BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. TEHACHAPI UNIFIED SCHOOL DISTRICT.	OAH Case No. 2018070708 ORDER FOLLOWING PREHEARING CONFERENCE AND CONTINUANCE OF DUE PROCESS HEARING

On September 10, 2018, a telephonic prehearing conference was held before Administrative Law Judge Alexa J. Hohensee, Office of Administrative Hearings. Andréa Marcus, Attorney at Law, appeared on behalf of Student. Stephanie Virrey Gutcher, Attorney at Law, appeared on behalf of Tehachapi Unified School District. The PHC was recorded.

Tehachapi filed its response to Student's first amended complaint on August 6, 2018, which permits the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200 (*M.C.*).)

Based upon discussion with the parties, the ALJ issues the following order:

1. Continuance of Hearing and Hearing Dates, Times, and Location. Student requested a continuance of the scheduled hearing until after September 19, 2018, due to her and witness unavailability on September 19, 2018. For good cause shown, the hearing is continued and shall take place on September 20, 25, 26 and 27, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at Tehachapi's offices located at 300 South Robison Street, Tehachapi, California 93561. The hearing shall begin at 9:30 a.m. the first day of the hearing and at 9:00 a.m. all other days, unless otherwise ordered.

As ordered in the scheduling order, the named local educational agency shall provide a facility for the hearing that fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), the Rehabilitation Act of 1973 (29 U.S.C. § 794 et seq.), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities. The named local educational agency certified that the facilities used for this case comply with the law. The local educational agency shall inform OAH within two days of the date of this order if it is unable to comply with this order.

Prior to the beginning of the hearing, Tehachapi shall ensure that the hearing room is configured into a courtroom setting and shall have at a minimum (1) a table for Student and his representatives; (2) a table for Tehachapi's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Tehachapi shall provide drinking water and tissue to all parties, witnesses and the ALJ. The same hearing room shall be used for each day of hearing and shall be available at least one hour prior to the commencement of the hearing each day. The hearing room shall be locked following the hearing each night. Tehachapi shall ensure that the hearing room and access to it are in compliance with the Americans with Disabilities Act.

The parties shall immediately notify all potential witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. A witness will not be regarded as unavailable for purposes of showing "good cause" to continue the hearing if the witness is not properly notified of the hearing date or properly subpoenaed, as applicable.

2. Issues and Proposed Resolutions. The issues at the due process hearing, and the proposed resolutions, are listed below.

1. Did Tehachapi, during the two-year statutory 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 Parent a right to meaningfully participate in educational decision-making by:

(a) Refusing to provide Parent with information about proposed interventions upon request;

(b) Refusing to discuss Parent's 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 Parent's request, for the IEP's 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) Determining the speech services Student would receive during the extended school year based upon Tehachapi policy, rather than Student's needs;

(g) Failing to provide prior written notice for denials of Parent requests made during IEP team meetings;

(h) Failing to report on Student's progress on goals at each IEP team meeting; and

(i) Misinforming Parent as to the date the December 2017 IEP was consented to by Parent?

4. Did Tehachapi deny Student a FAPE by failing to make, or implement, an offer of Lindamood Bell instruction in response to Parent 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 IEP's?

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 Parent consented to an occupational therapy assessment on November 28, 2017, or, within the statutory two-year limitations period, by failing to assess Student upon Parent's 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 Parent a right to meaningfully participate in educational decision-making by:

(a) Failing to timely respond to Parent's request for independent educational evaluations and, upon agreeing to an independent evaluation, failing to timely contract with 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 Parent;

(f) Failing to timely respond to Parent's document requests;

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

(h) Failing to notify Parent of team members who will be attending the IEP team meetings?

As remedies, Student seeks: reimbursement for education-related expenses; mileage reimbursement for travel to educational services; independent educational evaluations; weekly service logs; and compensatory education.

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall use numbers to identify exhibits, but shall place the letters "S" or "D" in front of the exhibit to designate if it is a Student or Tehachapi exhibit (for example, "S-1" or "D-2"). Each exhibit shall be internally paginated, by exhibit, or all of a party's exhibits shall be Bates-stamped. Each exhibit binder shall contain a detailed table of contents. Each party shall serve an exhibit binder containing its respective exhibits on the other party by 5:00 p.m. on September 13, 2018, in compliance with Education Code section 56505, subdivision (e)(7), unless the parties agree otherwise. At the hearing, each party shall supply an exhibit binder containing its exhibits for use by the ALJ, and a second exhibit binder for use by witnesses. The parties may not serve exhibits on OAH prior to the hearing. In the event of duplicate exhibits, the most legible version will be used.

Each exhibit shall consist of one document; separate documents may not be combined into one exhibit. Emails or letters may be consolidated into one exhibit if they are part of a single chain of messages. Documents offered as evidence to support a request for reimbursement must be separated by vendor and should be internally chronological where possible. To the extent practicable, exhibits in the binders shall be in chronological order.

Excerpts of an audio record of an individualized education program team meeting, if any, must be transcribed and offered as documentary evidence; that portion of the audio record transcribed shall be provided to the opposing party with the transcript to allow an opportunity to verify the accuracy of the transcription. Transcription need not be done by a certified court reporter.

The parties shall meet and confer by 5:00 p.m. on September 14, 2018, to eliminate duplicate exhibits from the exhibit binders. Duplicate exhibits and tabs should be removed from all binders prior to the first day of hearing. The parties shall not re-number exhibits

after duplicates are removed. The parties are encouraged, if the total number of documents is not too large, to place the exhibits for both parties into one binder. Each exhibit shall consist of one document; separate documents may not be combined into one exhibit.

The parties shall include, as exhibits, resumes for each witness expected to testify as to their professional credentials. Notwithstanding the requirements of Education Code section 56505, subdivision (e)(7), the parties shall exchange resumes not later than 24 hours before the witness is scheduled to testify.

Tehachapi shall include as part of its exhibits the school calendar(s) for the years at issue.

If the parties intend to rely on individualized education programs, the parties shall attach all pages of the IEP(s), including copies of all actual signatures on the IEP(s) and any typewritten or handwritten notes or comments, if any, written on the IEP(s).

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not included in the exhibit lists and not previously exchanged shall not be admitted into evidence at the hearing unless it is supported by written declaration under penalty of perjury, and the ALJ rules that it is admissible. Education Code section 56505, subdivision (e)(8), affords each party the right to prohibit the introduction of any evidence at the hearing that has not been disclosed at least five days before the hearing.

4. Witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available to the other party. The parties shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses twice or out of order. Neither party shall be permitted to call any witnesses not disclosed in the party's prehearing conference statement and listed below, except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ. Education Code section 56505, subdivision (e)(8), affords each party the right to prohibit the introduction of any evidence at the hearing that has not been disclosed at least five days before the hearing.

The parties are ordered to meet and confer by 5:00 p.m. on September 14, 2018, as to the schedule of witnesses. The parties shall coordinate the availability and order of testimony of witnesses to ensure that there is a witness available to testify at all times during the hearing, and to ensure that the hearing is completed as scheduled.

The parties are encouraged to review and shorten their witness lists prior to the hearing, bearing in mind that evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony. Education Code, section 56505.1, subdivision (h), empowers the ALJ presiding at a due process hearing to set a reasonable limit on the length of the hearing after consideration of all of the following: (i) issues to be heard, (ii) complexity of facts to be proven, (iii) ability of

the parties or their representatives to present their respective cases, and (iv) estimates of the parties as to the time needed to present their respective cases.

On the first day of hearing before the first witness testifies, the parties shall provide the ALJ with one **joint** detailed hour-by-hour schedule of all witnesses expected to testify at hearing, which list shall also include an estimate of time for each party's direct and cross-examination. Tehachapi shall have witnesses available in case agreement on a witness list is not reached.

The parties are ordered to meet and confer by **no later than 5:00 p.m. on September 11, 2018,** to identify the witnesses on its/his respective witness lists who cannot be produced at hearing without a subpoena and provide the witnesses contact information to opposing counsel so that subpoenas can be issued. As part of the meet and confer process, Tehachapi's counsel shall inform Student's counsel as to whether the witnesses on Student's witness list are employed by or otherwise under the control of Tehachapi, and if not, shall provide Student's counsel with the witness(es)' most recent contact information, including a telephone number and address at which process may be served. Any contact information provided by Tehachapi shall be used by Student's counsel for the limited purpose of issuing subpoenas or for contacting the witness(es) for purposes of attending the hearing and shall not be disseminated to any other person(s).

The ALJ will finalize the witness schedule, and will revisit the schedule at the beginning and end of each hearing day. Counsel shall meet and confer each day of hearing to revise the witness schedule as needed.

5. Scope of Witness Examination. Each witness shall be called to testify only once, except for rebuttal purposes, and all parties shall examine the witness on all issues when the witness is first called. After the first direct and cross-examinations, each party shall be limited in examining the witness to only those matters raised in the immediately preceding examination. If a party intended to call a witness called first by the other party, that party shall complete their direct examination at the same time as their cross examination. The order in which the parties present their cases in chief shall be subordinate to the need for each witness to appear only once.

6. Telephonic Testimony. Whether a witness may appear by telephone is a matter within the discretion of the ALJ. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) Any party seeking to present a witness by telephone shall move in advance for leave to do so, unless the opposing party has stipulated that the witness may appear by telephone. The proponent of the witness shall provide the proposed witness with a complete physical set of exhibit binders from all parties, containing all of each party's exhibits, prior to the hearing; and shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. Electronic copies of the evidence binders will not be permitted. The witness must be on a clear telephone connection, and in a location that ensures the confidentiality of the proceedings. No witness will be heard by telephone unless all these requirements have been fulfilled.

7. Electronic Recording of Hearing.

a. Audio Recording. Student requested permission to make an audio recording of the hearing. Any party who desires to make such a recording shall do so only on the conditions that: (1) The parties shall turn on and off the recording device at the same time that the ALJ is on and off the record, to avoid recording conversations while off the record; (2) the parties shall not play any part of the recording for a prospective witness; (3) the parties shall not publish or play any part of the recording for any purpose other than assisting in the representation and presentation of this due process hearing; (4) the parties will erase, or otherwise destroy, the recording after the hearing and all opportunities for appeal from any decision herein has been exhausted; and (5) the parties shall not use this recording in any subsequent due process hearing. The recording by OAH is the only official recording; recording of the hearing by a party is not the official record and is permitted as a courtesy. The operation of the party's recording mechanism will not be allowed to delay the hearing.

b. Video Recording. No party, witness or anyone else present may make any video recording of any part of the proceedings. Any person doing so shall be subject to sanctions.

8. Order of Presentation of Evidence. In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Here, Student is the petitioning party. Accordingly, Student shall present her case-in-chief, followed by Tehachapi.

9. Motions. During discussion of the issues for hearing, Student requested that two claims be identified that had not been expressly included in the "claims for relief" section of the first amended complaint, or Student's PHC statement. Tehachapi contended that the claims had not been clearly identified earlier, and it lacked notice of those claims. The two claims, that Tehachapi had untimely conducted assessments after receiving parental consent and had interfered with Parent's participation in the IEP process in retaliation for Parent's advocacy for her child, were delineated in the first amended complaint with their own headings and detailed allegations. The retaliation claim constituted no more than additional grounds for alleging interference with Parent's meaningful participation. Accordingly, Tehachapi had notice of the claims, and Student's request was granted.

Student moved for an order finding Tehachapi's response to Student's first amended complaint, served and filed by Tehachapi on August 6, 2018, insufficient, and ordering Tehachapi to file a more detailed response. In particular, Student wanted a response to the issue of Tehachapi's failure to timely conduct assessments. Student's counsel stated on the record that Student had intentionally delayed making the motion prior to the PHC because she did not want OAH to grant a continuance of the due process hearing for Tehachapi to review and further respond to the first amended complaint. Tehachapi represented, and Student conceded, that Tehachapi had filed a response, which the record reflects contained 10 pages of background information, responses to each of Student's claims for relief identified in the complaint, and affirmative defenses asserted. Student failed to provide any

authority for her request that OAH determine the sufficiency of Tehachapi's response, simply citing *M.C.*

Student's motion was denied as untimely. The parties were informed by the OAH scheduling order, served July 17, 2018, that the deadline to file prehearing motions was three days prior to the PHC. The scheduling order on the amended complaint, served on July 27, 2018, expressly stated as to motions: "**LAST DAY TO FILE**: 09/05/18." (Bold type in original). Student was on notice for over one month prior to the PHC that Tehachapi had not responded to her allegations of untimely assessments or retaliation. However, Student failed to file a timely written motion for a further response, which would also have alerted Tehachapi and OAH to Student's position on the number of claims alleged in the first amended complaint. More egregiously, Student's counsel intentionally chose to forego a timely written motion in favor of an oral motion at the PHC to circumvent what she perceived as an OAH policy of continuing hearings to allow school districts time to file a response. Even Student's PHC statement, prepared for the PHC, was devoid of reference to missing issues or Tehachapi's alleged insufficient response. Student made the strategic decision to make an oral motion at the PHC, rather than submitting a timely written motion challenging the sufficiency of the response, which deprived Tehachapi of an opportunity to review the motion, attempt informal resolution, or file written opposition with OAH. Student did not, and could not, show good cause for making her motion in an untimely manner. Further, Student could have amended her complaint to allege that Tehachapi's response denied meaningful parental participation, and thus constitutes a procedural violation that denied Student a FAPE.

In addition, Student cited no authority for OAH to determine the sufficiency of a school district's response. The IDEA contains an express procedure by which educational agencies may challenge the sufficiency of a due process hearing request by filing a notice of insufficiency. (20 U.S.C. § 1415(b) & (c).) No mechanism exists for having the state hearing office determine the sufficiency of a school district response. *M.C.* is inapposite, as it involved the lack of any school district response to the student's complaint, rather than a request for OAH to determine the sufficiency of the response, or to order further response. (See *M.C.*, 858 F.3d at pp. 1199-2000.)

Nonetheless, in the interest of fairness and an abundance of caution, Student and Tehachapi were ordered to meet and confer regarding Tehachapi's position on the two recently clarified issues to identify points of disagreement, and were encouraged to enter into stipulations regarding pertinent facts, contentions or resolutions as to those issues.

Tehachapi gave notice that it will be making a motion to limit the scope of Student's Issues 7 and 8 in light of prior OAH decisions adjudicating those issues through the dates of those decisions.

Other than Tehachapi's motion to limit, no prehearing motions are pending or contemplated. Any motion filed after this date shall be supported by a declaration under

penalty of perjury establishing good cause as to why the motion was not made at least three business days prior to the PHC of September 10, 2018.

10. Compensatory Education/Reimbursement. Any party seeking reimbursement of expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of expenditures, as part of its case in chief. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

11. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

12. Conduct of Counsel and Hearing Room Decorum. Counsel, all parties, and all witnesses shall conduct themselves in a professional and courteous manner at all times. Cellular phones, pagers, recorders, and other noisemaking electronic devices shall be shut off or set to vibrate during the hearing unless permission to the contrary is obtained from the ALJ.

13. Special Needs and Accommodations. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the mediation or hearing may contact the assigned calendar staff, identified in the scheduling order, at (916) 263-0880, as soon as the need is known. Additional information concerning requests for reasonable accommodation is available on OAH's website at https://www.dgs.ca.gov/oah/Home/Accessibility.aspx.

14. Hearing Open To the Public. At the request of Student, the hearing will be open to the public.

15. Settlement. The parties are encouraged to continue working together to reach an agreement before the due process hearing. Each of the parties shall inform OAH in writing immediately should they reach a settlement or otherwise resolve the dispute before the scheduled hearing, or if the petitioning party withdraws the request for due process. In addition, if a settlement is reached within five days of the scheduled start of the due process hearing, the parties shall also inform OAH of the settlement by telephone at (916) 263-0880.

IF A FULL AND FINAL WRITTEN SETTLEMENT AGREEMENT IS REACHED, OR THE PETITIONING PARTY WITHDRAWS THE DUE PROCESS HEARING REQUEST, AFTER 3:00 P.M. THE DAY PRIOR TO HEARING, EACH OF THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE FOR OAH REGARDING THE SETTLEMENT OR WITHDRAWAL AT (916) 274-6035. THE PARTIES SHOULD ALSO LEAVE CONTACT INFORMATION OF EACH PARTY OR COUNSEL FOR EACH PARTY. IN THE CASE OF SETTLEMENT, THE PARTIES SHOULD SIMULTANEOUSLY **EMAIL THE SIGNATURE PAGE OF THE SIGNED**

AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT https://www.applications.dgs.ca.gov/oah/oahsftweb.

Dates for hearing will not be cancelled until the letter of withdrawal or signature page of the signed agreement has been received by OAH. If an agreement in principle is reached, the parties should plan to attend the scheduled hearing unless different arrangements have been agreed upon by the assigned ALJ. The assigned ALJ will check for messages the evening prior to the hearing or the morning of the hearing.

If the matter settles subject to board approval, in addition to a signed copy of the signature page of the settlement agreement as noted above, the parties shall submit a request for a status conference and provide the date of the next board meeting. The hearing dates will not be cancelled without this information.

16. Failure to comply with this order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

DATE: September 11, 2018

DocuSigned by:
Alexa Hohensee
A7D463FF094544B...
ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings