No.

IN THE

# Supreme Court of the United States

S.W. AND C.W., ON BEHALF OF THEIR MINOR CHILD, B.W., PETITIONERS

*v.*

CAPISTRANO UNIFIED SCHOOL DISTRICT

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

**PETITION FOR WRIT OF CERTIORARI APPENDIX VOL. I (1a-50a)**

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## QUESTION(S) PRESENTED

1. Does a school district have an affirmative duty under the IDEA to prepare an annual individualized education program (IEP) for a child for the upcoming school year even after the parents unilaterally enroll the child in private school and seek reimbursement because the school district failed to provide a free appropriate public education (FAPE) for their child?

2. Should this Court resolve the confusion among the Circuits about a school district's affirmative duty under the IDEA to continue to prepare an annual IEP for a child even after parents change their child's enrollment from public to private school in the belief that the school district's then-current IEP was not providing a FAPE?

## PARTIES TO THE PROCEEDING

All the parties in this proceeding are listed in the caption.

## STATEMENT OF RELATED CASES

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## OPINIONS BELOW

The unpublished and unreported Memorandum of the United States Court of Appeals for the Ninth Circuit in *Capistrano Unified School District v. S.W. et al.*, Court of Appeals Nos. 20-55961 & 20-55987, decided and filed December 30, 2021, affirming in part and reversing in part the district court's order for reimbursement of costs for second grade and for occupational therapy services, is set forth in the Appendix hereto (App. 1-4).

The published Opinion of the United States Court of Appeals for the Ninth Circuit in *Capistrano Unified School District v. S.W. et al.*, Court of Appeals Nos. 20-55961 & 20-55987, decided and filed December 30, 2021, and reported at 21 F.4th 1125 (9th Cir. 2021), affirming the district court's judgment that the school district did not have to file for due process to defend the student's first grade IEP and did not have to develop an IEP for second grade, is set forth in the Appendix hereto (App. 5-29).

The unpublished Opinion of the United States District Court for the Central District of California in *Capistrano Unified School District v. S.W. et al.*, Civil Action Nos. SACV 18-01896 JVS(DFMx) & SACV 18-01904 JVS(DFMx), decided and filed August 19, 2020, and reported at 2020 WL 5540186; 2020 U.S. Dist. LEXIS 170706 (C.D. Cal. 2020), affirming in part and reversing in part the ALJ's decision and awarding student compensatory damages, is set forth in the Appendix hereto (App. 30-64).

The unpublished Order of the United States Court of Appeals for the Ninth Circuit in *Capistrano Unified School District v. S.W. et al.*, Court of Appeals Nos. 20-55961 & 20-55987, decided and filed February 4, 2022, denying petitioners' timely filed petition for rehearing *en banc*, is set forth in the Appendix hereto (App. 65).

The unpublished and unreported Decision of the Administrative Law Judge in *Parents on Behalf of Student v. Capistrano Unified School District*, OAH Case No. 2017120674, decided on July 25, 2018, finding a continuing duty for the school district to prepare an individualized education program (IEP) for student and ordering reimbursement to petitioners, is set forth in the Appendix hereto (App. 66-147).

## JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit affirming in part and reversing in part the district court's judgment, was entered on December 30, 2021; and its Order denying petitioners' timely filed petition for rehearing *en banc*, was decided and filed on February 4, 2022 (App. 5-29;65).

This petition for writ of certiorari is filed within ninety (90) days of the date the Court of Appeals denied petitioners' timely filed petition for rehearing *en banc*. 28 U.S.C. § 2101(c). Revised Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

## RELEVANT PROVISIONS INVOLVED

**United States Constitution, Amendment V:**

> No person shall...be deprived of life, liberty, or property, without due process of law....

**United States Constitution, Amendment XIV, Section 1:**

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**20 U.S.C. § 1400(d)(1)(A) (Individuals with Disabilities Education Act) ("IDEA"):**

> The purpose of this enactment is to insure that all children with disabilities have available to them a free appropriate education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.

**20 U.S.C. § 1412(a)(10)(A)-(C):**

**(10) Children in private schools**
**(A) Children enrolled in private schools by their parents**
**(i) In general**
To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary schools and secondary schools in the school district served by a local educational agency, provision is made for the participation of those children in the program assisted or carried out under this subchapter by providing for such children special education and related services in accordance with the following requirements, unless the Secretary has arranged for services to those children under subsection (f):

....

(II) In calculating the proportionate amount of Federal funds, the local educational agency, after timely and meaningful consultation with representatives of private schools as described in clause (iii), shall conduct a thorough and complete child find process to determine the number of parentally placed children with disabilities attending private schools located in the local educational agency.

....

**(ii) Child find requirement**
**(I) In general**
The requirements of paragraph (3) (relating to child find) shall apply with respect to children with disabilities in the State who are enrolled in

private, including religious, elementary schools and secondary schools.

....

**(III) Activities**

In carrying out this clause, the local educational agency, or where applicable, the State educational agency, shall undertake activities similar to those activities undertaken for the agency's public school children.

....

**(B) Children placed in, or referred to, private schoolsby public agencies**

**(i) In general** Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.

....

**(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency**

**(i) In general**

Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education

available to the child and the parents elected to place the child in such private school or facility.

**(ii) Reimbursement for private school placement**

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

....

**20 U.S.C. § 1414(d)(2)(A) & (d)(4)(A):**

**(d) Individualized education programs**

....

**(2) Requirement that program be in effect**

**(A) In general**

At the beginning of each school year, each local educational agency, State educational agency, or other State agency, as the case may be, shall have in effect, for each child with a disability in the agency's jurisdiction, an individualized education program, as defined in paragraph (1)(A).

....

**(4) Review and revision of IEP**

**(A) In general**

The local educational agency shall ensure that, subject to subparagraph (B), the IEP Team—

(i) reviews the child's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved; and

(ii) revises the IEP as appropriate to address—

(I) any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate;

(II) the results of any reevaluation conducted under this section;

(III) information about the child provided to, or by, the parents, as described in subsection (c)(1)(B);

**20 U.S.C. § 1415:**

**(a) Establishment of Procedures.** Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provisions of free appropriate public education by such agencies.

**(b) Types of procedures.** The procedures required by this section shall include----

**(1)** an opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and

educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

....

**(6)** An opportunity for any party to present a complaint—

**(A)** with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child....

....

**(f) Impartial due process hearing.**

**(1) In general**. Whenever a complaint has been received under subsection (b)(6) or (k) of this section, the parents involved in such complaint shall an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency, as determined by State law or by the State educational agency.

....

**(g) Appeal**. If the hearing required by subsection (f) of this section is conducted by a local educational agency, any party aggrieved by the finding and decision rendered in such a hearing may appeal such finding and decision to the State educational agency....

....

**(i) Administrative procedures**.

....

**(2) Right to bring civil action**.

**(A) In general**. Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section...shall have the right to bring a civil action with respect to the complaint

presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

....

**(3) Jurisdiction of district courts; attorney's fees.**

**(A) In general.** The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy....

**34 CFR § 300.131(a):**

**Child find for parentally-placed private school children with disabilities.**

**(a) General.**

Each LEA must locate, identify, and evaluate all children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the LEA, in accordance with paragraphs (b) through (e) of this section, and §§ 300.111 and 300.201.

**34 CFR § 300.148(a), (b) & (c):**

**Placement of children by parents when FAPE is at issue.**

**(a) General.** This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private

school or facility. However, the public agency must include that child in the population whose needs are addressed consistent with §§ 300.131 through 300.144.

**(b) Disagreements about FAPE.** Disagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures in §§ 300.504 through 300.520.

**(c) Reimbursement for private school placement.** If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.

**34 CFR § 300.323(a):**
**When IEPs must be in effect.**
(a) General. At the beginning of each school year, each public agency must have in effect, for each

child with a disability within its jurisdiction, an IEP, as defined in § 300.320.

**34 CFR § 507( a)(1):**
**(a) General**.
(1) A parent or a public agency may file a due process complaint on any of the matters described in § 300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).

**Cal. Ed. Code § 56343(d):**

An individualized education program team shall meet whenever any of the following occurs:
....
(d) At least annually, to review the pupil's progress, the individualized education program, including whether the annual goals for the pupil are being achieved, and the appropriateness of placement, and to make any necessary revisions. The individualized education program team conducting the annual review shall consist of those persons specified in subdivision (b) of Section 56341. Other individuals may participate in the annual review if they possess expertise or knowledge essential for the review.

**Cal. Ed. Code 56344(a) & (c):**

(a) ....an individualized education program required as a result of an assessment of a pupil shall be developed within 30 days after the commencement of the subsequent regular school

year as determined by each local educational agency's school calendar for each pupil for whom a referral has been made 30 days or less prior to the end of the regular school year....

....

(c) Each local educational agency shall have an individualized education program in effect for each individual with exceptional needs within its jurisdiction at the beginning of each school year in accordance with subdivision (a) and pursuant to Section 300.323(a) and (b) of Title 34 of the Code of Federal Regulations.

**Cal. Ed. Code §§ 56346 (e) & (f):**

(e) If the parent of the child consents in writing to the receipt of special education and related services for the child but does not consent to all of the components of the individualized education program, those components of the program to which the parent has consented shall be implemented so as not to delay providing instruction and services to the child.

(f) With the exception of a parent of a child who fails to respond pursuant to subdivision (b), or refuses to consent to services pursuant to subdivision (b), if the public agency determines that the proposed special education program component to which the parent does not consent is necessary to provide a free appropriate public education to the child, a due process hearing shall be initiated in accordance with Section 1415(f) of Title 20 of the United States Code. If a due process hearing is held, the hearing decision

> shall be the final administrative determination and shall be binding upon the parties. While a resolution session, mediation conference, or due process hearing is pending, the child shall remain in his or her current placement, unless the parent and the public agency agree otherwise.

## STATEMENT

Petitioner B.W ("Student") was initially diagnosed with autism by the Regional Center of Orange County in California which provided in-home services for her until she was three years old. Student had other medical issues caused by a metabolic disorder which affected her brain and her ability to think; she requires medication and must remain hydrated at all times. Her disability made her eligible for special education as a preschooler during the 2014-2015 school year. Respondent Capistrano Unified School District ("respondent" or "District") offered her an individualized education plan ("IEP") under the Individuals with Disabilities Education Act ("the IDEA" or "the Act"), 20 U.S.C. §§ 1400 *et seq.*

Student's parents, petitioners S.W. and C.W. ("petitioners"), did not consent to District's IEP and enrolled her in a private preschool. Before the beginning of the 2015-2016 school year when Student would attend kindergarten at District's own charter school Community Roots Academy ("CRA"), petitioners and District entered into a settlement agreement to resolve the proper level of services District would offer Student under the IDEA. It included the assistance of an additional program support aide ("an APS aide") throughout her entire

school day. Under this arrangement, Student flourished in preschool; the agreement ended on December 18, 2015, midway through Student's kindergarten year.

At a meeting with District's IEP team on December 18, 2015, petitioners requested that Student continue to be provided a full-time APS aide in order to supervise her activity and foster peer interaction. District's IEP offer, however, did not include a full-time APS aide; the IEP team believed it would hinder her independence and encourage her prompt dependency. Petitioners disagreed, believing that without a full-time aide, Student's health, behavior and pragmatic language and social skills would suffer.

Even though petitioners did not consent to the IEP, they assented to its implementation because it provided for at least some APS aide support and absent this IEP, Student might have no aide at all. But they did *not* agree that this IEP provided Student a free appropriate public education ("FAPE") as required under the IDEA. The IEP also did not address the need for a transition plan for Student from having a full-time APS aide to having just a part-time one.

When the December 2015 IEP was implemented in January of 2016, Student was traumatized by the absence of a dedicated aide. Her emotional condition deteriorated; she suffered panic attacks and crying; her hydration and nutrition flagged; and she was unable to finish her class work. Petitioners brought these concerns to District's annual IEP team meeting on May 23, 2016, armed with recommendations of their own board certified behavior analyst specializing in autism who believed based on her personal observation of

Student in school that, at the very least, she be provided a dedicated APS aide for the entire school day.

The annual IEP team meeting in May of 2016 exceeded the allotted time but District agreed to reconvene later in the year and tabled for further consideration petitioners' request that Student be given a full-time APS aide. Advised that CRA was moving to a new campus for the 2016-2017 first-grade school year, petitioners voiced concern about Student's ability to transition to the new location. The IEP team developed an agenda for the second team meeting but did not include petitioners' concerns about the transition; and District did not offer any changes to Student's IEP of December 18, 2015, one which petitioners believed did not provide Student with a FAPE.

After Student started the school year at CRA's new location as a first grader, the IEP team reconvened for its second meeting on September 12, 2016. Petitioners' continuing concerns about Student's inability to transition and the lack of a full-time APS aide during her school day, concerns shared by their private behavior analyst, were confirmed by Student's erratic behavior. She did not like attending school; she wept often during the school day; and her confidence waned without support by an aide. While the IEP District offered Student on September 12, 2016, addressed some new communication goals, it did *not* include a full-time APS aide or other program support. Petitioners did not consent to this 2016-2017 IEP or its implementation; and District continued to implement the goals, services and placement in the last IEP of December 18, 2015.

As a first grader at CRA without the services of a full-time APS aide, Student was reluctant to attend school or participate in classroom activities; she stated that she did not want to learn. On October 24, 2016, petitioners pursuant to 20 U.S.C. § 1415(b)(6) filed an administrative due process complaint alleging that the IEPs of December 18, 2015, and May 23, 2016/September 12, 2016 failed to provide Student a FAPE. Unable to reach a resolution with District, petitioners on February 9, 2017, notified District in writing that they did not believe that it had provided a FAPE for Student; and they unilaterally elected to place Student in private school (University of California-Irvine Child Development School or "UCI-CDS").

Petitioners told District that Student would stay in private school for the remainder of first grade and for second grade. They then paid Student's private school registration fees and sought reimbursement from District pursuant to 20 U.S.C. § 1412(a)(10)(C) for the cost of this private placement for both school years, i.e., the remainder of her first grade and her second grade.

On February 23, 2017, District responded by denying petitioners' reimbursement request and by proposing an IEP meeting to review their concerns, a written notice petitioners denied receiving. Before any hearing was held, petitioners unilaterally withdrew their due process complaint filed in October of 2016. As Student completed her first-grade matriculation at UCI-CDS, District failed to hold an annual IEP meeting in May of 2017 and accordingly failed to develop an IEP for Student's upcoming second-grade school year. At the end of Student's 2016-2017 school

year, her outdated first-grade IEP, i.e, the one first implemented on December 18, 2015, expired.

Student continued to attend UCI-CDS as a second grader for the 2017-2018 school year. On December 15, 2017, petitioners filed a new due process complaint again requesting reimbursement for Student's private school costs. On January 10, 2018, District denied their request, proposed an IEP meeting for February of 2018, and requested access to Student so that it could assess her current needs and make a new offer of a FAPE. A dispute over information and access ensued and on March 23, 2018, District filed an administrative complaint asking the Administrative Law Judge ("ALJ") to make Student reasonably available for assessment or release District from its IEP obligations.

On May 2, 2018, District held the annual IEP team meeting for Student based on information it had from her private providers. It again requested permission to assess Student; but petitioners did not consent. Two days later, petitioners' counsel agreed to District's assessment plan and asked District to withdraw its administrative complaint. District did so but Student and petitioners had moved out of District boundaries and Student was not produced for assessment. Petitioners' second due process complaint filed on December 15, 2017, remained "live."

For six days beginning on May 16, 2018, the ALJ (Judith L. Pasewark) of California's Office of Administrative Hearings received evidence raised by petitioners' second due process complaint (App. 66). Both Sara Young, District's executive director of

special education, and Dr. Myla Candelario, CRA's program specialist, testified that District does not provide annual IEPs for students who are privately placed unless the parents ask for one; and District has no duty to offer an IEP after petitioners privately placed Student at UCI-CDS on February 9, 2017 (App. 136-137). While District usually sends an annual notice to parents informing them of their right to a FAPE, it did not send petitioners such notice while Student was privately placed (App. 137).

On July 25, 2018, the ALJ issued her Decision (App. 66-147). She concluded *inter alia* that District denied Student a FAPE by failing to file a due process complaint to defend its first-grade IEP for Student; and by failing to have a current IEP in place at the beginning Student's 2017-2018 second-grade school year at UCI-CDS (App. 132-134; 134-137). As for District's failure to file for due process, the ALJ held that regardless of whether petitioners had withdrawn their first due process complaint, "[a] school district's obligation to provide special education and related services to a student is not predicated on the parents' actions, procrastinations or failures to act" (App. 133).

She found that District's 2015 IEP and its goals had become outdated and District had an affirmative duty to defend its IEPs of May 23, 2016, and September 12, 2016, by filing for due process "to implement what it considered an appropriate IEP to provide Student with the IEP while she attended [CRA]..." (*Id.*). Its failure to do so denied Student a FAPE (App. 134).

The ALJ also determined that District's failure to convene an IEP meeting in May of 2017 and have an

IEP in place for Student at the beginning of the 2017-2018 school year was not excused by her private placement at UCI-CDS for that school year (App. 135). Barring petitioners' revocation of consent for District's continued provision of special education services under the IDEA (there was none here), District "*must* conduct an IEP team meeting for a special education student at least annually...and *must* have an IEP in place at the beginning of each school year for each child with exceptional needs residing within the district" (App. 135-136, citing 20 U.S.C. §§ 1414(d)(2)(A) & (d)(4) and California Ed. Code §§ 56343(d) & 56344(c)) (emphasis supplied).

She concluded: "[r]e-enrollment in the public school is not required to receive an IEP[;] [i]t is residency, rather than enrollment, that triggers a district's IDEA obligations," regardless of parental cooperation with, or acquiescence in, District's preferred course of action (App. 135). District's failures denied Student a FAPE and petitioners were entitled to reimbursement reasonably related to the denial of this educational opportunity (App. 137;140-143).

Both parties appealed to the federal district court for the Central District of California which has jurisdiction under 20 U.S.C. § 1415(i)(3)(A). As for the District's affirmative duty to defend its IEPs of May 23, 2016, and September 12, 2016, by filing for due process, the district court after a bench trial reversed the ALJ's ruling (App. 55-57). It determined that District's due process obligation flows "only when it believes that it is not providing a FAPE,...*not* where the parent is the one seeking a different program than what the school district considers sufficient to provide a FAPE" (App.

56). Here District believed that its implementation of the 2016 IEPs was unnecessary for Student to receive a FAPE because she was already being "over-served" by the "stay-put" IEP of December 18, 2015, which it believed had provided her a FAPE (*Id.*). The trial judge therefore ruled that District was not obligated to file for due process to defend its 2016 IEPs (App. 56-57).

As for District's duty to have an IEP in place for Student at the beginning of the 2017-2018 school, the trial court again reversed the ALJ (App. 57-61). In aligning itself with three other Circuits and distinguishing Ninth Circuit precedent which appear to impose this duty on District, the trial court held that unless a prior IEP is under administrative or judicial review, a school district is not required to prepare an annual IEP where parents have clearly stated their intention to have Student remain in private school (App. 57-59;61). Here none of District IEPs was subject to administrative or judicial review and petitioners had unilaterally withdrawn Student from public school and placed her in private school, indicating an intent to keep her enrolled there for some time (App. 60-61). In these circumstances, District "had no obligation to provide the child with a new FAPE for the 2017-2018 school year" (App. 60).

Both District and petitioners appealed. On December 30, 2021, the court of appeals affirmed the district court by holding that District did not have to file for due process to defend its first-grade IEP and did not have to develop an IEP for Student's 2017-2018 school year (App. 20-28).The Panel first held that under the IDEA and California education law, District is obligated to launch a due process hearing only if *it*

determines that its proposed IEP to which the parents do not consent is necessary to provide a FAPE, *not* where the parent is the one seeking a different program than what District considers sufficient to provide a FAPE (App. 21-22).

The Panel also ruled that once petitioners placed Student in private school for second grade, District did not have to develop an IEP for that school year (App. 22-28). While a school district must prepare an annual IEP for students with a disability residing within its jurisdiction, the Panel held that if a student is enrolled in private school by her parents, there is no freestanding requirement for District to prepare an IEP for the upcoming school year, even if the parents have filed a claim for reimbursement (App. 24-25). Instead, "the district only needs to prepare an IEP if the parents ask for one" (App. 25).

The Panel relied on 20 U.S.C. §§ 1412(a)(10), a section of the IDEA addressing the services available for children placed in private school (App. 25-26). It read its provisions as creating just two kinds of private school students: (1) those placed there by the parents under § 1412(a)(10)(A) and these students need not be given IEPs; and (2) those placed in private school by the school district under § 1412(a)(10)(B) and for these students, this subsection requires school districts to prepare IEPs (*Id.*). The Panel further read § 1412(a)(10)(C) as addressing reimbursement for only one subset of these two kinds of private school students, i.e., those placed there by their parents under § 1412(a)(10)(A) (App. 26).

Since under § 1412(a)(10)(A), District is not required to develop an IEP for children placed in private school by their parents, without distinguishing whether those children's parents are seeking reimbursement under § 1412(a)(10)(C), the Panel concluded that the fact that reimbursement is being sought has no bearing on whether District is required to develop an IEP for these children (App. 26). It thus reasoned that if parents enroll their child in private school and make a claim for reimbursement, then the child has been enrolled in private school by her parents, § 1412(a)(10)(A) applies, and an IEP is not required unless the parents ask for one (App. 27). As it ruled, while District's duty to prepare an IEP does not depend on whether the parents cooperate, it does depend on whether Student has been enrolled by her parents in private school and that is what happened here (*Id.*).

The matter was remanded for the limited purpose of considering attorney's fees and in a separately filed Memorandum, the Panel addressed the district court's reimbursement of costs for Student's second grade and her occupational therapy services (App. 1-4). On February 4, 2022, the Panel denied petitioners' timely filed petition for rehearing *en banc* (App. 65).

## REASONS FOR GRANTING THE PETITION

### 1. A School District Has An Affirmative Duty Under The IDEA To Prepare An Annual IEP For A Child For The Upcoming School Year Even After The Parents Unilaterally Enroll The Child In Private School And Seek Tuition Reimbursement Because They Believe The School District's Current IEP Denies Their Child A FAPE.

If the Panel is right, when parents disagree with a school district's IEP because it does not offer their child a FAPE and then unilaterally remove their child from public to private school and seek tuition reimbursement, the school district is thereafter excused from its affirmative duty under the IDEA from preparing an annual IEP for the child unless the parents ask for one. This ruling undercuts the IDEA's collaborative process between school districts and parents in developing and implementing an appropriate IEP for the child annually; it allows school districts unilaterally to cease educational planning for the child, abandoning those children whose parents have disputed their IEP offers; it rewards school districts for failing to provide an appropriate IEP by relieving it of the duty to convene future IEP meetings if the parents invoke their right to privately place their child and seek reimbursement; and it sabotages the parents' rights of timely and robust involvement in formulating with school districts the most appropriate annual IEP for their child consistent with her needs.

A school district's preeminent obligation to prepare with a child's parents an annual IEP for eligible students living within its boundaries is at the core of

the IDEA. This duty holds true for *all* students with disabilities, including those whose parents have disagreed with the school district's proposed IEP and have exercised their right to unilaterally place their child in private school and seek tuition reimbursement under 20 U.S.C.§1412(a)(10)(C). Yet the Panel, turning this subsection's language fostering collaboration between school districts and parents on its head, has decided to impose on these parents rather than the school district this preeminent duty to prepare an annual IEP for the child by making them the triggering agent for an annual IEP. This decision allows school districts in the absence of such a parental request to abdicate their primary role in a child's educational planning, punishing children because the parents have exercised their procedural right under the IDEA of unilaterally placing them in private school.

The ruling is unsupported by the IDEA's plain language and is at odds with its aspiration that parents play a "significant role" in the IEP formulation process. See *Endrew F. V. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S.___, ____; 137 S.Ct. 988, 994;1001-1002 (2017); *Schaffer v. Weast*, 546 U.S. 49, 53 (2005); *Board of Education v. Rowley*, 458 U.S. 176, 208-209 (1982) ("Congress sought to protect individual children by providing for parental involvement" in the formulation of the child's IEP). District's failure to prepare an annual IEP for Student for the upcoming 2017-2018 school year is a procedural violation which not only denied Student a FAPE but also interfered with petitioners' robust participation in the annual IEP formulation process for their child, undermining the essence of the IDEA and "driv[ing] a stake into the very heart of the Act." *Amanda J. ex rel. Annette J. v.*

*Clark County School*, 267 F.3d 877, 892-893 (9th Cir. 2001) quoting *Town of Burlington v. Dept. of Educ.*, 736 F.2d 773, 783 (1st Cir. 1984). See *Rowley*, 458 U.S. at 206-207 (failing to create or implement an IEP is a procedural violation of the IDEA).

Petitioners submit that their petition raises the important question of whether under the IDEA a school district is affirmatively obligated to prepare an annual IEP for a child within its jurisdiction even after the parents have disagreed with its proffered IEP, enrolled the child in private school and now seek tuition reimbursement under 20 U.S.C.§1412(a)(10)(C). The issue raised therefore comes within Supreme Court Rule 10(c)'s guidance about the considerations which point toward the Court's granting a petition for certiorari, i.e., that "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by th[e] Court, or has decided an important federal question in a way that conflicts with relevant decisions of th[e] Court."

Student began first grade at CRA's new campus in September of 2016, with an annual IEP from District which did *not* include a full-time APS aide or other program support addressing Student's unique needs in academics and social/emotional development. Petitioners did not consent to this 2016-2017 IEP or its implementation and District continued to implement the outdated goals, services and placement of the last IEP of December 18, 2015.

On October 24, 2016, petitioners filed a due process complaint alleging the denial of a FAPE; and on February 9, 2017, unable to resolve this issue with

District, notified it in writing that because District had not provided Student a FAPE, they decided to place Student in private school for the remainder of first grade and for second grade. They sought tuition reimbursement under 20 U.S.C. §1412(a)(10)(C). On February 23, 2017, District acknowledged in writing Student's private placement and rejected petitioners' request for reimbursement. Petitioners paid Student's private registration fees and withdrew their pending due process complaint.

Even though Student remained a child with an IEP, however outdated, District made no further attempts to contact petitioners after February 24, 2017, relying on its policy of not preparing IEPs for students who are privately placed unless the parents ask for one (App. 136-137). District did not hold an IEP meeting for Student's annual IEP due in May of 2017. At the end of Student's 2016-2017 school year, her first-grade IEP, i.e., the outdated IEP implemented back on December 18, 2015, expired. With no IEP team meeting having occurred on or after May of 2017, there was no IEP in place for the beginning of Student's 2017-2018 school year. During all this time, Student continued to reside within District and petitioners never revoked their consent to special education and related services.

On this record, District was dutybound under the IDEA, the implementing federal regulations and supplemental California Education Law to prepare and have in place an annual IEP for Student for the upcoming 2017-2018 school year. 20 U.S.C. §§1414(d)(2)(A) & (d)(4)(A)(i) & (ii). 34 CFR §§300.323(a) & 300.324(b)(1). Cal. Educ. Code §§ 56343(d) & 56344(a) & (c). See *Endrew F. V. Douglas*

*Cnty. Sch. Dist. RE-1*, 580 U.S. at ____; 137 S.Ct. at 999; *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 238-239 (2009) ("a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP."). *Anchorage Sch. Dist. v. M.P.*, 689 F.3d 1047, 1055 (9th Cir. 2012). After all, strict adherence to the procedures set out in the IDEA "cannot be gainsaid," see *Rowley*, 458 U.S. at 205-206, and District's failure to hew to these procedures denied petitioners their input on the IEP and Student a FAPE under the Act.

*None* of this law requiring District to prepare an annual IEP contains exceptions when parents reject the IEP because it does not offer a FAPE, or unilaterally place their child in private school or demand tuition reimbursement under 20 U.S.C. §1412(a)(10)(C), or even withdraw their first due process complaint. See, e.g., *Bellflower Unified Sch. Dist. v. Lua*, 832 Fed. App'x 493, 496 (9th Cir. 2020); *Dep't of Educ. v. M.F.*, 840 F. Supp.2d 1214, 1231 (D. Haw. 2011); *Briere v. Fair Haven Grade School Dist.*, 948 F. Supp. 1242, 1254-155 (D. Vt. 1996).

Thus District cannot blame its own procedural improprieties under the IDEA on the conduct of parents because its affirmative duty to prepare an annual IEP does *not* depend on petitioners' cooperation with, or acquiescence in, District's preferred course of action. See, e.g., *Anchorage Sch. Dist. v. M.P.*, 689 F.3d at 1055;1059-1060; *J.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 432;459 (9th Cir. 2010); *Union School Dist. v. Smith*, 15 F.3d 1519, 1525-1526 (9th Cir. 1994); *Town of Burlington v. Dept. of Educ.*, 736 F.2d at 795. Nor is re-

enrollment in public school required to receive an IEP; it is residency rather than re-enrollment in public school which triggers District's affirmative obligation to prepare an annual IEP, one it cannot abdicate. *N.B. v. Hellgate Elem. Sch. Dist.*, 541 F.3d 1202, 1209 (9th Cir. 2008).

District was therefore bound to continue working with petitioners to develop a mutually agreeable annual IEP or revise it and file a due process complaint to obtain approval of the proposed IEP. See 20 U.S.C. § 1415(b)(6); 34 CFR § 300.507(a). See *Anchorage Sch. Dist. v. M.P.*, 689 F.3d at 1056. It could not unilaterally terminate Student's rights under the IDEA *by doing nothing at all* simply because petitioners rejected its IEP, enrolled Student in private school and asserted their rights under the Act. Condoning District's actions is antithetical to the IDEA's purposes and "would penalize parents—and consequently children with disabilities—for exercising the very rights afforded them under the IDEA." *Anchorage Sch. Dist. v. M.P.*, *supra*.

District's failure to hold an IEP meeting for Student's annual IEP due in May of 2017 therefore resulted in a denial of educational opportunity for Student and a denial of a FAPE. This together with proof that their private placement at CRA was appropriate entitled petitioners under this Court's *Burlington-Carter* test to tuition reimbursement under 20 U.S.C.§1412(a)(10)(C). See *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. at 246; *Florence County School Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Burlington School Committee v. Department of Education*, 471 U.S. 359, 369 (1985).

Finally, the Panel's reading of §1412(a)(10)(A)-(C) to conclude that there is no freestanding requirement for District to prepare an IEP for the upcoming school year for a child placed in private school by her parents is fundamentally flawed. First, its reading ignores the IDEA's seminal requirement that District, having already "found" Student and developed IEPs for her, is now dutybound by the IDEA itself, federal regulations and California Education Law to prepare and have in place an annual IEP for her upcoming school year. See 20 U.S.C. §§1414(d)(2)(A) & (d)(4)(A)(i) & (ii); 34 CFR §§300.323(a) & 300.324(b)(1); Cal. Educ. Code §§ 56343(d) & 56344(a) & (c). To have §1412(a)(10)'s language qualify this preeminent duty of District to prepare an annual IEP for Student, a child already "found" and provided a FAPE by District, is to make the tail wag the dog. There is nothing in §1412(a)(10) which qualifies District's preeminent obligation to prepare an annual IEP for Student for the 2017-2018 school year; its duty to prepare an IEP does not implicate the limitations of §1412(a)(10); and the Panel's reading otherwise is unjustified and wrong.

Second, §1412(a)(10)(A) contemplates a child who has unilaterally been placed in private school by her parents without prior involvement by a school district and without a FAPE; she is not yet been "found" by the school district and there have been no prior IEPs. In this situation, District has some responsibilities to provide for equitable services. See, e.g., §1412(a)(10)(A)(i); 34 CFR § 300.137(a). But unlike petitioners, the parents of such children do not have the rights to the services due if they had initially placed the child in public schools; there is no right to a FAPE or due process hearings; and there is no right to public

funding for private placements. See, e.g., *District of Columbia v. Oliver*, 2014 WL 686860 at *4 (D.D.C. 2014). The Panel's conflation of Student's status with that of a child addressed in §1412(a)(10)(A) makes its application of this subsection to Student or petitioners irrational and inappropriate.

*District's Duty To Bring A Due Process Complaint To Defend Its IEPs.*

The Panel held that District is not obligated to launch a due process hearing to defend its IEPs for Student if *District itself* determines that its IEPs provided a FAPE, regardless of the fact that petitioners disagreed. Once again, the Panel has it wrong. It is *not* District's belief in the sufficiency of its own IEPs which triggers a duty on its part to file for due process but rather an authentic FAPE dispute or impasse, one signified by a lack of consent on the part of petitioners. Any other reading of the IDEA's protocol for formulating IEPs disrupts the careful equilibrium between District and petitioners the Act set up for this process, i.e., a consortium of educators and parents working toward the same child-centric goals. Here petitioners disagreed with implementing in first grade the stale, outdated goals of the "stay put" IEP of December 18, 2015, one which petitioners had already asserted did not provide Student with a FAPE. District's further IEPs of May 23, 2016, and September 12, 2016, fared no better with petitioners and District was therefore bound to file for due process so that Student had an IEP while she attended CRA.

To make District's duty to file for due process turn on its own belief in the sufficiency of the IEPs it

prepared gives District too decisive a power in the school/parent collaborative process carefully crafted by the Act, depriving petitioners of the procedural and substantive rights given them as parents under the IDEA to contest IEPs on their merits, to enroll their child in private school and to seek tuition reimbursement. Once the impasse occurred, District was compelled to continue working with petitioners to develop a mutually agreeable annual IEP or revise it and file a due process complaint to obtain approval of its proposed IEP. *I.R. v. Los Angeles Unified Sch. Dist.*, 805 F.3d 1164, 1169 (9th Cir. 2015). See 20 U.S.C. § 1415(b)(6) &(f)(1); 34 CFR § 300.507(a)(1); California Ed. Code § 56346(f) ("a due process hearing *shall* be initiated....") (emphasis supplied). See *Anchorage Sch. Dist. v. M.P.*, 689 F.3d at 1056. It could *not* pretend that petitioners no longer had rights under the Act or that they had not lodged an authentic FAPE disagreement.

**2. The Court Should Resolve The Confusion Among The Circuits About The Affirmative Duty Of School Districts To Prepare An Annual IEP For A Child Even After The Parents Enroll Her In Private School And Do Not Cooperate With The School District's Preferred Course Of Action.**

The Panel's decision creates an intra-Circuit conflict about the affirmative duty of a school district to prepare an annual IEP, clashing as it does with another Panel's decision in *Anchorage Sch. Dist. v. M.P.*, 689 F.3d at 1055-1056, which holds that a school district has an affirmative continuing duty to review and revise, at least annually, a child's IEP regardless of parents' lack of cooperation in implementing a school district's preferred course of action.

Moreover, at least three other Circuits have qualified a school district's affirmative duty under the Act to prepare an annual IEP once a child is enrolled in private school by the parents. In *A.B. through Katina B. v. Abington Sch. Dist.*, 841 Fed. App'x 392, 395 (3rd Cir. 2021) and *D.P. ex rel. Maria P. v. Council Rock Sch. Dist.*, 482 Fed. App'x 669, 672-673 (3rd Cir. 2012), the Third Circuit holds that there is no such freestanding duty under the IDEA. Instead, that duty is extinguished once the child no longer attends public school and is enrolled in private school; the parents must ask the school district for an IEP in these circumstances. See 841 Fed. App'x at 395 (relying on §1412(a)(10)(A)) and 482 Fed. App'x at 672-673 (same). In *MM v. Sch. Dist. Of Greenville County*, 303 F.3d 523, 536-537 (4th Cir. 2002), the Fourth Circuit holds that a school district is obligated to continue developing IEPs for a child no longer attending its schools only when the prior year's IEP is under administrative or judicial review. *Id.* The First Circuit has reached the same conclusion. See *Amann v. Stow School System*, 982 F.2d 644, 651 n.4 (1st Cir. 1992) citing *Town of Burlington v. Dept. of Educ.*, 736 F.2d at 794.

Some federal district courts are likewise in disarray in acknowledging a school district's continuing affirmative duty to prepare annual IEPs for children once they are enrolled in private school as the result of a FAPE dispute. See, e.g., *Shane T. v. Carbondale Area Sch. Dist.*, 2017 WL 4314555 at **11-13 (M.D. Pa. 2017) (parent must request IEP); *E.T. v. Board of Ed. of Pine Bush Cent. Sch. Dist.*, 2012 WL 5936537 at **14-15 (S.D. N.Y. 2012) (while school district continues to have duty to develop IEP even when child is enrolled in private school outside school district, parents must

request it); *D.C. v. Vinyard*, 971 F. Supp. 2d 103, 109-110 (D. D.C. 2013) (school district has duty to prepare IEP for enrolled private school child upon parent's request that it do so).

The Court should address the confusion about a school district's responsibilities in this regard and assert that under the IDEA, a school district has an affirmative continuing duty to review and revise, at least annually, a child's IEP regardless of the parents' cooperation in implementing a school district's preferred course of action and regardless of the child's enrollment in private school.

## CONCLUSION

For the reasons identified herein, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Ninth Circuit, to vacate and reverse the judgment and to remand the case to the federal district court for the Central District of California in order to reinstate its reimbursement order as well as the Decision of the ALJ which found that District denied petitioners a FAPE by failing to file for due process to defend its IEPs developed in 2016, by failing to convene an annual IEP meeting in May of 2017, and by failing to have an IEP for Student in place at the beginning of the 2017-2018 school year; or provide petitioners with such further relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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CAPISTRANO UNIFIED SCHOOL DISTRICT,

Plaintiff-Appellant/Cross-Appellee,

v.

S.W. and C.W., on behalf of their minor child, B.W.,

Defendants-Appellees/Cross-Appellants.

Nos. 20-55961, 20-55987
Argued and Submitted September 3, 2021 Pasadena, California

FILED December 30, 2021

Appeal from the United States District Court for the Central District of California, James V. Selna, District Judge, Presiding, D.C. Nos. 8:18-cv-01896-JVS-DFM 8:18-cv-01904-JVS-DFM

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Before: Mark J. Bennett and Ryan D. Nelson, Circuit Judges, and David A. Ezra,[*] District Judge.

MEMORANDUM[**]

We addressed most of the parties' claims in a concurrently-filed published opinion. Here we address reimbursement of costs for second grade and occupational therapy services. The district court abused its discretion in ordering reimbursement for tuition and services for second grade. But the district court did not abuse its discretion in awarding reimbursement for occupational therapy services.

1. The district court abused its discretion in ordering reimbursement for second grade. The ALJ awarded reimbursement for second grade because she held that Capistrano violated its duty to prepare an IEP for that year. But because the district court found that there was no duty to prepare an Individualized Education Plan (IEP) for that year, the district court's second grade reimbursement award was thus untethered from any particular wrong. At oral argument, Capistrano disclaimed any reliance on the argument that, as a matter of law, reimbursement could never be appropriate relief in years in which there are no violation, and so we do not address that question here. Instead, we agree with Capistrano that, given the particular facts of this case, because it awarded a remedy untethered from any wrong, the district court abused its discretion in ordering reimbursement for second grade. The district court's choice of a remedy must be logical, plausible, and supported by inferences that may be drawn from facts in the record. *Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California*, 813 F.3d 1155, 1163 (9th Cir. 2015). Here, on these particular facts, the district court's award of reimbursement for second grade was illogical because it did not tether that award to any particular wrong.

2. The district court did not abuse its discretion in ordering reimbursement for occupational therapy ("OT"). Capistrano argues that B.W.'s parents waived OT reimbursement by affirmatively stating in front of the ALJ that OT was not at issue. But in the district court, Capistrano explicitly acknowledged that the parents *did* raise OT reimbursement in front of the ALJ, by referring several times to their "request for reimbursement of speech or OT services." And regardless, the parents did raise OT reimbursement below. B.W.'s parents did not challenge Capistrano's provision of OT services, but that does not mean that they thought those services were unnecessary. What's more, in separate portions of the hearing, the parents explicitly raised OT reimbursement in front of the ALJ. They asked the ALJ to order Capistrano "to reimburse parents for their tuition cost and related expenses -- including speech and language therapy, *occupational therapy*, and social skills instruction," as well as other expenses.

Capistrano waived its argument that OT services went above and beyond what was required for a free appropriate public education ("FAPE"). "Arguments not raised by a party in its opening brief are deemed waived." *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1033 (9th Cir. 2008). Capistrano waived its argument that the OT services exceeded what was needed to provide a FAPE by failing to raise it in its opening brief, which argued only that B.W.'s parents waived OT reimbursement. Because it raised the issue only in its reply brief, Capistrano waived its argument that the OT services went above and beyond what was required for a FAPE.

We hold that the district court abused its discretion in ordering reimbursement for tuition and

services for second grade but did not abuse its discretion in awarding reimbursement for occupational therapy services. The district court's judgment is therefore **AFFIRMED IN PART** and **REVERSED IN PART**. As stated in the concurrently-filed published opinion, we **REMAND** the case to the district court for the limited purpose of considering attorneys' fees.

Footnote

*The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.
**This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

21 F.4th 1125
United States Court of Appeals, Ninth Circuit.

CAPISTRANO UNIFIED SCHOOL DISTRICT,
Plaintiff-Appellant/Cross-Appellee,
v.
S.W. and C.W., on behalf of their minor child, B.W.,
Defendants-Appellees/Cross-Appellants.

Nos. 20-55961, 20-55987

Argued and Submitted September 3, 2021 Pasadena, California

Filed December 30, 2021

Appeal from the United States District Court for the Central District of California, James V. Selna, District Judge, Presiding, D.C. Nos. 8:18-cv-01896-JVS-DFM, 8:18-cv-01904-JVS-DFM

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Before: Mark J. Bennett and Ryan D. Nelson, Circuit Judges, and David A. Ezra,* District Judge.

## OPINION

R. NELSON, Circuit Judge

When B.W. was in first grade, after a dispute over services under the IDEA with Capistrano Unified School District, her parents withdrew her from public school, enrolled her in private school, and filed an administrative complaint seeking reimbursement for tuition and services. Capistrano's proposed placement and services for first grade were indisputably inadequate. What is mainly at issue are the consequences of that inadequacy. We hold that (1) the goals (as opposed to services) in B.W.'s first grade Individualized Education Program ("IEP") were not inadequate; (2) Capistrano did not have to file for due process to defend the first grade IEP; and (3) Capistrano did not have to have an IEP in place for the second grade. We thus affirm the district court on all three issues.[1]

### I

### A

The Individuals with Disabilities Education Act ("IDEA") "offers federal funds to States" for providing

a free appropriate public education ("FAPE") "to all children with certain physical or intellectual disabilities." *Fry ex rel. E.F. v. Napoleon Cmty. Schs.*, ___ U.S. ___, 137 S. Ct. 743, 748, 197 L.Ed.2d 46 (2017) (citing 20 U.S.C. § 1412(a)(1)(A)). "An eligible child" has "a substantive right" to a FAPE, which consists of "both instruction tailored to meet a child's unique needs and sufficient supportive services to permit the child to benefit from that instruction." *Id.* at 748–49 (citing 20 U.S.C. §§ 1401(9), (26), (29)) (internal quotation marks omitted). School districts must provide a FAPE "at public expense, under public supervision and direction, ... in conformity with" an IEP. 20 U.S.C. § 1401(9).

The IEP, "a personalized plan to meet all of the child's educational needs," is "the primary vehicle for providing each child with" a FAPE. *Fry*, 137 S. Ct. at 749 (internal quotation marks omitted); *see also* 20 U.S.C. § 1414(d). It is put together by the IEP Team, "a group of school officials, teachers, and parents." ***1130** *Fry*, 137 S. Ct. at 749 (quoting 20 U.S.C. §§ 1414(d)(1)(A)(i)(II)(bb), (d)(1)(B)). "[T]he IEP documents the child's current 'levels of academic achievement,' specifies 'measurable annual goals' for how she can 'make progress in the general education curriculum,' and lists the 'special education and related services' to be provided so that she can 'advance appropriately toward [those] goals.' " *Id.* (second alteration in original) (quoting 20 U.S.C. §§ 1414(d)(1)(A)(i)(I), (II), (IV)(aa)). The IEP Team must consider "the strengths of the child"; "the concerns of the parents for enhancing the education of their child"; "the results of the initial evaluation or most recent evaluation of the child"; and "the academic, developmental, and functional needs of the child." 20 U.S.C. § 1414(d)(3)(A). The IEP must be in effect at the

beginning of each school year and the "local educational agency" must ensure that the IEP Team reviews the IEP annually. 20 U.S.C §§ 1414(d)(2)(A), (4)(A)(i); Cal. Educ. Code §§ 56343(d), 56344(c).

"[T]he IDEA establishes formal procedures for resolving disputes" between parents and school districts over IEPs. *Fry*, 137 S. Ct. at 749. "[A] dissatisfied parent may file a complaint as to any matter concerning the provision of a FAPE with the local or state educational agency (as state law provides)." *Id.* (citing 20 U.S.C. § 1415(b)(6)). "That pleading generally triggers a preliminary meeting involving the contending parties." *Id.* (cleaned up); *see also* 20 U.S.C. §§ 1415(e), (f)(1)(B)(i). Then, "the matter proceeds to a 'due process hearing' before an impartial hearing officer." *Id.* (quoting 20 U.S.C. § 1415(f)(1)(A)). "[A]ny decision by a hearing officer on a request for substantive relief 'shall' be 'based on a determination of whether the child received a free appropriate public education.' " *Id.* at 754 (quoting 20 U.S.C. § 1415(f)(3)(E)(i)). "Finally, a parent unhappy with the outcome of the administrative process may seek judicial review by filing a civil action in state or federal court." *Id.* at 749 (citing 20 U.S.C. § 1415(i)(2)(A)).

Under the IDEA regulations, parental consent is generally required for initial evaluation, initial provision of special education services, and reevaluation, but not for a revision to an annual IEP. *See* 34 C.F.R. §§ 300.300(a)–(c). That said, the regulations permit a state to require parental consent for other services, including IEP revisions, if the state "ensures that each public agency in the State establishes and implements effective procedures to ensure that a parent's refusal to consent does not result

in a failure to provide the child with FAPE." *Id.* § 300.300(d)(2).

California has done so. Under its law implementing the IDEA, if the parent "consents in writing to the receipt of special education and related services for the child but does not consent to all of the components of the [IEP], those components of the program to which the parent has consented shall be implemented so as not to delay providing instruction and services to the child." Cal. Educ. Code § 56346(e). And "if the public agency determines that the proposed special education program component to which the parent does not consent is necessary to provide a free appropriate public education to the child, a due process hearing shall be initiated in accordance with" 20 U.S.C. § 1415(f). Cal. Educ. Code § 56346(f).

Finally, parents who unilaterally place a child in private school may seek reimbursement for the costs of special education and related services. *See* 20 U.S.C. § 1415. "[C]ourts may grant reimbursement under § 1415(i)(2)(C)(iii) only when a school district fails to provide a FAPE *and* the private-school placement is appropriate." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 242 n.9, 129 S.Ct. 2484, 174 L.Ed.2d 168 (2009). And the IDEA specifies ***1131** that reimbursement is permitted "for the cost of [private school] enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment." *Id.* at 248, 129 S.Ct. 2484 (quoting 20 U.S.C. § 1412(a)(10)(C)). That section was added by amendment in 1997 and elucidates the general authority to grant appropriate relief in 20 U.S.C. § 1415(i)(2)(C)(iii). *Id.* at 239, 242, 129 S.Ct. 2484. It applies "to students who previously received special

education and related services." *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078, 1087 (9th Cir. 2008), *aff'd*, 557 U.S. 230, 129 S.Ct. 2484, 174 L.Ed.2d 168 (2009); 20 U.S.C. § 1412(a)(10)(C)(ii).

B

This case arose out of a series of disagreements between B.W.'s parents and Capistrano. They disagreed about services for B.W. throughout her kindergarten year, but those disagreements are not at issue here. At the end of that year, at the IEP meeting, B.W.'s parents said that more "intensive support [was] necessary for [B.W.'s] continued growth/progress." They were concerned that several different people helped B.W. during her kindergarten year and said that B.W. did not know who was supporting her. The parents came to the meeting with their own expert, who recommended that B.W. should "have support for the entire length of the school day." Capistrano disagreed and explained that different tutors helped B.W. become more independent. B.W. completed kindergarten, meeting expectations with high marks in almost all areas.

Then, in the fall, after B.W. started first grade, the IEP Team reconvened. It reviewed B.W.'s transition to first grade and her parents' concerns about her adjustment to the public school's new campus. Capistrano proposed new goals and accommodations reflecting the parents' expert's recommendations. B.W.'s parents received a copy of the annual IEP offer. But they never consented to it or requested another IEP meeting.

A couple months into the school year, B.W.'s parents filed an administrative due process complaint

alleging inadequacies with both the kindergarten and first grade IEPs.

Then, in winter of that same year, B.W.'s parents unilaterally withdrew B.W. from the public school and enrolled her at a private school. B.W.'s parents told Capistrano that B.W. would stay in private school for the rest of first grade and for second grade. They sought reimbursement for private school tuition, programs, and related services for both school years.

Capistrano denied the parents' request for reimbursement and proposed an IEP meeting. B.W.'s parents did not respond.[2] B.W.'s parents then paid her registration fees for the private school. They also unilaterally withdrew their due process complaint, and at the end of the school year, B.W.'s first grade IEP expired.

B.W. continued to attend private school for second grade. Her parents filed a new due process complaint again requesting reimbursement for B.W.'s private school costs. Capistrano again denied the request and proposed an IEP meeting, and a dispute over information and access ensued. Ultimately, Capistrano was dissatisfied with its access to B.W. and filed an administrative complaint, asking the Administrative Law Judge (ALJ) either to order assessment of B.W. or release Capistrano from its IEP obligations.

Near the end of second grade, Capistrano held an annual IEP meeting for B.W. Capistrano again requested assessment of B.W.; B.W.'s parents agreed assessments were necessary, but they did not consent. Soon after, B.W.'s counsel consented to Capistrano's plan to assess B.W., but only if Capistrano withdrew its complaint. Capistrano withdrew its complaint but B.W.

was never produced for assessment, and B.W.'s parents' complaint remained "live."

C

The ALJ then decided B.W.'s operative (second) complaint. After ruling for Capistrano on two issues relating to kindergarten (not at issue here), the ALJ decided in favor of B.W.'s parents on the remaining four issues, concluding that Capistrano denied B.W. a FAPE by failing to: (1) develop appropriate first grade IEP goals; (2) make an appropriate offer of placement and services; (3) file for due process to defend the first grade IEP; and (4) have a current IEP in place at the beginning of second grade.

Both parties filed complaints challenging the ALJ's decision in federal district court, which had jurisdiction under 20 U.S.C. § 1415(i)(3)(A). The district court held a bench trial on issues (1) through (4) above.[3] *Capisistrano* [sic] *Unified Sch. Dist. v. S.W. et al.*, No. SACV 18-01896JVS(DFMx), 2020 WL 5540186 (C.D. Cal. Aug. 19, 2020). The district court affirmed the ALJ on issue (2) above, finding that Capistrano denied B.W. a FAPE in first grade by failing to make an appropriate offer of placement and services. Capistrano does not appeal that issue, so it is undisputed that Capistrano failed to provide B.W. with a FAPE in first grade.

The district court reversed the ALJ and found for Capistrano on the remaining issues. Although it found that Capistrano had no duty to prepare an IEP for B.W. in second grade, the district court still affirmed the ALJ's order of reimbursement for tuition and services in that year, finding that reimbursement was "nonetheless appropriate." Capistrano appeals only the reimbursement for second grade and for

occupational therapy services. The parents cross-appeal the remaining first grade issues.

We address whether (1) the goals in Capistrano's first grade IEP were inadequate, (2) Capistrano had to file for due process to defend the first grade IEP, and (3) Capistrano needed to develop a second grade IEP.

## II

"[W]hether the school district's proposed IEP" was a FAPE "is a mixed question that we review *de novo*." *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1310 (9th Cir. 1987). "Complete *de novo* review, however, is inappropriate." *Amanda J. ex rel. Annette J. v. Clark Cnty. Sch. Dist.*, 267 F.3d 877, 887 (9th Cir. 2001). "[W]e are not free 'to substitute [our] own notions of sound educational policy for those of the school authorities which [we] review.' " *Id.* (second and third alterations in original) (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)). Courts "must defer to [states'] 'specialized knowledge and experience' by giving 'due weight' to the decisions of the states' administrative bodies." *Id.* at 888 (quoting *Rowley*, 458 U.S. at 206–208, 102 S.Ct. 3034).

The district court's findings of fact are reviewed for clear error and conclusions of law are reviewed de novo. See *L.J. by & through Hudson v. Pittsburg Unified Sch. Dist.*, 850 F.3d 996, 1002 (9th Cir. 2017). A factual finding is clearly erroneous if it "is illogical, implausible, or without support in inferences that may be drawn from the record." *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc).

## III

We hold that (1) the goals in Capistrano's first grade IEP were not inadequate, (2) Capistrano did not have to file for due process to defend the first grade IEP, and (3) Capistrano did not have to develop an IEP for second grade.

### A

To start off, the first grade IEP's goals were appropriate. An IEP contains both goals and an offer of placement and services that the school district proposes to use to accomplish those goals. The district court here held that Capistrano's proposed placement and services for first grade were inadequate, and thus that the first grade IEP was inadequate. Capistrano does not appeal that ruling, and so here, both sides agree that the IEP was inadequate as to placement and services.

The parents argue that the IEP was also inadequate for a second reason: because its goals were inadequate. They argue that Capistrano's proposed first grade goals were inadequate in three ways: (1) the goals did not address B.W.'s unique needs, (2) Capistrano did not consider the parents' expert's recommendation or the parents' concerns, and (3) the goals relied on inaccurate data from the prior year and proposed inadequate methods for collecting future data.

We affirm the district court on all three grounds and hold that the IEP goals were adequate: the goals addressed B.W.'s needs, Capistrano considered the parents' recommendations (and those of their expert), and any data problems did not make the goals themselves inadequate.

1

The first grade IEP's goals targeted B.W.'s needs, as required. 20 U.S.C. § 1414(d)(1)(A)(i)(II). "[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.*, 919 F.3d 237, 251 (4th Cir. 2019) (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"). And California "does not require ... additional information, beyond that explicitly required by" the IDEA. Cal. Educ. Code § 56345(i). B.W.'s parents bear the burden of showing that the first grade IEP did not satisfy the IDEA requirements. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005).

The ALJ found that the goals addressed B.W.'s unique needs and found a problem with the goals "not in their suitability, but rather in the manner in which they were measured." The district court agreed that the goals were suitable but reversed the ALJ as to their measurement, finding that the IEP goals included descriptions of how progress would be measured. So neither the ALJ nor the district court found what the parents argue here: that the goals did not address B.W.'s unique needs.

B.W.'s parents argue that there were no goals dedicated to classroom socialization, redirection, and behavior support. But the parents' expert testified that the goals helped B.W.'s social interactions, coping strategies, response to cues, self-advocacy skills, and transition process. The expert even testified that the IEP addressed her recommended goals. A second expert called by the parents also agreed that the

proposed goals were "appropriate" in addressing B.W.'s emotional self-regulation, acceptance, and staying on task. And the ALJ found the goals were appropriate and "comported to [B.W.'s] unique needs." Thus, the district court properly upheld the ALJ's finding "that the [first grade] goals did comport to B.W.'s unique needs and were not inappropriate."

2

B.W.'s parents also argue that Capistrano ignored both their expert's recommendation that B.W. have only two behavioral tutors and B.W.'s parents' concerns about B.W.'s health issues and speech and language skills. Capistrano adequately considered the recommendation and concerns.

The parents' expert recommended that B.W. have no more than two behavioral tutors during the day. Relatedly, the parents "advocated for more 'direct interaction/support' " while meeting with the IEP Team, because they thought that more support would help address B.W.'s health issues, speech and language skills, and social deficits. In contrast, Capistrano "purposeful[ly]" proposed a "variety of [behavioral] tutors," not just two, because it thought that having more tutors would help B.W. become more independent. To be sure, Capistrano disagreed with the expert's recommendation and did not give B.W. everything that her parents requested. But their recommendation and concerns were still considered.

B.W.'s parents allege that these failures were not just substantive but were also procedural. But Capistrano's disagreement with the parents' concerns did not "seriously infringe[ ] the parents' opportunity to participate in the IEP formulation process." *See J.L. v.*

*Mercer Island Sch. Dist.*, 592 F.3d 938, 953 (9th Cir. 2010). As discussed above, Capistrano heard the parents' concerns and just disagreed; it did not infringe their opportunity to participate. Parents' participation does not require school authorities automatically to defer to their concerns. The district court properly found that the IEP Team considered B.W.'s parents' concerns and just disagreed.

3

B.W.'s parents allege two kinds of problems with the first grade IEP relating to data measurement. First, they ask the court to defer to the ALJ, who held that the IEP goals were inadequate because the means for collecting future data were "vague, inconsistent, and lacked sufficient definition of staff duties." And second, they argue that in formulating the IEP goals, Capistrano relied on past data that were so inconsistently collected that "it was impossible for [Capistrano] to create appropriate goals." We disagree on both points. Any problems with past or future data did not make the goals themselves inadequate.

I

First, the IEP included a statement of measurable goals and adequately described how progress would be measured. An IEP must include "a statement of measurable annual goals." 20 U.S.C. § 1414(d)(1)(A)(i)(II); *see also* 34 C.F.R. § 300.320(a)(2). And an IEP must also describe "how the child's progress toward meeting the annual goals ... will be measured." *Id.* § 1414(d)(1)(A)(i)(III); *see also* 34 C.F.R. § 300.320(a)(3). But there is no specific form of

measurement required by statute or caselaw. *Cf. R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1122 (9th Cir. 2011) (goal measurement can be "based on teachers' subjective observations"). Thus, goals could be measured ordinally (*e.g.*, no improvement/some improvement/ significant improvement), quantitatively, or in some other way. Indeed, B.W.'s parents acknowledge that Capistrano, the ALJ, and their own expert all agreed that "any method in data collection was appropriate, as long as it was consistent."

Here, ample evidence in the record supports that the first grade IEP proposed measurable goals. For example, one goal stated that B.W. "will attend to the teacher ... for 20 minutes, with no more than 2 prompts, in 4/5 given opportunities, over 2 consecutive weeks." The goals noted the evaluation methods, persons responsible for measuring the goals, and benchmarks for progress. The goals also noted that regular progress reports would be provided to B.W.'s parents. The district court correctly noted that the IDEA does not require adopting the "specific form of data collection preferred by" B.W.'s parents.

Thus, the district court properly found that "goals were set and measured and the IEP included a description of how B.W.'s progress was to be measured."

ii

Second, as to past data, any inconsistencies did not render the IEP goals themselves inadequate. In developing the IEP, the IEP Team must consider several factors, including "the strengths of the child," "the concerns of the parents," and "the results of the

initial [or most recent] evaluation of the child." 20 U.S.C. § 1414(d)(3)(A). But the IDEA does not require that the IEP Team rely on specific kinds of quantitative data. What the IDEA does require is that the IEP be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, — U.S. ——, 137 S. Ct. 988, 999, 197 L.Ed.2d 335 (2017). A calculated action is one that is "planned so as to achieve a specific purpose" or "deliberate." *Calculated*, Black's Law Dictionary (11th ed. 2019).

B.W.'s parents ask us to hold that an IEP necessarily cannot be reasonably calculated unless the data are consistently collected. But the IDEA contains no requirement to rely on quantitative data at all. To hold for B.W. would create a consistent measuring requirement: districts could validly implement an IEP in one year but still find that the data from that year were not consistent enough for the next year's IEP. The IDEA has no such requirement.

Because no such requirement exists, the essence of the parents' claim is really a challenge to the implementation of the prior year's IEP. *See Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007) ("[A] *material* failure to implement an IEP violates the IDEA."); *see also L.J. by N.N.J. v. Sch. Bd. of Broward Cnty.*, 927 F.3d 1203, 1216 (11th Cir. 2019) (In "implementation case[s], reviewing courts must assess whether the school has provided special education and related services 'in conformity with' a disabled child's IEP, not whether that IEP was appropriate to begin with." (citing 20 U.S.C. § 1401(9)(D))).

As proof that the prior data were not consistently collected, B.W.'s parents point to their expert's testimony that the data were collected inconsistently. For example, "it wasn't clear as to how many prompts [Capistrano] would allow to consider [B.W.] on task."

The problem is that Capistrano collected at least two sets of data: one set called "goal performance data sheets," which assessed whether B.W. was meeting her IEP goals; and a second set called "classroom support data sheets," which assessed behavioral prompting. The district court found that B.W.'s expert examined only the classroom behavior sheets and not the goal reports. B.W. responds that the goal reports are not "the only information that the district could have utilized to create new goals."

B.W.'s parents are correct that in creating new goals, Capistrano could have relied on the classroom support data sheets, and not just on the goal performance data sheets. But that does not save their argument. Their argument fails because Capistrano did not need to rely on any specific kind of data at all. And if construed as a challenge to data collection under the prior year's IEP, then her argument still fails, because the IEP required the IEP goal sheets to be recorded, which her expert did not examine.

The district court properly found that the IEP was not inadequate because of inconsistencies in the prior data.

B

Turning to the second issue, B.W.'s parents argue that Capistrano had an obligation to file for due process to defend its first grade IEP. Capistrano made

what it determined was an adequate IEP offer; B.W.'s parents disagree that the offer was adequate. B.W.'s parents argue that this impasse mandated a due process hearing, but they ignore the IDEA's plain text.

Under California law, parents may consent to some components of an IEP offer but not others. Cal. Educ. Code § 56346(e). In that situation, the components consented to "shall be implemented so as not to delay providing instruction and services to the child." *Id.* But "if the *public agency* determines that the proposed special education program component to which the parent does not consent is necessary to provide a" FAPE, then the district must launch a due process hearing. *Id.* § 56346(f) (emphasis added). The public agency's determination is thus the sole trigger for any obligation to file a due process complaint under California law.

B.W. provides no reason why the plain text does not govern. *See Connell v. Lima Corp.*, 988 F.3d 1089, 1097 (9th Cir. 2021) ("We begin with the statutory text, and end there as well if the text is unambiguous." (cleaned up)). B.W.'s parents rely on a line from *I.R. ex rel. E.N. v. Los Angeles Unified School District*, 805 F.3d 1164, 1169 (9th Cir. 2015), stating: "In effect, § 56346(f) compels a school district to initiate a due process hearing when the school district and the parents reach an impasse." But in context, *I.R.* held that a due process hearing is only triggered "[o]nce the *school district determines* that the component is necessary." *Id.* at 1169 (emphasis added). The district court thus properly concluded "the school district's due process obligation flows only where it believes that it is not providing a FAPE, but not where the parent is the one seeking a different program than what the school district considers sufficient to provide a FAPE."[4]

B.W.'s parents argue that because Capistrano had started unofficially to implement the first grade IEP goals, Capistrano must have believed that the previous goals were inadequate. But any apparent determination that the new goals were better does not necessarily imply that Capistrano also determined that the old goals were inadequate.

B.W.'s parents also argue that Capistrano did not verify that B.W. was in school after she withdrew from public school, so it could not have known whether B.W. was receiving a FAPE. But they cite no authority holding that the district must file for due process when parents unilaterally place their child in private school. We address below whether Capistrano had to prepare an IEP while B.W. was in private school; here, the question is whether Capistrano determined that it was not offering a FAPE while B.W. was in public school, and as to that question, its failure to verify her enrollment later makes no difference.

The district court properly found that "Capistrano had determined that implementation of the [first grade] IEP was not necessary for B.W.'s receipt of a FAPE." Thus, Capistrano did not need to file for due process.

C

Turning now to the final issue, once B.W.'s parents placed her in private school for second grade, Capistrano did not have to develop an IEP. Generally, Capistrano must prepare an annual IEP for students with a disability in its jurisdiction. 20 U.S.C. §§ 1414(d)(2)(A), (4)(A). But when there is no claim for reimbursement, students placed in private schools by their parents need not be given IEPs. The IDEA

requires instead that districts work with private schools to come up with a services plan, which the student does not have an individual right to challenge. *Id.* § 1412(a)(10)(A); 34 C.F.R. § 300.138.

The parties agree that IEPs are required for students in public school but not for students in private school with no claim for reimbursement. They also agree that the school district must develop an IEP when the parents request one, even if the child is in private school, because such a request shows that the parents are at least nominally seeking a public education for their child. They further agree that an IEP is required when the parents have enrolled the student in private school and there is a claim for reimbursement. But "[w]e are not bound by a party's concession as to the meaning of the law." *United States v. Ogles*, 440 F.3d 1095, 1099 (9th Cir. 2006). And on this last point, we disagree.

Such a requirement (to prepare an IEP when the parents enroll the child in private school and claim reimbursement) was first established in *Town of Burlington v. Department of Education*, 736 F.2d 773 (1st Cir. 1984). But in holding that there was such an IEP requirement, the First Circuit also acknowledged that the IDEA "omits any reference to whether IEPs are to be revised during the pendency of the review." *Id.* at 794. Still, the court decided that this silence required it to "fashion a rule to facilitate implementation of the Act," and went on to say that "[w]e think that pending review of an earlier IEP, local educational agencies should continue to review and revise IEPs in accordance with applicable law." *Id.* The *Burlington* court's rule was motivated by practical concerns: the court noted that IEPs in later years would help district courts evaluate whether a FAPE

was offered in those years. *Id.* But the court's rule was not rooted in any provision of the statute. And we have never adopted this reading.

So although the parties agree that an IEP is necessary when there is a claim for reimbursement, we have never explicitly held as such. That creates a problem because the parties' dispute centers on the details of when this requirement should apply.

The reason that these details are at issue arises from an unusual series of events. First, B.W.'s parents withdrew her from public school and filed a due process complaint seeking reimbursement. They also told Capistrano that B.W. would remain in private school for the rest of first grade and for second grade. But then, after Capistrano denied the reimbursement request, B.W.'s parents withdrew their first complaint, and did not file a second complaint (the operative complaint in this case) until several months later.

Capistrano argues that the time when it normally would have prepared B.W.'s IEP for second grade fell into the lull between the withdrawal of the first complaint and the filing of the second. Thus, it argues that it did not have to prepare an IEP for second grade, because there was no pending complaint and B.W. was thus simply a student placed in private school by her parents without a request for reimbursement. B.W.'s parents and amici, on the other hand, argue that removing B.W. from public school, placing her in private school, and requesting reimbursement (even if the request was later withdrawn), taken together, show that the parents were seeking reimbursement, even absent a pending proceeding at the time.

We hold that, if the student has been enrolled in private school by her parents, then the district need not

prepare an IEP, even if a claim for reimbursement has been filed. To be sure, when parents withdraw a student from public school and place her in private school, all they have to do is ask for an IEP, and then the district must prepare one. But regardless of reimbursement, when a child has been enrolled in private school by her parents, the district only needs to prepare an IEP if the parents ask for one. There is no freestanding requirement that IEPs be conducted when there is a claim for reimbursement.

Here's why. Section 1412(a)(10) governs the provision of services for children in private school, and it has three subparagraphs. The first is entitled "[c]hildren enrolled in private schools by their parents," and provides (among other things not relevant here) that such children need not be given IEPs. 20 U.S.C. § 1412(a)(10)(A). The second is entitled "[c]hildren placed in, or referred to, private schools by public agencies," and requires IEPs. § 1412(a)(10)(B).[5] And the third is entitled "[p]ayment for education of children enrolled in private schools without consent of or referral by the public agency." § 1412(a)(10)(C). This subparagraph states that reimbursement is not required if the district offered the child a FAPE but may be required if the district did not offer a FAPE. *Id.*

B.W.'s parents and amici argue that § 1412(a)(10) establishes three kinds of students: (A) students placed in private school by their parents without a request for reimbursement, (B) students placed in private school by the school district, and (C) students placed in private school by their parents with a request for reimbursement. But the more natural reading of the section is that it establishes two kinds of private school students—those placed by the parents and those placed by the school—and then includes a third part about

reimbursement for a subset of students placed by their parents.

Our reading is supported by two features of the IDEA. First, the titles of subparagraphs (A) and (B) refer to categories of students, while the third refers not to students but to payment. That is why we have previously observed that the ***1139*** IDEA recognizes only two categories of private school students: "children placed unilaterally in private schools by their parents" and "children placed in private schools by a public agency." *Hooks v. Clark Cnty. Sch. Dist.*, 228 F.3d 1036, 1039 (9th Cir. 2000). And second, B.W.'s parents' third category (children enrolled in private school without the consent of or referral by the public agency) falls entirely within the first category of students placed in private school by their parents. That is why subparagraph (C) begins by saying "[s]ubject to subparagraph (A)." 20 U.S.C. § 1412(a)(10)(C). And subparagraph (A) says nothing about only covering students who are not requesting reimbursement. *Id.* § 1412(a)(10)(A). This shows that, rather than establishing a third category, subparagraph (C) instead simply addresses reimbursement for a subset of students.

If parents enroll their child in private school and make a claim for reimbursement, then the child has still been enrolled in private school by her parents, subparagraph (A) applies, and an IEP is not required unless the parents ask for one.

B.W.'s parents and amici rely on *Anchorage School District v. M.P.*, 689 F.3d 1047 (9th Cir. 2012), to argue that districts must prepare an IEP each year once a due process proceeding has been launched, whether or not the parents cooperate. They thus argue that Capistrano had to prepare an IEP even after

B.W.'s parents placed her in private school and said that they intended to keep her there. But the district court properly held that "*Anchorage* does not stand for this proposition and concerned different circumstances."

In *Anchorage*, the student's parents and the district disagreed about an offered IEP and the parents filed for due process. 689 F.3d at 1052. While the claim was being adjudicated and, importantly, while the student remained in public school, the prior year's IEP was "stayed put" and the district "unilaterally postponed any further efforts to develop an updated IEP until after a final decision had been rendered" in the legal proceedings. *Id.* The court held that the district's obligation to complete an IEP remained in force, regardless of the due process complaint and the parents' lack of cooperation, and thus that the school district violated the IDEA by not preparing an IEP. *Id.* at 1056–57.

Thus in *Anchorage*, because the student remained in public school, the student obviously had not been enrolled in private school by his parents. So 20 U.S.C. § 1412(a)(10)(A) did not apply. But here, B.W. was enrolled in private school by her parents. B.W.'s parents and amici correctly note that school districts' obligation to prepare an IEP does not depend on whether the parents cooperate. But it does depend on whether the child has been enrolled by her parents in private school, and that is what happened here.[6]

One way to interpret B.W.'s parents and amici's argument is to say that when parents request reimbursement, they are functionally or constructively requesting that the child remain in public school. But that argument is difficult to accept here ***1140*** because B.W.'s parents explicitly told Capistrano that they

intended to keep B.W. in private school for second grade. The essence of B.W.'s parents' and amici's argument is that when parents withdraw a student from public school, enroll her in private school, and make a claim for reimbursement, it seems unfair to say that they are choosing to enroll their child in private school, because their hand has been forced by the district's failure to offer a FAPE. The problem is that subparagraph (A) does not refer to students placed in private school by their parents when there is no claim for reimbursement; it refers to "[c]hildren enrolled in private schools by their parents," full stop. B.W.'s parents' and amici's reading goes against the statutory text and we decline to adopt it.

IV

We hold that the first grade IEP's goals were appropriate, that Capistrano did not need to file for due process to defend the first grade IEP, and that Capistrano did not have to develop an IEP for second grade.

As to these issues, the judgment of the district court is **AFFIRMED**. We **REMAND** the case to the district court for the limited purpose of considering attorneys' fees.

Footnotes

*The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

1We address the rest of the parties' claims in a concurrently filed memorandum disposition.

2The parents claim that they never received the letter denying reimbursement, but the district court found that Capistrano sent it.

3The district court also considered a kindergarten issue not relevant here.

4An amicus, California Association of Lawyers for Education, makes policy arguments for why school districts should "have an affirmative obligation to request a due process hearing anytime there is a dispute over an offer of a FAPE." It argues some groups are "less likely to file for due process due to educational, financial, or other barriers," and so the IDEA's permissive dispute process "exacerbates this burden on parents" by not requiring "better equipped" school districts to file suit when a parent disagrees with the district's IEP. B.W.'s parents also mention public policy. But "[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law ...." *Bostock v. Clayton Cnty.*, —— U.S. ——, 140 S. Ct. 1731, 1737, 207 L.Ed.2d 218 (2020).

5When districts know that they cannot adequately serve a child with disabilities, sometimes they place the child into a private school that can provide more services.

6B.W. and amici rely on two other cases, both distinguishable as dealing with either students who had not yet been enrolled in private school or students whose parents requested an IEP. *See J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 460 (9th Cir. 2010) (parents notified district of intent to enroll in private school but student was still in public school at the time of the annual IEP meeting); *Bellflower Unified Sch. Dist. v. Lua*, 832 F. App'x 493, 496 (9th Cir. 2020) (school district "violated the IDEA by refusing to convene an IEP meeting in 2015 and 2016 *despite multiple requests* from ... parents" (emphasis added)).

2020 WL 5540186

United States District Court, C.D. California.
CAPISISTRANO UNIFIED SCHOOL DISTRICT
v.
S.W. ET AL.

Case No. SACV 18-01896JVS(DFMx) consol withSACV 18-01904 JVS(DFMx)

Filed 08/19/2020

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**Proceedings: [IN CHAMBERS]** Order Regarding Court Trial

The Honorable James V. Selna, U.S. District Court Judge

Both S.W. and C.W. on behalf of their minor child, B.W. ("B.W." or the "Student") and Capistrano Unified School District ("Capistrano") appeal a decision from the Office of Administrative Hearings ("OAH"). Student Op. Br. ("SOP"), ECF No. 45; Capistrano Op. Br. ("COP"), ECF No. 44. Both parties responded. Student's Resp. ("SR"), ECF No. 50; Capistrano's Resp. ("CR"), ECF No. 49.

For the following reasons, the Court **AFFIRMS** in part and **REVERSES** in part the Administrative Law Judge's ("ALJ") decision.

## I. BACKGROUND

This action arises under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400, et seq.

B.W. was a student at Community Roots Academy ("CRA"), a charter school in the Capistrano Unified School District, during the 2015-2016 school year as a kindergartner and part of the 2016-2017 school year as a first grader. Administrative Record ("AR") 1187, 1400, ECF No. 23. In February 2017, B.W. began attending the University of California, Irvine Child Development School ("UCI-CDS"), a private school. Id. at 1266.

### A. April 30, 2015 Annual Individualized Education Program ("IEP")

Prior to Student beginning kindergarten at CRA, B.W.'s parents and Capistrano entered into a confidential Informal Dispute Resolution Agreement (the "Settlement Agreement") which specified terms for B.W.'s transition to kindergarten at CRA, including full day Additional Program Support ("APS") by an aide. Id. at 1100-01. The Settlement Agreement also provided that the Student's IEP Team consisting of parents, general education teacher, special education teacher, an administrator, and the autism supervisor, would convene on or before December 18, 2015 to discuss B.W.'s transition to CRA. Id. at 1102. The term

of the Settlement Agreement concluded on December 18, 2015. Id. at 1100.

S.W. testified that it took a few weeks for the aide to begin her duties. Id. at 1428. During that time B.W. was scared, nervous, complained of headaches, stomachaches, had meltdowns and cried during the day, had a "difficult time understanding ... what she needed to do," and her water bottle came back home full despite needing to stay hydrated as a result of a medical condition. Id. at 1428-30. After the aide began providing full-time services to B.W., the problems subsided with the Student gaining independence, coming back with an empty water bottle, eating lunch, becoming excited to talk to her friends, and receiving praise from the teacher. Id. at 1430-31.

**B. December 18, 2015 IEP**

Pursuant to the terms of the Settlement Agreement the IEP team met on December 18, 2015. Id. at 421. At the meeting B.W.'s parents expressed that they preferred that B.W.'s aid provide more prompting "so that she learns the expectations for future development in higher grades. Parents shared concerns that if [B.W.] isn't supported enough that she may lose ground as she gets older." Id. at 422. Although B.W.'s parents shared a series of concerns such as B.W.'s interactions with a specific classmate, incomplete worksheets, inappropriate hydration with B.W.'s water bottle coming back home full, overstimulation, and tendency to wander away, they did not share any concerns pertaining to pragmatic skills such as a language deficit. Id. at 421-22, 2202-03. The IEP team discussed that B.W. was "independent during recess/lunch and for about 1.5 hrs. per day of [ ]

class time." Id. at 421. The Education Specialist addressed the parents' concerns regarding incomplete worksheets explaining that she had set "higher expectations" for B.W. which required additional prompting. Id. at 421-22.

The school team recommended that the support that had been provided by Specialized Academic Instruction ("SAI") be replaced with Additional Program Support ("APS"). Id. at 422. The school team had noted that B.W. had "the ability to be independent for a short amount of time, and [ ] felt that it was important for her growth to give her that opportunity throughout the day to have some independence ...." Id. at 1599-1600. The District ultimately offered the following free appropriate public education ("FAPE"):

- SAI; Accommodated in separate setting (pull out); 60 minutes per day;
- Intensive Behavioral Intervention ("IBI") support in the general education classroom; 90 minutes per day;
- IBI for recess support; three times per week; 30 minutes per session;
- APS in the general education classroom; 90 minutes per day;
- Group speech and language ("S/L") service; two times per week; 30 minutes per session; and
- Individual occupational therapy ("OT") services; two times per month; 30 minutes per session.

Id. at 424-425. The Parents provided consent to implement the IEP, but indicated that they did not agree that the IEP was a FAPE. Id. at 455. The

parents testified that they did not agree to the reduction of the one-to-one aide or the APS was supported, but consented to the IEP because it still included an hour and a half of aide support and without it they "would go back to no aide support at all." Id. at 1437. Capistrano did not address the need for a transition plan for B.W. from having a full-time APS aide to having an APS aide for only a portion of the day. Id. at 1442.

With the implementation of the December 18, 2015 IEP, B.W. continued to make progress in kindergarten such as becoming "more comfortable" sharing and talking in class and interacting with peers. Id. at 1627-28. B.W. made progress socially, emotionally, and academically. Id. at 1108-9; 1600. B.W.'s first semester progress report noted that B.W. had met academic expectations in the majority of areas, and demonstrated progress in the remaining areas. Id. at 1170. B.W. earned "Satisfactory" scores in all critical thinking, problem solving, self-management, collaboration, communication, and project management. Id.

Capistrano held B.W.'s annual IEP on May 23, 2016. Id. at 1131. At the IEP meeting, parents shared their continued concerns with the team including that they felt that B.W.'s "growth had been due to all the [i]ntensive support she has been receiving since she has been 2 yrs. They feel to continue to provide this intensive support is necessary for her continued growth/progress." Id. at 1159-1160. The parents advocated for more "direct interaction/support" rather than observation. Id. at 1160. The parents also shared concerns that there was inconsistency with IBI tutors and prompting with B.W. complaining that they didn't

know who was supporting them. Id. At least six different individuals provided IBI services between September 2015 and May 2016. Id. at 462-701, 1783. The data sheets were also used by a student's aide by the name of Ms. Krites who was not trained by the IBI supervisor and for whom neither Capistrano nor CRA witnesses reviewed her data. Id. at 2293-94.

The parents' private behavior analyst, Dr. Rosa Patterson, later testified at the OAH that there were many inconsistencies with the way the data was colleted including data collected in fluctuating time intervals and noting when the Student was on-task and independent. Id. at 1786-90. Dr. Patterson also noted that there were no operational definitions included for B.W. even though these were important when collecting data. Id. at 1784-89 (As "a way to minimize errors or flaws in the data, it would be important to have operational definitions that they can refer back to what they're collecting and what they're doing because, again, everyone's memory, you know, on any given day can vary. So it's helpful to have it in black and white for them."). She also testified that the data sheets showed that B.W. had "many meltdown behaviors" which were not typical for a developing child and that in her opinion a full-time aide was required to "work through the behavior" and work on "replacement behaviors for crying." Id. at 1803-05. Dr. Patterson also noted that B.W. was becoming more prompt-dependent in part because of how the different individuals providing services were prompting B.W. Id. at 1789-92.

Dr. Patterson attended the May 2016 IEP meeting and recommended B.W. "have support for the entire length of the school day." Id. at 707, 1159-60. Dr. Patterson's recommendations were based on two one-hour observations of B.W. Id. Despite having made a

note to herself that she needed to get the IBI data, she did not do so prior to recommending full day support at the IEP meeting. Id. at 1256, 1821-22, 1835-37.

The IEP team explained that the variety of IBI tutors was purposeful because they did not want a prompt dependent student and that B.W. had improved in terms of independence and returning to an activity when she was upset. Id. at 1159-60. B.W.'s teacher also explained that the IBI tutor would occasionally support B.W. prior to receiving two prompts from the teacher. Id. Information regarding how IBI worked in the classroom was also explained to the parents by means of an IBI handout. Id. at 1224 ("The first 2 prompts for the focal student need to come from the classroom teacher to facilitate more independence away from outside support."). The Autism Specialist also explained that B.W. had an "extremely high level of independence and on task behavior (90-100%)." Id. at 1160.

A second IEP meeting was scheduled because the team was unable to get through all of the agenda items including progress on prior IEP goals, new support services, and new goals. Id. at 1159-60.

B.W. completed kindergarten with the vast majority of her marks being the highest possible and met semester expectations in all areas except three subareas in mathematics. Id. at 1170. B.W.'s teacher testified that B.W. "did really well academically," "was right on target, right where we would want students academically by the end of kindergarten." Id. at 1642. Although the teacher acknowledged that B.W. had a few areas where she was "still struggling, ... that was pretty typical of our students during that time." Id. It was the teacher's opinion that B.W. was ready to move on to first grade. Id. at 1642-43.

## D. September 12, 2016 Annual IEP (Part 2)

The IEP team meeting reconvened on September 12, 2016. Id. at 1131. The Student never challenged that the IEP was not completed before the 2016-2017 school year. Id. at 51, 59.

CRA moved to a new campus in the 2016-2017 school year. Id. at 2138. The IEP team reviewed B.W.'s transition to first grade and the parents' concerns over B.W.'s adaptation to the new campus. Id. at 1154. The IEP team also reviewed the progress B.W. had made towards meeting her IEP goal, meeting four of six communication goals. Id. B.W. achieved 64% of her attention goal and 53% of her independently seeking assistance goal as of May 2016. Id. at 1140-41. B.W. still required prompting to stay on task for a full 15 minutes, and to follow through on making topic comments during reading. Id. at 1141, 1147. Nonetheless, B.W. was able to read fluently above grade level. Id. at 1147. The IEP team also developed new and modified goals to address B.W.'s needs. Id. at 1134-48.

Capistrano also proposed goals and accommodations correlated to the recommendations of Dr. Patterson's May 22, 2016 report. Dr. Patterson testified that the goals set by the IEP team addressed her recommended goals as stated in her May 22, 2016 report. See id. at 1831-34 cf. 707. To achieve such goals, the IEP proposed the following:

- SAI in the general education setting; 120 minutes per day;
- SAI in a separate environment; 60 minutes per day;
- Group S/L services; twice per week; 30 minutes per session;

- IBI in the general education environment in a group setting; five times per week; 60 minutes per session to address language, social, and behavioral deficits with data taken on levels of independence throughout the day;
- IBI for recess support; once per week; 30 minutes per session; and
- OT in a group setting; once per month; 30 minutes per session.

Id. at 1131. The parents received a copy of the May 23 and September 12, 2016 annual IEP and never requested any further IEP team meetings. Id. at 751-806, 1995-6. B.W.'s parents never consented to the IEP. Id. at 1716.

**E. October 2016-April 2017: Remainder Of B.W.'s 1st Grade Year**

On October 24, 2016, B.W.'s parents filed a due process complaint relating to B.W.'s IEPs from December 2015 through September 2016. Id. The parents unilaterally withdrew B.W. from CRA and placed her at UCI-CDS notifying Capistrano that they intended to seek reimbursement for "the cost of UCI CDS in addition to programs, related services, and transportation expenses". Id. at 864; see also 1478-1479 (testimony from S.W. explaining that they removed B.W. to UCI-CDS because they felt it was more appropriate for B.W.'s needs). On February 15, 2017, the parents informed CRA that they intended to keep student at UCI-CDS for the second semester of 1st grade and for second grade. Id. at 1060-61.

In response, Capistrano sent a Prior Written Notice ("PWN") to the parents on February 23, 2017,

denying the parents' request for reimbursement, and proposing an IEP meeting to review the parents' concerns. Id. at 1188-93, 1209-15. Capistrano did not receive a response to the PWN. Id. at 2000-01.

The due process complaint was withdrawn prior to the date the hearing was set. Id. at 1717. B.W.'s registration fee for the 2017-2018 school year was paid on March 17, 2017. Id. at 1575.

## F. The Second and Operative Due Process Complaint

On December 15, 2017, B.W. filed a new due process complaint. Id. at 1. On January 10, 2018, Capistrano sent the parents a PWN denying their request for district funded placement at UCI-CDS, proposing an IEP meeting for February 6, 2018, and requesting consent to releases of information from UCI-CDS and Dr. Patterson so that the District could assess B.W.'s current needs and make a new offer of FAPE. Id. at 1210-15. The district received a release on January 22, 2018. AR Supp. ("ARS"), 130, ECF No. 39. Capistrano staff were able to observe B.W. through a double-sided window at UCI-CDS for 20 minutes. ARS 24-27. At the time of the observation, Capistrano staff did not have records from UCI or Dr. Patterson and did not feel they had sufficient information to develop an IEP. Id. at 27-28. Thus, Capistrano sent a PWN on February 2, 2018 proposing to conduct an assessment of B.W. Id. at 29, 134-35.

On February 5, 2018, counsel for B.W. notified Capistrano that they agreed to delay the scheduled IEP meeting and would consider Capistrano's assessment plan. Id. at 155. The parents did not consent

to the assessment despite repeated follow up inquiries from Capistrano. Id. at 34, 35, 45-48.

On March 23, 2018, Capistrano filed a complaint requesting an order requiring parents to make B.W. reasonably available for assessment and if they do not, to release Capistrano from its obligations until they do. AR 115-32.

### G. The May 2, 2018 IEP Meeting

On May 2, 2018, Capistrano held the annual IEP meeting for B.W. based on the information it had obtained from her private providers. ARS 82, 87-88, 209-35. Although the parents were offered an opportunity to observe the offered placement in B.W.'s neighborhood school, they never did so. Id. at 62. At the meeting Capistrano again requested permission to assess B.W. Id. at 61-62. Although the parents agreed that assessments were needed, they did not provide consent at the meeting. Id.

On May 4, 2018, B.W.'s counsel provided consent to the assessment plan and asked that Capistrano withdraw its complaint. AR 262. Capistrano withdrew its complaint on May 9, 2018, with an express pledge from the parents that B.W. would be produced for assessment. Id. at 280. However, B.W. was never ultimately produced for assessment. ARS 65-66.

### H. The ALJ Decision

The ALJ considered six issues, the following five of which are being appealed by the parties:

1. Did Capistrano deny Student a free appropriate public education by failing to make an

appropriate offer of placement and services in the individualized education program developed on December 18, 2015, in the areas of intensive behavioral intervention; one-to-one aide assistance; speech and language therapy; and social skills services, to address Student's pragmatic language and social skills needs?

3. Did Capistrano deny Student a FAPE by failing to make an appropriate offer of FAPE in the annual IEP developed on May 23, 2016, and September 12, 2016, by failing to develop goals that addressed Student's needs in the areas of academics, social/emotional and anxiety?
4. Did Capistrano deny Student a FAPE by failing to make an appropriate offer of placement and services in the annual IEP developed on May 23, 2016, and September 12, 2016, in the areas of intensive behavioral intervention; one-to-one aid assistance; speech and language therapy; and social skills services, to address Student's pragmatic language and social skills needs?
5. Did Capistrano deny Student a FAPE by failing to file for due process to defend its IEP developed on May 23, 2016, and September 12, 2016?
6. Did Capistrano deny Student a FAPE by failing to convene an annual IEP team meeting in May 2017, and failing to have a current IEP in place for Student at the beginning of the 2017-2018 school year?

AR 1265. The ALJ found that evidence concerning assessments and IEPs that occurred after the date of the filing were beyond the scope of the hearing. Id. at 1505. The initial filing occurred on December 15, 2017

and the Student's request to file an amended complaint was granted on January 23, 2018. See id. at 1264.

On July 25, 2018, the ALJ rendered her decision finding that Capistrano denied Student a FAPE by failing to have an IEP in place for the beginning of the 2017-2018 school year. Id. at 1304-05, ¶61. The ALJ also ordered reimbursement for B.W.'s private tuition for the 2017-2018 school year (extending two months past the hearing date). Id. at 1306-7, ¶¶ 9, 1, 3. As to issue one, the ALJ found that Capistrano had not denied Student a FAPE by failing to file for due process hearing. Id. at 1266. "Capistrano provided Student with an appropriate placement and services under the December 18, 2015 IEP." Id.

## II. LEGAL STANDARD

The IDEA guarantees all disabled children a FAPE that emphasizes "special education and related services designed to meet their unique needs ...." 20 U.S.C. § 1400(d)(1)(A). A FAPE means special education and related services that: (1) are available to the student at public expense, under public supervision and direction, and without charge; (2) meet state educational standards; (3) include an appropriate education in the state involved; and (4) conform to the student's IEP. 20 U.S.C. § 1401(9).

An IEP is a written statement designed specifically for the disabled child, and is created by a team including the child's parents, teacher, a representative of the local educational agency, and (if appropriate) the child. 20 U.S.C. § 1414(d)(1)(A). An IEP must include information regarding the child's present levels of performance, a statement of annual goals and objectives, a statement of special educational

and related services to be provided the child, an explanation of the extent to which the child will not participate with non-disabled children in the regular class, and objective criteria for measuring the child's progress. Id.

Judicial review of the state hearing officer's decision under IDEA is a two-step process. First, a court must determine if a state has satisfied IDEA's procedural requirements. Henry Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982); see also M.C. by & through M.N. v. Antelope Valley Union High Sch. Dist., 858 F.3d 1189, 1194 (9th Cir. 2017). Second, a court must determine whether the state has met the substantive requirement of providing a FAPE "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 999 (2017).

A district court reviews the ALJ's decision under a modified de novo standard. Ojai Unified Sch. v. Jackson, 4 F.3d 1467, 1471–73 (9th Cir. 1993); Glendale Unified Sch. Dist. v. Almasi, 122 F. Supp. 2d 1093, 1100 (C.D. Cal. 2000). The district court receives the administrative record, hears additional evidence at a party's request, and then bases its decision on the preponderance of the evidence. 20 U.S.C. § 1415(i)(2)(C). The preponderance of the evidence standard "is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." Rowley, 458 U.S. at 206. Rather, the Court must give "due weight" to the administrative proceedings, which means that the district court should not try the case anew. Id. ;Capistrano Unified Sch. Dist. v. Wartenberg, 59 F.3d 884, 891–92 (9th Cir. 1995). More specifically,

the court should give substantial weight to the hearing officer's decision if the court finds that the decision was careful, impartial, and sensitive to the complexities presented. Ojai, 4 F.3d at 1476. The court "must consider the findings of the hearing officer carefully and endeavor to respond to the hearing officer's resolution of each material issue." San Diego v. Cal. Special Educ. Hearing Office, 93 F.3d 1458, 1466 (9th Cir. 1996) (quoting Ojai, 4 F.3d 1473–74). But the court may accept or reject the findings of the hearing officer as a whole once such consideration is granted. Id. Therefore, the court "can accord some deference to the ALJ's factual findings, but only where they are thorough and careful, and the extent of deference to be given is within [the court's] discretion." M.C. by & through M.N. v. Antelope Valley Union High Sch. Dist., 858 F.3d 1189, 1194 (9th Cir. 2017) (internal quotations omitted).

The party seeking relief bears the burden of proof. Schaffer v. Weast, 546 U.S. 49, 62 (2005).

## III. DISCUSSION

### A. Issue One

Issue One is defined as: Did Capistrano deny Student a free appropriate public education by failing to make an appropriate offer of placement and services in the individualized education program developed on December 18, 2015, in the areas of intensive behavioral intervention; one-to-one aide assistance; speech and language therapy; and social skills services, to address Student's pragmatic language, and social skills needs? AR 1265.

The Court finds that the ALJ's findings were thorough, careful, and impartial, and therefore gives significant weight to the ALJ's credibility determinations. See Ojai, 4 F.3d at 1476; Park v. Anaheim Union High Sch. Dist., 464 F.3d 1025, 1031 (9th Cir. 2006) (finding that ALJ's decision was "thorough and careful," in part because ALJ asked questions and provided a factual background and analysis to support the ultimate conclusion). The Student argues that the ALJ completely disregarded Dr. Patterson's testimony regarding her review of the data that was taken during the relevant time period. AR 1789-92, 1804. However, Dr. Patterson's testimony was not available to the IEP team at the time of the December 18, 2015 meeting. The parents presented no actual evidence at that meeting suggesting that B.W. had regressed, was not making progress, or that a full-time aid was critical to her success. Id. at 421-22. A school is not required to provide a program merely because it is preferred by a parent, even if it were better than what the school district offered. See Gregory K. v. Longview Sch. Dist., 811 F.2d 1307, 1314 (9th Cir. 1987). The key is whether the program at the time it was drafted, was objectively reasonable. Adams v. State of Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999). At the time the IEP was drafted, there was evidence before the IEP team that the Student was progressing, and the team engaged with the parents to address their concerns. AR 421-22, 1599-1600.

Accordingly, the Court **affirms** the ALJ's holding as to Issue One.

**B. Whether the OAH Decision Disregards Evidence that Student Received a FAPE While Fully Included in General Education**

Capistrano argues that throughout issues three through six the ALJ committed a legal error by failing to use the correct legal standard for a student who was fully included in a general education classroom. COP, 16. Specifically, that "for a child fully integrated in the regular classroom, an IEP **typically** should, as Rowley put it, be 'reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.' " Endrew F., 137 S. Ct. at 999 (quoting Rowley, 458 U.S. at 203-204 (emphasis added)). However, this is not an inflexible rule. Id. at n. 2 ("We declined to hold in Rowley, and do not hold today, that 'every handicapped child who is advancing from grade to grade ... is automatically receiving a [FAPE].' ").

"Rowley had no need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level." Id. at 1000. Endrew F. provided the missing guidance for non-fully integrated children, noting that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Id. at 1001. An IEP "need not aim for grade-level advancement" but "must be appropriately ambitious in light of [the student's] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives." Id. at 1000.

B.W. argues that she is not "fully integrated" because she was pulled out of the classroom for 17% of

her total classroom time for SAI and speech services. AR 730-731. B.W. attempts to distinguish Rowley arguing that the child in Rowley was fully integrated because they were in a "regular classroom for the entirety of the day" and were only pulled out for speech services. CR, 2; cf Rowley, at 184 (explaining that the IEP in Rowley required the student to receive instruction in a regular classroom using a hearing aid, and receive instruction from a tutor one hour each day and from a speech therapist three hours each week, but not shedding light on when the student was "pulled out"). Here, B.W. is part of generalized education, but was to be pulled out of class for an hour a day for SAI and an additional 30 minutes twice a week for speech therapy. Id. at 730-731.

While Rowley, Endrew F., and the IDEA do not define what constitutes a "fully integrated" student, the Court interprets the term in its plain meaning. Merriam-Webster's defines "integrated" as characterized by integration which in term is defined as the "incorporation as equals into society." Merriam-Webster's Collegiate Dictionary, 11th Ed. "Fully" is defined as "in a full manner or degree" or "completely." Id. B.W. was not completely a part of her class given that she was removed from the class daily for IEP and several times a week for speech therapy. Accordingly, B.W. was not "fully integrated." Thus, the standard that should have been used by the ALJ is that of a non-fully integrated student, in other words that the IEP was "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Endrews F., 1001. The ALJ applied the appropriate standard by citing and considering both Endrews F. and Rowley and weighing whether the plan

was reasonably calculated to make progress in light of B.W.'s circumstances. See e.g., AR 1295, 1300.

### C. Issue Three

Capistrano argues that the ALJ impermissibly made unilateral and substantive revisions to issue three. COP, 17. An ALJ has authority to reorganize and revise issues for clarity so long as it is substantively inconsequential. See J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist., 626 F.3d 431, 442-43 (9th Cir. 2010). However, a party "shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise." 20 U.S.C.A. § 1415.

Issue Three was defined in the amended complaint as "Did [Capistrano] deny Student a FAPE by failing to make an appropriate offer of placement, services, and goals via the IEP developed on May 23, 2016 and September 12, 2016?" AR 0059. The ALJ redefined the issue as "Did Capistrano deny Student a FAPE by failing to make an appropriate offer of FAPE in the annual IEP developed on May 23, 2016, and September 12, 2016, by failing to develop goals that addressed Student's needs in the areas of academics, social/emotional and anxiety?" Id. at 1265. The ALJ determined that "[t]heoretically, based on subject matter, none of these goals were inappropriate." Id. at 1298. However, the ALJ took issue with "Capistrano's collection of data, and the variance in measuring Student's progress on goals." Id. at 1298-99 ("The problems with these goals laid not in their suitability, but rather in the manner in which they were measured."). After considering the evidence presented, the ALJ determined that because the means of

measuring progress on the goals was vague, "a preponderance of the evidence showed that Capistrano denied Student a FAPE by failing to offer sufficiently clear goals." Id. at 1299.

Here, the unilateral revision of the issue did not change the ALJ's consideration of the parties' arguments because it did not expand the issue as Capistrano suggests. The initial issue as pled already included consideration of whether the goals were appropriate and measurability of a goal would logically be a factor considered in determining whether a goal was appropriate.

Capistrano also argues that the ALJ granted relief on mistaken testimony to make her decision because she relied on "Dr. Patterson's expert opinion regarding the reliability of Capistrano's collection of data, and the variance in measuring Student's progress on goals." AR 1298; see COP, 18-19. Capistrano contends that Dr. Patterson did not testify to the measurability of the goals because she testified that she did not review the goal data collection sheets, and only considered the prompting data. Id. The Student does not contest this in the responsive brief. A review of Dr. Patterson's testimony reveals that she did not review the goal performance data sheets, but instead only reviewed the prompting/independence data sheets. AR 1835; 1854-55; 2320. Dr. Patterson testified that she was more concerned about the prompting/independence data sheets because she was "looking for the consistency of the data being collected and the implementation of the strategies for her. And you know, ensuring that she was being provided the support that she needed to develop some of these skills further." Id. at 1855.

The Court takes issue with the ALJ's statement that on the face of the IEP "the means of measuring the goals, and the individual responsibilities for doing so, split among so many people, some of whom were inexperienced, did not provide sufficient clarity to withstand the requirements of" Union Sch. Dist. v. Smith, 15 F.3d 1519, 1526 (9th Cir. 1994). AR 1299. Union only requires that a school district present a formal written offer of an appropriate educational placement in order to "create[ ] a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement." Id. Union says nothing of what level of clarity is required in terms of goal measurability. The ALJ here considered Dr. Patterson's testimony and was persuaded that the inconsistently measured data as to prompting and independence constituted "variance in measuring Student's progress on goals." AR 1298. This Court disagrees.

First, reliance on Dr. Patterson's testimony as to the measurability of the goals was plain error because Dr. Patterson did not review the goal performance data sheets. Additionally, the OAH decision acknowledged that the 2016 goals did comport to B.W.'s unique needs and were not inappropriate, taking issue only with the way the data collection and variance in measuring B.W.'s progress. AR 1297-98. But Capistrano's approach to recording the data even if carried out by a series of individuals and not ideal pursuant to the Parent's expert does not render the offer of FAPE inappropriate. An IEP must include a description of "how the child's progress toward meeting the annual goals ... will be measured," and "when periodic reports

No.

IN THE

# Supreme Court of the United States

S.W. AND C.W., ON BEHALF OF THEIR MINOR CHILD, B.W., PETITIONERS

*v.*

CAPISTRANO UNIFIED SCHOOL DISTRICT

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

**APPENDIX VOL. II (51a-147a)**

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on the progress the child is making towards meeting the annual goals... will be provided." 34 C.F.R. § 300.320(a)(3); 20 U.S.C. § 1414(d)(1)(A)(i)(III). The IEP here met these requirements – goals were set and measured and the IEP included a description of how B.W.'s progress was to be measured. Capistrano was not required to go beyond that to establish a specific form of data collection preferred by the Parents. "The IDEA's broad mandate to provide handicapped children with a [FAPE] designed to meet the unique needs of each handicapped child is fairly imprecise in its mechanics. This vagueness reflects Congress' clear intent to leave educational policy making to state and local education officials." J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist., 611 F. Supp. 2d 1097, 1118 (E.D. Cal. 2009), aff'd, 626 F.3d 431 (9th Cir. 2010). The IEP satisfied the statutory requirements concerning goals in the annual IEP developed on May 23, 2016, and September 12, 2016.

Accordingly, the Court **reverses** the ALJ's findings and holding as to Issue Three.

## D. Issue Four

Capistrano argues that the Court should not give deference to the ALJ's decision as to Issue Four because it failed to address all issues raised. COP, 20. Specifically, Capistrano argues that rather than addressing the service levels challenged by the Student, the ALJ criticized the failure to provide a transition plan between the May 2016 Part 1 meeting and the September 2016 Part 2 meeting, despite timeliness and a transition plan never having been the issues raised. Id. Capistrano argues that had timeliness been at issue, they would have raised evidence showing

that the September meeting had been delayed because it was the first mutually agreeable date. Id. The Student argues that the lack of a transition plan was "directly related to whether the services in the areas of IBI, one-to-one aid assistance, and S/L therapy and social skills services were appropriate or not" and therefore was an issue sufficiently pled in the Amended Complaint. SOP, 19.

Issue Four was defined in the OAH opinion as: "Did Capistrano deny Student a FAPE by failing to make an appropriate offer of placement and services in the annual IEP developed on May 23, 2016, and September 12, 2016, in the areas of intensive behavioral intervention; one-to-one aid assistance; speech and language therapy; and social skills services, to address Student's pragmatic language and social skills needs?" Id. at 1265. This appears to have been derived in part from Issue Three in the Amended Complaint. Issue Three in the Amended Complaint was defined as "Did [Capistrano] deny Student a FAPE by failing to make an appropriate offer of placement, services, and goals via the IEP developed on May 23, 2016 and September 12, 2016?" AR 0059. Thus, the goal portion of the issue was addressed in Issue Three of the OAH opinion,[1] and the remaining portions appear to have been meant to have been addressed in this redefined issue of the OAH opinion. On this reframed issue, the ALJ concluded that because there was sufficient evidence before the IEP team at the time of the May meeting that B.W. did not do well with transitions, and that a transition was upcoming at the beginning of the school year, she required additional assistance (that of a one-to-one aid and a transition plan), and as a result, the services that were offered to her were insufficient and did not constitute a FAPE. AR 1300-1301. The ALJ's opinion

focused entirely on B.W.'s difficulties with transitions and need for a transitional plan. Id. ("Not only did the IEP team fail to consider a transition plan for a child with known transition difficulties at the May 23, 2016 IEP team meeting, it failed to convene the second part of the 2016-2017 annual IEP meeting prior to the beginning of the school year to consider a transition plan.").

The Court agrees with Capistrano that the alleged failure to provide a transition plan was an unpled issue and that timeliness was an unpled issue. Although the Student's complaint has continual mentions of her issues with transitions, whether Capistrano failed to provide a FAPE by failing to provide B.W. with a transition plan was not clearly pled in Issue Three or any other issues of the Amended Complaint. See generally, AR 0047-0060. Additionally, the Student did not challenge the timeliness of the September meeting in the Amended Complaint. Therefore, the Court affords no deference to the ALJ's decision on the Issue Three because the ALJ failed to address the service levels challenged by B.W.

Capistrano also argues that the ALJ committed an error by failing to apply the "Snapshot Rule." COP, 21. The "Snapshot Rule" states that "[a]ctions of the school systems cannot ... be judged exclusively in hindsight.... [A]n [IEP] is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." Adams, 195 F.3d at 1149. Thus, although the ALJ noted in her opinion that there was demonstrable evidence that as a result in the 2016-2017 school year the Student's behavior did in fact decline, it was not relevant to the

IEP at the time it was offered and should not have been considered as a factor in determining whether a FAPE was offered.

As described above, whether a transition plan was necessary to provide a FAPE was not properly pled in the Amended Complaint and therefore should not have been included in the ALJ's decision. Nonetheless, the ALJ noted that Capistrano "simply ignored" the parent's request to provide not only a transition plan to address the Student's difficulties with transitions, but also a full-time aid despite knowing at the IEP meetings that (1) the parents were concerned about the move from CRA to another campus; and (2) that the team knew from parental input and "information collected from the teacher, education specialist and autism specialist, that Student had difficulties with most forms of transitions, regardless of whether from place-to-place or lesson-to-lesson." AR 1300, ¶ 40. The notes from these meetings support the ALJ's conclusion. By completely ignoring the evidence of the Student's difficulties with transitions at the IEP meetings despite knowing that CRA was moving to a new campus in the fall, and ignoring the parent's request for one-to-one aid to assist with these transitions, the IEP created by Capistrano cannot "have reasonably [been] calculated to enable a child to make progress appropriate in light of the child's circumstances." See Endrews F., 1001. Having ignored such an issue, the services offered were insufficient and did not constitute a FAPE.

Accordingly, the Court **affirms** the ALJ's holding as to Issue Four.

## E. Issue Five

Issue Five is defined as: Did Capistrano deny Student a FAPE by failing to file for due process to defend its IEP developed on May 23, 2016, and September 12, 2016? AR 1265. Capistrano argues that the ALJ committed a legal error regarding issue five by disregarding Capistrano's determination that B.W. was receiving a FAPE through stay-put services. COP, 21-22. Capistrano's argument is effectively that by leaving the December 18, 2015 IEP in place, Capistrano made the determination that B.W. was receiving a FAPE. Capistrano argues that B.W. was over-served by the stay-put of the December 2015 IEP, since the proposed May/September 2016 IEP which they believed to be a FAPE would have reduced services from the December 2015 IEP which the parents had consented to. COP, 23-25.

The ALJ concluded that Capistrano was required to file for due process because the May 23, 2016 and September 12, 2016 IEPs were never consented to, and reliance on the December 18, 2015 IEP "which was essentially the April 30, 2015 IEP was unreasonable and inappropriate." AR 1302. The ALJ considered evidence that B.W.'s behavior had started to decline during the first semester of first grade, that the goals were outdated, and the "Student's behavior and anxiety." Id. The ALJ noted that Capistrano's "obligation to provide special education and related services to a student is not predicated on the parents' actions, procrastinations or failure to act. Capistrano had the obligation to affirmatively seek due process." Id. Thus, the ALJ did not fail to consider the December 18, 2015 IEP. Nonetheless, the ALJ failed to recognize

that Capistrano believed it was offering a FAPE and therefore, was not obligated to file for due process.

"At the beginning of each school year, each local educational agency, State educational agency, or other State agency, as the case may be, shall have in effect, for each child with a disability in the agency's jurisdiction, an individualized education program." 20 U.S.C.A. § 1414(d)(2)(a); see also 34 C.F.R. § 300.323(a). When the students and the school district reach an impasse, Cal. Educ. Code § 56346(f) effectively "compels a school district to initiate a due process hearing." I.R. ex rel. E.N. v. Los Angeles Unified Sch. Dist., 805 F.3d 1164, 1169 (9th Cir. 2015). However, this only "applies where the District believes that some baseline educational program is necessary to ensure that a student receives a FAPE, but the student's parents refuse to consent to it." A.W. by & through Wright v. Tehachapi Unified Sch. Dist., No. 117CV00854DADJLT, 2019 WL 1092574, at *8 (E.D. Cal. Mar. 8, 2019), aff'd, No. 19-15680, 2020 WL 3469107 (9th Cir. June 25, 2020). In other words, the school district's due process obligation flows only where it believes that it is not providing a FAPE, but not where the parent is the one seeking a different program than what the school district considers sufficient to provide a FAPE. See id. The ALJ misapplied the holding in I.R. and failed to recognize evidence that Capistrano had determined that implementation of the 2016 IEP was not necessary for B.W.'s receipt of a FAPE. See AR 1302 cf. 1714-1716, 1995-1996, 2106, 2319-2320, 314-15. Because Capistrano had determined that B.W. was over-served by the stay-put and that therefore it was providing B.W. with a FAPE, Capistrano was not obligated to file for due process under existing precedent.

Accordingly, the Court **reverses** the ALJ's holding as to Issue Five.

## F. Issue Six

Issue Six was defined as: Did Capistrano deny Student a FAPE by failing to convene an annual IEP team meeting in May 2017, and failing to have a current IEP in place for Student at the beginning of the 2017-2018 school year? AR 1265.

Capistrano argues that although the Ninth Circuit has not ruled on whether an IEP meeting must be convened for a privately placed student whose prior IEPs are not under administrative or judicial review and for whom parents have stated their intention to maintain the private placement, the ALJ committed a legal error because she failed to contend with any case law provided by Capistrano. COP, 25-27. The Court agrees.

Capistrano cites to three cases from the First, Fourth, and Third Circuits which recognize that although the IDEA generally requires a school district to have an IEP in place for each child at the beginning of the school year, an annual IEP is not required where a parent has clearly stated their intention to remain in private school unless a prior IEP is under administrative or judicial review. "[I]f a student is enrolled at a private school because of a parent's unilateral decision, the school district does not maintain an obligation to provide an IEP." D.P. ex rel. Maria P. v. Council Rock Sch. Dist., 482 F. App'x 669, 672 (3d Cir. 2012) (recognizing that the school districts have different obligations to students enrolled in private schools by their parents versus students placed in private school by the school district); see Amann v.

Stow Sch. Sys., 982 F.2d 644, 651, n. 4 (1st Cir. 1992). The Fourth Circuit has recognized that "[a] school district is only required to continue developing IEPs for a disabled child no longer attending its schools when a prior year's IEP for the child is under administrative or judicial review." MM ex rel. DM v. Sch. Dist. of Greenville Cty., 303 F.3d 523, 536-37 (4th Cir. 2002). The Court finds these opinions compelling and persuasive in light of the differentiation in the statutory and code language between the way the IDEA treats students who were pulled out of public school by parents versus students placed in private school by the school district. Cf. 20 U.S.C. § 1412(a)(10)(A)(i) (requiring a school district to provide students enrolled in private schools with "special education and related services in accordance with [certain] requirements," but without mentioning an IEP) with § 1412(a)(10)(A)(ii) (discussing IEP requirements, but not incorporating students enrolled in private schools); and cf. 34 C.F.R. § 300.146 (requiring that students placed in private school by an state educational agency be provided with an IEP) with § 300.137 ("No parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school").

The Student argues that the Ninth Circuit "has been clear that school districts are required to convene IEP meetings for students who are privately placed if parents have not revoked their consent in writing to the provision of special education and related services" citing to Anchorage Sch. Dist. v. M.P., 689 F.3d 1047, 1055 (9th Cir. 2012). But Anchorage does not stand for this proposition and concerned different circumstances. There the student completed second grade with an IEP

that had been consented to by the parents, but during the following school year while there were attempts to revise the IEP, the parties were unable to develop an updated IEP prior to its expiration. Id. at 1051. The IEP then came under administrative review and pursuant to the parties' stipulation the student was placed on a "stay put" order during the pendency of the administrative proceeding. Id. Relying on the stay put, the school district "unilaterally postponed any further efforts to develop an updated IEP until after a final decision had been rendered in the state court appeal of the hearing officer's split decision in the administrative proceeding." Id. at 1052. The Ninth Circuit determined that the school district had denied the student a FAPE by failing to provide an IEP at the beginning of the new school year despite the pending administrative decision clarifying that the school district has an obligation to annually revise an eligible child's IEP regardless of parental cooperation or acquiescence. Id. Anchorage does not shed light on a district's IEP obligation to a student whose IEP is not under administrative or judicial review and whose parents have unilaterally withdrawn them from public school and placed them in private school while indicating that they intend to keep the student enrolled in private school.

The response to a comment cited by Capistrano is instructive. COP, 26 (Referring to Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 FR 46540-01).[2] There, the regulators responded to a comment seeking clarification on which Local Education Agency (LEA) was responsible for offering a FAPE to a child find under 34 C.F.R. § 300.131. The regulators wrote that "[i]f a determination is made by the LEA where the private school is located that a child

needs special education and related services, the LEA where the child resides is responsible for making FAPE available to the child. If the parent makes clear his or her intention to keep the child enrolled in the private elementary school or secondary school located in another LEA, the LEA where the child resides need not make FAPE available to the child." As applicable here, the relevant facts are the following. The parents never consented to the IEP proposed in September 2016. AR 1131, 1716. The parents did not withdraw B.W. from CRA and place her at UCI-CDS until February 9, 2017. Id. at 864; see also 1473-1480 (testimony from S.W. explaining that they did not want to remove B.W. to UCI-CDS, but had to because despite trying everything they could, they could not get B.W.'s perceived needs addressed by Capistrano). On February 15, 2017, the parents informed CRA that they intended to keep student at UCI-CDS for the second semester of first grade and for second grade, but they planned to return to CRA for third grade or the start of fourth grade at the latest. Id. at 1060-61. Thus, the parents had made clear that they intended to keep B.W. enrolled in private school and therefore Capistrano had no obligation to provide the child with a new FAPE for the 2017-2018 school year.

Additionally, with regard to whether B.W.'s prior IEPs were under administrative or judicial review, although the ALJ properly identified the controlling Ninth Circuit law in I.R. she misapplied the ruling. See AR 1302. In I.R. the Ninth Circuit noted that Cal. Educ. Code § 56346(f) "compels a school district to initiate a due process hearing when the school district and the parents reach an impasse. As the goal of the statute is to ensure that the conflict between the school district and the parents is resolved promptly

so that necessary components of the IEP are implemented as soon as possible, a school district may not artificially prolong the process .... Id. at 1169. Although the Student's parents filed a due process complaint on October 24, 2016, it was later withdrawn by the parents prior to the hearing date in the spring of 2017. Id. at 1717. Capistrano never filled a counter-complaint or attempted to defend its offer. However, as explained in a prior section, although Student and Capistrano were at an impasse, Capistrano's responsibility to provide a due process hearing only flows if it determines that the "proposed special education program component to which the parent does not consent is necessary to provide a free appropriate public education to the child." Id. at 1168-69. Thus, by the spring 2017 and the beginning of the 2017-2018 school year, B.W.'s prior IEPs were not under administrative or judicial review and Capistrano had no obligation to convene an annual IEP team meeting in May 2017 and have a current IEP in place for Student at the beginning of the 2017-2018 school year.

Accordingly, the ALJ's decision as to Issue Six is **reversed.**

## G. Whether Reimbursement is Warranted

Reimbursement for a parent who prevails on an IDEA claim is not automatic. Anchorage, 689 F.3d at 1059. Reimbursement is only appropriate where the a school district violated the IDEA and the alternative placement was proper. Id. Even where such requirements are met, the Court must review the conduct of both parties "to determine whether relief is appropriate." Id. The Court "may consider all relevant equitable factors, including, *inter alia*, notice to the

school district before initiating the alternative placement; the existence of other, more suitable placements; the parents' efforts in securing the alternative placement; and the level of cooperation by the school district." Id.

Capistrano does not argue that placement at UCI-CDS was not appropriate, but argues that there were other "more suitable placements". COP, 28; ARS 209-35. They also argue that the ALJ committed legal error by not considering all relevant factors and not permitting any evidence of the parties' actions after January 2018 while still reimbursing the parents for the entire 2017-2018 school year. COP at 27.

This Court has reviewed the evidence cited by Capistrano in its motion and concludes that the compensatory remedy awarded by the ALJ was nonetheless appropriate. The Court acknowledges that: (1) Capistrano responded to the parent's request in February 2017 by sending a PWN on February 23, 2017, by proposing an IEP meeting, and Capistrano did not receive a response to this request (AR 1188-93, 12019-15, 2000-01); (2) the parents withdrew their due process complaint (AR 1717); (3) B.W.'s registration fee for the 2017-2018 school year was paid on March 17, 2017 (AR 1575); (4) that parents did not produce B.W. for assessment in the spring of 2018 (ARS 65-66). Nonetheless, as has already been discussed by the Court, Capistrano failed to provide a FAPE by failing to make an appropriate offer of placement and services via the IEP developed on May 23, 2016 and September 12, 2016 given that it ignored the evidence and noted concerns that the Student had difficulties with transitions. Additionally, while Capistrano sought to find a "more suitable placement," this was not done until May 2018. ARS 209-326 (the May 2018 IEP). The

parents, however, had continually (from May 2016 forward) made their concerns that the Student's needs were not being met continually known and notified Capistrano promptly when they sought to withdraw B.W. Thus, the Court finds that the ALJ's award for compensatory damages was appropriate.

Separately, the Student argues that the parents incurred expenses related to S/L and OT services for Capistrano's failure to provide a FAPE in its May/September 2016 IEP, but the ALJ did not address whether Student was entitled to reimbursement of these services. SOP, 17. Student was entitled for reimbursement of these services as well since they derived from the same injuries upon which relief was granted and would have been services provided as part of a FAPE. AR 1011, 1019-1059;1510-1511. Accordingly, the Court awards an additional $12,610.00 reflecting the cost of such services in additional compensatory damages.

## IV. CONCLUSION

For the foregoing reasons, the Court **AFFIRMS** in part and **REVERSES** in part the ALJ's decision and awards Student an additional **$12,610.00** in compensatory damages.

**IT IS SO ORDERED.**

### Footnotes

1Issue Three was defined in the OAH opinion as: "Did Capistrano deny Student a FAPE by failing to make an appropriate offer of FAPE in the annual IEP developed on May 23, 2016, and September 12, 2016, by failing to

develop goals that addressed Student's needs in the areas of academics, social/emotional and anxiety?"

2The informal guidance in Letter to Wayne, 73 IDELR 263 (OSEP Jan. 29, 2019), is not instructive given that the circumstances are different. The parent in the letter to Wayne had disclaimed any interest in obtaining services from the public school. Here, B.W.'s parent's withdrew the Student "[b]ased on their disagreement with the program offered," but did not disclaim any interest in obtaining services from the school district. See AR 864.

United States Court of Appeals, Ninth Circuit.

CAPISTRANO UNIFIED SCHOOL DISTRICT,
Plaintiff-Appellant/Cross-Appellee,
v.
S.W. and C.W., on behalf of their minor child, B.W.,
Defendants-Appellees/Cross-Appellants.

Nos. 20-55961, 20-55987

Filed 2/4/22

D.C. Nos. 8:18-cv-01896-JVS-DFM, 8:18-cv-01904-JVS-DFM

Before: Mark J. Bennett and Ryan D. Nelson, Circuit Judges, and David A. Ezra,* District Judge.

Judge Bennett and Judge R. Nelson have voted to deny Appellees' petition for rehearing en banc, and Judge Ezra has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED

Footnote

* The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, versus CAPISTRANO UNIFIED SCHOOL DISTRICT.

OAH Case No. 2017120674

DECISION

Parents on behalf of Student filed a request for due process hearing with the Office of Administrative Hearings on December 15, 2017, naming Capistrano Unified School District. OAH granted Student's request to amend the complaint on January 23, 2018.[1] On February 9, 2018, OAH granted the parties' joint request to continue the due process hearing.

Administrative Law Judge Judith L. Pasewark heard this matter in San Juan Capistrano, California, on May 16, 17, 18, 22, 23, and 24, 2018.

Timothy A. Adams and Lauren-Ashley L. Caron, Attorneys at Law, represented Student. Parents attended the hearing. Student did not attend the hearing.

Alefia E. Mithaiwala, Attorney at Law, represented Capistrano. Sara Young, Executive Director, Kimberly Gaither, Legal Specialist, and Janelle Stevens, Program Director, attended the hearing at various times on behalf of Capistrano.

At the parties' request, OAH continued the hearing for the parties to file written closing arguments. The record closed on June 18, 2018, upon receipt of closing briefs from the parties.

ISSUES[2]

1. Did Capistrano deny Student a free appropriate public education by failing to make an appropriate offer of placement and services in the individualized education program developed on December 18, 2015, in the areas of intensive behavioral intervention; one-to-to-one aide assistance; speech and language therapy; and social skills services, to address Student's pragmatic language and social skills needs?

2. Did Capistrano deny Student a FAPE by failing to file for due process to defend its IEP developed on December 18, 2015?

3. Did Capistrano deny Student a FAPE by failing to make an appropriate offer of FAPE in the annual IEP developed on May 23, 2016, and September 12, 2016, by failing to develop goals that addressed Student's needs in the areas of academics, social/emotional and anxiety?

4. Did Capistrano deny Student a FAPE by failing to make an appropriate offer of placement and services in the annual IEP developed on May 23, 2016, and September 12, 2016, in the areas of intensive behavioral intervention; one-to-one aide assistance; speech and language therapy; and social skills services, to address Student's pragmatic language and social skills needs?

5. Did Capistrano deny Student a FAPE by failing to file for due process to defend its IEP developed on May 23, 2016, and September 12, 2016?

6. Did Capistrano deny Student a FAPE by failing to convene an annual IEP team meeting in May 2017, and failing to have a current IEP in place for Student at the beginning of the 2017-2018 school year?

SUMMARY OF DECISION

Student did not sustain her burden of proof to establish that the December 18, 2015 IEP denied Student a FAPE by failing to make an appropriate offer of placement and related services. The December 18, 2015 IEP was an addendum to the April 30, 2015 annual IEP. As of December 18, 2015, Student was doing well and making progress on her goals. There was no information at that time to suggest Student required additional aide support or services or that changes were needed in the annual IEP.

Parents consented to the implementation of the December 18, 2015 IEP, but did not consent to the IEP as provision of FAPE. Student did not sustain her burden of proof to establish Capistrano denied Student a FAPE by failing to file for due process hearing. Capistrano provided Student with an appropriate placement and services under the December 18, 2015 IEP. As appropriate services were being provided, Capistrano's failure to provide Student with additional aide support, as requested by Parents, did not constitute a necessity; therefore, Capistrano was not required to file for due process hearing.

Student met her burden of proof to establish that the May 23, 2016, and September 12, 2016 IEPs failed to offer appropriate goals. While the areas of Student's unique needs were adequately identified, the data collected to determine Student's actual behavior and social/emotional needs was flawed. Further, the means for measuring these goals was vague, inconsistent, and lacked sufficient definition of staff duties in measuring and implementing the behavior and social/emotional goals. Further, Capistrano's failure to include a transition plan, or timely discuss Student's

known need for support with her transition to a new school site, deprived Student of educational benefit.

Capistrano's failure to seek a due process hearing for the May 23, 2016, and September 12, 2016 IEPs, denied Student educational benefit. Capistrano staff was aware the December 18, 2015 IEP goals were no longer appropriate for Student, as the goals were old, and most had been met. The lack of beneficial goals created a necessity for Capistrano to seek permission to implement the May 23, 2016, and September 12, 2016 IEPs without parental consent.

Finally, Capistrano maintained an obligation to convene an IEP team meeting to develop an IEP for the 2017-2018 school year. As there was no offer of placement and services made for Student, Student was denied educational benefit.

## FACTUAL FINDINGS

### BACKGROUND

1. Student was an eight-year-old girl who resided with her parents within Capistrano's boundaries during the applicable time frame. Student's school of residence was Oak Grove Elementary, however, she attended University California, Irvine Child Development School, a private school, since February 2017.

2. Student was initially diagnosed with autism by Regional Center of Orange County, which provided in-home services until Student reached age three; at which time she was offered special education and related services from Capistrano. Student has additional medical issues resulting from a metabolic disorder, which affect her brain, and ability to think.

Student requires medication, and must remain well hydrated at all times. During hearing, Mother expressed concern that Student required consistent support to monitor her water intake; Student did not recognize when she was over-stimulated and needed a break, and she did not know whom to ask for help. Mother was also concerned regarding Student's safety, and lack of a sense of direction, worrying that Student would wander away if not properly supervised.

3. Student has friends, participates in sports and girl scouts, but has trouble with transitions, focus, and multi-directions. Student also exhibits emotional issues, primarily panic and anxiety. Since 2012, Parents funded one hour per week of private speech and language therapy, and one hour per week of private occupational therapy for Student, provided by private agencies.

4. Capistrano first assessed Student in 2014, found her eligible for special education, and offered her an IEP for the 2014-2015 school year. Parents did not consent to the IEP. Student remained in a private preschool until the beginning of the 2015-2016 school year, when she enrolled in a kindergarten classroom at Community Roots Academy. Community Roots is a charter school which provides general education group based learning. It is a project oriented, interdisciplinary program. Social skills are embedded in the program. Student's kindergarten class contained 28 students, and was team taught by Tawnee Houses (now Keene) and Alexandra Jaspers. Pursuant to a contract with Community Roots, Capistrano provided special education and related services to eligible students attending Community Roots. The special education team at Community Roots consisted of Lindsay Carrucci, Capistrano's education specialist, and Myla Candelario, Capistrano's program specialist. Ms.

Carrucci and Ms. Candelario were Capistrano employees, while the teachers and school administrators were charter employees. The team worked on the Community Roots campus and provided special education services, planned supports, and facilitated the teachers. Community Roots took part in the decision making process, but Capistrano was the ultimate decision maker regarding Student's special education.

5. Prior to the beginning of the 2015-2016 school year, Parents wrote to Capistrano, reciting their concerns for the upcoming school year. Although Student did not have a full-time aide in her private preschool, Parents requested that Capistrano provide a full-time aide for Student, which her private service providers recommended. Parents requested an increase in goals and IEP expectations to meet development expectations of peers, and an increase in social activities with peers. Parents were concerned that if Student did not receive full-time aide support during her early education, she would lose ground as she got older.

6. Student started kindergarten without a full-time aide. However, on September 24, 2015, Capistrano entered into a settlement agreement with Parents and agreed to provide Student with additional program support in the form of an aide. This aide was described in the agreement as a staff member provided for the purpose of supporting and assisting Student in the educational setting, and monitoring and providing assistance to Student throughout the day for matters and activities such as Student's safety and recreation activities. This additional staff person, was not defined as a one-on-one aide solely assigned to Student, as the staff member could assist other students in the class, at

times when Student did not have specific needs or not in need of support at the time. This agreement remained in effect until December 18, 2015, when an addendum IEP team meeting was scheduled to determine whether Student required continuing additional support.

7. As part of the settlement agreement, Parents consented to implementation of goals and services from the April 30, 2015 IEP, for the 2015-2016 school year and waived all educational claims from August 25, 2015, to December 18, 2015.

8. Capistrano held an informal Student progress meeting on October 19, 2015. During the meeting, Ms. Houses reported Student had made excellent progress since starting at Community Roots. Student's fine motor skills and task completion abilities had greatly improved. She established friendships and could be guided to play with those friends during unstructured time. She had fewer meltdowns and was able to ask for help if she needed a break. Ms. Houses successfully pushed Student a little harder during academic periods. Ms. Carrucci reported that Student required about 20 prompts a day for redirections for attention to task. She was more readily motivated to complete tasks and activities on her own. She responded well to positive reinforcements.

9. Parents asked if the full-time aide had helped Student make progress. Student's teacher commented she could not determine if Student's progress was solely based on her aide. Student made continual growth and matured a lot since the beginning of school. Student could have completed the work without the aide, but it might take her longer to complete as she can become distracted. Amy Meyers-Megartiy, Capistrano's autism specialist, and Ms. Carrucci,

expressed their concerns of creating prompt dependency in Student.

10. Another informal Student progress meeting was held on November 17, 2015. Ms. Houses reported that Student continued to make excellent progress. Student was easily redirected and returned to task with relative ease. Student now required an average of 17 prompts per day for attention, and eight prompts for academics. Student would request a break if she became over-stimulated, however when Mother observed in the classroom, Student was more sensitive and had more emotional episodes than usual. The team noted Student's overall success thus far and stated her progress continued to excel on a daily basis.

11. An addendum IEP team meeting took place on December 18, 2015. Parents attended the IEP team meeting with their attorney. Parents were overall pleased with Student's progress at Community Roots, with the inclusion of the additional program support; however they were concerned with consistency of aide support and training. Parents expressed concern that Student was not drinking enough water; she was not always focused in class and liked to daydream at school; she did not complete her classwork; and she needed to be facilitated with peer interactions. When overstimulated, Student could not recognize that she needed a break, and could wander away if not properly supervised. All of these concerns reinforced Parents' insistence that Student required a full-time aide to supervise her and facilitate with her peer interaction.

12. Ms. Carrucci, responded to Parents' concerns, conveying that Student was appropriately supervised. She reported Student accessed her water bottle, even though Parents claimed it came home full. Ms. Carrucci surmised it was being refilled at school or

Student was putting her mouth to the bottle, but not drinking. Ms. Carrucci also explained Student's incomplete worksheets were due to increasing expectations being set for her. Student was being pushed to do more, as requested by Parents. With higher expectations, Student required more prompting. Ms. Carrucci noted that the balance between prompting and allowing independence was tricky. Parents agreed that Student would not do the work if not pushed, but Parents strongly preferred more prompting for Student at this early stage of intervention so she could learn the expectations for future development at higher grade levels. Parents were also dismayed that much of the aide support in the classroom was provided by parent volunteers rather than by trained staff.

13. The goals contained in the December 18, 2015 IEP were the same goals Parents had consented to in the September 24, 2015 Settlement Agreement, and were contained in the April 30, 2015 IEP. As of December 18, 2015, those goals were still in full force and implementation. Those goals included:

> (1) Student could follow group directions and transition independently through the daily routines; however she experienced difficulty maintaining attention when distractions were present. A behavior goal was created to improve Student's attention while working independently when distractions were present;
> (2) Student liked school and enjoyed many activities. She had preferred peers whom she would play with during the day. Student would approach a group and play in proximity to her peers. She experienced difficulty seeking assistance and making social comments. A

social/emotional goal was created to assist Student in problem solving and seeking assistance. A second social/emotional goal was crafted for Student to seek the attention of the person to whom she was speaking, and to make a comment about her skill, behavior or accomplishment.

(3) Parents reported Student needed constant reminders to use an appropriate grasp for scissor use, and writing. A goal was created to address Student's grasp and functional motor skills.

(4) Academically, during the reading of stories, Student would pay attention and listen, but experienced difficulty with making on-topic comments and predictions regarding the story. A reading goal was created for Student to make on-topic comments regarding what was read. A second reading goal was crafted for Student to make a reasonable prediction about what would happen next in a story.

14. Christine Lanners[3], Capistrano speech and language pathologist, was assigned to Community Roots and provided Student's speech and language services during kindergarten and first grade. At the December 18, 2015 IEP team meeting, Ms. Lanners reported Student was doing well. She greeted her peers and participated in small group sessions, but struggled with a goal for following unrelated directions. Although Student's voice tone was not a concern at school, Parents were concerned about her "baby voice" at home, and in her private acting class. IEP team members determined Student could follow class instructions and routines well, and needed minimal prompts to complete tasks. On the other hand, Student

continued to have difficulty and made little progress in engaging in reciprocal conversations. Student had difficulty with language concepts that did not have visual supports for her reference. She also continued to exhibit delays in receptive, expressive and pragmatic language. Ms. Lanners explained she was working on those areas.

15. The IEP offered goals for communication, including (1) answering "wh" questions; (2) asking "wh" questions; (3) following 3-part unrelated directions; (4) pragmatics to maintain eye contact and consistently greet and engage in social interactions; (5) pragmatics to stay on preferred and non-preferred topics for more than one-to-two exchanges; and (6) vocal volume. Overall, Student was still working on her annual goals created in April 2015, the goals were appropriate for Student's needs, and Student was making good progress on those goals.

16. Capistrano's offer of FAPE consisted of continued placement in the general education kindergarten at Community Roots, supported by 60 minutes per day of specialized academic instruction in a separate setting; 90 minutes per day of intensive behavioral intervention in the classroom for support and prompting; 30 minutes per week of intensive behavioral intervention for recess support; 90 minutes per day of additional program support service in the classroom; 30 minutes, twice per week of group speech and language therapy; and 30 minutes, twice monthly, of individual occupational therapy.

17. In their professional opinions, Capistrano and Community Roots team members did not believe a full-time or one-to-one aide was beneficial for Student. Use of an aide was highly restrictive. It hindered Student's independence and encouraged prompt dependency.

Capistrano's long term goal was to gradually fade Student's prompting so, by the third or fourth grade, Student would not need additional aide support. Capistrano prepared a chart to visually demonstrate the breakdown of time allotted to aide supervision offered in the December 18, 2015 IEP. In combination of all of Student's supports and services, Student would receive nearly full-time supervision.

18. Capistrano did not offer Student a full-time or one-to-one aide support, which was paramount to Parents. Parents consented to implementation of the goals and services contained in the December 18, 2015 IEP, however, they did not consent to the IEP as the provision of FAPE for Student.

19. Acronyms are often used by school districts to define their special education programs, but a common vernacular is not always utilized from school district to school district. For Capistrano, specialized academic instructions, sometimes referred to as "SAI," was defined as a program in which a student required a slower paced, small group instruction, and the use of specialized strategies that targeted specific skills development (academic, language, behavior) to access the general education curriculum and make progress towards goals. Specialized academic instruction was curriculum focused on grade level standards supported by special education staff.

20. Intensive behavioral intervention, or "IBI," had four different definitions at Capistrano. First, IBI was a system of strategies used for direct instruction of social skills. These strategies included breaking each skill down into small steps, reinforcement of skills, prompting to ensure success until prompts were faded, shaping of social responses, repetition, and multiple opportunities to practice skills for mastery,

generalization and maintenance. IBI also referred to group support within the school day to address language, social and behavioral deficits, in which data was taken on levels of independence throughout the day. A third definition of IBI was social recess support. Lastly, IBI, or an IBI tutor, was the title for the staff member who performed IBI related services. Additional program support, or "APS," was considered a SAI accommodation, and the acronym was interchanged throughout the hearing as an additional person support or aide, who was supported by special education staff inside the general education classroom. Any one of these acronyms as utilized by Capistrano could represent one-one-one support, but not necessarily. As a result, Parents were confused as to when Student was to be provided support, and by whom. Staff responsibilities in the classroom were not clear.

21. Capistrano began implementing the December 18, 2015 IEP in January 2016. The IEP contained no transition plan to scale back Student's one-to-one time. Mother reported Student was traumatized by this abrupt change. Parents understood Student's previous aide was scheduled to continue to provide additional support, but the IEP did not indicate a specific time for Student to receive one-to-one assistance. There was no continuity. Although the December 18, 2015 IEP called for IBI assistance, it was not one-to-one support. Instead, one or two IBI staff members remained in the back of the classroom observing and collecting data. Student was not introduced to the IBI team, nor did the IBI team provide assistance or prompting unless prompting of Student by the teacher had failed two-or-more times. Data collection was confusing, as the IBI staff did not

record an initial prompt, until Student had been already been prompted twice by the teacher. Parents reported Student had not been introduced to her IBI support team, and did not know who to ask for help if her aide was not present. This resulted in toileting and hydration problems. Since Student did not know who to ask to allow her to go to the bathroom, she did not drink her water, so she would not have to relieve herself. On occasion, Student asked her peers for bathroom assistance. Mother reported Student's emotional condition began to deteriorate. Student was having panic attacks and crying. She was bullied, lost friends, and did not eat her lunch. These problems also impacted her academically, as she was unable to finish classwork.

22. Mother tried to contact Ms. Carrucci to discuss Student's decline, but received no response. She spoke to Ms. Houses, but found her overwhelmed with her teaching duties, as her co-teacher, Ms. Jaspers, was out on medical leave. She sought assistance from Mr. Cavallaro, who, on more than one occasion, responded he had no power to assist her with special education. No one suggested convening an IEP team meeting to discuss Mother's concerns.

PARENTAL INFORMATION PREPARED FOR MAY 23, 2016 ANNUAL IEP

23. Prior to the May 23, 2016 IEP team meeting, Parents obtained a Speech and Language Therapy Progress Report, dated May 15, 2016, by Student's private speech and language therapist, Christine Essex. Ms. Essex is a licensed speech and language pathologist who provided Student with one hour per week of individual speech therapy services since 2012.

Ms. Essex did not testify at hearing. The report, contained both formal and informal testing results, and was designed to report on Student's long-term goals of demonstrating language comprehension, language expression, and speech production skills within chronological age-level expectations, and demonstrating improvement in social communication and executive functioning skills. The report contained 14 short-term goals for Student, many of which were similar to those in the December 18, 2015 IEP; and many of which Student had already met. Ms. Essex reported Student demonstrated significant progress, particularly in expressive language and speech production skills. Barriers to Student's progress included fluctuating attention and motivation, as well as increased length of time needed to complete tasks due to response effort. Ms. Essex recommended Student continue with her private speech and language program for an additional six months, with subsequent reevaluation. Parents presented the report to the May 23, 2016 IEP team.

24. Parents prepared a detailed outline of their concerns and points for discussion at the May 23, 2016 IEP team meeting. The outline spelled out what Parents saw going well at school, including Student's ability to make friends with proper support; ability to learn with proper support; improvement in reading ability with Ms. Carrucci's support; and improved understanding of more advanced language with Ms. Carrucci's support. Parents then outlined what was still hard for Student, including transitions and communication when things became hard; focus; going to restroom; and getting organized; safety, including hydration, toileting, nutrition and bullying; relationships with peers; and education and

development, including focus, difficulty finishing work, and lack of interest in homework. The outline saved room to consider input from the IEP team regarding what they had seen going well, and input on whether team members felt Parents were missing anything.

25. The outline then presented parental comments on the IBI staff, including that the IBI staff only observed Student from the back of the classroom; IBI support was inconsistent and utilized three different individuals instead of one; and two teacher prompts were required before the IBI staff could approach or communicate with Student. Parents noted that IBI staff did not greet Student in the morning; was unable to assist Student getting organized or prepared for class; unable to assist Student with transitions; did not support Student when she needed a break; did not support Student when she was confused; did not assist with toileting; did not assist with Student's hydration or nutrition needs; did not communicate with the teacher when things were hard for Student; did not intervene with Student and her peers when needed; and did not inform Student she could approach the IBI staff if she needed help. Parents also found the additional program support or aide ineffective. The aide was not permitted to support Student as had been explained to Parents at the December 18, 2015 IEP team meeting. The aide supported all of the students in the classroom, and was assigned to another child as a priority in lieu of Student.

26. The outline delineated Parents' requests and requirements for a successful IEP. Parental requests included 22 points which were primarily designed to correct the problems and ineffectiveness they observed in the December 18, 2015 IEP. Specifically, Parents requested only one IBI tutor be assigned to Student,

and that person needed to be introduced to Student, and become actively involved with her. The IBI tutor needed to be able to observe and identify when Student needed a break, was headed towards a meltdown, or having trouble communicating. The IBI tutor needed to actively ensure Student remained hydrated and ate her lunch. Parents requested an additional program support person be assigned specifically to Student, and not the entire class. Parents then made several other requests regarding assignment to a specific first grade class, inclusion of several friends in Student's class, and scheduling of quarterly progress meetings.

27. Before the May 23, 2016 IEP team meeting, Parents obtained independent school observations conducted by Rosa Patterson[4]of Autism Behavior Services. Mother indicated Dr. Patterson was employed for a second opinion and to look at Student's behavior with new eyes. Dr. Patterson did not provide a formal evaluation of Student. She had limited access to background information but, based upon her level of experience, she observed Student, offered consultation, and appropriate recommendations for Student. Dr. Patterson prepared written notes and recommendations for the IEP team's consideration.

28. Dr. Patterson observed Student on March 22, 2016, and April 29, 2016. During the March 22, 2016 observation, Dr. Patterson was informed that the IBI staff only prompted Student after two prompts from the teacher had already been given. Dr. Patterson observed Student during morning snack time-recess, transition back to class, and group instruction. An IBI staff member supervised Student, however, Student did not interact with the IBI staff member. Student initiated her own contact with peers for the remainder of the recess. Although Student had several exchanges

with different students, Dr. Patterson opined that Student was engaging in verbal stereotyping, rather than speaking directly to peers. Student appropriately transitioned back to the classroom for group study. Student attended appropriately during the group session and was prompted by the IBI tutors once to have Student look at the teacher. Student participated and raised her hand to answer a question. Student appropriately requested assistance from the IBI tutor and appropriately participated in small group activity with several peers.

29. The second observation took place on the afternoon of April 29, 2016. Capistrano's IBI supervisor accompanied Dr. Patterson. Staff reported that Student was tired and weepier that day. Staff utilized more prompting than during the prior observation. Staff gave Student directions for the assignment, and she started work at her desk. Student said her Mother was coming soon. The teacher and IBI tutor provided Student positive reinforcement throughout the activity, and Student finished the assignment. Student volunteered to help the trash monitor, and then went back to coloring. When the teacher transitioned the class to another activity, Student did not want to stop coloring, and began to whine, asking when her Mother was arriving. Student was successfully redirected and transitioned the activity.

30. Based upon these observations, Dr. Patterson made four recommendations:

> (1)To continue IBI-aide support throughout the day, to work on skills and social- emotional and behavioral growth, both in and outside of the classroom. TheIBI staff should be limited to two people and the role of the IBI staff and aideshould

be outlined to specify their functions and what each is working on.
(2)For the IBI supervisor or autism specialist to provide weekly and/or monthly guidance and supervision to the IBI staff and aide.
(3)To develop a communication system between home and school so Parents can support and generalize skills being taught at school and share schoolprogress across providers.
(4)Monthly, informal meetings with parents and service providers, both school and private, for consistency, and to share strategies across settings.

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31.Student's annual IEP team meeting began on May 23, 2016. Parentsattended this IEP team meeting, along with their attorney. Dr. Patterson participated by telephone.

32. This IEP team meeting was scheduled for two hours and primarily covered Parents' input and issues. Parents reported Student was successful in making friends and able to learn. Parents were pleased with Student's progress in the learning lab. Parents saw improvements in Student's ability to complete work, focus, and advanced language usage. Student was no longer saying she did not want to go to school. Student's teacher concurred, and indicated that Student had progressed academically and socially. Parents, however, felt Student's growth was due to the intensive support she received from her private providers, and were concerned they would need to continue this intensive support to ensure Student's continued progress.

33. Parents reported perceived flaws in Student's program, listed in their outline, focusing on the inconsistencies of support with the IBI staff and aide. Parents expressed frustration at a breakdown in communication with Capistrano and the Community Roots staff. They were not clear on what was happening at school, based upon their observations, information from school staff, and what Student reported. Capistrano was no longer providing informal progress meetings. Parents reiterated their preference for direct interaction and support, rather than observation and delayed prompting. They again requested a full-time aide to support Student. District responded to some of Parents' concerns, such as Student not receiving support in the morning before class. Student did not require that support as she was completing tasks independently, such as putting away her backpack. District also explained the delay in providing prompting until teacher prompts had been exhausted. All students in the class received a "two-prompt from the teacher" level of support. Capistrano and Community Roots IEP team members reported that Student had an extremely high rate of independence, and responded well to the teacher. Parents' remaining concerns were tabled for further investigation.

34. The IEP team also received Dr. Patterson's notes and discussed her observations and recommendations. Dr. Patterson reported Student exhibited emerging social skills, but was still utilizing parallel play, not always responding to her peers. This was an area for improvement. She also indicated she would like to see Student more engaged, ask for help, and advocate for herself. Dr. Patterson shared that the teacher did a nice job providing positive reinforcement

to Student. Based upon her expertise, Dr. Patterson opined that Capistrano staff could provide Student appropriate support and implement her recommendations. Her report indicated that IBI support should be limited to one-to-two people. Further, she concluded it would be helpful for Student to have support for the entire school day.

35. The IEP team noted that Community Roots was moving to a new location for the 2016-2017 school year. Although Parents raised concerns about transitioning Student to a new campus, the IEP team failed to address those concerns. The IEP team meeting ran over the allotted time, and the team agreed to reconvene at a later time. The team developed an agenda for the second meeting, which failed to include Parents' concern regarding the transition. Capistrano did not offer any changes to Student's IEP during the May 2016 meeting.

36. Capistrano convened part two of Student's annual IEP team meeting on September 12, 2016, following the start of the 2016-2017 school year. Capistrano failed to discuss Student's transition to the new campus, or provide Student a transition plan or supports to assist her transition to the new campus. Student was now in a first grade, general education classroom of 29-to-30 students. Rachael Adams[5], Student's new first grade teacher, reported Student had difficulty transitioning into the classroom but, once in the classroom, Student was able to follow class routine with minimal direction. She was becoming more comfortable with the new setting, and interacting with adults. Student's preferred recess play was walking around the "yak" track, often talking with a friend. Ms. Adams reported that aide and IBI support was usually provided early to mid- day, when academic lessons

occurred, rather than later in the day.

37. Parents shared their concerns about the new school year and transition to the new campus. Mother reported continuing difficulties with transitions and lack of supervision for Student. She described an extremely traumatic incident for Student on the first day of school. Student had no support or aide supervision at the end of the school day. She wandered off, became disoriented in her new surroundings, and was found curled up in a ball, hysterical. Student's anxiety levels remained high since that incident. Student reported to Parents that math was difficult and no one helped her. Student got nervous when asked about difficult school work. Father reported mornings were difficult for Student, and Student was increasingly nervous about the new campus. To alleviate her anxiety, Parents brought Student to school early to help her transition. Once other students began to arrive, and the campus got busier, Student became uncomfortable, her anxiety increased, and she wanted to go home. Father stayed with Student for approximately 15 minutes each day to calm her and get her to class. Parents also tried a later arrival time for Student, so she would not have time to build up anxiety, but her anxiety was still present when she arrived later. Parents reported that last year, the 2015-2016 school year, Student was excited to go to school. However, during the 2016-2017 school year, they had difficulty getting Student to go to school. Parents also indicated that the pick-up at the end of the school day was challenging. Student cried in the pick-up line. Every change at school was a challenge for Student. Parent's opined the environment and setting of the new campus was fine, but the resources supporting Student were not sufficient. Student needed consistency, and

her IBI-aide support was inconsistent. This was a significant problem for Student and her confidence diminished.

38. At hearing, Ms. Adams acknowledged that Student had wandered off onthe first day of school. She reported Student sometimes had difficulty transitioning and cried, usually when being dropped off at school by Parents. Ms. Adams reported she and the IBI staff then helped Student transition into the classroom. Ms. Adams would hold Student's hand during transitions. She reported that Student cried approximately three times per week for various reasons, including transitions. Overall, Ms. Adams reported Student was working to grade level academically. She felt Student was comfortable in class, felt safe, and knew who to ask for help.

39. Dr. Patterson attended the IEP team meeting by telephone. She clarifiedher initial recommendation by providing an addendum to her May 22, 2016 report, as follows:

> The recommendation [first overall recommendation in her report] should be understood to mean that the aide support provided to Student can be solely aide support daily. Student experienced success with the aide that was assigned to her at the beginning of the 2015-2016 school year and this individual was not designated as an IBI. It is not necessary that Student receive both IBI and aide support daily. The aide support provided to Student should continue to be limited to no more than two individuals to allow for consistency and to also provide Student an opportunity to generalize skills in a systematic manner daily. The role and

> responsibilities of the aide should be clearly articulated to the IEP team, parents, and even Student if necessary and appropriate to do so. The person assigned to Student should be well-equipped to work with Student's unique needs and also have established rapport with Student.

Dr. Patterson felt the IEP team listened to her, but felt the tone of the meeting was a negative reception. She had hoped for more conversation about making changes to the IEP.

40. The IEP team moved on to a discussion of goals. In general, Student hadmade substantial progress in all areas. Ms. Lanners reviewed Student's communication goals, and proposed new goals in that area. Student had met four of six communication goals. On the goals not met, she was progressing towards mastery on asking "wh" questions. The auditory processing goal requiring Student to follow three-step unrelated directions had proven difficult for Student. The IEP team identified five areas of need for Student and constructed corresponding goals. Parents inquired about eye contact. Communication Goal One addressed non-verbal language, which focused on appropriate eye contact, body orientation, and proximity. Goal Two addressed oral sequencing and was designed to improve Student's oral grammar, particularly her use of past and future tense forms. Goal Three continued to address answering "why" questions, and sought to increase Student's abstract responses. Goal Four continued to address Students audio processing regarding following three-step directions, seeking to increase her accuracy. Goal Five addressed non-preferred conversation, and was designed to increase Student's reciprocal conversations on non-preferred

subjects. Ms. Lanners reviewed Ms. Essex's report and felt it validated her own work with Student. Ms. Essex was working with Student on goals similar to those crafted by Ms. Lanners, and the goals could be supported with 30 minutes, twice a week, of speech and language services.

41. Ms. Carrucci wrote Student's academic goals. She acknowledged therewere not a lot of academics the first semester of kindergarten, but Student was capable of working independently on preferred activities. Student could read fluently at above grade level as she read over 100 kindergarten sight words, and was starting to spell them consistently. Student, however, needed to improve her ability to comment and answer questions about what she had read. The IEP team developed a reading comprehension goal to increase Student's ability to answer questions about key details in a story at her independent reading level.

42. Although Student expressed difficulty with math, she was fluent with basic math facts through five, but needed some support to solve word problems and to decide which step to take (add or subtract). A math goal was crafted to address word problems and sought to increase her ability to solve word problems with no more than one prompt.

43. As Student met her occupational therapy goal for use of a functional grasp, no goal was needed.

44. The primary disagreement between Parents and the remainder of the IEP team centered around Student's areas of need involving behavior, social/emotional and attention, present levels of performance, how present levels and progress were measured, and how and who would measure progress on new goals.

45. Amy Meyers-Megarity[6], Capistrano's autism

specialist, reported that Student exhibited a behavior need in the area of attention. According to present levels of performance, based upon data collected by Capistrano staff, Student could stay on task for 15 minutes with prompting when there were distractions present. A goal was created for behavior/attention, in which the baseline performance stated Student could attend to the teacher for 10 minutes, with no more than two prompts. The goal sought to increase Student's attention to 20 minutes with no more than two prompts. Measurement of progress was proposed through observation and documentation by (1) education specialist; (2) occupational therapist; (3) general education teacher; and (4) support staff.

46. Student's present level of performance in social/emotional areas indicated needs in the areas of seeking assistance and social comments. Student met her social comment goal and could obtain peer or adult attention and make comments about her skill, behavior or accomplishment and least three times per day. Student did not meet her goal for seeking assistance, and she was only able to solve the problem 53 percent of the time measured.

47. A goal was created for conflict resolution. When faced with a conflict or problem, Student was not assertive, tended to cry or withdraw from the situation. The goal sought to have Student develop skills to appropriately react to stressful situations, and verbally suggest a strategy to help her solve problems, with no more than two prompts. The goal was measured in the same manner and by the same personnel as the above attention goal.

48. A peer resolution goal was created to increase Student's ability to solve peer problems. Student's present level of performance indicated she

could verbally suggest a strategy for solving a peer problem on average with two-to-three prompts. The goal sought to increase Student's ability to solve problems with no more than one prompt. The goal was similar to the proposed conflict resolution goal, and was measured in the same manner and by the same personnel.

49. Student's present levels of performance indicated Student did not use the terms "expected and unexpected" related to behaviors observed in her presence nor did she describe her own behaviors as expected or unexpected. A goal was created to increase Student's skill in using the terms "expected and unexpected" regarding behaviors in her presence as well as her own behavior. The evaluation methods and responsible personnel were the same as contained in the prior three goals.

50. When participating in a class discussion, Student often copied previous comments of her peers regarding the subject being discussed, and required at least one prompt to make a different comment. A "meaningful participation" goal was created which sought to have Student make her own relevant comments on subjects being discussed in class with no more than one prompt. The evaluation methods and responsible personnel were the same as contained in the prior goals.

51. Ms. Carrucci indicated the additional support aide collected data in addition to the IBI staff. Ms. Carrucci supervised the aide in collecting this data and reviewed it "every so often." The additional support aide's duties were different than those of the IBI staff. Student had an additional support aide more than three hours per day, which could be one-to-one support. IBI support was intended to collect data on behavior and

social support, and to provide Student with prompts, after teacher's prompting.

52. Capistrano's FAPE offer for the 2016-2017 school year offered Student continuing placement in the Community Roots first grade, general education classroom, with the following supports and services:

> (a) Specialized academic instruction, 60 minutes per day, in a small group setting in the learning lab outside the classroom;
> (b)Specialized academic instruction, within a small group in the general education classroom, for two hours per day;
> (c)Speech and language group services, outside the classroom for 30 minutes, twice weekly;
> (d)Occupational therapy services for 60 minutes per month, in a push-in format to collaborate with the general education teacher regarding strategies to help with Student's self-regulation, and increase participation in the classroom, as well as monitor Student's fine motor skills;
> (e)IBI support consisting of 60 minutes each school day, to address language, social, and behavioral deficits, and collect data on Student's levels of independence throughout the day; and
> (f)IBI support consisting of 30 minutes per week of social recess support.

53. Capistrano's offer of FAPE did not include a full-time aide or the additional program support (aide) offered in 2015. Parents did not consent to the 2016-2017 IEP, or its implementation.

54. Ms. Carrucci opined the goals contained in the IEP were appropriate and the services offered provided adequate support for Student to be successful.

Parents' non-consent did not result in a denial of FAPE, as Student received services in excess of what she required.

55. On September 28, 2016, Ms. Candelario[7], sent Parents a prior written notice regarding their rejection of the 2016-2017 IEP.

STUDENT CONCERNS REGARDING GOALS

56. Parents disagreed with the behavior and social/emotional goals for several reasons. Specifically, Parents viewed Student's present levels of performance and baseline skills as inaccurate and skewed, due to faulty data collection. The data collected was vague and confusing.

57. At hearing, Dr. Patterson did not question the IEP team's determination of the goal areas Capistrano sought to address. Most of the proposed goals comported with the recommendations she provided. Instead, she questioned the validity of Capistrano's data collection. More data collection was not necessarily better data collection. Dr. Patterson explained an important principle of behavior data collection required that everyone collecting data measured the same thing. In Student's program, at least six people were collecting data at various times. Operational data was needed for reference by the data collector, i.e., determination of what was being measured. This information was not consistently provided on the data collection materials supplied by Capistrano and reviewed by Dr. Patterson. Dr. Patterson found Capistrano's data collection was flawed, as it contained inconsistencies, and was therefore considered unreliable. Specifically, the data collection sheets interval data fluctuated, some data

collection omitted the time collected altogether, and some data sheets contained reference to prompts, but also referred to Student as acting independently. If the data was incorrect, the analysis of the data was wrong as well. Additionally, the data collection sheets were used by the additional support aide to record information for her own use, as she was not qualified to collect IBI data.

58. The behavior and social/emotional goals indicated that progress would be measured by reducing prompting, from two-to-three prompts down one-or-no prompts. The goals, did not indicate which measurement of prompting was being used in each goal or whether prompts were being measured literally, from the first prompt administered, or measured commencing on the third prompt. Ms. Meyers-Megarity explained the IBI staff only recorded prompting after the second prompt from the teacher. The purpose of the IBI prompting was to direct Student's attention to the teacher. If Student was redirected within the first two prompts, she was acting independently according to the IBI data collector. As a result, Capistrano reported Student worked with a 90 percent independence rate, a percentage acknowledged as being higher than the on task rate for same-age grade peers. Typical peers generally exhibit a 75 to 80 percent independence rate. Capistrano team members relied on these figures to determine Student no longer needed behavior supports, and was in danger of becoming prompt dependent. While 90 percent may have been an accurate measure of prompts, it was an accurate measure of Student's ability after receiving two prompts from the teacher. Dr. Patterson opined that waiting until Student required a third prompt before addressing Student's needs was too long. In the meantime, Student was off

task or disconnected from the classroom instruction she needed. Dr. Patterson also noted that if Student was actually working with such a high rate of independence, the behavior goal addressing attention would be unnecessary.

59. This concern over reliability extended to the measurement of progress in the proposed behavior and social/emotional goals. The determination of measuring progress for the goals was vague, and responsibility for observations and the measuring of goals was split amongst five-to-six people, without delineation of individual responsibility. This all remained confusing and meaningless to Parents, as there was no continuity of support. They believed Student required direct support when she needed help, not data collection.

60. At hearing, Ms. Meyers-Megarity explained Capistrano's IBI services. Along with being Capistrano's autism specialist, Ms. Meyers-Megarity had been Capistrano's IBI supervisor since 2004. Ms. Meyers-Megarity had extensive experience with IBI services. At Capistrano, she supervised and managed 17 IBI tutors, and provided continuing training for Capistrano's IBI team. Ms. Meyers-Megarity presented as an excellent witness.

61. IBI tutors are full-time employees. Capistrano employs 17 IBI tutors who provide direct services and collect data. There are two additional senior tutors, with more training, who act as floaters and additional crisis support. Ms. Meyers-Megarity was aware Parents wanted full-time support for Student. Full-time IBI services were not provided as full-time support. If a student's intensity of need required full-time support, Capistrano would offer another type of service.

63. For Student, the IBI tutors collected data on

whether Student was on or off task. The purpose was to seek independence through reduction of prompting. Independence did not mean independent of teacher assistance, only independence from IBI or additional support. Although Student's IEPs did not specify when in the day IBI tutor support would be provided, Ms. Meyers-Megarity explained the daily time frame for IBI support was based upon the teachers' recommendations, such as when Student was more inclined to have social issues, such as during carpet time. Data was generally collected on Student in the afternoon, when Student participated in large, group based activities and longer instruction periods were common. An IBI tutor is not a "Velcro aide" who sits next to the student throughout the day.

64. All kindergarteners need prompts. A student can be on task and still have prompts recorded. As example, a student can be doing what the class is doing but require a prompt to stop doing something, such as flicking a pencil. It is the IBI tutor's job to refrain from intervening, as the intent is to have the student seek directions from the teacher. Ms. Meyers-Megarity opined that children with autism can learn a skill, but have difficulty generalizing that skill with more than one person. A one-to-one aide would not promote generalization.

65. Ms. Meyers-Megarity reviewed data collected by the IBI tutors. Data drives the analysis of whether a service is still needed. Ms. Meyers-Megarity maintained consolidated tally charts of Student's data collected on a monthly basis, from January through June 2016. Based upon this data, Student no longer required IBI support.

66. Stephanie Romberg,[8] took over for Ms. Meyers-Megarity as Capistrano's autism specialist and

IBI supervisor in May 2016. At hearing, Ms. Romberg explained the difference between a private or clinical model for provision of IBI services versus a school or educational model for providing IBI support. A clinical IBI model will determine a student's functional skill levels by conducting a functional behavior assessment. Data is collected to determine behaviors and create a treatment plan. An educational IBI model is designed to determine if a student can access his/her education. IBI is a more restrictive support for a student, and intended as a temporary support to help generalize positive behavior. A functional behavior analysis is utilized only for extreme behaviors. Student did not exhibit extreme behaviors and did not require a behavior intervention plan.

67. There is also a difference in data collection. Although both models are similar in structure, a clinical model collects multiple trials data, while an education model utilizes time samples, in which data is collected at time intervals, looking at how a student performs in the classroom. Additionally, there are several methods of collecting data, with many nuances between collection styles. Each method is appropriate, as long as it is consistent.

68. Ms. Romberg attended the September 12, 2016 IEP team meeting, as Capistrano's autism specialist at the new Community Roots campus. She had discussed Student's transition with Ms. Meyers-Megarity over the summer, and reviewed Student's IBI data. Based upon this information, Ms. Romberg concluded Student possessed high independence levels, and the amount of IBI support needed to be reduced, and aide support faded out as Student was capable of responding directly to the teacher. At the IEP team meeting, she made the recommendation for one hour

per day of IBI support, and 30 bulk hours of additional support, to support Student on first grade transitions. Ms. Romberg concurred with other Capistrano staff that the goal was to reduce Student's reliance on prompting and aide support. Ms. Romberg reported that complying with Parent's request for only one IBI tutor would not have been detrimental to Student, but, for purposes of strengthening generalization skills, two IBI tutors would be better. A full-time support aide would be detrimental in promoting independence. Further, an aide was not a teacher, and could not assist or support actual lessons as envisioned by Parents.

69. As of January 2017, data indicated Student's behavior was declining. Ms. Romberg opined the lower percentages were due to more difficult curriculum, which required more prompting, and Student had not been in class due to illness. Nevertheless, she felt Student got back on track, and was still on task.

70. Monica Navarro[8] provided pull-out SAI services to Student in the first grade until February 2017. She was also Student's case carrier. Ms. Navarro attended the September 12, 2016 IEP team meeting, as the incoming SAI teacher for the 2016-2017 school year. She had consulted with the prior SAI teacher Ms. Carrucci, and aware Parents had not consented to the IEP. Ms. Navarro also collected data on Student's progress for her own use, and not as part of Student's data records. Ms. Navarro reported Student was progressing well and her behavior was improving. Student did not present as an emotionally explosive child. Student could sometimes get frustrated, but could resolve her behavior, and capable of really good resolutions.

71. Ms. Navarro did not believe Student needed more support. More support would make Student more

dependent on prompting. Ms. Navarro did not observe the problems which concerned Parents. Student did not have trouble transitioning at school. Student always had water available and would drink it on her own.

72. Since Parents had not consented to the December 18, 2015 IEP, or the May 23, 2016, and September 12, 2016 IEPs, Capistrano continued to implement the services in the last agreed upon IEP, from 2015. As Student had progressed and met her 2015 goals, Ms. Navarro needed something to work on during SAI services. She implemented the 2016 goals where they were a natural progression of skills or embedded in the first grade curriculum.

73. On November 11, 2016, Student's attorney wrote Capistrano's attorney to address what was described as Capistrano's inconsistent provision of Student's aide and IBI support. The letter noted several lapses in aide and IBI support in October and November 2016, including the removal of Student's aide since kindergarten. Parents expressed great concern about these lapses in support because of Student's need to drink water and remain hydrated throughout the school day. During the periods of no aide or IBI support, Student came home with full bottles of water, and became ill with stomach and head aches, which resulted in severe digestive issues, difficulty sleeping and emotional distress due to no support at school. In turn, Student's illness and emotional distress resulted in her missing two days of school. Parents, through their attorney, reminded Capistrano that consistency was important for Student to access and benefit from her education. Neither Student nor Parents were informed of the removal of the aide, and the lack of a transition plan was not appropriate, given Student's needs. Parents remained concerned that, since

December 18, 2015 when the full-time aide was removed, Student exhibited an increased reluctance to attend school or participate during classroom activities; she stated she did not want to learn.

74. On November 28, 2016, Ms. Candelario responded to Parent's concerns expressed on November 11, 2016, in a letter of prior written notice. Ms. Candelario offered to add an additional accommodation for Student's IEP, prompts to remind Student to drink water from her water bottle throughout the day. The accommodation was offered to serve as a reminder for team members to be cognizant of Student's need to remain hydrated at school. As Parents had not consented to the 2016-2017 IEP, Capistrano would continue to provide Student with Student's last agreed to and implemented IEP.

75. On February 9, 2017, Student's attorney provided Capistrano a notice that Parent's did not believe Capistrano had offered Student a FAPE. Based upon this disagreement, Parents elected to unilaterally place Student, and seek reimbursement for the cost of the placement at University of California-Irvine Child Development Center School, along with all related program costs, related services, and transportation.

76. On Student's last day at Community Roots, Ms. Adams spoke with Father. Ms. Adams felt Student had been making excellent progress. Once Father left, Ms. Adams told another parent that the school could not give Student what she needed.

77. Ms. Candelario, testified that she mailed Parents a prior written notice on February 24, 2017, in response to the parental notice of unilateral placement and to notice an IEP team meeting on March 2, 2017. Mother testified neither she nor Father received this prior written notice. The prior written notice, however,

was mailed to Student's correct address, and was accompanied by an appropriate proof of service of mailing. Parents did not attend the March 2, 2017 IEP team meeting, or respond further.

78. Student's triennial IEP was due in May 2017, and Student had not been assessed since May 2014. No assessments or IEP meetings took place in 2017.

79. Capistrano made no further contact with Parents until January 10, 2018, subsequent to the filing of this request for due process hearing, at which time Capistrano provided Parents with another prior written notice to their February 9, 2017 notice of unilateral placement, along with a response to the complaint.

DR. SCHUCK'S TESTIMONY

80. Dr. Sabrina Schuck,[10] Director of the Child Development Center testified to explain why she accepted Student into the school, and reported on Student's emotional needs at that time.

81. Not all children are accepted into the Child Development Center. Each candidate is screened and must exhibit significant behaviors. For Student, her autism was comorbid with her depression and anxiety. When Student was accepted into the Child Development Center program, she had "hit the wall" at Community Roots. She was shutting down emotionally at Community Roots and not participating at school. As part of the admissions protocol, Ms. Adams filled out a questionnaire and rating scales regarding Student's participation in her class at Community Roots.

82. Ms. Adams responses in this document were more candid than her testimony. In rating Students behavioral problems Ms. Adams commented that

Student cried easily and frequently; she cried if a routine was different; and she had difficulty moving through transitions to other activities. Student needed prompting when transitioning; she had difficulty following multiple step directions once a day and needed prompting at each step. Student had difficulty remaining on task several times a day; she needed support to complete assignments; and she had difficulty getting on task four times a day, requiring one-on-one support to begin tasks.

83. Ms. Adams also rated Student's behavioral competencies. Of 48 behaviors rated, Ms. Adams rated Student fair, fairly well, or good in 21 areas. She scored Student with excellent behavior in 14 areas. Ms. Adams rated Student's behaviors as very poor or not too well in the areas of: Paying attention when another person is speaking; tolerating tasks that require sustained mental effort; concentrating in the presence of distractions; staying on task for an entire class period; transitioning from one subject to the next; maintaining steady emotions; enduring frustrations; remaining cool and calm; and controlling the tendency to cry when provoked.

84. On the Swan Rating Scale, which rates a child's ability to focus attention, control, activity, and impulses, Ms. Adams rated Student average or above other same age children; except for organizing tasks and activities and engaging in tasks that require sustained mental effort. In those two areas, Student scored slightly below average.

85. Ms. Adams reported Student's positive strengths: Student was kind- hearted, enjoyed drawing, and being around friends. She could verbalize her feelings and let an adult know when she needed a break. She took turns in speaking and made

improvement with her eye contact when speaking. On the other hand, Ms. Adams reported Student's weaknesses: Student was easily upset and these emotions could quickly escalate. She was working on transitions, such as from class time to recess. With prompting, she could transition. Completing or complying with a non-desired task was also a concern.

86. Dr. Schuck commented that Student could no longer benefit from a general education classroom. There were too many kids and the lessons moved too fast. Student was sensitive to being singled out, and felt she was different from the other students. Dr. Schuck opined that this may have been an antecedent to her anxiety. In accepting Student into the Child Development Center program, Dr. Schuck concluded Student required small classes, with a high staff to student ratio who were trained in mental health. Capistrano's program under the 2016-2017 IEP was not reasonable for Student at that time. The school setting at Community Roots was an antecedent to Student's behaviors and the extensive pull-out services only emphasized Student's differences from her peers.

PROCEDURAL TESTIMONY

87. Dr. Gregory Endelman[11] testified on behalf of Student. Dr. Endelman has provided special education policy training to school districts, including Capistrano. At hearing, Dr. Endelman addressed the issue of special education administrator's responsibility when a student was unilaterally placed.

88. According to Dr. Endelman, a charter school or its contracted local educational agency has an obligation to hold an annual IEP team meeting unless the student has left the district. Even without an IEP,

the child find obligationfootnote 12remains if the student still resides within the boundaries of the school district.[12] Child find is the continuing affirmative duty for a local educational agency to identify, locate, and evaluate all children suspected of having disabilities residing within its boundaries. (20 U.S.C. § 1412(a)(3).)

89. When a parent provides a school district with notice of unilateral placement, Dr. Endelman considered it to be best professional practice to do the following: (1) set an IEP team meeting to discuss the problems leading to the unilateral placement; (2) send parents a prior written notice; (3) attempt to contact the family more than once; and (4) file a request for due process hearing to defend the offer of FAPE.

90. Dr. Endelman opined that a school district has an affirmative obligation to provide a student with a FAPE, and is obligated to defend its offer of FAPE. Therefore, when parental consent is withheld from an IEP, a school district is obligated to follow up and/or file for due process.

91. Sara Youngf[13], Capistrano's executive director of special education, explained Capistrano's practice when a parent fails to provide consent to an IEP and offer of FAPE. Dr. Young indicated when there is no consent to an IEP, she meets weekly with the program specialist and staff to determine what to do next. Usually, Capistrano will file for due process only when there is a major change in the IEP or the student is being overserved in the existing IEP. Dr. Young acknowledged Parents did not consent to the December 18, 2015 IEP. In this matter, Student's placement did not change, and Parents had consented to the implementation of the goals and services contained in the IEP.

92. Parents did not consent to the

May/September IEP for the 2016-2017 school year. Instead, Parents filed for due process hearing on October 24, 2016, and FAPE issues regarding both the December 18, 2015, and the May 23, 2016 and September 12, 2016 IEPs. Shortly before hearing, over five months after filing, Student withdrew the complaint on April 18, 2017, after Student was unilaterally placed by Parents.

93. Pursuant to Dr. Young, Capistrano does not conduct IEPs of students who are privately placed unless the parents make a request for an IEP. Instead, Capistrano sends an annual notice to parents within its boundaries informing them of their right to an IEP. Dr. Young overlooked that Student was privately placed because of a FAPE dispute.

94. During hearing, Ms. Candelario incorrectly opined that Capistrano did not have a duty to offer an IEP to Student because she was privately placed. When presented with a Capistrano form, entitled Parent Certification of Intent, which was designed to advise parents of their rights to special education services when their child is privately placed, she indicated she did not send it to Parents, as it was usually sent to parents by Capistrano's private school liaison.

95. Student filed her request for due process on December 15, 2017. On January 10, 2018, Dr. Young provided Parents with another prior written notice, denying Parents' request for Capistrano to fund placement at Child Development Center.

RELATIONSHIP BETWEEN CAPISTRANO AND COMMUNITY ROOTS

96. Pursuant to a memorandum of understanding

between Capistrano and Community Roots, Capistrano remained the local education agency for purposes of providing special education and related services to students attending Community Roots. Capistrano staffed the entire special education program at Community Roots. Capistrano case carriers were responsible for all special education paperwork and management of student special education programs. Capistrano serviced 75 students with IEPs at Community Roots.

97. Mr. Cavallaro,[14] the school director at Community Roots, testified at hearing. As the administrator at Community Roots, Mr. Cavallaro attended IEP team meetings. He reported that Capistrano and Community Roots had a collaborative relationship. Mr. Cavallaro worked collaboratively with Capistrano through Ms. Candelario, Capistrano's special education program specialist. Ms. Candelario, however, testified that Mr. Cavallaro never reported Parent's concerns, or passed on Parents' request for an IEP team meeting.

98. Sharla Pitzen, Capistrano's director of special education during 2015-2017, testified at hearing. During her time as special education director, Ms. Pitzen, oversaw special education for Capistrano's preschool through fifth grade programs. She was also responsible for implementing special education and related services at Community Roots, as well as responsible for training special education teachers and staff assigned there. On February 18, 2016, Ms. Pitzen sent an email to several Capistrano administrators, including Sara Young, which set out her concerns regarding providing special education and related services to additional charter schools. In relevant part, the email states:

> "ellipsis I have some deep concerns regarding the hiring and retaining of special education staff and support ellipsis I'm quite concerned that we would have to staff an additional school with all the spec ed [special education] resources that we currently are having a difficult time hiring for our own schools ellipsis It has been so difficult to monitor and hire staff for Journey and Community Roots. When you add in the different calendars, philosophies, training, IEP management from our Program Specialists, Compliance Dept., Office Manager/Special Education Office for monitoring timesheets, absences, and evaluations for all spec ed staff. It really takes away from trying to provide the level of support and personnel for our other schools. ellipsis I'm truly a team player, but ellipsis I wanted you to know how difficult the spec ed demands are currently for our two K-8 Charters, and we are not even meeting those needs."

99. At hearing, Ms. Pitzen acknowledged the email. In spite of the email, she felt Capistrano was meeting the needs of the special education students at Community Roots. The difficulty in working with the charter schools was related to the charter school calendar and scheduling. The charter schools did not operate on the same school calendar as Capistrano, therefore staffing issues were challenging.

CHILD DEVELOPMENT CENTER

100. Dr. Schuck testified to explain the Child Development Center's operation. The Child

Development Center is a private school, grades one-through-eight, overseen by UCI Medical Center. The school provides an intensive behavioral support program in the context of a classroom setting. It is a therapy placement designed to assist students with functional difficulties or neuro-deficits, and seeks to determine what impedes a student's access to education. Dr. Schuck explained behavior must be controlled before the student can access his/her education. There are approximately 70 students enrolled in Child Development Center, with 15 students in each class. All teachers hold multi- subject credentials, and the school follows California common core curriculum. In addition to the teacher, each class has a mental health professional, case manager, and two behavior specialist aides. The adults in the classroom act as a team. The school utilizes technology, and each student has an iPad. Academic enrichment or educational therapy goes beyond the scope of the academics in the classroom, and is designed to prevent a student from falling behind.

101. Child Development Center employs a number of psycho-social treatment strategies, including universal token economy, positive discipline, and daily group social skills training sessions. Behavior is tracked all day long to discover the antecedents to the behaviors. Behavior is measured every 30 minutes and feedback with the student is provided. Dr. Schuck noted that, as a child with autism, Student needed immediate and continuous feedback. At the end of the day, students can cash in their tokens. Students receive one hour per day of small group social skills therapy and physical education activities which implemented social skills. An eight week parent participation training was required, and twice monthly meetings

thereafter are mandatory. Speech and language services and occupational therapy services are not offered at the Child Development Center.

102. In grades one-through-five, Child Development Center's mission is to provide an intervention program to change a student's behavior to allow re-entry into the public school system. The school aims to complete this goal within one-to-two years of attendance. The average attendance lasts 19 months, however, for students with autism, attendance is usually for two years.

103. When Student began attending school at Child Development Center, she exhibited significant behaviors; she was unwilling to "buy into the program." Dr. Schuck noted that as with most students with behavior problems in a new environment, "things get worse before they get better."

104. While enrolled at Child Development Center, Parents continued to express concern about Student's water intake and Student's perception of being bullied. Parents complained the school was not academically challenging, and Student continued to present with anxiety. Student was still having meltdowns in the morning and did not want to go to school. Dr. Schuck explained they were working on Student's anxiety. It took until Thanksgiving 2017 to transition Student into second grade, with new kids in class and higher expectations. Dr. Schuck diplomatically testified that Child Development Center needed to work on both Student's and Parents' perceptions and assimilation into the program.

105. Academically, Student's progress report for February-June 2017 indicated Student's reading foundational skills were proficient. Her reading standards in literature indicated she could decode

words and understand the basic meaning of what she was reading. She was working to expand her knowledge to higher level questions, and increase her reading comprehension. Student's writing skills ranged from developing to proficient. Student's writing was very clear, and she could express her ideas in written form independently, but was more comfortable with teacher support. Student appeared to benefit from pre-writing strategies, such as word banks and graphic organizers, before beginning to write. Student's language, spelling and grammar skills were generally proficient. Student's math skills were developing. Student could work independently in math and appeared to have a strong base with math facts. She relied on her fingers, but could work from memory when prompted by the teacher. Word problems remained a weakness for Student. Student's consistency and progress in her social skills development increased.

106. Dr. Schuck opined that the Child Development Center was an appropriate placement for Student, and she maintained the continuing goal was to transition Student back into the public school system for the 2018-2019 school year, if an appropriate placement was available.

REQUESTS FOR REIMBURSEMENT

107. Parents requested reimbursement for Student's unilateral placement, educational supports and services, and transportation. Mother credibly testified to establish sufficient foundation to establish the following expenses were incurred and paid by Parents for the period of February 1, 2017, through April 2018:

(1) Program intake for Child Development Center $150.00
(2) Mandatory Parenting Techniques program 920.00
(3) Registration for 2016-2017 475.00
(4) Registration for 2017-2018 475.00
(5) Monthly program fee February 2017 1,175.00
(6) Monthly program fee March 2017 2,350.00
(7) Monthly program fee April 2017 2,350.00
(8) Monthly program fee May 2017 2,300.00
(9) Monthly program fee June 2017 ,350.00
(10) Monthly program fee for July 2017 2,350.00
(11) Monthly program fee for August 2017 2,350.00
(12) Monthly program fee for September 2017 2,660.00
(13) Monthly program fee for October 2017 2,660.00
(14) Academic enrichment fee for October 2017 150.00
(15) Monthly program fee for November 2017 2660.00
(16) Academic enrichment fee for November 2017 150.00
(17) Monthly program fee for December 2017 2,660.00
(18) Academic enrichment fee for December 2017 240.00
(19) Monthly program fee for January 2018 2,660.00
(20) Academic enrichment fee for January 2018 330.00
(21) Monthly program fee for February 2018 2,660.00

(22) Academic enrichment fee for February 2018 390.00
(23) Monthly program fee for March 2018 2,660.00
(24) Academic enrichment fee for March 2018 330.00
(25) Monthly program fee for April 2018 2,660.00
(26) Academic enrichment fee for April 2018 330.00
(27) Educational therapy services for April 2018 (2 hrs. at100.00 per hr.) 200.00

108. Parents requested reimbursement for round-trip transportation to Child Development Center from their residence. The drivable distance between Student's residence and Child Development Center is 10.5 miles each way.

109. Parents requested reimbursement for services provided between March 2016 and November 2017, by Dr. Patterson through Autism Behavior Services, Inc., of $2,199.00. These expenses correspond with Dr. Patterson's observations and reports.

110. Parents requested reimbursement for social skills and speech improvement obtained through enrollment in the Gary Spatz Film and TV Acting Conservatory, LLC., of $3,950.00. Mother indicated Student was enrolled in this program to increase her social skills, and develop her speech, voice and memory, through acting exercises.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER

THE IDEA[15]

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq; 34 C.F.R. §300.1 (2006) et seq.[16]; Ed. Code, § 56000 et seq.; Cal Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

3. In Board of Education of the Hendrick Hudson Central School District v. Rowley (1982) 458 U.S. 176, 201 [102 S.C-t. 3034, 73 L.Ed.2d 690] (Rowley), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. Rowley expressly rejected

an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (Id. at p. 200.) Instead, Rowley interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (Id. at pp. 200, 203-204.)

4. The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since Rowley, Congress has not changed the definition of a FAPE articulated by the Supreme Court. [In enacting the IDEA, Congress was presumed to be aware of the Rowley standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit," or Court in that case. (J.L. v. Mercer Island School Dist. (9th Cir. 2010) 592 F.3d 938, 950 "meaningful educational benefit," all of these phrases mean the Rowley standard, which should be applied to determine whether an individual child was provided a FAPE. (Id. At p. 951, fn. 10.)

5. In Endrew F. v. Douglas County School District (2017) 580 U.S. [137 S.C-t. 988], the Supreme Court reconsidered the meaning of the phrase "some educational benefit" for a child not being educated in a general education classroom. The court rejected the contention by the school district that the IDEA was satisfied by a program providing "merely more than begin emphasis, de minimis end emphasis, " progress, as well as parents' contention that school district's must provide an education that is substantially equal to one afforded to children without disabilities. "To meet its substantive obligation under the IDEA, a school must

offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." (Id., 580 U.S., 137 S. Ct. at p. 1001.) The Court retained its earlier holding in Rowley that any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. While Endrew F. does not require an IEP to maximize educational benefit, it does require that "a student's educational program be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives." (Id., 580 U.S., 137 S. Ct. at p. 1000.)

6. In so clarifying "some educational benefit," however, the Court stated that it would not attempt to elaborate on what appropriate progress will look like from case to case. "It is in the nature of the Act and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." (Id., 580 U.S. , 137 S. Ct. at p. 1001.) Endrew F. does not create a new legal standard for what constitutes a FAPE, but is a clarification of Rowley. (K.M. v. Tehachapi Unified School Dist. (E.D. Cal. Apr. 5, 2017, 1:15-cv-001835 LJO JLT) 2017 WL 1348807,**16 to 18.)

7. The Ninth Circuit further refined the standard delineated in Endrew F. in M.C. v. Antelope Valley Unified Sch. Dist. (9th Cir. 2017), 858 F. 3d 1189), where the Court stated that an IEP should be reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities to enable progress to commensurate with non-disabled peers, taking into account the child's potential. (M.C., supra, at p.1201.)

The Ninth Circuit affirmed that its FAPE standard before the Endrew F. decision comports with Endrew F. (E.F. v. Newport Mesa Unified School Dist. (9th Cir. 2018) 726 Fed.Appx. 535.)

8. An educational agency in formulating a special education program for a disable pupil is not required to furnish every special service necessary to maximize the child's potential. (Rowley, supra, 458 U.S. at p. 199.) Instead, an educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. (Park v. Anaheim Union High School (9th Cir. 2006) 4654 F. 3d 1025, 1033.)

9. 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, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (Schaffer v. Weast (2005) 546 U.S. 49, 56 to 62 [126 S.C-t. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, Student had the burden of proof on each issue presented.

10. The statute of limitations for special education due process claims requires a party to file a request for a due process hearing within two years from the date the party knew or had reason to know of the facts underlying the basis for the request. (Ed. Code, § 56505, subd. (l); 20 U.S.C. § 1415(f)(3)(C).) The

statute does not apply to claims filed by a parent who was prevented from requesting the due process hearing due to either of the following: (1) specific misrepresentation by the local educational agency that it had solved the problem forming the basis of the due process hearing request; or (2) withholding of information by the local educational agency from the parent that was required to be provided to the parent. (Ed. Code, § 56505, subd. (1); 20 U.S.C. 1415 (f)(3)(D).) Student filed her initial complaint on December 15, 2017. Student did not raise any exceptions to the two year statute of limitations. Therefore, the applicable period of time in this matter is December 15, 2015, through December 15, 2017.

ISSUE ONE: DECEMBER 15, 2015 IEP AS APPROPRIATE OFFER OF SERVICES

11. Parents contend Capistrano failed to offer Student a FAPE in the December 18, 2015 IEP, by failing to provide appropriate goals and services in the areas of intensive behavioral intervention, one-to-to-one aide assistance, speech and language therapy and social skills services to address Student's pragmatic language and social skills needs. Parents preferred proactive aide services, believing if Student did not receive full-time aide support during her early education, she would lose ground academically as she got older. Capistrano, on the other hand, found full-time aide accommodations more restrictive and unnecessary where the ultimate target was to make Student independent and prompt free within a few years. Capistrano contends the December 18, 2015 IEP was appropriate and allowed Student to obtain educational benefit.

12. In 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 School Dist. (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (Ibid.) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's 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.)

13. Whether a student was offered or denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed, not hindsight. "An IEP must take account what was, and what was not, objectively reasonable ellipsis at the time the IEP was drafted." (Adams v. State of Oregon (9th Cir. 1999) 195 F3d 1141, 1142 (Adams), citing Fuhrman v. East Hanover Bd. of Education (3rd Cir. 1993) 993 F.2d 1031, 1041.)

14. Although Student never received one-to-one aide support in preschool, Parents remained adamant that Student required full-time aide support upon entering kindergarten. Parents entered into a settlement agreement with Capistrano on September 24, 2015, which provided Student additional aide support through December 18, 2015. As part of this agreement, Parents agreed to the implementation of the April 30, 2015 IEP, and released and waived all educational claims for the period of August 25, 2015, through December 18, 2015. Any remaining disputes

regarding the offer of FAPE contained in the April 30, 2015 IEP were waived by the settlement agreement, and were outside the statute of limitations in this matter.

15. The December 18, 2015 IEP was an addendum to the April 30, 2015 annual IEP. The provision of goals and services contained in the April 30, 2015 IEP were being implemented with parental approval, and intended to remain in effect until the next annual IEP in May 2016. As such, the December 18, 2015 IEP team meeting was designed to review Student's progress and determine if any changes to the annual IEP were necessary, primarily regarding full-time aide services.

16. No information was presented to suggest Student had regressed, or failed to make progress, prior to December 18, 2015. The information presented at hearing was to the contrary. Informal progress meetings held with Parents described Student as improving in task completion, having fewer meltdowns, and responding well to positive reinforcements. Ms. Houses' observations, as Student's general education teacher, were persuasive. Ms. Houses successfully pushed Student harder during academic periods and reiterated Student was making excellent progress. When asked if the aide was responsible for Student's successes, Ms. Houses noted Student made continual growth and matured a lot since the beginning of school. Without the aide, Student could have completed her work, but it might have taken her longer to complete, as she could be distracted. Educationally, Capistrano staff, including the education specialist and autism specialist, reported they remained concerned that continuing additional aide support would unnecessarily render Student prompt dependent.

17. Parents voiced their concerns at the December 18, 2015 IEP team meeting. While Parents remained adamant that Student required a full-time aide, Student presented no evidence to suggest that Student had regressed, or failed to make progress at school; nor did the evidence suggest that Student's progress was significantly based on full-time aide support. As a kindergartener, Student could be easily distracted even with aide support. While Mother reported concerns about hydration and lack of socialization, the information presented at hearing was insufficient to prove a full-time aide was required to provide a FAPE, or that a change in the goals and services were necessary based upon Student's progress at the time. Parents argued that Student required a transition plan to transition from full-time aide support to combined aide and IBI tutor support. The evidence, at that time, did not suggest a need for a transition plan, but merely parental apprehension of the "what ifs" in the event Student did not receive full-time aide support.

18. The December 18, 2015 IEP was appropriate in light of Student's disability and circumstances. Consequently, Student failed to show that Capistrano denied her a FAPE by failing to offer her appropriate placement and services in the December 2015 IEP.

ISSUE TWO: FAILURE TO DEFEND THE DECEMBER 18, 2015 IEP

19. Student contends Capistrano denied Student a FAPE by failing to file for due process to defend the December 18, 2015 IEP. Capistrano contends provision of a full-time aide was not a necessary component of the December 18, 2015 IEP, therefore Capistrano was not

required to file for due process.

20. If the parents of the child consents in writing to the receipt of special education and related services for the child but does not consent to all of the components of the IEP, those components to which the parents have consented shall be implemented so as not to delay provide instruction and services to the child. (Ed. Code, § 56346, subd. (e).) However, if the public agency determines that the proposed special education program component to which the parent does not consent is necessary to provide a free appropriate public education to the child, a due process hearing shall by initiated by the public agency. (Ed. Code, § 56346, subd. (f).)

21. Both parties cited I.R. v. Los Angeles Unified School District (9th Cir. 2015) 805 F.3d 1164, 1169 (I.R.) in support of their contentions regarding Capistrano's obligation to file for due process. Pursuant to I.R., the Ninth Circuit, in concurrence with the Education Code, recognized a two-prong test to determine a school district's obligation to file for due process. First, parent was required to have refused to consent to a component of the IEP. Second, the component in issue must be necessary to the provision of FAPE, to trigger a mandatory requirement for a school district to seek due process.

22. Applying I.R.'s two-pronged test, Capistrano's failure to seek due process was not required. The December 18, 2015 IEP was appropriate, and the omission of a full-time aide was not a necessary component of the IEP. For those reasons, Student failed to show by a preponderance of evidence that Capistrano denied her a FAPE by failing to defend the December 2015 IEP.

ISSUE THREE: MAY 23, 2016 AND SEPTEMBER 12, 2016 (2016-2017 ANNUAL IEP) OFFER OF APPROPRIATE GOALS

23. Student contends the annual IEP developed on May 23, 2016, and September 12, 2016, failed to develop goals that addressed Student's needs in the areas of academics, social/emotional and anxiety. Capistrano contends that the goals offered in the 2016 annual IEP were appropriate and comported to Student's identified unique needs.

24. An IEP is a written document which details the student's current levels of academic and functional performance, provides a statement of measurable academic and functional goals, a description of the manner in which goals will be measured, a statement of the special education and related services that are to be provided to the student and the date they are to begin, an explanation of the extent to which the child will not participate with non-disabled children in a regular class or other activities, and a statement of any accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments. (20 U.S.C. § 1414(d); Ed. Code, § 56345, subd. (a).)

25. When developing an IEP, the team must consider the strengths of the child; the concerns of the parents for enhancing their child's education; information about the child provided by or to the parents; the results of the most recent assessments; the academic, developmental, and functional needs of the child; and any lack of expected progress toward the annual goals. (20 U.S.C. § 1414(d)(3)(A), (d)(4)(A); 34 C.F.R. § 300.324(a), (b); Ed. Code, § 56341.1, subds. (a), (d).) An IEP must include a statement of measureable

annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability. Further, the IEP must specify the anticipated frequency, location and duration of educational services so that the formal specific offer from the school district will assist parents in presenting complaints with respect to any matter relating to the educational placement of the child. (Union Sch. Dist. v. Smith (9th Cir. 1994) 15 F.3d 1519, 1526, cert. den., 513 U.S. 965 (1994) (Union).)

26. Ms. Essex's speech and language progress report did not suggest the proposed IEP communication goals were inappropriate. Instead, the Essex report described the progress on Student's long-term goals of demonstrating language comprehension, language expression, and speech production skills within chronological age-level expectations, and demonstrating improvement in social communication and executive functioning skills provided in the private program. Of the 14 short-term goals contained in the report, many were similar to those contained in the December 18, 2015 IEP, and many had already been met by Student. Ms. Lanners considered the Essex report to validate her own work with Student, including the goals she drafted for the 2016 IEP.

27. Ms. Carrucci reported Student was able to read fluently at an above grade level, but needed to improve her ability to comment and answer questions about what she had read. Therefore, Capistrano offered a reading comprehension goal. Student was fluent with basic math facts through five, but needed some support to solve word problems. A math goal was crafted to address word problems and decrease prompts on this non-preferred activity. Additionally, Student had met her one occupational therapy goal, and had no residual

need for another one. Theoretically, based on subject matter, none of these goals were inappropriate.

28. Dr. Patterson's observation notes and recommendations offered little to suggest Capistrano had not accurately identified Student's behavior and social/emotional needs. She did not indicate Student required a full-time aide; but opined that Student's behavior support needed to be consistent and limited to no more than two IBI tutors.

29. Dr. Patterson's expert opinion regarding the reliability of Capistrano's collection of data, and the variance in measuring Student's progress on goals was persuasive. The behavior and social/emotional goals all comported to Student's unique needs. The problems with these goals laid not in their suitability, but rather in the manner in which they were measured. This data was used, in part, to determine Student's present levels, and to determine the content of the goals.

30. Dr. Patterson explained a fundamental premise of behavior analysis requires that data collection be consistent, and everyone collecting data measures the same thing. In Student's program, at least three people were collecting data at various time. The data needed for reference was not consistently provided on the data collection materials, and the data sheets do not reflect that the IBI tutors remained in sync. If the data collection was flawed and inconsistent, it was unreliable, and it skewed the data's analysis. The data sheets provided as exhibits were inconsistent. If the data was incorrect, the analysis of the data was wrong as well.

31. Ms. Meyers-Megarity is also well qualified in her profession and has extensive experience with IBI services. Ms. Meyers-Megarity explained away several of the inconsistencies reported by Dr. Patterson, and

described a valid protocol for collecting data in her program. The purpose of Capistrano's program, and the educational philosophy behind it, is not in question here. Her testimony provided a description of Capistrano and IBI policy, but did not address specifics related to Student or her IEP. The collection of the data collected, was inconsistent, the IBI services provided to Student were inconsistent, and individual responsibilities were not clearly delineated in the IEP. Further, the Community Roots teachers and administrators exhibited limited understanding of special education services and procedures. There was a disconnect between Capistrano and Community Roots which only intensified the need for delineation of responsibility and consistency in services.

32. Capistrano relied heavily on the chart prepared to indicate the amount of additional support Student would receive each day under the 2016-2017 IEP. The chart, however, did not define the responsibilities of the staff that would provide the support. This was further complicated by the various definitions of IBI utilized by Capistrano. Where more than one acronym definition is in usage, further definition is required in the IEP for clarity. It was not provided in the chart or the IEP.

33. To confuse things even further, the additional support aide collected data in addition to the IBI staff. Ms. Carrucci supervised the aide in collecting this data and reviewed it only "every so often." Capistrano witnesses emphasized the additional support aide's duties were different than those of the IBI staff. The support aide was available to Student more than three hours per day, which could entail one-to-one support. The specific time frame in which Student might need support varied based upon curriculum, activity

preference, and/or environment. Regardless of when the services were to be provided, the IEP failed to indicate what type of services or interactions were to be provided. As an example, in addition to providing prompting, the aide was utilized as Student's primary go-to person, for such needs as breaks, hydration and toileting. IBI support was intended to collect data on behavior and social support, and only to intervene after two prompts. The recess support IBI's duties were altogether different.

34. As Dr. Patterson stressed, the role and responsibilities of the aides should be clearly articulated to the IEP team, Parents, and even Student if necessary. Student's need to know who to go to for assistance was important, and the person assigned to Student needed to be well-equipped to work with Student's unique needs and also develop rapport with Student.

35. There is a difference between the clinical provision of IBI services and educational provision of IBI support, and many nuances in data collection styles. Each expert agreed that any method was appropriate as long as it was consistent. The evidence supported a finding that there were significant discrepancies in the data collection and provision of IBI services, which affected its analysis and IEP team members understanding of Student's needs. In addition, the data collected from an untrained aide, haphazardly reviewed, was also being considered by Capistrano. This lack of consistency comported with Ms. Pitzen's concern that Capistrano was unable to adequately monitor its staff at the charter school.

36. The concern over data reliability extended to the measurement of progress for the 2016-2017 goals. The means for measuring progress for the goals was

vague. The behavior and social/emotional goals split the responsibility for observation and goal measurement amongst five-to-six people. Measurement of progress on each of these goals, used undefined documents, by six people, not all of whom were measuring the same thing, without delineation of individual responsibility. On the face of the IEP, the means of measuring the goals, and the individual responsibilities for doing so, split among so many people, some of whom were inexperienced, did not provide sufficient clarity to withstand the requirements of Union. Consequently, a preponderance of evidence showed that Capistrano denied Student a FAPE by failing to offer sufficiently clear goals.

ISSUE FOUR: MAY 23, 2016 AND SEPTEMBER 12, 2016 (2016-2017) ANNUAL IEP OFFER OF PLACEMENT AND SERVICES

37. Student contends the 2016-2017 annual IEP failed to provide her with appropriate placement and services. Capistrano contends the 2016-2017 annual IEP was appropriate for Student.

38. An educational agency in formulating a special education program for a disabled pupil is not required to furnish every special service necessary to maximize the child's potential. (Rowley, supra, 458 U.S. at p. 199.) Instead, an educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. (Park v. Anaheim Union High School (9th Cir. 2006) 4654 F. 3d 1025, 1033.)

39. To determine whether a district offered a student a FAPE, the analysis must focus on the adequacy of the district's proposed program and not on

the family's preferred alternative. (Gregory K., supra, at p. 1314.) An IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (Shaw v. District of Columbia (D.D.C. 2002) 238 F. Supp.2d 127, 139 [IDEA does not provide for an "education ellipsis designed according to the parent's desires"], citing Rowley, supra, 458 U.S. at p. 207.) Nor does the IDEA require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (Rowley, supra, 458 U.S. at pp. 198-200.) Hence, if the school district's program meets the substantive Rowley factors, then that district provided a FAPE, even if the child's parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefit. (Gregory K., supra, 811 F.2d at 1314.)

40. Capistrano's failure to consider a transition plan for Student at the May 23, 2016 IEP team meeting significantly denied Student appropriate access to her education at the beginning of the 2016-2017 school year. During the May 23, 2016 IEP team meeting, Capistrano knew Community Roots was moving to a new campus at a different location. It knew from information collected from the teacher, education specialist and autism specialist, that Student had difficulties with most forms of transitions, regardless of whether from place-to-place or lesson-to-lesson. Capistrano knew from parental input at the IEP team meeting that transitions were hard for Student, and affected her ability to communicate when things became hard, and her ability focus and to get organized. Parents also expressed concern for Student's safety in the unfamiliar surroundings of the new campus. When Parents asked the IEP team to consider a transition plan for the new

school year and provide Student a full-time aide to help her successfully make the transition to the new school campus, the IEP team simply ignored this request. Capistrano was more concerned that the IEP team meeting had run overtime than it was with considering a transition plan for Student. Not only did the IEP team fail to consider a transition plan for a child with known transition difficulties at the May 23, 2016 IEP team meeting, it failed to convene the second part of the 2016-2017 annual IEP team meeting prior to the beginning of the school year to consider a transition plan. When the IEP team reconvened on September 12, 2016, Student already had suffered a traumatic incident due, in great part, to Capistrano's failure to provide appropriate supervision, and failing to allow Student to become acquainted with the unfamiliar layout of the new campus.

41. Student's anxiety levels remained high since her traumatic incident. Ms. Adams reported that, after the incident, Student would hold her hand during transitions. Student was increasingly nervous about the new campus. Student complained when math was difficult, no one helped her. Student did not want to go to school, while at the end of kindergarten Student looked forward to school. The transition from home to school became increasingly difficult, requiring Father to remain at school with Student each day to calm her and get her to class. Ms. Adams also reported Student had difficulties getting to class. Pick-up at the end of the school day was also challenging. Student cried in the pick-up line. Every change at school was a challenge for Student.

42. Student provided ample examples to support her contention that the behavior support provided to Student during the 2016-2017 was insufficient, and

resulted in a significant decline in Student's behavior and emotional status. Information collected by Capistrano during the first semester of the 2016-2017 school year indicated Student's behavior was declining. Capistrano acknowledged the curriculum was more difficult, and Student required more prompting.

43. While Ms. Adams played down Student's behaviors in her reports to Capistrano and Parents, her more candid reporting to Dr. Schuck bears more weight. Ms. Adams' questionnaire responses for Dr. Schuck, indicated Student had more significant and intense behaviors at school than previously reported, and much more than at the end of kindergarten. Student cried easily and frequently. She was easily upset and her emotions could quickly escalate. Student cried if a routine was different and she had difficulty moving through transitions to other activities. These behaviors should have also been apparent to the Capistrano staff collecting data and managing Student's behavior.

44. Dr. Schuck's expert testimony was the most persuasive. Child Development Center was selective in who it admitted into its program. Each candidate must exhibit significant behaviors. Dr. Schuck determined Student's autism was comorbid with her depression and anxiety. When Student was accepted into the Child Development Center program, she had hit the wall with Capistrano's program at Community Roots. She was shutting down emotionally and not participating at school. Capistrano was not providing Student with sufficient supports to access to her education. No one was listening. Capistrano's IBI team failed to recognize the antecedents to Student's meltdown.

45. For the foregoing reasons, Student proved by a preponderance of evidence that District denied her a

FAPE by failing to offer her an appropriate and timely IEP for the 2016-2017 school year.

ISSUE FIVE: FAILURE TO DEFEND THE MAY 23, 2016 AND SEPTEMBER 12, 2016 IEP.

46. Student contends Capistrano denied Student a FAPE by failing to file for due process to defend the May 23, 2016, and September 12, 2016 IEP. Capistrano contends that by continuing to implement the December 18, 2015 IEP, which Capistrano believed provided Student with services in excess of her needs, Capistrano was not required to file for due process.

47. The case law and statutes applied in Legal Conclusion paragraphs 19 and 20 are applicable here as well.

48. In applying I.R's two-pronged test to the May 23, 2016, and September 12, 2016 IEP, Capistrano was required to file for due process. Parents did not consent to any part of the May 23, 2016, or September 12, 2016 IEPs. Reliance on the December 18, 2015 IEP, which was essentially the April 30, 2015 IEP, was unreasonable and inappropriate. The goals contained in the 2015 IEPs were outdated. Ms. Navarro, Student's first grade special education teacher, testified that since Student had progressed and met her 2015 goals, she needed something to work on during SAI services. Goals are the backbone of special education services, and are required in an IEP. The absence of appropriate goals is a necessary component in determining whether to file for due process.

49. Second, Student's behavior had started to decline and her anxiety increased during the first semester of first grade. Data collected as of January 2017 indicated Student's behavior was declining. Ms.

Romberg opined this decline was related to a more difficult curriculum in the first grade, which required more prompting. This, coupled with the outdated goals, supported a finding that new goals were needed which were more closely related to the first grade curriculum than those contained in the December 18, 2015 IEP. This also constituted a necessary component. Along the same line of analysis, Student's behavior and anxiety also suggested the December 15, 2015 IEP was no longer working for Student, and the new IEP needed to be implemented to provide Student a FAPE. All of these reasons indicate Capistrano had an obligation to seek due process to allow it to implement May 23/September 1, 2016 IEP, without parental consent.

50. Capistrano sought to mitigate its obligation to file for due process by establishing that Student had filed a request for due process on October 24, 2016, alleging denial of FAPE in both the December 18, 2015 IEP, and the May 23, 2016, and September 12, 2016 IEPs. In response to that complaint, Capistrano was prepared to defend its IEPs. Student, however, withdrew the complaint on April 18, 2017, and waited another seven months to file this current complaint. Capistrano's reliance on Student's prior filing is misplaced. A school district's obligation to provide special education and related services to a student is not predicated on the parents' actions, procrastinations or failure to act. Capistrano had the obligation to affirmatively seek due process to implement what it considered an appropriate IEP to provide Student with the IEP while she attended Community Roots and services she required. By simply filing its own counter-complaint, Capistrano could have fulfilled its obligation to pursue implementation of the IEPs, as well as rendered Student's withdrawal of her complaint

ineffective.

51. Based upon the foregoing, a preponderance of evidence showed that District denied Student a FAPE by failing to file for due process.

ISSUE SIX: FAILING TO CONVENE AN IEP AND FAILING TO HAVE A CURRENT IEP IN PLACE AT THE BEGINNING OF THE 2017-2018 SCHOOL YEAR.

52. Student contends Capistrano denied Student a FAPE by failing to convene an annual IEP team meeting in May 2017, and failing to have a current IEP in place for Student at the beginning of the 2017-2018 school year. Capistrano contends it had no obligation to do so as Student had been privately placed at Children's Development Center.

53. A school district must conduct an IEP team meeting for a special education student at least annually "to review the pupil's progress the [IEP], including whether the annual goals for the pupil are being achieved, and the appropriateness of placement, and to make any necessary revisions." (20 U.S.C. § 1414(d)(4)(A)(i); Ed. Code, § 56343, subd. (d).)

54. A school district must have an IEP in place at the beginning of each school year for each child with exceptional needs residing within the district. (20 U.S.C. § 1414(d)(2)(A); Ed. Code, § 56334, subd. (c).)

55. An offer of placement must be made to a unilaterally placed student even if the district strongly believes that the student is not coming back to the district, or parents have indicated that they will not be pursuing services from the district. The requirement of a formal written offer should be enforced rigorously and provide the parent with an opportunity to accept or

reject the placement offer. (Union, supra at p. 1526.) The IDEA does not make a district's duties contingent on parental cooperation with, or acquiescence in the district's preferred course of action. (Anchorage School Dist. v. M.P. (9th Cir. 2012) 689 F.3d 1047, 1055.) Re-enrollment in the public school is not required to receive an IEP. It is residency, rather than enrollment, that triggers a district's IDEA obligations.

56. Even when parents have already decided to place their child in private school, the school district is not excused from obtaining their participation in the IEP process. Failure to include parents in an IEP team meeting is a procedural violation that denies the student a FAPE in the following school year. (D.B. ex. Rel. Roberts v. Santa Monica-Malibu Unified School District, (9th Cir. 2015) 606 Fed. Appx. 359, 360 to 361.)

57. Parents may revoke consent for the continued provision of special education and related services under the IDEA at any time. (34 C.F.R. § 300.9(c).) If the parent of a child revokes consent in writing for the continued provision of special education and related services, the public agency will not be considered in violation of the requirement to make a FAPE available to the child because of the failure to provide the child with further special education and related services and is not required to convene an IEP team meeting or develop an IEP for the child for further provision of special education and related services. (34 C.F.R. § 300.300(b)(4)(iii) & (iv).)

58. A school district must conduct an IEP meeting for a special education student at least annually "to review the pupil's progress, the [IEP], including whether the annual goals for the pupil are being achieved, and the appropriateness of placement, and to make any necessary revisions." (Ed. Code, §

56343, subd. (d); 20 U.S.C. § 1414(d)(4)(A)(i).) The statutes make no exception for the situation in which a parent has unilaterally placed his child in a private school and is demanding reimbursement because the District allegedly failed to offer or provide a FAPE. The duty of the District to hold annual IEP meetings continues during that period. (Briere v. Fair Haven Grade School Dist. (D.Vt. 1996) 948 F.Supp. 1242, 1254.)

59. Dr. Endelman's testimony, although informative in describing "best practices" for school districts, was unnecessary to establish Capistrano's obligation to provide Student with an IEP.

60. Capistrano responded to Parent's notice of private placement with a letter of prior written notice on February 24, 2017. Parents denied receiving this letter, however, the address information was correct, and it was accompanied by a proof of service pursuant to California Code of Civil Procedure, section 1013, subdivision (a)(3). The letter acknowledged Student's unilateral placement, and rejected Parent's request for reimbursement. The letter also included a notice of IEP team meeting scheduled for March 2, 2017. Parents did not respond or attend the IEP team meeting. Dr. Young described her protocol where Parents do not provide consent to an IEP: she meets weekly with the program specialist and staff to determine what to do next. Further it is not Capistrano's policy to conduct IEPs of students who are privately placed unless the parents make a request for an IEP. Instead, Capistrano sends an annual notice to parents within its boundaries informing them of their right to an IEP. Ms. Candelario, Capistrano's program specialist at Community Roots, opined Capistrano had no duty to offer an IEP to Student as a private school student. Further, she did not provide Parents with any

communications which informed Parents they had a right to an IEP. This also supports the claim that Capistrano was unaware of what was going on at Community Roots.

61. Regardless, District made no further attempts to contact Parents after February 24, 2017, although Student remained a student with an IEP. Capistrano did not hold an IEP team meeting, or attempt to hold an IEP team meeting for Student's annual IEP, due in May 2017. With no IEP team meeting, there was no offer of placement and services in place for the beginning of the 2017-2018 school year. Student continued to reside within Capistrano and Parents did not provide Capistrano a written notice of revocation of their consent to special education and related services. Therefore, Capistrano had the obligation to hold Student's annual IEP team meeting, and develop an IEP for implementation at the beginning of the school year. Capistrano's failure to do so resulted in a complete denial of educational opportunity for Student, and constituted a denial of FAPE. Consequently, Student proved by a preponderance of evidence that Capistrano denied her a FAPE during the 2017-2018 school year.

REMEDIES

1. Courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see School Committee of the Town of Burlington, Massachusetts v. Dept. of Education (1985) 471 U.S. 359, 369 [105 S.C-t. 1996, 85 L.Ed.2d 385] (Burlington).) This broad equitable authority extends to an ALJ who hears and decides a

special education administrative due process matter. (Forest Grove School Dist. v. T.A. (2009) 557 U.S. 230, 244, n. 11.)

2. An ALJ may order a school district to provide compensatory education or additional services to a student who has been denied a FAPE. (Student W. v. Puyallup School District (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (Id. at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (Id. at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (Reid ex rel. Reid v. District of Columbia (D.D.C. Cir. 2005) 401 F.3d 516, 524, citing Puyallup, supra, 31 F.3d at p. 1497.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (Reid, supra, 401, F.3d at p. 524.)

3. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and the private placement was appropriate. (20 U.S.C. § 1412(a)(10)C(ii); 34 C.F.R. § 300.148(c); see also School Committee of Burlington v. Department of Ed. (1985) 471 U.S. 359, 369 to 370 [105 S. C-t. 1996, 85 L. Ed.2d 385] (reimbursement for unilateral placement may be

awarded under the IDEA where the districts proposed placement does not provided a FAPE).) The private school placement need not meet the state standards that apply to public agencies to be appropriate. (34 C.F.R § 300.148(c); Florence County School Dist. Four v. Carter (1993) 510 U.S. 7, 14 [114 S. C-t. 36, 1126 L. Ed. 284] (despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable where the unilateral placement had substantially complied with the IDEA by conducting quarterly evaluations of the student, having a plan that permitted the student to progress from grade to grade and where expert testimony showed that the student had made substantial progress.).)

4. Student prevailed on Issues Three, Four, and Five, each of which determined that Capistrano denied Student a FAPE by failing to offer an appropriate IEP in the May 23, 2016, and September 12, 2016 IEPs. Further, by failing to file for due process to seek consent to implement the IEPs without parental consent, Capistrano left Student without an IEP for an unreasonable amount of time, thereby making Parents' decision to enroll Student in the Child Development Center appropriate. Parents notified Capistrano on February 9, 2017 of their intent to unilaterally place Student at Child Development Center and to seek reimbursement from Capistrano for Student's placement and related educational expenses.

5. Student also prevailed on Issue Six, by Capistrano failing to hold Student's May 2017 annual IEP, and failing to have an IEP in place at the beginning of the 2017- 2018 school year. This failure to offer Student a placement required Parents to continue Student's placement at Child Development Center so

she did not lose an educational benefit.

6. Dr. Schuck's testimony established that Child Development Center was an appropriate placement for Student. Although primarily a therapeutic placement, Child Development Center provided Student with behavioral and emotional supports which addressed Student's unique needs. Academically, Child Development Center provided Student with appropriate academics, based upon a grade level core curriculum.

7. Student provided sufficient documentation to support Parents' request for reimbursement for payment of the mandatory parenting program, registration fees for 2016-2017 and 2017-2018, and monthly enrollment fees for the period of February 2017 through June 2017, and September 2017 through March 2018, as those periods correspond to the periods of time Capistrano was responsible for Student's placement, based upon Capistrano's school year calendar. Although Child Development Center is a year-round school, no evidence was presented to support a finding that Student required remedial or retention programs during the summer to prevent regression. Likewise, Student failed in her burden of proof to establish that Student required academic enrichment programs or educational therapy. Therefore, Student's requests for program enrollment fees for July and August 2017, academic enrichment fees, and educational therapy are denied. Student is awarded parental reimbursement for Child Development Center in the amount of $39,150.00.

8. Student is also entitled to travel reimbursement for one round-trip per day, home-to-school. Student established the drivable distance round-trip between Student's home and Child Development

Center is 21 miles. Student's attendance records established Student attended Child Development Center for 180 day during the approved dates described in Paragraph Six above. Student is awarded parental reimbursement for travel reimbursement for 180 round-trips, for 21 miles per trip for a total 3,780 miles, reimbursable at the current federal income tax rate of $ .0545 per mile, for a total of $2,060.00.

9. Dr. Patterson persuasively testified that Student had difficulty with transitions. To avoid further disruption of Student's school year, or require additional transitions for the 2017-2018 school year, Parents are awarded reimbursement of enrollment fees at Child Guidance Center for April, May and June 2018, at the rate of $2,660.00 per month, plus reimbursement for travel expenses one round-trip per day. Said reimbursement is conditioned on Parents providing Capistrano with proof of Student's attendance during this period.

10. Student requested parental reimbursement for services provided by Dr. Patterson between March 2016 and November 2017, through Autism Behavior Services, Inc. Dr. Patterson was privately retained by Parents. The expenses listed on the invoice for Autism Behavior Services did not specify what services were provided. Student failed to prove Dr. Patterson provided any direct services to Student or that any such services were necessary, as Child Development Center was providing extensive behavior services. Although the dates of services rendered correspond to the dates of Dr. Patterson's observations and report, Student did not provide any evidence that Capistrano was obligated to pay for Dr. Patterson's reports as independent educational evaluations. Therefore, Student's request for reimbursement of Dr. Patterson's

services is denied.

11. Lastly, Parents requested reimbursement for social skills and speech improvement obtained through enrollment in the Gary Spatz Film and TV Acting Conservatory, LLC. Mother indicated Student was enrolled in acting class to increase her social skills, and develop her speech, voice and memory, through acting exercises. Student failed to establish acting classes were necessary for Student or that Mr. Spatz was qualified to provide social skills or speech therapy to Student. Student's request for reimbursement for the acting class is denied.

ORDER

1. Within 60 days of this decision, Capistrano shall reimburse Parents the amount of $35,915.00 for Student's tuition and related educational expenses at the Child Development Center. The award of reimbursement for tuition and related expenses is a compensatory award and shall not constitute Student's stay put placement.

2. Within 60 days of this decision Capistrano is ordered to reimburse Parents for Student's educationally related transportation costs in the amount of $2,060.00.

3. Capistrano shall reimburse Parents for monthly tuition at Child Development Center for April, May, and June 2018, in an amount not to exceed $2,660.00 per month. Capistrano shall reimburse Parents within 60 days of Parents presenting Capistrano with documentation of Student's enrollment and attendance during said period. The award of reimbursement for tuition is a compensatory award and shall not constitute Student's stay put placement.

4. Capistrano shall reimburse Parents for transporting Student to the Child Development Center, one round trip per day, from April 2018 through June 2018, at $.0545 per mile, within 60 days of Parents providing Capistrano documentation of mileage and Student's attendance during that period.

5. All other requests for reimbursement are denied.

PREVAILING PARTY

Pursuant to 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. In this matter, Capistrano prevailed on Issues One and Two. Student prevailed on Issues Three, Four, Five, and Six.

RIGHT TO APPEAL DECISION

This Decision is the final administrative determination and is binding on all parties. (Ed. Code § 56505, subd. (h).) The parties in this case have the right to appeal this Decision by bringing a civil action in a court of competent jurisdiction. (20 U.S.C. § 1415(i)(2)(A); 34 C.F.R. § 300.516(a); Ed. Code, § 56505, subd. (k).) An appeal or civil action must be brought within 90 days of the receipt of this Decision. (20 U.S.C. § 1415(i)(2)(B); 34 C.F.R. § 300.516(b); Ed. Code, § 56505, subd. (k).)

Dated: July 25, 2018

Digital Signature JUDITH L. PASEWARK Administrative Law Judge Office of Administrative

Hearings

Footnotes

1 District filed its response to Student's amended complaint on February 2, 2018, which permitted the hearing to go forward. (M.C. v. Antelope Valley Unified Sch. Dist. (9th Cir.) 858 F.3d 1189, 1199 to 1200.)

2The issues pleaded in the complaint have been combined, reorganized and rephrased for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (J.W. v. Fresno Unified School Dist. (9th Cir. 2010) 626 F.3d 431, 442 to 443.)

3Ms. Lanners holds a master's degree in speech and language pathology, and a bachelor's degree in communicative disorders. She holds a speech and language license and audiology board license from the State of California and also has a certificate of clinical competence from the American Speech and language Hearing Association. She was a speech and language pathologist at Capistrano for 18 years.

footnote 4 Rosa Patterson holds a bachelor's degree in psychology, and a master's degree in counseling. She obtained a doctorate in psychology in 2017. She is a board certified behavior analyst, and has a graduate certificate in behavior intervention in autism. Dr. Patterson is the Executive Director and owner of Autism Behavior Services, Inc., which provides applied behavior analysis programs, assessments and intervention services for toddlers through adulthood. She teaches applied behavior analysis on a graduate level. She has also worked as a school autism specialist and regional center coordinator.

5Ms. Adams holds a master's degree in teaching, and a

multiple subject teaching credential. Ms. Adams had no special education or autism training. The 2016-2017 school year was her first year as a teacher. As a general education teacher, Ms. Adams was an employee of Community Roots, not Capistrano.

6Ms. Meyers-Megarity holds a master's degree in special education and a bachelor's degree in psychology. She holds a level one credential in moderate special needs from California and an advanced standing intensive special needs certification in autism from Massachusetts.

7Dr. Candelario holds a doctorate in instructional technologies, and a master's degree in special education. She holds a preliminary administrative services credential, education specialist credential for mild/moderate disabilities, and an autism certificate credential.

8Ms. Romberg holds a master's degree in clinical psychology and a bachelor's degree in psychology. Ms. Romberg is a board certified behavior analyst and has completed graduate level coursework in applied behavior analysis. Before her employment at Capistrano, Ms. Romberg was the clinical director of Behavioral Support Partnership, a non-public applied behavior analysis agency. Ms. Romberg received her BCBA training from Dr. Patterson.

9Ms. Navarro holds a master's degree in elementary education, and a bachelor's degree in communication studies. She holds a California teaching credential in elementary teaching, and a teaching credential as an education specialist for mild/moderate disabilities.

10Dr. Schuck has a doctorate degree in education, and master's and bachelor's degrees in psychology and has completed both a pre-doctoral internship and a post-graduate fellowship in developmental pediatric and

neuropsychology. In addition to being the director of the Child Development Center School, Dr. Schuck is an assistant professor in the Department of Pediatrics in the School of Medicine at the University of California, Irvine.

11 Dr. Endelman is a doctoral candidate in education. He has a master's degree in educational psychology and a master's degree in counseling, as well as a bachelor's degree in psychology. Dr. Endelman is a licensed educational psychologist. He has an administrative services credential, and pupil personnel services credentials in both school psychology and counseling. Dr. Endelman is currently the Regional Director of Special Services for Orange County School of the Arts, a charter school. He also has prior experience as a school principal, director of special education, and SELPA coordinator for the Orange County Department of Education

12Child find is the continuing affirmative duty for a local educational agency to identify, locate, and evaluate all children suspected of having disabilities residing within its boundaries. (20 U.S.C. § 1412(a)(3).)

13Dr. Young has a doctorate of philosophy in education, bachelor's and master's degrees in special education, and a juris doctorate. She is licensed as an attorney in California and has previously practiced special education law.

14 Mr. Cavallaro holds a master's degree in educational leadership, and a teacher certificate from New Jersey. His experience has primarily been in private school settings. He was actively involved in establishing Community Roots Academy as a charter school, and negotiated the charter approval process with Capistrano.

15 Unless otherwise indicated, the legal citations in the

introduction are incorporated by reference into the analysis of each issue decided herein.

16All citations to the Code of Federal Regulations refer to the 2006 edition, unless otherwise noted.