

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

PARENT ON BEHALF OF STUDENT,

V.

CAPISTRANO UNIFIED SCHOOL DISTRICT.

CASE NO. 2023050289

DECISION

SEPTEMBER 25, 2023

On May 5, 2023, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parent on behalf of Student, naming Capistrano Unified School District. The matter was continued on June 8, 2023. Administrative Law Judge Brian H. Krikorian heard this matter by Zoom videoconference on July 11, 12 and 13, 2023 and August 8 and 9, 2023.

Attorneys Timothy Adams and Madeline Knutson represented Student. Parent attended all hearing days on Student's behalf. Attorney Ernest Bell represented Capistrano Unified School District. Deborah Aufill attended all hearing days on Capistrano's behalf.

At the parties' request the matter was continued to August 21, 2023, for written closing briefs. The record was closed, and the matter was submitted on August 21, 2023.

ISSUES

A free appropriate public education is referred to as a FAPE. An Individualized Education program is referred to as an IEP.

1. Did Capistrano deny Student a FAPE in the IEP dated February 26, 2021, and finalized on May 7, 2021, by:
 - a. failing to offer goals to appropriately address:
 - nonverbal intellectual ability
 - receptive language
 - expressive language
 - pragmatic language
 - communication
 - peer socialization
 - adult socialization
 - stereotype
 - behavior rigidity
 - sensory sensitivity
 - attention/self-regulation
 - adaptive behavior skills

- daily living skills
 - aggression
 - socialization, and
 - safety skills.
 - b. failing to offer services to appropriately address the areas of need identified above in (a); and
 - c. failing to offer a placement appropriate to support the goals and services identified above?
2. Did Capistrano deny Student a FAPE by failing to ensure the IEP team comprised the necessary participants, specifically the school psychologist, and alternate augmentative communication specialist, at the May 7, 2021, IEP team meeting?
3. Did Capistrano deny Student a FAPE in the IEP dated May 21, 2021, by:
- a. failing to offer goals to appropriately address:
 - nonverbal intellectual ability
 - receptive language
 - expressive language
 - pragmatic language
 - communication
 - peer socialization
 - adult socialization
 - stereotype
 - behavior rigidity
 - sensory sensitivity

- attention/self-regulation
 - adaptive behavior skills
 - daily living skills
 - aggression
 - socialization, and
 - safety skills.
- b. failing to offer services to appropriately address the areas of need identified above in (a); and
- c. failing to offer a placement appropriate to support the goals and services identified above?
4. Did Capistrano deny Student a FAPE by failing to ensure the IEP team comprised the necessary participants, specifically the school psychologist, alternate augmentative communication specialist, behavior specialist, speech and language specialist, and occupational therapist, at the May 21, 2021, IEP team meeting?
5. Did Capistrano deny Student a FAPE in the IEP dated February 23, 2022, by:
- a. failing to offer goals to appropriately address:
- nonverbal intellectual ability
 - receptive language
 - expressive language
 - pragmatic language

- communication
- peer socialization
- adult socialization
- stereotype
- behavior rigidity
- sensory sensitivity
- attention/self-regulation
- adaptive behavior skills
- daily living skills
- aggression
- socialization
- safety skills
- outburst behavior, and
- self-injury behavior.

- b. failing to offer services to appropriately address the areas of need identified above in (a); and
- c. failing to offer a placement appropriate to support the goals and services identified above?

- 6. Did Capistrano deny Student a FAPE by failing to ensure the IEP team comprised the necessary participants, specifically the school psychologist, and alternate augmentative communication specialist, at the February 23, 2022, IEP team meeting?

7. Did Capistrano deny Student a FAPE in the IEP dated February 22, 2023, by:

a. failing to offer goals to appropriately address:

- nonverbal intellectual ability
- receptive language
- expressive language
- pragmatic language
- communication
- peer socialization
- adult socialization
- stereotype
- behavior rigidity
- sensory sensitivity
- attention/self-regulation
- adaptive behavior skills
- daily living skills
- aggression
- socialization
- safety skills
- outburst behavior, and
- self-injury behaviors

b. failing to offer services to appropriately address areas of need identified above in (a); and,

c. failing to offer a placement appropriate to support the goals and services identified above?

8. Did Capistrano deny Student a FAPE by failing to ensure the IEP team comprised the necessary participants, specifically the school psychologist, and alternate augmentative communication specialist, at the February 22, 2023, IEP team meeting?
9. Did Capistrano deny Student a FAPE in the IEP dated April 21, 2023, by:
 - a. failing to offer goals to appropriately address:
 - nonverbal intellectual ability
 - receptive language
 - expressive language
 - pragmatic language
 - communication
 - peer socialization
 - adult socialization
 - stereotype
 - behavior rigidity
 - sensory sensitivity
 - attention/self-regulation
 - adaptive behavior skills
 - daily living skills
 - aggression
 - socialization
 - safety skills

- outburst behavior, and
 - self-injury behaviors.
- b. failing to offer services to appropriately address areas of need identified above in (a); and,
- c. failing to offer a placement appropriate to support the goals and services identified above?
10. Did Capistrano deny Student a FAPE by failing to ensure the IEP team comprised the necessary participants, specifically the school psychologist, and alternate augmentative communication specialist, at the April 21, 2023, IEP team meeting?
11. Did Capistrano deny Student a FAPE by denying Parent the right to meaningfully participate in the IEP developed on April 21, 2023, by predetermining its offer of educational programming?

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 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).) In this case, Student has 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 nine years and two months old and beginning fourth grade at the time of hearing. Student resided within Capistrano's geographic boundaries at all relevant times. The parties submitted a stipulation of fact that Student was no longer a resident of Capistrano as of July 24, 2023. Student was eligible for special education under the category of Autism. Student presented concerns in communication, social interaction, and self-injurious behavior.

THE PARTIES PRIOR SETTLEMENT AGREEMENT

Although not delineated as a separate issue, Capistrano raised the affirmative defense that Student's claims in Issues 1 through 4 are barred by the parties' settlement agreement, which contained a broad waiver of claims through June 3, 2021. Capistrano argues that because Student's claims related to the drafting and implementation of the February 26, 2021, IEP, these claims were barred by the waiver. Student argues that the settlement agreement does not bar those claims as they related to the 2019 IEP agreement and its addendum dated February 20, 2020.

Parents have the right to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a).) OAH has jurisdiction to hear due process claims arising under the IDEA. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 10281029 (*Wyner*).)

Settlement agreements are interpreted using the same rules that apply to interpretation of contracts. (*Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 686, citing *Adams v. Johns-Manville Corp.* (9th Cir. 1989) 876 F.2d 702, 704.) "Ordinarily, the words of the document are to be given their plain meaning and understood in their common sense; the parties' expressed objective intent, not their unexpressed subjective intent, governs." (*Id.* at p. 686.) If a contract is ambiguous, i.e., susceptible to more than one interpretation, then extrinsic evidence may be used to interpret it. (*Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69

Cal.2d 33, 37-40.) Even if a contract appears to be unambiguous on its face, a party may offer relevant extrinsic evidence to demonstrate that the contract contains a latent ambiguity; however, to demonstrate an ambiguity, the contract must be “reasonably susceptible” to the interpretation offered by the party introducing extrinsic evidence. (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 391, 393.)

Here, Parent and Capistrano signed an Alternative Dispute Resolution agreement to resolve issues surrounding the September 13, 2019, IEP and the February 20, 2020, addendum to that IEP, as well as issues that arose due to the Covid-19 pandemic. As part of the settlement agreement, Parent broadly waived all known and unknown claims on behalf of Student that existed through June 3, 2021. Both parties jointly drafted the agreement. The current complaint seeks adjudication of issues going back to May 5, 2021.

In *Pedraza v. Alameda Unified Sch. Dist.* (N.D. Cal. 2007, No. C 05-04977 VRW) 2007 WL 949603 (Pedraza), the United States District Court for the Northern District of California recognized OAH’s jurisdiction to adjudicate claims alleging denial of a free appropriate public education as a result of a violation of a mediated settlement agreement, as opposed to “merely a breach” of the mediated settlement agreement that should be addressed by the California Department of Education’s compliance complaint procedure. In that case, the settlement agreement intended that the placement set forth in the terms of the agreement would provide Student with a FAPE. Under *Pedraza*, OAH therefore retains jurisdiction over the issue of whether an implementation failure led to a denial of FAPE to a student when the IEP at issue was agreed to and the subject of a FAPE waiver in a negotiated settlement agreement. In this case *Pedraza*, does not

apply because the settlement agreement did not make permanent changes to the IEPs, and the September 19, 2019 IEP, and its February 20, 2020 addendum, are designated in the agreement as "stay put."

Capistrano met its burden of proof in establishing that the parties' settlement agreement barred procedural claims from May 5, 2021, two years from the date of filing, through June 3, 2021. Paragraphs six and seven of the agreement are a comprehensive release and discharge of all claims. Student unambiguously waived all claims against Capistrano through June 3, 2021, the defined end date of the agreement. Therefore, any claims against Capistrano for its actions and omissions through June 3, 2021, including procedural violations, were waived in the settlement agreement. Accordingly, Issues 2 and 4 are barred by the waiver.

The agreement did not, however, waive any claims regarding the substantive nature of the IEP or if it was properly implemented beginning June 4, 2023. As such the remaining issues are analyzed below.

ISSUE 1: DID CAPISTRANO DENY STUDENT A FAPE IN THE IEP DATED FEBRUARY 26, 2021, AND FINALIZED ON MAY 7, 2021, BY FAILING TO OFFER APPROPRIATE GOALS, SERVICES AND PLACEMENT?

Student contends that Capistrano denied Student a FAPE in the IEP dated February 26, 2021, and finalized on May 7, 2021, by

a) failing to offer goals to appropriately address:

- nonverbal intellectual ability,
- receptive language,

- expressive language,
 - pragmatic language,
 - communication,
 - peer socialization,
 - adult socialization,
 - stereotype,
 - behavior rigidity,
 - sensory sensitivity,
 - attention/self-regulation,
 - adaptive behavior skills,
 - daily living skills,
 - aggression,
 - socialization, and
 - safety skills,
- b) failing to offer services to appropriately address areas of need identified above in (a); and
- c) failing to offer a placement appropriate to support the goals and services identified above.

Capistrano denies that it denied Student a FAPE and contends that it provided appropriate placement, goals, accommodations, and services.

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 individualized education program, referred to as 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. ____ [137 S.Ct. 988, 1000].)

THE 2021-2022 IEP GOALS APPROPRIATELY ADDRESSED ALL OF STUDENT'S UNIQUE AREAS OF NEED

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.)

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, supra* at 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, supra* at 1036.)

An IEP meeting was held on February 26, 2021. Student was in first grade. The meeting was Student’s annual review. Parent raised concerns related to Student’s behavior, attention, communication, and toilet training. Student struggled when he was denied access and could not emotionally cope with changes and transitions. Capistrano placed Student at Port View Preparatory, referred to as Port View, a non-public school with a highly structured curriculum for children with cognitive and behavioral issues. Student strongly preferred working for edible reinforcements like fruit, chips, and popcorn. Student preferred working on an iPad, or an augmentative alternative communication device, referred to as an AAC device.

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).

The IEP must contain a description of how the child’s progress toward meeting the annual goals will be measured and when periodic reports on the progress the child was making toward meeting the annual goals (such as using 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).) Each of the goals in the February 2021 IEP complied with that requirement.

Areas of need are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical, and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.). However,

"[t]he IDEA does not require that each identifiable need, deficit, or area of struggle or challenge be addressed in a separate goal as long as the IEP, overall, offers a FAPE." *Coleman v. Pottstown Sch. Dist.* (3d Cir. 2014) 581 Fed.Appx. 141, 147-148.

Student's Issue 1(a) does not challenge any specific goal. Consequently, the analysis below is focused on whether the goals provided in the February 26, 2021 IEP adequately addressed the following areas of need for Student.

NONVERBAL INTELLECTUAL ABILITY

Dr. Marta M. Shinn is a licensed clinical child psychologist. Shinn evaluated Student and testified at hearing. Shinn reviewed the 2021-2022 IEP. Shinn opined that the IEP did not properly address Student's non-verbal concerns and abilities. Shinn administered a Test of Nonverbal Intelligence, Fourth Edition to Student as part of her independent evaluation of Student. The test measures intelligence, aptitude, abstract reasoning, and problem-solving, in ascending order of difficulty. It is a language-free intelligence test that requires no reading, writing, speaking, or listening on the examinee's part. Student scored within the "very poor" range, indicating that he has very low abstract reasoning and problem-solving skills. He was not at the expected levels of functioning

in comparison to other same-age children who are also eight years and 11 months old. Shinn was unable to provide a specific example at the hearing of what kind of nonverbal goal was needed. Shinn defined a "nonverbal intellectual ability" goal as one in the area of "problem solving."

The February 26, 2021, IEP did not specifically list "nonverbal intelligence" as an area of need. Speech pathologist Horan testified at the hearing. Horan did not believe that nonverbal ability was a specific "need." Student had three goals under the category of "social/emotional" in the 2020 IEP which addressed Student's non-verbal skills. The first goal required Student to request "help" either by sign language, vocally, or through his AAC device. The second goal required Student to independently "request access" to an item or activity through "total communication," defined as voice, picture, sign language, or AAC device. In the third goal, Student would independently request "more" using total communication.

Similarly, in the area of mathematics, Student was provided four separate goals that addressed nonverbal skills. The first goal addressed Student's location of numerals on his AAC device. The second goal measured Student's ability to match numbers. In the third goal, given two-dimensional shapes, Student would receptively identify the named shape in a field of three different shapes. The fourth and final goal required Student to demonstrate one-to-one correspondence to 10 with 80 percent accuracy, when given manipulatives and visual support.

All of these goals addressed Student's skills at solving problems and addressed Student's nonverbal communication deficits.

RECEPTIVE LANGUAGE, EXPRESSIVE LANGUAGE, PRAGMATIC LANGUAGE, AND COMMUNICATION

Horan testified that

- receptive language was the ability to understand received communication,
- expressive language was the ability to communicate thoughts and ideas to others, and
- pragmatic language was social language, or the ability to understand and communicate language in a socially appropriate way.

In the area of "communication," Student met two out of his three prior goals. For the 2021 IEP, student was provided three new goals in "core vocabulary," "expressive language and describing," and "pragmatic language." Student's speech and language therapist, Horan, described Student as a very fun, sweet student. She would model using the iPad and he would then take it from her and identify the words he needed. For example, he became able to identify the "Food" folder and would point to his favorite foods. He was very engaged with using the iPad and AAC devices. Student learned to make request for things he wanted. Because Student was nonverbal, she made use of multi-modal communications such as the AAC device, the iPad, and using hands or white boards to provide Student with choices to pick.

Under the category of "reading," the first three goals were for listening comprehension, and required Student to use pictures to answer "who," "what," and "where" questions. The fourth goal required Student to locate his own name given four

name cards, and the fifth goal measured Student's ability to locate his own name on his AAC device, in the "personal information folder." The sixth and final goal stated that Student would sort 10 items, one at a time, into two categories.

Student was provided two goals in behavior for the 2021 IEP. The first goal, "regulation," required Student to demonstrate improved sensory processing and regulation and the second goal called for Student to use total communication when frustrated.

These goals appropriately addressed Student's skills and his areas of need in speech, language, and expression.

PEER SOCIALIZATION, SOCIALIZATION AND ADULT SOCIALIZATION

For the 2021 IEP, Student was provided five goals in social and emotional needs: The first goal required Student to request "help" either by sign language, vocally, or through his AAC device. The second goal required Student to independently "request access" an item or activity through "total communication," defined as voice, picture, sign language, or AAC device. In the third goal, Student would independently request "more" using total communication. In the fourth goal, Student would tolerate denied access to an item, task, or area that Student requested. The fifth and final goal required Student to attend to a tabletop task for four minutes.

Student's goals on speech and language also contained socialization goals. For example, goal number three specified that "during a structured or unstructured play with a peer," Student would use his AAC device to communicate his intentions.

The 2021 IEP appropriately addressed Student's adult and peer socialization needs.

STEREOTYPE, AGGRESSION, SELF-INJURIOUS BEHAVIOR, SAFETY SKILLS, OUTBURST BEHAVIOR AND BEHAVIOR RIGIDITY

The 2021 IEP did not specifically delineate stereotype, aggression, self-injurious behavior, safety skills, outburst behavior and behavior rigidity as "needs." However, the evidence at hearing established that all of these areas were appropriately addressed in the provided goals, as well as the services offered in the IEP.

Stereotypy is defined as frequent repetition of the same, typically purposeless movement, gesture, posture, or vocal sounds or utterances (as in autism spectrum disorder). (<https://www.merriam-webster.com/dictionary/stereotypy>). Shinn opined that Student was lacking a specific goal in this area of need. Occupational Therapist Danielle Krause testified at hearing. Krause worked with Student at Port View. Krause opined that it is not sound behavioral practice to establish goals for reduction or extinction of maladaptive behaviors. Rather, behaviorists establish goals for development of functionally equivalent replacement behaviors, referred to as FERBS.

The 2021 IEP directly addressed Student's repetitive actions by providing goals such as Student asking for help, requesting access to items or places, and tolerating denied access to items or places. Krause opined that as Student developed these skills,

he would demonstrate fewer maladaptive behaviors such as stereotyping, since the new skills would replace the older behaviors. The IEP also addressed Student's behavioral needs. As noted above, Student was provided a goal for regulation and requesting a break under the category of behavior, as well as communication goals which would enable him to express his emotions. The 2021 IEP also called for measures of each occurrence of the maladaptive behavior through the implementation of a behavior intervention plan.

SENSORY SENSITIVITY

The 2021 IEP did not specifically identify "sensory sensitivity" as a need. However, Student's sensory skills were addressed through the other goals. For example, Student's "regulation" goal required Student to "demonstrate improved sensory processing and regulation." Student's motor skills goals required him to work with scissors and utensils. These goals appropriately addressed this area of need.

ATTENTION/SELF-REGULATION, ADAPTIVE BEHAVIOR SKILLS, DAILY LIVING SKILLS

In the area of "self-care," Student was provided with two goals. The first goal measured Student's ability to wash his own hands. The second goal was toileting. Student would stand for at least 10 seconds to urinate in a urinal or toilet at least two times per day and maintain a dry diaper or underwear. Student was also provided three goals in "motor." Student would utilize an adapted writing utensil to encourage a more mature grasp and color within the boundaries. The second goal required Student to

demonstrate fine motor skills, visual motor skills and bilateral coordination skills by cutting along a five-inch line. The final motor skill goal measured Student's ability to trace over four inch vertical and horizontal lines, deviating no more than one-half an inch. The 2021 IEP appropriately addressed the area of need in self-regulation, adaptive behavior, and daily living skills.

The notes of the February 26, 2021, IEP indicate that both Capistrano and Port View staff went over Student's progress, and outlined all the proposed goals, in detail. Parent was provided with a copy of the Multidisciplinary Report prior to the IEP, and the notes indicated that Parent agreed that the report accurately described Student. In total there were 20 goals, and Parent agreed to each goal. Another IEP meeting was held on May 7, 2021. The team agreed to increase the extended school year services by 20 days, and Parent's advocate requested a 35-day extension. The IEP team agreed to that request.

Here, Student did not prove by a preponderance of the evidence that the goals presented in the 2021-2022 IEP were inappropriate. Parent consented to the 2021-2022 IEP and agreed to all the goals. The primary objection voiced by Shinn was that the IEP lacked goals addressing "nonverbal intellectual abilities" and "safety." However, a review of the goals, and the testimony adduced at hearing, established that Capistrano addressed Student's safety as well as his ability to solve problems, such as sorting and making specific choices when asked. Student was making progress on each goal.

Student did not meet his burden of proving, by a preponderance of the evidence, that the goals under Issue 1(a) were inappropriate. While the goals were not identified in the specific language suggested by Student, each of the combined 25 goals proposed

in the 2021-2022 IEP's addressed Student's unique needs and deficits. The goals in the February 26, 2021, IEP were appropriately designed to allow Student to progress and were implemented throughout the school year.

CAPISTRANO OFFERED SUFFICIENT SERVICES TO ADDRESS STUDENT'S UNIQUE NEEDS IN THE 2021-2022 IEP

Student contends that the 2021-2022 IEP did not offer services and accommodations to allow Student to progress and to address Student's unique needs. Capistrano rejects that contention and argues that it provided Student with tailored services that met his unique needs. Student did not prove, by a preponderance of the evidence, that Capistrano failed to meet its obligation regarding services and accommodations in Issue 1(b).

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).)

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 considering the child's circumstances. (*Rowley*, supra, 458 U.S. 176, 201-204; *Endrew supra*, at [137 S.Ct. 988, 1000].). The 2021-2022 IEP proposed the following services for Student:

1. Specialized academic instruction within a group session, for 360 minutes per day.
2. A one-to-one aide 360 minutes per day.
3. Speech and language services within a group session 60 minutes per week.
4. A speech and language consultation 30 minutes per month.
5. Occupational therapy within a group session, 30 minutes per week.
6. Occupational therapy consults 30 minutes per month.
7. Curb-to-curb transportation.
8. Extended school year services for 20 days. This was later extended to 35 days upon Parent's request at the May 21, 2021, IEP meeting discussed below.

Joceline Solano was an education specialist at Port View and was Student's teacher during his tenure. Solano testified at hearing. Solano was familiar with Student since he started at Port View in November of 2020. Solano described Student as someone who loves to interact with others and is playful. He also would be shy at times, and he covered his face. Student loved adult attention but did not express the same desire for peer socialization.

Solano would adapt the lessons to something Student wanted to engage in, such as using cartoons or characters he liked. Once she did this, Student tended to become more engaged and would want to do more work. Solano opined that Student made

substantial progress since arriving at Port View in November 2020. She saw progress in his ability to tolerate more, being able to do more of the tasks they asked of him, socializing, leisure activities, being able to sit for longer periods of times, and initiating communication, such as telling her to “go away”. He became more independent, including requesting to see or speak with someone. Student would now request to do work where he would have to be prompted in the early years.

Student’s occupational therapist was Rachel Rucireta. Rucireta also testified at the hearing. She described Student’s areas of strength to include many underlying strong motor skills, obtaining needed items on his own, postural stability, as well as his ability to navigate the campus. Rucireta worked with Student to increase his self-regulation and self-care. She defined self-regulation as being able to manage emotions, actions, reactions and meet the demands of the environment. Student can also open containers, use scissors, open bags, use a pencil. Rucireta observed Student’s tremendous growth since he has started school at Port View. He could do many things he couldn’t do at the beginning, such as manipulate utensils or cutting objects. Rucireta phased out using adaptive scissors, and Student was beginning to use standard scissors. Student’s self-regulation had strongly improved and he could perform the activities for a given duration.

Student did not raise any specific challenges to the types of services provided, or the degree of services. Student did not present evidence that the services were inadequate for Student to educationally progress, nor did Student present evidence that any needed services were omitted. Student did not meet his burden in establishing by a preponderance of the evidence in Issue 1(b) that Capistrano failed to provide adequate services and accommodations in the 2021-2022 IEP. To the contrary, the evidence

strongly suggested that Student was receiving constant one-to-one instruction and aid during the school year. His specific needs were being addressed, and the evidence showed that while at school, he was making substantial progress.

THE 2021-2022 IEP PROVIDED APPROPRIATE PLACEMENT AT PORT VIEW

The 2021-2022 IEP recommended placement at Port View, and Parent did not object to that placement. Student's expert Shinn testified that she did not dispute the appropriateness of Port View during the 2021-2022 school year. In Shinn's assessment report, she noted that due to the heightened structure and large amount of support at Port View, Student was able to learn and engage effectively.

As discussed more fully in Issue 9 below, Student's primary objection to placement at Port View arose in the spring of 2023, when Student's behavior at home began to escalate and cause disruption. There was no testimony or evidence establishing that Port View was an inappropriate placement for Student in the 2021-2022 school year, and based upon the evidence, Port View was the least restrictive environment. As such, Student did not prove in Issue 1(c) that placement at Port View was incorrect for the 2021-2022 IEP.

Capistrano prevailed on Issue 1.

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ISSUE 2: DID CAPISTRANO DENY STUDENT A FAPE BY FAILING TO ENSURE THE IEP TEAM COMPRISED THE NECESSARY PARTICIPANTS, SPECIFICALLY THE SCHOOL PSYCHOLOGIST, AND ALTERNATE AUGMENTATIVE COMMUNICATION SPECIALIST, AT THE MAY 7, 2021, IEP TEAM MEETING?

Student argues that Capistrano failed to ensure that the IEP team comprised of all necessary participants. As observed above, Capistrano is correct that Student's claims in this issue are barred by the settlement agreement. Student did not meet his burden of proof on this issue.

Capistrano prevailed on Issue 2.

ISSUE 3: DID CAPISTRANO DENY STUDENT A FAPE IN THE IEP DATED MAY 21, 2021, BY FAILING TO OFFER APPROPRIATE GOALS, SERVICES AND PLACEMENT?

Student contends that Capistrano denied Student a FAPE in the IEP dated May 21, 2021, by

a) failing to offer goals to appropriately address:

- nonverbal intellectual ability,
- receptive language,
- expressive language,
- pragmatic language,
- communication,

- peer socialization,
 - adult socialization,
 - stereotype,
 - behavior rigidity,
 - sensory sensitivity,
 - attention/self-regulation,
 - adaptive behavior skills,
 - daily living skills,
 - aggression,
 - socialization,
 - safety skills,
 - outburst behavior; and
 - self-injury behaviors,
- b) failing to offer services to appropriately address areas of need identified above in (a); and
- c) failing to offer a placement appropriate to support the goals and services identified above.

Capistrano denies that it denied Student a FAPE and contends that it provided appropriate placement, goals, accommodations, and services.

In the IEP dated February 26, 2021, and May 7, 2021, Student was offered a 20-day extended school year service. On May 21, 2021, the IEP team met to consider Parent's request that Student participate in Port View's full 35-day extended school year

schedule. The team agreed that Student would benefit from a 35-day program and amended the IEP to provide that service. Parent consented to the IEP, and Capistrano provided a prior written notice on May 24, 2021, confirming the change.

There were no additional goals, services or accommodations added to the IEP on May 21, 2021. There was no new information provided at the May 21, 2021, meeting that suggested new goals were needed, nor was any evidence presented that Parent requested additional goals at this meeting. As analyzed above, the goals in the February 26, 2021 and May 7, 2021 IEP, were appropriate and addressed Student's needs. Accordingly, Student did not prove that the May 21, 2021, IEP departed in any other way from the IEP finalized on May 7, 2021, which has been found to be appropriate.

Capistrano prevailed on Issue 3 in its entirety.

ISSUE 4: DID CAPISTRANO DENY STUDENT A FAPE BY FAILING TO ENSURE THE IEP TEAM COMPRISED THE NECESSARY PARTICIPANTS, SPECIFICALLY THE SCHOOL PSYCHOLOGIST, ALTERNATE AUGMENTATIVE COMMUNICATION SPECIALIST, BEHAVIOR SPECIALIST, SPEECH AND LANGUAGE SPECIALIST, AND OCCUPATIONAL THERAPIST, AT THE MAY 21, 2021, IEP TEAM MEETING?

Like Issue 2 above, Student's claims in this issue are barred by the settlement agreement. Student did not meet his burden of proof on this issue.

Capistrano prevailed on Issue 4.

ISSUE 5: DID CAPISTRANO DENY STUDENT A FAPE IN THE IEP DATED FEBRUARY 23, 2022, BY FAILING TO OFFER APPROPRIATE GOALS, SERVICES AND PLACEMENT?

- a) Capistrano held an annual IEP team meeting on February 23, 2022. Student contends that Capistrano denied Student a FAPE in the IEP dated February 23, 2022, by (a) failing to offer goals to appropriately address:

- nonverbal intellectual ability,
- receptive language,
- expressive language,
- pragmatic language,
- communication,
- peer socialization,
- adult socialization,
- stereotype,
- behavior rigidity,
- sensory sensitivity,
- attention/self-regulation,
- adaptive behavior skills,
- daily living skills,
- aggression,
- socialization,
- safety skills,
- outburst behavior; and
- self-injury behaviors,

- b) failing to offer services to appropriately address areas of need identified above in (a); and
- c) failing to offer a placement appropriate to support the goals and services identified above.

Capistrano denies that it denied Student a FAPE and contends that it provided appropriate placement, goals, accommodations, and services.

THE 2022-2023 IEP GOALS ADDRESSED STUDENT'S UNIQUE NEEDS

NONVERBAL INTELLECTUAL ABILITY

Like the previous IEP, the February 23, 2022, IEP did not specifically list "nonverbal intelligence" as an area of need. However, many of the other goals discussed below in the area of reading, math, socialization, safety skills and behaviors meet Student's nonverbal needs. The primary objection voiced by Shinn to the February 2022 IEP was that the IEP did not address all of Student's needs, and that the IEP team should have been considering a higher level of treatment and services for Student.

Under the category of "reading," the first goal was in listening comprehension. The second goal required Student to match kindergarten short vowel sight words to their corresponding picture in a field of two or more pictures. The third goal provided that when given a statement, Student would be able to match it to the pictures of the setting or character described in a field of two or more pictures. The fourth goal required Student to match emotions, and the fifth and final goal required Student to identify various kinds of weather from a field of three.

The IEP team proposed three “math” goals for the 2022-2023 IEP. In the first goal, Student would be able to hand over a specific number of up to five manipulatives. The second goal required Student to put visuals and numbers from one to 10 in the correct order. The third and final goal required Student to match colors from a field of three or more.

All of these goals addressed Student’s skills at solving problems and addressed Student’s nonverbal communication deficits.

RECEPTIVE LANGUAGE, EXPRESSIVE LANGUAGE, PRAGMATIC LANGUAGE, AND COMMUNICATION

Four new “communication” goals were proposed for the IEP. Each goal had benchmarks. The first goal required Student to initiate a greeting and “greeting extension,” such as “play tag” or “want go.” In the second goal, Student would be required to navigate to his “help” folder to advocate for his needs. The third goal required that Student construct a sentence using a subject, verb, and object. The fourth and final goal required Student to express how he felt.

The IEP notes indicated that Parent raised concerns about Student’s communication levels. She agreed with the speech and language goals but wanted to see more improvement as it related to Student’s health needs. Horan recommended adding individual speech sessions to increase Student’s communication.

The goals addressed Student’s skills and his areas of need in speech, language, and expression.

PEER SOCIALIZATION, SOCIALIZATION AND ADULT SOCIALIZATION, SENSORY SENSITIVITY

The next area of need in the 2022-2023 IEP was "social" and "emotional behavior." Student met all five previous goals, achieving between 72 and 95 percent in performance level. Student substantially progressed over the school year in using his AAC device for functional communication and engaging in replacement behaviors to avoid outbursts. Student was also learning to tolerate denied access to highly preferred items. However, Student needed to maintain that progress for longer periods of times. Student also needed to request restroom breaks more often, and not void on himself, and to expand the amount of leisure activities and skills to non-technological items.

The IEP team proposed no additional goals in this area for 2022-2023 but added socialization tasks to his communication and behavior skills. These included the need for Student to express how he was feeling, navigating into his "help" folder to advocate for his needs, and expressing how he was feeling. The IEP notes reflect that the team recognized that Student needed to develop interests that would allow him to make friends, resulting in goals for group play with board games, puzzles, Thera putty, and sensory bins. These also addressed Student's sensory needs.

The 2022 IEP appropriately addressed Student's sensory and adult and peer socialization needs.

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STEREOTYPE, AGGRESSION, SELF-INJURIOUS BEHAVIOR, SAFETY SKILLS, OUTBURST BEHAVIOR AND BEHAVIOR RIGIDITY

The 2022 IEP did not specifically delineate stereotype, aggression, self-injurious behavior, safety skills, outburst behavior and behavior rigidity as “needs.” Again, the evidence at hearing established that all of these areas were appropriately addressed in the provided goals.

In the area of “behavior,” Capistrano proposed eight new goals. In the first goal, Student would swallow what was currently in his mouth and wait before continuing to eat to avoid gagging or throwing. The second goal required Student to independently request access to an item, activity, or area by selecting a single icon or word on his AAC device. The third goal required Student to select the word or icon “bathroom” on his AAC device when presented with a visual that it was time to transition to the restroom. In Student’s fourth goal, when presented with a sensory or non-technological item, game or puzzle, Student would independently attend to the activity for seven minutes in the absence of challenging behaviors. In the fifth goal, Student would tolerate denied access to a previously requested item, task, or area by continuing with the task without challenging behaviors. The sixth goal required Student to attend to a tabletop task for seven minutes with proper body orientation and engagement. The seventh goal required Student to request a “break” from aversive stimuli, as demonstrated by indicating that he needed a break on his AAC device. The eighth and final behavioral goal provided that when Student was presented with a coping strategy, Student would independently engage in that coping strategy without challenging behaviors.

All of the goals listed above addressed, either directly or indirectly, Student's behavior needs. The behavior specialist indicated that Student was showing a downward trend for aggression, elopement, and self-injurious behavior incidents. This included managing his outbursts and self-injurious behavior. The 2022 IEP appropriately addressed Student's needs in these categories.

ATTENTION/SELF-REGULATION, ADAPTIVE BEHAVIOR SKILLS, DAILY LIVING SKILLS

In the area of "self-care," Student met one out of two goals, was progressing on the second goal, and had achieved 80 percent success overall. The team did not propose new goals in "self-care" but moved Student's toileting goal to behavior. Student's final area of need was "motor skills." Capistrano proposed four new goals. The first required Student to trace over the four-inch letters of his initials deviating no more than $\frac{1}{4}$ inch. The second goal required Student to cut along an eight-inch line, staying within $\frac{1}{4}$ inch of the cutting line. The third goal required Student to perform two alerting and two calming sensory activities in the occupational therapy room. The fourth goal required Student to engage in visual motor tasks for five minutes.

Student did not prove by a preponderance of the evidence in Issue 5(a) that the goals presented in the 2022-2023 IEP were inappropriate, or that Capistrano did not address all of Student's needs as required in the IEP. Again, Parent consented to the 2022-2023 IEP, and agreed to all the goals. Shinn opined that although some of the goals discussed regression and safety, there were no specific goals for either one. However, the IEP provided extended school year services, and Port View personnel who testified all indicated that there was only limited regression by Student, primarily after medication changes.

Once again, a thorough review of the non-academic goals, and the testimony adduced at hearing, established that Capistrano addressed Student's safety, his ability to solve problems, such as sorting and making specific choices when asked, and his ability to monitor his own behavior and self-care. While Student did not meet every goal, he did meet many of them and was progressing on all the others. The goals, taken as a whole, were challenging and appropriate and addressed Student's needs.

SERVICES AND PLACEMENT IN THE 2022 IEP ADDRESSED STUDENT'S NEEDS

Student did not prevail on Issues 5(b) and 5(c). The 2022-2023 IEP proposed the following services for Student:

1. Specialized academic instruction within a group session, for 360 minutes per day.
2. A one-to-one aide 360 minutes per day.
3. Speech and language services within a group session 60 minutes per week.
4. A speech and language consultation 30 minutes per month.
5. Occupational therapy within a group session, 30 minutes per week.
6. Occupational therapy consults 30 minutes per month.
7. Curb-to-curb transportation.
8. Extended school year services for 35 days.

Student did not present any evidence that the additional services offered were inadequate, or inappropriate. The IEP again recommended continued placement at Port View. The overwhelming evidence presented at hearing demonstrated that the proposed services were allowing Student to make substantial progress. Solano

testified that Student's abilities had expanded and deepened from 2021 to 2022. By the 2022 school year, Student was working on identifying kindergarten sight words, on transitioning to the restroom and communicating his need to toilet to understand how to advocate this need. These steps demonstrated the success Port View educators had made in his learning and personal progress.

The evidence demonstrated that Port View was the least restrictive environment, provided Student with a highly structured program that allowed him to progress, and had sufficient staffing to keep Student safe and manage his maladaptive behavior. No evidence suggested that for the 2022-2023 IEP, placement at Port View was inappropriate or that Parent suggested an alternative placement. Accordingly, Capistrano did not deny Student a FAPE in the 2022-2023 IEP, and Capistrano prevailed on Issue 5.

ISSUE 6: DID CAPISTRANO DENY STUDENT A FAPE BY FAILING TO ENSURE THE IEP TEAM COMPRISED THE NECESSARY PARTICIPANTS, SPECIFICALLY THE SCHOOL PSYCHOLOGIST, AND ALTERNATE AUGMENTATIVE COMMUNICATION SPECIALIST, AT THE FEBRUARY 23, 2022, IEP TEAM MEETING?

An IEP team must include at least the parent; a representative of the local educational agency; a regular education teacher of the child if the child is, or may be, participating in the regular education environment; a special education teacher or provider of the child; an individual who can interpret the instructional implications of assessment results, and other individuals who have knowledge or special expertise regarding the pupil, as invited at the discretion of the district, the parent; and when appropriate, the student. (Ed. Code, § 56341(b)(1), (5-6).) "An individual who can interpret the instructional

implications of assessment results” may be “one of the other statutorily mandated members of the IEP team, or another individual who has knowledge or special expertise regarding the student.” (*J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 461.) The law provides a list of those individuals who must participate in designing an IEP; an expert on the child’s specific disability is not required. (*B.D. v. Puyallup School Dist.* (9th Cir. 2011) 456 Fed. Appx. 644, 645; *R.P. v. Prescott Unified School Dist.*, (9th Cir. 2011) 631 F.3d 1117, 1122.)

The February 23, 2022 IEP meeting was attended by Parent and her advocate; Education Specialists Solano and Nicole Kolenic; Occupational Therapist Lori Spear; Assistant Principal Sarah Kagawa-Purohit; speech therapist Horan; and behavior specialist Danielle Krausse.

Capistrano contends that Student offered no compelling evidence at the hearing as to why a school psychologist or second “AAC specialist” was required to attend this meeting. Capistrano is correct on the latter point, as Horan was an AAC specialist. However, there was no evidence that a psychologist was present or “an individual who can interpret the instructional implications of assessment results.” The law requires that such a person be present or be excused by the student. No evidence of an excusal of a psychologist was presented at hearing. As such, Capistrano’s failure to have a psychologist attend was a procedural violation of the IDEA.

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In matters alleging a procedural violation, a due process hearing officer may find that a child did not receive a FAPE only if the procedural violation did any of the following:

- Impeded the right of the child to a FAPE.
- Significantly impeded the opportunity of the parent to participate in the decision-making process regarding the provision of a FAPE to the child of the parent.
- Caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)I; Ed. Code, § 56505, subd. (f)(2).)

A hearing officer also shall not base a decision solely on non-substantive procedural errors unless the hearing officer finds that the non-substantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian of the pupil to participate in the formulation process of the IEP. (Ed. Code, § 56505, subd. (j).)

Student presented no evidence that his right to a FAPE was impeded by the failure of a psychologist to attend the meeting. There was nothing in the record to suggest that review of an assessment was necessary at the February 23, 2022, meeting, or that Student was denied services or accommodations as a result of that violation. Nor did Student present any evidence at the hearing that the need for interpretation of an assessment occurred at this meeting.

The IEP meeting was attended by Parent and an advocate. The notes of the February 23, 2022, IEP do not reflect any concern raised by Parent or her advocate that the non-presence of a psychologist was an issue. The notes also reflect that Parent

freely expressed her concerns at the meeting. Parent did not testify at hearing that her ability to participate at the February 2022 meeting was impinged, or that the presence of a psychologist would have allowed her to add pertinent information for the team to consider.

Finally, Capistrano offered appropriate goals, accommodations, and services to Student. There was no evidence that the failure of a psychologist to attend the meeting deprived Student of any educational benefit. All the personnel at the meeting were highly qualified and most were involved in Student's daily education and services. As such, although Capistrano failed to have a psychologist present at the meeting, Student failed to establish why the non-presence of a psychologist was a substantive violation of the IDEA. Accordingly, Capistrano prevailed on Issue 6.

ISSUE 7: DID CAPISTRANO DENY STUDENT A FAPE IN THE IEP DATED FEBRUARY 22, 2023, BY FAILING TO OFFER APPROPRIATE GOALS, SERVICES AND PLACEMENT?

Student contends that Capistrano denied Student a FAPE in the IEP dated February 22, 2023, by

- a) failing to offer goals to appropriately address:
 - nonverbal intellectual ability,
 - receptive language,
 - expressive language,
 - pragmatic language,
 - communication,
 - peer socialization,

- adult socialization,
 - stereotype,
 - behavior rigidity,
 - sensory sensitivity,
 - attention/self-regulation,
 - adaptive behavior skills,
 - daily living skills,
 - aggression,
 - socialization,
 - safety skills,
 - outburst behavior; and
 - self-injury behaviors,
- b) failing to offer services to appropriately address areas of need identified above in (a); and
- c) failing to offer a placement appropriate to support the goals and services identified above

Capistrano denies that it denied Student a FAPE and contends that it provided appropriate placement, goals, accommodations, and services.

Student's annual IEP team meeting was held on February 22, 2023. Parent was concerned with Student's increasing maladaptive behaviors at home and his high levels of self-injurious behaviors. Parent was concerned that Student's safety was in jeopardy at home as a result. This included destruction of property at home and in his room.

This contrasted with Student's behavior at school over the past year where Student communicated well with adults using his AAC device, and his behavior had improved. Student still required more peer interaction at school.

THE 2023-2024 IEP GOALS ADDRESSED STUDENT'S UNIQUE NEEDS

Speech pathologist Horan opined that Student's 2022 IEP goals had been challenging, and his goals in 2023 were similarly ambitious. The team believed that Student's progress resulted in more rigorous goals. Occupational therapist Krause testified that Student was able to take on an ambitious program because he had increased his tolerance for denied access to preferred items and activities, increased his ability to communicate his wants and needs, and increased his ability to cope with frustration. Shinn, on the other hand, opined that the 2023 IEP did not match the level of supports needed by Student as it did not address his intellectual ability and did not enable Student to use his AAC device with peers. However, Shinn acknowledged that Student received "some benefit" because he met numerous goals and was progressing towards others.

NONVERBAL INTELLECTUAL ABILITY

As before, the February 22, 2023, IEP did not specifically list "nonverbal intelligence" as an area of need. Once again, other goals discussed below directly addressed this need. This included goals in the area of socialization, math, reading, safety skills and behaviors.

In the area of "reading," Student met four out of six goals, with achievement success between 60 and 93 percent. Student still required aid in correctly expressing

emotions in visuals that were presented. The team proposed two new goals. The first goal required Student to be able to identify emotions in others by expressing that emotion on his AAC device and the second goal required Student to use three words or icons to describe a picture or video.

The next area was in “mathematics.” Student met one out of three goals, with an achievement level of 67 to 87 percent. Student could not sort items by color, and could only demonstrate receptive knowledge of quantitative concepts, such as big or small, with 42 percent accuracy. Two new math goals were proposed. In the first goal, Student would be able to demonstrate pointing to a specified object from a field of two or more numbers. In the second goal, Student would be able to demonstrate knowledge of quantitative concepts by pointing to an item stated by staff.

All of these goals addressed Student’s skills at solving problems and addressed Student’s nonverbal communication deficits.

RECEPTIVE LANGUAGE, EXPRESSIVE LANGUAGE, PRAGMATIC LANGUAGE, AND COMMUNICATION

In the area of “communication,” Student progressed towards all four 2022-2023 goals, achieving 45 to 70 percent success rate. The team proposed four goals for the 2023 IEP. The first goal measured Student’s sequencing in language. When shown three picture cards depicting activities of daily living, such as “brushing teeth”, Student would place them in the correct order. In the second goal, Student was required to describe a picture, object, or video by providing one association with a “3+ icon phrase”. The third goal required Student to expressively identify 10 body parts by navigating to

the "body parts" folder on his AAC device. The fourth and final goal provided that when given a simple problem, such as running out of toothpaste, Student would state the problem to an adult.

The goals addressed Student's skills and his areas of need in speech, language, and expression.

PEER SOCIALIZATION, SOCIALIZATION AND ADULT SOCIALIZATION,
SENSORY SENSITIVITY

The 2023 IEP addressed Student's socialization and sensory needs through various goals. Student's second behavioral goal required him to engage in coping strategies when presented with adverse stimulus. The third behavioral goal required Student to engage in sensory leisure activities that involved puzzles, playdoh, Thera putty or sensory bins. Student's first reading goal required Student to identify the emotions expressed by others. Student's third motor goal addressed sensory processing.

The 2023 IEP appropriately addressed Student's adult and peer socialization needs, and his sensory needs.

STEREOTYPE, AGGRESSION, SELF-INJURIOUS BEHAVIOR, SAFETY SKILLS,
OUTBURST BEHAVIOR AND BEHAVIOR RIGIDITY

The 2023 IEP did not specifically delineate stereotype, aggression, self-injurious behavior, safety skills, outburst behavior and behavior rigidity as "needs." Again, the evidence at hearing established that all of these areas were appropriately addressed in the provided goals discussed in this section including behavior, regulation, self-care, and

denied access. Student was also provided a behavior intervention plan to deal directly with his self-injurious behavior. The evidence established, as discussed in Issue 9, Student's behavior and outbursts had diminished over the previous two years.

Capistrano appropriately addressed these needs.

ATTENTION/SELF-REGULATION, ADAPTIVE BEHAVIOR SKILLS, DAILY LIVING SKILLS

The next area of need was "behavior." Student met six out his eight 2022 IEP goals. Student achieved between 38 and 100 percent progress on each goal. Student had made significant progress in requesting access but continued to engage in challenging behaviors when denied or delayed access. Student continued to need physical assistance with self-care in the restroom and continued to engage in self-injurious behavior. The team proposed an additional eight goals for the 2023-2024 IEP.

The first goal required Student to complete a series of consecutive tasks when given visual support and given breaks as needed, and transition from one task to another. The second goal required Student to independently engage in coping strategies or go to a coping location when engaging in precursor behaviors such as physical aggression. The third goal provided that when presented with a sensory or non-technological play item, such as a puzzle, Student was required to independently engage with each activity without challenging. The fourth goal provided that when Student was given a set visual timer for a restroom break, he would independently select the bathroom icon on his AAC device upon the timer going off, without challenging behaviors. The fifth goal required Student to independently request a "break" or "all done" from adverse stimuli by either signing or selecting the "I need a break" icon without challenging behaviors. The sixth goal stated that when Student

was taken to the restroom each hour, Student would void in the toilet or have a dry diaper. The seventh goal also addressed toileting. In that goal, Student would independently complete each step, such as grabbing toilet paper and wiping himself, when completing his restroom routine. In the eighth and final goal, Student would independently tolerate denied or delayed access to a previously requested item or task by continuing with the current task or choosing an alternative activity in the absence of challenging behaviors.

The team proposed three new self-care goals for the 2023 IEP. The first goal required Student to engage in domestic tasks. The second goal required Student to wash a plate, a bowl, and a cup. The third and final goal involved food preparation. Student would follow steps needed to operate a microwave oven given a visual for how many minutes he needs to press.

In "motor control," the team proposed three new goals. The first goal required Student to spell his name utilizing a variety of media. The second goal required Student to demonstrate the ability to complete at least three functional bilateral coordination tasks, such as pulling up his pants or zipping his coat, given a visual demonstration. The third and final goal required Student demonstrate the ability to proactively access or utilize identified strategies within his environment to assist with attention, regulation, and participation.

An additional IEP meeting was held on April 21, 2023, which is discussed in further detail below in Issue 9. At that meeting, Krause stated that Student was making behavioral progress at school. Port View implemented a process where Student would wear a protective helmet, which improved his self-injurious behaviors. When Student had outbursts or engaged in such behavior, the Port View staff had implemented various

non-aggressive procedures to de-escalate Student's outbursts. This included using low tones of voice, limited demands, pads to isolate Student, and calming words. Krause also noted that based upon the data collected, Student's outbursts often increased when he had personal medication changes, or had taken long breaks from school, such as vacations and holidays. Solano observed that when medication changes occurred, they would hold back on certain demands of Student until he adjusted. The evidence showed that despite the behavior concerns, Student was able to attend instructional outings with the class with little concern, and in fact actively participated in trips to the park. Krause opined that overall, Student's behaviors were manageable in the current setting. The occupational therapist, Spear, noted that Student was progressing well on his new goals.

Student did not prove by a preponderance of the evidence in Issue 7(a) that the goals presented in the 2023-2024 IEP did not fully address all Student's areas of need. Parent consented to the 2023-2024 IEP and agreed to all the goals. Shinn's opinion that the goals were generalized, and the IEP did not have comprehensive goals regarding non-verbal intelligence, was not credible when viewed against the overwhelming evidence of Student's progress in prior IEPs and the complexity of the new goals. A school district is not required to address a student's behavior problems that occur outside of school when the student demonstrates educational progress in the classroom — generalization of skills is not required for a student to receive a FAPE. A school district is required to address behavioral problems extraneous to the academic setting only to the extent they affect the student's educational progress. (*San Rafael Elem. Sch. Dist. v. Cal. Special Educ. Hearing Office* (N.D. Cal. 2007) 482 F. Supp. 2d 1152, 1160, 1162. Once again a thorough review of the goals, and the testimony presented at

hearing, established that Capistrano addressed Student's safety, his ability to solve problems, his communication with adults and peers, comprehension levels and his ability to monitor his own behavior and self-care.

SERVICES AND PLACEMENT IN THE 2023 IEP WERE APPROPRIATE

Student did not prevail on Issues 7(b) or 7(c). The 2023-2024 IEP proposed the following services for Student:

1. Specialized academic instruction within a group session, for 360 minutes per day.
2. A one-to-one aide 360 minutes per day.
3. Speech and language services within a group session 60 minutes per week.
4. A speech and language consultation 30 minutes per month.
5. Occupational therapy within a group session, 30 minutes per week.
6. Occupational therapy consults 30 minutes per month.
7. Curb-to-curb transportation.
8. Extended school year services for 35 days.

The IEP also recommended continued placement at Port View, and Student did not challenge the adequacy of any of the above services at the IEP meeting or at hearing. The evidence demonstrated that the proposed services allowed Student to make substantial progress. The evidence demonstrated the success Port View educators had made in his learning and personal progress. By the time of the 2023 annual review,

Student had met 12 of his 24 goals from the prior year. Student's behaviors were generally triggered by demands made upon the use of complex and nonpreferred tasks and activities in Student's program demonstrated his progress in attending to tasks, tolerating denied access, and coping with feeling frustrated.

No evidence suggested that for the February 22, 2023, IEP placement at Port View was inappropriate or that Parent suggested an alternative placement. To the contrary, the notes of the February 22, 2023, IEP stated that "[f]amily would like to keep [Student] at Port View and feels its (sic) an appropriate placement." Port View allowed Student to make substantial progress and he received a meaningful educational benefit. The only concern about placement that was raised in the February 22, 2023, IEP meeting was Student's safety at home, and his tendency to destroy items and hurt himself at home. Parent indicated that the Orange County regional center approved Student for a home residential program but could not find any openings for him. As discussed thoroughly in Issue 9 below, the Port View program at school was highly structured with well trained staff and had sufficient support to control Student's outbursts.

Accordingly, Capistrano did not deny Student a FAPE in the February 22, 2023, IEP, and Capistrano prevailed on Issue 7.

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ISSUE 8: DID CAPISTRANO DENY STUDENT A FAPE BY FAILING TO ENSURE THE IEP TEAM COMPRISED THE NECESSARY PARTICIPANTS, SPECIFICALLY THE SCHOOL PSYCHOLOGIST, AND ALTERNATE AUGMENTATIVE COMMUNICATION SPECIALIST, AT THE FEBRUARY 22, 2023, IEP TEAM MEETING?

Parent; pediatrician Dr. Kozak; Regional Center Behavior Support Specialist Chrislyn Saxena; Regional Center Coordinator Michelle Mendez; Port View Director (and psychologist) Dr. Tomaino; teachers Solano and Kolenic; Krause; Horan and Rucireta attended the February 22, 2023, IEP meeting. No compelling evidence was presented at the hearing why a separate school psychologist or a “AAC specialist” was required to attend this meeting. No evidence suggested the absence of these additional individuals limited the development of the goals and services offered to Student. All the personnel at the meeting were highly qualified and most were personally involved in Student’s education and services. Student failed to establish why the failure of either of the identified individuals to attend this meeting was a procedural violation of the IDEA.

Accordingly, Capistrano prevailed on Issue 8.

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ISSUE 9: DID CAPISTRANO DENY STUDENT A FAPE IN THE IEP DATED APRIL 21, 2023, BY FAILING TO OFFER APPROPRIATE GOALS, SERVICES AND PLACEMENT?

An annual IEP team meeting was held on April 21, 2023. Student contends that Capistrano denied Student a FAPE in the IEP dated April 21, 2023 by

a) failing to offer goals to appropriately address:

- nonverbal intellectual ability,
- receptive language
- expressive language,
- pragmatic language,
- communication,
- peer socialization
- adult socialization,
- stereotype,
- behavior rigidity,
- sensory sensitivity,
- attention/self-regulation,
- adaptive behavior skills,
- daily living skills
- aggression,
- socialization

- safety skills,
 - outburst behavior; and
 - self-injury behaviors,
- b) failing to offer services to appropriately address areas of need identified above in (a); and,
- c) failing to offer a placement appropriate to support the goals and services identified above.

Capistrano denies that it denied Student a FAPE and contends that it provided appropriate placement, goals, accommodations, and services.

The primary concern raised by Parent at the April 21, 2023 meeting focused on Student's continued and increasing maladaptive behaviors and his high levels of self-injurious and destructive behaviors at home. Student's behaviors had worsened and escalated to the point that in March and April of 2023, Student had caused a hematoma in his ear, requiring emergency hospital treatment and a psychiatric hold. Student acted out at home, often destroying property in his room, and disrupting the household.

GOALS AND SERVICES

No new goals or services were proposed to be added to the February 22, 2023, IEP at the April 21, 2023 meeting. Parent indicated she was "very overwhelmed" at the February 2023 meeting and felt somethings had been overlooked. Parent's focus was on Student's behavior at home, as well as he his lack of communication. Parent and

Student's pediatrician reported that Student's self-injurious behavior at home had caused him hospitalization and injuries to his person. Parent also raised concerns that Student's AAC device was broken at home.

Port View's principal advised Parent they would provide a loaner AAC device to Student for use at home until his other AAC device was repaired. He also offered to consider any additional supports needed to assist Parent at home. However, based upon his own observations, Port View was seeing positive results and progression at school. Finally, a behavior intervention plan assessment was offered by the team to determine what additional supports could be added.

Based upon the analysis in Issue 7, the goals offered in the February 2023 IEP sufficiently addressed Student's unique needs. Student did not prove by a preponderance of the evidence that any new information provided at the April 21, 2023 meeting required additional goals and services be considered.

PLACEMENT

Although Parent had agreed in February 2023 that Port View was an appropriate placement and wanted Student to remain at Port View, at the April 21, 2023, meeting, Parent requested that Student should now be placed at a full-time residential treatment center, referred to as an RTC. Parent contends that while Port View is a highly structured placement for Student, Student's behaviors regressed at home, and escalated to the point of causing damage to the home, damage to Student, as well as to Mother and his sister. As such, Parent argued that Capistrano should have changed Student's placement in April 2023 to an RTC. Capistrano argued that Student's placement at Port View was appropriate, that he was making progress and learning, and that most concerns were at

home, not at school. As such, Capistrano argued an RTC placement would not be the least restrictive environment, and in fact, would undermine the progress made at Port View.

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.)

To determine whether a school district offered a student a FAPE the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide

the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefit. (*Id.*)

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.)

Student's maladaptive behaviors at Port View decreased during the 2022-2023 school year. This progress occurred despite the increase of academic and social demands on Student that would normally trigger his maladaptive behaviors at school. Even though the 2022 and 2023 IEPs increased Student's expectations in his learning, Student decreased his maladaptive behaviors over the course of the two school years. The primary spikes of maladaptive behavior were limited to Student's return from breaks or changes in circumstances outside of the school setting. Solano, Rucireta, Horan, and Krause testified that Student's behaviors are safely managed at Port View, with minimal techniques including blocking with soft mats. Student attended classes at Port View more than 95 percent of instructional days at Port View.

Parent pointedly testified about the injuries Student suffered at home, as well as Student's destruction of items in his room including the windows, window coverings, walls, and other items. Student offered two video exhibits demonstrating his behavioral outbursts at home and at school. The home video showed Mother attempting to de-escalate Student's conduct with frequent demands on Student to calm himself and avoid destruction when he was upset. Student appeared to escalate his behavior, throwing items, hitting himself and striking Parent. The other video showed Student having a similar behavioral outburst at school. In that video, Student was put prone on a padded mat. Krause supported Student while holding a thin mat to prevent him from

moving, rolling, or standing. Krause did not make any demands upon Student in the video and spoke to him calmly. After a short period of time, Student de-escalated, and Krause then inputted the behavior data in her tablet.

Elliot Handler, M.D. testified at hearing. Handler is a psychiatrist and supervised the treatment of Student by Dr. Jessica Tran at the University of California, at Irvine medical center. Handler did not have first-hand experiences with Student and did not fully review Student's IEPs or observe Student's conduct at school. Handler also agreed on cross-examination that a comparison of the tone of how Parent versus the way Krause de-escalated Student in the two videos could be an important factor. However, Handler opined that based upon Student's self-caused hematoma to his ear, his treatment at the hospital, the psychiatric hold, as well as the scrapes and bruises on his face and body, an RTC placement was more appropriate than Port View.

Handler's testimony was not persuasive because he lacked sufficient foundation to evaluate Student's educational placement. Handler's opinion was primarily based upon his supervision of Dr. Tran, and his review of the medical records. Handler conceded that he had not reviewed Student's IEPs or reviewed Student's educational records to determine if an RTC placement would allow Student to have a better superior learning benefit. Handler admitted he had no experience directly supporting Student during a behavioral outburst, and he had not observed Student being supported with suitable behavioral strategies at home or at school until he saw the videos at hearing.

Shinn opined that she had a high opinion of Port View as a placement, and that she had treated other students attending Port View. Shinn also opined that she often recommended Port View as a suitable placement for students with similar behavioral issues. However, because of the severity of Student's behaviors, Shinn felt that Student

required a 24-hour placement to avoid regression and harm during the non-school hours. Shinn opined that Student loses the gains he achieves at school when he returns home, and that he is unable to recover skills following instructional breaks. Shinn also felt that Port View was not appropriate because Student was not generalizing the various coping and behavioral skills he learned outside of the school environment.

Under *Rachel H.*, the analysis of whether an offer of placement is appropriate begins with evaluating whether a general education setting is appropriate for Student. There was no dispute in this case that a general education setting was not the appropriate placement for Student, and neither party argued for such a placement. The primary issue is whether placement at Port View would provide sufficient educational benefits to Student, or if he required a full-time placement at an RTC to accomplish that goal. Accordingly, a detailed analysis of each of the *Rachel H.* factors is not necessary to determine that full time general education was not an appropriate placement.

Residential placement is, by its nature, considerably more restrictive than day school. (See *Kerkam by Kerkam v. Superintendent, D.C. Public Schools*. (D.C. Cir. 1991) 931 F.2d 84, 87; *G.D. v. Westmoreland School Dist.* (1st Cir.1991) 930 F.2d 942, 948; *Carlisle Area School v. Scott P. By and Through Bess P.* (3d Cir. 1995) 62 F.3d 520, 534, amended (Oct. 24, 1995).) The IDEA does not define a therapeutic placement; however, both day schools and residential facilities can qualify as therapeutic placements. By their very nature, therapeutic placements require a student's removal from the general education environment. As a result, a therapeutic placement is one of the most restrictive placements on the least restrictive environment continuum. (34 C.F.R. § 300.115.) Given their restrictive nature, removal of a student with disabilities to a residential setting complies with the least restrictive environment mandate in only extremely limited

situations for students with severe disabilities who are unable to receive a FAPE in a less restrictive environment. (*Carlisle Area Sch. Dist. v. Scott P.*, supra, 62 F.3d at p. 523.)

A district's responsibility under the IDEA is to remedy the learning-related symptoms of a disability, not to treat other, non-learning related symptoms. (*Forest Grove School District v. T.A.* (9th Cir. 2011) 638 F.3d 1234, 1238-39 [no abuse of discretion in denying parent reimbursement where district court found parent sought residential placement for student's drug abuse and behavior problems.].) An analysis of whether a residential placement is required must focus on whether the placement was necessary to meet the child's educational needs. (*Clovis Unified School District v. California Office of Administrative Hearings* (9th Cir. 1990) 903 F.2d 635, 643 (Clovis).) If "the placement is a response to medical, social, or emotional problems ... quite apart from the learning process," then it cannot be considered necessary under the IDEA. (*Id.*, accord *Ashland School Dist. v. Parents of Student R.J.* (9th Cir.2009) 588 F.3d 1004, 1009.).

Student did not prove by a preponderance of the evidence that placement at an RTC would be the least restrictive environment for Student. Student made progress in his program throughout his years at Port View and demonstrated progress at each of the annual reviews at issue in this matter. The evidence established that, up through and including the February 22, 2023, IEP meeting, all parties agreed that Port View was the correct placement for Student. Mother even expressed her desire that Student remain at Port View at that meeting. The February meeting notes demonstrate that the primary problem was insufficient support for Parent and Student at home, not at Port View. The local regional center had agreed to provide personnel to assist Parent but was unable to find staff to fill that role. The events at home and in Student's private life,

including changing his medication, often resulted in Student's conduct escalating. However, when those escalations occurred at Port View, the highly structured nature of the program successfully adapted to Student's changes.

Heather Pizzo testified at hearing. Pizzo was coordinator of Mental Health Services at Capistrano and has experience working with three California approved RTCs. Pizzo worked with placing students at Port View while she was employed at Capistrano. Pizzo opined that Port View's program works with students with lower cognitive abilities and autism and had a strong behavioral program that meets students' academic, vocational, and daily living skills and needs. Pizzo attended the April 21, 2023, IEP meeting. Pizzo opined that based upon her review of Student's IEPs, his progress on goals and his attendance, Port View was the least restrictive environment for Student because Port View uses the same methods as an RTC. Pizzo believed that if Student was placed at an RTC, his maladaptive behavior may not necessarily improve, but will just be displayed in another environment rather than at home. Because Student did not react well with transition and new people, placement in an RTC would put Student in a new environment with new people, away from his family and the people he had grown accustomed to at Port View.

Kerkam by Kerkam, supra, 931 F.2d 84 presents an appropriate analysis on facts like those presented here. Parents rejected a day-class placement offer for their cognitively impaired son and unilaterally placed him in a residential treatment center because having him live at home "had proved unworkable." (*Id.* at p. 87.) Parents then sought reimbursement from the district. The court agreed that the parents' chosen residential placement was superior to the day class offered by the district for Student's overall well-being, but that the district had still met its educational obligations, since

the student was educationally progressing at the proposed placement (*Id.*). See also *Ashland, supra*, at 1009, 1010, holding that the District Court correctly rejected Student's argument that placement at an RTC was the district's responsibility, because Student's "risky behaviors" outside of school prompted her parents to place her at the RTC. "Where, as here, the private-school placement is a residential facility, the placement is appropriate only if it is 'necessary to provide special education and related services.'" (*Id.*) See *Seattle School Dist., No. 1 v. B.S., supra*, at 1501(1996), holding that placement at a RTC was appropriate where the ALJ and the district court found that Student was unable to derive any meaningful benefit from the current placement.

No dispute exists that Mother is a single parent, and Student and his sister are still recovering from the death of their father. This has aggravated Student's behavior at home and has put tremendous pressure on Parent. In addition, the Orange County regional center has not provided Parent the aid it has promised. However, based upon the legal requirements of the IDEA, Capistrano appropriately offered Student placement at a suitable educational placement in Port View in the April 2023 IEP, where he progressed and continued to show development in his educational program.

As such, Capistrano prevailed on Issue 9.

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ISSUE 10: DID CAPISTRANO DENY STUDENT A FAPE BY FAILING TO ENSURE THE IEP TEAM COMPRISED THE NECESSARY PARTICIPANTS, SPECIFICALLY THE SCHOOL PSYCHOLOGIST, AND ALTERNATE AUGMENTATIVE COMMUNICATION SPECIALIST, AT THE APRIL 21, 2023, IEP TEAM MEETING

The April 21, 2023, meeting was attended by, among others,

- Education Specialist Kolenic; Pizzo (a psychologist);
- Tomaino (a psychologist);
- Orange County Regional Center Area Manager Carmen Gonzalez;
- Dr. Valeria Kozak;
- Student's pediatrician;
- Regional Center Service Coordinator Michelle Mendez;
- Occupational Therapist Lori Spear;
- Horan; Pizzo;
- Port View Principal Dr. Edward Miguel;
- Krausse;
- Solano;
- Mother and
- her attorney.

As noted by Capistrano, there were two psychologists present at this meeting, Tomaino and Pizzo, and speech therapist Horan was an AAC specialist. Student offered no evidence that the composition of the team negatively impacted Student's education or the offer of FAPE.

Capistrano prevailed on Issue 10.

ISSUE 11: DID CAPISTRANO DENY STUDENT A FAPE BY DENYING PARENT THE RIGHT TO MEANINGFULLY PARTICIPATE IN THE IEP DEVELOPED ON APRIL 21, 2023, BY PREDETERMINING ITS OFFER OF EDUCATIONAL PROGRAMMING?

Student contends that Capistrano predetermined Student's special education eligibility, supports, services and placement at the April 21, 2023, meeting. Capistrano stated it did not predetermine Student's IEP and that Parent meaningfully and fully participated in the IEP team meeting. Student did not meet his burden of proof on this issue.

A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation and then simply presents the IEP to the parent for ratification (*Ms. S. ex rel. G. v. Vashon Island Sch. Dist.*, at 1131 (9th Cir. 2003)). A school district may not enter an IEP meeting with a "take it or leave it" position, and if it does so, then even the parents' decision not to cooperate thereafter may not excuse the district's error. (*Id.*).

Predetermination is a procedural violation of the IDEA that occurs in connection with an IEP team meeting when a district has decided on its offer prior to the meeting,

such as when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*H.B. v. Las Virgenes*, 239 Fed.Appx. 342, 344 345.)

Predetermination causes a deprivation of educational benefits where, absent the predetermination, there is a strong likelihood that alternative educational possibilities for the student would have been better considered. (*M.S. v. Los Angeles Unified School Dist.* (C.D. Cal. September 12, 2016, Case No. 2:15-cv-05819-CAS-MRW) 2016 WL 4925910 at p.12. (citing *Doug C.*, *supra*, 720 F.3d 1038, 1047).) District team members may form opinions prior to IEP meetings. However, if the district goes beyond forming opinions and becomes “impermissibly and deeply wedded to a single course of action,” this amounts to predetermination. (*P.C. v. Milford Exempted Village Schools* (S.D. Ohio, Jan. 17, 2013, No. 1:11- CV-398) 2013 WL 209478, p.7.)

In this case, Student did not present evidence Capistrano predetermined Student’s program, and more importantly, the placement of Student at the April 21, 2023, meeting. The meetings’ notes and the testimony of meeting attendees established that Parent fully participated in the April 2023 IEP team meeting and was accompanied by an attorney. The purpose of the April 21, 2023, meeting was to discuss changes in placement. The notes also reflect that Student’s attorney freely participated. Regarding participation in discussing Student’s goals and services, Parent was present at the meeting and the prior February 22, 2023, meeting. Parent agreed to all goals and services of the February 2023 IEP. No request was made to change the goals or services at the April 21, 2023, meeting.

On the issue of placement, Parent had already consented to, and requested, placement at Port View as part of the February 22, 2023, IEP. As such Student did not credibly establish that Capistrano arrived at the April 21, 2023, meeting with a “predetermined” decision to continue placement of Student at Port View. To the contrary, and as discussed in Issue 9, the members of the IEP team engaged in a

comprehensive discussion about the least restrictive environment and what was best for Student's educational interests. Capistrano considered Parent's request that placement be made at an RTC, and the team thoroughly discussed the continuum of options available. Pizzo credibly opined that removing Student from Port View and placing him full time at a residential center would most likely not alleviate the behavioral problems facing Student, but simply shift them to a new environment. All the Port View staff who worked daily with Student expressed their belief that Student would continue to progress, and that his behavior would become more manageable over time, if he remained at Port View. This was consistent with the testimony and evidence presented at the hearing. Parent's concerns were thoughtfully considered and addressed by the team, additional outside personnel attended the meeting, and Capistrano proposed an additional behavior assessment to assist matters at home. There was no indication that Capistrano was making a "take it or leave it" offer to Student.

Student did not meet his burden of proof that Capistrano predetermined any of the goals, services, or placement options offered at the April 21, 2023, IEP meeting. Capistrano prevailed on Issue 11.

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.

ISSUES 1(a), 1(b), AND 1(c):

Capistrano did not deny Student a FAPE in the IEP dated February 26, 2021, and finalized on May 7, 2021.

Capistrano prevailed on Issue 1 in its entirety.

ISSUE 2:

Capistrano did not deny Student a FAPE by failing ensure the IEP team comprised the necessary participants, specifically the school psychologist, and alternate augmentative communication specialist, at the May 7, 2021, IEP team meeting.

Capistrano prevailed on Issue 2.

ISSUE 3(a), 3(b), AND 3(c):

Capistrano did not deny Student a FAPE in the IEP dated May 21, 2021.

Capistrano prevailed on Issue 3 in its entirety.

ISSUE 4:

Capistrano did not deny Student a FAPE by failing ensure the IEP team comprised the necessary participants, specifically the school psychologist, and alternate augmentative communication specialist, at the May 21, 2021, IEP team meeting.

Capistrano prevailed on Issue 4.

ISSUE 5(a), 5(b), AND 5(c):

Capistrano did not deny Student a FAPE in the IEP dated February 23, 2022.

Capistrano prevailed on Issue 5 in its entirety.

ISSUE 6:

Capistrano procedurally violated the IDEA by failing to ensure the IEP team comprised the necessary participants, specifically a school psychologist, at the February 23, 2022, IEP team meeting. However, Student did not prove that the lack of a psychologist denied Student a FAPE.

Capistrano prevailed on Issue 6.

ISSUE 7(a), 7(b), AND 7(c):

Capistrano did not deny Student a FAPE in the IEP dated February 22, 2023.

Capistrano prevailed on Issue 7 in its entirety.

ISSUE 8:

Capistrano did not deny Student a FAPE by failing to ensure the IEP team comprised the necessary participants, specifically the school psychologist, and alternate augmentative communication specialist, at the February 22, 2023, IEP team meeting.

Capistrano prevailed on Issue 8.

ISSUE 9(a), 9(b), AND 9(c):

Capistrano did not deny Student a FAPE in the IEP dated April 21, 2023.

Capistrano prevailed on Issue 9 in its entirety.

ISSUE 10:

Capistrano did not deny Student a FAPE by failing to ensure the IEP team comprised the necessary participants, specifically the school psychologist, and alternate augmentative communication specialist, at the April 21, 2023, IEP team meeting.

Capistrano prevailed on Issue 10.

ISSUE 11:

Capistrano did not deny Student a FAPE by denying Parent the right to meaningfully participate in the IEP developed on April 21, 2023, by predetermining its offer of educational programming.

Capistrano prevailed on Issue 11.

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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.

Brian H. Krikorian

Administrative Law Judge

Office of Administrative Hearings