meeting in December 2021 because his special education eligibility continued after Parents disenrolled Student from Capistrano. Student asserts Capistrano should have held an IEP team meeting in December 2021 and that the *Capistrano* case should not be followed because it violates child find law.

Capistrano asserts Student was a parentally-placed private school student and therefore it was not required to hold an IEP team meeting unless Parents requested one. Capistrano also asserts Parents did not request one. Capistrano asserts it responded to Student's counsel by offering a special education assessment and an IEP team meeting, but Student declined both.

As discussed in Issues 1, 2, and 5, Capistrano was not obligated to develop an IEP or to offer Student a FAPE when he was privately placed from August 20, 2019, through August 21, 2022. Capistrano was not obligated to offer Student a FAPE while he was privately placed because Parents did not request for Capistrano to develop an IEP for Student, as evidenced by Parent's testimony, letters from counsel, the signed notices of private placement, several email chains, and several settlement agreements. (*Capistrano, supra*).

Moreover, Parents' counsel's September 10, 2021 letter did not ask for an IEP or ask to reenroll Student in Capistrano. Capistrano's September 21, 2021 response offered a full assessment and an IEP. Parent declined the offer to assess Student for eligibility and hold an IEP team meeting. Because Parent did not agree to the September 2021 assessment plan and did not request an IEP leading up to December 2021, Capistrano was not obligated to hold an annual IEP meeting.

Student failed to prove by a preponderance of the evidence that Capistrano denied him a FAPE by failing to hold an annual IEP team meeting in December 2021.

ISSUE 9: DID CAPISTRANO DENY STUDENT A FAPE BY FAILING TO DEVELOP AN INTERIM IEP PURSUANT TO PARENTS' REQUEST ON AUGUST 17, 2022?

Student alleges Capistrano was obligated to provide him with an interim IEP when he reenrolled in Capistrano in August 2022.

Capistrano asserts because Parents did not consent to Student's triennial reevaluation, Student's special education eligibility expired in December 2021. Capistrano further asserts when Student reenrolled as a former private school student, he had to re-establish his special education eligibility.

On August 17, 2022, Parent asked to hold an interim IEP team meeting on August 22, 2022, in anticipation of Student's August 22, 2022 reenrollment in Capistrano. This is the first time Parent requested assessments or an IEP team meeting since Student had been a parentally-placed private school student. On September 1, 2022, Capistrano held a student study team meeting and offered an assessment plan,

which Parent signed and emailed to Capistrano on September 8, 2022. However, Parent gave conditional consent, crossing out portions of the assessment plan and interlineating other requests.

On September 15, 2022, the parties executed a settlement agreement regarding the cognitive assessments Parent requested. On September 15, 2022, Capistrano generated a new assessment plan, and agreed to allow Dr. Shinn and Parrett to consult on the alternative means of assessments Capistrano would conduct. Parent consented on September 16, 2022. Capistrano conducted the assessments and held IEP team meetings on November 15, 2022, and December 16, 2022.

In this case, Parents failed to consent to Capistrano's February and September 2021 assessment plans and failed to sign authorizations for exchange of information provided with the assessment plans. Capistrano did not have authority to proceed with assessments until Parents gave written consent to the assessment plan on September 16, 2022. Capistrano agreed to allow Dr. Shinn to provide test instrument and ratings scale recommendations to Parrett.

If a student has an IEP and transfers into a district within the same academic year, the local education agency shall provide the student with a FAPE, including comparable services described in the previously approved IEP, in consultation with the parents for a period not to exceed 30 days, by which time the local education agency shall adopt the previously approved IEP or shall develop, adopt, and implement a new IEP that is consistent with state and federal law. (Ed. Code, §§ 56043, subd. (m)(1), 56325, subd. (a)(1).) However, Student was not a public-school transfer student. Student was a parentally-placed private school student who re-enrolled in Capistrano after being away for three years.

Student did not establish Capistrano was required to hold an interim IEP team meeting. Capistrano did not have an obligation to develop an interim IEP for when Student re-enrolled because he had been a privately placed student. A school district is only obligated to provide an interim IEP team meeting when a student transfers from one public school district to another public school district at the beginning of the regular school year. Student was not transferring from one public school district into another public school district, but instead was a private school student. Therefore, Student was not entitled to an interim IEP.

When Student re-enrolled into Capistrano and Parents requested an IEP, Capistrano was obligated to meet with Parents and initiate a new assessment plan to establish eligibility, which it did. Capistrano was obligated to hold an IEP team meeting to review the assessments and determine whether Student continued to qualify for special education and related services, which it did.

Student failed to prove by a preponderance of the evidence that Capistrano denied him a FAPE by failing to develop an interim IEP in August 2022.

ISSUE 10: DID CAPISTRANO DENY STUDENT A FAPE BY USING A MODIFIED DISCREPANCY MODEL IN THE SEPTEMBER 2022 ASSESSMENT PLAN, EXCLUDING COGNITIVE ASSESSMENTS, SUCH THAT IT FAILED TO ADDRESS ALL AREAS OF UNIQUE NEED?

The ALJ dismissed Issue 10 on the last day of hearing as Student failed to establish a viable claim. However, for the sake of a thorough analysis, the ALJ will analyze the issue based on the evidence presented.

Student's amended complaint alleges Capistrano denied Student a FAPE by using a modified discrepancy model in the September 2022 assessment plan, such that it failed to address all areas of unique need.

After nine days of hearing, Student failed to clearly articulate the issue and define the modified discrepancy model at issue. Further, Student failed to articulate the definition of the modified discrepancy model without describing the cognitive assessment issues which are excluded by the September 15, 2022 settlement agreement, as detailed in the ALJ's June 28, 2023 Order Clarifying Issues for Due Process Hearing. Student did not articulate any contentions which were not excluded by the settlement agreement. The evidence demonstrated that the parties settled the issue of cognitive assessments, and as a result, agreed Parrett and Dr. Shinn collaborated on the recommended alternative assessments. Their collaboration resulted in adding three additional ratings scale assessments, as agreed by the parties.

The modified discrepancy model is not defined in the IDEA or the California Education Code. At hearing, Parent argued it meant patterns of strengths and weaknesses, but that was not alleged in the amended complaint and will not be considered in this Decision. There was no expert testimony from Dr. Shinn defining or explaining what a modified discrepancy model was.

Student did not establish what was not appropriate about the September 2022 assessment plan, excluding cognitive assessments. Parent received the revised assessment plan on September 15, 2022, the same day the parties entered into the September 2022 settlement agreement which resolved the cognitive assessment issues. Parent gave written consent on September 16, 2022.

Dr. Shinn confirmed she collaborated with Parrett by recommending additional rating scales to address Student's patterns of strengths and weaknesses. Parrett persuasively testified she agreed to include the Children's Psychological Processes Scale, the School Motivation and Learning Strategies Inventory, and the Social Emotional Assets and Resilience Scales. Parrett convincingly opined the assessment plan was appropriate to comprehensively assess Student's unique needs, identify disabilities which affected his involvement and progress in the general education curriculum, and determine his eligibility for special education.

Therefore, Student failed to meet his burden of proof on this issue and did not prove Capistrano denied him a FAPE.

ISSUE 11: DID CAPISTRANO DENY STUDENT A FAPE IN THE NOVEMBER 15, 2022 AND DECEMBER 16, 2022 IEPS BY FAILING TO OFFER APPROPRIATE GOALS, ACCOMMODATIONS, SERVICES, AND PLACEMENT?

Student asserts his general education placement was not appropriate because he should have been offered general education 50 percent of the time, with a one-to-one subject matter specialist helping him up to three hours a day using specific methodology. Student argues Capistrano is required to individualize his program to maximize his twice-exceptional high cognition while simultaneously addressing his dyslexia, central auditory function, and executive function deficits. Student alleges the IEP does not address his twice-exceptional profile and unique patterns of strengths and weaknesses in written expression and reading.

Student alleges that his twice-exceptional status required Capistrano to conduct additional assessments and that its failure to do so meant the resulting multidisciplinary

report and IEP offer of goals and placement were inappropriate. Student asserts the assessment results were flawed, and the goals, accommodations, services, and placement offered were inappropriate to address his unique profile. However, the appropriateness of the multidisciplinary report is not at issue and will not be addressed in this Decision.

Student alleges his written expression goal was not sufficient because it did not use his global whole child present levels of performance, meaning his gifted intelligence. Student alleges he needed a central auditory processing goal with an assistive technology device such as the remote microphone device. Student also alleges he needed a speech and language goal for dyslexia and language processing disorders. However, Student did not challenge the underlying assessments or not qualifying for a speech and language impairment. Further, Student alleges he needed an additional executive function goal to help with his working memory and to use an executive functioning program.

Finally, Student asserts the November 15, 2022 IEP is inadequate because he requires two to three and a half hours per week of private outside tutoring and educational therapy to keep up his high grades, and Capistrano must provide the one-to-one individual tutoring that is currently working for Student.

Capistrano alleges it provided Student with access to specialized instruction and related services individually designed to provide educational benefit through an IEP reasonably calculated to enable him to make progress appropriate in light of his circumstances. Capistrano asserts Student's high grade point average and excellent grades in his honors classes demonstrate the offer was appropriate and that he was making progress.

The initial November 15, and December 16, 2022 IEP team meetings were held to evaluate Student's eligibility for special education and offer him a FAPE for high school. Capistrano offered the following program:

- eligibility under the categories of other health impairment and specific learning disability,
- general education placement at Aliso Niguel High School,
- collaborative English, 252 minutes per week in three sessions, a general education class with a general education teacher and a special education teacher to help students with IEPs,
- resource specialized academic instruction, 252 minutes per week in three sessions of work study skills,
- honors biology, and
- honors algebra II/trigonometry.

By the November 2022, evaluation, Student earned a 3.6667 grade point average. He earned a B plus in honors biology, a B in honors algebra II/trigonometry, and a C in collaborative English.

By the end of the ninth grade fall semester, Student earned a 4.2 weighted grade point average, meaning the difficulty of his honors classes added to his score. He earned an A minus in honors biology, a B in honors algebra II/trigonometry, and a B plus in collaborative English. Student also earned an A plus in rapid prototype, described as three-dimensional modeling and rendering, an A in college and career, and an A minus in physical education.

By the end of the ninth grade spring semester, Student earned a 4.2 weighted grade point average, and a 3.7 unweighted grade point average. He earned an A minus in honors biology, a B minus in honors algebra II/trigonometry, and a B in collaborative English. Student also earned an A plus in rapid prototype, an A in resource, and an A minus in physical education. He performed in the above average and exceptional range compared to his general education peers. With a weighted grade point average of 4.2, was in the top two percent in his class of 673 students.

ISSUE 11a: STATEMENT OF APPROPRIATE MEASURABLE ANNUAL GOALS BASED ON PRESENT LEVELS OF PERFORMANCE DESIGNED TO MEET UNIQUE NEEDS IN THE IEP

Student alleges the goals are insufficient because his present levels of performance did not address Student's gifted cognition and his areas of weakness.

Capistrano alleges the present levels of performance were accurate and the goals were appropriate and measurable.

Failing to develop appropriate and measurable goals may be procedural defects in the development of the IEP. A procedural violation results in liability only if the violation impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process; or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); see *Target Range, supra*, 960 F.2d 1479, 1484.)

Whether a student was offered or denied a FAPE is determined by looking at what was reasonable at the time the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, (*Adams*), citing *Furhman v. East Hanover Board of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041.) This is known as the "snapshot rule."

An IEP must include a statement of measurable, annual academic and functional goals designed to meet the needs of the student. An IEP must also include a description of how the student's progress toward annual goals will be measured. (Ed. Code, § 56345, subds. (a)(2) & (3).) 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* (Office of Special Education and Rehabilitative Services [OSEP] March 25, 1988); Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 regulations).)

Goals are deemed appropriate when they address each area of unique need, are based on present levels of performance, and present a challenging series of objectives. Thus, goals are deemed measurable when they can be measured by grade level and accuracy level. (Ed. Code, § 56345.)

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).) 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 ex rel. F.B. v. Spartanburg County School Dist. Two* (D.S.C., Sept. 2, 2011, No. 7:10-CV-01873-JMC) 2011 WL 3882850 [the use of percentages tied to the completion of discrete tasks was an appropriate way to measure student progress].)

On November 15 and December 16, 2022, the IEP team reviewed Student's present levels of performance. The IEP team developed three goals in Student's unique areas of need as of November 15, 2022, based upon what Student had a reasonable chance of attaining in one year. The IEP team wrote goals in written expression, reading, and work completion.

Student had a written expression and process edit goal to develop and strengthen his writing. Student scored in the average range for spelling, basic writing skills and written expression, including spelling, editing, writing samples, and sentence writing fluency. However, Student did not always plan, edit, or rewrite his work. He made spelling and grammatical errors because he did not edit his work. Student needed verbal reminders to complete all four steps of the writing process.

Student's written expression goal projected that when Student had verbal reminders, he would complete all four steps of the writing process including planning, creating a rough draft, editing, and revising, and rewriting, when given a writing assignment. Student would increase his ability to plan, edit, and correct his writing samples. His present level of performance at this task was completing two tasks. The new annual goal was to increase his ability to complete all four tasks. Student would complete two tasks by April 14, 2023, three tasks by September 29, 2023, and four tasks by November 15, 2023, as measured by the teacher's data collection and his work samples.

Student did not establish the written expression goal was not objectively measurable. The goal specified the number of tasks Student would need to complete with reminders. The goal provided a projected timeline to measure how they would be achieved.

Student alleged his written expression goal was not appropriate because it did not use his global whole child present levels of performance. However, Student did not establish the measurable annual goals were not based upon his present levels of academic achievement and functional performance, and which he had a reasonable chance of attaining within a year.

Student's educational therapist Laura Thompson assessed him in April 2023. She did not interview his teachers or get ratings scales from his teachers. She reviewed the records Parents provided, and worked with Student. Thompson was not part of the November and December 2022 IEP teams because she became involved six months after it occurred. Therefore, Thompson's testimony is not relevant to what the IEP team knew at the time it developed the IEP, whether it was reasonable, and whether Student was offered a FAPE. (*Adams*, *supra*, 195 F.3d 1141, at 1149.)

Thompson opined Student needed help outlining his thoughts on paper, using quotes, capitalizing letters, and writing a thesis. She opined he performed at a lower level than his verbal expression, was not performing at grade level and needed a graphic organizer. However, Thompson incorrectly scored him using the 10th grade common core standards when he was in ninth grade. Therefore, her testimony about his low grade level performance was not persuasive. Her credibility was diminished by her improper evaluation of Student and therefore does not carry weight.

Jasmine Erhard, Student's English 1 collaborative teacher, reviewed his strengths and weaknesses at the November 15, 2022 IEP team meeting. When Student wrote lengthy narratives, he made spelling and grammatical errors, but did not revise his work. Erhard opined his mistakes with capitalization were common for a ninth-grade student. He completed 95 percent of his work, but rushed through the assignment and left errors before submitting it. Erhard opined this was common among his ninth-grade general education peers. Student was very creative and did very well writing his own science-fiction short stories. She convincingly opined he performed better than most of his peers.

Megan Parrett, the school psychologist, persuasively testified the reading goal appropriately integrated Student's needs and was written to help him make progress in the general education classroom. Parrett assessed Student and looked to areas of strength that corresponded to his academic strengths, and areas of weakness that corresponded to his academic weakness. She detailed a lengthy description of Student's cognitive strengths and processing areas that may be impacted if a student showed signs of dyslexia. Student had difficulty with decoding and reading fluency.

Parrett collaborated with Dr. Shinn, reviewed documents from Parents, reviewed Student's outside assessments, and interviewed his private tutors and Student's Parents to understand his full background and history. Parrett reviewed all the data and developed the 77-page multidisciplinary report. She opined the written expression goal was appropriate and would help Student make progress similar to his general education peers.

Kerry Kelley, the resource specialist teacher, administered Student's Woodcock Johnson IV Tests of Achievement. He credibly testified the IEP team used data from the multidisciplinary report to determine Student's present levels of performance, and to develop draft goals and edit them at the IEP team meeting. Kelley also consulted with Dr. Shinn and recalled her input on the proposed goals. The written expression and process edit goal was necessary because Student made many easy mistakes while writing quickly, and he needed to slow down to correct and edit his writing. Student did not always show evidence of planning or rewriting.

Student did not establish the written expression goal was not appropriate. It addressed an important area of unique need. It was based on Student's present levels of performance and offered a challenging set of objectives to be worked toward in the next 12 months.

Student had a reading goal in decoding, phonological processing, and oral reading fluency. He scored in the low average range on word attack and reading fluency. Student's reading rate was unusually slow and not smooth. Student scored in the average range for basic reading skills, reading fluency, and reading comprehension. However, he did not read a grade level passage clearly and accurately.

Student's reading goal projected that when Student read a ninth or 10th grade level passage of 375 words, he would read the passage with no more than four errors. He would also increase his ability to comprehend literature, stories, dramas, and poems. His present level of performance at this task was reading 375 words while making 10 errors. The new annual goal was to increase his ability to read ninth and 10th grade

level texts with fewer errors. He would make no more than eight errors by April 14, 2023, no more than six errors by September 29, 2023, and no more than four errors by November 15, 2023, as measured by the teacher data collection and work samples.

Parrett persuasively testified the reading goal integrated Student's needs and was written to help him make progress in the general education classroom. Parrett collaborated with Dr. Shinn to understand Student's full background and history. She described Student as having below average reading decoding, below average reading fluency on some subtests, average spelling, and average reading comprehension. Based on all the data she reviewed, the goal was appropriate to help Student make progress similar to his peers.

Erhard opined Student's reading comprehension was good. Kelley persuasively testified he drafted the reading fluency accuracy goal because Student scored in the low average range in word attack skills on two measures. Student also rushed through the writing process and did not review and edit his work.

Student did not establish the reading goal was not objectively appropriate and measurable. The goal specified the number of mistakes in a ninth or 10th grade reading level passage with 375 words that Student must improve upon. It addressed an important area of unique need. It was based on Student's present levels of performance and offered a challenging set of objectives to be worked toward in the next 12 months.

Student had a work completion need and required reminders to turn in his assignments. He struggled with work completion because his executive functioning was an area of concern. Student had difficulty self-monitoring. However, he only had seven missing assignments in three months. Capistrano proposed a work completion goal to address this need.

Student's work completion goal projected that with verbal prompting, Student would have no more than one missing assignment. He would improve his study skills. His present level of performance at this task was seven missing assignments in three months. The new annual goal was to increase his ability turn in assignments on time.

Student would complete and return assignments with no more than five missing assignments by April 14, 2023. He would have no more than three missing assignments by September 29, 2023. He would have no more than one missing assignment by November 15, 2023, as measured by the teacher's data collection and work samples.

Student did not establish the work completion goal was not objectively measurable. The goal specified the number of times Student was expected to turn in his assignments on time.

Parrett persuasively testified the work completion goal integrated Student's needs and was written to help him make progress in the general education classroom. Parrett collaborated with Dr. Shinn to understand Student's full background and history. In her multidisciplinary report, Parrett described Student's processing strengths and his processing weaknesses in short-term working memory. She detailed how his short-term working memory was related to his academic weaknesses. She opined his working

memory deficits could impact his executive functioning abilities. Based on all the data she reviewed, the goal was appropriate to help Student make progress similar to his general education peers.

Erhard documented that Student turned in 95 percent of his work. Kelley persuasively established that the purpose of the work completion goal was to help Student track his missing assignments. Student's executive functioning was related to his lack of work completion. Kelley determined Student had missing assignments and the goal was needed.

Student did not establish the work completion goal was not appropriate. It addressed an area of need. It was based on Student's present levels of performance and offered a challenging set of objectives to be worked toward in the next 12 months. Student did not establish he required an additional work completion goal.

Student did not establish he required a separate speech and language goal. Student did not qualify for speech and language services and did not establish it was an area of need.

Student did not establish he required a central auditory processing goal with an assistive technology device such as the remote microphone device. Parrett persuasively testified the multidisciplinary report described several assessments which identified that Student's processing weaknesses were related to his short-term working memory. Those executive function deficits were identified in his eligibility under other health impairment. Further, his short-term working memory weaknesses were addressed in his work completion goal, as detailed above. There was no evidence he required an additional central auditory processing goal or required a remote microphone device.

Student did not meet his burden of proof that the IEP failed to offer appropriate and measurable goals based on his present levels of performance. Student's special education evaluation and present levels of performance indicated he was operating at grade level or higher. Student's goals included reading, writing, and work completion. His work completion goal required him to turn in assignments at the ninth or 10th grade level. Capistrano provided appropriate goals for student to learn the content standard in the general education curriculum.

ISSUE 11b: APPROPRIATE ACCOMMODATIONS AND MODIFICATIONS IN THE IEP

The IEP must contain a statement of the modifications or supports for which school district personnel will provide to students to advance appropriately toward attaining annual goals and make progress in the general education environment. The IEP must also contain a statement of individual accommodations that are necessary to measure the academic achievement and functional performance of the student on state and district assessments. Ed. Code, § 56345, subds. (a)(4), (5.)

ASSISTIVE TECHNOLOGY

Student alleges the assistive technology accommodations offered were not appropriate because they were generic. Student asserts his private tutor provided 70 hours of assistive technology services, and therefore he required it. Student alleges Capistrano should have offered reduced text-rich content and more multisensory approaches. Student alleges Capistrano should have offered an assistive technology device such as the remote microphone device to help with his central auditory processing disorder.

Capistrano alleges it offered appropriate assistive technology accommodations and modifications.

Based on Student's needs, Capistrano offered Student a Chromebook laptop with

- internet capabilities,
- Google Suite applications,
- Google Docs,
- word prediction,
- voice typing,
- spell check and
- grammar check.

The Chromebook had Google Drive and the canvas learning platform for students and teachers to share folders. Student would receive a standard keyboard because he could physically access it. The IEP team recommended monitoring Student's internet use to focus his time and attention on school tasks, rather than on social media. To assist him with reading, writing, and work completion and executive functioning, Capistrano offered text to speech, to help with his decoding and fluency. The accommodations would also help Student with proofreading support when he was editing his writing, including capitalization. Student would have access to audio text and access to note taking tools to help with his writing and executive functioning.

Student provided no expert testimony or other persuasive evidence that the assistive technology accommodations Capistrano offered were not appropriate. Parent is not an assistive technology expert, and his opinion alone is not persuasive to satisfy Student's burden of proof.

GENERAL ACCOMMODATIONS AND MODIFICATIONS

Student alleges the general accommodations and modifications offered were not appropriate because they were generic. Student alleges he should have been provided one-to-one help in all his core subjects because he received it privately, it was effective, and he should have continuity in his program. Student alleges the private one-to-one tutoring was effective and Capistrano should have offered it in the IEP.

Student alleges his dyslexia adversely affected his ability to read the word problems in his honors algebra II/trigonometry and statistics class in ninth grade. He alleges his dysgraphia affected his notetaking and he should have access to peer and teacher notes. He alleges his textbooks should include reading support and multisensory textbooks, where the text is highlighted and has eye-tracking technology to make sure he is engaged. Student alleges he required the multi-media approach that works with the private literacy and learning tutoring he receives.

Student alleges Capistrano should have offered college board testing accommodations, giving him additional time and a separate testing facility. However, OAH has no jurisdiction over college board testing accommodations and cannot address this allegation.

Capistrano alleges it offered both appropriate program modifications and appropriate accommodations.

Capistrano offered chunking assignments and projects into smaller portions to be completed in steps. The IEP offered preferential seating close to his teacher to help with his comprehension and focus. It offered brief two-to-three-minute attention breaks. It offered to repeat and/or rephrase instructions to help student understand directions.

Capistrano offered reminders of his tasks and expectations. It offered check-ins for understanding. Capistrano offered access to peer and/or teacher notes. It offered to reduce the volume of Student's work when possible if they could still meet standards. The IEP allowed Student permission to take photos of the white board. It allowed Student additional time on class and homework assignments, up to twice the amount of time. The IEP offered access to assistive writing devices which included text to speech, audio text, and note taking tools.

Erhard described how Scott McCoy, the educational specialist in her English 1 collaborative class, assisted the roster of students with IEPs and 504 plans. Student sat next to McCoy in her class. In addition to assisting Student as needed, McCoy offered copies of the power point notes, physical and digital copies of test and voice recordings. McCoy assisted during the entire length of her class.

Additionally, Erhard explained Student had access to the "Paper" service in all of his subjects. Capistrano offered "Paper" to all its students with direct access to on-line, live, tutoring by professors and credentialed teachers in all subjects. This service provided an educational tutor on demand, on a one-to-one basis, available 24 hours a day, seven days a week. Students could also receive support from two other online platforms, Clever and Canvas.

Erhard convincingly testified she made available to Student all the accommodations and modifications. If Student did not want them, she moved on with her instruction. Student outperformed his peers. With a 4.2 weighted grade point average, he was in the second percentile of his class of 673 students.

Student provided no expert testimony that these accommodations offered were not appropriate. Conversely, Kelley convincingly testified the accommodations and modifications were appropriate. He believed they were all potentially beneficial to Student, especially chunking assignments into smaller pieces, preferential seating to help with focus, and up to twice as much extended time to complete assignments.

Student did not establish the accommodations were not appropriate because they did not include the one-to-one support in his core subjects he received privately. Capistrano provided unlimited tutoring with an online educational service, and it was available 24 hours a day. Moreover, Student received excellent grades in his honors classes, and his general education classes.

Student did not establish the accommodations were not appropriate because they did not address his dyslexia and dysgraphia. Capistrano provided him with a Chromebook. To assist Student with reading, writing, and executive function Capistrano offered text to speech, to help with his decoding and fluency. The accommodations would help him with proofreading support when he was editing his writing, including capitalization. Student would have access to audio text, access to note taking tools to help with his writing and executive function. Student received excellent grades in his honors classes, and his general education classes.

The preponderance of the evidence showed Capistrano offered Student accommodations based upon his present levels of performance and to help him achieve his IEP goals. The evidence did not show Student required additional accommodations not included in the November and December 2022 IEPs.

ISSUES 11c AND 11d: APPROPRIATE SERVICES AND PLACEMENT

Student contends Capistrano failed to offer appropriate placement and services in the November and December 2022 IEPs. Student alleges his general education placement for 87 percent of his school day was not appropriate and that it should have been closer to 50 percent of his school day. Student alleges he should have been in a special day class, resource class, or a more restrictive setting, so he could have one-to-one support. Student alleges his English collaboration class was inappropriate because it should have been provided on a one-to-one basis. Student alleges the offer of his honors biology and honors math classes was inappropriate because he did not have appropriate support and required private tutoring to excel. Student alleges he should have been in a resource specialist program for math instead of honors algebra II/trigonometry. Student alleges his resource specialist program was inadequate because the special education teacher did not provide expert assistance to re-teach him concepts. Student alleges he should have been given a language and literacy program, and a subject matter expert math teacher to help him with his honors classes.

Capistrano asserts it offered appropriate services and placement.

Student provided no evidence the Aliso Viejo High School general education and honors programs were not an appropriate placement. Similarly, Student provided no expert testimony or other persuasive evidence that the related services Capistrano offered were not appropriate. Parent is not a professional in the psychology or education fields, and therefore, his testimony was not convincing.

Rather, the evidence established that Capistrano's IEP offer was appropriate because it provided Student access to specialized instruction and related services individually designed to provide him educational benefit and reasonably calculated to enable him to make progress appropriate in light of his circumstances. The specialized high school program and related services offered were appropriate, with the combination of general education, collaboration, resource room, and honors classes. The offer was commensurate with his placement, present levels of performance, and his goals.

Parrett, the school psychologist, convincingly testified the IEP offer comprehensively integrated Student's unique needs. It was developed to meet his needs to succeed in the general education environment. It addressed his areas of strengths and weaknesses.

Capistrano was not required to maximize Student's high grade point average and his honors classes under *Rowley*, but rather to provide a basic floor of opportunity reasonably calculated to make progress in light of his circumstances. The educational tutoring Parents provided to help Student with homework and tests undoubtedly helped Student achieve his high grades, but does not in itself prove Capistrano denied Student a FAPE.

Student was clearly making progress. Student's special education evaluation and present levels of performance indicated he was operating at grade level and higher. He performed in the average range on spelling and reading comprehension, with below average scores in reading decoding, some reading fluency subtests. Student's IEP goals included him reading at the ninth or 10th-grade level, when he was in ninth grade.

Capistrano provided more than *Rowley* required, as Student excelled in rigorous academic courses and outpaced most of his peers. Student achieved mastery of difficult subjects. Capistrano provided more than the basic floor of opportunity for Student to achieve success in general education, as required. Capistrano provided more than Student required to advance from grade to grade. (*Endrew*, supra.)

The preponderance of the evidence showed Capistrano offered Student IEP appropriate placement and services in the November and December 2022 IEPs. Student did not prove Capistrano denied him a FAPE by failing to offer appropriate goals, accommodations, services, and placement.

ISSUE 12: DID CAPISTRANO DENY STUDENT A FAPE BY FAILING TO FACILITATE MEANINGFUL PARENT PARTICIPATION IN THE NOVEMBER 15, 2022, IEP PROCESS?

Student alleges Capistrano significantly impeded Parents' opportunity to participate in the decision-making process regarding Student's November 2022 IEP. Parent claims they did not get to review the draft IEP document before the IEP team meeting. Parent claims the IEP team did not agree with their concerns.

Capistrano alleges it promoted parental participation by collaborating with Student's private educational psychologist Dr. Shinn, by adding three of her recommended assessments, and by adding a goal.

Parental participation in the IEP and the educational placement process is critical to the organization of the IDEA. (*Doug C. v. Hawaii Dept. of Education* (9th Cir. 2013) 720 F. 3d 1038, 1043, (*Doug C.*)) Parental participation safeguards are "[a]mong the most important procedural safeguards" in the IDEA and "[p]rocedural violations that

interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA." (*Doug C., supra*, 720 F. 3d at p. 1044, citing *Amanda J., supra*, 267 F.3d at 882, 892.)

The IEP team shall consider all the relevant material which is available on the child. No single score or product of scores shall be used as the sole criterion for the decision of the IEP team as to the child's eligibility for special education, or developing an appropriate program. (20 U.S.C. § 1414(b)(2)(B); Ed. Code, § 56320, subd. (e); Cal. Code Regs., tit. 5, § 3030, subd. (a).)

The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child. (34 C.F.R. § 300.501(b).)

A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP team meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693-5 (*N.L.*); *Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1036.)

The November 2022 IEP document includes meeting notes summarizing the conversations of the team during the meeting. The meeting notes detail many of Parents' concerns. In addition, the convincing testimony of Capistrano's IEP team members established the many conversations they had with Parents.

Parent meaningfully participated in the IEP process. Capistrano agreed to review the records Parents provided to collaborate with Dr. Shinn during the assessment process. Capistrano agreed to include three additional rating scale assessment measures Dr. Shinn

recommended. Dr. Shinn and Parents attended the two IEP team meetings in November and December 2022. Dr. Shinn and Parents asked questions and asked for changes to the IEP. Parrett and Kelley persuasively testified they considered Parents' input before and during the IEP team meeting. The IEP team developed draft goals for the IEP, made edits and additions based on Parents' and Dr. Shinn's input. The IEP team did not always agree to making Parents' requested changes and was not required to do so. Neither Dr. Shinn nor Parents provided persuasive testimony that Parents did not meaningfully participate in the IEP process.

Parents meaningfully participated in the development of an IEP because they were informed of Student's problems, attended the IEP team meeting, expressed disagreement regarding the IEP team's conclusions, and requested revisions in the IEP.

Student failed to prove Capistrano denied him a FAPE by impeding parental participation in the development of the November 2022 IEP.

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 1:

Capistrano did not deny Student a FAPE by failing to convene an annual IEP team meeting in December 2020.

Capistrano prevailed on Issue 1.

ISSUE 2:

Capistrano did not deny Student a FAPE, by failing to hold an IEP team meeting in response to January 2021 emails from Parents regarding Parents' concerns.

Capistrano prevailed on Issue 2.

ISSUE 3:

Capistrano did not deny Student a FAPE by failing to include comprehensive assessments, excluding cognitive assessments, in its February 1, 2021 assessment plan.

Capistrano prevailed on Issue 3.

ISSUE 4:

Capistrano did not deny Student a FAPE by failing to file for due process when Parents did not consent to the February 1, 2021 assessment plan.

Capistrano prevailed on Issue 4.

ISSUE 5:

Capistrano did not deny Student a FAPE by failing to hold an IEP team meeting in response to the September 10, 2021 letter from Parents' counsel regarding Parents' concerns.

Capistrano prevailed on Issue 5.

ISSUE 6:

Capistrano did not deny Student a FAPE by failing to include appropriate assessments, excluding cognitive assessments, of Student in its September 22, 2021 assessment plan.

Capistrano prevailed on Issue 6.

ISSUE 7:

Capistrano did not deny Student a FAPE by failing to file for due process when Parents did not consent to the September 22, 2021 assessment plan, excluding cognitive assessments.

Capistrano prevailed on Issue 7.

ISSUE 8:

Capistrano did not deny Student a FAPE by failing to convene an annual IEP team meeting in December 2021.

Capistrano prevailed on Issue 8.

ISSUE 9:

Capistrano did not deny Student a FAPE by failing to develop an interim IEP pursuant to Parents' request on August 17, 2022.

Capistrano prevailed on Issue 9.

ISSUE 10:

Capistrano did not deny Student a FAPE by using a modified discrepancy model in the September 2022 assessment plan, excluding cognitive assessments, such that it failed to address all areas of unique need.

Capistrano prevailed on Issue 10.

ISSUE 11:

Capistrano did not deny Student a FAPE in the November 15, 2022 and December 16, 2022 IEPs by failing to offer appropriate goals, accommodations, services; and placement.

Capistrano prevailed on Issues 11(a)-(d).

ISSUE 12:

Capistrano did not deny Student a FAPE by failing to facilitate meaningful parent participation in the November 15, 2022, IEP process.

Capistrano prevailed on Issue 12.

(This space intentionally left blank. Text continues on following page.)

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.

DEBORAH MYERS-CREGAR

Administrative Law Judge

Office of Administrative Hearings