

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

THE CONSOLIDATED MATTERS INVOLVING:
CAPISTRANO UNIFIED SCHOOL DISTRICT, AND
PARENT ON BEHALF OF STUDENT.

CASE NO. 2023120742

CASE NO. 2024040536

DECISION

AUGUST 1, 2024

On December 20, 2023, the Office of Administrative Hearings, called OAH, received a due process hearing request from Capistrano Unified School District, called Capistrano, in case number 2023120742. On April 15, 2024, OAH received a due process hearing request from Student naming Capistrano in case number 2024040536. On May 29, 2024, OAH consolidated the two cases, and identified Capistrano's case as the primary case for determining statutory deadlines.

Administrative Law Judge Jennifer Kelly heard this matter by videoconference on June 4, 5, 6, 7 and 17, 2024.

Attorney Kathleen Loyer represented Student. Parent attended all hearing days on Student's behalf. Attorney Alefia Mithaiwala represented Capistrano. Attorney Shiksha Patel observed all hearing days on Capistrano's behalf, except for June 17, 2024. Kathy Purcell, Capistrano's Executive Director Alternative Dispute Resolution Compliance, attended all hearings days on its behalf, except for the afternoon of June 17, 2024. Deborah Aufill, Legal Specialist, attended the hearing during the afternoon of June 17, 2024 on Capistrano's behalf.

At the parties' request, the matter was continued to July 8, 2024, for written closing briefs. The record was closed, and the matter was submitted on July 8, 2024.

ISSUES

A free appropriate public education is called a FAPE. An individualized education program is called an IEP.

CAPISTRANO'S ISSUE

1. May Capistrano implement the October 27, 2023 IEP without parental consent?

STUDENT'S ISSUES

2. Did Capistrano deny Student a FAPE in the 2023-2024 school year by failing to place him in the least restrictive environment?

3. Did Capistrano deny Student a FAPE in the 2023-2024 school year by failing to offer sufficient or adequate supplementary supports and services, specifically, behaviorally trained staff with supervision?

On day one of the due process hearing, the parties offered a Joint Stipulation of Facts for Due Process Hearing signed by the parties' attorneys in April 2024, called Joint Stipulation. The Joint Stipulation was admitted into evidence. The parties stipulated and agreed to the following:

1. Parents agree the IEP goals, which include goals in behavior, social/emotional, speech and language, and occupational therapy, in Student's October 27, 2023 IEP are appropriate and not in dispute.
2. Parents agree the program modifications, supplementary aids, and accommodations in Student's October 27, 2023 IEP are appropriate and not in dispute.
3. Parents agree the supports/modifications provided to school personnel in Student's October 27, 2023 IEP are appropriate and not in dispute.
4. Parents agree the testing accommodations in Student's October 27, 2023 IEP are appropriate and not in dispute.

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5. Parents agree the service of additional program support offered to Student in his October 27, 2023 IEP are appropriate and not in dispute.
6. Parents agree the speech language services offered to Student in his October 27, 2023 IEP are appropriate and not in dispute.
7. Parents agree the occupational therapy services offered to Student in his October 27, 2023 IEP are appropriate and not in dispute.
8. Parents agree that the Remote/Distance Learning Plan for Instruction and Services during Emergency Conditions in Student's October 27, 2023 IEP offered to Student in his October 27, 2023 IEP is appropriate and not in dispute.
9. Parents agree that they had the opportunity to participate in and help develop the October 27, 2023 IEP.
10. Parents agree that the only portions of Student's October 27, 2023 EP which are inappropriate, and therefore in dispute, are:
(1) Capistrano's offer for placement in the STARS program (Specialized Academic Instruction, called SAI, in a separate environment) for the regular school year and extended school year; and (2) Capistrano's offer of SAI in the "gen ed," meaning general education (lunch and recess) for 80 minutes weekly during the regular school year. Therefore, these are the only portions of Student's October 27, 2023 IEP to which Parents have not consented.

Based upon the parties' stipulation, the only components of Student's IEP in dispute were:

- Capistrano's offer to place Student in the STARS program for the 2023-2024 regular and extended school year; and
- Capistrano's offer of mainstreaming for Student during lunch and recess 80 minutes weekly with one-to-one aide support during the 2023-2024 regular school year.

During hearing and in his closing brief, Student contended Capistrano's board-certified behavior analyst, called behavior analyst, worked with Student without Parent's knowledge and should have attended the October 27, 2023 IEP team meeting. Student did not plead this issue in his complaint and Capistrano did not agree to add this issue to the due process hearing. Therefore, this Decision only decides the issues stated in the Order Following Prehearing Conference Granting Motion to Consolidate dated May 29, 2024, and as the ALJ clarified on the record with the parties at the start of hearing.

JURISDICTION

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

- all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to

meet their unique needs and prepare them for further education, employment and independent living, and

- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Each party had the burden of proof as to their respective issues. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was seven years old and ready to transition to second grade at the time of the hearing. Student resided with his parent and grandparents within Capistrano's boundaries. Parent held Student's educational rights. Student qualified for special education under the categories of autism, other health impairment, and speech or language impairment.

ISSUE 1: MAY CAPISTRANO IMPLEMENT THE OCTOBER 27, 2023 IEP WITHOUT PARENTAL CONSENT?

Capistrano's issue is analyzed first because a determination of whether Capistrano's placement offer was appropriate requires a finding the October 27, 2023 IEP's offer of goals, accommodations, supports, and services met Student's unique needs and was reasonably calculated to enable Student to receive educational benefit, regardless of parental stipulation. Only after identifying the necessary goals, accommodations, supports, and services that Student required to receive a FAPE does the question turn to whether the IEP's offer of educational placement was appropriate. Therefore, the appropriateness of an IEP placement requires a determination that the goals, accommodations, supports, and services offered in the IEP was reasonably calculated to enable Student to receive an educational benefit. (20 U.S.C. § 1412(a)(5)(A) (removal of the child from the regular education environment occurs only when the child cannot be satisfactorily educated in the regular class even with the use of supplemental aids and services).)

Capistrano contended its October 27, 2023 IEP was developed in accordance with the IDEA's procedural requirements and offered Student appropriate goals, services, and accommodations. Student stipulated to these contentions. Capistrano further contended the IEP's offer of placement in a special day class for students with mild-to-moderate disabilities offered Student a FAPE in the least restrictive environment. Capistrano seeks an order allowing it to implement Student's October 27, 2023 IEP without parental consent.

Student contended Capistrano's placement offer was not the least restrictive environment for Student. Student asserted the least restrictive environment for Student was a general education classroom with a one-to-one aide fluent in English and Spanish. Student further contended the one-to-one aide should be trained in applied behavior analysis and supervised by a behavior analyst for Student to receive a FAPE.

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. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an IEP for an eligible student based upon the IDEA and state law. (20 U.S.C. §§ 1401(14), 1414(d)(1); 34 C.F.R. §§ 300.320, 300.321, and 300.501; Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a), and 56363, subd. (a).) All references to the Code of Federal Regulations are to the 2006 version, unless otherwise noted.

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 (*Rowley*); *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. 386, 402 [137 S.Ct. 988, 1000] (*Endrew F.*))

Special education is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) Related services are transportation and other developmental, corrective, and supportive

services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [in California, related services are also called designated instruction and services].)

Specialized academic instruction is an instructional service, individualized based on a student's needs, and provided by a credentialed special education teacher. (California Department of Education, Special Education Guidance for COVID-19 (September 30, 2020); Cal. Code Regs., tit. 5, § 3053, subd. (c); see also Ed. Code, § 56001, subds. (n) & (o).) Title 34 Code of Federal Regulations part 300.39(b)(3) defines specially designed instruction, used interchangeably with the term specialized academic instruction, as adapting, as appropriate, to the needs of a child eligible for special education, the content, methodology, or delivery of instruction to address the unique needs of the child, to ensure access to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

There are two parts to the legal analysis of a local educational agency's compliance with the IDEA. First, the tribunal must determine whether the local educational agency has complied with the procedures set forth in the IDEA. (*Rowley*, *supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs and was reasonably calculated to enable the child to receive educational benefit appropriate in light of the child's circumstances. (*Ibid*; *Endrew F.*, *supra*, 580 U.S. at p. 402.)

To meet its substantive obligation under the IDEA a school district must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Endrew F., supra*, 580 U.S. at p. 399.) A review of an IEP must consider whether the IEP was reasonable, not whether the court regards it as ideal. (*Ibid.*) In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the proposed program, not the program preferred by the parent. Even if the program preferred by the parent would result in greater educational benefit to the student, that does not mean the school district's program was inappropriate. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314 (*Gregory K.*)) The adequacy of an IEP turns on the unique circumstances of the child for whom it was created. (*Endrew F., supra*, 580 U.S. at p. 399). For a child who is not fully integrated in the regular classroom and not able to achieve at grade level, the child's educational program must be appropriately ambitious in light of his circumstances. (*Id.*, at p. 402.)

An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*)). An IEP is "a snapshot, not a retrospective." (*Ibid.*, citing *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

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STUDENT'S INITIAL EVALUATION DURING THE 2022-2023 SCHOOL YEAR

Student's initial IEP was dated November 10, 2022. Capistrano developed IEP amendments on December 12, 2022, February 13, 2023, and April 17, 2023.

The central dispute between the parties related to Capistrano's subsequent offer of placement in the October 27, 2023 IEP. Therefore, to evaluate whether Capistrano offered Student a FAPE in the October 27, 2023 IEP it is necessary to consider the facts that led up to their offer of special education and related services in the October 27, 2023 IEP.

Capistrano initially assessed Student for special education eligibility in fall 2022. Student's initial November 10, 2022 IEP, and his subsequent lack of progress towards his IEP goals, informed the October 27, 2023 IEP team about Student's unique needs.

Student attended kindergarten during the 2022-2023 school year at his school of residence, called Las Palmas, located within Capistrano's boundaries. Las Palmas offered a dual Spanish/English immersion program for its students in kindergarten through fifth grade. At the kindergarten grade level, 80 percent of instruction was taught in Spanish and 20 percent was taught in English. As students progressed from grade to grade, the percentage of Spanish instruction decreased, and the percentage of English instruction increased.

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Student had a clinical diagnosis for attention deficit hyperactivity disorder by Dr. Cindy Evans from Kaiser Permanente. Student frequently avoided academic work and had difficulty engaging in whole group activities and instruction. He was easily distracted and frustrated during non-preferred activities. Student used inappropriate language and hit and yelled at adults and peers.

Parent referred Student for assessment in early September 2022 due to concerns about Student's attention, sensory processing, and social-emotional functioning. Capistrano issued an initial assessment plan to Parent on September 9, 2022, to determine if Student met eligibility criteria for special education services. Parent consented to the initial assessment plan on September 13, 2022. Capistrano revised the assessment plan on September 22, 2022, to add an assessment in "special circumstance instructional assistance," a term that meant aide support. Parent consented to Capistrano's revised assessment plan on October 5, 2022.

Capistrano assessed Student in

- academic/preacademic achievement,
- speech and language,
- intellectual development,
- social-emotional-adaptive behavior,
- perceptual processing,
- health, and
- gross-fine motor development.

Capistrano also conducted a functional behavior assessment to assess the function of Student's behavior and a special circumstances instructional assistance assessment to determine if Student needed one-to-one aide support. The results of Student's initial

evaluation are summarized here because they were considered by the October 27, 2023 IEP team and were the results of the most recent evaluation of Student at the time of the October 27, 2023 IEP team meeting. (20 U.S.C. § 1414(d)(3)(A)(iii); 34 C.F.R. § 300.324(a)(iii).)

PSYCHOEDUCATIONAL ASSESSMENT

Licensed Educational Psychologist Lorenzo Loson oversaw Capistrano's multidisciplinary team assessment of Student and developed a report dated November 10, 2022. Loson had been a bilingual school psychologist at Las Palmas for 10 years. He held a master's degree in school psychology and a pupil personnel services credential, which allowed him to conduct psychoeducational assessments. Loson's duties included conducting assessments for special education eligibility, observation of students, providing individual counseling services, and presenting his findings to IEP teams. Loson had previous experience as a behavior therapist in the home setting working with children and adults with autism and cognitive impairments. In conducting Student's psychoeducational assessment, Loson:

- obtained Parent and teacher input,
- reviewed Student's developmental and medical background and health screening,
- reviewed Student's attendance records, grades, and disciplinary reports,
- observed Student on multiple occasions across school settings and during testing, and
- administered a variety of assessment measures, including standardized tests and rating scales.

Loson administered Student's assessments in English because English was Student's primary language. Parent reported Student was active, distractable, and shy. Student did not initiate play with others. Parent believed Student's impulsivity and inattention were his biggest challenges. Student became frustrated when demands were placed on him, and his response was to run away or fight.

Student's kindergarten teacher, Star Morales, reported Student was generally off task in the classroom. He generally did not follow instructions and was non-compliant. He sometimes used inappropriate language. When Student was off task and redirected by his teacher, Student became upset and frustrated. He spit and hit the teacher and other adults. Student refused to sit with his teacher or engage with her when she spoke in Spanish.

Loson observed Student in the unstructured setting, in the classroom, and during administration of the assessments. During recess, Student sat with his peers but did not engage with them. Student used inappropriate language with his peers. He did not follow his teacher's instructions to line up with his class. In the classroom setting, Student did not follow the teacher's instructions to complete a worksheet. He hid under the desk and ignored directions from an instructional aide. During formal assessments, Student was inattentive and constantly stood up and walked away from the testing area. He often responded to questions by stating, "I don't know" or "I don't know letters."

Loson administered the Wechsler Preschool and Primary Scale of Intelligence to measure Student's overall intellectual ability. Student scored in the low average range. Student demonstrated weaknesses in fluid reasoning, which measures a student's ability to solve new problems presented visually and verbally, and in processing speed, or the ability to perform relatively easy mental tasks quickly and fluently. Student scored in the

average range in verbal comprehension, which relies on the ability to access information from long-term memory, and on a visual spatial index test, which measures short-term recall of visual information. Student's working memory, which measured a student's ability to manipulate information contained in immediate recall, indicated average ability.

Loson administered other subtests to obtain additional information about Student's cognitive profile. The general ability index provided an estimate of general intelligence and was less dependent on working memory and processing speed. Student scored 88, which fell in the low average range. On the nonverbal index, which measured general intellectual functioning and minimized expressive language demands, Student scored 75, which fell in the borderline range. On the cognitive proficiency subtest, comprised of four subtests drawn from working memory and processing speed, Student scored in the low average range.

Loson administered the Beery-Buktenica Developmental Test of Visual-Motor Integration to assess Student's perceptual-motor skills. This assessment required Student to look at geometric forms and copy them on paper with a pencil and evaluated the extent to which he could integrate his visual and motor abilities. Student scored in the below average range. Student could draw 12 of 21 geometric shapes correctly but struggled to replicate the details in more complex shapes. Loson reported Student's distractibility may have adversely affected his performance on this measure.

Loson considered the results of an academic achievement assessment administered by educational specialist Eryn Connors. Connors administered the Woodcock-Johnson Tests of Academic Achievement, Fourth Edition to measure Student's academic performance levels and determine Student's academic strengths

and weaknesses. Student scored in the very low range in basic reading and math reasoning compared to his same aged peers. He scored in the low range in reading comprehension, written expression, basic math skills, and math problem solving.

Loson considered the results of the Woodcock-Johnson Test of Oral Language Fourth Edition, to determine Student's ability to use and comprehend oral language. Student's overall oral language skills in English were in the low average range compared to his same aged peers. Student's overall oral expression, which measured recall of auditory input and oral development, fell in the average range. Student's listening comprehension scores fell in the average range.

On the Behavior Assessment System for Children, Third Edition, a norm-referenced rating scale measuring numerous aspects of behavior and personality, Parent and teacher rated Student clinically significant in

- hyperactivity,
- aggression,
- anxiety,
- depression,
- atypicality, and
- attention.

On the Connors-3, a tool used to evaluate symptoms of attention deficit hyperactivity disorder and related disorders, Parent and teacher rated Student elevated in inattention, hyperactivity and impulsivity, and peer relations. Teacher rated Student elevated in defiance/aggression, and Parent noted an elevated concern in executive functioning.

Loson administered the Autism Diagnostic Observation Schedule – Second Edition to Student. This measure assessed social and communicative behaviors in children with autism. This instrument included a series of semi-structured tasks to evaluate a child’s understanding of social situations and interactions, verbal skills, and social play. Based on this measure, Student demonstrated a moderate to high degree of behaviors related to autistic-like symptoms.

Autism Spectrum Rating Scales were administered to Parent and Student’s teacher. Their responses indicated Student demonstrated a moderate-to-high degree of autistic-like symptoms.

FUNCTIONAL BEHAVIOR ASSESSMENT

Loson conducted a functional behavior assessment to determine the function of Student’s behavior. A functional behavior assessment evaluates maladaptive behavior, determines its function, and develops a plan to address it. Loson collected data over 29 school days between September 20 and November 2, 2022. Loson compiled the data in a written report dated November 10, 2022. He observed Student in multiple settings throughout the school day. Loson also considered the results of his psychoeducational assessment, Parent, teacher, and one-to-one aide interviews, attendance records, grades, and disciplinary reports.

Loson’s functional behavior report identified Student’s problem behaviors as inappropriate touching/talking, physical aggression, non-compliance, and eloping. Loson collected data regarding the frequency, duration, and intensity of those behaviors. Student engaged in inappropriate touching and talking approximately 16

times per day. The behavior ranged in duration from 30 seconds to 10 minutes. The behavior included yelling and talking about specific body parts, attempting to touch body parts, and using inappropriate language.

Student engaged in physical aggression 16.58 times per day during the data collection period. The duration of these behaviors ranged from 30 seconds to 10 minutes. The behaviors included attempting to engage in physical aggression and contacting and harming others. Student's non-compliant behaviors occurred 9.48 times per day and lasted from one to five minutes. This behavior consisted of ignoring directions or needing one to more than three prompts to comply. Student engaged in running away, called elopement behavior 1.66 times per day. The behavior lasted from 30 seconds to 15 minutes. The behavior included attempting to elope or eloping out of the classroom.

Given this information, Loson hypothesized the function of Student's behavior was task avoidance and attention seeking. Loson developed recommendations to remediate or control the problem behaviors. Loson's recommendations included establishing and maintaining replacement behaviors for the targeted behaviors, changes to the environment to support Student, and materials and curriculum for the replacement behaviors.

SPECIAL CIRCUMSTANCE INSTRUCTIONAL ASSISTANCE ASSESSMENT

Loson conducted a special circumstance instructional assistance assessment to determine if Student qualified for one-to-one aide support. The assessment was based on Parent and teacher interviews, and structured and unstructured observations. Loson

also used the Behavioral Observations of Students in Schools tool to collect data to assess Student's on-task and off-task behaviors in the academic setting compared to a random sample of peers. Loson concluded Student was actively engaged in academic activities at a decreased rate when compared to his peers. Student's off-task behavior included moving, talking, making noise, or not facing the teacher. He required prompting from his teacher and redirection during classroom activities. Student's attention increased during videos or highly preferred tasks. Loson concluded Student met the criteria for special circumstance instructional assistance.

SPEECH-LANGUAGE EVALUATION

Certified speech-language pathologist Kristin Popovich assessed Student in September and October 2022 and produced a report dated November 10, 2022. Popovich's assessment was based on information from multiple standardized assessments, reports from Student's teacher and Parent, and Popovich's observations. Student's language skills were in the below average range compared to his same aged peers. Student exhibited difficulties in sentence comprehension, receptive vocabulary, and pragmatic language skills. Student demonstrated an articulation deficit, which reduced his speech intelligibility. Popovich's report recommended Student be found eligible for special education under the category of speech or language impairment.

OCCUPATIONAL THERAPY ASSESSMENT

Occupational therapist Megan Keithly assessed Student's fine motor and sensory processing skills. Keithly used a variety of standardized assessment tools, Parent and teacher questionnaires, classroom handwriting samples, and observations. Student demonstrated functional gross motor skills and postural control. On standardized

assessments, Student scored in the average to below average range in fine motor and manual dexterity. He scored below average and in the poor range on visual motor and visual perceptual tests. Student could write his name but did not know how to write the other letters of the alphabet. Student struggled with processing sensory information which impacted his ability to self-regulate. Student had difficulty attending to non-preferred tasks in the classroom setting.

INITIAL NOVEMBER 10, 2022 IEP

Student's initial IEP team met on November 10, 2022, three months after Student started kindergarten. The IEP team reviewed the psychoeducational assessment report, the functional behavior assessment, and the special circumstances instructional assistance evaluation by school psychologist Loson, the academic assessment by Connors, the speech and language assessment by Popovich, and the occupational therapy assessment by Keithly.

Parent shared her concerns about Student, including Student's frustration throughout the school day. Parent explained Student's medication recently had changed and he was adjusting to the side effects. Parent was concerned Student's attention deficit hyperactivity disorder was worsening.

Loson shared the results of the functional behavior assessment with the IEP team and proposed a behavior intervention plan. The November 10, 2022 behavior intervention plan identified the behaviors that impeded Student's learning, including inappropriate touching and talking, physical aggression, non-compliance, and eloping.

The plan denoted the frequency, intensity, and duration of the problem behaviors, along with environmental factors and predictors for behaviors. It described necessary changes to instruction and supports, including

- a token economy system,
- visual and verbal cues for asking for help,
- taking breaks,
- social stories about appropriate behaviors,
- use of a timer, and
- sensory items.

The plan identified the function of Student's behaviors, which included escape, attention, and task avoidance and listed functionally equivalent replacement behaviors. The plan listed teaching strategies to teach the functionally equivalent replacement behaviors and recommended effective reinforcement strategies.

The IEP team found Student eligible for special education under the categories of autism, other health impairment, and speech or language impairment. The IEP team developed

- five reading goals,
- two math goals,
- eight behavior goals,
- three social-emotional goals,
- three communication goals, and
- three writing goals.

The IEP offered Student a wide range of accommodations to assist Student in accessing his educational program. The IEP offered school personnel consultation with specialists, collaboration among service providers, and opportunities for continuing education and professional development to ensure access to latest methods and strategies.

The IEP offered Student placement in the general education setting with the following services:

- 120 minutes weekly, or two hours daily, specialized academic instruction in a separate setting;
- 360 minutes daily one-to-one aide support, called “additional program support” by Capistrano, to support Student’s social-emotional, behavior and academic needs, and the safety of Student and others in the general education classroom;
- 10 minutes monthly consultation between the educational specialist and general education teacher;
- 30 minutes weekly, or 15 minutes two times weekly, individual speech language services;
- 30 minutes weekly individual occupational therapy services; and
- 30 minutes monthly consultation services between the occupational therapist and staff and support staff working with Student.

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The IEP team determined Student's behavior impeded his learning and that of others and that Student required behavior interventions. The IEP team developed behavior goals and attached Student's behavior intervention plan to the IEP. Parent consented to the IEP on November 10, 2022.

DECEMBER 12, 2022 IEP AMENDMENT

The IEP team reconvened on December 12, 2022. The purpose of the IEP amendment meeting was to review Student's behaviors and update Student's behavior intervention plan.

Morales reported on Student's behavioral progress. Student's use of inappropriate speech had decreased. Student worked well with his one-to-one aide, but he still demonstrated frustration when asked to complete non-preferred tasks. He sometimes engaged in inappropriate conduct, such as flipping desks.

Education specialist Connors reported that Student could work for a short time and then required a break. He sat at an individual desk away from his peers, which helped him focus on instruction. Connors incorporated sensory and movement breaks throughout instruction, including a weighted backpack and movement breaks every 20 minutes. Connors and Morales reported Student's behaviors were triggered by demands or requests to complete work or engage in non-preferred activities.

Loson shared updates on data collected since the November 10, 2022 IEP team meeting. Connors and Student's aide Patricia Wilcox collected data on Student's behaviors and provided the data to Loson. Wilcox was trained on data collection by

Connors and Stephanie Romberg, Capistrano's district level behavior analyst. Loson analyzed the data and wrote replacement behaviors for the teachers and staff working with Student.

During the 15 school days between November 14, 2022, through December 9, 2022, Student engaged in maladaptive behaviors, including

- inappropriate comments,
- refusal,
- non-compliance,
- hitting and kicking,
- throwing objects,
- eloping, and
- screaming.

Loson recommended the behavior intervention plan be updated to add blocking pads for staff and to incorporate sensory breaks into Student's schedule. Student's new behavior data was added to the IEP's present levels of performance.

Principal Barrosa shared her observations of Student with the December 12, 2022 IEP team. Student was more successful in the Learning Lab where he received specialized academic instruction. He could complete an academic task for five to seven minutes with adult support to earn a two-minute reward. Student protested three to five minutes before engaging in the next task. Barrosa recommended the IEP team reconvene in February 2023 to reevaluate Student's progress and determine if Student required a change of placement from general education.

Parent expressed her concerns to the IEP team. She relayed she was not interested in consenting to a change of placement other than general education for Student. Parent consented to the December 12, 2022 IEP amendment.

FEBRUARY 13, 2023 IEP AMENDMENT

The IEP team reconvened on February 13, 2023. The purpose of the IEP team meeting was to discuss Student's progress and a possible change in placement.

Morales reported on Student's academic progress in the general education classroom. Student missed Spanish instruction and was behind in foundational skills. She reported Wilcox was successful in helping Student complete his work before engaging in a preferred activity. Wilcox sat on the carpet with Student during carpet time and encouraged him to participate in group activities. Wilcox translated for Student when he did not understand Morales' instructions in Spanish.

Connors reported on Student's progress towards his IEP goals and shared a copy of Student's progress report. Student made progress on some goals. For example, his letter identification increased. However, Student's overall progress towards his IEP goals was not adequate. Student's interactions with peers in the Learning Lab had improved, except for a few incidents of aggressive behavior.

Speech language pathologist Popovich reported Student's behaviors had improved within the therapy setting. However, Student's non-compliance limited progress on his communication goals.

Loson shared an updated behavior intervention plan and reviewed data collected after the December 12, 2022 IEP team meeting. Student's targeted behaviors of inappropriate behavior and physical aggression had decreased. Loson attributed the improvements in these areas to the positive behavior interventions implemented by teachers and staff.

Student's non-compliant behaviors, such as verbal refusal, ignoring demands, and pushing things away increased significantly. Specifically, between December 12, 2022 and January 31, 2023, Student engaged in non-compliant behaviors, defined as ignoring directions or needing one to three prompts, 27.22 times per day, compared to 9.48 times per day between September 20 and November 2, 2022. Student engaged in eloping behaviors, defined as attempting to elope or eloping outside the classroom, an average of 2.57 times per day, as compared to 1.66 times per day between September 20 and November 2, 2022. Loson shared an updated copy of Student's behavior intervention plan. The revised behavior intervention plan added the data collected between December 12, 2022, and January 31, 2023.

At hearing, Loson opined Student's maladaptive behaviors occurred more frequently in the general education classroom because more academic demands were placed on Student in that setting. In comparison, the Learning Lab had a larger adult-to-student ratio, Student was instructed in English at his level by an education specialist, and Student had more opportunities for breaks and sensory input.

The IEP team at the February 23, 2023 meeting engaged in a robust discussion about a potential change of placement for Student. Principal Barrosa shared that although Student had made some progress with behaviors, he required a smaller program with more adult supports. Morales passionately communicated Student

required a smaller environment with instruction taught in English. Morales believed Student should acquire a solid foundation in his native language of English before learning Spanish. Parent wanted Student to remain in the general education dual immersion program.

The February 13, 2023 amendment IEP offered Student placement in a mild-to-moderate special day class in the Success Through Academic Readiness and Social Skills program, called STARS. Specifically, this placement included 290 minutes per week, or 4.83 hours per day, of specialized academic instruction. The STARS program had a small class size of 12 students and a higher adult-to-student ratio compared to a general education classroom. The class was taught by a credentialed special education teacher specifically trained in teaching students with mild-to-moderate special needs. The special education teacher was supported by two paraprofessionals. Some students also had a one-to-one aide. The class moved through the general education curriculum but at a slower pace. The program addressed students' needs in academics, language, behavior, and social skills. Students were provided supports utilizing both accommodated and modified curriculum. Each student's academic work was individually tailored, but students worked in small groups. The Capistrano IEP team members believed the STARS program, which as a special day class was a more restrictive setting than his current general education placement, was necessary for Student to make progress towards his academic, communication, behavior, social-emotional, and sensory goals.

Parent disagreed with placement in the STARS program. Parent was concerned Student would mimic the maladaptive behaviors of other students in the program. Parent wanted Student to remain in the general education dual immersion program at Las Palmas. Parent consented to the February 13, 2023 IEP amendment, except for the special day class placement in STARS.

On March 8, 2023, Capistrano issued a prior written notice to Parent. (20 U.S.C. § 1415(b)(2)(B)(3); 34 C.F.R. § 300.503.) The prior written notice confirmed Capistrano's offer of the mild-to-moderate special day class placement and related services in the STARS program as discussed at the February 13, 2023 IEP team meeting.

APRIL 17, 2023 IEP AMENDMENT

The IEP team reconvened on April 17, 2023 with the same IEP team members. The purpose of the IEP team meeting was to discuss Student's progress and a possible change in placement out of general education and into a special day class within STARS.

The IEP team discussed Student's progress towards his behavior and academic goals. Loson shared Student's eloping behaviors and use of inappropriate words had decreased. Student's behaviors in physical aggression and non-compliance had increased. The IEP team discussed positive intervention strategies to support Student's behavior goals, including the use of a token board and "first, then" statements.

Education specialist Connors reported on Student's progress towards his IEP goals. Student had not made measurable progress towards his academic goals in reading and mathematics. Connors and Morales shared that Student had limited peer interactions in their classrooms. The Capistrano IEP team members reiterated their recommendation that Student's placement be changed to the STARS special day class program. Parent disagreed. Finally, the IEP team determined Student qualified for extended school year services and Student's IEP was amended to add this service. Parent consented to the April 17, 2023 IEP but again declined a change of placement

out of general education and into the STARS special day class. On May 24, 2023, Capistrano issued a prior written notice confirming its FAPE offer made at the April 17, 2023 IEP team meeting.

OCTOBER 27, 2023 IEP DEVELOPMENT AND COMPLIANCE WITH PROCEDURAL REQUIREMENTS

NOTICE, PARENTAL PARTICIPATION, AND IEP TEAM

School districts must provide parents with notice of meetings that will be held to decide placement. (34 C.F.R. § 300.501(b)(1).) The IEP team meeting must be scheduled at mutually agreed upon time and place. (Ed. Code, § 56341.5, subd. (c).)

State and federal law require school districts to provide the parent of a child eligible for special education with a copy of a notice of procedural safeguards upon initial referral, and thereafter at least once a year, as part of any assessment plan, and at other designated times. (20 U.S.C. § 1415(d)(1); 34 C.F.R. § 300.504(a); Ed. Code, § 56321, subd. (a).) At each IEP team meeting, the district must inform the parent of state and federal procedural safeguards. (Ed. Code, § 56500.1, subd. (b).)

The IEP team must consist of parents or their representative, a regular and special education teacher, a qualified representative of the school district, and an individual who can interpret instructional implications of assessment results. (20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a); Ed. Code, § 56341, subd. (b).) The IEP team may also include individuals who have knowledge or special expertise regarding the child. (34 C.F.R. § 300.321(a).) Parents of a child with a disability must be afforded an

opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child. (34 C.F.R. § 300.501(b) & (c); Ed. Code, §§ 56304, 56341.)

Capistrano provided proper notice to Parent on October 4, 2023 for the October 27, 2023 IEP team meeting. Parent was offered a written copy of procedural rights at the meeting. All required persons attended the meeting, including

- Parent,
- education specialist Connors,
- general education teacher Martha Gomez,
- school psychologist Loson,
- speech pathologist Popovich,
- occupational therapist Keithly, and
- principal Barrosa.

Parent actively participated at the meeting by asking questions and expressing concerns. Capistrano proved the October 27, 2023 IEP team meeting met procedural requirements for notice, participation, and attendance. (Ed. Code, § 56505, subd. (j).)

IEP GOALS WERE PROCEDURALLY AND SUBSTANTIVELY COMPLIANT

The student's needs must be described through a statement of present levels of academic achievement and functional performance, including how the student's disability affects the involvement and progress in the general education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320(a)(1).)

An IEP must contain a statement of measurable annual goals for the child designed to enable the child to be involved in and make progress in the general education curriculum and meet each of the other educational needs. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345, subd. (a)(2).) Annual goals should describe what a student with a disability can reasonably be expected to accomplish within a 12-month period. (Ed. Code, § 56344; *Letter to Butler* (United States Department of Education, Office of Special Education and Rehabilitative Services, March 25, 1988); U.S. Dept. of Educ., Notice of Interpretation, Appendix A to 34 C.F.R., part 300, 64 Fed. Reg. 12,406, 12,371 (1999 regulations).) The purpose of goals is to assist the IEP team in determining whether a student is making progress in all areas of need. Therefore, the IEP must also describe how progress towards the goals will be measured and reported. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(3); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the specific special education services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (b).)

Capistrano established the October 27, 2023 IEP included annual goals in all areas of need. The goals were based upon present levels of performances reported by the teachers and service providers at the IEP team meeting. The IEP team members discussed and developed the proposed goals with input from Parent.

The IEP offered Student 20 goals in academics, behavior, social-emotional, communication, and fine motor. For reading, the IEP offered Student four goals to address Student's needs in letter sounds, medial vowel and final sounds, segment

sounds, and sight words. The IEP offered three math goals to address Student's needs in addition/subtraction, identifying numbers, and rote counting. The IEP offered five behavior goals for

- eloping out of area,
- non-compliance,
- on-task behavior,
- outbursts, and
- physical aggression.

To address Student's social-emotional needs, the IEP offered three goals in group engagement, initiating interaction, and self-regulation. Two communication goals were offered in semantics-negation and topic maintenance. The IEP offered three fine motor goals in writing numbers, writing capital letters, and writing lower case numbers.

The October 27, 2023 IEP's goals were based on Student's present levels of performance and were measurable and designed to meet Student's needs. The goals described skills the IEP team believed Student could achieve within one year. Each goal had benchmarks to track Student's progress. Capistrano met its burden of proving the October 27, 2023 IEP goals were procedurally and substantively compliant.

UPDATED BEHAVIOR INTERVENTION PLAN

When a child's behaviors impede his learning or that of others, the IDEA requires that the IEP team consider the use of positive behavioral interventions and supports and other strategies to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) Children with disabilities who

exhibits serious behavioral challenges are entitled to timely behavioral assessments as well as development and implementation of positive behavioral interventions and supports. (20 U.S.C. § 1400(c)(5)(F); Ed. Code, § 56520, subd. (b).)

Loson shared an updated behavior intervention plan with the October 27, 2023 IEP team. Loson created the October 27, 2023 behavior plan based on updated data collection and observations. The behaviors which impeded Student's learning were identified as:

- physical aggression, described as
 - headbutting,
 - pushing/pulling,
 - hitting,
 - kicking, and
 - throwing objects;
- non-compliance, described as
 - verbal refusal,
 - ignoring instructions,
 - not following class or individual instructions,
 - being off task,
 - ignoring teacher's request or questions, and
 - lying on the floor or under the desk;

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- inappropriate comments, described as screaming and making noises; and
- eloping out of the area, described as leaving a designated area without permission.

Student's behaviors occurred daily and lasted from 10 seconds to one hour.

The IEP team determined the behavior impeded learning because it

- was disruptive to Student and others,
- interfered with instruction,
- took attention away from classmates during instruction, and
- put classmates and staff in danger of physical injury.

The antecedents of Student's behaviors were identified as requests or demands placed on Student or when presented with a non-preferred task.

The behavior intervention plan sought to replace Student's problem behavior with appropriate classroom behaviors and expectations when provided adult support. The behavior intervention plan included a list of teaching strategies and enforcement procedures for staff to establish, maintain, and generalize replacement behaviors. Staff response to Student's behavior depended on the level of intensity and ranged from prompting Student to ask for a break or more time with a preferred activity to providing additional prompts and sensory input. The October 27, 2023 behavior intervention plan was an appropriate update of Student's prior behavior intervention plan from November 10, 2022, which was last updated on April 17, 2023. The IEP team also created five functionally equivalent replacement behavior goals in Student's IEP to increase Student's use of replacement behaviors, reduce the frequency of Student's problem behavior, and develop new general skills. Capistrano established the behavior

intervention plan offered positive behavioral interventions and supports, and other strategies, to address behaviors that impeded Student's learning or that of others. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i).)

ACCOMMODATIONS, SUPPORTS, AND SERVICES

An IEP must include a description of the placement, services, and accommodations offered to the student, including program modifications or supports. (20 U.S.C. § 1414(d)(1)(A)(IV); 34 C.F.R. § 300.324(a)(2)(iv); Ed. Code, § 56345, subd. (a)(4); *Burlington v. Department of Educ. Of Mass.* (1985) 471 U.S. 359, 368 [105 S.Ct. 1196] (*Burlington*).) The IEP team must determine and specify in the IEP the type of related services a student will receive. (34 C.F.R. § 300.320(a)(4).)

The IEP must include a projected start date for services and modifications, as well as the anticipated frequency, location, and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7).) The IEP must include an explanation of any extent to which the student will not participate with nondisabled students in the regular class and extracurricular and nonacademic activities. (20 U.S.C. § 1414(d)(1)(A)(i)(V); 34 C.F.R. § 300.320(a)(5).) Further, an IEP must state whether extended school year services are offered. (Ed. Code, § 56345, subd. (b)(3).)

Capistrano's teachers, service providers, the school psychologist, and school principal were called as witnesses at hearing. Each was credentialed or licensed in their respective field, experienced and well-qualified for their positions. Each of these witnesses testified with a professional demeanor, answered questions readily and fully, and had a thorough understanding of Student based on their involvement in Student's educational program. Morales and Gomez had Student in their general education

classrooms during the 2022-2023 and 2023-2024 school years, respectively, and interacted with and observed Student daily. Popovich provided speech language services to Student two times weekly. Connors delivered daily specialized academic instruction to Student in the Learning Lab until Parent withdrew consent to specialized academic instruction following the October 27, 2023 IEP. Connors also conferred with Student's one-to-one aide at least once daily. Loson reviewed and analyzed data collected on Student's behaviors, observed Student in the classroom or during recess, and communicated with Connors about Student's behaviors. Barrosa observed Student in the classroom and on the playground and frequently assisted Student's teachers and staff with helping Student deescalate. Capistrano's witnesses' testimony about Student and his educational needs at the time of the October 27, 2023 IEP was persuasive and given substantial weight.

The October 27, 2023 IEP team determined Student required accommodations to access his educational program. The IEP offered Student a wide range of accommodations, which were proven successful in reducing Student's behaviors, including

- direct supervision,
- a "first/then" visual,
- a token board,
- zones of regulation,
- seating away from exits,
- an individual desk and workspace,
- movement and sensory scheduled breaks through the school day/class period, fidgets, and
- sensory items.

The IEP also offered supports to school personnel working with Student. Specifically, school personnel were provided the opportunity to consult with district specialists and collaborate with services providers. Each accommodation was appropriately designed to support Student in the educational setting. At hearing, Student did not claim otherwise.

The October 27, 2023 IEP offered Student the following services:

- 300 minutes, or five hours daily, specialized academic instruction in a separate setting in the STARS program;
- 80 minutes weekly, or 1.33 hours daily, specialized academic instruction to support Student's social-emotional and behavior goals during lunch and recess breaks;
- 360 minutes, or six hours daily, one-to-one aide support to address Student's social/emotional, behavior, and academic needs and Student's safety and the safety of others;
- 10 minutes monthly consultation between the educational specialist and general education teacher;
- 15 minutes two times weekly, individual speech language services;
- 30 minutes weekly occupational therapy services in a small group setting of no more than three students;
- 30 minutes monthly consultation services between the occupational therapist and support staff working with Student to address skill development in the classroom environment in writing and self-regulation;
- daily round trip transportation to the STARS program; and
- extended school year services.

The IEP described the time Student would spend in the general education environment with his typically developing peers as

- physical education,
- lunch,
- recess,
- passing periods, and
- school day activities.

The October 27, 2023 IEP's offer of special education, related services, accommodations, and supports was appropriate and reasonably calculated to enable Student to make progress appropriate considering his circumstances. The IEP described the specialized academic instruction, related services in speech and language, occupational therapy, and transportation, and set forth the projected start date, length, frequency, and duration of instruction, services, and supports. The IEP offered Student extended school year services to prevent regression and described how his IEP would be implemented in emergency conditions.

Capistrano met its burden of proving the October 27, 2023 IEP's offer of program modifications, supplementary aids, and accommodations and supports to school personnel were appropriate. Further, Student stipulated and agreed Capistrano's offer of program modifications, supplementary aids, and accommodations and supports to school personnel was appropriate.

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PLACEMENT IN A SPECIAL DAY CLASS WAS THE LEAST RESTRICTIVE ENVIRONMENT

Capistrano contended placement in the STARS program special day class was the least restrictive environment for Student. Capistrano further contended Student's needs in reading, math, behavior, social-emotional, sensory, fine motor, and speech could not be met in the general education classroom and Student required small group, specialized academic instruction in a separate setting.

Student contended the STARS program was not the least restrictive environment for Student. Student further contended the least restrictive environment for Student was the general education classroom with bilingual one-to-one, behaviorally trained aide support with supervision by a behavior analyst.

Federal and state laws require school districts to provide a program in the least restrictive environment. (34 C.F.R. § 300.114; Ed. Code, § 56033.5.) California law defines "specific educational placement" as that unique combination of facilities, personnel, location, or equipment necessary to provide instructional services to an individual with exceptional needs. (Cal. Code Regs., tit. 5, § 3042, subd. (a).) The IEP team must consider the meaning of the evaluation data and the placement options and consider educating the child in the least restrictive environment. (34 C.F.R. § 300.116.)

A special education student should be educated with non-disabled peers to the maximum extent appropriate but may be removed from the regular education environment when the nature of the severity of the student's disability is such that education in the regular classroom with the use of supplementary aides and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.144(a)(2)(i))

and (ii); Ed. Code, § 56342.) This requirement reflects the IDEA's "strong preference" for educating children with disabilities in a regular classroom environment. (*Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834 (*Poolaw*).)

School districts, as part of a special education local plan area, must have available a continuum of program options to meet the instructional and service needs of special education students. (34 C.F.R § 300.115(a); Ed. Code, § 56360.) The continuum of program options includes but is not limited to, in increasing order of restrictiveness:

- regular education;
- resource specialist programs;
- designated instruction and service;
- 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, and instruction in the home, in hospitals, or other institutions. (Ed. Code, § 56361.)

An IEP must document its rationale for placement in other than the student's school and classroom they would otherwise attend if not disabled. (34 C.F.R. § 300.116; 71 Fed. Reg. 46,588 (August 14, 2006); Cal. Code Regs., tit. 5, § 3042.) The IEP must indicate why the student's disability prevents their needs from being met in a less restrictive environment even with the use of supplementary aides and services. (*Ibid.*)

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 consideration the requirement that children be educated in the least restrictive environment;
- placement is determined annually based upon the child's IEP and is as close as possible to the child's home;
- unless the IEP specifies otherwise, the child must attend the school that he would attend 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 he needs; and
- a child with a disability is not removed from education in age-appropriate regular classroom solely because of needed modifications to the general education curriculum. (34 C.F.R. § 300.116; Ed. Code, § 56342.)

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To determine whether a special education student can be satisfactorily educated in a regular education environment, the Ninth Circuit United States Court of Appeals has balanced the following factors:

1. the educational benefits available in the general education classroom, supplemented with appropriate aids and services, as compared with the educational benefits of the special education classroom;
2. the nonacademic benefits of interaction with children without disabilities;
3. the effect the student has on the teacher and children in the regular class; and
4. the costs of mainstreaming the student.

(*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Education* (5th Cir. 1989) 874 F.2d 1036, 1048-1050 (*Daniel R.R.*)]). Mainstreaming is a term used to describe opportunities for disabled students to engage in activities with nondisabled students. (*M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 640, fn. 7.)

The Ninth Circuit determined the benchmark for measuring whether a student can be educated in a regular classroom is progress towards meeting their IEP academic goals, not achieving grade-level performance. (*D.R. v. Redondo Beach* (9th Cir. 2022) 56 F.4th 636, 644-645 (*D.R.*)). In *D.R.*, the student made substantial progress toward the academic goals in his IEP. Specifically, the student met four of his six academic goals and made progress on the remaining two. The Ninth Circuit determined the student

received significant academic benefit in his existing general education classroom and the general education placement was the appropriate, least restrictive placement. (*Ibid.*)

Whether education in the regular classroom, with supplemental aids and services, can be achieved satisfactorily is a fact-specific inquiry. (*Daniel R.R., supra*, 874 F.2d at p. 1048.) If a school district determines a child cannot be educated in a general education environment, then the least-restrictive-environment analysis requires a further determination whether the child has been mainstreamed to the maximum extent appropriate considering the continuum of placement options. (*Daniel R.R., supra*, 874 F.2d at p. 1050.)

STUDENT DID NOT RECEIVE EDUCATIONAL BENEFIT IN THE GENERAL EDUCATION CLASSROOM

The first factor under *Rachel H.* considers the educational benefits of full-time placement in a regular classroom supplemented with appropriate aids and services, as compared with the educational benefits of the special education classroom. At hearing, Capistrano's witnesses, including Loson, Morales, Gomez, Connors, Popovich, and Barrosa offered persuasive testimony establishing Student did not receive educational benefit in the general education classroom supplemented with a one-to-one aide, extensive accommodations, and a behavior intervention plan. Student told his teachers and service providers he did not like Spanish and refused to read, write, or speak. He exhibited more maladaptive behaviors in the general education classroom than in the Learning Lab and during recess.

School psychologist Loson testified in support of Student's placement in the STARS program. Loson presented as a highly qualified and convincing witness. Student's academic scores were within the low to very low area in academic testing. Student's overall cognition was in the low average range, but Student had relative strengths in verbal and working memory. Loson credibly opined Student was cognitively capable of learning general education curriculum, but he required a small setting with instruction by a special education teacher. First-grade work was difficult for Student because his behaviors interfered with his learning. Student did not make progress towards his IEP goals in the general education setting even with the significant supplementary aids and supports offered in Student's initial IEP.

Loson opined Student could benefit from the STARS placement because of its high adult-to-student ratio and slower paced instruction. The special education teacher and paraprofessionals in the STARS program spoke in English, which was Student's primary language. Student's academic instruction would be delivered by a special education teacher specifically trained in reducing maladaptive behavior. Student could benefit from modeling the behaviors of the other students in the STARS program. Loson expressed sincere concern that Student had missed foundational learning skills because of his behaviors. Loson's opinions were convincing based upon his experience, his knowledge of Student, and his thoughtful and careful demeanor.

General education teacher Morales offered persuasive testimony at hearing in support of Student's placement in a special day class within the STARS program. Morales held a bachelor's degree in liberal studies and a master's degree in education

instruction. She held a multiple subject teaching credential. Morales had taught kindergarten for 18 years. Morales was trained in evidence-based interventions to meet the academic, behavior, and social-emotional needs of students.

Morales was familiar with the STARS program and previously observed the program. Morales opined Student could benefit from the small group instruction taught by a credentialed special education specialist and supported by two paraprofessionals. Students in the STARS program rotated through centers led by the special education teacher and paraprofessionals. Morales believed Student could benefit from interacting and building relationships with his similarly situated peers and with adults. The STARS program had imbedded sensory supports. She described the classroom's sensory corner with weighted stuffed animals, fidgets, and chairs. Morales expressed genuine concern at hearing about Student's lack of progress in the dual immersion general education classroom with one-to-one aide support and a behavior intervention plan. Morales' testimony was convincing based upon her experience, familiarity with Student, and sincere demeanor.

General education teacher Gomez also persuasively opined Student could not receive educational benefit in the general education classroom even with supplemental aids and supports. Gomez was Student's first-grade general education teacher during the 2023-2024 school year. Gomez held a bilingual multiple subject teaching credential. She had been a teacher for over 30 years. At hearing, Gomez described Student as bright and having a solid vocabulary in English. However, she persuasively opined Student's behavior prevented him from completing academic work. Student required prompting by his one-to-one aide. He demonstrated work refusal by closing or throwing books. Student lagged academically behind his same aged peers, and he

could not read. During writing assignments, Student did not participate and instead drew pictures of preferred items, such as boats. As the school year progressed, Student could not do the same academic work as the other first graders. Student refused to speak or write in Spanish. Gomez opined Student was frustrated by the academic pressures he experienced in the general education placement.

Gomez told the October 27, 2023 IEP team she had concerns about Student's progress in academics and his maladaptive behaviors. Student could not work independently and did not complete classwork. Student continually told Gomez he had "too many words" and he did not understand Spanish. Student's first trimester report card for the 2023-2024 school year indicated Student could not read or write in Spanish. He did not know high frequency words. Gomez believed the dual language program was overwhelming both academically and socially for Student. Gomez convincingly opined Student was not capable of grade-level work and did not understand her instructions in Spanish.

Education specialist Connors testified at hearing. Connors held a mild-to-moderate teaching credential and a master's degree in special education. She had been a teacher for 22 years. She previously taught for 11 years in the STARS program. Connors knew Student since kindergarten. She conducted the academic assessment portion of Capistrano's November 2022 multidisciplinary assessment for Student and attended all Student's IEP team meetings during the 2022-2023 school year. Connors attended the October 27, 2023 IEP team meeting.

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Connors implemented Student's specialized academic instruction during the 2022-2023 school year following Parent's consent to the November 10, 2022 IEP. She also implemented Student's specialized academic instruction at the start of the 2023-2024 school year through October 27, 2023. Connors described Student as curious and energetic.

Student's behaviors obstructed his ability to make meaningful progress towards his IEP goals. On academic assessments, Student scored low to very low in all subject matters. At the time of the October 27, 2023 IEP, Student had made progress on some of his academic goals. For example, his performance in blending sounds and identifying "more or less" when shown a group of objects was at or above what was required to meet this goal and he made progress towards his goal of identifying 18 letters. Student's progress was at or above what was required on his math goal of identifying "which is more or less" when shown a group of objects. Student did not make adequate progress on his other academic goals, specifically

- pronouncing initial and final sounds when given 12 consonant-verb-consonant words,
- identifying medial or final sounds in orally presented words,
- selecting a book and attending to the reading of the book, and
- identifying the sounds for 16 letters.

Student did not make meaningful progress on his math goal of independently counting from one to 60.

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Student's progress was at or above what was required for his goal in decreasing inappropriate verbal comments. Student's progress was not sufficient to meet his annual behavior goals in

- remaining on task with visual or auditory distractions,
- decreasing incidents of screaming,
- complying with safety rules,
- complying with teacher directions or requests with no more than one prompt,
- reducing physically aggressive behaviors,
- following the classroom routine, and
- remaining on task when directed to a non-preferred activity.

Student's progress on his social-emotional goals was not sufficient to meet his annual goals in maintaining appropriate peer interactions, requesting adult assistance to use self-regulating strategies, or engaging in group activities in a positive manner. Connor convincingly opined Student did not receive academic benefit in the general education classroom because his behaviors impeded his learning.

Connors opined Student's behaviors were less frequent in the Learning Lab with implementation of the IEP accommodations including frequent breaks, a visual schedule, and asking adults if he could work on a preferred activity. Student generally transitioned well from the general education classroom to the Learning Lab. Student benefitted from one-to-one instruction. Connors opined Student could obtain educational benefit in the STARS program with small group instruction by a special education teacher and a higher adult-to-student ratio. Connors' opinions were persuasive based upon her experience as an education specialist, her experience

working in the STARS program, and her knowledge of Student from assessing him and implementing his specialized academic instruction. Connors' opinions were given significant weight.

Speech pathologist Popovich participated in the October 27, 2023 IEP team meeting and testified at hearing. Popovich was a licensed speech language pathologist and held an American Speech-Language-Hearing Association certificate of clinical competence. Popovich had 18 years' experience working as a speech language pathologist. Popovich presented as a highly qualified witness. She was familiar with Student from conducting a speech language assessment as part of the November 2022 multidisciplinary assessment, attending Student's IEP team meetings during the 2022-2023 and 2023-2024 school years, and providing speech language services to Student.

Student's pragmatic language deficits impacted his ability to interact with peers. Student was expressive and had an expansive vocabulary in English in areas of interest, such as the Queen Mary and the Titanic. He struggled with social communication in areas that were not of interest to him. For example, if a peer brought up a topic that was not interesting to Student, Student ignored the peer or walked away.

Popovich reported Student's progress on his communication goals to the October 27, 2023 IEP team. On his goal of adding an appropriate comment or question on a non-preferred topic, Student made some progress but not sufficient progress to meet the goal within 12 months. At hearing, Popovich opined Student's progress on this goal was minimal because of Student's refusal to comply with Popovich's instructions during speech language therapy. Popovich lowered her demands on Student during therapy to improve his compliance. For example, she incorporated topics preferred by Student into her sessions.

Popovich offered convincing testimony in support of the appropriateness of the STARS program. Student could benefit from small group instruction by a special education teacher and the ability to practice his communication and social skills with his similarly situated peers. She believed the bilingual general education environment was inappropriate for Student because he did not speak or understand Spanish. Popovich expressed genuine concern about Student's non-compliant behavior and its impact on his social language skills and peer relationships. Popovich's testimony was persuasive based upon her experience, her familiarity with Student, and her straightforward and candid testimony.

Principal Barrosa offered compelling testimony about Student's inability to obtain educational benefit in the general education classroom. Barrosa was familiar with Student from greeting him daily at the start of the school day and during transitions, observing him in the classroom, and supporting the classroom teachers and staff when Student engaged in maladaptive behaviors. Barrosa also attended most of Student's IEP team meetings.

Barrosa was the principal at Las Palmas Elementary School since 2018. Barrosa held a multiple subject teaching credential, a master's degree in bilingual education, and a Doctor of Education in Organizational Leadership. Barrosa worked at Las Palmas in various capacities since 1992, including as an elementary and middle school language teacher, a language immersion coordinator, an assistant principal, and principal.

Barrosa passionately and convincingly opined the general education classroom was not appropriate to meet Student's needs. During her observations of Student, Student worked with his one-to-one aide and did not interact with his peers. Student

did not participate in classroom activities. Barrosa opined Student could benefit from the higher adult-to-student ratio and small group activities in the STARS program.

Parent testified at hearing. Parent was a credentialed teacher. She held a multi-subject general education teaching credential since 2006. Parent expressed sincere concern about Student. She believed Student's attention deficit hyperactivity disorder and sensory processing deficits caused Student to be distracted in the general education classroom. Parent was critical of Student's one-to-one aide and education specialist Connors. Parent did not think Student's one-to-one aide was appropriately trained to support Student's behavior and sensory processing deficits. Parent believed Connors improperly touched Student by putting her hands on his cheeks to get his attention and squeezing his arm. Parent based this contention on information from Student. Parent's testimony was not corroborated by other evidence. Parent revoked consent to specialized academic instruction following the October 27, 2023 IEP team meeting because she did not want Student working with Connors.

At hearing, Parent did not dispute Student struggled academically and behaviorally in the general education setting. However, she believed Student made sufficient progress to remain in the general education setting with additional supports and wanted him to continue in the dual immersion general education classroom with a behaviorally trained, one-to-one aide. Parent also did not dispute that Student did not make meaningful progress towards his IEP goals. Although Parent did not want Student placed in the STARS program and believed Student would mimic poor behaviors by his classmates, she did not articulate any other reason she disagreed with the placement and offered no persuasive testimony supporting Student's continued placement in general education. Parent's opinion that Student would mimic behaviors of classmates

in the STARS program was not given much weight because it was not supported by any other evidence and because Parent visited the STARS program at a time students were not in class. Although Parent preferred placement in the dual immersion general education classroom, that classroom was not appropriate to meet Student's unique needs. (*Gregory K., supra*, 811 F.2d 1307, 1314.)

The preponderance of the evidence proved Student acquired minimal if any educational benefit from the general education classroom. The first factor under *Rachel H.* weighed in favor of placement in a more restrictive placement.

STUDENT DID NOT RECEIVE NONACADEMIC BENEFITS IN THE REGULAR CLASSROOM

The second factor under *Rachel H.* considers the nonacademic benefits of placement in the regular classroom. The weight of the evidence showed Student received little nonacademic benefits in the regular classroom. Student did not interact with peers and required support from a one-to-one aide to complete work.

At the time of the October 27, 2023 IEP team meeting, Student made minimal if any progress on his goal of remaining on task when faced with visual or auditory distractions. Student left his seat or argued with adults. Student also did not make meaningful progress on his goal of decreasing incidents of screaming. Data collected for Student's behavior intervention plan showed Student screamed or made noises approximately eight times daily.

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At hearing, Gomez and Barrosa opined Student did not obtain nonacademic benefit from being around his peers. At times, he sat on the carpet during circle time, but did not participate. He did not participate during whole class instruction. Gomez expressed concern Student did not want to interact with his peers. Barrosa opined Student did not emulate his peers in the general education setting. Student sometimes distracted his classmates by making off-topic comments, going under the desk, and yelling. Student's behavior impacted his ability to receive nonacademic benefit from the general education classroom.

The preponderance of the evidence provided Student did not receive nonacademic benefit in the general education classroom. The second factor under *Rachel H.* weighed in favor of a more restrictive placement.

STUDENT'S IMPACT ON HIS PEERS AND TEACHERS

The third factor considers the effect the child with a disability has on the teacher and children in the regular classroom. Capistrano's witnesses offered consistent and credible testimony establishing the negative impact of Student's behaviors on the teacher and the other children in the general education classroom. Gomez persuasively opined that Student's maladaptive behaviors caused her to lose instructional time. Although Student was supported by a one-to-one instructional aide, Gomez sometimes had to assist the aide in managing Student's behaviors which took time away from her instruction to the entire class. Gomez also credibly explained Student's peers were distracted by Student's yelling, noises, and behaviors. As an example, she described an incident when Student refused to open his book and some of his classmates became frustrated and called out to Student to open his book.

Principal Barrosa offered persuasive testimony confirming Student's behaviors were disruptive and distracting to Student's peers. Student tried to divert his classmates during whole group instruction. He hid under the table, yelled, and made inappropriate comments. Barrosa or the assistant principal were called to assist the classroom teacher and staff anywhere from several times daily to several times per month. Barrosa implemented positive behavioral strategies from Student's behavior intervention plan, including using, "first, then" phrases and offering Student a sensory break or a preferred activity. Sometimes she removed Student from the classroom to allow him time to deescalate.

Student often did not follow instructions from Wilcox and Gomez. Barrosa opined Student's behaviors did not significantly improve after the October 27, 2023 IEP. Towards the end of the 2023-2024 school year, Student's peers were frustrated with Student's conduct. One child told Barrosa he could not be friends with Student any longer because he was tired of being yelled at by Student. Barrosa persuasively opined that Student's behaviors negatively impacted Student's peers and teachers in the general education classroom.

The preponderance of the evidence proved Student's refusal to participate in class activities was a distraction to Student's peers and teachers. The third *Rachel H.* factor weighs in favor of a more restrictive placement.

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COST WAS NOT A DETERMINING FACTOR IN CAPISTRANO'S PLACEMENT OFFER

The fourth *Rachel H.* factor considers the cost of placing the child with a disability full-time in a regular classroom. Here, cost was not a factor in determining Student's placement. Accordingly, the fourth factor under *Rachel H.* is neutral.

Balancing the *Rachel H.* factors, along with persuasive testimony from Capistrano's witnesses about Student's needs in academics, communication, and behavior, Student did not receive educational benefit from full inclusion in general education, even with the use of supplementary aids and services. Student required a more restrictive placement to obtain educational benefit and meet his IEP goals. Capistrano proved by a preponderance of the evidence that Student required placement in a special day class in the STARS program, which was located at a different school site than Student's home school.

Having determined Student could not be educated fulltime in a general education environment, the least restrictive environment analysis requires a further determination whether placement in the STARS program provided Student mainstreaming opportunities to the maximum extent appropriate considering the continuum of placement options. (*Daniel R.R.*, *supra*, 874 F.2d at p. 1050.) Special day classes serve students with similar and more intensive needs. (Ed. Code, § 56364.2.) Students may be enrolled in special day classes only when the nature or severity of the disability is such that education in the regular class with the use of supplementary aids and services, including curriculum modification and behavioral support, cannot be achieved satisfactorily. (*Ibid.*) School districts must ensure that each child with a

disability participates in activities with nondisabled pupils to the maximum extent appropriate to the needs of the individual with exceptional needs, including nonacademic and extracurricular services and activities. (*Ibid.*)

Capistrano proved that the October 27, 2023 IEP offered Student access to general education peers and mainstreaming opportunities to the maximum extent appropriate for him. (*Daniel R.R., supra*, 874 F.2d at p. 1050.) The October 27 2023 IEP offered Student mainstreaming opportunities with his general education peers during lunch, recess, passing periods, and school activities. Capistrano also offered one hour and 30 minutes daily support by an education specialist during lunch and recess to support Student's social-emotional and behavior goals. Capistrano proved it offered Student a placement that addressed Student's unique needs, was reasonably calculated to provide him educational benefit, and mainstreamed him in the general education environment to the maximum extent appropriate.

Capistrano met its burden of proving the October 27 IEP offered Student a FAPE in the least restrictive environment. The October 27, 2023 IEP was comprehensive and contained all statutorily required information. The IEP contained:

- Student's present levels of academic achievement and functional performance;
- an analysis of how Student's disability affected his involvement and progress in the general education curriculum;
- a statement of 20 measurable, annual goals designed to meet Student's unique needs and allow him to make educational progress;

- a statement of how Student's goal performance would be measured and reported to Parent;
- a description of related services, supports, and accommodations along with projected start dates and duration, frequency, and location of services, supports and accommodations;
- an offer of extended school year services;
- daily round trip transportation;
- an individualized determination about how the IEP would be implemented under emergency conditions; and
- a behavior intervention plan.

Capistrano met its burden of proving the October 27, 2023 IEP complied with IDEA procedures and offered Student a FAPE in the least restrictive environment. Capistrano prevailed on Issue 1.

STUDENT'S ISSUE 2: DID CAPISTRANO DENY STUDENT A FAPE IN THE 2023-2024 SCHOOL YEAR BY FAILING TO PLACE HIM IN THE LEAST RESTRICTIVE ENVIRONMENT?

Student contended Capistrano denied him a FAPE by failing to place him in the least restrictive environment during the 2023-2024 school year. Student contended the least restrictive environment for Student was a general education classroom with a one-to-one bilingual, behaviorally trained aide with supervision by a behavior analyst.

Capistrano contended placement in a special day class within the STARS program was the least restrictive environment for Student. Capistrano further contended Student required specialized academic instruction in English by a credentialed special education teacher, slower instructional pacing, and a small student to adult ratio.

The adequacy of an IEP is determined based on the unique circumstances of a child. (*Endrew F.*, *supra*, 580 U.S. at p. 404.) An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams*, *supra*, 195 F.3d 1141, 1149.) An IEP must take in account what was, and was not, objectively reasonable when the snapshot was taken, or the time the IEP was drafted. (*Id.* at p. 1149.)

Student did not meet his burden of proving Capistrano's offer of placement for the 2023-2024 school year denied him a FAPE. As discussed in Issue 1, Capistrano's placement offer in the October 27, 2023 IEP was appropriate to meet Student's unique needs and was the least restrictive environment. The October 27, 2023 IEP team was aware Student's behavioral deficits were paramount and materially interfered with his ability to access his education. Student's unique needs required placement in a more restrictive setting than a general education classroom. Student could benefit from a small classroom setting with a special education teacher and behavioral components embedded in the program. Student could not make academic progress until his behavioral issues were successfully addressed.

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Student did not offer persuasive evidence in support of his argument Capistrano's placement offer denied him a FAPE. While Parent preferred that Student remain in the general education environment with a one-to-one, bilingual, behaviorally trained aide and supervision by a behavior analyst, Parent's criticism of the STARS program was unpersuasive and not supported by the evidence.

Student offered no persuasive expert testimony supporting his contention the general education classroom with behavioral supports was the least restrictive environment. Dr. Carly Cox testified at hearing on Student's behalf. Cox was a medical doctor and board certified by the American Board of Pediatrics since 2009. Cox was Student's pediatrician since he was a newborn. Cox saw Student at least once annually for his annual check-ups and when he had medical needs. Cox described Student as having sensory integration issues, including sensitivity to noise, food, textures, and clothing.

Cox wrote a letter "to whom it may concern" on April 1, 2024; six months after the October 27, 2023 IEP team meeting. Cox stated Student was diagnosed with attention deficit hyperactivity disorder but he "is not in the Autism Spectrum" and "does not need to be in a special education classroom." Cox described Student's behavior in her office as "age appropriate" and that he was "capable of performing grade level schoolwork."

At hearing, Cox conceded she had not reviewed any of Student's IEPs and did not know why he was eligible for special education. She did not review any of Student's academic assessments, observe Student at school, or speak to any of his teachers. She conceded her description of Student's academic progress was based on Parent's report. Cox did not know if Student could perform first-grade level work, such as adding and

subtracting, reading, or writing. Cox's lack of knowledge about Student's academic, behavioral, social-emotional, and speech and language needs in the educational setting rendered her testimony unpersuasive. Cox's willingness to offer opinions about Student's educational needs relying primarily on Parent's report and without consideration of Student's assessment data, and academic, behavioral, and social-emotional progress in the educational setting diminished her credibility. As a result, Cox's testimony was given little weight.

Dr. Cindy Evans also testified on Student's behalf. Evans was a licensed medical doctor and board certified by the American Board of Family Medicine. Evans' medical practice focused on children and adults with developmental disabilities.

At Parent's request, Evans wrote a letter dated March 2, 2024, describing Student's academic progress. The letter was addressed to "whom it may concern." At hearing, Evans explained she understood her letter would be provided to Student's IEP team. The letter described Student as making "significant academic and social progress" since attending the dual language immersion program and as having had "no behavioral referrals since being removed from the special education classroom." The letter stated Student should remain "in the least restrictive environment (a regular education classroom)" to challenge him academically and allow him to interact with typical peers. Evans advocated for Student to be given "standard" classroom accommodations including extra time on tests, "alteration of testing formats," and written instructions.

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Evans opined Student did not meet clinical criteria for autism under the Diagnostic and Statistical Manual of Mental Disorders, called DSM-5. Evans described Student as demonstrating repetitive behaviors but engaging in appropriate social behaviors during her clinical observations. Evans conceded that eligibility for autism in the educational context is based on different criteria than a clinical diagnosis.

Evans based the content of her letter on Parent's report and Evans' clinical evaluation of Student. Evans did not review Student's October 27, 2023 IEP, Student's school records, including his disciplinary records, or speak to anyone at Capistrano. She recalled briefly reviewing Student's initial IEP but could not recall the contents.

On cross-examination, Evans seemed surprised to learn that Student had not been removed from a special education classroom and placed in a general education dual immersion program. She understood Student had been in a special day class and made sufficient progress to transfer to a full-time general education classroom. The fact Student was in a general education classroom surprised Evans, and she commented a bilingual class would not be appropriate for Student if he was struggling academically. Evans became defensive when questioned about Student's disciplinary record. Her understanding that Student had not received disciplinary referrals was based solely on Parent's report. Evans attempted to retract her comments by stating it is "up to the school" to determine Student's educational program and her focus was on Student's medical needs. Evans' lack of understanding about Student's academic, behavioral, and social-emotional needs in the educational setting rendered her opinions unpersuasive. Accordingly, Evans' opinions about what constituted an appropriate placement for Student were given little weight.

Occupational therapist Camille Bustillo testified on Student's behalf. Bustillo was a licensed occupational therapist since 2015. She provided clinical occupational therapy services to Student. Bustillo previously worked as an occupational therapist in the private school setting. At hearing, Bustillo described Student's sensory processing needs and his sensitivity to sounds. She opined Student likely would be more dysregulated in a large classroom with more noises and distractions. Bustillo described strategies to support Student's sensory needs, including a visual schedule, a sensory diet, regular movement breaks, and zones of regulation. On cross-examination, Bustillo agreed her recommendations were comparable to the supports offered in Student's October 27, 2023 IEP. Bustillo's testimony supported Student's need for a smaller classroom with more behavior and sensory supports. Therefore, Bustillo's testimony helped establish Student could not obtain educational benefit in a general education classroom.

Parent wanted Student to remain in the dual immersion classroom at Las Palmas. Parent believed Student made academic progress at Las Palmas, particularly after she withdrew consent to specialized academic instruction following the October 27, 2023 IEP team meeting. When questioned about Student's low grades and insufficient goal progress, Parent did not agree Student's progress was below expectations for a first-grade student. Parent believed any progress by Student should be celebrated and did not want Student moved out of general education. Although Parent preferred Student remain in a general education setting, her testimony did not support a finding this was the appropriate placement for Student. As discussed in Issue 1, Student did not offer persuasive evidence that Student could obtain academic and nonacademic benefit with supplementary supports and services in a general education classroom.

The preponderance of the evidence proved that a general education class was not an appropriate placement for Student at the time of the October 27, 2023 IEP. Student failed to meet his burden of proving Capistrano denied him a FAPE in the 2023-2024 school year by failing to offer him placement in the least restrictive environment. Capistrano prevailed on Student's Issue 2.

STUDENT'S ISSUE 3: DID CAPISTRANO DENY STUDENT A FAPE IN THE 2023-2024 SCHOOL YEAR BY FAILING TO OFFER SUFFICIENT OR ADEQUATE SUPPLEMENTARY SUPPORTS AND SERVICES, NAMELY BEHAVIORALLY TRAINED STAFF WITH SUPERVISION?

Student contended Capistrano denied him a FAPE by failing to offer appropriate supplementary aids and services to support Student in the general education dual immersion program. Student asserted Capistrano should have offered Student a bilingual one-to-one aide trained in ABA with supervision by a behavior analyst.

Capistrano contended the October 27, 2023 IEP offered sufficient and adequate supplementary supports and services to address Students' behavioral needs. Capistrano contended the October 27, 2023 IEP's offer of one-to-one aide support, a behavior intervention plan targeting Student's inappropriate behaviors, extensive accommodations, and collaboration among school personnel and service providers was appropriate to meet Student's behavior needs.

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STUDENT'S STIPULATION WAIVED THE RIGHT TO CHALLENGE THE OCTOBER 27, 2023 IEP'S OFFER OF ONE-TO-ONE AIDE SUPPORT AND SUPPORTS AND MODIFICATIONS TO SCHOOL PERSONNEL

Student's stipulation waived the right to challenge the appropriateness of Capistrano's offer of one-to-one aide support and consultation between service providers and supports and modifications to school personnel. Student stipulated in paragraphs 3 and 5 of the Joint Stipulation that the October 27, 2023's offer of one-to-one aide support and supports and modifications to school personnel were appropriate and not in dispute. Notwithstanding these stipulations, Student questioned witnesses at hearing and argued in his closing brief that Capistrano should have offered Student a bilingual, behaviorally trained aide supervised by a behavior analyst.

The October 27, 2023 IEP offered Student six hours daily one-to-one aide support, defined in the IEP as "additional program support," to support Student's social/emotional, behavior and academic needs, as well as Student's safety and that of others. The IEP's offer of one-to-one aide support did not state Student's aide would be bilingual, trained in ABA, or supervised by a behavior analyst. Student stipulated in Paragraph 5 of the Joint Stipulation that the offer of aide support was appropriate. The October 27, 2023 IEP also offered Student consultation services between school personnel and service providers under the Accommodations, Supports, and Services portion of the IEP. Student stipulated in paragraph 3 of the Joint Stipulation that the supports and modifications to school personnel were appropriate and not in dispute.

Student waived his right to challenge the appropriateness of Capistrano's offer of one-to-one aide support and supports and modifications to school personnel. (*Palmer v. City of Anaheim* (2023) 90 Cal.App.5th 718, 723 (a party is bound by its own agreement

as to what is material and a stipulation of facts is conclusive upon the parties unless the trial court, in its discretion, permits a party to withdraw from a stipulation of facts. (citations omitted).) Accordingly, Student was barred from challenging the appropriateness of these services. For this reason, Student did not prevail on Issue 3.

STUDENT FAILED TO PROVE HE REQUIRED A ONE-TO-ONE BILINGUAL AIDE TRAINED IN ABA AND SUPERVISED BY A BEHAVIOR ANALYST TO RECEIVE A FAPE

Even if the stipulation did not waive Student's Issue 3, Student failed to meet his burden of proof that he required a bilingual, behaviorally trained aide supervised by a behavior analyst to enable him to make progress appropriate in light of his circumstances.

The educational benefit to be provided to a child requiring special education is not limited to addressing the child's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.)

A child's unique needs include the child's

- academic,
- social,
- health,
- emotional,
- communicative,

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- physical, and
- vocational needs. (*Seattle School 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), reversed in part on other grounds by *Schaffer, supra*, 546 U.S. at p. 56-58).)

The IDEA and California law require IEP teams to consider the use of positive behavioral interventions and supports, and other strategies, to address behaviors that impede a student's learning or that of others. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56520, subd. (b)(1).) The federal regulations implementing the IDEA require the IEP team to consider the use of positive behavior interventions, supports and other strategies, but they do not specify the interventions, supports, or strategies that must be used. (71 Fed. Reg. 46683 (Aug. 14, 2006).)

Throughout hearing and in his closing brief, Student argued he required a bilingual aide. Student offered no expert testimony or legal authority in support of his contention Capistrano was required to provide bilingual aide support to meet its FAPE obligation. Student failed to meet his burden of proof on this contention.

Student also failed to prove that Student required a one-on-one, ABA trained aide, with supervision by a behavior analyst, to receive FAPE at the time of the October 27, 2023 IEP. Student did not offer expert testimony in support of this contention. Student offered no assessments demonstrating Student required this level of support to make progress towards his IEP goals. Student did not elicit testimony from Capistrano's witnesses suggesting Student could make progress towards his IEP goals in the general education setting with a behaviorally trained aide with behavior analyst supervision.

Student offered Grandparent's testimony at hearing. Grandparent volunteered at Las Palmas weekly. She worked in the library each Wednesday and volunteered in Student's classroom two times monthly to help with art projects. Grandparent sometimes observed Student with his aide at Las Palmas. Student did not follow Wilcox's directions in the first-grade classroom, such as refusing to put away a book. Student did not like to write. Grandparent did not believe Wilcox responded well to Student's sensory needs or encourage him to participate in activities, such as physical education. Grandparent did not believe Student felt safe with Wilcox. Grandparent presented as a loving and caring grandparent. However, her testimony was not probative on the issue of whether Student required a behaviorally trained aide with supervision by a behavior analyst to receive a FAPE.

In support of the contention Student required a behaviorally trained aide with supervision, Student offered evidence of the numerous disciplinary referrals made for Student. Between the start of the 2023-2024 school year on August 15, 2023, through the October 27, 2023 IEP team meeting, Student had 19 disciplinary referrals. Student pointed to the disciplinary referrals as evidence Student required additional behavioral support through a behaviorally trained aide with supervision.

A similar argument was rejected by the United States District Court for the Eastern District of California. In *A.W. by and through Wright v. Tehachapi Unified School Dist.*, the parent argued their child required a one-to-one aide with supervision by a behavior analyst because Student's maladaptive behaviors persisted following cessation of behavior analyst supervision services. The court rejected the parent's argument, finding that although the child's behavioral issues had not been entirely resolved, "it did not follow that [the student] was denied a FAPE because those behaviors persisted."

(*A.W. by and through Wright v. Tehachapi Unified School Dist.* (E.D. Cal. Mar. 8, 2019) 2019 WL 1092574, at *7, *affd.* (9th Cir. 2020) 810 Fed.Appx. 588 (*A.W.*)). The court reasoned a student is not denied a FAPE “simply because the district’s proposed education plan provides less educational benefit than what a student’s parent might prefer.” (*Id.*, citing *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.* (9th Cir. 2013) 725 F.3d 1088, 1096-86.) Instead, the test for whether a FAPE offer is substantively appropriate under the IDEA is whether the IEP “developed through the [IDEA’s] procedures is reasonably calculated to enable the child to receive educational benefits.” (*A.W.*, *supra*, at *7 (citations omitted).) The court upheld the ALJ’s finding that although the student’s maladaptive behaviors were not totally controlled, the district’s educational program provided some tangible benefit. (*Ibid.*)

Although Parent preferred Student receive one-to-one aide support by an aide trained in ABA with behavior analyst supervision, Student did not prove this was necessary for Student to receive a FAPE. The evidence proved the October 27, 2023 IEP offered Student a variety of positive behavior interventions, supports, and strategies to address Student’s behaviors. The October 27, 2023 IEP offered Student five goals to address Student’s needs in

- complying with directions,
- following classroom routines,
- engaging in non-preferred activities,
- staying on task,
- engaging in physically aggressive behavior,
- eloping out of areas, and
- screaming.

The IEP offered extensive accommodations, including

- a first/then visual,
- a token board,
- preferential seating,
- movement breaks throughout the school day and class periods,
- fidgets,
- a wiggle cushion, and desk beads, and
- a sensory schedule.

It included an updated behavior intervention plan which identified the supports that were successful in removing Student's maladaptive behaviors, such as frontloading activities, access to sensory items, and scheduled sensory movement breaks throughout the day. The behavior intervention plan identified functionally equivalent replacement behaviors, and included teaching strategies, including

- reinforcement procedures for establishing,
- maintaining the replacement behaviors,
- changes to the environment to support Student, and
- materials and curriculum to support implementation of the plan.

The IEP offered Student one-to-one aide support throughout the school day. None of these supports required a behavior aide or supervision from a behavior analyst and Student offered no evidence that they did.

Student waived his right to argue Capistrano denied him a FAPE by failing to offer sufficient or adequate supplementary supports and services, namely behaviorally trained staff with supervision. Further, even assuming Student did not waive his right to challenge these services, Student did not meet his burden of proving by preponderance

of the evidence he required behavior supports beyond the behavior supports Capistrano offered him in the October 27, 2023 IEP to access the general education curriculum and make educational progress.

Student did not meet his burden of proof on this issue. Capistrano prevailed on Issue 3.

CONCLUSIONS AND PREVAILING PARTY

As required by California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided.

ISSUE 1:

The October 27, 2023 IEP offered Student a FAPE in the least restrictive environment such that Capistrano may implement it without Parent's consent.

Capistrano prevailed on Issue 1.

ISSUE 2:

Capistrano did not deny Student a FAPE during the 2023-2024 school year by failing to place him in the least restrictive environment.

Capistrano prevailed on Issue 2.

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ISSUE 3:

Capistrano did not deny Student FAPE during the 2023-2024 school year by failing to offer sufficient or adequate supplementary supports and services, namely, behaviorally trained staff with supervision.

Capistrano prevailed on Issue 3.

ORDER

1. Capistrano may implement the October 27, 2023 IEP without parental consent.
2. All relief sought by Student is denied.

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.

Jennifer Kelly

Administrative Law Judge

Office of Administrative Hearings