

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

TEHACHAPI UNIFIED SCHOOL DISTRICT.

OAH Case No. 2018070708

DECISION

Parents on behalf of Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on July 16, 2018, naming Tehachapi Unified School District. With leave, Student filed an amended complaint on July 26, 2018. OAH granted Student's request for a continuance on September 10, 2018.

Administrative Law Judge Alexa J. Hohensee heard this matter in the Tehachapi, California on September 25, 26, and 27, and October 17 and 18, 2018.

Andréa Marcus and Goriune Dudukgian, Attorneys at Law, appeared on behalf of Student. Mother and Father attended the hearing on behalf of Student.

Stephanie Virrey Gutcher and Darren J. Bogié, Attorneys at Law, appeared on behalf of Tehachapi. Dennis Ferrell, Tehachapi's Director of Special Education, attended the hearing on behalf of Tehachapi.

At the parties' request, OAH granted a continuance until November 20, 2018, for the parties to file written closing arguments. Upon timely receipt of written closing arguments, the record was closed, and the matter was submitted for decision.

ISSUES

1. Did Tehachapi, during the two-year statute of limitations period, deny

Student a free appropriate public education by failing to offer appropriate speech and language services to address language arts, reading, writing, vocabulary development, and communication skills, specifically, an insufficient amount of one-on-one services and group services with typical peers?

2. Did Tehachapi deny Student a FAPE, from September 9, 2016, to the filing of the first amended complaint, by failing to develop appropriate speech goals?

3. Did Tehachapi, during the two-year statutory limitations period, deny Student a FAPE by denying Parents a right to meaningfully participate in educational decision-making by:

- (a) Refusing to provide Parents with information about proposed interventions upon request;
- (b) Refusing to discuss Parents' issues of concern at individualized education program team meetings;
- (c) Making IEP team decisions outside of IEP team meetings;
- (d) Failing to provide Student with a clear offer of FAPE, or complete IEP documents upon Parents' request, for the IEPs of October 16, 2017, December 15, 2017, January 19, 2018, May 5, 2018, and May 31, 2018;
- (e) Determining the amount and type of speech services Student would receive according to the speech pathologist's schedule;
- (f) Failing to provide prior written notice for denials of Parents' requests made during IEP team meetings; and
- (g) Failing to report on Student's progress on goals at each IEP team meeting?<sup>1</sup>

4. Did Tehachapi deny Student a FAPE by failing to make, or implement, an

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<sup>1</sup> Student withdrew two subparts of Issue 3, designated as Issues 3(f) and 3(i) in the prehearing conference order, on the first day of hearing.

offer of Lindamood Bell instruction in response to Parent's request from August 10, 2017, through June 2018?

5. Did Tehachapi deny Student a FAPE from July 16, 2016, by failing to include clear offers of appropriate goals in Student's IEPs?

6. Did Tehachapi fail to provide Student with the assistive technology provided as an accommodation in Student's February 2017 IEP?

7. Did Tehachapi deny Student a FAPE by failing to timely assess Student after Parents consented to an occupational therapy assessment on November 28, 2017, or, within the statutory two-year limitations period, by failing to assess Student upon Parents' requests for assessments in the areas of occupational therapy, speech and language, psychoeducation, or inclusion?

8. Did Tehachapi, during the two-year statutory limitations period, deny Student a FAPE by denying Parents a right to meaningful participation in educational decision-making by:

(a) Failing to timely respond to Parents' request for independent educational evaluations and, upon agreeing to an independent evaluation, failing to timely contract with and pay the assessors;

(b) Developing Student's annual IEP over a series of IEP team meetings;

(c) Starting IEP team meetings after the scheduled time;

(d) Failing to provide Parent with documents to be reviewed at the meetings sufficiently in advance;

(e) Making an inappropriate placement offer at the IEP team meeting of February 24, 2017, with the intent of upsetting Mother;

(f) Failing to timely respond to Parents' document requests;

(g) Giving inconsistent responses to Parents' requests made during IEP team meetings; and

- (h) Failing to notify Parents of team members who would be attending the IEP team meetings?

## SUMMARY OF DECISION

Tehachapi did not deny Student a FAPE by developing its offers of FAPE over a series of IEP team meetings that prioritized Parents' meaningful participation in the development of all components of Student's educational program and allowed sufficient time for Parents' participation. However, Tehachapi did deny Student a FAPE by failing to develop annual goals to address Student's poor core vocabulary, lack of understanding of basic conversational concepts, and severe expressive and receptive language delays, and by failing to offer one-on-one speech and language services necessary to support such goals and address all of Student's speech and language needs. Tehachapi denied Student a FAPE by failing to offer weekly social communication opportunities with a small group of typical peers, facilitated by a speech language pathologist to address Student's pragmatic language needs. Tehachapi wrote incomplete and unclear offers of special education and related services in all but one IEP by failing to state whether the speech and occupational therapy services offered were to be provided on a one-on-one, small group or consultation basis. An unclear offer of FAPE was also made in the April 27, 2018 IEP, which designated push-in speech services as individual, when those services were not intended to be delivered on a one-on-one basis. Tehachapi also failed to timely respond to Parents' requests for occupational therapy and inclusion assessments, which significantly interfered with Parents opportunity to participate in the development of Student's educational program, resulting in a denial of FAPE.

Student failed to meet her burden of proof on her remaining 17 claims.

As remedies for Tehachapi's failure to provide a FAPE, Student was awarded compensatory speech and language services, and independent educational assessments

in the areas of occupational therapy and inclusion. Tehachapi was also ordered to provide staff training.

## FACTUAL FINDINGS

1. At the time of the hearing, Student was eleven years old. She resided with Parents within Tehachapi's boundaries, and was eligible for special education and related services under the categories of autism and speech and language impairment at all relevant times.

## DUE PROCESS HISTORY

2. Parents and Tehachapi took due process complaints to hearing three times prior to this matter. Some, if not all, of the decisions are on appeal by one party or the other.

3. During these disputes, Parents pulled Student out of school and kept her at home. Student missed half of second grade (2014-2015) and half of third grade (2015-2016).

4. On October 2, 2015, OAH issued a due process decision in consolidated matters brought by Parents and Tehachapi, OAH Case Nos. 2015030954 and 2015050934, finding that Tehachapi's December 18, 2014 IEP offer of placement in a Kern County autism program in Stockdale offered Student a FAPE in the least restrictive environment. Student appealed this decision to the United States District Court for the Eastern District of California and asserted her right to stay put in a Tehachapi special day classroom pursuant to a March 17, 2014 IEP.<sup>2</sup>

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<sup>2</sup> "Stay put" refers to a student's right to remain in her current educational placement pending the outcome of a due process dispute. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.581(a); Ed. Code, § 56505, subd. (d); See *Student v. Tehachapi Unified School Dist.*

5. Just prior to the period at issue in this matter, in an IEP dated March 3, 2016, Tehachapi made Student an offer of special education and related services. Placement was in a mild to moderate special day class, with mainstreaming in general education for science, library and computer lab.<sup>3</sup> Tehachapi offered Student a one-on-one instructional ("special circumstances") aide throughout the day. Speech and language services were offered at 160 minutes per month and 80 minutes per month, although how those services would be delivered (individually, in a small group or on a consultation basis) was not specified in the IEP. The IEP included a behavior plan to address aggressive and noncompliant behaviors, and an offer of reduced special education and related services proportional to a shortened school day during Tehachapi's four-week extended school year. Parents did not consent to the March 3, 2016 IEP.

#### 2016-2017 SCHOOL YEAR

6. Student's stay put placement at the beginning of the 2016-2017 school year was a special day class for students with mild to moderate disabilities at her home school of Cummings Valley Elementary School, taught by Chris Duff, with 40 minutes per week of group speech and language services.<sup>4</sup> The annual goals implemented under

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(Dec. 1, 2016) OAH Case No. 2016080786.)

<sup>3</sup> "Mainstreaming" is a term used to describe opportunities for disabled students to engage in activities with nondisabled students. (*M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 640, fn. 7.)

<sup>4</sup> See *Student v. Tehachapi Unified School Dist.* (Dec. 1, 2016) OAH Case No. 2016080786, p. 3, and *Student v. Tehachapi Unified School Dist.* (April 19, 2017) OAH Case No. 2016110289, p. 5.

stay put were from the March 17, 2014 IEP.

7. On September 9, 2016, Tehachapi convened an IEP team meeting at Parents' request. Mother, Student's advocate, a family friend, special education director Dennis Ferrell, Mr. Duff, Student's speech pathologist Carolyn Winchell, a general education teacher, a school psychologist, a school nurse and the school principal attended. The meeting started 14 minutes late.

8. As background information, it was not unusual for IEP team meetings to start a few minutes late, or to go beyond the time scheduled. Tehachapi teachers were late if the substitute teachers did not arrive at the classroom on time, or if there was important information for the teacher to share with the substitute before leaving the class to the substitute's care. Meetings were also delayed if off-campus team members, such as parents, advocates, assessors, or non-school district service providers, arrived late. The team members would often extend the meeting to make up for a late start, or to finish an agenda item, if the schedules of the team members allowed.

9. The purpose of the September 9, 2016 meeting was to go over a list of disagreements Parents had with the March 3, 2016 IEP offer, discuss Parents' request for home instruction, review a behavior assessment report by Student's private behavior services supervisor Jeffrey Hayden, Ph.D., discuss a doctor's prescription for behavior services, and hear a report on language instruction Student received over the summer.

10. The meeting began with a call to Anne Perry, the director of the Pasadena office of Lindamood Bell, a company that taught a proprietary method of reading intervention. Ms. Perry reported that Student had completed the "Talkies" program over summer 2016. Talkies was for children who could not independently speak in complete sentences, and at the end of the six-week program, Student was able to "work with" sentences up to seven words at a time, make 22 of 50 letter sounds, and "kind of" organize the pieces of a sentence. Lindamood Bell did pre-work and post-work testing

(which was not normed to Student's age group) which Ms. Perry told the team demonstrated 10 months of "mental age" progress, in six weeks (from five years and seven months, to six years and five months). Student demonstrated some kindergarten-level skills, but no first-grade level skills. Ms. Perry told the IEP team that Student was focused and worked four hours per day, with Mother there to provide redirection and a "clinician" working with Student one-on-one. Student had not received any reading instruction, but Ms. Perry wanted Student to move onto a reading intervention program and recommended another 200 to 240 hours of Lindamood Bell instruction to improve Student's reading level. Ms. Perry promised to provide a written report of test results to Tehachapi and was excused from the meeting.

11. Mother told the team that Student's physician had written a prescription for insurance-funded behavior services that she wanted incorporated into Student's IEP so that those services would be provided to Student at school. The IEP team declined to write a health plan for an insurance-funded behavior aide to accompany Student at school.

12. Prior to the September 9, 2016 IEP team meeting, Mother drafted an attachment to the March 3, 2016 IEP, which she contended provided written consent to some parts of that IEP. However, her attachment was not signed, and Tehachapi team members asked Mother to clarify which portions of the IEP she had agreed to and which parts of the IEP she wanted changed. Student's advocate insisted that a new IEP be developed from scratch, which Tehachapi team members declined to do, as the March 3, 2016 IEP had just been completed at the end of the prior school year.

13. At the September 9, 2016 IEP team meeting, Mother, Student's advocate, and the family friend were confused about what constituted an offer of special education and related services. The advocate believed that a new offer had to be written and documented at the end of each IEP team meeting. Mr. Ferrell explained that there



was an outstanding offer, and that the team simply wanted clarification on which parts Parents consented to have implemented and to discuss revision of those components Parents wanted changed.

14. The meeting ran out of time, and the IEP team members agreed to reconvene to review Lindamood Bell's testing after Ms. Perry provided a copy of the test scores. Parent said she wanted to bring Student to school for an informal assessment on the skills learned over the summer. The meeting adjourned without change to the March 3, 2016 offer of special education and related services. An 11-page IEP document with meeting notes, but without an offer of special education and related services, was created to memorialize the September 9, 2016 IEP team meeting.

15. On October 12, 2016, the parties informally resolved a dispute concerning Student's assistive technology needs in a written agreement that provided for Tehachapi to fund an independent educational evaluation in the area of assistive technology.

16. On October 20, 2016, Student filed a due process hearing request, in OAH Case No. 2016110289, regarding whether Tehachapi denied Student a FAPE by refusing to allow Student's doctor-ordered, insurance-funded applied behavior analysis services to be provided at school.

17. During October 2016, Tehachapi attempted to schedule another IEP team meeting to review Lindamood Bell test results received. Parents were insurance agents with a very busy business during open enrollment from October through December, and they did not respond to Tehachapi's emails proposing IEP team meeting dates in November 2016.

18. On December 1, 2016, OAH issued a decision in OAH Case No. 2016080786, which held that Tehachapi had denied Student a FAPE in the March 6, 2016 IEP by predetermining the amount of speech services offered according to the availability of its speech therapist, rather than Student's needs. As a remedy, Parents

were awarded reimbursement for the cost of the six-week Lindamood Bell language program Student attended in summer 2016.

19. On December 5, 2016, Tehachapi emailed Mother that Student's annual IEP review was due December 7, 2016, and Tehachapi at least wanted to open and adjourn a meeting to meet that timeline. Mother responded that she needed more advance notice to attend, she wanted Tehachapi to do informal academic assessments of Student prior to the meeting and wanted to schedule a time when Ms. Duff, who was ill, could attend. Mother complained that the independent assistive technology assessment had not been completed, but stated that Student would not be available for testing until after the winter break and issuance of an OAH decision on whether Student could be accompanied to school by her behavior aide.

20. Parents were very involved in Student's program and wanted to attend all IEP team meetings. When a Parent was unable to attend an IEP team meeting prior to statutory deadlines for holding that meeting (such as an annual review), or when Parents required additional time in order to provide input to the team or ask questions, Tehachapi prioritized Parents' participation over meeting deadlines. Tehachapi regularly requested Parent input, and Mother and Student's advocate often spoke at length during IEP team meetings about their observations of Student, their opinions regarding Student's educational needs, the components of a program to meet those needs, and their vision of Student's placement, program, and services in the future. Mother often requested to re-visit agenda items from prior meetings. Tehachapi team members were respectful of Mother's comments, and answered questions as often and for the length required to satisfy the inquiries by Mother, Student's advocate, and the family friend. Tehachapi team members attempted to complete IEP team meetings as promptly as possible while still giving Parents the time they needed to participate fully in the IEP development process.

21. On December 29, 2016, Tehachapi appealed the OAH decision on predetermination of speech services to the United States District Court.

22. An assistive technology assessment of Student was performed in January 2017 by Brenda Barraza, an assistive technology specialist. Student displayed high levels of resistance and frustration, including crying through writing tasks and required high levels of prompting and redirection to attend and comply with the assessment. She independently used keys to navigate a computer, and Mother reported that Student enjoyed kid-friendly educational websites and used a computer at home for online academic activities and games. Student had a functional pencil grip and legible handwriting, although she displayed deficiencies in letter size and spacing. Student wrote about two words per minute. Student did slightly better on a keyboard (four words per minute using one finger). When given a visual model to copy, Student slowly typed out words without punctuation.

23. Ms. Barraza concluded that the most helpful accommodation for Student was adult scaffolding support, such as having an adult read text to Student, provide choices on a whiteboard for visual support, rephrase, and ask probing questions. She recommended that Student be provided with a keyboard and word processing program with spell check and word prediction as accommodations for academic tasks. Student preferred touch screens, but Ms. Barraza recommended Student learn keyboarding skills, as when academic expectations increased, exposure to typing and keyboarding skills would be beneficial. As Student was still young, Ms. Barraza recommended that Student primarily work on handwriting skills, but have access to a computer for lengthy written assignments that were arduous for Student. She also recommended text-to-speech software for when Student did not have access to an adult reader, although Ms. Barraza thought adult help remained necessary to assist Student with comprehension of what was read.

24. On February 24, 2017, Tehachapi convened an IEP team meeting to review the assistive technology assessment and continue the September 9, 2016 IEP team meeting. Mother, two advocates for Student, Mr. Ferrell, Ms. Barraza, general education teacher Julie Robson, an administrator, and Student's assigned speech pathologist Ms. Winchell and her speech assistant attended.

25. Ms. Barraza reported on her assessment and responded to questions from Student's advocates. The general education teacher told the IEP team that a computer with word processing software was already available in the classroom. A keyboarding skills curriculum was also available. Mother wanted the IEP team to write a goal for keyboarding and provide Student with up-front training on the software, but Tehachapi team members did not think that was necessary, because that would be addressed by the classroom curriculum and accommodations already in place.

26. Student's advocate inquired about having Student take independent study rather than attend school without her insurance-funded behavior aide. Mr. Ferrell indicated that Tehachapi stood by its March 2016 IEP offer and would not offer independent study. Mother became upset when Ms. Duff opined that Student would be unable to keep pace with students in her mild to moderate disabilities classroom and should be placed in a classroom for students with moderate to severe disabilities. Mother believed Student had made progress in her academic skills since the December 2015 assessments for the last triennial and envisioned having Student being fully integrated into a grade level classroom with typical peers. Mother raised her voice at Ms. Duff during the discussion, and Mr. Ferrell asked her not to attack Ms. Duff. Mother accused Mr. Ferrell of trying to take away her right to parent participation, and did not calm down until Mr. Ferrell asked all team members to take a deep breath and calm down.

27. Following that discussion, Mr. Ferrell stated that there was an outstanding offer of placement in the County program, but that Tehachapi wanted to see Student return to school in the classroom for students with mild to moderate disabilities as offered in the March 3, 2016 IEP. Mr. Ferrell was referring to the December 18, 2014 IEP found to be an offer of FAPE by OAH, and affirmed by the District Court, when he stated that the offer of the County program had been and still was an offer of FAPE; however, he was clearly asking Parent to consent to the March 3, 2016 IEP offer instead, which would allow Tehachapi to implement the March 3, 2016 IEP upon Student's return to school. Mr. Ferrell repeatedly stated that Tehachapi wanted Student to return to Cummings Valley in the mild to moderate program. Mother was adamant that Student would not return to Cummings Valley until Student could be accompanied by her insurance-funded behavior aide. Mother was much calmer during this discussion and understood that Tehachapi was offering placement at Cummings Valley in Ms. Duff's classroom. Mother had no reasonable basis for interpreting Mr. Ferrell's statements as an offer to place Student in a County program, which was contrary to the rest of the placement discussions and documentation of the meeting. Mr. Ferrell did not make an offer of County placement at the February 24, 2017 IEP team meeting, and the IEP itself did not contain any such offer.

28. The IEP team discussed the goals in the March 2016 IEP, and Mother informed the team that she would not consent to the IEP unless the goals were changed. The IEP team discussed whether Student should be formally, rather than informally, reassessed for academic skills, and Mr. Ferrell said he would send Tehachapi's decision on conducting early triennial assessments to Parents. The meeting was then adjourned, and a four-page IEP document was prepared to memorialize the meeting, with no changes to the existing March 3, 2016 IEP.

29. In March 2017, Tehachapi informed Mother that it was agreeable to conducting formal assessments in spring 2017, including an academic assessment, as early preparation for Student's triennial review due by December 7, 2017. Parents were amenable, but arrangements broke down when Tehachapi declined to allow Student's behavior aide to accompany her during testing.

30. On March 27, 2017, Tehachapi attempted to schedule an IEP team meeting in April 2017 to discuss getting Student back in school. Mother declined to attend another IEP team meeting. She told Tehachapi that another meeting was not warranted because it had not conducted formal or informal academic assessments. Mother wanted Student's academic goals rewritten in light of Student's progress with Lindamood Bell instruction and felt that would not be possible without Tehachapi also assessing Student. Mother requested an IEP team meeting longer than two hours be scheduled to review academic assessments.

31. On April 19, 2017, OAH issued its decision regarding Student's insurance-funded behavior aide. The decision did not order Tehachapi to allow Student's insurance-funded aide to provide behavior services at school, but rather, ordered Tehachapi to convene an IEP team meeting to discuss the issue further. Tehachapi was ordered to pay the insurance-funded behavior program supervisor, Dr. Hayden, to attend that meeting. If the IEP team decided to allow private behavior aides in the classroom, the decision ordered Tehachapi to fund specified hours of training and collaboration between the private behavior aide, classroom teacher and school staff before the private aide accompanied Student into the classroom.

32. On May 19, 2017, Tehachapi convened an IEP team meeting to comply with the OAH order. Tehachapi also wanted to discuss extended school year services for Student. Mother, Student's advocate, a family friend, Mr. Ferrell, Ms. Duff, a general education teacher, Dr. Hayden and an associate from Hayden Consultation Services, a

school psychologist, a school nurse, a school program director, and a school administrator attended. The meeting started five minutes early.

33. Dr. Hayden explained that he completed a behavior assessment in the home according to insurance company standards and not a formal functional behavior assessment related to school performance. Both Mother and Student's advocate contributed to the discussion of Student's current behaviors. Dr. Hayden expressed concern about Student's social skills and social development, particularly as she had been out her entire fourth grade school year and missed opportunities to practice her social skills or access to peer role models. Student used aggression and threats of aggression to escape non-preferred activities, and needed to learn appropriate behaviors for dealing with non-preferred tasks. Dr. Hayden had recommended, and the insurance company had approved funding for, 40 hours per week of behavior intervention with supervision.

34. Dr. Hayden stressed that Student would take instruction from her teachers. The behavior aides would sit next to or behind Student to use behavioral strategies and provide behavior support, but would not deliver curriculum. He envisioned behavior support allowing Student to participate in both special education and general education classes. Ms. Duff and the general education teacher expressed that the behavior aide could be accommodated in their classrooms, although they worried about the impact on the rest of the class.

35. Dr. Hayden told the IEP team Tehachapi would not be responsible for monitoring or supervising the behavior aides, reporting on behaviors, or adapting Student's behavior plan, which Hayden Consulting would do on a regular basis as part of its obligation to Student's physician/insurance company. The team agreed to have the medically-prescribed behavior aide accompany Student at school pursuant to a

health plan. Team members also agreed that no behavior plan was necessary for the IEP, as Student had a prescription for behavior support.

36. Mr. Ferrell wanted to finalize a memorandum of understanding with Hayden Consulting that set out school district requirements for adult behaviorists to work on campus (such as fingerprinting) and have it approved by Tehachapi's school board. The IEP team discussed a schedule with the goal of having Student back in school by June 15, 2017, which would be a week into the four-week 2017 extended school year.

37. The team then discussed the components of an extended school year program for Student's return to school. Tehachapi offered placement in a special day class for students with mild to moderate disabilities. Ms. Duff again expressed concern about whether a mild to moderate placement was appropriate for Student, who had severe academic and communication deficits, but the IEP team believed the placement would provide information on how Student handled the transition back to school and baselines for an IEP team meeting to be held at the beginning of the 2017-2018 school year. The Tehachapi team members agreed to maintain Student's direct speech services at the same level, 160 minutes per month, but removed the 80 minutes per month of consultation between the teacher and the speech pathologist as unnecessary for three weeks of extended school year.

38. The IEP team agreed to reconvene in August 2017, and the meeting was adjourned after three and one-half hours. A seven-page IEP document was prepared, modifying the March 3, 2016 IEP to note keyboard access for English language arts embedded in the classroom, and offering extended school year.

39. After the May 19, 2017 IEP team meeting, a memorandum of understanding with Hayden Consulting was approved by the school board. On June 13, 2017, Mother signed consent to the extended school year placement offered in the



seven-page May 19, 2017 IEP, with Student to be accompanied by the insurance-funded behavior aide.

40. On June 18, 2017, Mother emailed Mr. Ferrell that despite Student's ability to speak in sentences when asked by adults, and to repeat lines from movies, she struggled to initiate conversations with same-age peers and mispronounced a number of words, such as saying "cwose" for close. Mother requested speech goals be drafted at the next IEP team meeting in the areas of initiating and maintaining conversation and correct pronunciation.

41. On August 2, 2017, Tehachapi sent Mother an IEP team meeting notice for August 10, 2018, and included both the positions and names of persons scheduled to attend. Mother signed and returned the notice, indicating she would attend.

42. On August 10, 2017, Tehachapi convened an IEP team meeting to review Student's transition back to school and her performance during the extended school year, in anticipation of the upcoming 2017-2018 school year.<sup>5</sup> Mother, Student's advocate, a family friend, Dr. Hayden and an associate, Mr. Ferrell, Ms. Duff, fifth grade special education teacher Sue Morrison, school speech pathologists Mary Ferrell and Kathy O'Malley, an administrator, a school nurse, and a school psychologist attended. The meeting began 14 minutes late.

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<sup>5</sup> Student did not move into evidence copies of the IEP documents from August 10, 2017, September 15, 2017, or October 16, 2017. Instead, Student submitted a heavily redacted, cut-and-paste IEP document created by Mother, that incorporated changes and additions Mother sought, without distinguishing the original content from Mother's proposed revisions. Information on what occurred at those IEP team meetings was gleaned from the testimony of witnesses, those parts of the IEP documents still intact and the audio recordings.

43. The IEP team agreed to develop a new annual IEP for Student. The IEP team reviewed a new Lindamood Bell test report. In July 2017, Lindamood Bell had administered the same battery of tests administered in July 2016. Student's picture vocabulary score dropped from the fifth to the second percentile, but in two reading tests her score increased from the first to second percentile, and third to fifth percentile, respectively. Student continued to score at or below the first percentile on the remainder of the 15 standardized scores reported. On an oral reading test, Student recalled from 25 to 63 percent of what was read to her at the pre-primer to second grade level, but nothing from the third or fourth grade level. On a test of writing skills, Student identified only 20 of 50 sound symbols and could not sound out any nonsense words, the same level as July 2016. The team called Ms. Perry on the telephone, and Ms. Perry was very optimistic about Student's progress. She recommended that Student continue Lindamood Bell instruction for four hours per day, five days per week, for 30 to 50 weeks, or a total of 600 to 1,000 hours. Ms. Perry conceded to the team that Lindamood Bell was no longer a nonpublic agency certified by the State of California Department of Education to provide educational services to students with special needs, but suggested that Lindamood Bell could set up a learning center for students on the Cummings Valley campus, or work with Student online for one to two hours per day.

44. After the call with Ms. Perry, Mr. Ferrell explained that Tehachapi already had programs to assist students with reading and other academic skills, including the Wonders reading program. Ms. Duff noted that the students in her mild to moderate special day class were generally two years behind grade level, and Student was three to four years behind according to the Lindamood Bell test results. Mother requested that Student participate in Lindamood Bell for four to five hours per day during the winter, spring and summer breaks.

45. The extended school year teacher's report was read. Student had transitioned back to school well. Student did best with math and liked using a calculator. Mother requested that the IEP team look again at occupational therapy, as Student struggled with writing, but after some discussion, Tehachapi team members deferred further discussion for the annual review in December 2017.

46. Dr. Hayden reported on behavior intervention during extended school year. Student exhibited maladaptive behaviors due to academic frustration, but did well with reminders and prompts. Student had been resistant to leaving the classroom for speech services. IEP team members expressed concern that Student's stay put IEP required an instructional aide with her as well, and Dr. Hayden promised to collaborate with Ms. Duff to create a smooth working relationship between adults in the classroom.

47. The IEP team discussed placement for the 2017-2018 school year and offered Student placement at Cummings Valley in a mild to moderate special day class, with 18 percent of her time mainstreamed into general education. Student was offered speech services of 60 minutes per week, which the team discussed would be delivered as 40 minutes per week in a small group, and 20 minutes per week of consultation between the speech pathologist, Student's teachers and the aides. The team agreed to meet again after the school year started to discuss the best classes for mainstreaming and opportunities for social skills practice. The IEP team agreed that Mother could visit a mild to moderate classroom taught by Julie Hagerty. The meeting lasted for two hours and fifteen minutes.

48. Tehachapi prepared an August 10, 2017 IEP document that included present levels of performance from the March 3, 2016 IEP as modified by the team's discussion, the goals from the March 3, 2016 IEP, the accommodations page from the May 19, 2016 IEP, and the current offer of placement and services, constituting a complete IEP document. The August 10, 2017 IEP did not specify which or what amount

of speech therapy would be provided in a small group or by consultation, because the IEP software program used by Tehachapi did not have a pull-down menu to insert the delivery model of services offered.

## 2017-2018 SCHOOL YEAR

49. Beginning with the 2017-2018 school year, Mr. Ferrell was no longer the administrator responsible for speech pathologists and speech services in the special education department.

50. On August 11, 2017, Mother asked Tehachapi staff for information on the Wonders reading program.

51. Before the 2017-2018 school year began, Mother visited two special day classrooms for fifth grade students with mild to moderate disabilities and spoke to the teachers, Ms. Duff and Julie Hagerty. At Mother's request, Student was reassigned to Ms. Hagerty's classroom.

52. On August 22, 2017, Tehachapi sent Mother an IEP team meeting notice for September 15, 2017. It included both the positions, and the names of persons scheduled to attend.

53. On September 15, 2017, Tehachapi convened an IEP team meeting to discuss Student's present levels of performance. Mother, Mr. Ferrell, Ms. Hagerty, Ms. Morrison, speech pathologists Ms. Ferrell and Ms. O'Malley, a school psychologist, a school nurse, and an administrator attended.

54. The IEP team discussed reading intervention programs used by Tehachapi to help students with mild to moderate disabilities improve decoding, fluency, comprehension and other reading and English language arts skills. In particular, the team discussed the Wonders reading intervention curriculum, which was already embedded in Ms. Hagerty's classroom. The Wonders program allowed for informal assessment as students progressed in the curriculum. Mother wanted Student to receive

Lindamood Bell program instruction, but Tehachapi team members wanted to test Student's progress under the Wonders program after six weeks to compare Student's progress to that under Lindamood Bell.

55. The team also discussed Student's upcoming triennial review. Parents and Tehachapi team members had differing views of Student's abilities and potential. Parents did not trust Tehachapi staff to conduct appropriate assessments of Student, and Tehachapi agreed to consider funding independent psychoeducational and speech and language assessments for the triennial. Mr. Ferrell asked Mother to notify Tehachapi of their choice of independent assessors. The meeting was adjourned after two hours and fifteen minutes, and a page of meeting notes was added to the back of the August 10, 2017 IEP.

56. After the September 15, 2017 IEP team meeting, Mother emailed materials on Lindamood Bell reading intervention to Mr. Ferrell. She also requested written information on the reading intervention programs discussed in the IEP team meeting, particularly the Wonders program. Mother had been impressed with Student's progress at Lindamood Bell and speculated that that program was superior to Tehachapi's reading interventions.

57. On September 18, 2017, Mother emailed Mr. Ferrell requesting that the next IEP team meeting be in early October, excusing several members of the team and requesting copies of any assessments and proposed goals prepared for the meeting. Mother expected that Ms. Hagerty would have informal academic assessments of Student's reading levels in Wonders, but Student was still working on reading goals from 2014 because Parents had not consented to the goals in the March 6, 2016 or August 10, 2017 IEPs.

58. On September 19, 2017, Mother notified Tehachapi of Parents' choice of Gary Katz, Ph.D., and Karen Schnee, speech language pathologist, to perform the

triennial independent educational assessments in psychoeducational functioning and language and speech, respectively. Mother also requested an occupational therapy assessment be performed by the school district.

59. On September 28, 2017, speech pathologist Ms. Ferrell emailed two proposed communication goals to Mother: for Student to (1) improve expressive language skills by initiating a conversation with a peer or adult staff and maintaining through three conversational exchanges; and (2) improve pragmatic skills by expressing her wants and needs to adult staff when frustrated or upset by words, gestures, or other appropriate means.

60. On October 16, 2017, Tehachapi convened an IEP team meeting to discuss Student's present levels of performance. Parents, Student's advocate, Mr. Ferrell, Ms. Hagerty, Ms. Morrison, Ms. Ferrell, a school psychologist, and the principal attended.

61. Mother complained that the IEP team notice had not contained individual's names, and Mr. Ferrell explained that individual's names were not required, but Tehachapi would always notify Parents of the positions of the team members invited.

62. The IEP team discussed Student's present levels of performance in academics. In math, Student could add two three-digit numbers with the use of manipulatives, and identify three-digit numbers. She was learning to add and subtract with a calculator, but did not yet grasp multiplication. In reading, Student could read third grade sight words, recall facts from simple consonant-verb-consonant books and read third grade books that she had memorized, but struggled with comprehension. In writing, she could copy sentences. Behaviorally, Student was able to use a visual schedule to transition and enjoyed earning stickers for work completed. Student pounded her fists and hit herself when she became frustrated, but recovered well with

two-minute breaks. Mother shared that Student was also learning to self-regulate at home.

63. The IEP team discussed developing math, reading, and writing goals, and Ms. Hagerty agreed to draft proposed goals based on the team discussion of present levels and send them to Mother.

64. Ms. Ferrell presented proposed speech goals. Mother wanted the draft goal about initiating or responding in a conversation to include incremental increases in the number of conversational turns, with the annual goal for Student to maintain a conversation through seven to 10 exchanges. Ms. Ferrell agreed to revise that annual goal to include greater increases in conversational turns.

65. Mother asked that the IEP require Tehachapi to video record Student working on her goals each month and send the recordings to Parents as a form of progress report. Tehachapi declined to provide videotaped progress reports.

66. The IEP team discussed and agreed that Tehachapi would fund independent educational evaluations in the areas of psychoeducational functioning and speech and language for Student's triennial review. Mother confirmed Parents' choice of Dr. Katz and Ms. Schnee as assessors. Ms. Schnee had previously performed an assessment of Student in 2015. Parents again requested an occupational therapy assessment by the school district, and Tehachapi agreed to send Parents an assessment plan. The meeting lasted two and one-half hours.

67. On October 17, 2017, Ms. Hagerty emailed Mother proposed academic goals per the IEP team discussion: in math, (1) to divide a three-digit number by a two-digit divisor using manipulatives or a calculator and (2) to learn place values (for example, that 2 has the value of 200 in 7236); in reading (3) to learn 200 high frequency fourth and fifth grade sight words, (4) to decode regularly spelled multi-syllable words with guidance, and (5) to pull key ideas and evidence from text; and in writing (6) to

write a one-paragraph narrative of a real or imagined event with details and a clear sequence, with guidance.

68. On October 19, 2017, Mother emailed Tehachapi requesting that Tehachapi update the accommodations and least restrictive environment pages of the August 10, 2017 IEP, remove four pages of 2014 assessment data that indicated that Student had an intellectual disability and provide her with a complete copy of the finished IEP.

69. On October 20, 2017, Ms. Ferrell sent Mother a revised communication goal, that Student would initiate and/or respond and maintain a conversation using appropriate eye contact, turn taking, and topic maintenance with a peer or adult staff for 10 or more turns.

70. On October 24, 2017, three school days after her first request, Mother again asked Tehachapi for a copy of the August 10, 2017 IEP with her requested changes.

71. On October 26, 2017, Mother made a written request for the occupational therapy assessment she had verbally requested at the October 16, 2017 IEP.

72. On October 27, 2017, Mr. Ferrell's assistant emailed Mother that Mr. Ferrell had been unavailable for several days, but that she would be meeting with him the following Monday to review changes made to the August 10, 2017 IEP at Parent's request. A copy would then be sent to Parents. Mother replied with an additional list of changes for the IEP.

73. Impatient with the IEP team process, on October 31, 2017, Mother created her own cut-and-paste version of the August 10, 2017 IEP with the changes she wanted. For example, Mother added that Tehachapi would record monthly videos showing Student's work on goals, deleted intellectual disability as one of Student's special education eligibility categories, covered up baseline information she disagreed with and



inserted a speech goal of 10 conversational exchanges and Ms. Hagerty's draft academic goals. Mother wrote onto the document that Student would receive 20 minutes per week of one-on-one speech services and 40 minutes per week of speech services in a small group. The cut-and-paste document was signed "in attendance only," and included a page at the back summarizing corrections and disagreements. The attachment stated that Parents would agree to implementation of the goals, with the addition of video recorded progress reports. Mother forwarded her cut-and-paste August 10, 2017 IEP document to Tehachapi. Tehachapi did not interpret the unsigned, parent-created document as consent to any portion of the actual August 10, 2017 IEP offer of special education and related services, but placed Mother's cut-and-paste IEP into Student's educational records.

74. On November 1, 2017, Mr. Ferrell emailed Mother that Sara Ortiz-Davitt, an occupational therapist employed by Tehachapi, would conduct an occupational therapy assessment of Student. He asked for clarification regarding an earlier emailed request from Mother for an "inclusion" assessment, explaining the qualifications of certain Tehachapi staff to assess a student's ability and readiness to be included in a general education setting. He indicated that he would compile a list of the special education teachers who had that certification and asked if Mother had an independent inclusion specialist in mind. Mr. Ferrell reported he was waiting for cost information from Dr. Katz and Ms. Schnee to finalize the contracts for their upcoming assessments.

75. On November 8, 2017, Mother emailed Mr. Ferrell to inquire if the contracts for the independent assessors had been finalized. Mr. Ferrell responded that he had not received cost information from Dr. Katz, but agreed to fill out Dr. Katz' contract with the last amount billed by Dr. Katz for a similar assessment.

76. On November 9, 2017, Mr. Ferrell emailed Mother an assessment plan for the occupational therapy assessment. Mother checked a box on the plan for "three year

review,” signed the assessment plan on November 10, 2017, and returned the plan the next day.

77. On November 14, 2017, Tehachapi’s school board approved the contracts for independent assessments by Dr. Katz and Ms. Schnee.

78. On November 17, 2017, Ms. Schnee began her speech and language assessment of Student. She observed Student in Ms. Hagerty’s classroom for 30 minutes in the morning and during lunch. Student was familiar with daily classroom routines, and able to follow three-to-four-step directions. Ms. Schnee did not observe Student interacting with her classmates. Student said “blacktop play” to her aide as a request to go outside. Ms. Haggerty reported that Student did not initiate conversation with her peers and struggled with sharing. Student could read the words in fourth grade books, but did not comprehend at that level and struggled with decoding. Student enjoyed working with manipulatives for math and could copy simple sentences with prompting and guidance.

79. Based on a previous private cognitive assessment of Student obtained by Parents and a cognitive measure administered by Ms. Schnee in 2015, Ms. Schnee was of the opinion that Student had average “nonverbal” intelligence. Ms. Schnee reviewed the Lindamood Bell test results, and Mother told her that during one-on-one Lindamood Bell instruction, Student had made amazing progress in six weeks, demonstrated focus to task for 55 minutes at a time and had not exhibited any maladaptive behaviors.

80. Ms. Schnee administered a standardized test of oral language. Student scored in the borderline range for picture vocabulary and in the extremely low range for oral comprehension and understanding directions. Student’s oral language composite standard score was 51, in the extremely low range. However, in a rapid naming subtest, where a student is asked to name common pictured objects, Student earned a score in

the average range. In a standardized test of auditory comprehension, Student scored in the borderline range in vocabulary and elaborated sentences (e.g., questions, negative) and low average in grammatical morphemes (e.g., pronouns, verb number and tense). Ms. Schnee had administered the same test in 2015, and Student had increased from borderline scores in two categories, but shown a decrease in core vocabulary. In a standardized measure of spoken language, Student scored in the extremely low range in all categories, including expressive vocabulary, sentence expression, grammatical morphemes, and inferences. On additional spoken language subtests administered, Student scored in the extremely low range in receptive vocabulary, sentence comprehension, and pragmatic language (social communication), in the borderline range in antonyms (opposites), and a low average score in synonyms (similar meanings).

81. Student's overall intelligibility was 60 to 70 percent, without voice or fluency disorder. Her mean length of utterance for spontaneous statements was five words, although she typically spoke with echolalia (repeating words heard) and scripting (learned phrases).

82. From this testing, Ms. Schnee concluded that Student qualified for speech therapy and should be mainstreamed with typical peers to have exposure to and contact with appropriate role models. In the area of academics, she concluded that Student should be taught on a one-to-one basis to bring her academic skills up to Student's full potential, including with a Lindamood Bell program to be embedded at Student's school site.

83. On November 27, 2017, Tehachapi attempted to schedule with Parents the dates of December 7, 2017, for Student's "annual" IEP team meeting, and December 15, 2017, for Student's "triennial" IEP (due December 18, 2017). Mother responded that she did not understand why Tehachapi was scheduling two IEP team meetings and that she

was not available on December 7, 2018. She also requested that Dr. Katz and Ms. Schnee attend the annual review to give their assessment reports.

84. On November 27, 2017, Mother completed a parent questionnaire on Student's behaviors and adaptive skills that had been sent to her by Dr. Katz.

85. Mr. Ferrell emailed Mother on November 27, 2017, that Student's annual was due before the triennial, and California Department of Education audits required school districts to at least begin the meetings by the dates required. He requested Mother consider "combining" the annual and triennial. The IEP team could then open and close a meeting on December 7, 2017, with no action, and continue the meeting to January 2018 to allow the independent assessors more time, as he no longer thought that the independent assessment reports would be ready by December 15, 2017.

86. Mother was dismayed and upset. She believed that Tehachapi had not acted quickly to ensure that the independent assessments would be ready for a timely triennial review. She was anxious to have a new IEP offer in place for her daughter, as Tehachapi had not agreed to implement her cut-and-paste document. Mother emailed a demand to know when Tehachapi would have a final IEP with an offer of special education and related services for Student.

87. On November 28, 2017, Mr. Ferrell responded that he could not commit to whether the IEP would be completed at the next meeting, but noted Tehachapi had invested 10 to 12 hours in collaborating with Mother on creating an educational program for her daughter and wanted the IEP completed as much as she did. He also noted that Mother had changed the occupational therapy assessment plan by checking a "triennial" box on the form, but that was incorrect as the occupational therapy assessment was being done at parental request and not for the triennial review. He asked Mother to sign a new assessment plan without change.

88. On December 5, 2017, Tehachapi sent Mother a notice of IEP team meeting scheduled for December 15, 2017. The notice listed the positions and names of all persons invited to attend.

89. On December 7, 2017, Tehachapi convened an IEP team meeting that was opened and closed without action, and neither Parent attended. Tehachapi prepared a few pages to document the meeting, and sent a copy to Parents with proposed a health plan for Student's behavior aide services. Mr. Ferrell believed that Mother had consented to an IEP team meeting with no action, although Tehachapi did not have such consent in writing.

90. On December 8, 2017, Mother signed and returned the meeting notice for December 15, 2018, indicating that she would attend.

91. On December 8, 2017, Mr. Ferrell contacted Ms. Schnee to see if she was available to attend an IEP team meeting on December 15, 2017, and review her assessment with the IEP team. Ms. Schnee had completed the speech assessment and emailed a copy to Mr. Ferrell. She was available on December 14, 2017, but was leaving the country for two weeks the day after.

92. Dr. Katz, a licensed and well-qualified psychologist, performed his psychoeducational assessment of Student in December 2017. Dr. Katz prepared for Student's psychoeducational assessment by conducting a comprehensive review of Student's educational background, including 100 assessments, reports, and other educational documents provided by Tehachapi and Parents. Student had a history of difficulty with social awareness, communication, and autistic mannerisms, and extremely low or unavailable cognitive scores, possibly due to Student's language impairment, her inability to perform test measures due to being on the autism spectrum, or both. In psychoeducational testing for her last triennial in 2014, Student's academic skills fell at or below the first grade, with extremely low to borderline scores. In December 2015

testing by a private psychologist retained by Parents, Student scored average in a brief measure of nonverbal intelligence, although academic scores fell at or below the first percentile. School records reflected that Student was generally a happy child, but did not independently initiate social contact with peers. Student also had a history of being pulled out of school by Parents and kept at home.

93. On December 11, 2017, Dr. Katz observed Student in her special day class for 45 minutes. There were seven students and seven adults, including the classroom teacher. The teacher engaged in direct and group instruction and played videos on appropriate social interaction. For 78 percent of the time, Student was engaged in the lesson and appropriately transitioned between tasks.

94. On December 11, 2017, and January 11, 2018, Dr. Katz administered multiple standardized measures of cognitive ability and achievement, and rating scales for behavior and adaptive skills. Student was tested with her behavior aides present, but the aides were out of Student's view and interacted with her very little. During testing, Student was verbal, quickly engaged in testing tasks and responded to encouragement. She also exhibited a flat affect, made little eye contact, repeated what was said, engaged in scripted speech and made mild articulation errors. Dr. Katz administered multiple tests and subtests to confirm that the results obtained were consistent. Dr. Katz believed that the scores obtained were accurate reflections of Student's ability.

95. Student's cognitive scores on a verbal intelligence measure were in the low to extremely low range. Her scores on two non-verbal intelligence tests were higher, in the delayed range, with below average or low average scores in reasoning and visual processing. Student displayed relative strength in applying her acquired word knowledge and performing on verbal tasks. Her scores indicated relatively poor working memory capacity and slow processing speed interfered with Student's capacity to perform complex verbal tasks. She had stronger scores when manipulating materials,

indicating better performance when she could use a hands-on approach over visualization. Student scored extremely low in a fluid reasoning subtest, suggesting difficulties identifying and applying important information. She exhibited weak ability to acquire, retain, and retrieve knowledge about the world around her. On a measure of academic achievement, Student earned extremely low scores at or below the first percentile in all categories. Dr. Katz reasoned that Student's academic skills were below the estimates of her cognitive ability.

96. Dr. Katz diagnosed Student with mild intellectual disability, autism spectrum disorder, attention deficit hyperactivity disorder (predominantly inattentive), with generalized anxiety disorder and a history of language disorder.

97. On December 14, 2017, Mr. Ferrell emailed Ms. Perry, asking whether Lindamood Bell could provide Student with online program classes for an hour per day after school, four days per week for 20 weeks, for a total of 80 hours. Ms. Perry said she would look into it.

98. On December 15, 2017, Tehachapi convened Student's triennial IEP team meeting. Mother, Student's advocate, a family friend, Mr. Ferrell, Ms. Hagerty, Ms. Morrison, Ms. Ferrell, the school principal and a school psychologist attended. The meeting began 18 minutes late.

99. Ms. Schnee was unavailable, Dr. Katz had not finished his report, and the occupational therapy assessment was not yet due or finalized, so the IEP team agreed to meet again in January 2018 to review assessments.

100. Mother requested one-on-one speech services, but Ms. Ferrell explained that one-on-one speech services were for students with severe apraxia or difficulties with sound production. Ms. Ferrell told the IEP team that Student needed small group speech instruction to learn pragmatic (social communication) skills, which was Student's primary area of language need. Ms. Ferrell recommended an additional 20 minutes of

speech consultation per month, which would include classroom observation and working with the teacher and Student, to develop learning strategies that could be implemented throughout the day. The additional consultation minutes were adopted by the IEP team and added to the IEP, pending review of Ms. Schnee's report. Mother, Student's advocate, and the family friend noted that Student was very difficult to understand and expressed concerns that if her speech services were provided in a small group with other Students with speech problems, her progress would be stunted. Tehachapi team members decided to wait for Ms. Schnee to present the results of the independent speech and language assessment prior to developing speech goals and deciding the level of speech services.

101. The team discussed computer access in the classrooms. Student's advocate preferred that Student use a Chromebook or iPad, but Mr. Ferrell noted that the computers in Student's classrooms had the software to support Student's learning and keyboards for learning keyboarding skills.

102. Ms. Hagerty reported that Student had moved on to three-digit subtraction and enjoyed math. She reported that Student's behaviors had greatly improved because of the support of the behavior aide. The team agreed that Student did not need a behavior plan because Hayden Consulting had developed and was managing Student's behavior as part of her health plan.

103. Mother requested that Student have more mainstreaming time in the general education classroom. The IEP team agreed that Student could attend general education music, computer, and library periods. Student's advocate wanted Student to be mainstreamed into a general education science or math class, explaining that Student could just sit in the room and work on her own assignments, such as manipulatives math, rather than participate in grade-level curriculum. The team discussed having Student go to a few social studies classes instead, as the reading for



those classes could be supported in Student's special day class. Tehachapi team members agreed that Student would be mainstreamed in general education for 32 percent of her time, the same percentage offered in the May 19, 2017 IEP, with daily classes rotated through physical education, music, computer, and social studies, as well as time with typical peers during lunch and recess. The mainstreaming schedule would start after the winter break, and plans were made to introduce Student to the general education classes over the next week.

104. The IEP team discussed proposed goals, but agreed that the discussion should be deferred until Student's present levels of performance were updated in light of the triennial assessments. Mother again requested that Student's progress be video recorded and Tehachapi offered, instead, to let Mother visit the classroom and observe.

105. The IEP team meeting lasted for almost three hours. The IEP team members agreed to reconvene in January 2018, and the meeting was adjourned. Mother was provided with a copy of the December 15, 2017 IEP, which did not yet have completed present levels, goals or an offer of special education and related services.

106. On December 19, 2017, Tehachapi sent Mother a notice of IEP team meeting to continue the triennial review on January 18, 2018. The notice contained the positions of each of the Tehachapi staff members invited, but did not provide individual names. Mother signed and returned the notice, stating she would attend.

107. On January 16, 2018, Mother requested a copy of the occupational therapy assessment report from Tehachapi. Mr. Ferrell responded that the 60-day time period for the occupational therapy assessment review had not run, and that the assessment report would not be reviewed at the January 18, 2018 IEP team meeting.

108. On January 18, 2018, Tehachapi convened an IEP team meeting. Mother, Student's advocate, a family friend, general education teacher Ms. Morrison, Ms.

Hagerty, Dr. Katz, Dr. Hayden, Mr. Ferrell, a school speech pathologist, and an administrator attended. The meeting started 15 minutes late.

109. General education teacher Ms. Morrison reported on Student's progress in mainstreaming. Student seemed overwhelmed in music class and wanted to leave, but enjoyed the computer lab. Student also attended social studies and library. Ms. Morrison was collaborating with Ms. Hagerty on Student's integration into general education classes.

110. Dr. Katz shared his assessment results and observations. Working memory and processing speed were areas of specific weakness for Student, and her cognitive abilities were in the extremely low to below average range, with scattered stronger abilities. In academic achievement, Student was generally at or below the first percentile. He concluded that Student had a broad array of academic deficits that included difficulty with understanding and using language, spoken and written, and an imperfect ability to listen, think, speak, read, write, spell, and do mathematical calculations. He recommended that the team set high expectations, that Student be presented with opportunities to interact with neurotypical peers, that goals be small and measurable and increase in complexity as Student's skills grew, that Student be given a quiet place to work apart from other Students, that Student's assignments be short and varied, and that teachers use multiple teaching modalities, among others. Team members wanted more information from Dr. Katz, but agreed to move on to Ms. Schnee's report and have Dr. Katz return for another IEP team meeting.

111. Ms. Schnee shared her assessment results and told the IEP team Student's receptive and expressive language skills were low, and her use of sentences and grammar was in the extremely low range. Student had improved in intelligibility from 2015, but had significant vocabulary deficits, was unable to follow multi-step oral directions, and had severe delays in pragmatic language. Ms. Schnee recommended as

annual goals that Student: (1) master the meaning of 50 new words to expand vocabulary, (2) demonstrate the ability to follow two to three consecutive oral directions utilizing prepositions, pronouns and temporal ordering, (3) demonstrate the ability to make simple inferences from curricular text, and (4) demonstrate the ability to greet peers, request help, and state a polite refusal in a structured small group setting.

112. Ms. Schnee recommended that Student receive two 20-minute sessions in the classroom (push-in services) and two 20-minute individual sessions in the speech room (pull-out services) to work on the proposed goals. Ms. Schnee also recommended a 45-minute weekly social skills group or “lunch bunch” for Student to practice social skills. A lunch bunch is organized interaction between a small group of typical peers and students with social language deficits, to give the latter an opportunity to practice learned social skills such as greeting peers, maintaining eye contact, and engaging in conversations on topics of shared interest. A lunch bunch is held in a safe space and interactions are facilitated by a speech pathologist. Ms. Schnee also recommended one-on-one educational therapy and the Lindamood Bell method for reading instruction.

113. The meeting adjourned after three hours, with an agreement to reconvene to discuss Dr. Katz’s recommendations and review the occupational therapy assessment. Tehachapi created a separate four-page IEP document for this IEP team meeting, consisting of notes and a signature page. Those notes were not physically included in the triennial review IEP dated December 15, 2017, and did not constitute a new offer of special education and related services.

114. After the January 18, 2018 IEP team meeting, Tehachapi sent Mother a notice of IEP team meeting to continue the triennial review on January 30, 2018. The notice contained the positions of each of the Tehachapi staff members invited, but did not provide individual’s names.

115. On January 25, 2018, Mother signed and returned the IEP team meeting notice for January 30, 2018, indicating that she would attend, but writing on the notice that the lack of names made it impossible for her to know if the meeting should be rescheduled due to the unavailability of a key team member.

116. Prior to January 30, 2018, Ms. Ortiz-Davitt conducted an occupational therapy assessment of Student. Ms. Ortiz-Davitt observed that Student greeted people when she entered the room, sat where directed with prompting, and wrote her name at the top of the paper Ms. Ortiz-Davitt handed to her. Student followed instructions, and although she frequently looked around the room, she stayed seated throughout the assessment.

117. Student gripped her pencil correctly and used classroom manipulatives that required significant fine motor skills. Student participated in recess with her peers and was able to access all playground equipment. Student's physical education teacher did not report any concerns with Student's participation.

118. Ms. Ortiz-Davitt administered a test of writing ability, which tested memory for dictated letters, control (neatness and proportion), and letter orientation, placement, size, start, sequence, and spacing. Student generally oriented, placed, sequenced, and spaced her letters appropriately. She had difficulty keeping her letters on the line when she was looking elsewhere. Ms. Ortiz-Davitt believed that Student's writing errors could be addressed with the embedded classroom curriculum "Handwriting Without Tears" and double-lined paper to enable Student to better visualize letter size and line placement.

119. On January 30, 2018, Tehachapi convened an IEP team meeting. Mother, Student's advocate, a family friend, a representative from Hayden Consulting, Ms. Hagerty, Ms. Morrison, Ms. Ortiz-Davitt, a school psychologist, and a school administrator attended. The meeting started 17 minutes late.

120. Ms. Ortiz-Davitt presented her occupational therapy assessment and recommended specially lined paper as an accommodation, with an annual goal of writing three sentences with correct letter sizing and spacing with verbal and visual prompts. Ms. Ortiz-Davitt recommended that Student work on letter sizing and placement during classroom lessons, and that Student's teacher receive occupational therapy consultation for 30 minutes per month in the classroom to develop strategies for helping Student to practice and improve her writing skills on a daily basis. Student's advocate inquired if visual models on an iPad would be helpful, but Ms. Ortiz-Davitt stressed that classwork and direction from the teacher would be more beneficial. The IEP team members adopted Ms. Ortiz-Davitt's proposed goal, but after discussion, added 60 minutes per month of occupational therapy consultation to Student's IEP.

121. The IEP team discussed mainstreaming opportunities for Student, and Ms. Morrison reported that Student had difficulty attending the music class due to sensitivity to noise levels in that class.

122. The IEP team discussed the assistive technology devices, such as computers, available in the classrooms. Student's advocate still wanted Student to have a Chromebook. The meeting was adjourned after approximately three hours, to be continued.

123. Prior to February 20, 2018, Tehachapi sent Mother a notice of IEP team meeting to continue the triennial review on February 22, 2018. The notice contained the positions of each of the Tehachapi staff members invited, but did not provide individual names. Mother signed and returned the notice, indicating that she would attend and writing on the notice that the lack of names made it impossible for her to know if the meeting should be rescheduled due to the unavailability of a key team member.

124. On February 22, 2018, Tehachapi convened an IEP team meeting to continue the triennial review. Mother, Student's advocate, a family friend, Mr. Ferrell, Ms.

Hagerty, Ms. Morrison, speech pathologist Diane Cole, Dr. Katz, a school psychologist, and a school administrator attended. Ms. Barraza, the assistive technology specialist, joined the meeting by telephone. Ms. Ferrell was unavailable for several months in spring 2018, and other speech pathologists were responsible for providing speech therapy to students on her caseload. The meeting started 40 minutes after the noticed time.

125. Dr. Katz continued his review of the psychoeducational test results. He opined that Student should be viewed as a student with mild to moderate disabilities, but cautioned that her educational program should present concepts and materials at her developmental level. Student needed significant supports, such as pictures and graphs, incorporated into her instruction. He felt that Student's intellectual disability was the most significant factor impeding her ability to learn. Mother and Student's advocate vehemently disagreed that Student had an intellectual disability and insisted that Student's autism and resulting language deficits interfered with Student's ability to score higher on tests of cognition. Ms. Hagerty opined that Student's inattention and maladaptive behaviors were the biggest issues impacting Student's education. After a discussion, the IEP team agreed that Student's primary disability would be autism, with a secondary eligibility of speech and language impairment.

126. Ms. Hagerty reviewed Student's academic progress. Student could identify 200 fourth and fifth grade sight words, and Ms. Hagerty recommended a new reading goal to include vocabulary development. The IEP team discussed adding a math goal to address the concepts of area, perimeter, and basic geometry, which would coincide with an upcoming unit on the solar system.

127. The IEP team reviewed Ms. Hagerty's proposed reading goals and discussed using Lindamood Bell instruction. Ms. Perry had informed Mr. Ferrell that Lindamood Bell could provide online instruction for an hour a day, five days per week,

but Mr. Ferrell was concerned that Cummings Valley did not have the technology or connectivity to get such a program up and running. He recommended that the IEP team consider arranging for Student to receive the instruction at home for six to eight weeks, or 40 hours, and measuring Student's progress to see if the Lindamood Bell program was working before committing to additional hours. Mother was agreeable to Student accessing the program from the home computer.

128. On review of accommodations, the IEP team also agreed to add access to a laptop computer in the classroom as an assistive technology accommodation.

129. Mother requested clarification on whether the occupational therapy offered to Student was a direct or consultation service. Mr. Ferrell confirmed that the offer was for consultation with Student's teacher, and that Student would be working with her teacher, not the occupational therapist, on strengthening her writing skills.

130. The meeting adjourned after three hours with an agreement to reconvene to continue the triennial review. Tehachapi created a separate six-page IEP document for this IEP team meeting, consisting of notes and service, accommodation, and signature pages, that was added to the back of the triennial review IEP dated December 15, 2017.<sup>6</sup>

131. Prior to February 26, 2018, Tehachapi sent Mother a notice of IEP team meeting to continue the triennial review on the morning of March 13, 2018, a date and time Mother had requested. The notice contained the positions of each of the Tehachapi staff members invited, but did not provide individual names. Mother signed and returned the IEP team meeting notice on February 26, 2018. Mother also emailed Tehachapi that she would like a copy of the draft IEP prior to the meeting.

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<sup>6</sup> Multiple copies of the December 15, 2017 IEP were admitted into evidence. Although the page numbers for that IEP did not include the February 22, 2018 pages, those pages were included in one copy of the December 15, 2017 IEP. (Ex. S-198).

132. On March 1, 2018, Mother emailed Mr. Ferrell that she wanted to consent to occupational therapy, Lindamood Bell instructions, laptop access in the classroom and the mainstreaming time discussed to date, but could not because she had not yet received a complete copy of the December 15, 2017 IEP. Mother could not have consented to occupational therapy services, Lindamood Bell instruction, a laptop or increased mainstreaming, because Tehachapi had not yet made a new offer of special education and related services that contained those components.

133. On March 5, 2018, Mother again emailed Mr. Ferrell to request a copy of the draft IEP from the last meeting.

134. On March 9, 2018, Ms. Hagerty emailed Mother the revised academic goals developed from the discussion at the February 22, 2018 IEP team meeting. Ms. Hagerty informed her that the proposed communication goals were still being written by the speech pathologist. She also informed Mother that a different general education teacher would be at the upcoming meeting.

135. On March 13, 2018, Tehachapi convened an IEP team meeting to continue Student's triennial review. Mother, Student's advocate, a family friend, Mr. Ferrell, Ms. Hagerty, school speech pathologist Anne Wood, and a school psychologist attended.

136. The team discussed Mother's request for an inclusion assessment, and Mr. Ferrell reviewed with the IEP team the credentials of Tehachapi assessors, including several credentialed resource specialists. Student's advocate wanted Tehachapi to use an inclusion specialist she had heard speak at a seminar, who advocated for full inclusion for all students. Tehachapi team members agreed to have Dennis Costa, a resource specialist at a Tehachapi high school, perform the assessment and to reconvene for the IEP team to review the assessment in May 2018.

137. The team telephoned Ms. Perry to inquire about providing Student with 40 hours of services and retesting her in six weeks. Ms. Perry told the team that Lindamood



Bell would not enter into a contract for less than 100 hours.

138. The team discussed revision of the draft annual academic goals, with changes made in light of the triennial assessment reports and at Mother's request. Some goals were made more difficult, for example, one math goal was changed to include seven-digit numbers, and another was updated to include calculations of area, perimeter, and circumference. A reading goal was modified to address both reading and listening comprehension. One of the reading goals was rewritten to address fluency. The updated academic goals were adopted by the IEP team.

139. The meeting was adjourned after over three hours, with an agreement to reconvene. Notes of the March 13, 2018 IEP team meeting were added to the December 15, 2017 IEP, but no new offer of placement, program or services was made.

140. On March 16, 2018, Tehachapi sent Mother a notice of IEP team meeting to continue the triennial review to March 22, 2018. The notice contained the positions of each of the Tehachapi staff members invited, but did not provide individual names. Mother signed and returned the IEP team meeting notice the same day, indicating that she would attend, but wrote that the lack of names made it impossible for her to know if the meeting should be rescheduled due to the unavailability of staff members who worked with Student.

141. On March 19, 2018, Mother emailed speech pathologist Anne Woods to request a copy of the revised draft speech goals.

142. On March 20, 2018, Ms. Woods responded that she was still working on the goals, and in particular wanted to contact Ms. Ferrell, who had experience working with Student. She also informed Mother that there was not currently a social skills group at Student's school, so one could not be offered to begin until Student transitioned to middle school for sixth grade the following school year.

143. On March 22, 2018, Tehachapi convened an IEP team meeting to continue the triennial review. Mother, Student's advocate, a family friend, Mr. Ferrell, Ms. Hagerty, Ms. Morrison, Ms. Ferrell, Ms. Woods, and a school psychologist attended. The meeting started 17 minutes late.

144. Student's advocate asked that the goals be further modified to refer to regular reporting periods, and that sixth grade vocabulary words be added to the reading goals (along with fourth and fifth grade words), and those changes were adopted by the IEP team. Mother requested that Student be given more options on how to respond to questions for the reading comprehension goals, and the team added that Student could respond by choosing the correct picture card or sentence strip. Ms. Hagerty expressed concern that Student's goals were becoming overly complex, but agreed to use classroom accommodations, such as a calculator, to work on them.

145. At Mother's request, a speech goal was added for learning and using basic communication concepts. The two speech goals adopted by the IEP team were that Student: (1) Student initiate, respond and/or maintain a conversation using appropriate eye contact, turn-taking and topic maintenance through 10 turns with typical peers, and (2) given picture or verbal prompts, use temporal concepts, pronouns, and prepositions in complete sentences. The speech goals included formulas for measuring progress and incremental objectives.

146. The IEP team discussed Ms. Schnee's recommendation that Student have four individual 20-minute speech therapy sessions (two pull-out and two push-in), and Tehachapi team members expressed concern that Student would be pulled away from class repeatedly, particularly as middle school classes were longer than elementary school classes, and Student would miss instruction given to her classmates. The team changed the August 10, 2017 offer of 60 minutes per week of small group speech services to 40 minutes per week of individual push-in services and 40 minutes per week

of small group pull-out services, which aligned with the middle school bell schedule. The offer constituted a net increase in direct speech services from 60 minutes per week to 80 minutes per week.

147. The IEP team discussed Student's mainstreaming time, and at Mother's request, eliminated time in general education music. This reduced Student's time in general education to 24 percent of the school day. The IEP team agreed that the inclusion assessor, Dennis Costa, could observe Student and make recommendations for mainstreaming opportunities in middle school.

148. The meeting adjourned after four hours, and the IEP team agreed to reconvene in May 2018 to discuss the extended school year. Mother was provided with a copy of the December 15, 2017 IEP, with changes through the March 22, 2018 team meeting.

149. On March 22, 2018, after the meeting, Mother emailed Mr. Ferrell that the IEP was inaccurate and provided a list of errors or missing information.

150. On March 23, 2018, Mr. Ferrell replied that, indeed, some changes showed up in the IEP computer software system that did not print on the hard copy, and he attached two pages summarizing the information. He added that the school psychologist was still typing the results of Dr. Katz' assessment into the IEP, and once that was done, the pages would be renumbered and a complete copy would be sent to Parents. He noted that there would be a further discussion of speech minutes at the next meeting, and that the occupational therapy assessment had yet to be reviewed. Later that day, he forwarded a 24-page December 17, 2017 triennial IEP document to Mother.

151. On March 28, 2018, Mother took Student to Lindamood Bell for another evaluation. Lindamood Bell administered the same tests they had used to assess Student's reading skills in July 2016 and July 2017. Student's vocabulary skills had

improved from the second to third percentile since she last attended Lindamood Bell, from the kindergarten to first grade level. On three tests of learning aptitude, Student continued to score at below the first percentile, with the same scores she had earned on April 22, 2016, July 25, 2016, and July 19, 2017. On one oral reading test, Student scored at a higher age and grade equivalent, but was still below the first percentile. On one reading test, her score increased from the second to the fifth percentile; however, almost all of her academic scores remained at or below the first percentile.

152. On or before April 20, 2018, Tehachapi sent Mother a notice of IEP team meeting to continue the triennial review to April 27, 2018. The notice contained the positions of each of the Tehachapi staff members invited, but did not provide individual names. Mother signed and returned the IEP team meeting notice on April 20, 2018, indicating that she would attend, but wrote on the notice that the lack of names made it impossible for her to know if the meeting should be rescheduled due to the unavailability of a key team member.

153. On April 27, 2018, Tehachapi convened an IEP team meeting to consider Student's extended school year program and Lindamood Bell services. Mother, Student's advocate, a family friend, Mr. Ferrell, Ms. Hagerty, Ms. Morrison, a school psychologist, and a school administrator attended. The meeting began 17 minutes late.

154. The team discussed Lindamood Bell methodology for Student, and Mr. Ferrell indicated that Tehachapi was willing to fund 100 hours. Mother wanted Student to use some of those hours over the summer, but Tehachapi was worried that they would not have staff to accompany Student and wanted to offer one hour during the school day and one hour at home after school during the school year. Mother indicated that she thought Student's insurance aide would be sufficient to enable Student to attend Lindamood Bell during extended school year 2018, and Student had sufficient insurance hours to cover that. The IEP team agreed that Tehachapi would fund 100

hours of Lindamood Bell instruction for Student during extended school year, if there was room for Student in the Lindamood Bell summer program.

155. The IEP team discussed related services for the extended school year. Tehachapi team members and Mother agreed that during extended school year Student would receive 40 minutes of individual push-in and small group pull-out speech services per week and 60 minutes of occupational therapy.

156. The IEP team discussed speech services and the push-in and pull-out delivery models. Tehachapi team members envisioned that the speech pathologist would not provide push-in services to Student using a one-on-one delivery model, but would work with Student and her classmates on Student's conversational exchanges goal. Ms. Wood expressed discomfort with the characterization of such push-in services as "one-on-one," but that description of the push-in services was written into the IEP. In response to questions from Student's advocate regarding a social skills class, Mr. Ferrell informed the IEP team that the speech pathologists would be doing a unit of social skills in the special education classrooms.

157. Tehachapi's final offer of special education and related services was written onto a separate offer of FAPE page, and included: placement in a mild to moderate special day class, with mainstreaming in general education for 24 percent of the time; an instructional aide for the entire school day; 40 minutes of individual push-in speech services per week and 40 minutes of small group pull-out speech services per week; and 60 minutes per month of occupational therapy consultation services. For the extended school year, Tehachapi offered placement in a mild to moderate special day class that met for a reduced day during the four-week extended school year, with 20 minutes of individual push-in speech services per week and 20 minutes of small group pull-out speech services per week; and 60 minutes per month of occupational therapy

consult services. Tehachapi also offered Student 100 hours of reading instruction, with Lindamood Bell as the contracted provider subject to school board approval.

158. The meeting was adjourned after two hours. Tehachapi prepared a 26-page IEP document, dated December 15, 2017, that embodied Tehachapi's complete offer of special education and related services.

159. On May 1, 2018, Tehachapi sent Mother a notice of IEP team meeting on May 21, 2018, to discuss additions to the IEP for Student's transition to middle school the following school year. The notice contained the positions of each of the Tehachapi staff members invited, but did not provide individual names. Mother signed and returned the notice the next day, indicating that she would attend.

160. On May 7, 2018, Mother emailed the principal of Student's school to request a copy of the logs for speech services Student had received during the 2017-2018 school year.

161. On May 7, 2018, both Parents signed the 26-page December 17, 2017 IEP, completed on April 27, 2018, and returned it to Mr. Ferrell. They wrote on the signature page that they consented to implementation only and did not agree that the offer was a FAPE.

162. On May 10, 2018, Tehachapi scanned and emailed copies of the speech logs through February 2018. Ms. Ferrell had been out after that month, and Tehachapi notified Mother that it was collecting additional logs from the substitutes who had covered for Ms. Ferrell. For the next week, Mother continued to email multiple Tehachapi staff members inquiring about the speech logs. Mother was directed to contact one administrator for speech log information, which made Mother angry.

163. On May 15, 2018, Tehachapi made the remaining speech logs available for Mother to pick up.

164. On May 15, 2018, Dennis Costa, a resource specialist who was familiar with the services available at both middle schools in Tehachapi, reached out to Mother for her input.

165. On May 16, 2018, Mr. Costa met with Mother. After their discussion, he arranged for a resource specialist from one of the middle schools to attend the May 21, 2018 IEP team meeting.

166. On May 17, 2018, Tehachapi notified Mother that they calculated Student had missed 300 minutes of speech services in 2017-2018 school year and proposed to pull Student out for one-on-one speech services for the remainder of the school year to make up the difference.

167. On May 21, 2018, Tehachapi convened an IEP team meeting to discuss Student's transition to middle school. Mother, Student's advocate, a family friend, Mr. Ferrell, a general education teacher, special education teachers, and speech pathologists from each of the two middle schools, and a resource specialist from the local middle school attended. The meeting started 30 minutes late.

168. Mother requested that the dates for Student's annual review be changed to make the current IEP offer effective for an entire year, and to accommodate Parents' business schedules which were heavily impacted in December. Tehachapi team members agreed, and the IEP document was changed to reflect that the May 21, 2018 IEP team meeting was an annual review. Tehachapi moved all information from the December 15, 2017 IEP, completed on April 27, 2018, into a May 21, 2018 IEP document and realigned the dates in the annual goals for achievement by May 21, 2019.

169. A middle school resource specialist described the resource program at middle school, in which a resource specialist provided assistance to students in English language arts, math, and study skills. Sixth graders were also able to take electives in art, band, and technology. Middle schoolers took six periods of 51-minute classes, and a 20-

minute homeroom period, for a total of seven periods per day.

170. The middle school closest to Student's home had a moderate to severe special day class with an alternate curriculum and a focus on daily living activities. There was a possibility of splitting the class to make a higher-functioning mild to moderate special day class, but Mother indicated that she believed her daughter had academic potential and would not consent to placing Student in a class for students with moderate to severe disabilities. After a detailed discussion, Tehachapi team members recommended that Student take three periods of specialized academic instruction in the resource program for English language arts, math, and study skills, with mainstreaming into general education for science, social studies, physical education, and homeroom daily.

171. Mr. Costa did not attend, but he submitted a report. Per the report, Mr. Costa had observed Student at the cafeteria and in Ms. Hagerty's class for one hour. Student took direction well and had minimal interaction with her classmates. Both Ms. Hagerty and Ms. Morrison reported that Student rarely did work independently. However, other than waving her arms around and pulling her clothes partially off, she did not have behaviors that would interrupt a general education classroom. Mr. Costa also observed two special education classes at Jacobson Middle School and reported favorably on both. He had communicated with a resource teacher at Jacobson Middle School by email and opined that the resource class might be a general education option. He listed as concerns the pressure of keeping up academically in a general education classroom, the decrease in one-to-one instructional opportunities, potential disruptive behavior, and the hesitancy of middle school typical peers to interact with a student accompanied by an adult.

172. Mr. Costa did not testify at the hearing. His report was extremely cursory, and his opinions regarding the resource class were unsupported by any information



about the class. Notably, the report did not include any observations of, or information on, the non-resource general education classrooms available at either of the middle schools. Mr. Costa listed concerns, but no suggestions on if, or how, those concerns could be addressed to support Student in the general education environment. The report was incomplete and inadequate to advise the IEP team on how and to what extent Student could be mainstreamed in general education classes in middle school. Mother requested an independent educational evaluation by an outside inclusion specialist. The meeting adjourned after two hours, to be continued in June 2018 after Student had completed extended school year.

173. On May 30, 2018, in response to several email inquiries about Student's program by Mother over several days, Mr. Ferrell emailed Mother that Student was currently being served in a mild to moderate special day class, with an instructional aide, direct and consultation speech services, and transportation. He asked for time to confirm which goals were in place in light of the many IEPs. He also promised to schedule an IEP team meeting before the end of the school year on June 7, 2018, to discuss her concerns.

174. On June 4, 2018, Mother emailed Mr. Ferrell to request a copy of the May 21, 2018 IEP.

175. Tehachapi approved a 100-hour contract with Lindamood Bell and on June 13, 2018, Student began Lindamood Bell reading instruction. Student accessed a Lindamood Bell clinician online for four hours per day, working in 10 minute blocks with breaks between tasks. Student had her one-on-one behavior aide with her to facilitate instruction.

176. On June 25, 2018, Tehachapi emailed Mother a notice of IEP team meeting for June 29, 2018, with the positions and some names of the Tehachapi staff who would attend. Mother signed that she would attend and returned the notice the same day.

177. On June 29, 2018, Tehachapi convened an IEP team meeting to review the May 21, 2018 IEP in light of Student's progress during the extended school year session and to revise the annual goals if necessary. Mother, Student's advocate, Mr. Ferrell, a general education teacher, Student's special education extended school year teacher, a school psychologist and counselor from the middle school, and a representative from Hayden Consulting attended. The meeting started 20 minutes late.

178. Student's extended school year teacher reported that Student would be able to participate in a resource specialist classroom for math in middle school, if she had access to a calculator. Tehachapi team members adopted a change to Student's special education services to include a resource specialist class for the math period and study skills as an elective. Student would take English language arts, a difficult class for her, in a special day classroom. The IEP was modified to reflect that Student would be mainstreamed for 60 percent of her school day.

179. On Mother's report that chewing gum gave Student sensory input, the May 21, 2018 IEP was amended to allow discreet gum chewing in class as an accommodation.

180. The team discussed, without further changing the IEP, the Workability program offered at middle school, middle school activities, strategies for Student to become familiar and acclimated to the middle school campus and agreed to meet as the year progressed to discuss opportunities for Student to become more independent. The meeting lasted two hours and was adjourned. Mother was provided with a complete May 21, 2018 IEP, including the changes made at the June 29, 2018 IEP, which added intellectual disability as an eligibility category.

181. On July 16, 2018, Student filed the instant request for a due process hearing.

## POST-FILING EVENTS

182. On July 17, 2018, Mother signed a partial consent to implementation of the May 21, 2018 IEP, as amended on June 29, 2018, detailed in a "parent attachment." She consented to the class schedule and percentage of mainstreaming, the full-time instructional aide, 60 minutes per month of push-in occupational therapy services, implementation of the academic and speech goals, and the accommodations. She did not consent to 320 minutes per month of speech services, she did not agree to less speech hours during the extended school year, she did not agree that Student should not be able to chew gum outside the classroom, and she did not consent to intellectual disability as an eligibility category.

183. Mother included in the attachment that she thought the present levels of performance needed to be updated again, that the baselines for the writing, listening comprehension and communication goals were not measurable, and that the services page did not specify if services were provided one-on-one or in a small group and the lack of a definition made the offer vague and confusing. She requested that Student's speech therapy be one-half individualized in the speech room, and one-half small group or push-in. She also asked for additional occupational therapy consultation services to ensure Student could safely move about in her physical education classes and could better move up and down stairs.

184. On August 9, 2018, Student completed another 100 hours of the Lindamood Bell program. Lindamood Bell measured Student's progress by administering the same battery of tests administered on July 25, 2016, July 19, 2017, and March 28, 2018. In the test of vocabulary, Student scored in the fifth percentile, the same percentile she scored in July 2016. Her raw score on that test increased by nine points, slightly less than the 10 point increase from July 2017 through March 2018 achieved without Lindamood Bell instruction. Student's standard reading score on

another reading measure decreased from the fifth percentile to the fourth percentile. On a third reading measure, Student's rate-of-reading score increased from the first to the second percentile, but her accuracy, fluency, and comprehension scores remained at less than the first percentile, as they were in July 2016 and July 2017. In a test of paragraph reading recall, Student increased significantly in her recall of second grade passages, from 38 percent to 63 percent, with recall of pre-primer passages at 25 percent, first grade passages at 38 percent (down from 50 percent in July 2017), third grade passages at 13 percent (down from 38 percent in March 2018) and fourth grade at 25 percent (an increase from 13 percent in March 2018).

185. On Lindamood Bell's tests of academic achievement, Student's spelling score was in the third percentile, which was an increase from the second percentile in July 2016, but a decrease from the fourth percentile in March 2018. Student's math computation score remained below the first percentile, as it had consistently been since July 2016. Aptitude, auditory conceptualization, symbol imagery, and word attack remained at less than the first percentile. Students non-standard "age equivalent" scores (7.8, 6.0, 5.3, 6.4, 7.5, 7.9, 6.6, 7.0, 6.0, 5.0, 6.2) and "grade equivalent" scores (2.1, 1.0, 2.9, K.3, 2.7, 1.4, 2.0, 1.0, K.0) varied across tests, but this performance was generally insufficient to elevate Student's standard scores above the first percentile. Notably, Student's age equivalent and grade equivalent scores in August 2018 were frequently lower than her previous scores on the same tests. As a whole, this testing established that Student made little, if any, progress in her vocabulary, reading, or other academic skills after 200 hours of instruction using the Lindamood Bell methodology.

#### STUDENT'S EXPERTS

Anne Perry

186. Anne Perry earned a master's degree in teaching in 1992, and a general

education teaching credential in English in 1998. She did not possess a special education credential, and she did not testify as to any education or training in teaching students with special needs beyond what might have been covered in her coursework to obtain her master's degree and her single subject general education credential. Ms. Perry testified that Lindamood Bell was research-based, but conspicuously absent from her testimony was any claim that Lindamood Bell had been shown effective for students with special needs, particularly children with autism and speech and language impairment. In addition, Lindamood Bell was not a nonpublic agency certified by the California State Department of Education to provide educational intervention to students with special needs. Ms. Perry's description of Student's progress in the Lindamood Bell program as a "marked increase" and "exciting" was in marked contrast to the standardized scores, seemed exaggerated and was unpersuasive. As the director of a Lindamood Bell center, she had an obvious conflict in recommending that Student receive another 600 to 1,000 hours of Lindamood Bell instruction (and that Tehachapi fund a Lindamood Bell program on its school grounds). Her testimony regarding Student's reading and academic progress with Lindamood Bell instruction, and her recommendation for continued Lindamood Bell programming, was unpersuasive and accorded little to no weight.

Karen Schnee

187. Ms. Schnee was a well-qualified speech language pathologist and was a special education teacher from 1980 to 1985. However, her resume stated that she worked as an advocate for students at due process hearings, indicating bias. Her resume also stated that she had completed requirements to administer and interpret a test of cognitive ability, although determining cognitive ability is usually done by trained and licensed psychologists, which Ms. Schnee is not. Ms. Schnee testified that she worked in the Psychology Department of California State University Northridge, but that did not

qualify her to diagnose cognitive ability, any more than someone who works beside a doctor or lawyer is qualified to give medical or legal advice.

188. Ms. Schnee's work as an advocate for students, the fact that she held herself out as someone qualified to opine on a child's cognitive ability without proper credentialing, and her willingness to render opinions in areas outside her area of expertise adversely affected her credibility. Ms. Schnee had not been educated, trained or practiced in special education academic instruction for over three decades, and her opinions regarding Student's cognitive ability, academic needs, or placement at Lindamood Bell for reading intervention, were not persuasive.

189. Nonetheless, Ms. Schnee's opinions regarding Student's speech, language, and communication abilities were well-reasoned and not contradicted by another speech language pathologist. Her answers in that area were complete, and she provided explanations when requested or needed. Within her area of expertise, her opinions regarding Student's speech, language, and communication needs, appropriate goals to address those needs, and speech services necessary for Student to make progress on her speech goals, were persuasive and accorded significant weight. According to Ms. Schnee, the two communication goals developed for Student over the past two years were generally appropriate, but did not go far enough and did not address all areas of language weakness for Student, including articulation, vocabulary, following multi-step directions and understanding basic communication concepts. She was concerned that Student did not have the underlying understanding of pronouns, prepositions and time to make progress on one of goals adopted on March 22, 2018. Ms. Schnee also testified persuasively that Student needed one-on-one pull-out services to work on her weaknesses in expressive and receptive language and that working in a small group, while appropriate for learning and practicing social communication skills, was not sufficiently intense for Student to progress in those areas. Lastly, she convincingly stated

that Student needed a weekly 45-minute social skills program to practice with neurotypical peers who could model pragmatic skills for Student.

Debra Malmberg

190. Debra Malmberg, Ph.D. was a licensed psychologist and board certified behavior analyst. She never met Student or observed her. She was an experienced inclusion specialist, having worked with several school districts to mainstream special education students into general education. Her criticisms of Mr. Costa's cursory attempt at an inclusion assessment were credible and convincing. However, when she spoke about remedies, Ms. Malmberg tended to speak in broad generalities, lacked familiarity with Student or Tehachapi's middle school programs and failed to align her testimony with special education standards. All of these deficiencies adversely affected her credibility, and the persuasiveness of her testimony beyond the criticisms of Mr. Costa's report.

## LEGAL CONCLUSIONS

### INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA<sup>7</sup>

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.;<sup>8</sup> Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that

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<sup>7</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>8</sup> All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for 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).) In general, an individualized education program is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic, and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 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. The Supreme Court revisited and



clarified the *Rowley* standard in *Endrew F. v. Douglas County School Dist.* (March 22, 2017) 580 U.S. \_\_ [137 S.Ct. 988] (*Endrew F.*). It explained that *Rowley* held that when a child is fully integrated into a regular classroom, a FAPE typically means providing a level of instruction reasonably calculated to permit advancement through the general education curriculum. (*Id.*, 137 S.Ct. at pp. 1000-1001, citing *Rowley*, *supra*, 458 U.S. at p. 204.) As applied to a student who was not fully integrated into a regular classroom, the student's IEP must be reasonably calculated to enable the student to make progress appropriate in light of his or her circumstances. (*Endrew F.*, *supra*, 137 S.Ct. at p. 1001.) The Ninth Circuit affirmed that its FAPE standard comports with *Endrew F.* (*E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535 (*Newport Mesa*).)

4. 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) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) 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. 56-62 [126 S.Ct. 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 the issues decided.

#### ISSUES 1 AND 3(E): SPEECH SERVICES

5. In Issue 1, Student contends that for the two years prior to the filing of Student's complaint, Tehachapi denied her a FAPE by failing to offer Student appropriate speech services, specifically one-on-one services and weekly facilitated communication opportunities with typical peers. In Issue 3(e), Student contends that at

the March 22, 2018 IEP team meeting, Tehachapi determined the offer of speech therapy minutes according to the speech pathologist's availability rather than Student's needs. Tehachapi contends that Student did not establish that she required one-to-one speech services, or that she needed speech services to practice social skills with her typical peers. Tehachapi also contends that Student did not present evidence that any offer of the amount of services was based on the speech pathologist's schedule.

#### Effect of Statute of Limitations on March 3, 2016 IEP Claims

6. Preliminarily, Tehachapi had an outstanding offer of speech services in the March 3, 2016 IEP at the beginning of the statutory period in this matter. Normally, an IEP for a disabled child is measured based on what was reasonable at the time that it was created, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149; *Tracy N. v. Dept. of Educ., State of Hawaii* (D.Hawaii 2010) 715 F.Supp.2d 1093, 1112.) This evaluation standard is known as the "snapshot rule." (*J.W. v. Fresno* (9th Cir. 2010) 626 F.3d 431, 439.) In addition, a parent may not bring a due process claim challenging the appropriateness of an IEP that was created outside the statute of limitations in the absence of an implementation issue, although the IEP document is in effect within the statute of limitations, as special education law does not recognize the doctrine of continuing violations as an exception to the two year statute of limitations. (See *J.L. v. Ambridge Area School Dist.* (W.D.Pa. 2008) 622 F.Supp.2d 257, 268-269; *E.F. v. Newport Mesa Unified School Dist.* (C.D. Cal., June 23, 2015, No. SACV 14-00455-CJC(RNBx)) 2015 WL 3867982, \*8, fn. 6); see *K.P. v. Salinas Union High School Dist.* (N.D. Cal., Apr. 8, 2016, Case No. 5:08-cv-03076-HRL) 2016 WL 1394377, \*10.)

7. A previous decision involving the parties to this case found that the March 3, 2016 IEP denied Student a FAPE because the level of speech services was predetermined by Tehachapi and based upon the availability of school staff, rather than

Student's needs. Relief was awarded for that denial of FAPE through August 12, 2016.<sup>9</sup> The parties have already litigated the appropriateness of the speech services offered in the March 3, 2016 IEP, and are precluded from relitigating that issue between them.<sup>10</sup> Accordingly, relief will be limited to an award for the denial of FAPE to Student for

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<sup>9</sup> *Student v. Tehachapi Unified School Dist.* (Dec. 1, 2016) OAH Case No. 2016080786. The complaint in that matter alleged a FAPE violation with regard to offered speech services through August 12, 2016, the filing of the complaint.

<sup>10</sup> Under the doctrine of collateral estoppel, or issue preclusion, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.<sup>12</sup> The doctrine serves many purposes, including relieving parties of the cost and vexation of multiple lawsuits, conserving judicial resources, and, by preventing inconsistent decisions, encouraging reliance on adjudication. (*Allen v. McCurry* (1980) 449 U.S. 90, 94 [66 L.Ed.2d 308]; see, 7 Witkin, Cal. Procedure (4th ed. 1997) Judgments, § 280 et seq.). Here, the parties requested and were granted that administrative notice be taken of prior OAH decisions between them, but no evidence was submitted of which, if any, of those decisions were still on appeal. Therefore, the prior decisions are treated as final for purposes of issue preclusion. That a decision be final is interpreted less strictly for issue preclusion than for res judicata, or claim preclusion. It is enough that the previous judgment includes any prior adjudication of an issue "that is determined to be sufficiently firm to be accorded conclusive effect." (*Sandoval v. Superior Court* (1983) 140 Cal.App.3d 932, 936; see, 7 Witkin, Cal. Procedure (4th ed. 1997) Judgments, § 312.) A decision in an IDEA due process hearing is entitled to conclusive effect. (Ed Code, § 56505(h) ["The hearing conducted pursuant to this section shall be the final administrative determination and binding on all parties"].)

Tehachapi's failure to offer appropriate speech services from August 12, 2016, through December 5, 2016, when Tehachapi attempted to conduct an annual IEP review that would have included an offer of speech services, as discussed below.<sup>11</sup>

#### Delay in Developing IEP

8. During the statutory period at issue in this matter, Tehachapi made reasonable attempts to hold and complete Student's annual and triennial IEP reviews in a timely manner. It could not do so primarily due to prioritizing participation of Parents in the educational decision-making process over statutory deadlines, and allocating the abundant time required for participation of Mother, Student's advocate, and the family friend in IEP team meetings. As discussed at Issue 8(a), Tehachapi did not deny Student a FAPE by taking the time necessary to obtain and thoroughly consider the input of Parents and their chosen independent assessors on Student's present levels of performance before making its offers of services. (See *Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038 (*Doug C.*)). Accordingly, this decision analyzes the appropriateness of Tehachapi's offers of speech services on the dates they were offered, as opposed to the dates they were statutorily due.

9. 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 of educational services must be designed to meet the student's unique needs and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314 (*Gregory K.*);

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<sup>11</sup> Student did not challenge the appropriateness of the March 3, 2016 IEP's speech goals in the prior action, and the statute of limitations bars Student from challenging the appropriateness of those goals in this proceeding. Accordingly, the pre-limitations speech goals will not be discussed in Issue 2.

20 U. S.C. § 1401(9).) If a student is not fully integrated into a regular classroom, his or her IEP must be reasonably calculated to enable him or her to make progress appropriate in light of his or her circumstances. (*Endrew F.*, *supra*, 137 S.Ct. at p. 1001.)

10. 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. (*Gregory K.*, *supra*, 811 F.2d at p. 1314.) The IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [The IDEA does not provide for an "education . . . designed according to the parent's desires"], citing *Rowley*, *supra*, 458 U.S. at p. 207; see also *Miller v. Bd. of Education of the Albuquerque Public Schools* (D.N.M. 2006) 455 F.Supp.2d 1286, 1307-1309; *aff'd on other grounds*, *Miller v. Bd. of Education of the Albuquerque Public Schools* (10th Cir. 2009) 565 F.3d 1232.)

11. Applying the *Rowley* standard, as affirmed in *Endrew F.*, the weight of the evidence established that at the time of the August 10, 2017 IEP offer of speech services through the filing of Student's complaint, Student required weekly one-on-one services with a speech language pathologist, in particular to address her significant vocabulary delays, lack of understanding of basic concepts such as pronouns and severe expressive and receptive language deficits. In addition, from August 10, 2017 through the filing of Student's complaint, the weight of the evidence also established that Student required speech language pathologist-supervised interaction with a small group of typical peers to make progress in acquiring social communication skills. Student's speech and language deficits were her primary area of need and in the absence of such services, Tehachapi's IEP offers of special education and related services were not reasonably calculated to enable Student to make progress appropriate in light of her circumstances.

12. Regarding individual speech services, Ms. Schnee testified convincingly that Student needed individual pull-out services to work on areas of weakness that

included significant articulation errors, a poor core vocabulary, difficulty following directions, difficulty understanding basic concepts such as pronouns and prepositions and severe expressive and receptive language deficits. Student needed more intense services than could be provided in a small group, particularly over the extended school year when Student was at risk of losing the language skills acquired during the school year. Ms. Schnee recommended two individual 30-minute sessions per week in her 2015 assessment report and two 20-minute individual pull-out sessions per week to the January 18, 2018 IEP team. Notably, Tehachapi did not call a speech pathologist to contradict Ms. Schnee's opinion that Student needed these one-on-one speech services to address her speech and language needs. Throughout the period at issue, Parents reported that Student had difficulty finding and using words, and the Lindamood Bell test results regularly demonstrated Student's ability to use and understand language was very delayed and had a devastating impact on her ability to comprehend what she read. This information was known to Student's IEP team on August 10, 2017, when the first offer of special education and related services was made, yet one-on-one speech services were not offered to Student.

13. Mr. Ferrell, a consistent member of Student's IEP team, testified that speech services offered as "direct" push-in services could be provided to Student in the classroom on a one-on-one basis or in a small group. As discussed at Issue 3(d), Tehachapi's failure to clearly identify whether speech services were individual, small group, or otherwise resulted in an unclear offer of special education and related services. There was no evidence, let alone convincing evidence, that the "direct" services offered in Student's IEPs were intended to be delivered on an individual basis. In fact, discussions at the IEP team meetings of August 10, 2017, December 15, 2017, and February 22, 2018, included explanations from Ms. Winchell and Ms. Ferrell that Student's services would be provided exclusively in a small group to address social

communication. The April 27, 2018 IEP push-in services were designated “one-on-one,” but the team explained that the speech pathologist would use that time teaching Student how to interact with her classroom peers in real time, and the offered time was not intended to provide Student with the individualized services she required to work on acquisition and understanding of vocabulary, or understanding the underlying basic concepts of language, necessary for her to improve her communication skills.

14. Regarding social skills, Ms. Schnee testified persuasively that Student required a “lunch bunch,” or other safe environment with a small group of typical peers to practice social skills building with neurotypical role models. She admitted that she had not investigated and was not aware of, opportunities for social skills practice with typical peers embedded into Student’s classroom program. However, Tehachapi did not call any witnesses familiar with the speech services at Cummings Valley to establish that opportunities to work with a speech pathologist and typical peers were available to students in Ms. Duff’s or Ms. Hagerty’s classrooms. On the contrary, there was evidence that a social skills class was *not* available to Student in representations by Tehachapi team members at multiple IEP team meetings. Although Tehachapi offered Student speech pathologist consultation services from the March 3, 2016 IEP until removed by the April 27, 2018 IEP, there was no evidence that those services included supervision of controlled interactions with a small group of typical students to work on Student’s language and communications goals. The 60 to 80 minutes per month of consultation offered was far less than the 30 to 45 minutes per week of facilitated social skills practice with peers that Ms. Schnee convincingly testified was needed. Mr. Ferrell testified that the small group push-in services were offered to work on social skills development, and that Student would have opportunities to interact with typical peers during daily mainstreaming accompanied by an aide given facilitation strategies as part of Student’s consult services. However, Mr. Ferrell was not involved with the speech program at

Cummings Valley after August 2017, and was not sufficiently knowledgeable or qualified to opine whether small-group push-in sessions, coupled with typical peer interactions during mainstreaming facilitated by an aide, were sufficient to meet Student's need to practice social skills with typical peers.

15. Student met her burden of proving by a preponderance of the evidence that she was denied a FAPE by Tehachapi's failure to offer her individual speech services, or to offer her speech pathologist-facilitated social skills development opportunities with a small group of three to four typical peers from August 10, 2017 through the filing of Student's complaint. Remedies will be discussed later in this decision.

## ISSUE 2: SPEECH AND LANGUAGE GOALS

16. Student contends that Tehachapi denied her a FAPE by failing to develop appropriate speech and language goals. She argues that the August 10, 2017 IEP lacked annual goals for receptive language, core vocabulary, and articulation. She also argues that Tehachapi should have invited Ms. Schnee to the March 22, 2018 IEP rather than develop goals without Ms. Schnee's input, and that the IEP team should have adopted Ms. Schnee's 2015 and 2017 recommendations for additional communication goals in the December 15, 2017 and May 21, 2018 IEPs. Lastly, Student argues that she lacked the skill base to meet the additional communication goal developed in the March 22, 2018 IEP because she did not understand temporal concepts, pronouns, or prepositions and had no realistic chance of obtaining that goal. Tehachapi argues that Ms. Schnee lacked the knowledge of Student's academic levels to opine if Student could meet proposed speech goals, and that Student's delayed communication skills were due to her lack of school attendance.

17. An annual IEP must contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2)



meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345, subd. (a)(2).) Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. (*Letter to Butler*, 213 IDELR 118 (OSERS 1988); Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 regulations).)

18. An IEP team must review a student's IEP at least annually to review the pupil's progress, to determine whether the annual goals are being achieved and revise the IEP as appropriate, taking into account among other matters, whether there is a lack of expected progress toward the annual goals. (34 C.F.R. § 300.324(b)(1)(ii)(a); Ed. Code, § 56341.1, subd. (d)(1).) The IEP team must meet whenever the student "demonstrates a lack of anticipated progress" on annual goals (Ed. Code, § 56343, subd. (b).)

19. A school district is not required to develop goals for areas covered by the general curriculum for which the student needs only accommodations and modifications. (Fed. Regs., Appendix A, *Part 300 – Assistance to States for the Education of Children with Disabilities* (1999), discussing language also contained in the 2004 reauthorization of the IDEA at 20 U.S.C., § 1414(d)(1)(A)(i)(II).)

20. As discussed at Issue 1, the March 3, 2016 IEP is outside of the applicable statute of limitations, and Student cannot now challenge the appropriateness of the goals developed as part of that IEP. The March 3, 2016 goals very closely mirrored the goals recommended in Ms. Schnee's 2015 speech assessment report. When it came time to review Student's speech goals in December 2016, the goals previously offered were not yet six months old, and there had been no reason for Tehachapi staff to call an IEP team meeting due to a lack of anticipated progress prior to the annual review.

21. As discussed at Issue 8(a), Tehachapi did not deny Student a FAPE by developing the annual review IEP over a period of months through August 10, 2017.

Specifically as to goals, the weight of the evidence did not establish that Tehachapi denied Student a FAPE by taking until August 10, 2017 to develop an offer of new annual goals.

22. At the IEP team meeting of February 24, 2017, the goals developed at the March 3, 2016 IEP team meeting were less than a year old. Student had not had an opportunity to work on the goals because Parents had not consented to implementation of the March 3, 2016 goals and because Student had been pulled out of school a few months after the March 3, 2016 goals had been developed. No evidence was presented to the IEP team that Student's present levels of performance had changed. In fact, the Lindamood Bell reading and academic testing demonstrated that Student's speech-related academic skills, such as vocabulary, reading and writing, remained at the same levels. Therefore, Student showed no need for development of updated goals at the February 24, 2017 IEP team meeting.

23. At the May 19, 2017 IEP team meeting, called to comply with the OAH order to meet about the behavior aide and to make an offer of placement and services for the 2017 extended school year, the Tehachapi team members still had no information that Student's present levels of performance had changed. However, because Mother intended to send Student to extended school year once the behavior aide was in place, and Student would then receive speech services from Tehachapi, the IEP team members agreed to meet before the start of the 2017-2018 school year to update Student's present levels of performance in speech and develop new goals as necessary. It was not until after that meeting, on June 18, 2017, that Mother wrote to Tehachapi to request development of additional speech goals to address pronunciation and conversational skills. In light of the fact that the IEP team had agreed to reconvene prior to the beginning of the 2017-2018 school year to develop new speech goals, when it would have current information on Student's speech and language skills, it was

reasonable for the team to defer development of new goals until the August 10, 2017 IEP, and the evidence did not establish that Student required updated goals to make progress in light of her circumstances at that time.

24. At the August 10, 2017 IEP, the IEP team had the extended school year teacher's report of the speech and language skills Student exhibited during three weeks of extended school year and a telephonic report by Ms. Perry on a reevaluation of Student's reading and academic skills. Based upon staff reports that Student was able to ask for what she wanted or needed in short sentences, but demonstrated difficulty in initiating, responding and maintaining reciprocal conversations with peers or adults, the IEP team developed a communication goal for Student to improve social interaction and expressive language skills by engaging in social exchanges. Ms. Schnee testified that the sole communication goal in the August 10, 2017 IEP was appropriate to address some of Student's communication needs, but also persuasively opined that Student exhibited a severe vocabulary deficit, difficulty following oral directions, and a lack of social skills such as greeting, requesting help, or stating a polite refusal that interfered with her ability to make educational progress and for which goals should have been developed. No Tehachapi witnesses were called to knowledgeably testify that Student did not have these communication deficits, or that needs in these areas would be appropriately addressed by one goal or Student's classroom curriculum without the need for goals in those areas. Accordingly, and the August 10, 2017 IEP failed to include annual goals in these areas of need, resulting in a procedural violation.

25. After the August 10, 2017 IEP team meeting, Parents disagreed that the proposed communication goal addressed all Student's areas of need in speech and language. In response to Mother's concerns, Ms. Ferrell modified the proposed communication goal to improve expressive language skills by initiating a conversation with a peer or adult, and to improve pragmatic skills by expressing her wants and needs

to adult staff using multi-modal communication. However, Ms. Ferrell did not draft goals to address Student's severe lack of vocabulary, inability to follow directions, or lack of understanding of fundamental concepts underlying communication. At the IEP team meeting of October 16, 2017, which discussed Student's speech needs, the modified communication goal was adopted. However, Mother and Tehachapi then agreed to fund an independent speech assessment with Ms. Schnee and reconvene to further draft goals if warranted after more information was available on Student's present levels of speech and language functioning. Nonetheless, Student continued to have a severe vocabulary deficit that was not addressed by her annual goals, and lacked the vocabulary and the understanding of such basic concepts as pronouns and prepositions to make progress on the new communication goals. As such, Tehachapi continued to fail to meet its obligation to draft goals to address each of the speech and language needs resulting from the multiple disabilities that impacted Student's ability to learn and communicate.

26. Student's IEP team did not reconsider her speech and language needs until Ms. Schnee had completed her independent speech assessment and presented it to the IEP team at the meeting of January 18, 2018. Even then, the IEP team deferred drafting speech and language goals until Dr. Katz' report and a fourth Lindamood Bell evaluation and did not discuss proposed speech and language goals until the March 22, 2018 IEP team meeting. At the March 22, 2018 meeting, the IEP team developed and adopted two communication goals, for Student to: (1) initiate or respond and maintain a conversation with appropriate eye contact, turn taking and topic maintenance through 10 turns with typical peers, and to (2) use temporal concepts, pronouns and prepositions in complete sentences, given pictures or verbal prompts. Ms. Schnee testified convincingly that these two goals were generally appropriate, but did not go far enough. Her November 2017 speech assessment report identified areas of need not

addressed by the proposed goals, including in the areas of vocabulary development, following two-to three-step oral directions, making simple inferences from curricular text, or demonstrating the ability to greet, request help, or state a polite refusal in a small group. Ms. Schnee also testified credibly that Student could not reasonably be anticipated to make meaningful progress on the annual pragmatic communication goal to use pronouns, prepositions and temporal concepts during conversational exchanges without learning the underlying vocabulary, language concepts and expressive and receptive language skills necessary to achieve that goal. However, no further speech goals were developed at the March 22, 2018 or any subsequent IEP team meetings to address Student's need for acquisition of these underlying skills, which goals would have prompted a discussion of whether student required the one-on-one speech services discussed at Issue 1 to make progress on those goals. Accordingly, Tehachapi failed to meet its obligation to draft goals to address all of the speech and language needs resulting from Student's disabilities during that time.

27. Although Ms. Schnee was not familiar with Student's classroom curriculum, or Student's academic levels, she had formally assessed Student's speech and language skills twice in two years. Ms. Schnee was familiar enough with Student's language skills to credibly opine about Student's ability to make progress on the annual communication goals proposed in the March 22, 2018 IEP. Although a Student's absence from school may explain her lack of progress on goals until her return to school in the 2017 extended school year, Tehachapi had an obligation to develop annual goals to enable Student to be involved in, and make progress in the general curriculum, and to address each of the other educational needs that resulted from Student's disabilities. The weight of the evidence established that Student had severe vocabulary, oral comprehension and expressive, and receptive language delays resulting from multiple disabilities that impacted her language development for which annual goals were not

included in Student's IEPs from August 10, 2017 through the filing of Student's complaint. Failure to develop such goals, regardless of why Student exhibited her disability-related language delays, significantly interfered with Parents opportunity to participate in the decision-making process of developing an educational program for Student; and because speech services were not allocated to address annual goals in these areas of need, Student was deprived of educational benefit.

28. Student contends that Tehachapi also committed a procedural violation by failing to have Ms. Schnee, the triennial assessor of Student's language needs, present at the March 22, 2018 IEP team meeting when annual speech goals were developed. However, Student's IEP team always had one to two licensed speech language pathologists present at each meeting. Any team member who is qualified to interpret the results of an assessment may do so (20 U.S.C. § 1414(d)(1)(B)(v); 34 C.F.R. 300.321 (a)(5); Ed. Code, § 56341, subd. (b)(5)), and there was no need for Ms. Schnee to attend when qualified district speech language pathologists were present to explain Ms. Schnee's 2017 assessment results and goals recommendations to the team. Tehachapi did not commit a procedural violation by failing to invite Ms. Schnee to the March 22, 2018 IEP team meeting.

29. From just prior to the August 10, 2017 IEP team meeting through the filing of Student's complaint, Mother complained that Student was difficult to understand. However, the 2017 extended school year teacher reported that Student could communicate her wants and needs with short sentences, and although Ms. Schnee found Student only 60 to 70 percent intelligible in November 2017, she concluded that speech production had been a strong area of improvement over the past two years and did not recommend an articulation goal in her assessment report of December 2017, or at the IEP team meeting on January 18, 2018. Accordingly, the weight of the evidence did not establish that Student needed an articulation goal to address her

communication needs, and it was not a procedural violation for Tehachapi not to draft a speech production/articulation goal.

30. The determination of whether or not the communication goals developed by Tehachapi during the statutory period addressed all of Student's needs resulting from her disabilities was challenging. There was extensive discussion about Student's speech and language needs at multiple IEP team meetings, as well as discussion of goals and services, with a variety of opinions expressed. However, at hearing, Ms. Schnee was the only speech language pathologist called to opine on whether the goals drafted for Student were sufficient to address Student's communication needs. Her conclusion that they did not was not contradicted by anyone with education, training or experience in her field. Although Ms. Schnee exhibited bias, and her credibility was adversely impacted by relying heavily on parental reports and venturing opinions outside her area of expertise, her testimony regarding Student's communication needs was well-reasoned, logical and ultimately persuasive. Accordingly, the evidence showed that it was more likely than not that Tehachapi failed to draft and adopt goals that addressed all of Student's educational needs in the area of speech and language arising from her disabilities.

31. In the event of a procedural violation, a denial of FAPE may only be found if that violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).) Student had severe expressive, receptive and pragmatic language delays. Student's IEP teams had information that Student was impacted by three serious disabilities which each, and perhaps all, contributed to her speech and language delays: autism, intellectual disability and speech and language impairment (including apraxia). Tehachapi's failure to draft goals in all of Student's areas of speech, and language need

resulted in Student not having speech services allocated to allow her to make progress in those areas those areas of need. Accordingly, Tehachapi's failure to draft appropriate goals deprived Student of educational benefit.

32. Student met her burden of proving by a preponderance of the evidence that she was denied a FAPE by Tehachapi's failure to develop appropriate speech goals to address all of her speech needs resulting from her speech and language impairment. Remedies are discussed at the end of this decision.

### ISSUE 3(A): INFORMATION REGARDING PROPOSED INTERVENTIONS

33. Student contends that Tehachapi denied Student a FAPE by depriving Parents of meaningful participation in developing her IEP by failing to provide Parents with information about proposed interventions, specifically Tehachapi's response-to-intervention reading programs and any informal reading assessments done on Student, necessary for Parents to give informed consent to Tehachapi's reading programs. Tehachapi argues that Mother was provided with the names of the reading intervention programs, and that information about these programs was discussed at multiple IEP team meetings.

34. A school district must obtain informed consent from the parent before providing special education and related services to the child. (Ed. Code, § 56346(a).) "Consent" as defined in part 300.9(a) of 34 Code of Federal Regulations, means the parent has been fully informed, in the parent's native language, of all information relevant to the activity for which consent is sought.

35. The IDEA mandates that special education and related services and supplementary aids and services, be based upon peer-reviewed research to the extent practicable. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. 300.320(a)(4).) The phrase "to the extent practicable" means that supports and services should be based on peer-reviewed research to the extent that it is possible, given the availability of peer-reviewed research.



(71 Fed. Reg. 46,665 (Aug. 16, 2006).) The IDEA does not require the IEP to designate the particular instructional methodology. (*Id.*)

36. Although Student argues that Parents could not give informed consent to Tehachapi's reading intervention program without detailed information on the intervention curriculum, IEP teams are not required to have a discussion on the research-based methods offered, or to provide documentation of those methods. The U.S. Department of Education has determined that such a requirement is unnecessary and would be unduly burdensome to the IEP team. (*Ibid.*) Section 56345, subdivision (a)(4), of the Education Code requires a "statement of the special education and related services and supplementary aids and services, based upon peer-reviewed research to the extent practicable, to be provided to the pupil," which mirrors the IDEA's substantive requirement that special education and services offered to a student be based upon peer-reviewed research to the extent practicable. That section does not add a procedural requirement that the instructional methodologies be written into the IEP document itself.

37. Mother may have desired more information than she received during the discussions at the August 10, 2017 and September 15, 2017 IEP team meetings, but Tehachapi was not required to discuss the research-based reading interventions offered, or to provide documentation of those methods. Mother preferred that Student receive Lindamood Bell reading instruction, which she believed was superior to the reading interventions offered by Tehachapi. However, Tehachapi was not required to adopt Parents' preferred program, or to demonstrate that Tehachapi's programs were as good or better than Lindamood Bell. A school district is not required to maximize a student's potential, and as long as a school district offers a FAPE, methodology is left to the district's discretion. (*Rowley, supra*, 458 U.S. at pp. 200 and 208.) While a district should maintain an open discussion with parents regarding the use of various educational

methodologies, the district ultimately decides which methodology to utilize. (*Carlson v. San Diego Unified Sch. Dist.* (9th Cir. 2010) 380 Fed.Appx. 595 (unpub.); *A.S. v. New York City Dept. of Educ.* (2d Cir. 2014) 573 Fed.Appx. 63.) Student failed to establish that informal reading assessments were conducted, or that any informal reading assessment information was not provided to Parents.

38. Here, the evidence demonstrated that Tehachapi identified Student's need for reading intervention, drafted reading goals and offered reading intervention to address her reading goals. Student did not present evidence that the Wonders program, or other programs offered, were not based upon peer-reviewed research or otherwise inappropriate for Student. Mother, Student's advocate, and the family friend were active participants in extensive discussions regarding reading intervention and so were not deprived of a meaningful opportunity to be part of the decision-making process with regard to addressing Student's deficits in reading fluency, decoding, and comprehension.

39. Student did not meet her burden of proving by a preponderance of the evidence that she was denied a FAPE because her Parents were unable to participate in decision-making regarding reading interventions because Tehachapi did not provide them with written information regarding its reading intervention programs or informal assessment.

#### ISSUE 3(B): TEAM CONSIDERATION OF PARENT CONCERNS

40. Student contends that Tehachapi denied her a FAPE by failing to be responsive and receptive to parent requests. The only example cited in Student's closing brief is the request of Student's advocate at the December 15, 2017 IEP team meeting that Student receive individual speech therapy, which the IEP team did not discuss at that time. Tehachapi disagrees, noting that the request for individual speech services was discussed, but further action was postponed to the January 18, 2018 IEP team

meeting for Ms. Schnee to report on her assessment of Student's speech and language needs and make recommendations on how to meet those needs.

41. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*NIL v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrman v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

42. Student's need for individual speech services was discussed at the December 15, 2017 IEP team meeting. Tehachapi team members also reasonably deferred further discussion, and a decision on the speech services to be offered until after Ms. Schnee's report presented to the IEP team. Ms. Schnee was an assessor of Parent choice. Audio tapes of the IEP team meeting on December 15, 2017, January 18, 2018, March 22, 2018, and April 27, 2018, establish that hours of conversation took place regarding Student's speech needs, including extensive input from Mother, Student's advocate and the family friend. As discussed at Issue 8(b), Tehachapi team members were very responsive and receptive to Parents' requests, as can be seen in the regular additions of and modifications to the IEP documents, goals, placement and related services throughout the statutory period. Parents were informed of Student's problems, Mother attended all IEP team meetings, Mother and Student's advocate expressed disagreement regarding the IEP team's conclusions during IEP team meetings and in parent attachments. Parents meaningfully participated in the development of

Student's IEPs, and Tehachapi's failure to adopt all of Parents' requests does not establish that Tehachapi failed to consider those requests.

43. Student failed to meet her burden of establishing by a preponderance of the evidence that she was denied a FAPE because Tehachapi team members failed to discuss Parents' issues of concern at IEP team meetings.

#### ISSUE 3(C): DECISIONS OUTSIDE OF IEP TEAM MEETING

44. Student contends Tehachapi made decisions regarding Parents' request for Lindamood Bell instruction outside of the IEP team meeting and violated Parents' right to be involved in formulating their child's IEP. Tehachapi disagrees, arguing that the Lindamood Bell services were discussed and offered in the context of IEP team meetings.

45. An educational agency's predetermination of an IEP seriously infringes on parental participation in the IEP process, which constitutes a procedural denial of FAPE. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.)

Predetermination occurs "when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." (*HOB., et al. v. Las Virgins Unified School Dist.* (9th Cir. 2007) 239 Fed.Appx. 342, 344; see also, *Ms. S. ex reel G. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131 (*Vashon Island*) ["A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, then simply presents the IEP to the parent for ratification."].)

46. Parents retain the right to refuse consent to implementation of the IEP, in whole or in part (*YR. v. Los Angeles Unified School District* (9th Cir. 2015) 805 F.3d 1164, 1170, citing 34 C.F.R. 300.300(d)(3)), but cannot dictate the terms of the offer itself. Development of an IEP is a team decision, but if the team members do not agree, it is the school district that is ultimately responsible for ensuring that a student is offered a

FAPE. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526 (*Union*); *Letter to Richards*, 55 IDELR 107 (OSEP 2010).) The IDEA gives parents the right to participate in decisions about their child's program, but it does not give parents the right to control or veto any individual IEP offer provision. (*Vashon Island, supra*, 337 F.3d at p. 1131.)

47. No evidence was offered that Mr. Ferrell did anything other than contact Ms. Perry between IEP team meetings to obtain information to bring back to the team, and research Tehachapi resources regarding the cost, internet connectivity, and other requirements for implementation of Lindamood Bell instruction methods. Lindamood Bell had lost its nonpublic agency certification, and Tehachapi had to determine the legal and financial feasibility of entering into a "consulting" agreement with a non-certified agency for reading intervention instruction. Tehachapi team members were concerned that Student had not made progress with 100 hours of previous Lindamood Bell instruction and reasonably wanted to do a diagnostic block of 40 hours prior to utilizing Lindamood Bell as a reading intervention for additional hours. Team discussions took place over multiple meetings, including September 9, 2016, August 10, 2017, March 13, 2018, with an offer of an additional 100 hours of Lindamood Bell reading instruction on April 27, 2018. Tehachapi team members did not interfere with Parents' participation in developing Student's educational program by carefully considering whether a previously ineffective program would meet Student's reading intervention needs before investing in another block of hours with that reading intervention program.

48. There was no evidence that Mr. Ferrell or other Tehachapi IEP team members had anything but open minds regarding implementation of a Lindamood Bell as a methodology for reading intervention. Reasonable questions regarding the efficacy and feasibility of implementation of that program did not establish that any team member's opinion on Lindamood Bell was predetermined. School district personnel may

meet informally and engage in conversations on issues such as teaching methodology, lesson plans, coordination of service provision, or potential services or placement so long as they come to an IEP team meeting with an open mind. (See, e.g., *Bursar v. Corpus Christi Independent School Dist.* (1995 5th Cir.) 51 F.3d 490, 494, fn. 7, *cert. denied* 516 U.S. 916 (1995); *RDS. and S.L. v. Miami-Dade County School Bd.* (11th Cir. 2014) 757 F.3d 1173, 1188-1189.)

49. Student failed to meet her burden of establishing by a preponderance of the evidence that Tehachapi team members made decisions about incorporating Lindamood Bell methodology into Student's educational program outside of the IEP team meetings.

#### ISSUE 3(D) AND 5: CLEAR AND COMPLETE OFFER OF FAPE, INCLUDING ANNUAL GOALS

50. At Issue 3(d), Student contends Tehachapi failed to make clear offers of FAPE, including annual goals, or to provide complete IEP documents for the IEP team meetings held on October 16, 2017, December 15, 2017, January 19, 2018, May 5, 2018, or May 31, 2018. At Issue 5, Student contends that Tehachapi failed to make clear offers of appropriate goals in Student's IEPs. Tehachapi contends Student had audio recordings of each meeting and ample communications with Tehachapi to be knowledgeable at all times the offers of special education and related services.

51. Meaningful parental participation requires that the IEP document fulfill the IDEA's explicit requirement of written prior notice to parents when a school district proposes, or refuses, to initiate or change the educational placement of a disabled child. (See 20 U.S.C. § 1415(b)(1)(C).) The procedural requirement of a formal IEP offer creates a clear record and eliminates troublesome factual disputes years later about what placement and services were offered. (*Union, supra*, 15 F.3d at p. 1526.) A formal written

offer is therefore more than a mere technicality, and this requirement is vigorously enforced. (*Ibid.*)

52. A formal, specific offer from a school district (1) alerts the parents of the need to consider seriously whether the proposed placement is appropriate under the IDEA, (2) helps parents determine whether to reject or accept the placement with supplemental services, and (3) allows the district to be more prepared to introduce relevant evidence at hearing regarding the appropriateness of placement. (See *Union*, *supra*, 15 F.3d at p. 1526.)

53. *Union* involved a district's failure to produce any formal written offer. However, numerous judicial decisions have invalidated IEPs that, though offered, were insufficiently clear and specific to permit parents to make an intelligent decision whether to agree, disagree, or seek relief through a due process hearing. (See, e.g., *ASK. v. Alexandria City School Bd.* (4th Cir. 2007) 484 F.3d 672, 681; *Knuble v. Baxley City School Dist.* (6th Cir. 2001) 238 F.3d 755, 769; *Bend Laine School Dist. v. CH.* (D. Ore., June 2, 2005, No. 04-1468) 2005 WL 1587241, p. 10; *Glendale Unified School Dist. v. Almas* (C.D.Cal. 2000) 122 F.Supp.2d 1093, 1108; *Mill Valley Elem. School Dist. v. Eastin* (N.D.Cal., Oct. 1, 1999, No. 98-03812); see also *Marcus I. v. Department of Education* (D. Hawai'i, May 9, 2011, No. 10-00381) 2011 WL 1833207, pp. 1, 7-8.) One district court described the requirement of a clear offer succinctly: *Union* requires "a clear, coherent offer which [parent] reasonably could evaluate and decide whether to accept or appeal." (*Glendale Unified School Dist. v. Almasi* (C.D. Cal. 2000) 122 F.Supp.2d 1093, 1108.)

54. The IEP must describe the services offered and their anticipated frequency, location and duration of services. (20 U.S.C. § 1414(d); Ed. Code, § 56345, subd. (a).) In addition, the IEP must include "appropriate objective criteria, evaluation procedures, and schedules for determining, on at least an annual basis, whether the annual goals are being achieved," and a statement of how the student's progress toward the goals will be

measured. (Ed. Code, § 56345, subd. (7), (9); 20 U.S.C. § 1414(d)(1)(A)(i)(III).) An examination of an IEPs goals is central to the determination of whether a student has received a FAPE. In *Adams*, the court stated: “[W]e look to the [IEP] goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer ... a meaningful benefit.” (*Adams, supra*, 195 F.3d at p. 1149.)

55. The weight of the evidence established that each of the IEP offers of special education and related services were unclear to the extent they did not identify whether the speech and occupational therapy services were to be provided on an individual, small group, or consultation basis. The testimony Mr. Ferrell that the software program used by Tehachapi did not have a pull-down menu to designate the delivery model of the services was credible, but that fact did not overcome Tehachapi’s duty to document the services offered with sufficient specificity for Parent to understand what was offered and for any school district into which Student might transfer to understand the nature of the offer, such as by writing the description of proposed service delivery in the IEP meeting notes.

56. Tehachapi’s use of the terms “direct” and “consult” during IEP team meeting discussions did little to resolve this ambiguity, as Tehachapi used “direct” to mean *both* individual and small group. Disturbingly, Mr. Ferrell’s testimony suggested that the IEP team itself was unsure of whether an offer of “direct” services included one-on-one services, leaving it to the discretion of the speech pathologists or occupational therapists implementing the IEP to determine whether to work with Student individually, or in a small group. Use of such an ambiguous term in an IEP falls short of the IDEA requirement that an IEP detail the related services to be provided to the student.

57. The April 27, 2018 IEP did not use the term “direct,” but designated that the push-in speech services offered would be provided “one-on-one.” However, that



term was intended to indicate that the speech pathologist would be in the classroom to work with Student in a small group with classroom peers and not that the speech pathologist would work with Student on a one-to-one basis. Ms. Ferrell articulated to the April 27, 2018 IEP team her discomfort with the designation of push-in classroom services as one-on-one on the IEP, but Tehachapi wrote that term into the IEP, resulting in an IEP that failed to correctly state the nature of the services to be provided. The designation of push-in speech services as one-on-one did not produce a clear, coherent offer of special education and services and, per *Union*, impacted Parents' ability to evaluate the IEP.

58. The IEP offers of August 10, 2017, April 27, 2018, May 21, 2018 and June 29, 2018 were insufficiently clear and specific to permit Parents to make an intelligent decision whether to agree, disagree, or seek relief through a due process hearing. Identification of the delivery model for Student's speech services was particularly important, as Student's severe expressive, receptive, and social communication delays were some of her greatest areas of need.

59. Student's contention that incomplete copies of IEP documents were provided to Parents because of minor typographical errors, inaccurate meeting notes, or inclusion of information Parents wanted removed, fails for several reasons.

60. The IDEA does not require a school district to include additional information in a student's IEP beyond what is explicitly required. (34 C.F.R. 300.320(d)(1).) An IEP does not need to include recommendations submitted to or discussed at IEP team meetings, but not adopted. (*Letter to Anonymous* (OSEP 1994) 20 IDELR 1460.) An IEP is not required to be a verbatim recording of the IEP team meeting. (*Jefferson County School Dist. R-1* (SEA CO April 13, 2004) 104 LRP 30613.)

61. Because the IDEA does not require non-essential information in the IEP, school districts are not obligated to prepare meeting minutes or notes. Nonetheless,

meeting notes can provide helpful information to persons reviewing the IEP, such as who attended the meeting, what presentations were made, which topics were discussed and what agreements were reached by the team. (See *Student v. Antelope Valley Union High School Dist.*, (Oct. 19, 2005) OAH Case No. N2005060581.)

62. The weight of the evidence, including dozens of hours of audio recordings, established that Tehachapi's meeting notes accurately documented what occurred at the IEP team meetings, including what presentations were made, which topics were discussed, and what agreements were reached by the IEP team. The few errors in the IEPs were minor and immaterial and promptly corrected when brought to Tehachapi's attention. The documents were not incomplete due to Parents' disagreement with the accuracy of the IEP notes, Parents' disagreement with the summary of present levels of performance, or the offered components of the educational program as an IEP was developed. Any delays in Tehachapi providing Parents with copies of IEP documents were due to Parents' frequent and extensive requests for changes to the IEP documents, to which Tehachapi responded in a reasonably timely manner. Parents' extensive documentation of their opinions of Student's needs, and their program preferences is not a required component of the IEP. Therefore, Tehachapi's failure to include all of Parents' requested language changes and attachments in Student's IEPs was not a procedural violation of the IDEA.

63. Mother frequently complained that the documents from the IEP team meetings did not include full and complete reviews of present levels of performance, annual goals, accommodations, and the current offer of special education and services. However, as discussed at Issue 8(a), many of the IEP team meetings had to be continued, even after the meetings were extended to three and four hours in length, and not all IEP team meetings resulted in new offers of placement, services, or accommodations. Tehachapi made offers of special education and related services in the

IEPs of May 19, 2017 (extended school year), August 10, 2017, March 22, 2018, May 21, 2018, and June 29, 2018. The other IEP documents, including the IEPs from October 16, 2017, January 18, 2018, and May 21, 2018, did not include new or different offers of special education and related services, and did not contain all of the pages contained in a full IEP document. It was not a procedural violation for those IEP documents to lack pages with a clear offer of appropriate goals because they did not contain and did not purport to contain, complete offers of FAPE. The IEP documents that did make complete offers of special education and related services included pages clearly setting out the goals adopted by the IEP team and incorporated into the offer of FAPE.

64. The December 15, 2017 IEP was developed over a long series of IEP team meetings, including December 7, 2017 (no action taken), December 15, 2017, January 30, 2018, March 13, 2018, March 22, 2018, and April 27, 2018. Until April 27, 2018, the IEP team had not completed review of the information and team discussions on the offer of special education and services and the December 15, 2017 IEP was not finalized, and that is why the copies provided to Parents constituted less than a full IEP. The copies provided to Parents after each of the IEP team meetings contained all information in the IEP to date. Tehachapi provided Parents with a copy of the December 15, 2017 IEP that contained all required components of an IEP, and an offer of FAPE on April 27, 2018, as soon as the IEP was completed. In fact, Parents consented to implementation of that IEP on May 7, 2018.

65. Student met her burden of proving by a preponderance of the evidence that she was denied a FAPE because Tehachapi failed to make a clear offer of related services, specifically by failing to specify whether the services offered were to be delivered individually, in a small group or on a consultation basis. However, Student failed to meet her burden of proving by a preponderance of the evidence that Tehachapi denied her a FAPE by failing to provide Parents with complete IEP

documents, or with clear offers of annual goals in the IEPs that offered Student a FAPE.

### ISSUE 3(E): PREDETERMINATION OF SPEECH SERVICES

66. Student contends Tehachapi predetermined the offer of speech services at the March 22, 2018 IEP team meeting according to the speech pathologist's schedule. Tehachapi disagrees.

67. Student bases her contention on a statement made during the IEP team meeting that whether one-on-one speech services could be provided "depended on scheduling for the new school year, especially since at middle school they switch classes." However, Student presents this statement out of context. The statement was made during a discussion of the length of classes and the difficulty and disruption of pulling Student out of middle school classes that are 40 minutes long for 20-minute speech therapy sessions. Mother and Ms. Perry had told the team that Student could focus during Lindamood Bell instruction for hours at a time with short breaks, and there was no reason Student's speech services at middle school could not be provided in 40-minute blocks. Understandably, the speech pathologist at the middle school scheduled her time in 40-minute blocks to minimize singling students out for speech services, and the IEP team was discussing scheduling issues, not premising the individual services on speech pathologist availability. In fact, Tehachapi did offer 40 minutes weekly of both push-in and small group speech services in the March 22, 2018 IEP, consistent with the amount, if not the delivery models, recommended by Ms. Schnee. Student's contention that some amount of speech services were not offered due to the speech pathologist's schedule is disingenuous.

68. Student did not meet her burden of proving by a preponderance of the evidence that Tehachapi denied her a FAPE by determining the amount of speech therapy services if offered according to the speech pathologist's schedule.

### ISSUE 3(F): PRIOR WRITTEN NOTICE

69. Student contends Tehachapi failed to provide Parents with a prior written notice of its refusal to offer the Lindamood Bell reading intervention program when it was requested by Mother at the September 9, 2016 IEP team meeting. Tehachapi argues that the request for a particular reading methodology does not trigger the need for a prior written notice.

70. A school district is required to give the parents of a child with a disability written notice a reasonable time before it refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. (20 U.S.C. § 1415(b)(3)(b); 34 C.F.R. § 300.503(a)(2); Ed. Code, §56500.4(a).) A prior written notice must contain, as relevant here: (1) a description of the action proposed or refused by the agency; (2) an explanation for the action; and (3) a description of the assessment procedure or report which is the basis of the action. (Ed. Code, § 56500.4, subd. (b).) An IEP document can serve as prior written notice as long as the IEP contains the required content of appropriate notice. (71 Fed.Reg. 46691 (Aug. 14, 2006).)

71. The procedures relating to prior written notice "are designed to ensure that the parents of a child with a disability are both notified of decisions affecting their child and given an opportunity to object to these decisions." (*C.H. v. Cape Henlopen School Dist.* (3rd Cir. 2010) 606 F.3d 59, 70.) When a failure to give proper prior written notice does not actually impair parental knowledge or participation in educational decisions, the violation is not a substantive harm under the IDEA. (*Ibid.*)

72. Here, Parents were not requesting a change to the identification, evaluation, or educational placement, or the provision of FAPE to Student. Rather, Parents were seeking to have Student's academic reading goals addressed with a particular methodology, and a discussion of methodology for reading intervention did not trigger the need for a prior written notice.

73. In addition, whether or not Tehachapi would or could implement Parents' preference for Lindamood Bell as the reading intervention methodology was discussed at IEP team meetings on August 10, 2017, September 15, 2017, February 22, 2018, March 13, 2018, and March 22, 2018, ensuring Parents were notified of Tehachapi's decisions regarding implementation of Lindamood Bell as well as given an opportunity to object to these decisions, which was documented in the IEP meeting notes. An IEP provides parents with prior written notice when the school district proposes, or refuses, to initiate or change the educational placement of a disabled child in the IEP. (*Union, supra*, 15 F.3d at p. 1526.) Accordingly, even were a prior written notice required, any failure to give proper prior written notice did not actually impair Parents' knowledge or participation in educational decisions, and such a procedural violation would not constitute a substantive harm.

74. Student failed to meet her burden of proving by a preponderance of the evidence that Tehachapi denied her a FAPE by failing to provide Parents with prior written notice regarding the decision of whether to implement Lindamood Bell as a reading methodology.

#### ISSUE 3(G): PROGRESS REPORTS

75. Student contends that from Student's return to school for the 2017-2018 school year, Tehachapi failed to update Parents on Student's progress on goals, both because it was unclear which goals were being worked on and because progress reports were not provided at the IEP team meetings. Tehachapi argues that Mother received a verbal update on Student's progress from IEP team members at each IEP team meeting.

76. An IEP team must review a student's IEP periodically, but not less frequently than annually, to determine whether the Student's annual goals are being achieved (20 U.S.C. § 1414(d)(4)(A)(i); Ed. Code, § 56380, subd. (a)(1).) The IEP team shall

also meet whenever the student “demonstrates a lack of anticipated progress.” (Ed. Code, § 56343, subd. (b).)

77. An IEP must include a description of when periodic reports on the progress the student is making toward meeting the annual goals will be provided, such as through the use of quarterly or other periodic reports concurrent with the issuance of report cards. (34 C.F.R. § 300.320(a)(3)(ii); Ed. Code, § 56345(a)(3).)

78. Student did not brief this issue in her closing brief. Student’s IEPs were drafted with annual goals that included three objectives, for a total of three periodic reports of Student’s progress. Student did not submit into evidence any progress reports, let alone establish that the progress reports were defective for reporting on the wrong goals, or by including incorrect or insufficient information. None of Student’s teachers or service providers were called to testify as to which goals were being worked on during the 2017-2018 school year. Student submitted abundant evidence that Mother and Student’s advocate generated confusion regarding which goals had been offered and consented to, particularly as Mother herself wrote confusing emails and parent attachments and disseminated them to multiple members of Tehachapi staff, which generated additional confusion. However, Student attended school pursuant to a stay put placement under a 2014 IEP until Parents consented to placement and extended school year only under the May 19, 2017 IEP and not to proposed goals. Parents did not consent to implementation of new goals until May 7, 2018, at the end of the 2017-2018 school year. In light of the many hours of IEP team meeting discussion on drafting new annual goals for Student during the statutory period, and Parents’ repeated and adamant refusal to consent to goals, Student’s argument that Parents were unaware of which goals were in place prior to their May 7, 2018 consent to implementation of the goals in the April 27, 2018 IEP is unpersuasive.

79. To the extent Student contends that Tehachapi was required to review progress on goals at every IEP team meeting, such an argument is unreasonable and inconsistent with the IDEA. First, both the IDEA and California law require that IEP teams review annual goals, not progress during reporting intervals. Second, the California legislature mandated review of annual goals for lack of progress, without reference to whether interim objectives were timely met, and the legislature is presumed to have meant exactly what it said. (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1081.) Third, the IDEA does not contemplate that all annual goals will be achieved. It expressly provides that one of the purposes of the annual IEP review is to determine whether annual goals are being achieved and *revise* the IEP to address any lack of expected *progress toward* those goals. (34 C.F.R. § 300.324(b)(1)(ii)(A).)

80. As discussed at Issue 3(d), it took many meetings to complete Tehachapi's offers of special education and related services, including goals, but Parents were timely provided with copies of the documents as the meetings were completed. As Parents had not consented in writing to any of the goals proposed until May 7, 2018, any delay in receiving those documents did not affect the goals being implemented in the interim.

81. The audio recordings establish that Student was making progress on her goals after she returned to school for the 2017-2018 school year, and that Student's progress was discussed at most, if not all, of the IEP team meetings. The evidence did not support a finding that Tehachapi denied Parents an opportunity to meaningfully participate in the IEP development process by failing to regularly update them on Student's progress on annual goals.

82. Student failed to meet her burden of proving by a preponderance of the evidence that Tehachapi denied her a FAPE by failing to provide Parents with regular reports of Student's progress on goals.



## ISSUES 4 AND 8(G): PARENTS' REQUEST FOR LINDAMOOD BELL INSTRUCTION AND TEHACHAPI'S ALLEGEDLY INCONSISTENT RESPONSES

83. At Issue 4, Student contends she was denied a FAPE because, despite Mother's request for Lindamood Bell instruction as early as September 9, 2016, Lindamood Bell instruction was not offered until the April 27, 2018 IEP. At Issue 8(g), Student contends that Tehachapi gave inconsistent responses to Parents' requests for Lindamood Bell instruction. Tehachapi contends Lindamood Bell was an instructional methodology, not a component of FAPE, and that the alleged inconsistencies were no more than back and forth discussions.

84. Student's argument that she was entitled to Lindamood Bell instruction prior to April 27, 2018, fails for several reasons. First, the Lindamood Bell reading intervention program was just one of multiple reading intervention methodologies discussed by Student's IEP team. As discussed at Issue 3(a), Tehachapi was entitled to choose methodology and was not required to put its choice of methodology into the IEP document. Student had been out of school for an entire year, and Tehachapi team members reasonably wanted to have Student work with the reading intervention curriculums adopted by Tehachapi and in place in the classroom before deciding whether to replace that with a new reading intervention methodology. Mother agreed with a trial of the Wonders reading intervention. There was no reason for Tehachapi to offer hours of Lindamood Bell method instruction until the end of the 2017-2018 school year, and no requirement that they implement the program until Parents gave written consent to the April 27, 2018 IEP.

85. Second, although Parents preferred Lindamood Bell as a methodology and requested that it be implemented, Tehachapi was not required to offer Parent's methodology of choice (*Rowley, supra*, 458 U.S. at p. 208), let alone to implement that program. Tehachapi had adopted the Wonders reading intervention program and

others, and courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (See *T. B. v. Warwick School Commission* (1st Cir. 2004) 361 F.3d 80, 84.) Additionally, Student did not establish that Lindamood Bell is even an effective instructional method for children with disabilities like those of Student.

86. Third, Lindamood Bell was not a component of Tehachapi's offers of special education and related services in the IEPs of August 10, 2017, December 15, 2017, or March 22, 2018, and Tehachapi was not required to include a reference to Lindamood Bell in any of those IEPs.

87. Student did not brief the issue of alleged inconsistent responses. To the extent Student contends the discussions of the Lindamood Bell program, or any other aspect of Student's IEPs, were inconsistent over time, this argument fails. Tehachapi reasonably investigated the Lindamood Bell programs and brought information back to the team as it became available. Tehachapi had insufficient information to make an offer when Ms. Perry was teleconferenced into the March 13, 2018 IEP team meeting and said she would have to get back to Mr. Ferrell whether Lindamood Bell could provide a short diagnostic period of instruction. Tehachapi revisited Parents' request for Lindamood Bell methodology when Mother wrote disagreement letters or asked for Tehachapi to change to Lindamood Bell at IEP team meetings. Parents cannot be permitted to demand that issues be revisited in hopes of changing the opinions of IEP team members, and then accuse Tehachapi of significantly interfering with Parents' participation in the IEP process for agreeing with Parents and making a change in the offered reading intervention methodology.

88. Student failed to meet her burden of proving by a preponderance of the evidence that Tehachapi denied her a FAPE by failing to offer or implement Lindamood Bell instruction prior to the IEP offer of April 27, 2018. Student also failed to meet her

burden of proving by a preponderance of the evidence that Tehachapi denied her a FAPE by providing inconsistent responses to Parents regarding an offer of Lindamood Bell instruction.

#### ISSUE 6: ASSISTIVE TECHNOLOGY IMPLEMENTATION

89. Student contends she was denied a FAPE because Tehachapi failed to write into the May 19, 2017 or August 10, 2017 IEPs the recommended annual goals and accommodations in the independent assistive technology assessment report presented at the February 24, 2017 IEP team meeting. Tehachapi contends that the recommended equipment, software, and curriculum were already accessible to Student in her classroom.

90. If the IEP team determines that a pupil needs a particular device or service, including an intervention, accommodation, or other program modification, to receive a FAPE, the IEP must include a statement to that. (Ed. Code, § 56341.1, subd. (c).) Assistive technology devices that are necessary for a FAPE must be included in the Student's IEP. (*Letter to Anonymous*, 18 IDELR 627 (OSEP 1991).)

91. A school district must implement all components of a student's IEP. (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(c).) When a student alleges the denial of a FAPE based on the failure to implement an IEP, to prevail, the student must prove that any failure to implement the IEP was "material," which means that the services provided to a disabled child fall "significantly short of the services required by the child's IEP." (*Van Duyn v. Baker School Dist.* 5J (9th Cir. 2007) 502 F.3d 811, 822.) A minor discrepancy between the services provided, and the services required in the IEP is not enough to amount to a denial of a FAPE. (*Ibid.*) "There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education." (*Ibid.*)

92. Ms. Barraza's assistive technology report, presented to the IEP team on February 24, 2017, recommended that Student use a word processor with word prediction software and opportunities to practice keyboarding skills to support writing assignments. However, her report stressed that it was important that Student continue to work on handwriting skills, and that the technology was recommended only when written output was lengthy and arduous for Student. Student needed adult support and scaffolding, not access to a laptop, throughout the school day. The assistive technology recommendations were not immediately inserted into the IEP, but Student already had access to a computer with word prediction software and opportunities to learn keyboarding skills during computer lab as part of her weekly classroom routine. Student was also working on goals at the end of the 2016-2017 school year and during the 2017-2018 school year, that did not require production of lengthy written assignments.

93. It was a procedural violation that the assistive technology accommodations were not written into the offers of special education and relate services in the May 19, 2017 and August 10, 2017 IEPs, but a minor one. Student did not have lengthy and arduous writing assignments and had the opportunity to access a computer and work on keyboarding skills during her regularly scheduled computer lab. Therefore, had Parents consented to those IEPs, Student would have benefitted from the assistive technology accommodations even without those accommodations expressly listed on the IEP. The procedural errors in documenting computer access in the IEPs was immaterial, because the services to be provided to Student would not have fallen significantly short of the accommodations recommended by Ms. Barraza.

94. However, this issue is set forth in Student's complaint as an implementation issue. Parents did not consent to the August 10, 2017 IEP and did not consent to the December 15, 2017 IEP until May 7, 2018. Accordingly, Tehachapi had no duty to implement the assistive technology recommendations prior to May 7, 2018.

Student presented no evidence that Tehachapi failed to implement the assistive technology accommodations in the December 15, 2017 IEP, as modified on April 27, 2018, after Parents' consent on May 7, 2018.

95. Student did not meet her burden of proving by a preponderance of the evidence that Tehachapi denied her a FAPE by failing to write assistive technology accommodations into Student's IEPs prior to April 27, 2018, or that the assistive technology accommodations written into the December 15, 2017 IEP completed on April 27, 2018, were not implemented.

#### ISSUE 7: TIMELY AND NECESSARY ASSESSMENTS

#### ISSUE 8(A): INDEPENDENT EDUCATIONAL ASSESSMENTS

96. At Issue 7, Student contends Tehachapi failed to timely complete Student's occupational therapy assessment after Mother's consent and failed to timely respond to Parents' requests for assessments in the areas of occupational therapy, speech and language, psychoeducation, and inclusion. At Issue 8(a), Student contends that Tehachapi delayed contracting with and compensating Dr. Katz and Ms. Schnee. Tehachapi argues that Mother agreed to delay the occupational therapy assessment, that it was not obligated to provide independent educational evaluations within the statutory timelines applicable for school district assessments, and that it acted reasonably in contracting with the chosen assessors.

97. Special education law references "initial evaluations" (20 U.S.C. § 1414(a)(1)(A); 34 C.F.R. § 300.301; Ed. Code, § 56320), and "reevaluations." (20 U.S.C. § 1414(a), (c); 34 C.F.R. § 300.303; Ed. Code, § 56381, subd. (a)(1).) "An initial evaluation is the first complete assessment of a child to determine if the child has a disability under the IDEA, and the nature and extent of special education and related services required. Once a child has been fully evaluated. . . any subsequent evaluation of that child would

constitute a reevaluation." (71 Fed.Reg. 46640 (Aug. 14, 2006).) California law refers to a reevaluation as a "reassessment." (Ed. Code, § 56381.)

98. The IDEA provides for reevaluations to be conducted not more frequently than once a year unless the parent and school district agree otherwise, but at least once every three years unless the parent and school district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment must be conducted if the school district "determines that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment, or if the pupil's parents or teacher requests a reassessment." (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

99. Reassessment generally requires parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To start the process of obtaining parental consent for a reassessment, the school district must provide proper notice to the student and his or her parents. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The proposed assessment plan must be given in writing to the parent within 15 days of the referral for assessment. (Ed. Code § 56321, subd. (a).) The school district must give the parents and/or student 15 days to review, sign, and return the proposed assessment plan. (*Id.*)

100. Parents who want their child to receive special education services must allow reassessment if conditions warrant it. In *Gregory K*, the court stated that "if the parents want [their child] to receive special education under the Act, they are obliged to permit such testing." (*Gregory K*, *supra*, 811 F.2d at p. 1315; See, e.g., *Patricia P. v. Board of Educ. of Oak Park and River Forest High School Dist. No. 200* (7th Cir. 2000) 203 F.3d 462, 468; see also, *Johnson v. Duneland School Corp.* (7th Cir. 1996) 92 F.3d 554, 557-58.) In *Andress v. Cleveland Independent. School Dist.* (5th Cir. 1995) 64 F.3d 176, 178

(*Andress*), the court concluded that “a parent who desires for her child to receive special education must allow the school district to evaluate the child ... [T]here is no exception to this rule.”

101. Parents who want their children to receive special education services cannot force the district to rely solely on an independent evaluation. (*Johnson v. Duneland Sch. Corp.* (7th Cir.1996) 92 F.3d 554, 558; *Andress, supra*, 64 F.3d at pp. 178-79; *Dubois v. Conn. State Bd. of Ed.* (2d Cir.1984) 727 F.2d 44, 48.) A school district has the right to evaluation by an assessor of its choice. (*M.T.V. v. DeKalb County School Dist.* (11th Cir. 2007) 446 F.3d 1153, 1160.) Moreover, the right to assess belongs to school districts, and parents have no right to insist on outside assessors. (See, *Andress, supra*, 64 F.3d at p. 179.) In *G.J. v. Muscogee County Sch. Dist.* (M.D. Ga. 2010) 704 F.Supp.2d 1299, *affd.* (11th Cir. 2012) 668 F.3d 1258 (*Muscogee*).

102. As long as statutory requirements for assessments are satisfied, parents may not put conditions on assessments. (*Letter to Anonymous* (OSEP Sept. 17, 1993) 20 IDELR 542, 20 LRP 2357; *Haowen Z. v. Poway Unified School Dist.* (S.D. Cal. Aug. 14, 2013 , Case No. 13-CV-1589-JM (BLM)) 2013 WL 4401673, \*5 (unpub.) citing *K.S. v. Fremont* (ND Cal. 2009) 679 F.Supp.2d 1046.) Moreover, the right to assess belongs to school districts, and parents have no right to insist on outside assessors. (See, *Andress, supra*, 64 F.3d at p. 179.) Parents’ conditions “vitiating any rights the school district had under the IDEA for the reevaluation process....” (*Muscogee, supra*, 668 F.3d at p. 1264.)

103. A school district is required to conduct an assessment and convene an IEP team meeting to review the assessment within 60 days of receiving parental consent to assess, excluding pupil vacations in excess of five days, unless the parent agrees to an extension in writing. (20 U.S.C. § 1414(a)(1)(C)(I); Ed. Code, § 56043, subd. (f)(1).)

104. A school district’s failure to conduct appropriate assessments, or to assess in all areas of suspected disability, may constitute a procedural denial of a FAPE. (*Park v.*

*Anaheim Union High School District* (9th Cir. 2006), 464 F.3d 1025, 1031-1033.) In the event of a procedural violation, a denial of FAPE may only be found if that procedural violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or caused deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).)

### Occupational Therapy Assessment

105. Mother requested that the IEP team consider occupational therapy services for Student at the August 10, 2018 IEP, but did not request an occupational therapy assessment until September 19, 2017. The email requesting the occupational therapy assessment triggered Tehachapi's obligation to prepare an assessment plan for Parents' signature within 15 days, and it committed a procedural violation by failing to respond to Parent's request.

106. Tehachapi also failed to timely respond to Parents' oral and written requests for an occupational therapy assessment on October 16, 2017. Although it was reasonable for Tehachapi to make an effort to confirm with Parents that Ms. Ortiz was an acceptable assessor, it did not give Parents a written proposed assessment plan until November 28, 2017, more than 60 days after the initial assessment request.

107. Mother made a unilateral change to the proposed assessment plan prior to signing it, which voided the consent. However, Tehachapi unreasonably delayed for another three weeks in discovering the change before providing another assessment plan to Parents on November 28, 2017.

108. Mother signed the new assessment plan on November 28, 2017, triggering Tehachapi's obligation to complete the assessment and review it at an IEP team meeting within 60 calendar days, excluding Tehachapi's pupil vacation for Winter break from December 22, 2017 through January 7, 2018, or a total of 17 days. Accordingly, an IEP team review of the completed assessment was due on or before February 13, 2018.



Accordingly, procedural violation is found on this ground, as the occupational therapy assessment was completed and timely reviewed by the IEP team at the January 30, 2018 IEP team meeting.

#### Inclusion Assessment

109. Parents originally requested that Dr. Malmberg perform an inclusion assessment as an independent educational evaluation on November 1, 2017, but as Tehachapi had not yet conducted their requested an inclusion assessment for Student, Parents were not entitled to an independent educational evaluation.<sup>12</sup> Parents agreed to wait until Dr. Katz gave his triennial psychoeducational assessment report to revisit Parents' request for an inclusion assessment.

110. Parent requested additional mainstreaming opportunities for Student at the December 15, 2017 IEP team meeting, but the team did not revisit the inclusion assessment that would make additional inclusion possible until the March 13, 2018 IEP team meeting. Although Tehachapi then obtained Parents' consent and timely completed and reviewed the inclusion assessment at the May 21, 2018 IEP, Tehachapi committed a procedural violation by waiting over three months to prepare an inclusion assessment plan for Parents' consent. In addition, when the assessment was presented, it was woefully inadequate.

111. In conclusion, Tehachapi's delays in responding to Parents' assessment requests and conducting the occupational therapy and inclusion assessments interfered

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<sup>12</sup> A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the school district, subject to certain conditions. Here, Tehachapi had not yet performed its own inclusion assessment. The independent assessments by Dr. Katz and Ms. Schnee were arranged by agreement of the parties.

with Parents opportunity to meaningfully participate in the decision-making process of developing an appropriate educational program for Student. Student was found eligible for occupational therapy services at the January 30, 2018 IEP and was deprived of educational benefit by the delay in the offer of occupational therapy services as it is reasonable to presume that Tehachapi would have found Student eligible for occupational therapy services sooner if it had timely assessed Student. Remedies will be discussed at the end of this decision.

### Psychoeducational and Speech and Language Assessments

112. The weight of the evidence did not establish that Tehachapi delayed in failing to respond to Parents' request for independent assessors, as Parents were not entitled to independent assessments as part of Student's triennial. Student's triennial reassessment was due to be completed by December 18, 2017. Mother's desire to have academic assessments completed at the end of the 2016-2017 school year, rather than waiting for the triennial in 2017-2018, did not obligate Tehachapi to conduct the triennial assessments earlier. Student had not been in school for the entire 2016-2017 school year, and Tehachapi IEP team members wanted to assess Student after she had attended the 2017 extended school year and back in the school environment. Parents distrusted the school district assessors, and they eventually agreed with Tehachapi at the October 16, 2017 IEP team meeting that the triennial psychoeducational and speech and language assessments would be conducted by independent assessors of Parents' choice, rather than by school district staff. By agreement of the parties, Tehachapi was not using its own employees, and the 60-day timeline for completion and review of assessments by school district staff did not apply.

113. The weight of the evidence did not establish that Tehachapi engaged in any unnecessary delay in completing the contracts with the independent assessors. Tehachapi agreed to fund the independent assessments, and Mother reiterated her

choice of assessors at the October 16, 2017 IEP team meeting. Mr. Ferrell testified convincingly that he acted promptly to obtain contract information from the independent assessors, provide that information to Tehachapi's legal counsel to prepare the necessary contracts and to finalize the contracts with the assessors and obtain school board approval. The contracts were approved by the school board on November 14, 2017, less than 30 days after the agreement to fund. Ms. Schnee began her assessment just days after the board approval, and Mr. Katz sent questionnaires for Parents to complete in November 2017 and performed observations of Student in Ms. Hagerty's classroom on December 11, 2017. Tehachapi had no control over the independent assessors' work schedule, and there was no evidence that Tehachapi acted in any way to interfere with or delay the independent assessments.

114. The evidence did not establish that any misunderstandings between either Dr. Katz or Ms. Schnee and Tehachapi regarding payment pursuant to their contracts caused delay in the completion and presentation of the assessments. Ms. Schnee completed the speech assessment prior to December 15, 2017, but could not attend an IEP team meeting on that day or during the two weeks after because she was out of the country. Both assessors testified credibly and convincingly that payment delays did not interfere with the conduct of their assessments or the presentation of their results to Student's IEP team. In fact, both assessors subsequently entered into additional contracts with Tehachapi to perform independent assessments.

115. Student met her burden of proving by a preponderance of the evidence that Tehachapi denied her a FAPE by failing to timely assess Student for occupational therapy and inclusion. However, Student failed to meet her burden of proving by a preponderance of the evidence that Tehachapi denied her a FAPE by failing to timely conduct psychoeducational or speech and language assessments.

## ISSUE 8(B): DEVELOPMENT OF ANNUAL IEP OVER SERIES OF MEETINGS

116. Student contends Tehachapi denied her a FAPE because it delayed in developing her annual IEPs over a series of meetings, with redundant and unnecessary IEP team meetings. Tehachapi contends development of Student's IEPs over multiple meetings was required for FAPE, particularly as input from Parents and several independent assessors was needed before the IEP team could make an informed offer of special education and related services to Student.

117. A school district has an affirmative duty to review and revise, at least annually, an eligible child's IEP to determine whether the annual goals for the pupil are being achieved. (20 U.S.C. §§ 1414(d)(2)(A) and (4)(A); 34 C.F.R. §§ 300.323(a) and 300.324(b)(1); Ed. Code § 56380(a)(1); see *Anchorage School Dist. v. M.P.* (9th Cir. 2012), 689 F.3d 1047, 1055 (*Anchorage*).) An IEP must be reviewed and revised because the needs of a child with a disability often change, and the IEP must be responsive to those changes in order to offer a FAPE. (20 U.S.C. §§ 1414(d)(4)(A),(B).) IEP teams must meet no less frequently than once per year to design a new program, even where it is clear the services of the student will remain the same. (34 C.F.R. § 300.324(b)(1)(i).) The team meeting to review annual goals does not preclude the IEP team from meeting for other purposes. (See Ed. Code, § 56380, subd. (c).)

118. To the extent possible, the school district should encourage the consolidation of the triennial reevaluation meetings and other IEP team meetings for the child. (20 U.S.C. § 1414(d)(3)(E); 34 C.F.R. 300.324(a)(5).) However, the district may convene as many meetings in a year as any child may need. (*Letter to Borski* (OSEP 1990) 16 IDELR 884.)

119. When parents request extensive revisions to an IEP, the school district has two options: (1) continue working with the parents to develop a mutually agreeable IEP, or (2) unilaterally revise the IEP and then file an administrative complaint to obtain

approval of the proposed IEP. (*Anchorage, supra*, 689 F.3d. at p. 1056.) The Ninth Circuit has been particularly harsh in criticizing school districts for failing to ensure parental participation in the development of their child's IEP. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992), *superseded on other grounds by* 20 U.S.C. § 1414(d)(1)(B).) In *Anchorage*, the parents and educational agency had a strained relationship due to the parents' "zealous" advocacy for their son, which included the filing of four administrative complaints within several months. Nonetheless, the Ninth Circuit admonished the school district to continue working with the parents, explaining that "it would be antithetical to the IDEA's purposes to penalize parents – and consequently children with disabilities, for exercising the very rights afforded to them under the IDEA." (*Anchorage, supra*, 689 F.3d. at p. 1056.)

120. In *Doug C., supra*, 720 F.3d 1038, the parent frequently wanted to reschedule meetings, and when the parent wanted to reschedule the annual review due to illness, the agency held the annual IEP team review without the parent to meet a statutory deadline. The Ninth Circuit explained that parental participation in the IEP process is critical to the IDEA's structure, which relies upon parental participation to ensure the substantive success of the IDEA in providing quality education to disabled students:

[W]e think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon

full participation of concerned parties *throughout the development* of the IEP . . . demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

(*Doug C.*, *supra*, 720 F.3d at pp. 1043-1044, quoting *Rowley*, *supra*, 458 U.S. at pp. 205-206 (*emphasis added*); see also *Honig v. Doe* (1988) 484 U.S. 305, 311 ["Congress repeatedly emphasized throughout the [IDEA] the importance and *indeed the necessity of parental participation* in both the development of the IEP and any subsequent assessments of its effectiveness."(*emphasis added* )].)

121. The Ninth Circuit has emphasized that parental participation safeguards are among the most important procedural safeguards in the IDEA, and procedural violations that interfere with parental participation in the IEP formulation process "undermine the very essence of the IDEA." (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 892 (*Amanda J.*)). In *Amanda J.*, the Ninth Circuit explained that parental participation was key to the operation of the IDEA, because parents not only represent the best interests of their child in the IEP development process, but also "provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know." (*Id.*, at p. 882.)

122. The fact that it may be difficult to schedule meetings or to work with a parent does not excuse a failure to include the parent in the IEP team meeting. (*Doug C.*, *supra*, 720 F.3d at p. 1045; *Roberts v. Santa Monica-Malibu Unified School Dist.* (9th Cir. 2015) 606 Fed.Appx. 359.) Educational agencies have timelines to meet, which may be jeopardized by having to reschedule or continue meetings, and the Ninth Circuit explained the deliberation process that the agency must use:

The more difficult question is what a public agency must do when confronted with the difficult situation of being unable to meet two distinct procedural requirements of the IDEA, in this case parental participation and timely annual review of the IEP. In considering this question we keep in mind the purposes of the IDEA: to provide disabled students a free appropriate public education and to protect the educational rights of those students. It is also useful to consider our standard for determining when a procedural error is actionable under the IDEA. We have repeatedly held that “procedural inadequacies that result in the loss of educational opportunity or seriously infringe the parents’ opportunity to participate in the IEP formulation process, clearly result in the denial of FAPE.” When confronted with the situation of complying with one procedural requirement of the IDEA or another, we hold that the agency must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in a denial of FAPE. In reviewing an agency’s actions in such a scenario, we will *allow the agency reasonable latitude in making that determination*.

(*Doug C.*, *supra*, 720 F.3d at p. 1046 (Internal citations omitted, emphasis added)). The Ninth Circuit noted that it previously held that delays in meeting deadlines did not deprive the student of educational benefit (see *A.M. v. Monrovia* (9th Cir. 2010) 627 F.3d 773, 779), and held that the agency’s decision to prioritize strict deadline compliance over parental participation was clearly not reasonable.

123. Here, the opening pages of the parties' closing briefs demonstrate the strained relationship between Parents and Tehachapi, if the history of administrative complaints and pending appeals were not enough. The audio recordings of the IEP team meetings established that Tehachapi staff had a very difficult time completing an IEP due to zealous parental participation. Mother attended each IEP team meeting with Student's advocate and a family friend, each of which required information to be re-reviewed to their individual satisfaction. Mother and Student's advocate were often argumentative and often misinformed on Tehachapi's legal responsibilities. Mother frequently requested to re-visit agenda items discussed in a prior IEP team meeting, particularly when she was hoping to produce a different consensus. Because Mother routinely emailed multiple school staff regarding her questions prior to IEP team meetings, Tehachapi staff were required at meetings to take time to untangle whether and by whom requests had been received, and if and by whom action had been taken in response to Parents' requests. Mother wrote parental attachments to the IEPs with extensive lists of changes she wanted to Student's IEPs and even created her own cut-and-paste proposed IEP, which required additional IEP team meetings for discussion and attempts to obtain parental consent.

124. Robust discussions by Mother and Student's advocate at each IEP team meeting resulted in delays that placed Tehachapi in the difficult position of being unable to both comply with procedural deadlines for annual and triennial IEP review and allow for Parents' full participation. Tehachapi made the reasonable determination that promoting parental participation promoted the purposes of the IDEA and was least likely to result in a denial of FAPE. Tehachapi is entitled to reasonable latitude in prioritizing Parents' participation, as the Ninth Circuit has repeatedly emphasized that parental contributions to an IEP are fundamental to developing a FAPE and, at *Doug C.*,



stated in no uncertain terms that school districts should prioritize parental participation over meeting deadlines.

125. Tehachapi prioritized Parents' participation in the development of Student's IEPs over compliance with procedural deadlines. The audio recordings of the IEP team meetings at issue demonstrated that the discussions at each meeting were generally civil, but were also involved, lengthy and sometimes contentious, resulting in meetings that could not complete the agenda for a full IEP. The meetings of Student's IEP team routinely took longer than the two, three, or four hours scheduled and multiple meetings were required to resolve disputes regarding Student's present levels of performance and appropriate educational program components. Tehachapi team members solicited Mother's input and allowed Mother and Student's advocate generous amounts of time to explain Parents' concerns and offer opinions and recommendations on Student's program. Throughout the time at issue, Mother requested extensive IEP revisions, and multiple meetings allowed robust discussions of Student's skills, progress and program options. In accordance with *Anchorage*, Tehachapi complied with the letter and spirit of the IDEA by convening as many meetings as necessary to address Mother's meaningful participation in the IEP development process, prioritizing that participation over statutory deadlines.

126. Prioritizing Parents' participation also was least likely to result in a denial of FAPE to Student. Parents would not allow Student to attend school during the 2016-2017 school year pending issuance of an OAH decision on Student being accompanied by an insurance-funded behavior aide, and Tehachapi reasonably chose to work on developing IEPs with Parents' participation during her absence from school. Student returned to School in June 2017 pursuant to an IEP consented to by Parents for extended school year services. Tehachapi had an August 10, 2017 offer of special education and services developed, with parental participation, in place before the start

of the 2017-2018 school year. Tehachapi also developed the April 27, 2018 triennial IEP, as modified on May 21, 2018, and June 29, 2018, for Student's transition into middle school for the 2018-2019 school year, again with parental participation, including independent assessors of Parents' choice. Although delays were inherent in prioritizing Parents' participation over IEP annual review deadlines, Tehachapi reasonably determined that such a course of action was least likely to result in a denial of FAPE than making IEP offers without the full participation of Parents. Accordingly, allowing Tehachapi reasonable latitude in making this decision and noting that Student had current IEP offers in place at the beginning of each school year, it was not a procedural violation for Student's IEP team meetings to be delayed so that Parents could fully and meaningfully participate in the development of Student's educational program.

127. There was no evidence that Tehachapi sought to schedule unnecessary IEP team meetings, to inconvenience Parents or for any other reason. Each IEP team meeting had an express purpose and was continued only in the event additional information was necessary for the IEP team to fully consider input so Tehachapi could make or modify an offer of special education and related services. Tehachapi had an existing offer of goals, placement, services, and accommodations on March 3, 2016, and modified that offer when provided with additional information at the IEP team meeting of May 19, 2017. Tehachapi made an offer of special education and related services on August 10, 2017, and met on October 16, 2017 discuss Parents' parental attachment, updating present levels of performance, adopting goals, Parents' request for an occupational therapy assessment, and whether the triennial assessments should be completed by independent assessors. After the annual IEP team meeting was opened and closed without action, IEP team meetings were held on December 15, 2017, January 18, 2018, January 30, 2018, February 22, 2018, March 13, 2018, and March 22, 2018, to review the various assessment reports, develop annual goals and finalize an offer of

FAPE. The April 27, 2018 IEP was called to address Parents' concerns with the March 22, 2018 IEP and resulted in further revisions to the offer of special education and related services, to which Parents consented for implementation only on May 7, 2018. The May 21, 2018 IEP team meeting was timely called to review Mr. Acosta's inclusion report, and plan for Student's transition to middle school. The June 29, 2018 IEP team meeting was called to discuss Student's progress after the extended school year and to plan for the upcoming transition to middle school in light of that report. Each of these meetings were called for the purpose of eliciting parental participation on developing an offer of special education and services and timely scheduled.

128. Some delays between IEP team meetings were inherent in having independent assessors conduct Student's assessments, but with the exception of the occupational therapy and inclusion assessment reviews, the delays were not the result of dilatory or reasonable conduct by Tehachapi. Instead, a series of meetings was held as needed to allow abundant parental participation and to have Student's IEP team work through the information required to develop an appropriate educational program for Student, without unnecessary delay.

129. Tehachapi promptly scheduled continued meetings to take place within two to four weeks, unless Parents did not respond (as was the case in November 2017) or independent assessors required additional time. All meetings were convened with an express purpose, and either brought at Parent's request, called in response to parental attachments, necessitated by statutory deadlines, or needed for further information in order to develop an offer of special education and related services.

130. Tehachapi made a reasonable effort to reduce the number of meetings. It combined the annual and triennial meetings, and scheduled one meeting where both Ms. Schnee and Dr. Katz could present their assessment reports. Tehachapi also accommodated Mother's request to realign the annual review to take place in May 2019

to accommodate Parents' work schedules. Tehachapi could have delayed the presentation of reports by Dr. Katz and Ms. Schnee, to schedule the presentation of the occupational therapy assessment at the same time, but in light of the historic need for abundant time to respond to questions from Mother, and Tehachapi's desire to review the reports to update present levels of performance and draft proposed goals, it was reasonable for Tehachapi to schedule meetings when the independent assessment reports were available without further delay for another report.

131. It was reasonable for Tehachapi to schedule Student's IEP team meetings in blocks of two hours, later increased to three or four hours. Tehachapi was in the unenviable position of repeatedly taking special education staff away from the students they served, and it was not unreasonable to put a limitation of two to three hours on IEP team meetings to return staff to their classrooms, or to complete IEP team meetings for multiple students in a day. Student's IEP team meetings more often than not involved repetitive and circular discussions that likely would have continued through any additional time allotted. Continuances of meetings gave Mother and Student's advocate time to process their questions and articulate them in writing for the next IEP team meeting. It also provided Tehachapi with a reasonable mechanism for wrapping up one discussion and obtaining agreement from the team on the next agenda item for a reconvened meeting.

132. Tehachapi's series of IEP team meetings unquestionably resulted in Student's annual IEP review due December 7, 2016, not being completed until August 10, 2017, and the annual review due December 7, 2017, being completed four months later on April 27, 2018. However, per the guidance of *Doug C.*, when confronted with the situation of complying with one procedural requirement of the IDEA or another, Tehachapi made the reasonable determination that holding a series of meetings to provide Parents with the time necessary for them to provide all of their input regarding

Student's unique needs and to have all of their questions answered promoted the purposes of the IDEA and was less likely to result in a denial of FAPE than completing the IEP without careful consideration of Parents' input. *Doug C.* requires a reviewing administrative law judge to allow Tehachapi reasonable latitude in making that determination, and here, the unique facts of this case establish that Tehachapi acted reasonably in prioritizing the participation of Parents and completing Student's offer of special education and related services over a series of IEP team meetings.

133. As discussed at Issues 7 and 8(a), delays inherent in retaining independent assessors to conduct the psychoeducational and language and speech assessments were beyond Tehachapi's control. More importantly, delays for purposes of obtaining current present levels of performance provided the IEP team with critical information about Student, who had been out of school for most of the past three years, and complied with Parents' request for dispensing with old assessment information and obtaining new assessment information. Cooperating with Parents on gathering current information on Student's cognitive ability, academic skills, and other present levels of performance, increased Parents' opportunities to meaningfully participate in the process of developing Student's educational program. Accordingly, Tehachapi should be accorded reasonable latitude, rather than penalized, for taking the extra time to gather Parents into the decision-making process.

134. Student did not meet her burden of proving by a preponderance of the evidence that Tehachapi denied her a FAPE by developing her annual IEPs over a series of meetings.

#### ISSUE 8(C): DELAYS IN START OF IEP TEAM MEETINGS

135. Student contends Tehachapi denied her a FAPE and violated the IDEA by routinely starting the IEP team meetings late. Tehachapi disagrees.

136. The IDEA requires districts to schedule an IEP team meeting at a mutually

agreed time and place. (34 C.F.R. § 300.322(a)(2).) The IDEA does not impose specific timelines in connection with the IEP team meeting notice requirement. It simply requires that the school district notify the parents of the IEP team meeting early enough to ensure that they will have an opportunity to attend. (34 C.F.R. § 300.322(a)(1).) Ten days is a customary period, and is generally considered adequate time for parents to make whatever arrangements are necessary to attend. (*Letter to Constantian* (OSEP 1990) 17 IDELR 118.)

137. Tehachapi often started the IEP team meetings late by 15 minutes or more, but also often allowed the meetings to continue for 15 or more minutes beyond the scheduled time period. The weight of the evidence did not establish that the delays in the start of the IEP team meetings were caused by Tehachapi IEP team members, were excessive in number or length, or were other than inadvertent. Although the cumulative time seems large, that is an inevitable consequence of Tehachapi's determination to hold as many IEP team meetings as necessary to ensure full parental participation, and the size and composition of Student's large IEP team.

138. Tehachapi held the December 7, 2017 IEP team meeting without Parents' present. This is a procedural violation both because Parents were willing to attend the meeting if it was rescheduled, and Parents were given very short notice. However, Tehachapi also notified Mother of the meeting and of its intention to open and close the meeting without action if Mother could not attend. Because no action was taken in Parents' absence, holding that meeting without Parents present did not deny Student a FAPE because there was no interference with Parents' right to be involved in the development of Student's educational program.

139. Student did not meet her burden of proving by a preponderance of the evidence that Tehachapi denied her a FAPE by intentionally delaying the start of any IEP team meeting, or that the cumulative inadvertent delays significantly impeded Parents'

opportunity to participate in the decision-making process regarding the provision of a FAPE to Student.

#### ISSUE 8(D): DOCUMENTS IN ADVANCE OF IEP TEAM MEETINGS

#### ISSUE 8(F): RESPONSE TO DOCUMENT REQUESTS

140. At Issues 8(d) and 8(f), Student contends she was denied a FAPE because Tehachapi failed to provide Parents with documents to be reviewed at IEP team meetings sufficiently in advance, or to respond to her records requests in a timely manner. Tehachapi argues that there was no evidence that it delayed in providing documents or withheld information from Parents, or in the instance of independent assessors, that Tehachapi received the assessment reports before Parents did.

141. The parent of a student with special needs is afforded the right and opportunity to examine all school records of the student five business days after the request is made by the parent, either orally or in writing.” (Ed. Code, § 56504.) Educational records include assessments that are personally identifiable to the child, and must be disclosed to the parents. (*Newport Mesa, supra*, 371 F.Supp.2d at 1175.)

142. The weight of the evidence established that Tehachapi routinely forwarded documents to be considered at an IEP team meeting to Parents as soon as they were available. For example, Ms. Hagerty emailed proposed academic goals to Mother four days before the March 13, 2018 IEP team meeting. However, when Mother requested proposed speech goals from Ms. Ferrell three days prior to the March 22, 2018 IEP team meeting, Ms. Ferrell was very forthright in responding to Mother the next day that she had not yet finished drafting the proposed goals and they were not yet available. Parents were able to obtain the independent assessor’s reports directly from the independent assessors and did not need to go through Tehachapi. Mother unquestionably wanted to have documents sooner, but the weight of the evidence did

not establish that the documents Mother requested were not provided to her as soon as finalized and ready for distribution to the rest of Student's IEP team, or that the delayed interfered with her ability to participate in Student's educational decision-making process.

143. The weight of the evidence also established that Tehachapi promptly responded to all Parents' requests for documents. Delays of a few days were sometimes unavoidable if the person to whom the request was directed was not available, or if Parents were also seeking action on Tehachapi's part, such as a series of changes to an IEP document. Mother generated a significant amount of confusion with regard to her requests by routinely emailing multiple staff members for information, forwarding emails, and generally having many partial email chains going on at the same time, and Tehachapi acted reasonably by directing Mother to send all requests for information through Mr. Ferrell to avoid future confusion and delay in responding to Parents. (*Forest Grove School Dist. v. Student* (D. Or. Nov. 27, 2018, Case No. 3:14-cv-00444-AC) 2018 WL 6198281, \*\*13-15.)

144. Other than IEP documents and assessment reports, the only documents sought by Mother were speech logs, and the weight of the evidence established that those documents were provided to Parents in a timely manner. Mother requested copies of Student's speech logs on May 7, 2018, and all of the speech logs in Student's educational files were promptly sent to Mother on May 10, 2018. Tehachapi informed Mother that Student had been served by substitute speech language pathologists during the 2017-2018 school year, and that additional time was necessary to obtain those documents. The remaining logs were promptly provided on May 15, 2018.

145. Student failed to meet her burden of proving by a preponderance of the evidence that Tehachapi denied Student a FAPE by failing to provide Parents with



documents for review at IEP team meetings as soon as available, or by failing to timely respond to Parents' document requests.

#### ISSUE 8(E): PARENT REACTION TO PLACEMENT OFFER

146. Student contends Mr. Ferrell intentionally offered Student placement at a County program at the IEP team meeting of February 24, 2017, because he wanted to upset Mother. Tehachapi disagrees.

147. The weight of the evidence established that Mr. Ferrell did not make an offer of County placement at the February 24, 2017 IEP team meeting. The IEP itself did not contain any such offer. More importantly, the transcript of the IEP team meeting clearly reflects that Mr. Ferrell stated the County placement offer had been made several years ago, and that Tehachapi had a March 3, 2016 IEP offer outstanding to place Student in a mild to moderate special day class in her home school. Mother took Mr. Ferrell's statements out of context, and Student's contention that Tehachapi was somehow making another offer of placement in a County program at the February 24, 2017 IEP, to upset Mother or otherwise, appears disingenuous.

148. Student failed to meet her burden of proving by a preponderance of the evidence that Tehachapi made an offer of placement in a County program at the February 24, 2017 IEP team meeting to upset Mother.

#### ISSUE 8(H): NOTICE OF TEAM MEMBER ATTENDANCE

149. Student contends Tehachapi was required to include the names of IEP team members in the notice of IEP team meetings. Tehachapi contends that such specificity is not required.

150. The IDEA directs school districts to notify parents about who will be in attendance at the IEP team meeting. (34 C.F.R. § 300.322(b)(1)(i).) The Department of Education's Office of Special Education Programs does not interpret this regulation to

require that the notice identify individuals who will be attending the IEP team meeting by name, as long as the notice identifies the individuals by position. (*Letter to Livingston* (OSEP 1994) 21 IDELR 1060.) "Position," in this context, refers to the position held in the school district, not within the IEP team. (*Letter to Livingston* (OSEP 1995) 23 IDELR 564.)

151. Here, Tehachapi was not required to provide Parents with the names of the persons who would be attending the IEP team meetings. Tehachapi was required to, and did, identify the invited school district IEP team members by the position they held within Tehachapi.

152. Student did not meet her burden of proving by a preponderance of the evidence that Tehachapi denied her a FAPE by failing to provide the names of individual school district IEP team members in the IEP team meeting notices.

#### REMEDIES

153. Student prevailed on Issues 1 and 2, as she was denied a FAPE by Tehachapi's failure to develop appropriate speech and language goals and to offer one-on-one speech services or speech pathologist facilitated interactions with typical peers. Student partially prevailed on Issue 3(d) because she was denied a FAPE by Tehachapi's failure to specify in all IEPs except the April 27, 2018 IEP whether related services offered were to be provided to Student on a one-on-one, small group or consultation basis. Lastly, Student also partially prevailed on Issue 7 because she was denied a FAPE when Tehachapi delayed in responding to Parents' requests for occupational therapy and inclusion assessments and having them timely completed.

154. As remedies, Student seeks reimbursement to Parents of fees paid to her advocate to attend IEP team meetings, reimbursement for travel to and from Lindamood Bell's offices between July 27, 2017 and June 13, 2018 for assessments, that Tehachapi fund and independent transition assessment for Student's transition to

middle school and an independent inclusion assessment, and that Tehachapi provide compensatory education.

155. Under federal and state law, 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.Ct. 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 [129 S.Ct. 2484, 174 L.Ed.2d 168].)

156. School districts may be ordered to provide compensatory education or additional services to students who have been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. (*Ibid.*) An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at p. 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.) 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.” (*Ibid.*)

157. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the school district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *Burlington, supra*, 471 U.S. at pp. 369-371.) Parents may receive reimbursement for their

unilateral placement if the placement met the child's needs and provided the child with educational benefit, even if not all necessary educational benefits are provided. (*C.B. v. Garden Grove Unified Sch. Dist.* (9th Cir. 2011) 635 F.3d 1155, 1159 (*C.B.*.) However, the parents' unilateral placement is not required to meet all requirements of the IDEA. (*Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14 [114 S.Ct. 361].)

158. As a remedy for Tehachapi's failure to offer one-on-one speech and language services or goals to address Student's vocabulary and communication deficits from August 10, 2017 through the end of the 2018 extended school year, which ended just prior to the filing of Student's complaint (42 weeks), Student is awarded a block of 28 hours of compensatory education in one-on-one speech therapy by a licensed Tehachapi speech and language pathologist. This amount is calculated at the rate of 40 minutes per week in accordance with Ms. Schnee's recommendation for the level of one-on-one services Student needed at the time of the November 2017 assessment. As a remedy for Tehachapi's failure to offer Student speech services according to her needs from August 12, 2016 through December 5, 2016 (16 weeks), Student is awarded an additional block of 16 hours, calculated at the rate of 60 minutes per week, the level of individual services recommended by Ms. Schnee in her 2015 assessment.

159. As a remedy for Tehachapi's failure to offer Student weekly speech language pathologist-facilitated opportunities to practice social communication skills with typical peers from August 10, 2017, through the end of the 2018 extended school year, a period of 42 weeks, Tehachapi shall establish such a program at Student's middle school to begin within 45 days of the date of this order and provide Student with 45 minutes per week of social skills instruction with typical peers through that program for 32 weeks. If such a program cannot be established to begin within that time, Tehachapi shall directly fund Student's participation in a program of Parents' choice, within Kern County and a reasonable distance from Tehachapi, that provides facilitated

opportunities to practice social communication skills with typical peers facilitated by a speech language pathologist present during such practice, for up to two hours per week for the remainder of the 2018-2019 school year and 2019 extended school year, or during the 2019 Summer break for up to 32 hours (calculated at the rate of 45 minutes per week, the level recommended by Ms. Schnee, for 42 weeks). Tehachapi need fund only days of Student's actual attendance in the program. This social skills instruction is compensatory, and shall be in addition to any social skills instruction that may be offered or implemented under an IEP developed on or after July 16, 2018, the date Student filed her complaint.

160. If Student is required to travel to a social skills program, Tehachapi shall reimburse Parents at the then-current federal mileage rate for travel between Student's house and the social skills program, for not more than one round-trip per day, and in no event to exceed 120 miles per round trip. Parents shall provide proof of attendance as a condition of travel reimbursement.

161. As a remedy for Tehachapi's failure to timely respond to Parent's requests for occupational therapy and inclusion assessments, Parents shall be awarded independent educational evaluations in those areas. Tehachapi shall fund independent educational evaluations in the areas of occupational therapy and inclusion in accordance with its Special Education Local Plan Area (SELPA) guidelines. Tehachapi shall also compensate the assessor for three hours of attendance, which includes travel, at the IEP team meeting to present the report and recommendations, if any. Attendance by the independent assessor at the IEP team meeting may be by telephone.

#### Tehachapi Training

162. The IDEA does not require compensatory education services to be awarded directly to a student, so staff training may be an appropriate remedy. (*Park, supra*, 464 F.3d at p. 1034 [student, who was denied a FAPE due to failure to properly

implement his IEP, could most benefit by having his teacher appropriately trained to do so[.]) Appropriate relief in light of the purposes of the IDEA may include an award that school staff be trained concerning areas in which violations were found, to benefit the specific pupil involved, or to remedy procedural violations that may benefit other pupils. (*Ibid.*, see also, e.g., *Student v. Reed Union School Dist.* (Jan. 23, 2009), OAH Case No. 2008080580 [requiring training on predetermination and parental participation in IEP team meetings]; *Student v. San Diego Unified School Dist.* (Dec. 13, 2004) Special Education Administrative Hearing Decisions SN 2739-04 [requiring training regarding pupil's medical condition and unique needs].)

163. Here, Tehachapi's staff committed multiple clear procedural violations including: failure to make clear offers of FAPE by failing to clearly state on the IEP documents whether related services offered were to be provided on a one-on-one, small group, or consultation basis; failure to timely respond to parental requests for assessment; and failure to complete and review district assessments within statutory deadlines. The training shall address the IDEA, its implementing regulations and California law impacting the following topics: timelines and procedures for responding to parental requests for assessment; timelines and procedures for obtaining parental consent to assess; timelines and procedures for conducting assessments; clear and complete FAPE offers; IEP documentation requirements; and timelines and procedures for review of assessments at IEP team meetings.

## ORDER

1. Tehachapi shall provide Student with 44 hours of one-on-one compensatory speech therapy by a licensed speech and language pathologist on Tehachapi's staff. These hours shall be provided outside of the school day, at a time and place mutually convenient to Parents and the speech and language pathologist. The speech and language pathologist shall work on the goals proposed in Ms. Schnee's

December 2, 2017 speech and language evaluation report.

2. Tehachapi shall establish a program at Student's middle school, to begin within 45 days of the date of this order, that provides Student with weekly opportunities of 45-minutes to practice social communication skills with typical peers facilitated during those 45-minute sessions by a licensed speech language pathologist and provide Student with 45 minutes per week of social skills instruction with typical peers through that program for 32 weeks. If Tehachapi cannot establish such a program to begin within that time, Tehachapi shall fund Student's participation in an established social skills program of Parents' choice, within Kern County and a reasonable distance from Tehachapi, that provides opportunities to practice social communication skills with typical peers facilitated by a speech pathologist present during such practice, for up to two hours per week for the remainder of the 2018-2019 school year and 2019 extended school year, or during the 2019 Summer break, for up to 32 hours, at an hourly rate not to exceed Tehachapi's contract rate for private speech language pathologists. Tehachapi need fund only days of Student's actual attendance in the program. Parents shall be reimbursed for transportation between Student's home and the social skills program, at the then-current federal mileage rate, for one round-trip per day of actual attendance in the program. The social skills instruction ordered herein is compensatory, and shall be in addition to any social skills instruction that may be offered or implemented under an IEP for Student developed on or after July 16, 2018.

3. Except as otherwise specified in paragraph 5, Tehachapi shall fund an independent occupational therapy evaluation, to be performed by an assessor selected by Parents that meet the guidelines of Tehachapi's SELPA. Parents will provide Tehachapi with the name of a qualified assessor to conduct the independent occupational therapy evaluation. Within 20 business days of its receipt of Parents' selection, Tehachapi shall contract with the assessor to perform the independent

occupational therapy evaluation. Tehachapi shall convene an IEP team meeting to review the independent occupational therapy evaluation within 30 days of the assessor's report.

4. Except as otherwise specified in paragraph 5, Tehachapi shall fund an independent inclusion evaluation, to be performed by an assessor selected by Parents that meet the guidelines of Tehachapi's SELPA. Parents will provide Tehachapi with the name of a qualified assessor to conduct the independent inclusion evaluation. Within 20 business days of its receipt of Parents' selection, Tehachapi shall contract with the assessor to perform the independent inclusion evaluation. Tehachapi shall convene an IEP team meeting to review the independent inclusion evaluation within 30 days of the assessor's report.

5. Tehachapi shall compensate Student's selected assessors at the rate specified in the SELPA guidelines, or if no rate is provided, the assessors' usual and customary rate, including a written report for each assessment and three hours of participation (by telephone or in person) by each of the assessors at an IEP team meeting to review the assessor's report. Tehachapi shall pay for the independent evaluations within 45 calendar days of receipt of the independent assessor's written demand for payment. The assessment reports shall include recommendations as to the frequency, duration and delivery model of services Student requires, if any, and shall include proposed annual goals for any services recommended.

6. Within five days of Tehachapi's receipt of this decision, Tehachapi shall provide Parents with the SELPA guidelines for conducting the independent educational evaluations.

7. Within 60 days of this decision, Tehachapi shall provide six hours of training to all administrative personnel who are or may be involved with the administration of special education programs, including the preparation of assessment



plans, conduct of assessments, arrangement of IEP team meetings and conduct of IEP team meetings, in the following topics: timelines and procedures for responding to parental requests for assessment; timelines and procedures for obtaining parental consent to assess; timelines and procedures for conducting assessments; clear and complete FAPE offers; IEP documentation requirements; and timelines and procedures for review of assessments at IEP team meetings. The training shall be conducted by an independent agency or institution not affiliated with Tehachapi and which specializes in education training to school districts. Tehachapi shall maintain a log with the names, signatures and duration of attendance of all participants in the training.

## 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. Here, Here, Student prevailed on Issues 1 and 2, and partially prevailed on Issues 3(d) and 7. District partially prevailed on Issues 3(d) and 7. Tehachapi prevailed on all remaining issues.

## RIGHT TO APPEAL THIS DECISION

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

Dated: December 17, 2018

/s/

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ALEXA J. HOHENSEE

Administrative Law Judge

Office of Administrative Hearings