

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

PARENT ON BEHALF OF STUDENT,

V.

CAPISTRANO UNIFIED SCHOOL DISTRICT.

CASE NO. 2024070499

DECISION

January 22, 2025

On July 15, 2024, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Capistrano Unified School District, called Capistrano Unified. On August 21, 2024, OAH granted the parties' joint request to continue the due process hearing to the current dates. Administrative Law Judge Judith Pasewark heard this matter via videoconference on October 22, 23, 24, 29, 30, and 31, and November 5 and 6, 2024.

Attorneys Timothy Adams and Andrea Blair represented Student. Parent attended all hearing days on Student's behalf. Attorney Daniel Harbottle represented Capistrano Unified. Director of Alternate Dispute Resolutions Kathy Purcell and Program Specialist Deborah Aufill attended the hearing on Capistrano Unified's behalf.

At the parties' request the matter was continued to December 23, 2024, for written closing briefs. The record was closed, and the matter was submitted at close of business on December 23, 2024.

ISSUES

State and federal law both limit the subject matter of due process hearings to only those issues that the party requesting due process has raised in the due process complaint. (*M.C. by and through M.N. v. Antelope Valley Union High Sch. Dist.*, (9th Cir. 2017) 858 F. 3d 1189, 1196; Ed. Code, § 56502(i).)

Prior to the commencement of the hearing, Capistrano Unified requested confirmation of Student's issues as stated in the Order Following Prehearing Conference, dated October 11, 2024, as the only issues to be determined in the due process hearing. The issues as stated in the Order Following Prehearing Conference, were recited into the record to no objections. Capistrano Unified asserted that it did not consent to expanding Student's issues beyond those stated on the record, to no objection. Therefore, the issues of Student's due process complaint are limited to the following:

1. Did Capistrano Unified deny Student a free appropriate public education, called FAPE, by failing to implement his December 7, 2022, interim individualized education program, called IEP, by failing to provide one-to-one support?

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2. Did Capistrano Unified deny Student a FAPE in its 30-day review IEP developed on March 2, 2023, by failing to offer goals, services and placement to appropriately address Student's needs in the areas of communication, readiness, social/emotional and gross motor skills?
3. Did Capistrano Unified deny Student a FAPE in the annual IEP developed on May 26, 2023, and August 31, 2023, by failing to offer goals, services and placement to appropriately address Student's needs in the areas of communication, readiness, social/emotional, and gross motor skills?
4. Did Capistrano Unified deny Student a FAPE in the May 26, 2023, and August 31, 2023 IEP, by denying Parents meaningful participation in the IEP team meetings by predetermining Student's placement and services?
5. Did Capistrano Unified deny Student a FAPE in the February 29, 2024, May 8, 2024, and May 28, 2024 IEP, by failing to offer goals, services and placement to appropriately address Student's needs in the areas of
 - muscle weakness,
 - postural strength and stability,
 - motor skills,
 - confirmation of requests,
 - receptive vocabulary,
 - greetings,

- yes/no reliability,
- attention to task,
- matching objects to icons,
- personal identification,
- sensory needs,
- emotional regulation,
- self-care,
- functional pre-academics,
- functional communication, and
- social skills?

6. Did Capistrano Unified deny Student a FAPE by failing to consider the continuum of services and placement options during the May 28, 2024 IEP team meeting?

In its closing brief, Capistrano Unified contended that, by definition, the issues as stated above rendered Student's evidence regarding Student's medical conditions and safety concerns irrelevant to the due process complaint. While Capistrano Unified correctly asserted that Student's medical and safety evidence was not determinative of Student's issues per se, the evidence offered collateral support for Student's contention that the Capistrano Unified placement was inappropriate.

Therefore, Student's evidence, as presented, was admitted, considered, and appropriately weighed to make the factual determinations in this Decision.

JURISDICTION

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

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

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a 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.)

Student was five years old at the time of hearing. Student resided with Parents within Capistrano Unified's geographic boundaries at all relevant times. Student qualified for special education under the categories of multiple disabilities in the areas of intellectual disability, orthopedic impairment, speech or language impairment and other health impairment.

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).) Student filed the complaint and had the burden of proof on each issue.

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).)

BACKGROUND

Student initially resided within the Newport Mesa Unified School District, called Newport Mesa. Newport Mesa conducted a comprehensive educational assessment on February 9, 2022, and held Student's initial IEP team meeting on February 10, 2022.

No evidence was presented to suggest Student ever attended school in Newport Mesa. Student and his parents subsequently moved within the jurisdiction of Capistrano Unified, and enrolled Student in Capistrano Unified on December 2, 2022. Student started preschool in Capistrano Unified on January 9, 2023, during the 2022-2023 school year.

Student did not return to Capistrano Unified for the 2023-2024 school year, and instead, Parents enrolled Student in the Gray Academy, Orange County, called the Academy, then a non-profit, private school which was tailored for significantly disabled, medically fragile children. The Academy obtained conditional California certification as a non-public school in December 2023. Student continued to attend the Academy for the 2024-2025 school year.

Student presented with a series of disabilities which consisted of significant physical, respiratory, and neurological complications due to Student's diagnosis of hypoxic ischemic encephalopathy, which resulted in:

- a global developmental delay,
- spastic quadriplegic cerebral palsy,
- subclinical seizures,
- cortical visual impairment,
- dysphagia, defined as difficulty swallowing, requiring a gastrostomy tube,
- reflux, and
- laryngomalacia with obstructive sleep apnea.

Student was medically fragile. Of significant concern was Student's premature startle reflex response which was triggered by noise and caused Student to go into hyperextension and become dysregulated for various periods of time, lasting up to 20 minutes. When Student cried for periods of time, he had difficulty breathing and swallowing secretions. This strong startle reflex also occurred when Student was overstimulated, resulting in a primitive reaction within Student's sympathetic nervous system that caused him to react by flailing his arms and legs, resulting in harm to himself, as well as emotional discomfort, and an inability to self-regulate.

Student was non-verbal and relied on significant adult support to participate in all activities due to his physical limitations. It was difficult for Student to coordinate movement of his arms, hands, legs, feet and head. Student received occupational

therapy, feeding therapy, physical therapy, speech services, gastroenterology, orthopedic and neurology services, and home care nursing services from the Regional Center of Orange County.

Throughout the hearing, Parent emphasized the importance of understanding Student's startle reflex responses, aversion to loud noise, seizure potential and gastrointestinal issues which posed risks to Student's safety and well-being.

ISSUE 1: DID CAPISTRANO UNIFIED DENY STUDENT A FAPE BY FAILING TO IMPLEMENT HIS DECEMBER 7, 2022 INTERIM IEP BY FAILING TO PROVIDE ONE-TO-ONE SUPPORT?

Student contended Capistrano Unified in its December 7, 2022, interim IEP failed to implement Student's February 10, 2022 IEP from Newport Mesa, by failing to provide Student with a dedicated one-to-one aide.

Capistrano Unified contends its December 7, 2022 IEP offered Student a full day of additional program support, the same as had be offered in the prior Newport Mesa IEP. Further, Capistrano Unified provided additional program support on those few days Student attended class.

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

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. 386, 402 [137 S.Ct. 988, 1000].)

If a student with an IEP in effect moves to a new school district in the same state, the same school year, the new school district must provide services comparable to those received in the old district until it either (1) adopts the IEP developed in the old district or (2) develops, adopts, and implements a new IEP. (34 C.F.R. § 300.323(e); Ed. Code, § 56325, subd. (a)(1).)

The purpose of a comparable IEP is to avoid disrupting a student's educational program upon a transfer to another school district, allowing the new district a period of time to obtain prior records, and assess, observe and interview, in order to design an appropriate IEP for the student. The United States Court of Appeals for the Ninth Circuit has interpreted the phrase "in effect" to mean the last implemented IEP. This means that the new district is only obligated to provide comparable services which were implemented in the prior district, even if adopted by the district and approved by Parent. (*A.M. v. Monrovia Unified Sch. Dist.*, (9th Cir. 2010) 627 F.3d 773, 779.)

When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to the disabled child and those required by the IEP. (*Van Duyn v. Baker Sch. Dist.*, (9th Cir. 2007) 502 F.3d 811, 814.)

Student and his family moved within the boundaries of Capistrano Unified on December 7, 2022, and Parent provided Capistrano Unified a copy of Student's February 10, 2022 IEP from Newport Mesa. Capistrano Unified prepared an Interim Placement Request to act as Student's 30-day interim IEP. The placement request incorporated goals and services contained in the Newport Mesa IEP and assigned Student's special education services to placement in the Pre-structured Teaching Educating Prepared Students, or STEPS preschool program at Richard Henry Dana Exceptional Needs Facility, called Dana. The list of goals, services and accommodations, taken directly from the Newport Mesa 2022 IEP, did not include a dedicated one-to-one aide.

Specifically, the Newport Mesa February 10, 2022 IEP found Student eligible for special education and related services under the category of multiple disabilities in the areas of intellectual disability, orthopedic impairment, speech or language impairment and other health impairment, and offered Student placement in a non-categorical special day class on a short-day schedule with mainstreaming opportunities during recess and outdoor play.

The IEP notes indicated that one-to-one aide support was confirmed. Parents asked about the preparation process for the aide. The IEP team discussed options for bringing Student to school with the staff prior to the first day of school. All classroom staff would be aware how to use the feeding tubes in the event the aide was absent.

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The IEP document itself, however, did not contain a specific provision for dedicated one-to-one aide services. Instead, the IEP provided for full time independence facilitator services. Student provided no evidence from Newport Mesa to establish its provision of an independence facilitator was defined as a dedicated one-to-one aide.

Parents initially consented to the February 10, 2022 Newport Mesa IEP except for placement. The Newport Mesa IEP team reconvened on May 19, 2022, at which time Parents consented to the entire IEP as written.

Email communication on December 8, 2022, to Parents and the STEPS teacher and staff from the school psychologist reported Student would begin attending the STEPS program in January 2023, and would receive additional program support, speech, occupational and physical therapies, and nurse support. The email did not reference a dedicated one-to-one aide.

On December 20, 2022, Parent provided Capistrano Unified with an authorization for oral and gastrostomy feeding, which allowed the school nurse to train, monitor, and supervise non-medical school personnel to assist with Student's gastrostomy tube feeding and oral feeding. Parent offered to do a training for school personnel to demonstrate her recommendations.

Parents assumed that, based upon Student's significant needs, Capistrano Unified's additional support program meant a dedicated one-to-one aide. When they toured the school, they explained that the one-to-one aide was a crucial part of the IEP brought from Newport Mesa. On January 17, 2023, pursuant to communication with Principal Ellis, Parents discovered that Student did not have a dedicated one-to-one aide, and again expressed that the aide was critical to Student learning to tolerate the school environment and most importantly, meet his goals. Parent emphasized Student

was still learning self-regulation, and it was important to have a dedicated person there to assist him and learn his cues. Parent opined that without the dedicated one-to-one aide, Capistrano Unified could not provide sufficient support to set Student up for success.

Student did not establish by a preponderance of the evidence that Capistrano Unified was required to implement dedicated one-to-one aide services for Student. Student offered no evidence to establish that Student ever attended school in Newport Mesa. Student offered no evidence to establish one-to-one aide services or accommodations were ever implemented at Newport Mesa. Although Parents consented to the February 10, 2022 IEP, no evidence was presented to establish that Student ever received dedicated one-to-one aide services. As a result, Student failed to prove Capistrano Unified had any obligation to provide a dedicated one-to-one aide based upon the Newport Mesa February 2022 IEP. Capistrano Unified was not prevented from offering its own additional support program, even if it did not designate one specific adult to provide the service to Student.

The Interim Placement Request provided Student with full-time additional program support, which was offered as individual, direct contact/instruction provided on the Dana campus. This was comparable to the Newport Mesa offer of an independence facilitator offered for direct, individual services to support Student's physical limitations and significant delays in communication. In comparing the Newport Mesa and Capistrano Unified IEP's, Student's argument represented a distinction without a difference.

The evidence indicated that Parents wanted a dedicated one-to-one aide for Student to provide Student consistency in services and mitigate his startle reflex responses; they collaterally assumed one would be provided. Parents, however, submitted the Newport Mesa IEP document, as written, to Capistrano Unified, and Capistrano Unified relied on the IEP, verbatim, to provide Student's interim goals, services, and placement.

The actions of a school district with respect to whether it had knowledge of, or reason to suspect, a disability, must be evaluated in light of information that the district knew, or had reason to know, at the relevant time. It is not based upon hindsight. (See *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (citing *Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1041).)

Assuming in arguendo that Capistrano Unified was required to implement the Newport Mesa 2022 IEP, the IEP did not specifically include a dedicated one-to-one aide as part of the IEP services or accommodations. It was undisputed that Student's multiple disabilities required one-to-one adult assistance at all times at school and at home. It was also undisputed Student was assisted by a variety of family members, including grandparents, and aides in the home. Parent's concerns that Student's startle reflex was activated by unknown people and Student was more comfortable with people he knew was valid. Student's startle reflex, however, would likely occur upon transitioning to the new classroom and new people, regardless of how many adults were providing physical assistance, until Student got to know them. It was Parent's speculation and opinion at that time that Student could not bond with more than one adult. Parent also authorized additional non-dedicated trained personnel to assist with Student's feeding.

Simply put, neither the February nor May 2022 Newport Mesa IEPs specifically provided a dedicated one-to-one aide. At hearing, Parents relied on their recollection of a communication with Principal Ellis. According to Parents, Ellis stated he was attempting to hire an additional aide for Student. Parent contended his statement acknowledged that Capistrano Unified offered a dedicated one-to-one in its IEP but had not yet employed an aide specifically for Student to implement the IEP as intended. Ellis's statement was not definitive of Student's contention, nor was the statement made until after Parents removed Student from school. Ellis recalled the statement was made in the context of accommodating Parents in order to return Student to school. The IEP already provided individual program support, which meant full-time adult support by a person familiar with Student and capable of implementing his IEP. Ellis simply could not guarantee the same person every day.

ISSUE 2: DID CAPISTRANO UNIFIED DENY STUDENT A FAPE IN ITS 30-DAY REVIEW IEP DEVELOPED ON MARCH 2, 2023, BY FAILING TO OFFER APPROPRIATE GOALS, SERVICES, AND PLACEMENT TO ADDRESS STUDENT'S NEEDS IN COMMUNICATION, READINESS, SOCIAL/EMOTIONAL AND GROSS MOTOR SKILLS?

Student contended the essential function of an IEP was to set out a plan for pursuing academic and functional advancement which Capistrano Unified failed to provide in the incomplete IEP.

Capistrano Unified contended the March 2, 2023 IEP made no offer of FAPE and was continued to May 26, 2023, to obtain additional information to make an appropriate offer of FAPE.

An IEP is a written document that states the child's present levels of academic achievement and functional performance, creates measurable annual goals for the child, describes the child's progress toward meeting the annual goals and explains the services that will be provided to the child to help him advance toward attaining his goals. (*Timothy O. v. Paso Robles Unified School Dist.*, (9th Cir. 2016) 822 F.3d. 1105, 1111.)

The IEP must comprehensively describe the child's educational needs and the corresponding special education and related services that meet those needs. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 368 [105 S.Ct. 1996] (*Burlington*).) The IEP must identify the special education and related services and supplementary aids and services, including program modification or supports. (*Id.*, 471 U.S. at 368; 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.324(a)(2)(iv); Ed. Code, § 56345, subd. (a)(4).)

The IEP documents the child's current levels of academic achievement, specifies measurable annual goals for how the child can make progress in the general education curriculum and lists the special education and related services to be provided so the student can advance appropriately towards those goals. (20 U.S.C. § 1414(d)(1)(A)(i)(I), (IV)(aa).) The IEP team must consider the strengths of the child; the concerns of the parent for enhancing the education of the child; the most recent evaluation of the child; and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); *Capistrano Unified School District v. S.W. and C.W. on behalf of their minor child B.W.* (9th Cir. 2021) 21 F. 4th 1125, 1129, 1130.)

Parents were righteously upset at the appalling events which occurred commencing January 9, 2023, the first week of school in the STEPS program. These events were not determinative of whether Capistrano Unified was obligated to provide a dedicated one-to-one aide in its 30-day interim IEP. The events, however, did establish parental concerns, and Capistrano Unified's shortcomings which occurred the first week of school in the absence of a dedicated aide. These events were continually raised by Student to support Parents' contentions that Capistrano Unified could not provide an appropriate educational program for Student.

Parent described Student's school attendance as a big leap for Student, and his first week in school was very rough on him. Student was unable to tolerate a full five-hour school day. Feeding was not working at all. On the first day of school, Parent was allowed to quickly demonstrate how to feed Student. Parent noted, however, the staff was not paying attention, nor was she allotted adequate time to accurately teach someone how to feed him. Later that morning, Parent was called to pick up Student after attempting to feed Student a snack and give him water through his gastrointestinal tube. Student became so upset that he projectile vomited five feet across the classroom.

When Parent arrived in the classroom, Student was undressed, lying on his side in his diaper, and was not moving. This was alarming as Student's body was never still due to his spastic quadriplegic cerebral palsy. Parent described Student as completely zoned out. There was no aide present.

As the classroom staff was unable to appropriately feed Student, Parent offered to come to school to feed Student lunch daily. This was contrary to school policy; therefore, it was determined that Student would go home each day before lunch.

For the remainder of the week, when Parent picked Student up from school, Student was visibly upset; he had clearly been crying, his face was red, and his nose was running.

On January 13, 2023, the situation culminated when Parent picked up Student. Student looked distraught. Student's diaper had not been changed. His pants were soaking wet, and his urine had soaked through to his stroller. Student had red marks on his neck which appeared to have happened by his head falling to his side with the restraint strap cutting into his neck. No one at Dana adjusted Student's head position. Parent provided photographs of Student. The photographs were disturbing and supported Parent's description of the neglect.

Parents did not discuss these incidents with Student's teacher or show her the photographs.

Student's teacher, Valery Fischer, acknowledged that feeding difficulties arose during the first week of school. Student needed significant help eating. Fischer was authorized to feed Student, but at the time she was not familiar with his startle reflex. Fischer reported that sufficient feeding training was not provided the first week of school. This resulted in initial difficulties feeding Student, including some vomiting. Fischer stopped Student's feeding when he vomited and was unable to get Student to eat everything Parent provided for Student to eat.

Fischer utilized a toileting protocol in which Student's diaper was changed every 60-to-90 minutes, or more often if needed. She never saw an abrasion on Student's neck. Since Parents did not share the photographs with Fischer, she did not address the incidents as she was unaware of the problems.

On January 17, 2023, Parents discovered Student did not have a dedicated one-to-one aide. Parents decided to pull Student out of the program, as they did not feel comfortable with anything that had happened during the first week of school. Finding out that Capistrano Unified failed to provide Student a dedicated one-to-one aide was “simply too much.”

The parties intended to discuss the dedicated one-to-one aide situation at the 30-day IEP team meeting scheduled for February 6, 2023. At Parent’s request, however, the 30-day IEP was rescheduled to March 2, 2023. The IEP was delayed as Student traveled to Florida for an intensive therapy program. Parents did not return Student to the STEPS program until March 3, 2023, when Capistrano Unified provided Student a one-to-one aide.

Capistrano Unified held Student’s 30-day review IEP on March 2, 2023. Although Student enrolled in Capistrano Unified in December 2022, Student only attended shortened class days for six days in January 2024, before Parents removed him from the classroom setting entirely. As a result, Student’s March 2, 2023 IEP was primarily based upon information contained in Newport Mesa’s February 9, 2022 IEP. As discussed further in Issue 5 of this Decision, the findings contained in the 2022 Newport Mesa assessment report were consistent with the findings and conclusions of Student’s independent evaluators shared in 2024.

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Based upon the information contained in the Newport Mesa assessment report, Student demonstrated solid pre-academic and readiness skills in the zero to three and six to nine month age ranges, with scattered skills in the nine to 12 and 12 to 24 month ranges. Student demonstrated limited skills in

- self-regulation and responsibility,
- self-concept,
- attention/memory,
- visual perception, and
- visual-motor skills.

Student was non-verbal and could not consistently or adequately communicate his wants and needs. Student could respond to environmental sounds, human voices, recognize familiar faces, and follow a line of visual regard. Student could gain adult attention by vocalizing or crying, and was beginning to shake his head for yes or no.

Student had some success with augmentative and alternative communication devices utilizing head-tracking and eye-gaze such as the Tobii-Dynavox.

Newport Mesa determined Student presented with significant motor delays. Student demonstrated unique needs in the areas of muscle weakness, decreased hamstring range of motion, impaired motor control, and decreased stability in holding positions such as sitting. Student's decreased mobility skills impeded his ability to access and participate within the school setting.

Cognitively, Student displayed significant developmental delays in all areas. Student showed significant delays in all areas of adaptive behavior and required significant assistance throughout his day.

Newport Mesa concluded that Student had unique educational needs in the areas of communication, functional fine/visual motor skills, social/emotional, readiness, and mobility, in addition to ongoing medical and nursing services.

Newport Mesa determined that Student appeared to warrant additional support in the form of an independence facilitator due to his physical limitations and significant delays in communication. Student demonstrated mobility needs that required positioning or bracing multiple times daily with the use of a stander, walker, gait trainer or wheelchair. Student required close adult proximity and prompts including physical assistance to stand. Student primarily complied with only one-to-one direction and monitoring with familiar adults. Student required direct assistance with personal care. Student required support to facilitate communication and use of augmentative and alternative communication equipment. No testimony was offered from Newport Mesa to define the role of an independence facilitator or any other portion of its IEP.

In crafting an IEP which provides a child a FAPE, the child's baseline performance is generally determined through quantitative data obtained from assessments, observations, work samples and progress on prior goals. Given Capistrano Unified's scant contact with Student, the IEP team determined it required more time to observe Student in the classroom, conduct assessments, and collect data. Therefore, the IEP team relied heavily on the goals and services provided in the Newport Mesa IEP which Parents consented to.

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Paraphrased, the February 10, 2022 Newport Mesa IEP contained the following annual goals:

- The first goal addressed expressive language and sought for Student to accurately provide "yes" and "no" responses;
- The second goal addressed expressive language and sought for Student to accurately provide "more" and "all done" responses;
- The third goal addressed receptive and expressive language and sought for Student to independently choose objects;
- The fourth goal addressed cause and effect play and sought for Student to independently manipulate novel cause and effect toys;
- The fifth goal addressed attending to task and sought for Student to demonstrate focused attention during an adult directed;
- structured activity and interface with materials; and
- The sixth goal addressed imitating and sought for Student to imitate three motor actions.

The March 2, 2023 Capistrano Unified IEP team meeting was

- attended by Principal Ellis,
- occupational therapist Gwyneth Hooper,
- speech and language therapist Adrienne Donahue,

- educational specialist Valery Fischer,
- general education teacher Laura Lopez,
- school nurse Julie Anderson-Canizales,
- physical therapist Mona Farrand,
- Parents and their advocate.

The IEP team obtained information from Parent which represented the most current information regarding Student's strengths and weaknesses as well as present levels of performance. Parent was most concerned about Student's global developmental delay. Student was making progress in his ability to communicate his wants and needs. He was beginning to use the eye-gaze devices. Parent believed Student knew what was going on around him and recognized familiar people. Student did not have difficulty with transitions, but he struggled with new environments and new people, which resulted in Student crying and becoming upset. Additionally, Student would cry if not being heard. Student might cry for five-to-10 minutes. Student's startle response also contributed to upset and extended crying.

Student's interest in interacting with familiar people was a strength. Parent reported that Student liked being in crowds. He would initiate with others by grabbing a sleeve and would reach for things he wanted to play with. Student was very interested in other children. Other children could understand Student's multi-modality communications 70 percent of the time, and often met his needs before he expressed them.

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CAPISTRANO UNIFIED DID NOT FAIL TO OFFER APPROPRIATE
GOALS IN THE AREAS OF COMMUNICATION, READINESS,
SOCIAL/EMOTIONAL AND GROSS MOTOR SKILLS

Student contended the March 2, 2023 IEP failed to contain appropriate IEP goals that included accurate and measurable data, thereby making the proposed goals impossible to be properly measured.

Capistrano Unified contended it did not have sufficient time to accurately determine whether Student's goals and services from his prior 2022 Newport Mesa IEP remained appropriate. Based on the information available to Capistrano Unified on March 2, 2023, the IEP offered Student appropriate goals and services in all areas of previously identified needs and was approved by Parents.

An IEP requires a statement of measurable annual goals, including academic and functional goals, designed to meet the needs of the student that result from the disability to enable the student to be involved in and make progress in the general education curriculum, and meet each of the other educational needs of the student that result from the disability. (Ed. Code, § 56345, subd. (a)(2)(A)(B).)

The statement of annual goals "must" include a description of the manner in which the pupil's progress toward meeting annual goals will be measured. (20. U.S.C. § 1414 (d)(1)(A)(i)(III); Ed. Code, § 56345, subd. (a)(3).) No specific form of measurement is required by statute or case law. In evaluating whether goals were measurable, the Ninth Circuit has stated that "goals could be measured based on teacher subjective

observations; ordinarily, e.g., no improvement, some improvement, significant improvement; or in any other way.” (*Capistrano Unified School Dist. v. B.W.*, (9th Cir. 2021) 21 F. 4th 1125, 1133-35.)

To evaluate an IEP, the court looks “to the [IEP’s] goals and goal achieving methods at the time the plan was implemented and ask[s] whether these methods were reasonably calculated to confer the child with a meaningful benefit. (*Adams*, 195 F.3d at 1149.) “The goals may differ, but every child should have the chance to meet challenging objectives.” (*Endrew F.*, *supra*, 580 U.S. 386 at 402.)

Speech and language pathologist Adrienne Donahue testified regarding Student’s speech and language goals and services. Donahue was a licensed speech and language pathologist and held a bachelor’s degree in speech and language pathology and audiology, and a master’s degree in speech and language pathology. Donahue demonstrated a variety of experience with special education, conducting an estimated 20 speech and language assessments annually, and attending an estimated 50 IEP team meetings per year.

Donahue reviewed the 2022 Newport Mesa assessment report and IEP as part of the Capistrano Unified special education intake team. Donahue also implemented the speech and language goals included in the interim IEP and saw Student three times for a total of 45 minutes. Donahue opined that she needed more time to work with Student to obtain enough data to make an informed determination of the level of services Student required. Therefore, Donahue adopted the Newport Mesa speech and language and social emotional goals into the March 2, 2023 IEP, to provide more time to determine accurate baselines and refine the goals.

Donahue explained that not all the goals included numbers or percentages for measurement, but she felt the goals were descriptive enough and contained sufficient information to begin to collect data and observe Student. The goals could be revised and become more specific when additional data was collected for the May 26, 2023 IEP team meeting. As such, Donahue reported the communication and social emotional goals contained in the March 2, 2023 IEP were appropriate until further data collection was completed.

Occupational therapist Gwyneth Hooper testified regarding Student's occupational therapy goals and services. Hooper, a registered occupational therapist, held a bachelor's degree in occupational therapy, and was employed by Capistrano Unified in the STEPS program for 22 years. Hooper had extensive experience in the school setting, implementing therapeutic strategies, evidenced-based interventions and environmental modifications for children with developmental delays, and physical and cognitive impairments. Hooper conducted an estimated 15-to-20 occupational therapy assessments per year.

Like Donahue, Hooper was a member of the intake team who reviewed the Newport Mesa assessment and IEP. Hooper worked with Student for two sessions, for a total of 40 minutes. Hooper was aware Parents wanted a feeding goal; however educationally related occupational therapy did not address feeding issues. The IEP team informed Parent that California Children's Services would work directly with Student regarding snacks and lunch. Parents declined the service, as they preferred to work with their private provider.

Hooper reported that the goals incorporated into the March 2, 2023 IEP contained occupational therapy goals which addressed Student's gross motor skills. The cause-and-effect goal as well as the tool use goal involved use of gross motor skills which were practiced every day in the classroom. Hooper reported the goals related to Student's gross motor skills were appropriate.

Mona Farrand, a Capistrano Unified physical therapist, attended the March 2, 2023 IEP team meeting. Farrand held a bachelor's degree in physical therapy and worked for Capistrano Unified since 2008. Farrand presented as a highly qualified professional who not only provided educationally based physical therapy for many years, but previously worked as a pediatric physical therapist for California Children's Services with children with neuromuscular and orthopedic disorders. Farrand had experience conducting comprehensive developmental assessments, equipment consultations and home program implementation.

Farrand was also on the intake team and reviewed the Newport Mesa assessment report and IEP. Farrand shared that she wanted more time to evaluate Student's physical therapy goals, which addressed rolling and sitting. Therefore, she maintained the existing goals as appropriate until the IEP team could collect more data.

Farrand was responsible for obtaining the necessary equipment for Student. Farrand opined that within the first week of school, they were still obtaining equipment which Student needed for everyday use and practice. It was difficult to develop new goals and services without enough information to determine the next step.

Valery Fischer, Student's teacher, testified at hearing. Fischer held bachelor's degree in psychology and a master's degree in education, with additional graduate study in special education, advocacy, and psychology. Fischer held a specialist instruction credential for moderate to severe disabilities and an early childhood special education certificate. Fischer taught in the special education setting since 1986, teaching at Capistrano Unified for the last 22 years, primarily in the STEPS program. Fischer also stated she required more time to evaluate Student. She needed more than six days to become familiar with Student. She noted that Student did a little better each day, but she needed more time to work with his startle reflex and to fully understand his needs.

The IEP team determined Student had educational needs in receptive and expressive language. Student's prior assessment scores indicated receptive language skills at the 10-month level, and expressive language skills at the five-month level. Student did not consistently communicate his wants and needs using a fixed modality.

All goal baselines were based on the Newport Mesa's assessment and February 2022 IEP.

The first goal addressed expressive language.

- The goal sought, that given a question, Student would demonstrate accurate "more" and "all done" responses using eye-gaze to icons in eight-of-10 trials, over three consecutive data collection sessions. The goal supported the use of accepted language and style during communication and was measured by the teacher and speech and language pathologist observation and data collection.

The second goal addressed expressive language.

- The goal sought that, when given a question, Student would demonstrate accurate "yes" and "no" responses using eye-gaze to icons, head turning or head nod in eight-of-10 trials over three consecutive data collection sessions. The goal supported the use of accepted language and style during communication and was measured by the teacher and speech and language pathologist through observation and data collection.

The third goal addressed choosing.

- The goal sought that, when given a simple question, such as "what do you want?," Student would independently choose an object, photo, or picture symbol to indicate his preference using a multi-modality response, such as eye-gaze, reaching forward, or indicating "yes/no" when items are presented in a field of two-to-three in eight-of-10 trials over three consecutive data collection sessions. The goal supported the use of language to communicate with others in familiar social situations for a variety of basic purposes and was measured by the teacher and speech and language pathologist by observation and data collection.

The IEP team determined Student had social emotional needs including engaging independently with cause and effect play with the use of a switch device.

The fourth goal addressed cause and effect.

- The goal sought that, when given optimal seating and positioning, Student would appropriately manipulate three novel cause-and-effect toys independently using a switch device with his foot or hand for one minute, across two weeks of data-collection sessions. The goal supported initiative in learning and was measured by the teacher and all service providers by observation.

The IEP team determined Student demonstrated needs in educational readiness, including attending to task, imitating, and using tools, therefore the IEP team created goals to support his needs in these areas.

The fifth goal addressed attending to task.

- The goal sought that, when given optimal seating and positioning, Student would demonstrate focused attention during a directed structured activity, given no more than one redirection to stay on task for one minute. The goal supported interactions with familiar adults and was measured by teacher observations.

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The sixth goal addressed imitating.

- The goal sought for Student to imitate three motor movement actions when modeled by an adult in 70 percent of opportunities across two weeks of data collection. The goal supported group participation and was measured by teacher observation.

The seventh goal addressed tool use.

- The goal, designed as a foundational hand skill goal, sought that, when provided optimal seating and positioning, when a novel classroom tool, such as a marker or crayon was placed in Student's hand, Student would hold on to the tool for 20 seconds in 70 percent of opportunities, across two weeks of data collection sessions. The goal supported development of skills and motor control when working with visual arts tools and was measured by the teacher and occupational therapist by observations.

The eighth goal address rolling.

- The goal sought to increase Student's ability to roll from his back to his stomach and get his arms out with moderate assistance four-out-of-five times across three sessions of data collection. The goal was measured by observation but omitted who would conduct the measurements.

The ninth goal addressed sitting.

- The goal sought for Student to prop sit on the floor with assistance for 30 seconds, four-out-of-five times across three sessions of data collection. The goal was measured by physical therapist observation.

Fischer noted that Student's interim goals had only been in effect for six days before the March 2, 2023 IEP. Student's first week of school was difficult. The first week of school was often difficult for children. In the beginning, Fischer was not familiar with Student's startle reflex, but Student began to improve over time.

Fischer wrote the readiness goal, because a student must attend to task before he/she can learn. Fischer opined that although more time was needed with Student to finish creating goals, none of the goals were detrimental to Student.

In their list of exceptions to the IEP, Parents consented to the goals. No objections were made to the form or content of the goals themselves. Instead, Parents objected to the occupational therapy and physical therapy services as insufficient to meet Student's extensive needs. Parents also consented to the extension of time to obtain further data in order to complete the goals.

Student's contentions that the goals, throughout Capistrano Unified's IEP's conducted between March 2023 and May 2024, were inappropriate was primarily based on the testimony of their independent evaluators: occupational therapist Aja Roley, speech and language pathologist Abby Rosenberg, psychologist Lisa Grajewski, and the

Academy's physical therapist Jo Anne Carpenter. The independent evaluations and relevant testimony of the evaluators is discussed at length later in this Decision in the chronological order in which they were presented to the IEP team in 2024.

Independent speech and language pathologist Rosenberg opined that although Student's present levels of performance aligned with the Newport Mesa assessment, she would have added a pragmatic goal, such as greetings. Rosenberg opined that Student's needs were so specific that detailed descriptions were required in each goal to outline how to measure each goal. She found the proposed communication goals inappropriate as she concluded they were not measurable which rendered the goals vague. Similarly, she determined that the amount of speech and language services offered were insufficient to meet Student's needs. She opined Student required three, 30-minute sessions of individual service per week.

Independent occupational therapist Roley found the occupational goals and services inappropriate as well. In developing her opinion, Roley did not review the March 2, 2023 IEP as part of her evaluation or initially consider Student's attendance as a factor in her conclusions. Roley provided lukewarm testimony regarding the March 2, 2023 IEP. Roley found the determination of Student's areas of need to be appropriate. Student's startle reflex and emotional regulation had not been addressed and needed a self-regulation goal. Roley's objections to the goals were form over content on baselines and measurement. Roley opined that "[the goals] could have been written better." Roley's objection to the IEP were more with the services which she found insufficient. Roley opined Student required 30 minutes per week of direct occupational therapy services and more time for consultation.

Independent psychologist Grajewski opined the March 2, 2023 IEP was inappropriate because it provided no consistent one-to-one support, and did not appropriately address Student's startle reflex. Grajewski's opinions were chiefly a repetition of parental concerns contained in her assessment report. For this, and other reasons discussed in Issue 5, Grajewski's testimony was not credible, and was given no weight.

For purposes of Issue 2, none of the evaluators met with Student, conducted their assessment, or observed Student prior to Student's enrollment at the Academy. Student did not provide Capistrano Unified with the independent evaluation reports until 2024, and the evaluators did not share their findings with the IEP team until commencement of the 2024 IEP team meetings on February 29, 2024. As qualified expert witnesses, each of these evaluators could offer their opinions regarding the validity of the goals. These opinions, however, were influenced by their subsequent observations and assessment of Student. As example, in reviewing Student's 30-day IEP, Roley was unaware that Student had only attended school six days, a collateral fact needed to accurately examine each goal. Roley's testimony regarding the inappropriateness of the goals in the 30-day IEP was based on the almost identical reasoning and conclusion contained her assessment report and testimony given regarding goals in the May 28, 2024 IEP. Each independent assessor faced a similar problem with their testimony being influenced by their evaluation of Student.

As stated in *Adams*, the actions of a school district must be evaluated in light of information that the district knew, or had reason to know, at the relevant time. It is not based upon hindsight. The independent evaluators based their findings and recommendations on information obtained after the March 2, 2023 IEP team meeting; and this information was not shared with the IEP team until May 2024. Student relied

on these opinions and critiques to invalidate the March 2, 2023 IEP inconsistent with *Adams*. Rosenberg opined the goals were inappropriate because they did not contain Student's present levels of performance and were not measurable. Roley indicated the goals needed more information. Carpenter based her opinions on contact with Student at the Academy. As a result, the testimony presented by Rosenberg, Roley, and Carpenter, was not credible and was given little weight in relation to the March 2, 2023 IEP.

Student failed to establish the goals contained in the March 2, 2023 IEP denied Student a FAPE. While an IEP must include a statement of annual goals designed to meet a student's unique educational needs, it is not required to contain every goal from which a student might benefit." (*Capistrano Unif. Sch. Dist. v. S.W.*, *supra*, 21 F.4th at p. 1133.)

Student failed to identify how the goals failed to address each of his areas of concern, but instead lumped the goals together and generalized that if each of the goals were deficient, it generically followed they could not support his areas of concern. Logical, but not legally sound. The IEP must show a direct relationship between the present levels of performance, the goals, and the specific educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (b).) The law does not dictate that the required information be in a specific portion of the IEP, if it is included elsewhere. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d)(2007); Ed. Code, § 56345, subd. (h)].)

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The goals were not perfect, but they comported to Student's known areas of need and provided sufficient information to allow the service providers to begin observation and collect data for further review in six weeks. The goals aligned with prior goals set by Newport Mesa based upon known information in Student's 2022 comprehensive assessment.

The goals addressed each area of Student's contention: communication, readiness, social/emotional and gross motor skills. The goals were supported by the information contained in the 2022 Newport Mesa assessment report, which was not significantly challenged at hearing.

Even if accepting Student's contention that form controlled content, Capistrano Unified's failure to masterfully construct the goals amounted to only a procedural violation. Not every procedural violation is sufficient to support a finding that a student was denied a FAPE. (*R.B., ex rel. F.B. v. Napa Valley Unified Sch. Dist.*, (9th Cir 2007) 496 F.3d 932, 938 (quoting *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).)

A procedural error results in a denial of a FAPE only if the violation impeded the student's right to a FAPE; significantly impeded the parent's opportunity to participate in the decision-making process; or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2) (2006); Ed. Code, § 56505, subds. (f)(2) & (j); *Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1043 (*Doug C.*) [citing *Target Range, supra*, 960 F.2d at p. 1484].) While Student experienced an amazingly bad first week of school and had sizeable difficulties due to his startle reflex responses, Student did not establish that the flaws in the goals impeded parental opportunity to

participate in the decision-making process; or caused a deprivation of educational benefits, which would be more thoroughly discussed after an additional six weeks of working with Student.

Student's contention was without merit. Parents provided consent to the goals contained in the 2022 Newport Mesa IEP, and subsequently submitted that IEP to Capistrano Unified with the full intent for Capistrano to implement those same goals as FAPE pending a 30-day review of educational records and classroom observations. Of note, no educational records from Newport Mesa were presented to establish Student's progress on the goals which would have assisted Capistrano Unified in determining whether any changes to the goals were needed. Instead, Parents consented to the goals as presented.

The irony was not lost on the ALJ that in nine days of hearing, Student provided more days of information and data regarding Student than he provided to the IEP team after one week of school attendance. School districts often continue IEP team meetings for a period of time to obtain additional information relevant to draft accurate and thoughtful provisions of a child's IEP. It was unreasonable if not irresponsible to expect a comprehensive IEP for a highly complex child to be developed from only six days of school attendance. Each of Student's highly qualified service providers stated they each needed more time to complete their annual goals, and Parents, knowing the IEP was not complete, provided consent.

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CAPISTRANO UNIFIED DID NOT FAIL TO OFFER APPROPRIATE
SERVICES IN THE AREAS OF COMMUNICATION, READINESS,
SOCIAL/EMOTIONAL AND GROSS MOTOR SKILLS

Student contended the amount of time allotted for occupational therapy and physical therapy was insufficient given Student's physical disabilities.

Capistrano Unified contended the services offered by the IEP team addressed Student's areas of need in communication, readiness, social/emotional and gross motor skills as the services selected, and each related service provided appropriate frequency and duration to support Student's goals.

Related services, referred to as designated instructional services in California, are provided when the student's IEP team determines that services are required in order for the student to benefit from special education. (34 C.F.R. § 300.34(a).) A student's need for related services is determined on an individual basis as part of the IEP process and must be based on the student's individual needs. (34 C.F.R. § 300.320(a)(4).)

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 also include a statement of the anticipated frequency, location, and duration of related services that will be provided. (34 C.F.R. § 300.320(a)(7).)

To support Student's communication goals, the IEP team offered three, 15-minute sessions of individual push-in speech and language services per week, provided by a speech and language pathologist or licensed assistant. Additionally,

the IEP provided for 15 minutes per month of consultation between the speech and language pathologist and classroom teacher to facilitate Student's language skills in the classroom.

To support Student's occupational therapy goals, the IEP team offered 20 minutes per week of push-in group occupational therapy services to be provided in class in collaboration with the teacher and staff. Additionally, the IEP provided 15 minutes per month of occupational therapy consultation between the occupational therapist and any member of the IEP team.

The IEP provided 30 minutes per week of individual physical therapy services in a separate environment, along with 60 minutes, four times a year of physical therapy consultation.

Donahue, Hooper, and Farrand each indicated that they needed additional time to appropriately determine Student's annual goals, and subsequently determine the amount of corresponding services were required.

Parents did not consent to the time allotted to Student's physical and occupational therapy services. Parents opined that the sheer amount of disability Student experienced and the amount of work needed to maximize Student's progress required more service sessions. There is no doubt that Parents know their child well. However, Parents are not licensed professionals with years of experience providing educationally based services, as were the Capistrano Unified members of the IEP team.

As with their contentions regarding the goals, Student relied on the testimony of his expert witnesses, who conducted independent evaluations in speech and language, occupational therapy, and physical therapy, to support the hypothesis that Student

required more services to appropriately support his needs. The credibility determinations made above regarding the goals in the March 2, 2023 IEP apply to the expert testimony regarding services as well.

Therefore, Student did not establish that the services offered in the IEP were insufficient to support Student's goals. The services offered by the IEP team were sufficient to support the goals in all of Student's identified areas of need.

CAPISTRANO UNIFIED DID NOT FAIL TO OFFER APPROPRIATE PLACEMENT TO PROVIDE SERVICES IN THE AREAS OF COMMUNICATION, READINESS, SOCIAL/EMOTIONAL, AND GROSS MOTOR SKILLS

Parents contended that the STEPS program placement was inappropriate due to their significant safety concerns based upon Student's experience the first week of school which resulted in their decision to remove Student from school. Further, the IEP team's failure to provide a dedicated one-to-one aide resulted in Capistrano Unified's inability to implement Student's IEP on the Dana campus.

Capistrano Unified contended its offer of placement in the STEPS program was appropriate, and that Student's contentions were based on their desire for an alternate educational placement at the Academy for the 2023-2024 school year.

School districts are required to provide each special education student with an appropriate program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids

and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114 (a)(2); Ed. Code, §§ 56031, 56033.5); *D.R. v. Redondo Beach Unif. Sch. Dist.*, *supra*, 56 F.4th at 643-44 [citing *Sacramento City Unif. Sch. Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404].) The IDEA also requires, to the maximum extent appropriate, that a child with a disability be educated with children who are not disabled. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2); Ed. Code, § 56040.1, subd. (a).)

Principal Ellis and STEPS teacher Fischer described the STEPS placement located at Dana. The Dana campus served approximately 142 students. Student's classroom, located in the main building, was separated from other programs on campus. There were six children in Student's class. Several of the children were more severely disabled than Student. Most of the students had gastrointestinal tubes and seizures. A registered nurse and licensed vocational nurse were located on campus.

The classroom was designed to maintain safety and provide extra aide support to assist Student. The classroom was large with handicapped access, mats on the floors, equipment to assist the students, a kitchen, and a changing station near the kitchen. An adapted playground was used by all students. Student did not have close interaction with other students on the playground. The STEPS program classroom environment was appropriate to serve the needs of medically fragile and highly disabled students.

Based upon only the first week of school, Fischer acknowledged that Student's startle reflex triggered by noise caused Student to be dysregulated which impacted his ability to attend to instruction. Fischer explained that the goals, as written, could be implemented in the classroom, and she worked on goals in the classroom daily. Fischer

also worked closely with service providers in the classroom. Again, having only six days in the classroom, Fischer did not have sufficient time to observe Student's startle reflex, to develop calming strategies or make even simple classroom modifications.

Nor did Fischer have sufficient time to make changes in Student's feeding protocol, or even recommend a change of placement if warranted. Similarly, in six days, Student did not have sufficient time to bond with Fischer and the classroom staff, or adjust to the classroom environment, his first time in a school setting. None of the Capistrano Unified service providers indicated an inability to implement Student's goals and services in the classroom or during pull-out services on campus.

The March 2, 2023 IEP team discussed Parents' request for a consistent one-to-one aide. Capistrano Unified shared that the STEPS program could provide Student a one-to-one aide, but due to staffing challenges, it could not guarantee a consistent permanent employee. Ellis shared that he understood Parents' desire for consistency in services, however it would be beneficial for Student to work with another adult for at least a small amount of time each day to become familiar with Student in the event the regular aide was absent. Ellis recommended that once Student became settled and calm, several other staff members should work with Student.

The IEP team included provision of additional program support which provided one-to-one support for Student. Upon obtaining the one-to-one aide support, Student returned to the STEPS program placement on March 3, 2023, and remained until the end of the 2022-2023 school year.

Student failed to establish that Capistrano Unified's offer of placement in the March 2, 2023 IEP denied Student a FAPE. As determined above, the goals and services offered by the IEP team were appropriate under the circumstances based upon the information Capistrano Unified had at the time.

Student's concern regarding the incidents during the first week at Dana were irrelevant to the issue of placement. The issue was whether the goals, services, and placement as proposed on March 2, 2023, were appropriate, not whether the goals and services were appropriately implemented in January 2023. There was no demonstrated reason to change Student's placement at that time.

ISSUE 3: DID CAPISTRANO UNIFIED DENY STUDENT A FAPE IN THE ANNUAL IEP DEVELOPED ON MAY 26, 2023, AND AUGUST 31, 2023, BY FAILING TO OFFER GOALS, SERVICES AND PLACEMENT TO APPROPRIATELY ADDRESS STUDENT'S NEEDS IN THE AREAS OF COMMUNICATION, READINESS, SOCIAL/EMOTIONAL, AND GROSS MOTOR SKILLS?

MAY 26, 2023 IEP

Student contended Capistrano Unified failed to offer Student a FAPE in the May 26 and August 31, 2023 IEP's primarily based upon health contentions and expert witness opinions which required an alternate educational placement. Student's evidence and arguments were basically the same as presented for Issue 2.

Capistrano Unified contended that the May 26, 2023 IEP addressed each of Parents' concerns, created 14 goals each of which were reviewed and approved by Parents and their advocate, and provided appropriate services and placement which had been adapted to Student's unique needs.

Prior to the May 26, 2023 IEP, Parent provided her concerns on a Parent Input Form, dated May 5, 2023. In response to Capistrano Unified's inquiry regarding goals, Parents requested a physical therapy goal in which Student's head control and core strength continued to improve, and that Student consistently walk in his gait trainer independently. Parents sought an occupational therapy goal to work on decreasing Student's startle reflex as well as a goal to learn to use his hands more effectively to play. Parents wanted a communication goal for Student to consistently use his talker to answer questions and make requests. Parents opined that Student was capable of significant gains in his abilities, but required additional physical therapy, occupational therapy, and speech services to effectively progress toward his goals.

CAPISTRANO UNIFIED DID NOT FAIL TO OFFER APPROPRIATE
PLACEMENT TO PROVIDE GOALS IN THE AREAS OF
COMMUNICATION, READINESS, SOCIAL/EMOTIONAL, AND
GROSS MOTOR SKILLS

Student contended the May 26, 2023 IEP failed to contain appropriate IEP goals that included accurate and measurable data, thereby making the proposed goals impossible to be properly measured.

Capistrano Unified contended that based on the information available on May 26, 2023, the IEP offered Student appropriate goals and services in all areas of previously identified needs and was approved by Parents.

The Capistrano Unified IEP team met on May 26, 2023, to complete Student's annual IEP. Parents and their advocate attended the IEP team meeting along with

- Hooper,
- Donahue,
- Fischer,
- Farrand,
- Canizales,
- Ellis, and
- speech and language pathologist and assistive technology specialist Kaylie Gustafson.

As of May 26, 2023, Student attended only 28 of 95 school days since enrolling in Capistrano Unified.

The IEP team determined Student's communication present levels of performance based upon what little information was available due to Student's limited school attendance. First and foremost, Student demonstrated a need for consistency in school attendance to promote the use of his communication device with teachers, peers and school staff. This could only be accomplished by increasing his opportunities for instruction and practice.

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Parent and speech and language pathologist Gustafson discussed Student's communication goals. Gustafson shared success stories of Student appropriately using his eye gaze device and using it well. The IEP team agreed to have the speech and language pathologist, teacher, and augmentative and alternative communication specialist collaborate to improve the matching goal by pairing it with a story to make it more meaningful, and to modify the two-word utterance goal.

Student's first goal addressed core and fringe vocabulary.

- The baselines indicated Student could answer a simple question of "what do you want?" by independently choosing an object or picture to indicate his preference of highly preferred activities using eye gaze on his device or by directly looking at the objects in a field of two-to-eight objects in 83 percent of opportunities. Student was inconsistent in using vocabulary at times when it matched his body language and the context.
- The goal sought to have Student use multimodal communication and fringe words to produce at least six core and fringe words that matched his body language and context in 80 percent of opportunities given initial modeling within his school day across three out of five trial days.
- The goal contained two benchmarks and was measured by teacher and speech and language pathologist observation.

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Student's second goal addressed increasing pragmatic functions.

- The baselines indicated that Student used multimodal communication to request an item or action and answer a personal question. Student was emerging with communicating the pragmatic functions of request recurrence, social comment, protest, and getting attention. He imitated language to direct an action when provided with a model. Student did not use greetings despite modeling.
- The goal sought to have Student use multimodal communication to produce a one-or-two-word utterance using at least four pragmatic functions in 70 percent of opportunities given initial modeling across three-out-of-five trial days.
- The goal contained two benchmarks and was measured by teacher and speech and language pathologist observation and data collection.

In social/emotional areas, Student's present levels of performance indicated he needed to respond more consistently to greetings and hearing his name called; he needed to establish eye contact with a communicative partner; and needed to use his body and voice to make choices when presented with two items. Student needed to use his hands more functionally when seated upright using a desk or tray table. The IEP team again noted that Student needed to improve his attendance to get more familiar with school staff and have the opportunity to engage with materials over a long period of time.

Student's third goal addressed responding to name.

- The baselines indicated Student did not noticeably respond to his name being called from a close distance by a staff member and rarely established even fleeting eye contact with familiar school staff.
- The goal sought that when his name was called, Student would acknowledge social interaction by orienting his body towards the person who called his name and establish brief eye contact in three-out-of-four opportunities.
- The goal contained two benchmarks and was measured by teacher observations.

The IEP team determined Student's present levels of performance in readiness covered the areas of attending to task, imitating, and tool use. Student needed to attend school consistently to become more familiar with staff and school routines, and to have the opportunity to engage with materials over a longer period of time. Student needed to use his hands more functionally when seated in an upright position and begin to imitate actions. Student needed to increase his participation in small group activities with his peers.

Student's fourth goal addressed attending to cause and effect.

- The baselines noted Student engaged with his favorite push button toy for two minutes off and on when positioned lying on his side on the mat.

- The goal sought that, when presented with a cause-and-effect toy in supported seating with a tray table, Student would engage in play with the toy for at least one minute using a total of three cause and effect toys, for three-out-of-five opportunities.
- The goal contained two benchmarks and was measured by teacher and occupational therapist observation and data collection.

Student's fifth goal addressed identifying his name.

- The baseline indicated Student was observed finding his printed name paired with a drawing of a face when asked to say "Student" using his eye-gaze device.
- The goal sought to have Student identify his printed name in a field of six classmates' names with an average of 80 percent accuracy in five consecutive trial days, using high- and low-tech eye gaze strategies.
- The goal contained two benchmarks and was measured by teacher observations.

Student's sixth goal addressed imitating actions.

- The baselines indicated Student did not visually attend to classroom staff. Student had limited purposeful arm and hand control.

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- The goal sought that, when shown a one-step action and given repeated modeling, Student would imitate an adult's action for three, one-step actions one out of five opportunities.
- The goal contained two benchmarks and was measured by teacher observations.

Student's seventh goal addressed matching.

- The baseline indicated Student could play a fish matching game on his eye-gaze device.
- The goal sought to have Student match pictures with identical objects for a total of 10 different pictures using his eye gazing device, with an average of 80 percent accuracy in five consecutive trials.
- The goal contained two benchmarks and was measured by teacher observation.

Student's eighth goal addressing song/story.

- The baselines indicated Student could press a pre-programmed button switch to contribute a word or phrase when optimally positioned near his hand while being read a thematic story during story circle time. Student was observed using his eye gaze device to participate in story time within a one-minute wait time and three visual models.

- The goal sought that when a familiar song was sung or story read, Student would participate in the activity by filling in the missing familiar words or phrases using a pre-programmed device for at least five different vocabulary words per thematic unit within 30 seconds each presented turn across three out of five opportunities.
- The goal contained two benchmarks and was measured by teacher and speech and language pathologist observations.

Student's present levels of performance in the areas of motor skills indicated Student needed to use his hands more functionally when seated upright in a supported chair. He needed to build walking endurance using a gait trainer and needed to develop his ability to maintain his seated balance on the floor while reaching to interact with cause-and-effect switch toys. Student required alternate positioning throughout the day.

Student's ninth goal addressed floor sitting.

- The baselines indicated that when Student reached for a toy while in a prop sitting position, he lost his balance.
- The goal sought that, with close supervision, Student would maintain a prop sitting position or upright seated position on a floor mat and maintain his balance while reaching out with one upper extremity towards a desired cause and effect switch toy four out of five times over four trial days.
- The goal contained two benchmarks and was measured by teacher and physical therapist observations.

Student's 10th goal addressed hand to midline.

- The benchmarks indicated that while seated on a chair, Student typically positioned his arms outstretched to the sides. He could explore toys with his hand but had not been observed to play or explore a toy using both hands in midline.
- The goal sought that after a setup of positioning an object on his hands, Student would demonstrate improved bilateral skills by bringing his hands to midline and sustaining his grasp on an object using both hands for at least 10 seconds in four out of five trials over five days.
- The goal contained two benchmarks and was measured by teacher and occupational therapist observations.

The 11th goal addressed tool use.

- The baselines indicated Student could hold a rhythm stick placed in his hand for over 20 seconds when given prop support.
- The goal sought that, when given optimal seating and positioning, when a novel classroom tool was placed in Student's hand, Student would hold onto the tool for 20 seconds in one out of five opportunities.
- The goal was intended to provide a foundation for Student to improve hand skills, contained two benchmarks and was measured by the teacher and occupational therapist observations.

The 12th goal addressed walking.

- The baselines indicated Student could take reciprocal steps in a gait trainer set in unidirectional mode with assistance for directionality and safety. Student needed to build his endurance with walking as he was not consistent with his performance.
- The goal sought that, with assistance for safety, Student would demonstrate the ability to walk in a gait trainer at least 20 minutes in four out of five recess periods over one week.
- The goal required active participation to initiate or engage in simple physical activities, contained two benchmarks, and would be measured by the teacher and physical therapist observations.

Parents raised concerns regarding Capistrano Unified's ability to handle Student's feeding needs. Fischer and Hooper asked Parents for any useful information or instructions obtained during Student's intensive feeding therapy. Parents reported there was no written report. The IEP team brought up concerns regarding the current feeding orders from Student's doctor and requested an update from the doctor. The IEP team again shared information about California Children's Services which could possibly provide Student with additional feeding support at school.

Student's present level of performance in self-care indicated Student tolerated being moved through a variety of positions during dressing and diaper changes. Student accepted a spoonful of pureed food, given physical prompts to keep his tongue in his mouth and his lips closed. Student needed to increase his participation in self-feeding and washing his hands.

The 13th goal addressed hand washing.

- The baselines reported Student opened his palm when a wet wipe was placed on it.
- The goal sought for Student to maintain a grasp on a wet wipe placed on his palm and move his fingers together for five seconds to participate in washing his hands after eating.
- The goal contained two benchmarks and was measured by teacher observation.

The 14th goal addressed spoon to mouth.

- The baselines indicated that when a spoon was placed in Student's right hand, he was able to sustain the grasp for about three seconds. Student could not bring the spoon to his mouth or feed himself with a spoon.
- The goal sought that, given a setup of placing a spoon in his hand or accommodation as necessary, Student would sustain a grasp on the spoon and bring it to his mouth at least one-time during mealtime over three consecutive days.
- The goal contained two benchmarks and was measured by teacher and occupational therapist observations.

To support the goals, the IEP team offered Student a variety of assistive and augmentative and alternative communication devices which included an eye gazer, adaptive school equipment, classroom sensory tools, and personal equipment.

Collaboration by service providers was offered to train staff on safety, handling and transferring Student, as well as augmentative and alternative communication training and support.

The IEP team also proposed a self-soothing goal, which was intended to help Student work towards limiting the duration of time that he cried. Parents' strong objections led the IEP team to remove this goal.

Parents requested daily logs for additional information on Student's goal progress, startle reflex, and crying episodes. The IEP team agreed. This was in addition to the toileting log, gross motor program log, and physical therapy logs offered.

After discussion of the proposed goals, parental concern regarding the goals, and parental collaboration in completing the goals, Parents had no further questions and consented to the goals.

Independent speech and language evaluator Rosenberg opined that the focus of the goals had changed to language functions and intent as she recommended. The goal language was more precise due to more data collection, which was also a good thing. Rosenberg, however, still opined that the goals were inappropriate largely based on their construction. Rosenberg found the wording of the multimodal communication goal to not be 100 percent aligned with the baseline. The baseline in the pragmatic function goal was not measurable, and the goal on social interaction was not offered as a speech and language goal, but rather as an occupational therapy goal. She opined that some of the goals assumed things not contained in the goal.

Independent occupational therapy evaluator Roley opined that the goals addressed Student's areas of need very well. Roley, however, felt the goals did not speak to Student's progress made on the goals, therefore the baselines were not clear as to how they related to the goal. Roley was not aware that Student had only attended a total of 28 days of school, which limited the data collection to report baselines. If a baseline was not included in the goal, Roley assumed the baseline was zero. Roley opined that she would rephrase the goals which, if adjusted, would be appropriate.

Roley also noted that self-regulation was an area of need, and while the IEP did not contain a related goal, it did contain accommodations for support.

Carpenter's opinions were based on her experiences as Student's private physical therapist at the Academy. Carpenter opined the goals did not meet Student's needs. Carpenter found fault with the walking goal, opining the goal sought too much of Student. 20 minutes in a gait trainer would be too hard on Student's head and strength. Student could only go 20-to-30-feet in a gait trainer. On the other hand, Carpenter expressed a need for a goal for Student to maintain his head upright, posture control, and endurance.

Capistrano Unified's physical therapist Farrand, who created the goal, explained that she was excited to see Student walk in a gait trainer, and she wanted to challenge and expand his endurance and directionality. The choice of 20 minutes corresponded to the time allotted for recess.

Student presented no credible evidence other than parental opinion that the goals were insufficient. The goals addressed the areas of communication, readiness, social/emotional and gross motor skills comported with Student's identified areas of

need. The goals provided the means by which they would be measurable, through the observations and collection of data by a qualified teacher and appropriate service providers.

The testimony of Rosenberg, Roley, and Carpenter was again offered contrary to *Adams*. Therefore, their testimony regarding the May 26, 2023 IEP goals lacked credibility and was given little weight.

CAPISTRANO UNIFIED DID NOT FAIL TO OFFER APPROPRIATE
SERVICES TO ADDRESS THE AREAS OF COMMUNICATION,
READINESS, SOCIAL/EMOTIONAL AND GROSS MOTOR SKILLS

Student contended the amount of time allotted for occupational therapy and physical therapy in the May 26, 2023 IEP was insufficient given Student's physical disabilities.

Capistrano Unified contended the services offered in the May 26, 2023 IEP addressed Student's areas of need and each related service provided appropriate frequency and duration to support Student's goals.

The May 26, 2023 IEP team offered the following services:

- Group specialized academic instruction in the STEPS program five hours per week;
- Individual specialized health and nursing care services for gastrointestinal tube hydration, 30 minutes per day, five days per week;
- Health and nursing consultation six hours per year;

- Individual speech and language services 30 minutes, three times per week;
- Speech and language consultation to consult with the teacher to facilitate Student's language skills in the classroom, 15 minutes per month;
- Group occupational therapy services 30 minutes per week;
- Individual occupational therapy services 30 minutes, twice per month;
- Occupational therapy consultation 30 minutes per month;
- Individual physical therapy services one hour per day, five days per week; and
- Assistive technology services consultation 20 hours per year to provide trainings for staff and parents, and to maintain equipment operation.

Rosenberg found the speech and language services appropriate at three, 30-minute sessions per week. Roley found the occupational therapy services did not adequately meet Student's needs. She recommended 30-minute individual sessions, two times per week, preferably in a sensory room. Group sessions were too overwhelming for Student. Interestingly this was the same opinion Roley expressed at the May 28, 2024 IEP team meeting when reviewing her evaluation report.

Carpenter believed the physical therapy services were insufficient. Carpenter recommended 60 minutes, two to three times per week, including full services during extended school year.

The IEP team also recommended extended school year and related services to prevent Student's regression, however, Parents declined the offer of an extended school year program.

Student presented no credible evidence other than parental opinion that the services were insufficient. Once again, Student relied on the opinions of his independent evaluators to establish the services contained in the May 26, 2023 IEP were inappropriate, contrary to *Adams*. The testimony of Student's independent evaluators remained inapplicable to the 2023 services, and the evaluators' testimony was given little weight.

CAPISTRANO UNIFIED DID NOT FAIL TO OFFER PLACEMENT TO ADDRESS THE AREAS OF COMMUNICATION, READINESS, SOCIAL/EMOTIONAL AND GROSS MOTOR SKILLS

The IEP team discussed a continuum of supports and placements. The IEP team offered placement in a separate class with specialized academic instruction in the STEPS program located on the campus of the Early Childhood Center.

Parents' disagreement with Capistrano Unified's offer of placement primarily stemmed over the placement location rather than the program itself. Further, Student's contentions were primarily based upon health and safety concerns at the placement site rather than on the goals and services to be implemented in the STEPS program placement.

Parents sought an alternate educational placement at the Academy and based their request on Student's medically fragile status and need for a low sensory environment to address his startle reflex.

THE GRAY ACADEMY-ORANGE COUNTY

Kristen Gray, the founder of the Gray Academy, testified at hearing. Gray was a dynamic witness, and her testimony was not challenged.

Gray founded Gray Academy in Santa Monica, California. Her own children had rare disabilities, and their programs and clinical trials led to the creation of the Academy in 2018. Gray described the mission of the Academy as a program to treat the whole child to grow and adapt. The Academy was intended to provide a safe, controlled environment for moderate to severely disabled, medically fragile students with extensive needs, including a variety of medical needs. There were no other non-public schools in California specifically designed for this student demographic. 12 students attended the Academy in Santa Monica, six of whom were on contract from school districts.

The Academy provided

- specialized academic instruction,
- music,
- social skills,
- physical therapy,
- occupational therapy, and
- speech and language services.

Gray explained that the Academy provided a high level of services based upon traditional school-based services as well as state-of-the-art equipment for therapeutic interventions.

In 2022, Parent contacted Gray regarding opening a satellite of the Academy in Orange County, California. Gray reported that Parent had been touring schools for Student and wanted to create a program which fit Student. Parent became a fiscal sponsor for an Orange County program and networked with other parents and service providers. In August 2023, the Academy opened in Orange County as a non-profit private school which students attended pursuant to fundraised scholarships. Parent was the Director of the Academy's Orange County location and received no salary. Gray also did not receive a salary. Gray reported that in December 2023, the Academy obtained conditional certification as a non-public school.

Parent described her involvement with the Academy. Parent considered herself a volunteer as she received no salary. As Director, she oversaw administrative tasks, assisted with obtaining non-public certification status, and provided information and tours to special education local plan areas and the California Department of Education.

The classroom at the Academy was described as quiet and clean with large windows. Typically, there were four children in Student's classroom. The therapy room next door to the classroom contained a variety of therapy equipment. Music played in the room. According to Parent, the school was adding a swing and suspended equipment.

Initially, the Academy was a non-profit private school. The school was financed through fundraisers, and each student received a scholarship. Annual enrollment at the Academy now cost between \$45,000 and \$75,000, depending on the individualized services required. Established rates for the 2023-2024 and 2024-2025 school years consisted of \$215 per day for specially designed instruction, \$150 per hour for therapy

services, \$120 for music, \$35 per hour for licensed vocational nursing service, and \$25 per hour for paraprofessional services. Scholarships were still provided to students who were not under a school district contract for placement in a non-public school.

Parents provided invoices for Student's tuition and related services. Each invoice listed the amount charged for the tuition or service, and each invoice indicated the amount was paid-in-full. Parent, as Director of the Academy and custodian of records, did not indicate who prepared the invoices. Furthermore, Student submitted no evidence to establish when the invoices were paid, nor any evidence of payment.

STEPS PROGRAM WAS PROGRAMATICALLY SIMILAR TO THE ACADEMY

Capistrano Unified members of the IEP team pointed out that the STEPS program also provided a highly controlled environment.

Fischer informed Parents that since the incidents of the first week of school, she made significant changes to the classroom to create a lower noise and low sensory environment to adapt to Student's unique needs. This was reflected in Student's return to school on March 3, 2023.

Parents expressed concern about Student becoming ill; he gets seizures and then required hospitalization. Parents wanted a controlled environment to minimize Student's exposure to other children to prevent Student's risk of getting ill.

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Parents submitted a letter from Student's neurologist, Ying Peng, which was written at Parent's request. The letter reported that Student had seizures which were triggered by acute illness and/or fever, which required medical care in a hospital emergency room. Peng opined that

"while we encourage our patients to attend school on a regular basis, it is important that medically complex children like Student receive their education in a well-controlled environment to other children and adults is limited to small groups whose health is closely monitored. Ideally, regular temperature checks are performed on all attendees to prevent the spread of illness as well as taking all possible infection control measures in his class."

Parents requested that all persons entering the classroom have their temperature taken to avoid illness pursuant to Dr. Peng's request.

Dr. Peng's missive was generic at best. Dr. Peng did not testify at hearing to clarify or explain her opinion, nor was any evidence presented to suggest that Dr. Peng ever observed Student's classroom or was aware of any of the health protocols practiced there.

The IEP team explained that although Student was exposed to other children on the playground, it was at a distance. Student was not in close proximity to other children on the playground. Further, Student had not become ill at school this year from other children.

Fischer shared that Student was in a very controlled environment at school. Given there were seven other medically fragile students in the classroom, the staff was very cautious with all the children. Equipment, mats, toys and bathrooms were regularly cleaned to protect the health of the students. Capistrano Unified followed the guidelines of the Orange County Department of Health and the California Department of Education. The district's nurse explained that Capistrano Unified did not administer temperature checks as it was not required by federal, state, or county health laws.

Student failed to establish by a preponderance of the evidence that the offer of placement in the self-contained classroom of the STEPS program denied Student a FAPE. The only difference in the STEPS program was it moved from Dana to the Early Childhood Center. Each of Parents' concerns could be addressed in the STEPS program. Each of the goals and services could be implemented in the STEPS program.

A school district is not required to discuss every possible alternate placement once it has determined that the district has a suitable placement in which Student's IEP can be appropriately implemented. The placement sought by Parents at the Academy was demonstrably similar to the placement offered by Capistrano Unified in the STEPS program.

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On June 22, 2023, via email to Capistrano Unified, Parent reiterated her concerns regarding Student's health and safety in a school district placement. As Parent stated in the email,

"we also believe that some children like Student have such great medical, therapeutic, and educational needs that they are just not able to be accommodated within the public special education model...there are children who are medically fragile and/or have severe neurological disorders that require alternative placement."

Parent continued,

"we do not believe that Dana ENF is able to address the very unique needs of children like Student at the high end of vulnerability with respect to health and safety, but also with respect to the individualized therapies that these children require to meet their maximum potential."

Parents did not consent to the May 26, 2023 IEP and requested alternative dispute resolution to further discuss their request for an alternate placement. Capistrano Unified declined to participate in an alternative dispute resolution session.

On July 22, 2023, Parents retained counsel, and notified Capistrano Unified in writing that, among other things, Parents did not believe the educational placement and services offered in the May 26, 2023 IEP constituted a FAPE. Therefore, Student intended to seek reimbursement for any private placement and services under title 34 of the Code of Federal Regulations section 300.148.

AUGUST 31, 2023 IEP

Parents and their attorney attended the August 31, 2023 IEP team meeting.

The IEP team meeting was specifically intended for further discussion of Student's placement, after Parents' written notification to seek reimbursement for private placement.

Parents and the Capistrano Unified members of the IEP team rehashed the same concerns and responses as made at the May 26, 2023 IEP team meeting. The IEP team offered to conduct district assessments, however, Student declined in favor of pursuing independent evaluations.

The IEP team addressed parental concerns presented in Parent's June 22, 2023 email. Fischer addressed Parents' sensory concerns for Student, specifically his startle reflex. Fischer noted that in the beginning, Student startled easily, but he continued to make progress as he was integrated into the routine. Student tolerated the classroom. Dana's Principal Ellis confirmed Student's progress based on his own observations. The STEPS classroom was generally quiet.

Fischer reported Parents were aware she specifically changed Student's diaper on the mat to reduce the chance of Student being startled by moving him to a different environment which was noisier. All appropriate sanitation and privacy measures were taken and considered. Thus, changing Student in the classroom environment was no different.

Fischer acknowledged that one extended crying incident was reported to Parent. Parent requested and Fischer agreed to inform Parents daily of Student's crying, but

Student was rarely in school to track this concern. Further, the IEP team had proposed a self-soothing goal for Student which sought to lessen Student's crying, but Parents had adamantly refused the goal.

The IEP team discussed the parental placement of Student at the Academy. The Academy was currently open for the 2023-2024 school year but was not accredited or certified as a non-public school. The IEP team informed Parents the fact that the Academy was not certified as a non-public school was a reason the IEP team could not consider funding Parent's choice of private placement. Parents and their attorney ended the IEP team meeting.

Pursuant to the California Department of Education website, the Academy opened as a certified nonsectarian non-public school on November 29, 2023.

The IEP team made no changes to the May 26, 2023 IEP at the August 31, 2023 IEP team meeting. Thus, for the same reasons as discussed with the May 26, 2023 IEP, Student did not prove Capistrano failed to offer appropriate goals, services, or placement at the August 31, 2023 IEP. Capistrano Unified indicated it was ready, willing, and able to educationally serve and assess Student; he was more than welcome to return to the STEPS program at the Early Childhood Center at any time.

Student enrolled at the Academy in August 2023, for the 2023-2024 school year and continues to attend for the 2024-2025 school year.

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ISSUE 4: DID CAPISTRANO UNIFIED DENY STUDENT A FAPE IN THE MAY 26, 2023, AND AUGUST 31, 2023 IEP, BY DENYING PARENTS MEANINGFUL PARTICIPATION IN THE AUGUST 31, 2023 IEP TEAM MEETINGS BY PREDETERMINING STUDENT'S PLACEMENT AND SERVICES?

Student's Closing Brief limited his discussion of Issue 4 only to a claim of predetermination at the August 31, 2023 IEP.

Student contended that the IEP team was aware of parental concerns and request for alternate educational placement from IEP discussions at the May 26, 2023 IEP team meeting. Despite Parents' informing Capistrano Unified of their concerns with district programming as well as Student's unique neurological needs that could not be appropriately addressed in a district placement, the IEP team was unwilling to consider a change of placement to the Academy.

Capistrano Unified contended that the August 31, 2023 IEP team meeting was called for the very purpose of discussing Parents' concerns regarding Parents' requested placement. Additionally, while attempting to discuss Student's need for alternate placement, Parents and their attorney refused to further participate and ended the IEP team meeting.

Predetermination occurs when district members of an IEP team unilaterally determine a student's placement in advance of an IEP team meeting, including when it presents one placement option at the meeting and is unwilling to consider other

alternatives. (*Deal v. Hamilton County Board of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.)
A district may not arrive at an IEP meeting with a “take it or leave it” offer. (*J.G. v. Douglas Cnty. Sch. Dist.* (9th Cir. 2008) 552 F.3d 786, 801, fn. 10.)

Parental participation in the development of an IEP is essential to the IDEA. (*Winkleman v. Parma City Sch. Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994]. It is “[a]mong the most important procedural safeguards” in the Act. (*Amanda J. v. Clark Cnty. Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

While parental preference may be one factor that is considered in determining the overall outcome with respect to placement, it is not the predominant or overriding force in making a final placement decision or deciding any matters that individually comprise placement. (*Letter to Bina*, (U.S. Dept. of Educ., Office of Special Education and Rehabilitative Services (OSERS), 1991.) Parents do not have the right to veto the placement decision made by the placement group. (*M.S. v. Vashion Island Sch. Dist.*, (9th Cir. 2003) 337 F. 3d 1115; *cert. denied* 544 U.S. 928.)

Should the IEP team be unable to reach a consensus on decisions, the school district makes the decision and provides parents with prior written notice of the district's proposals and refusals. (34 C.F.R. § 300.503(a); *Letter to Richards*, (U.S. Dept. of Educ., Office of Special Education Programs (OSEP), 2020).)

Student’s Issue 4 is meritless. The factual determinations for Issue 4 are extensively reported in Issue 3 above and are incorporated herein.

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Capistrano Unified made its offer of FAPE at the May 26, 2023 IEP team meeting after extensive discussion, in which Parents and their advocate vigorously participated. As was their right, Parents did not agree with the IEP team decision to offer Student placement in the STEPS program located at the Early Childhood Center, and did not consent to the May 26, 2023 IEP.

On July 22, 2023, Parents retained counsel, who notified Capistrano Unified in writing that, among other things, Parents did not believe the educational placement and services offered in the May 26, 2023 IEP constituted a FAPE, and that Parents intended to seek reimbursement

The August 31, 2023 IEP team meeting was held to discuss placement in response to Student's unilateral placement at the Academy. Capistrano Unified participated in further discussion and responded to Parents' concerns and contentions. The IEP team discussed placement at the Academy. As argued by Student in his Closing Brief, Capistrano Unified had all the information it needed to understand what Parents' concerns were and why they did not believe the district's program and services were appropriate, yet Capistrano Unified continued to make the same proposals and did not make any meaningful changes to Student's IEP. The IEP team's decision to maintain their offer of placement did not constitute predetermination; it constituted a disagreement with Parent's demand.

Further, even if the IEP team had been impressed with Parents' new plea, the Academy was not a certified non-public school; therefore, the IEP team correctly informed Parents they were not legally permitted to consider expending public funds for a private school placement.

Parents provided no evidence that the IEP team predetermined Student's placement at the August 31, 2023 IEP team meeting. Being provided no new information supporting the inappropriateness of the STEPS program, the IEP team was not required to change its offer simply because of parental preference. Even assuming the IEP team desired to appease Parents with an alternate educational setting, it was prohibited by law from offering placement at the Academy. Parents did not seek placement at any location other than the Academy.

ISSUE 5: DID CAPISTRANO UNIFIED DENY STUDENT A FAPE IN THE FEBRUARY 29, 2024, MAY 8, 2024, AND MAY 28, 2024 IEP'S BY FAILING TO OFFER GOALS, SERVICES, AND PLACEMENT TO APPROPRIATELY ADDRESS STUDENT'S NEEDS IN THE AREAS OF MUSCLE WEAKNESS, POSTURAL STRENGTH AND STABILITY, MOTOR SKILLS, CONFIRMATION OF REQUESTS, RECEPTIVE VOCABULARY, GREETINGS, YES/NO RELIABILITY, ATTENTION TO TASK, MATCHING OBJECTS TO ICONS, PERSONAL IDENTIFICATION, SENSORY NEEDS, EMOTIONAL REGULATION, SELF-CARE, FUNCTIONAL PRE-ACADEMICS, FUNCTIONAL COMMUNICATION, AND SOCIAL SKILLS?

Student contended that the goals, services, and placement offered in the May 28, 2024 IEP were inappropriate to address Student's needs.

Capistrano Unified contended the goals and services offered in the May 28, 2024 IEP were appropriate and did not require placement outside of the STEPS program.

Student's annual IEP for the 2024-2025 school year was developed over three IEP team meetings occurring on February 29, May 8, and May 28, 2024. The three IEP team meetings, together referred to as the May 28, 2024 IEP, culminated in Capistrano Unified's offer of FAPE. Therefore, the factual determinations and analysis contained in Issue 5 are based on one offer of FAPE completed on May 28, 2024, rather than three separate offers.

The IDEA requires that an offer of a FAPE include special education and related services that are designed to meet the unique needs of the student. (20 U.S.C. § 1400(d)(1).) When resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by parents, even if that program will result in greater educational benefit to the student. (*Ibid.*)

For a school district's offer of special education to constitute a FAPE, the offer must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Ibid.*)

An appropriate public education "does not mean the absolutely best or 'potential-maximizing' education for the individual child." (*Los Angeles Unified Sch. Dist. v. A.O. by and through Owens* (9th Cir. 2024) 92 F.4th 1159, 1172 [quoting *Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314](*Gregory K.*.)

The May 28, 2024 IEP team consisted of

- occupational therapist Moore,
- education specialist/kindergarten STEPS teacher Susan Butler,
- general education preschool teacher Lopez,
- education specialist/case carrier Fischer,
- speech and language pathologist Briana Skinner,
- Principal Ellis,
- district nurse Kim Bryan,
- school psychologist Laura Eiselman,
- general education kindergarten teacher Juliana Mittino-Smith,
- physical therapist Farrand, and
- Parents.

Parents were accompanied by their attorney. Additionally, over the three IEP team meetings, Abby Rosenberg, Aja Roley, Lisa Grajewski, and Cami Scagliotti each appeared to review their independent evaluations with the IEP team.

On February 29, 2024 the IEP team discussed parental concerns. Parents reported that:

- Student required highly qualified one-to-one aide support which, in Parent's opinion, historically Capistrano Unified had failed to provide consistent aide support coverage.
- Student required intensive feeding therapy. Previously Capistrano Unified struggled to feed Student his lunch consistently.

- Student was medically fragile and his doctors recommended placement in a small, controlled environment where temperature checks are a routine part of the program.
- Student's sensory processing deficits made it challenging for him to be in a variety of settings, such as a bathroom. As a result, Student required a separate environment for changing his diaper that has privacy. Parents contended that previously Capistrano Unified failed to ensure Student's privacy and dignity.
- Student's startle reflex prevented him from accessing his education in the comprehensive school setting. As a result, Parents believed that Student spent most of his school day dysregulated.
- Student demonstrated progress in a smaller, high structure, controlled, low sensory environment with limited exposure to large groups. There were three students in Student's classroom, and the maximum number allowed would be five. Student's classroom could possibly serve grades TK through eighth.

INDEPENDENT SPEECH AND LANGUAGE EVALUATION

Rosenberg presented her independent speech and language evaluation report to the IEP team on February 29, 2024.

Rosenberg conducted an independent evaluation of Student on November 8, 2023. She completed her written report on December 23, 2023. Rosenberg held both a bachelor's and master's degree in communicative disorders, and a doctorate in social ecology. She was licensed by the American Speech-Language Hearing Association, and

held a California state license, certificate of competence, and rehabilitative services credential. Rosenberg considered her field of study to center on interdisciplinary studies of adolescent language and learning disorders, juvenile justice and developmental psychology, as was evidenced by her extensive publications and presentations listed in her curriculum vitae. Rosenberg's practice emphasized adolescent language. While Rosenberg was highly qualified, her areas of expertise did not appear to include Student's age group or disability demographics.

At hearing, Rosenberg expanded on her qualifications. Rosenberg has conducted over 1,000 independent evaluations primarily on school-aged children. Her evaluations have been contracted by both school districts and parents, and she has extensively testified in due process hearings before OAH. Rosenberg qualified as an expert witness in speech and language.

In conducting her evaluation, Rosenberg reviewed the Newport Mesa 2022 assessment report and the Capistrano Unified May 26, 2023 IEP.

Rosenberg conducted her evaluation and observed Student at the Academy on November 8, 2023. Rosenberg noted that Student was currently being treated by speech and language pathologist Leah Beekman, using his eye gaze device. Beekman was implementing six communication goals using the eye gaze device which were not based upon an IEP.

Rosenberg observed Student in his classroom with Beckman and teacher Megan Birk present. No other students were present in the classroom. Student was emotionally unstable, and sensitive to ambient noise as well as tone and volume of adult voices in his

presence. He displayed positive and negative responses to people's voices, positive responses to having access to preferred objects and activities, and negative responses of crying and physical rejection to not having access to preferred objects and activities.

Student demonstrated communications to serve the functions of:

- Requesting objects, actions and people;
- Responding to questions;
- Regulating others' behavior;
- Joint attention;
- Protesting;
- Greeting; and
- Choosing.

Rosenberg conducted a clinical assessment using the Functional Communication Profile-Revised, which assesses several areas including

- sensory,
- motor skills,
- behavior,
- attentiveness,
- receptive language,
- expressive language,
- pragmatic/social,
- speech,
- voice, and
- fluency.

Rosenberg's overall impressions described Student as a non-verbal limited communicator. Student depended on his eye gaze device to communicate, and his communication served a range of functions. Student had preferred objects, actions and people and made requests discriminately. Student was generally rewarded with the requests he chose, which was used to motivate and reinforce him. While Student consistently used his eye gaze device to communicate, his reliability was dependent on

- motivation,
- attention,
- sensory regulation,
- fatigue and
- organization.

Student's ability to consistently identify named icons, link words into phrases, and follow directions was emerging.

Rosenberg found the eye gazer device an appropriate modality for Student and shared her expectation that Student was expected to make tremendous gains in this area with consistent intervention and shared information across all communication partners.

Rosenberg identified the following areas of deficit and proposed the goals focus as follows:

- The first goal addressed confirmation of requests for objects or actions and sought that, when requesting an action or object, Student would activate a picture icon to create a sentence strip with "I want____" and reactivate the complete strip to confirm his selection with his eye gaze device.

- The second goal addressed confirmation of requests for continuance of activity, and sought that, when requesting continuation of activity, Student would activate a pictured icon to create a sentence strip with "more____," and reactivate the complete strip to confirm his selection with his eye gaze device.
- The third goal addressed receptive vocabulary and sought for Student to identify familiar people, activities, and colors when named by activating his eye-gaze device.
- The fourth goal addressed greetings and sought for Student to activate a pictured icon to greet a person's picture in response to the same on his eye gaze device.
- The fifth goal addressed yes/no reliability and sought for Student to activate yes/no icons on his eye gaze device in response to a factual identification question.
- The sixth goal addressed attention to task and sought for Student to sustain visual attention to follow a moving target on his eye gaze device to cover the entire visual field for 15 seconds.
- The seventh goal addressed matching objects to icons and sought for Student to activate a pictured icon to match an actual object held in front of him.
- The eighth goal addressed the area of personal identification and sought for Student to activate a pictured icon to respond to "what is your name" from four pictured people.

Rosenberg recommended Student participate in speech and language therapy for three, 30-minute sessions each week. Rosenberg concluded that caregivers, parents and all educators collaboration regarding consistent cueing and expectations with the use of an alternative augmentative communication was critical.

At hearing, Rosenberg reported it was her impression that the Newport Mesa assessment aligned with her findings. Rosenberg opined that the communication areas of need as determined by the IEP team were appropriate, but the IEP team should add a goal to address greetings. The IEP team complied.

Rosenberg opined the communication goals were inappropriate as they failed in their construction. As example, the first goal had too many components, the second goal did not contain baselines, and the third goal baselines did not provide data. Rosenberg believed that Student had more abilities than what we were currently able to see. She redrafted the district goals for academic preparedness as Student progresses, but she warned that her redrafted goals should be taken into consideration with caution. As indicated in her evaluation report, Rosenberg's proposed goals addressed confirmation of requests, receptive vocabulary, greetings, yes/no reliability, attention to task, matching, and personal identification.

The IEP contained goals which addressed Rosenberg's proposed goals; however, Rosenberg's redrafted goals were based on her speculation regarding Student's unperceived abilities. Such speculation along with Rosenberg's own caveat rendered those goals flawed and nondeterminative of a necessity to provide additional goals in those areas.

INDEPENDENT PHYSICAL THERAPY EVALUATION

Scagliotti reviewed her independent physical therapy evaluation report with the IEP team on February 29, 2024.

Scagliotti held a bachelor's degree in physiological sciences and a master's degree in physical therapy. Scagliotti, a licensed physical therapist for 23 years, worked as an outpatient pediatric physical therapist at Stepping Stones Therapy since 2018. Scagliotti was experienced with pediatric neurological, orthopedic, and cognitive impairments. Scagliotti understood the difference between medical and educational/school based physical therapy services, conducted evaluations, crafted goals, attended IEP team meeting, and treated pediatric patients within an educational model.

Scagliotti conducted an independent physical therapy evaluation of Student on September 27, and October 17, 2023, and completed a written report on October 20, 2023. The purpose of the evaluation was to obtain Student's current level of gross motor functioning to determine current physical therapy needs.

Parent's primary concerns were in the areas of decreased postural control, and poor postural endurance limiting participation in social, academic and physical activities throughout the day. Parent also reported concerns with Student's position changes throughout the day facilitating optimal function, his ability to participate in standing and ambulatory activities during the school day and implementing physical therapy intervention to help Student participate in his academic environment.

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Scagliotti evaluated Student in a clinical setting with Parent and nurse present. Scagliotti also observed Student's physical therapy session at the Academy and conducted an interview of Student's physical therapist and Student's teacher at the Academy.

During the clinical assessment, Student participated well and tolerated therapist handling well. Parent was an active participant in the assessment and helped Student better understand tasks presented to him. During both the clinical and school therapy sessions, Student was happy, cooperative, and engaging. Student was interactive with his school physical therapist and responded to tactile and verbal cueing. He participated in floor transitions, sit to stand activities, and gait training activities with excellent compliance.

Based upon her observations, the results of the alternate standardized testing obtained in the Southern California Ordinal Scales of Development-Developmental Scale of Gross Motor Abilities, the Developmental Profile-3 scales, and the Peabody DMS-2, along with the information obtained from Parent and Student's physical therapist, Scagliotti determined that Student was showing increased lower extremity weight acceptance, improved initiation of steps and longer sitting balance tolerance. Student was also beginning to weight shift and use upper extremities to push switches in sitting position with minimal support. Scagliotti concluded that with ongoing physical therapy, new skills have been learned and Student was gaining more strength leading to more erect posture which will allow him more access to his classroom and learning environment.

Student demonstrated significant muscle weakness throughout his trunk and extremities with dystonic movement patterns limiting functional independence. Postural muscle weakness was apparent in sitting and standing positions. Weakness in posterior extensor muscle groups prevented Student from maintaining erect posture for prolonged periods of time. Postural strength and stability remained a key factor in Student's ability to learn in an academic environment, utilize his eye gaze device, and engage with peers. Additionally, Student demonstrated a significant delay in motor skill performance. Based on these findings, Scagliotti recommended that Student participate in 60 minutes of physical therapy twice per week in a school setting.

Scagliotti recommended four goals:

- The first goal sought improvement of postural strength to allow Student to press a floor switch in two of three trials with his preferred hand, from a floor sit position, with close supervision;
- The second goal sought improvement in midline orientation and sitting balance by demonstrating his ability to bench sit for five minutes with minimal assistance while bringing hands to midline to manipulate a toy;
- The third goal sought to manipulate an upright head and trunk in a stander in the classroom, positioned less than five degrees from vertical, using upper extremities in a functional activity on a tray as needed for a 15-minute interval once a day; and
- The fourth goal sought to ambulate for 20 feet with moderate assistance at shoulders from the physical therapist.

Scagliotti was an articulate and informative witness who thoroughly reviewed her assessment report at hearing. Her observations and standardized testing results were not significantly challenged at hearing; they were similar to those contained in the Newport Mesa assessment. Scagliotti testified that Student's startle reflex impaired all areas of Student's development, however Student responded appropriately to therapy.

Scagliotti's conclusions however were marginally flawed to the extent that she did not speak to the Capistrano Unified physical therapist and did not explore Student's ability to function in a public-school setting. As a result, Scagliotti did not know how the district physical therapist implemented physical therapy goals, or whether her proposals could be implemented in the public-school setting. Ultimately, Scagliotti made no determination regarding the physical therapy goals in the public-school setting. Instead, her dissatisfaction with the IEP's focused on the construction of goals as drafted by the IEP team, similar to those objections raised by Rosenberg.

Student spent a great deal of time questioning Scagliotti about the validity of the physical therapy goals contained the IEP's. Scagliotti acknowledged that the IEP goals addressed the areas of deficit, including muscle weakness, postural strength and stability. Her disapproval of the goals was form over content. Scagliotti opined that the goals were inappropriate because they required further details and clarification for implementation and could not be accurately measured due to lack of baselines contained in the goal. As Scagliotti stated, "they are not how I would have written the goals." Collaterally, Scagliotti felt the physical therapy goals were inappropriate as they did not directly address the goals she recommended.

INDEPENDENT OCCUPATONAL THERAPY EVALUATION

The IEP team reconvened on May 8, 2024, to continue their review of Student's independent evaluations. Roley reviewed her independent occupational assessment with the IEP team.

Roley held a master's in occupational therapy and sciences, and a doctorate in occupational therapy. In addition to a California Board of Occupational Therapy license, Roley held a National Board of Certification for Occupational Therapy certificate. Roley maintained a private practice in which she conducted assessments, consultations and interventions. She was the owner and director of Centerpointe for Children, in Irvine, California, which provided private, and school based pediatric occupational therapy services. Roley was also employed as an occupational therapist with Susanne M. Smith, Inc. Roley acted as the lead occupational therapist in a team of assessors at Susanne M. Smith, Inc. and was hired by Parents to provide this independent evaluation.

Roley was experienced with conducting evaluations for educational purposes and in school settings. Roley estimated she conducts one independent evaluation a week and worked with speech and language pathologist Susanne Smith Roley for 12 years. Roley attended an estimated 10 IEP team meetings per week.

Roley assessed Student on September 5, 2023. A written report was completed in October 2023. Parents provided Student's background and health information. Parents expressed concerns about Student's development of independence in daily tasks including his fine and gross motor skills, and adaptive, social, and academic abilities. Parents worried about Student's sensory sensitivities, emotional regulation,

and health and safety in a busy classroom environment. Parents desired to determine the services necessary to support Student in his development and ability to access his education.

Parents provided Student's educational history which reported Student transferred to Capistrano Unified and began the STEPS preschool program full time. Concerns with Student's frequent and prolonged upsets at school, and medical safety based upon Student's risk of seizures if he spiked a fever, led to Parents removing Student from the public school and his subsequent enrollment in the Academy. The background information did not contain any reference to the short time Student attended the STEPS program, nor did it review any documents from Capistrano Unified prior to the May 26, 2023 IEP. Roley did not attend the March 2, 2023 IEP team meeting and did not review the IEP document as part of her evaluation. Roley reported she did not quantify Student's school attendance but was more concerned with his academics.

In assessing Student, Roley and her team conducted a limited record review, parent interview, observation at the Academy, and clinical observation. Standardized testing included the Adaptive Behavior Assessment, third edition, given to Parent and teacher; Sensory Processing Measure, second edition, preschool age, home and school forms; and Behavior Rating Inventory of Executive Function-2, Preschool version, was given to Parent.

Roley concluded that despite Student's physical limitations, Student loved movement opportunities. Opportunities for movement at frequent intervals throughout the day, supported Student's arousal and attention necessary for participation in his daily activities. Roley acknowledged Student's diagnosis and parental health concerns, and reported Student required frequent health monitoring.

Roley reported that Student had significant delays in developmental and adaptive skills. He exhibited signs of fluctuating sensory reactivity to sounds, lights, touch and movement, which impacted his attention and emotional regulation in loud and busy environments. Student required a calming, low stimulus sensory environment of decreased noise and visual stimulus to support his attention, emotional control, and participation in self-care tasks including toileting and diaper changes. Roley determined rather generically that Student required intensive one-to-one support and adaptive equipment to gain and sustain an ever-increasing set of skills essential for him to acquire independence, access to curriculum, and benefit from his education.

Roley determined occupational therapy could focus on areas of concern by addressing sensory reactivity and self-regulation due to:

- Fluctuating reactivity to stimuli including touch, movement, sound, and visual input such a startle reflex and upset;
- Dysregulation of his alertness, attention, emotional responses and activity level;
- Need for a high intensity of passive movement opportunities to feel alert and calm.

Occupational therapy was needed to address fine and visual motor skills due to:

- Difficulty with finger and hand strength and dexterity;
- Functional tool use;
- Visual motor skills necessary to safely and appropriately access technology;
- Negotiating moving targets;

- Motor control including balance and body awareness;
- Navigating safely through various environments, including the school campus;
- Engaging in meaningful activities; and
- Social skills.

To support these identified needs, Roley recommended maintaining the goals proposed in the May 26, 2023 IEP, along with the addition of four additional goals.

- The first additional goal addressed self-regulation and sought for Student to choose from a visual list of sensory regulation strategies that either help to alert or calm him, depending on his needs that resulted in a more organized state, as demonstrated by increased attention and on-task behavior for a five-minute activity with minimal (25 percent) adult prompts.

Roley was unaware that the IEP team proposed a self-regulation goal at the May 26, 2023 IEP team meeting, but it was rejected by Parents.

- The second additional goal addressed praxis and social participation and sought for Student to participate in one new activity per week and engage in this with the support of one other child or adult, for five minutes, without upset, in four-out-of-five opportunities.
- The third additional goal addressed postural control and bilateral hand skills and sought that, when given postural support from an adult or a high-backed swing, Student would sit upright and

grasp/hold the handles of the swing with both his right and left hands for one minute with moderate support (50 percent), in four-out-of-five opportunities.

- The fourth additional goal addressed lunchtime participation and sought that, given individualized supervision during lunchtime, Student would bite and chew one new textured food per week over a four-week period.

Due to the severity of Student's perceptual motor deficits impacting his adaptive skills and school performance, Roley recommended;

- One-to-one direct services by a licensed occupational therapist for three, 30-minute sessions per week, in a variety of school settings including the lunchroom/cafeteria and playground with access to suspended equipment;
- 30 minutes of occupational therapy consultation with parents and the educational team;
- Reassessment in one year to determine future recommendations.

Roley also recommended an orientation and mobility assessment in addition to a series of classroom accommodations. Those accommodations included:

- A calming, low stimulus sensory environment during learning activities;
- A private and quiet toilet environment to support Student's participation and emotional control during diaper changes;

- Opportunities for movement and sensory breaks between structured classroom activities to support Student's attention, regulation, and arousal;
- Use of a light board while working on fine motor activities;
- Use of a slant board or easel so materials can be placed in a vertical position;
- 30 seconds to one-minute activity breaks that Student enjoys every 10 minutes;
- One-to-one adult support during recess to allow Student's engagement on the playground equipment, including swings and slides;
- Positive behavior support strategies;
- Visual reminders of unfamiliar sequences of activities that Student must do during the day; and
- Preparation of Student in advance of transitions and expectations in new circumstances.

At hearing, Roley opined that the May 28, 2024 goals were appropriate. The baselines contained sufficient information. The goals were sufficiently understandable to be worked on by either an occupational therapist or physical therapist.

Roley opined that the May 28, 2024 IEP did not provide sufficient occupational therapy services. Student needed more weekly one-to-one sessions in a pull-out format, preferably in a sensory room. Group services were too overwhelming for

Student. Roley opined that Student required at least three, 30-minute sessions per week. She also opined that services should also be provided in other areas, such as the lunchroom and playground because of Student's needs in those environments.

Roley did not include any information about district classroom, nor did she observe the STEPS program. In response, Roley indicated her evaluation was not conducted to determine FAPE or placement; she was only concerned with determining Student's needs and goals. At the end of her testimony, Roley acknowledged the May 28, 2024 occupational therapy goals comported with Student's needs.

INDEPENDENT PSYCHOEDUCATIONAL EVALUATION

Lisa Grajewski presented her independent psychoeducational evaluation to the IEP team on May 8, 2024.

Grajewski, a licensed psychologist, conducted an independent psychoeducational evaluation of Student. Grajewski held a master's degree in clinical forensic psychology, and a doctorate in psychology whose dissertation addressed the impact of military sexual trauma on perceived fitness for duty. Grajewski described her private practice as clinical and forensic services, including individual psychotherapy, psychological testing, and educational evaluations for children, adolescences, and adults. Her clientele included individuals currently involved in legal issues, academic issues and concerns, including specific learning disabilities, and individuals seeking clinical psychotherapy. Clients ranged from juveniles through geriatrics, including pretrial and incarcerated clients. Many of Grajewski's clients were referrals from attorneys, the California Victim Compensation Board, and Employee Assistance Program who suffered from acute trauma and post-traumatic stress disorder.

Grajewski conducted Student's evaluation on September 22, 2023, December 7, 2023, and March 24, 2024. A written report was prepared in April 2024 and sent to Capistrano Unified on May 3, 2024. Grajewski presented her report to the IEP team on May 8, 2024. The evaluation included collateral assessments and observations because Student could not participate in standardized testing due to his developmental deficits and non-verbal status. Grajewski therefore relied on observations at the Academy, and current teacher and parent reports to provide the information to determine Student's abilities and potential needs. Grajewski also reviewed Rosenberg's independent speech and language evaluation report, dated November 8, 2023, and cited Rosenberg's observations and recommendations as part of her own assessment report.

Grajewski's reporting of Student's educational history in the STEPS program uncannily paralleled Parent's testimony describing Student's medical needs and parental concerns regarding health and safety. Some of the negative information regarding the STEPS placement was hearsay and factually false, and Parent selectively omitted relevant information. As example, Grajewski was unaware of Student's limited and modified attendance; she was unaware that some of the more egregiously described events, such as remaining in wet diapers and clothing, occurred only once, during the first week of school, rather than occurring often as determined in her findings. Grajewski's report emphasized that Capistrano Unified did not respond to her requests for an observation, however Grajewski relied on an incorrect telephone number. Moreover, additional factual errors made and acknowledged in the written report were allegedly corrected by Grajewski, however no corrected report was provided to either counsel or the ALJ.

Assessment results were similar to those contained in the Newport-Mesa assessment report.

Most of Grajewski's summary contained conclusions which were based on supposition and hearsay solely founded on parental input. As example, Grajewski concluded that Student's needs were outside of what Capistrano Unified could provide. Without substantiation other than parental opinion, Grajewski concluded that since the beginning of Student's academic career, he received educational interventions and services that were not often suitable to his needs. Grajewski did not review Student's IEPs to determine what goals and services were offered to support Student, nor did she speak with Capistrano Unified teachers and providers to determine what interventions were utilized.

Grajewski further concluded that Student's disrupted educational and delayed developmental progress were likely significantly impacted by his placement in the STEPS program. Being unaware of the limited time Student attended the STEPS program, and without observing Student's interaction with Fischer, Student's highly experienced teacher, Grajewski offensively opined that those who do not know how to work with the complexities of Student's disabilities often "give up" and lose interest in helping Student.

Grajewski opined that therapies specific to Student's needs were implemented at the Academy, and Student was benefiting from occupational therapy, feeding therapy and other therapies that have shown to ameliorate his startle response and improve communication. Having not reviewed the IEP's, Grajewski was unaware that Capistrano Unified provided Student with occupational therapy, physical therapy, and speech and language services. Feeding therapy was available at Dana, but was provided through California Children's Services, a service declined by Parents.

Grajewski recommended:

- A smaller classroom setting with a one-to-one aide throughout the day, with limited auditory and tactile stimuli that allows for less distraction;
- Multisensory instruction;
- Occupational therapy as indicated by the occupational therapist;
- Feeding therapy in the school and home setting that included training for parents and aide;
- Speech and language therapy, 30 minutes, three times per week;
- Physical therapy assessment;
- Technology to assist Student with language disability, specifically an eye-gaze device, and continuing alternative augmentative communication training for parents, caregivers, and teachers;
- Enrichment activities, including physical activity, at least one hour per day;
- Coordinated physical activity that stimulates and coordinates large muscle groups, including pool therapy and use of a trexo device at least two hours per week;
- Development of positive, alternative routines and breaking Student's day into subdivided routines;

- Presenting one task at a time and limiting choices to avoid overwhelming Student with options;
- Preparing for changes with alerts or advance notice of changes;
- Establishing a consistent daily study routine with executive function supports, keeping Student's environment reasonably quiet and free of distractions. Parent supervision is helpful to review tasks, help prioritize, set goals, and monitor completion of each task; and
- Monitoring any symptoms of anxiety and depression that may manifest because of his frustrations and challenges.

The differences between Capistrano Unified's offer of FAPE and the recommendations of Grajewski did not lie in the goals, services, or type of placement for Student needed to allow Student to make meaningful progress. The difference rested in the teaching strategies and methodologies used by Capistrano Unified, and the program preferred by Parent. Grajewski conceded to parental desires to be intimately involved in Student's daily education to the extent of parental supervision, including reviewing tasks, prioritizing, setting goals, and monitoring completion of each task. Such involvement was unrealistic and unnecessary in a public-school setting but was perfectly acceptable in a school setting created by Parent, administered by Parent, and staffed by Parent.

Although Grajewski presented an extensive and impressive professional profile, she did not report experience with medically fragile, multiple-disability, cognitively impaired, non-verbal children. Grajewski testified to experience in special education, independent

educational evaluations, and IEP meeting attendance. Grajewski's experience in these areas did not appear to be a primary focus of her practice. Grajewski was not a school psychologist, nor did she observe Student in the STEPS program, nor did she review any of Student's IEPs. Grajewski's emphasis was on Student's progress at the Academy, and the appropriateness of an Academy placement rather than on the IEPs offered by Capistrano Unified.

As a result of these unacceptable flaws and questionable judgment, Grajewski's testimony and assessment report was given little credibility, and therefore little weight.

MAY 28, 2024 IEP AND FAPE OFFER

On May 28, 2024, the IEP team reconvened to complete Student's annual IEP for the 2024-2025 school year.

The IEP team consisted of the same participants as the February 29 and May 8, 2024 IEP team meetings, minus the presence of the independent evaluators.

School psychologist Laura Eiselman conducted Student's transition assessment and reviewed and assisted the IEP team in developing Student's transition plan. Eiselman held a bachelor's degree in psychology, and a master's degree in educational psychology with an embedded school psychology credential. The transition assessment was created because Student was scheduled to transition from transitional kindergarten

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to kindergarten for the 2024-2025 school year. The assessment contained a consolidation of records which provided the information of what Capistrano Unified knew about Student. The following transition supports were offered by the IEP team:

- Collaboration between current and new service providers prior to Student's first day of school in his new placement;
- A Student visit to the campus and class prior to the first day of school in the new placement; and
- An opportunity for Parents to meet with the new IEP team prior to the first day of school, if desired.

The STEPS program kindergarten teacher attended the IEP team meeting to answer parental questions regarding the program. Parents were invited to observe the classroom.

Student spent a great deal of time exploring the transition plan. Such expenditure of time was unwarranted because the transition plan and services were not included in the issues presented in this matter. Should Student argue otherwise, he failed to establish any nexus between the transition services and a relation to the services needed to appropriately address Student's needs in the areas of muscle weakness, postural strength and stability, motor skills, confirmation of requests, receptive vocabulary, greetings, yes/no reliability, attention to task, matching objects to icons, personal identification, sensory needs, emotional regulation, self-care, functional pre-academics, functional communication, and social skills.

CAPISTRANO UNIFIED DID NOT FAIL TO OFFER GOALS TO APPROPRIATELY ADDRESS STUDENT'S NEEDS IN THE AREAS OF MUSCLE WEAKNESS, POSTURAL STRENGTH AND STABILITY, MOTOR SKILLS, CONFIRMATION OF REQUESTS, RECEPTIVE VOCABULARY, GREETINGS, YES/NO RELIABILITY, ATTENTION TO TASK, MATCHING OBJECTS TO ICONS, PERSONAL IDENTIFICATION, SENSORY NEEDS, EMOTIONAL REGULATION, SELF-CARE, FUNCTIONAL PRE-ACADEMICS, FUNCTIONAL COMMUNICATION, AND SOCIAL SKILLS

Student contended that the goals offered in the May 28, 2024 IEP failed to provide Student with goals in all areas of need as identified in the independent evaluation reports presented to the IEP team. Additionally, the goals were procedurally inappropriate.

Capistrano Unified contended the 16 goals proposed and agreed to by Parents during the IEP team meeting with counsel present were extensive, appropriate, and addressed the areas challenged by Student in Issue 5.

Based on the report from Parents, Academy speech and language pathologist Beekman, and Rosenberg's independent evaluation, the IEP team determined that Student's main areas of need in communication were in

- expressing himself using his eye-gaze device with greater independence,
- requesting a variety of items,

- calming/sensory strategies,
- answering personal questions, and
- stating his feelings.

The first goal addressed identifying emotions.

- The baseline information provided by Beekman reported Student's baseline could not currently be determined because his augmentative and alternative communication device was being altered, and they were unsure if emotion icons were programmed on Student's current device settings.
- The goal sought that, when given three-to-four verbal, visual or gestural prompts, Student would produce one-to-two-word utterances using multimodal communication to state the feelings of others when shown visual stimuli or a person within his immediate environment in four-out-of-five opportunities for three sessions as measured by data collection and observation.
- The goal contained two benchmarks and was measured by teacher and speech and language pathologist observations and documentation.

The second goal addressed requesting.

- The baselines as reported by Beekman indicated Student was working on requesting and he required maximum supports and prompting to answer those questions. The Academy did not report

a specific number of trials that Student was able to perform, as Student's augmentative and alternative communication device was being altered, making the information unavailable.

- The goal sought that, with moderate verbal, visual or gestural prompting, Student would produce one-to-two-word utterances using multimodal communication to request calming or sensory strategies at least three times per session for three sessions as measured by data collection and observation.
- The goal contained two benchmarks and was measured by teacher and speech and language pathologist observation.

The third goal addressed yes/no questions.

- The baselines provided by the Academy reported Student was working on yes/no questions and that he required maximum supports and prompting to answer those questions. The Academy did not report a specific number of trials Student was able to perform.
- The goal sought that, when given verbal, visual, or gestural prompting, Student would use multimodal communication to accurately answer yes/no questions in four-out-of-five opportunities for three sessions as measured by data collection and observation.
- The goal contained two benchmarks and was measured by teacher and speech and language pathologist observation and documentation.

Regarding Student's social/emotional needs, the IEP team determined that Student needed to respond more consistently to greetings and hearing his name called. Student needed to initiate greetings using his communication device. He needed to establish eye contact with the communicative partner and use his body and voice to make choices when presented with two items. Student needed to use his hands more functionally when seated upright in a supported chair at a desk or using a tray table.

The fourth goal addressed greetings.

- The baseline reported Student responded to his name 25 percent of the time and was reported to use his eye gaze device to say hi/bye to peers given prompting.
- The goal sought that, when given access to a communication device, Student would independently initiate greeting staff and peers who approach him using an eye-gaze or button switch device on three-out-of-five trials.
- The goal contained two benchmarks and was measured by teacher observations.

In the area of readiness, the IEP team determined Student needed to use his hands more functionally when seated upright in a supported chair and begin to imitate actions. Student needed to increase his participation in small group activities and needed to identify common body parts.

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The fifth goal addressed body parts.

- The baselines indicated that per Parent report, Student was unable to identify where he is in pain.
- The goal sought for Student to receptively identify four body parts on himself or in pictures correctly four-out-of-five trials.
- The goal contained two benchmarks and was measured by teacher observation and documentation.

The sixth goal addressed imitating action.

- The baseline indicated Student did not visually attend to classroom staff and had limited purposeful arm and hand control.
- The goal sought that, when shown a one-step action and given repeated modeling, Student would imitate an adult's action for three, one-step actions in one-out-of-five opportunities.
- The goal contained two benchmarks and was measured by teacher observations and documentation.

The seventh goal addressed matching.

- The baseline indicated Student was observed to play a fish matching game on his eye-gaze device. Beekman reported that Student did not demonstrate matching objects to icons.

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- The goal sought for Student to match pictures of identical objects for a total of 10 different pictures, with an average of 80 percent accuracy in four-out-of-five trials using eye gaze to select the correct picture from a field of six.
- The goal contained two benchmarks and was measured by teacher observations and documentation.

The eighth goal addressed participation in song/story.

- The baseline reported Student had been observed to press a pre-programmed button switch optimally positioned near his hand to contribute a word or phrase while being read a thematic story in Story Circle Time. Student has used his eye-gaze device to participate in story time with "pig" and "no" within one-minute wait time and three visual models.
- The goal sought that, when a familiar song is sung or story read, Student would participate in the activity by filling in missing familiar words or phrases using a pre-programmed augmentative alternative communication device for at least five different vocabulary words per thematic unit within 30 seconds each presented turn across three-out-of-four opportunities.
- The goal contained two benchmarks and was measured by teacher and speech and language pathologist through observation and documentation.

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Based upon the information provided from the Academy's physical therapist Carpenter, and Scagliotti's independent physical therapy evaluation report, the IEP team determined that Student needed to use his hands more functionally when seated upright in a supported chair and needed to continue working on increasing his independence with sitting and transferring skills, as well as walking endurance.

The ninth goal addressed basic grasp.

- The baseline, as reported by Carpenter and Scagliotti's independent physical therapy evaluation, indicated that Student was observed to attempt to grasp and pick-up classroom items placed in front of him with staff support. Student was observed to lift his right hand and with support held a marker using a palmar grasp. Student required hand-over-hand support to trace pre-written lines.
- The goal sought that, when a classroom object was presented to Student, Student would sustain a grasp given moderate, 20-to-50 percent, hand-over-hand assistance on the object for a minimum of 20 seconds in four-out-of-five opportunities.
- The goal contained two benchmarks and was measured by observation and documentation by the teacher and occupational therapist.

The 10th goal addressed functional reach.

- The baselines reported by the Academy indicated Student was able to achieve between 60 and 70 degrees of shoulder flexion on his left arm to reach and engage a cause-and-effect item on his tray

table. Student was working on his functional reach in a gravity assisted side-lying position. Student preferred to use his left hand to reach and engage with presented classroom tools.

- The goal sought that, when presented with a cause-and-effect toy, Student would reach and activate the switch given two prompts in four-out-of-five opportunities.
- The goal contained two benchmarks and was measured by teacher and occupational therapist observations and documentation.

The 11th goal addressed releasing objects.

- The baseline indicated that based on the independent occupational therapy assessment report, Student was observed to require physical support to voluntarily release a marker from his hand.
- The goal sought that, after an object was positioned in Student's left hand, Student would initiate release of the object into a designated area given moderate assistance of 25-to-50 percent support from staff in four-out-of-five opportunities.
- The goal contained two benchmarks and was measured by teacher and occupational therapist observations and documentation.

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The 12th goal addressed safe sitting.

- The baseline reported that based on input from the independent physical therapy report, Student's lateral protective reactions were emerging. Student was observed to use his upper extremities to protect himself when thrown off balance in sitting. These reactions were inconsistent but were present in both the clinical setting and during his physical therapy session.
- The goal sought for Student to develop his protective extension reactions to support ongoing development of safe sitting skills at school by consistently being able to catch himself after given a gentle perturbation to his balance during supervised ring sitting on the floor three times to his left side, and three times to his right side, four-out-of-five times over four trial days.
- The goal contained two benchmarks and was measured by teacher and physical therapist observations and documentation.

The 13th goal addressed transfers.

- The baselines reported that based on input from the Academy and Scagliotti's independent physical therapy evaluation, Student was doing well with sit-to-stand transfers. From a standing position given physical support at his trunk, Student did not have the motor strength to forward flex his trunk and bend his hips and knees with control to resume a 90/90 supported seated position.

- The goal sought that, from a standing position given physical support at his trunk, Student would have the motor strength and control to forward flex his trunk and bend his hips and knees to resume a 90/90 supported seated position with verbal prompting as necessary four-out-of-five times over four trial days.
- The goal contained two benchmarks and was measured by teacher and physical therapist observations and documentation.

The 14th goal addressed walking.

- The baselines reported that based on input from the Academy and Scagliotti's independent physical therapy evaluation, Student could walk six steps, up to 20-to-30-feet with physical support. A gait trainer was not available at the Academy.
- The goal sought that, with assistance for directionality and safety, Student would demonstrate the ability to walk in a gait trainer or with physical assistance and no assistive device for at least 20 minutes four-out-of-five recess periods over one consecutive week.
- The goal contained two benchmarks and was measured by teacher and physical therapist observations and documentation.

The IEP determined that Student tolerated being moved through a variety of positions during dressing and diaper changes. Student accepted spoonfuls of pureed food given physical prompts to keep his tongue in his mouth and his lips closed. Student needed to increase his participation in self-feeding and washing his hands.

The 15th goal addressed hand washing.

- The baseline indicated that Student could open his palm when a wet wipe was placed on it.
- The goal sought for Student to maintain a grasp on a wet wipe placed on his palm and move his fingers together for five seconds to participate in washing his hands after eating.
- The goal contained two benchmarks and was measured by teacher observations and documentation.

The 16th goal addressed spoon-to-mouth.

- The baseline reported that when a spoon was placed in Student's right hand, Student was able to sustain a grasp for about three seconds. Student was unable to bring the spoon to his mouth or feed himself with a spoon.
- The goal sought that, given a set up by placing a spoon in Student's hand or accommodation as needed, Student would sustain a grasp on the spoon and bring it to his mouth at least 3 times during mealtime over three consecutive days.
- The goal contained two benchmarks and was measured by teacher and occupational therapist observation and documentations.

In her testimony at hearing, Rosenberg opined that the goal areas were appropriate but were written improperly.

Rosenberg opined that the first goal which addressed emotions was not appropriate because it contained too many components. The second goal which addressed requesting contained no baseline. The third goal contained no data in the baseline.

Rosenberg opined that the fourth goal, a social/emotional goal which addressed greetings, was inappropriate because it should have included the speech and language pathologist to measure and collect data. She expressed the same objections to the seventh goal which addressed imitating actions and the eighth which addressed matching. This was an incorrect conclusion. The IDEA accords educators discretion to select from various methods of meeting the individualized needs of a student, provided those practices are reasonably calculated to provide him with an educational benefit. (*Crofts v. Issaquah Sch. Dist. No. 411* (9th Cir. 2022) 22 F.4th 1048, 1056-57 [citing *R.P. ex rel. C.P. v. Prescott Unif. Sch. Dist.* (9th Cir. 2011) 631 F.3d 1117, 1122]. (*Crofts*).

While the academic and physical therapy goals involved communication, Student presented no evidence to suggest those goals could not be appropriately implemented by the district's chosen provider or could only be implemented by a speech and language pathologist. As reminded by Fischer, the service providers observed Student during their therapy sessions, the teacher observed Student the entire day. Further, Rosenberg failed to consider the consultation and collaboration which went on between the teacher and service providers.

Student challenged Skinner's ethics in drafting the speech and language goals. Skinner, as Capistrano Unified's Augmentative and Alternative Communication, or AAC, specialist, attended the IEP team meeting primarily to address Student's AAC needs. Skinner drafted the first goal which addressed emotions because Parent wanted an

emotion goal. Since she had never met Student, she relied on Roley's independent evaluation and communications with Beekman to draft the goal. Skinner acknowledged she was unable to gather a baseline because Beekman was unable to provide data due to Student's eye-gaze device being unavailable. Skinner anticipated the goal could be modified at a subsequent IEP team meeting once additional data was provided. According to Skinner's emails with Beekman, Student was already working on the third goal which addressed yes/no questions. Skinner did not write the fourth goal which addressed song/story. Skinner was referenced on the goal as she is the AAC specialist.

In her testimony at hearing, Scagliotti indicated that the proposed occupational therapy goals addressed Student's needs in the areas of muscle weakness, postural strength and stability. The proposed physical therapy goals could also be considered occupational therapy goals.

Scagliotti again criticized the format of the goals. Scagliotti opined that the safe sitting goal was unmeasurable. It was not as she would have written it. Scagliotti opined that she wanted more information included in the transfer goal and walking goal. The goals required clarification for implementation. These were minor procedural concerns.

Scagliotti concluded her testimony with the opinion that the goals were inappropriate because they did not directly address the goals which she recommended in her evaluation report.

Farrand opined that the physical therapy goals were school-based needs; how did Student's disabilities affect his access and participation at school?

Student's meager school attendance impacted the collection of data. Farrand acknowledged that measurements contained in some of the physical therapy goals were based on her educated guesstimates, but each goal was good for Student and her guesstimate was based on the information contained in Scagliotti's independent evaluation.

Roley reviewed the occupational therapy goals and opined they were appropriate in relation to Student's areas of need.

In comparing the IEP team's proposed goals to those created by Roley in her evaluation Roley again noted Student needed a goal for self-regulation, although there was an accommodation for the use of sensory-regulatory tools. Parents refused to consider a self-regulation goal. Roley recommended a goal for social participation which required Student's interaction with another child or adult which was contrary to Parent's stance on maintaining minimal contact with others to prevent illness.

Roley recommended a goal that addressed postural control and bilateral hand skills. Goal nine addressed grasp; goal 10 addressed functioning reach; goal 11 addressed releasing objects; and goal 12 addressed safe sitting. Each of these goals contained components which addressed posture control and hand skills. The difference between the goals was primarily in the methodologies used by Roley versus Capistrano Unified. As stated above, the holding in *Crofts* provided the school district discretion to select from various methods of meeting the individualized needs of a student, provided those practices are reasonably calculated to provide him with an educational benefit. Neither methodology was incorrect or inappropriate.

Roley's fourth goal addressed feeding, biting and chewing, which were not educationally related. Despite this, the medically related feeding therapy services were available to Student through a program which Parents rejected.

Each of the above witnesses provided an almost equal amount of credible testimony, some good, some flawed. While the ALJ concurs with Capistrano Unified's observation that Student's counsel conducted his witness examinations with constant leading questions, Capistrano Unified allowed the questioning to occur. Nevertheless, the witnesses answered to the best of their ability.

"'[A]n IEP is not required to contain every goal from which a student might benefit.' (*R.F. by & through E.F. v. Cecil Cnty. Pub. Schs.*, (4th Cir. 2019) 919 F.3d 237 (citation omitted); see also, *E.R. by E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 768 (5th Cir. 2018) (per curiam) (not requiring excessive goals')." *Capistrano Unified Sch. Dist. v. S.W.*, (9th Cir. 2021), 21 F.4th 1125, 1134, cert. denied sub nom. *S.W. on Behalf of B.W. v. Capistrano Unified Sch. Dist.*, 143 S.Ct. 98, 214 (2022).)

Student did not prove by a preponderance of the evidence that the goals contained in the May 28, 2024 IEP failed to support Student's needs in the areas of

- muscle weakness,
- postural strength and stability,
- motor skills,
- confirmation of requests,
- receptive vocabulary,
- greetings,
- yes/no reliability,

- attention to task,
- matching objects to icons,
- personal identification,
- sensory needs,
- emotional regulation,
- self-care,
- functional pre-academics,
- functional communication, and
- social skills.

Pursuant to *Crofts*, supra, school districts maintain the discretion to select from various methods of meeting the individualized needs of a student, provided those practices are reasonably calculated to provide the student with an educational benefit. The May 28, 2024 IEP goals comported with Student's needs and most also addressed Student's needs collaterally commingled. Based upon the plain language of each goal:

- The first goal addressed identifying emotions and supported Student's functional communication and social skill needs.
- The second goal addressed requesting, and supported Student's sensory and emotional regulation needs.
- The third goal addressed yes/no questions and supported Student's yes/no reliability, pre-academics, and functional communication needs.
- The fourth goal addressed greeting and supported Student's greetings, personal identification and social skills needs

- The fifth goal addressed body parts, and supported Student's matching, receptive vocabulary, self-care, and functional communication needs.
- The sixth goal addressed imitating action and supported Student's attending to task needs.
- The seventh goal addressed matching and supported Student's functional pre-academics, confirmation of requests, receptive vocabulary and matching needs.
- The eighth goal addressed participation in song/story and supported Student's functional communication, functional pre-academics, and motor skill needs.
- The ninth goal addressed a basic grasp and supported Student's motor skill needs and muscle weakness needs.
- The 10th goal addressed functional reach and supported Student's muscle weakness, and motor skills needs.
- The 11th goal addressed releasing objects, and supported Student's motor skill needs.
- The 12th goal addressed safe sitting and addressed Student's muscle weakness, postural strength and stability and gross motor skills needs.
- The 13th goal addressed transfers and addressed muscle weakness, postural strength and stability and gross motor skills.

- The 14th goal addressed walking and addressed Student's muscle weakness, postural strength and stability and gross motor skill needs.
- The 15th goal addressed hand washing which supported Student's self-care needs.
- The 16th goal addressed spoon-to-mouth which supported Student's self-care and motor skill needs.

The crux of Student's contentions regarding the inappropriateness of the goals relied on Rosenberg, Roley, and Scagliotti's opinions that the goals failed on a procedural level by failing to contain appropriate baselines, or were vague, not having been composed in witnesses' preferred manners. None of the witnesses opined that these transgressions constituted a substantive denial of FAPE. At best, the flaws in the goals amounted to procedural violations. As stated earlier in this Decision, a procedural error results in a denial of a FAPE only if the violation impeded the student's right to a FAPE; significantly impeded the parent's opportunity to participate in the decision-making process; or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2) (2006); Ed. Code, § 56505, subds. (f)(2).) Student failed to offer any evidence that Student experienced any deprivation of educational benefit on any issue in his case.

As Roley testified, she did not conduct her evaluation of Student to determine FAPE or placement, she only sought to determine Student's needs and appropriate goals. The evaluation reports of the other independent evaluators mirror that

comment as well. Consensus of opinions indicated Student required a small, controlled educational environment which could address Student's startle reflex and other sensory needs. Their opinions simply reported that based on observation, the Academy could meet Student's environmental needs. None of the independent evaluators, Rosenberg, Roley, or Scagliotti commented on the STEPS program or otherwise determined the Capistrano Unified placement could not meet Student's needs.

Further, none of the witnesses opined or otherwise testified that the May 28, 2024 IEP denied Student a FAPE. The limited purpose for which the independent evaluators conducted their evaluations was reflected in their surprisingly blasé testimony regarding the validity of the goals and services. In this case, a determination of inappropriate drafting did not equate to a failure to appropriately address Student's needs.

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CAPISTRANO UNIFIED DID NOT FAIL TO OFFER SERVICES TO APPROPRIATELY ADDRESS STUDENT'S NEEDS IN THE AREAS OF MUSCLE WEAKNESS, POSTURAL STRENGTH AND STABILITY, MOTOR SKILLS, CONFIRMATION OF REQUESTS, RECEPTIVE VOCABULARY, GREETINGS, YES/NO RELIABILITY, ATTENTION TO TASK, MATCHING OBJECTS TO ICONS, PERSONAL IDENTIFICATION, SENSORY NEEDS, EMOTIONAL REGULATION, SELF-CARE, FUNCTIONAL PRE-ACADEMICS, FUNCTIONAL COMMUNICATION, AND SOCIAL SKILLS

Student contended the testimony of Rosenberg, Roley, and Scagliotti established that the services offered by Capistrano Unified were insufficient to support Student's needs.

Capistrano Unified contended the services supported Student's needs and provided sufficient services to support the proposed goals.

Student's contention was not supported by the evidence. Only Scagliotti opined the proposed physical therapy services were insufficient to support Student. Her opinion was based upon implementing the goals she proposed, not the goals offered by the IEP team.

Rosenberg opined that the IEP team's offer of three, 30-minute sessions of speech and language therapy per week was appropriate. She speculated that the consult services were probably not adequate, but she was not sure, because she did not know what the consultation would look like.

Roley opined that Student required more occupational therapy services than were offered in the May 28, 2024 IEP. The district's offer of 30 minutes, three times per week however was the same number of services Roley recommended in her evaluation report. Roley's opinion that services should also be conducted in other areas such as the lunchroom and playground contradicted Parents' basic tenet that Student should be maximumly segregated to avoid illness.

Roley recommended that the IEP provide more than 30 minutes per month in consultation/collaboration, although she did not quantify how much more than her recommended 30 minutes was needed.

Farrand opined that the IEP team's offer of two, 30-minute sessions per week of physical therapy services was appropriate. This was in addition to the other supports embedded in the STEPS program and classroom.

The evidence supports a finding that the services contained in the May 28, 2024 IEP were sufficient to meet Student's needs in the areas of muscle weakness, postural strength and stability, motor skills, confirmation of requests, receptive vocabulary, greetings, yes/no reliability, attention to task, matching objects to icons, personal identification, sensory needs, emotional regulation, self-care, functional pre-academics, functional communication, and social skills.

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CAPISTRANO UNIFIED DID NOT FAIL TO OFFER PLACEMENT TO APPROPRIATELY ADDRESS STUDENT'S NEEDS IN THE AREAS OF MUSCLE WEAKNESS, POSTURAL STRENGTH AND STABILITY, MOTOR SKILLS, CONFIRMATION OF REQUESTS, RECEPTIVE VOCABULARY, GREETINGS, YES/NO RELIABILITY, ATTENTION TO TASK, MATCHING OBJECTS TO ICONS, PERSONAL IDENTIFICATION, SENSORY NEEDS, EMOTIONAL REGULATION, SELF-CARE, FUNCTIONAL PRE-ACADEMICS, FUNCTIONAL COMMUNICATION, AND SOCIAL SKILLS

Student contended that Student required placement in a low sensory environment such as the Academy that allowed Student to be more regulated and productive during his school day to access his related therapy services and access his education in a safer environment.

Capistrano Unified contended that the IEP team offered Student placement in the STEPS program at the Early Childhood Center, which provided an appropriate environment to support Student's unique and academic needs.

The obligation of the IEP team is to offer the student an IEP that is reasonably calculated to enable him or her to make appropriate progress in light of his or her circumstances. (*Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988, 991, 197 L. Ed. 2d 335 (2017).) In order to receive educational benefit, a child's educational program must be *appropriately ambitious* in light of his circumstances. (*Id.* at 14.)

The IEP team recommended a specialized academic instruction environment with a focus on a functional curriculum. The IEP team recommended a self-contained setting would best support Student's unique and academic needs. The recommended placement consisted of a similar student to adult ratio when compared to his setting when he attended the STEPS program. Further, students in the recommended placement had access to general education curriculum that was appropriately modified based upon individual need and ability level. The STEPS program also provided Student mainstreaming opportunities in the regular school setting, where appropriate.

The Academy provided

- specialized academic instruction,
- music,
- social skills,
- physical therapy,
- occupational therapy, and
- speech and language services.

The Academy provided a high level of services based upon traditional school-based services as well as state-of-the-art equipment for therapeutic interventions. Each of Student's witnesses observed Student at the Academy, and each highly praised the classroom as a highly controlled environment for medically fragile children which was beneficial to Student.

Placing a student in the least restrictive environment is a mandate of the IDEA. It is not a choice that can be ignored in determining placement. Placement in the STEPS program provided Student with the opportunity for access to the regular school setting, if appropriate. Conversely placement in the Academy provided a classroom of three children and provided no opportunity for contact with other students, if appropriate.

California also requires that a placement foster maximum interaction between disabled students as their non-disabled peers in a manner that is appropriate to the needs of both. (Ed. Code, § 56031.) Placement in the STEPS program satisfied this requirement by providing Student with the opportunity for access to the regular school setting, if appropriate.

Student's evidence that the STEPS program was inappropriate was not persuasive. Student's contentions did not support his issue. The issue was whether Capistrano Unified's offer of placement appropriately addresses Student's needs in the areas of

- muscle weakness,
- postural strength and stability,
- motor skills,
- confirmation of requests,
- receptive vocabulary,
- greetings,
- yes/no reliability,
- attention to task,
- matching objects to icons,
- personal identification,
- sensory needs,
- emotional regulation,
- self-care,
- functional pre-academics,
- functional communication, and
- social skills.

The analysis of each of Student's issues determined that Student failed to prove that the goals and services contained in each of Student's IEP's did not appropriately address Student's needs.

As Roley testified, she did not conduct her evaluation of Student to determine FAPE or placement as she only sought to determine Student's occupational therapy needs and appropriate goals. The evaluation reports of the other independent evaluators mirror that comment as well. Consensus of opinions indicated Student required a small, controlled educational environment which could address Student's startle reflex and other sensory needs. Their opinions simply reported that based on observation, the Academy could meet Student's environmental needs. None of the independent evaluators, Rosenberg, Roley, or Scagliotti commented on the STEPS program or otherwise determined the Capistrano Unified placement could not meet Student's needs.

Further, none of the witnesses opined or otherwise testified that the May 28, 2024 IEP denied Student a FAPE. The limited purpose for which the independent evaluators conducted their evaluations was reflected in their surprisingly blasé testimony regarding the goals and services.

Upon determining the goals and services were appropriate, the only remaining question relating to the selection of placement was whether the goals and services could be implemented in the STEPS program. Student's teacher and service providers stated the goals and services could easily be implemented in the STEPS program. This,

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coupled with the STEPS program's compliance with least restrictive environment requirements, made the district's offer of placement in the STEPS program the appropriate choice for placement.

Student did not prove Capistrano Unified's offer of goals, services, or placement in the May 28, 2024 IEP was inappropriate or denied Student a FAPE.

ISSUE 6: DID CAPISTRANO UNIFIED DENY STUDENT A FAPE BY FAILING TO CONSIDER THE CONTINUUM OF SERVICES AND PLACEMENT OPTIONS DURING THE MAY 28, 2024 IEP TEAM MEETING?

Student contended that at the time of the May 28, 2024 IEP team meeting the Academy had attained conditional non-public school status and should have been considered as a placement option for Student. However, many district witnesses did not consider Student's continued placement at the Academy. Student contended that none of the district members of the IEP team observed Student or attempted to gather additional information regarding the Academy's programming.

Capistrano Unified contended that the IEP document reflected that the team discussed consideration of a continuum of placements, and Student provided no evidence to suggest otherwise. Further, Student's claim was a procedural violation which required a showing of substantive prejudice, a point Student failed to address.

A special education local plan agency must ensure that a continuum of alternative programs is available to meet the needs of individuals with exceptional needs for special education and related services. (34 C.F.R. § 300.115 (a); Ed. Code, § 36360.) The continuum must include a variety of options, including but not limited

to, instruction in regular education programs, resource specialist programs, designated instruction and services, special classes, and non-public nonsectarian schools. (34 C.F.R. § 300.115(b)(1); Ed. Code, § 56361.)

Student correctly noted that these regulations require only that a continuum must be available. A local education agency is only required to consider those placements in the continuum that may be appropriate for a particular child. There is no requirement that the IEP team members discuss all options, so long as alternative options are available. (See *L.S. v. Newark Unified School District*, (N.D.Cal, May 22, 2006, No. C 05-03241 JSW) 2006 WL 1390661, p. 6.)

A non-public school may be placed under contract with a local educational agency to provide the appropriate special education facilities, special education or designated instruction and services required by the individual with exceptional needs if no appropriate public education program is available. (Ed. Code, §56365 (a).)

This means that once an IEP team has determined the appropriate educational program for a student and has determined that the public school can provide that educational program, the discussion of the continuum of placements ceases. As indicated in Issue 5 above, Capistrano Unified determined the STEPS program could meet Student educational needs.

Student's teacher Maegan Birk testified regarding the benefits of Student's placement at the Academy. Birk held a teaching credential as an intervention specialist in Ohio. She received her California teaching credential for moderate to severe special education in August 2023, when she was employed at the Academy as a teacher and administrator.

Birk described the Academy as a non-public school serving students transitional kindergarten through eighth grade with moderate to severe disabilities, specifically structured to go beyond the classroom and treat the whole child.

Student was one-of-three children in her class. Birk reported that the Academy provided students with more specialized services. Each child received at least 50 minutes per week of physical therapy, occupational therapy and speech and language services. The therapies were integrated.

The Academy provided specialized equipment such as gait trainers, spiders board, and spinners. Students could move from equipment to equipment. The Academy also offered intensive therapies, so school was not missed due to travel.

Birk utilized sensory input regulation, movement and changing of position for Student. She worked with Student on daily living skills, such as brushing teeth and hair. Birk and each of the aides were trained on each child's communication device.

Student had a one-to-one aide throughout the day, including during therapies and lunch. Birk and the aide were trained on Student's feeding and hydration. Student required hydration at least once per hour.

Student needed to be regulated to remain on task which required a low sensory environment. The Academy provided a private bathroom in which to change Student's diapers.

Birk communicated with each parent daily and conducted frequent meetings to discuss the child's progress or proposed changes in the child's program.

Each of the students was medically fragile and prone to illness due to the lack of strong immune systems. The Academy required temperature checks at sign in before being allowed in the classroom. If a child spiked a temperature above 100.4 degrees, the child was not allowed in the classroom, and instead was provided instruction via Zoom. The Academy also focused on increased hand washing.

The May 28, 2024 IEP reflected that the IEP team discussed a continuum of placement options by considering general education, general education with specialized academic instruction, related services and a separate class with specialized academic instruction. IEP notes reported that in making the service recommendation, the IEP team engaged in discussion regarding the continuum of service options including general education with push-in, pull-out services and alternate placements, (such as STEPS). The continuum of placements was discussed, and the team determined the least restrictive environment to best meet Student's needs was the STEPS (moderate/severe) preschool program. Student did not discredit these notes or offer evidence to the contrary.

Student focused on contentions that Capistrano Unified had an obligation to further explore Student's placement and progress at the Academy. As example, Student acknowledged the testimony of Skinner, Farrand, and Moore, which reported each of them reached out to Student's service providers at the Academy to gather information on Student's present levels for Student's IEP. Student faulted them for failing to follow up to obtain more information or seek to have the Academy staff participate in developing Student's goals. Student failed to provide any authority that discussion of the continuum required Capistrano Unified to comply with these claims or have Student's private school providers participate in the creation of the district's offer of FAPE.

Student acknowledged that the IEP team received information from Parents, Birk, and the Academy's service providers regarding the level of support Student received at the Academy, the progress he was making with decreasing startle response, and increasing his ability to attend to access his education, as well as his progress with feeding therapy, occupational therapy and physical therapy services, and speech and language services. Student erroneously assumed that since the IEP team did not acquiesce to Parents' preferred placement in the Academy, the IEP team did not consider their input.

Student argued that Capistrano Unified could not provide Student with required services. Student emphasized the feeding therapy provided at the Academy. There was no disagreement that Student required feeding assistance, and feeding goals were appropriate. Student argued that Student required feeding therapy which was not available in the STEPS program made the district's placement inappropriate. Student again ignored the realities that educationally related occupational therapy did not provide services which extended into the mouth. Instead, feeding therapy could be provided by Capistrano Unified through California Children's Services, a program which Parents refused. The IEP team provided appropriate occupational therapy and physical therapy goals regarding feeding, which could be provided in the STEPS program.

Related services include school health services include school nurse services. (34 C.F.R. § 300.34 (a).) Student contended that temperature checks were a necessary service for Student to make educational progress, even though Student had never been sick due to school attendance. The letters provided by Student's doctors were not persuasive to establish a requirement to provide temperature checks at school.

Student contended the Academy's ability to temperature check was ignored by the IEP team. This misstated the evidence. Capistrano Unified did not offer a temperature check because it was not required by either the county health department nor was it required by state or federal law, including the IDEA. Student provided no authority to the contrary.

Student contended that none of the district members of the IEP team observed Student or attempted to gather additional information regarding the Academy's programming. Student did not provide any authority to suggest Capistrano Unified had an obligation to do so. The law does not require a comparison of a parent's chosen program and a school district's offered program to determine which provides more benefit. (*Gregory K., supra*, 811 F.2d at 1314-15.)

Student did not prove Capistrano Unified failed to have a continuum of placement options available or failed to discuss the continuum of services and placement options at the May 28, 2024 IEP team meeting.

CONCLUSIONS AND PREVAILING PARTY

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

ISSUE 1:

Capistrano Unified did not deny Student a by failing to implement his December 7, 2022 interim IEP by failing to provide one-to-one support?

Capistrano Unified prevailed on Issue 1.

ISSUE 2:

Capistrano Unified did not deny Student a FAPE in its 30-day review IEP developed on March 2, 2023, by failing to offer goals, services and placement to appropriately address Student's needs in the areas of communication, readiness, social/emotional and gross motor skills.

Capistrano Unified prevailed on Issue 2.

ISSUE 3:

Capistrano Unified did not deny Student a FAPE in the annual IEP developed on May 26, 2023, and August 31, 2023, by failing to offer goals, services and placement to appropriately address Student's needs in the areas of communication, readiness, social/emotional, and gross motor skills:

Capistrano Unified prevailed on Issue 3.

ISSUE 4:

Capistrano Unified did not deny Student a FAPE in the May 26, 2023, and August 31, 2023 IEP, by denying Parents meaningful participation in the August 31, 2023 IEP team meetings by predetermining Student' placement and services.

Capistrano Unified prevailed on Issue 4.

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ISSUE 5:

Capistrano Unified did not deny Student a FAPE in the February 29, 2024, May 8, 2024, and May 28, 2024 IEP by failing to offer goals, services and placement to appropriately address Student's needs in the areas of

- muscle weakness,
- postural strength and stability,
- motor skills,
- confirmation of requests,
- receptive vocabulary,
- greetings,
- yes/no reliability,
- attention to task,
- matching objects to icons,
- personal identification,
- sensory needs,
- emotional regulation,
- self-care,
- functional pre-academics,
- functional communication, and
- social skills.

Capistrano Unified prevailed on Issue 5.

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ISSUE 6:

Capistrano Unified did not deny Student a FAPE by failing to consider the continuum of services and placement options during the May 28, 2024 IEP team meeting.

Capistrano Unified prevailed on Issue 6.

ORDER

Student's request for relief on all issues 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.

Judith L. Pasewark

Administrative Law Judge

Office of Administrative Hearings