

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

GUARDIAN ON BEHALF OF STUDENT,

OAH Case No. 2015090255

v.

VACAVILLE UNIFIED SCHOOL  
DISTRICT.

**DECISION**

On August 28, 2015, Guardian, on behalf of Student, filed a request for a due process hearing with the Office of Administrative Hearings, naming Vacaville Unified School District. On September 15, 2015, OAH granted the parties' joint request to continue the hearing dates.

Administrative Law Judge Theresa Ravandi heard this matter in Vacaville and Sacramento, California, on February 22-25, 2016, and March 1-3, 2016.<sup>1</sup>

Tania L. Whiteleather, Attorney at Law, represented Guardian and Student. Guardian attended each day of hearing with the exception of a short period of time the afternoon of March 1, 2016. Student was not present.

Jan E. Tomsy, Attorney at Law, represented Vacaville. Dr. Kerri Mills, Assistant Superintendent of Vacaville, attended each day of hearing.

At the conclusion of the hearing, the matter was continued at the parties' request to March 28, 2016, to allow time to file written closing briefs. The record closed with the parties' timely submission of closing briefs and the matter was submitted for decision.

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<sup>1</sup> This matter was heard at the Sacramento OAH office on the afternoon of February 23, 2016, and all day on February 24-25, 2016. The matter was digitally recorded on February 22 and 23, 2016, for a short period of time. Due to technical difficulties with the recording equipment, OAH arranged for a court reporter for the remainder of the hearing.

## ISSUES

*Issue 1:* Did Vacaville deny Student a free appropriate public education from August 28, 2013, through August 28, 2015, by:

- a. failing to assess Student in speech and language, communication, and assistive technology; and
- b. failing to appropriately assess Student in speech and language, communication, and assistive technology?

*Issue 2:* Did Vacaville deny Student a FAPE from October 2014 through the start of the 2015-2016 school year by failing to provide a speech-language pathologist who was able to appropriately work with Student and communicate with Guardian as part of Student's speech and language services?<sup>2</sup>

*Issue 3:* From September 11, 2014, through August 28, 2015, did Vacaville fail to implement Student's individualized education program by:

- a. failing to provide assistive technology devices, specifically the Novachat and the Pragmatic Organization Dynamic Display; and
- b. failing to provide staff training in the use of the Novachat and the PODD as communication devices for Student?<sup>3</sup>

## SUMMARY OF DECISION

This case is about a young lady with severe speech, language, and cognitive challenges and her right to communication devices that will increase her ability to interact and have her voice heard. Despite being aware of Student's communication struggles and need for augmentative alternative communication since 2002 when she initially qualified for special education, Vacaville did not assess Student's needs in the area of assistive technology

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<sup>2</sup> At the start of hearing, Student withdrew her original Issue 2 involving a denial of FAPE for failing to provide placement and services in the least restrictive environment.

<sup>3</sup> In her closing brief, Student asserts that the ALJ substantively changed her implementation claim by excluding the failure to implement assistive technology services to Student as included in the January 25, 2016 Order Following Prehearing Conference. Student agreed to the issues as delineated herein at the start of the hearing. In any event, provision of Student's communication devices necessarily includes implementing the devices by providing augmentative alternative communication services to Student. Further, both parties litigated the implementation of Student's 60 hours of augmentative alternative communication services and addressed this in their closing briefs.

until October 2013, following Guardian's request. Seven months later, in May of 2014, Vacaville assessed Student's needs for augmentative alternative communication for the first time, when she was 15 years old. In September 2014, Vacaville agreed that Student required the Novachat, a speech-generating device, and the PODD, a partner-assisted, low-tech, communication system.

The crux of this case is whether Vacaville timely and appropriately identified Student's unique communication needs, and provided and implemented communication devices in conformity with her IEP. This Decision finds that Vacaville had a duty to assess Student in the area of assistive technology, including augmentative alternative communication, by August 28, 2013, and that it failed to appropriately assess Student and did not identify her communicative status and needs until September 2014, upon the presentation of an independent educational evaluation. This Decision also finds that Vacaville failed to provide Student with the Novachat and the PODD as required by her September 2014 IEP, and failed to implement these devices and timely train staff on the use of the devices. As of the time of hearing, Vacaville still had not provided Student with either of these agreed-upon systems. Student did not prove that her assigned speech and language specialist for the 2014-2015 school year was unable to implement her speech and language services.

## FACTUAL FINDINGS

### *Jurisdiction*

1. For her entire educational career, Student has resided within Vacaville's district boundaries, first with her mother, and then with her adult sister. The Superior Court of California, County of Solano, appointed Student's adult sister as her legal guardian in September 2008. Student is a client of the North Bay Regional Center and initially received services through the Easter Seals Early Intervention Program.<sup>4</sup> In March 2002, Vacaville qualified Student for special education pursuant to the category of low cognitive ability, currently known as intellectual disability.<sup>5</sup> At the time of hearing, Student was completing

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<sup>4</sup> Regional Centers are private, nonprofit entities that operate pursuant to the Lanterman Developmental Disabilities Act (Welf. & Inst. Code, § 4500 et seq.) and provide specified services to help individuals with developmental disabilities to live at home to the extent possible and access the community. (Welf. & Inst. Code, § 4512.) Under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et seq.), states can receive funding to provide Part C early start services to enhance the development of infants and toddlers up to three years old who have disabilities.

<sup>5</sup> Through 2007, Student's IEP's identified her eligibility category as limited cognitive ability. In 2008 the category changed to mental retardation. With the passage of Rosa's Law in October 2010 (Public Law 111-256) this category was reclassified as intellectual disability.

11th grade at Will C. Wood High School in a special day class for students with moderate to severe disabilities, run by the Solano County Office of Education.

2. Student has always been served in a County special day class program. Vacaville is the district of residence and the local educational agency responsible for offering and providing Student a FAPE.<sup>6</sup> Vacaville contracts with Solano County to provide Student an educational placement and most of her IEP services. Vacaville is ultimately responsible for the actions or inactions of the County and for any violations of the Individuals with Disabilities Education Act with regards to Student.

#### *Overview of Student's Disability and Programming*

3. Student has a severe intellectual disability stemming from her diagnosis of Down Syndrome, a genetic disorder consisting of a range of mental and physical symptoms, often associated with significant speech and language delays. Due to her disability, Student has severe deficits in conceptual skills and spoken language, though her adaptive skills are higher than her cognitive functioning. Since 2007, Student's full scale intelligence quotient has measured in the moderately to severely delayed range as determined by the Leiter International Performance Scale-Revised, a nonverbal measure of cognitive ability. Underlying the issues in this case is a dispute as to whether Student is capable of learning more and if her speech and language abilities can be increased using augmentative means.

4. Student's needs and level of communicative functioning have remained relatively constant over the years. Though Student perceives herself as an oral communicator and has always attempted to verbalize, she is essentially nonverbal, vocalizing single word and multiple syllable approximations which are no more than 30 percent intelligible to an unfamiliar listener. Student is a multi-modal communicator. In addition to vocalization and word approximations, she uses gestures, modified sign language (simple signs), proxemics (bringing her communication partner to the desired object), picture communication symbols, and most recently the PODD and the Novachat.

#### *Vacaville's Knowledge of Student's Communication Needs Prior to February 2013*

5. At the time of her initial IEP meeting in March of 2002, Student's IEP team agreed that she required assistive technology in the form of the Picture Exchange Communication System (PECS), which uses picture and symbol icons to represent words and facilitate communication. One of Student's communication goals specifically targeted her use of PECS. By January 2003, Student had completed Phase One of PECS (How to Communicate) and could independently exchange a picture icon with a verbal word

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<sup>6</sup> Under California law, the public agency responsible for providing education to a child between the ages of 6 and 18 is generally the school district in which the child's parent or legal guardian resides. (Ed. Code, § § 48200, 56300).

approximation when presented with icon choices. She had started Phase Two (Distance and Persistence) and was learning to travel to her communication partner to express her wants. Student's new PECS goal called for her to complete Phase Three (Simple and Conditional Discrimination): discriminate between preferred and non-preferred symbols, and Phase Four (Sentence Construction): connect icons in simple sentences to spontaneously request.<sup>7</sup> By the time of her transition to kindergarten in July of 2004, Student was still using PECS at the single word level. Notably, by the time Student turned five years of age, Vacaville acknowledged that computers were a highly preferred activity for Student.

6. Student's fall 2007 triennial assessment revealed moderate cognitive delays with a full scale I.Q. of 42, moderate deficits in communication and daily living skills, and mild socialization deficits. Student's signing, expressive verbalization, and overall attention had decreased in the prior two years. Her receptive language skills measured at the 18-20 month range with expressive skills in the 12-15 month range. County speech evaluator Andrea Forrest recommended continued use of PECS supplemented with verbal and signed communication. In 2010, Ms. Forrest again assessed Student's speech and language needs, though Student's noncompliance made it difficult to determine her true abilities. In general, her language skills remained at the 18-23 month range, though Student demonstrated some receptive abilities at the 30-35 month level. Student learned by doing things, and required a direct, consistent, and repetitious approach. Her standardized I.Q. score measured 36, indicating severe cognitive delays. Student's teacher completed the Student Annual Needs Determination Inventory.<sup>8</sup> Some of Student's areas of independent skills relevant to the issues in this case included: flipping a switch on and off; computer awareness including using input device for cause and effect; utilizing a keyboard or device to access software; using a mouse to operate a computer; and attempting to interact with peers and adults.

7. At the start of the 2011-2012 school year, Student remained in elementary school for her seventh grade year due to Guardian's concerns about her transition to middle school. Transitions, such as from elementary school to middle school, and middle school to high school, were difficult for Student given her need to acclimate and her struggle to express herself in a way that others could understand. Student did well when her staff and routine remained consistent. Just prior to the start of school in August 2011, Student had a tonsillectomy and her pressure-equalizing ear tubes replaced. Following surgery, it was difficult to encourage Student to verbalize. Her oral-motor imitation ability remained extremely limited and variable. Student would make a few attempts to vocalize and then appeared defeated, putting her head down and refusing to reengage.

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<sup>7</sup> PECS is a Six Phase system. There was no evidence as to the skills targeted in Phases Five and Six, though these phases include vocabulary development.

<sup>8</sup> This is an extensive inventory of tasks across many domains including communication, academics, and daily living skills that identifies a student's skills as independent or emerging.

8. Prior to her transition to Willis Jepson Middle School in December 2011, Vacaville provided Student an iPod to use as a communication device for a trial basis. At the December 1, 2011 IEP team meeting, Guardian requested a referral for assistive technology services. Vacaville agreed to this and to convene a further IEP team meeting after Student's trial of the iPod to review results. Vacaville never convened an IEP team meeting to discuss if the iPod was an effective means of communication for Student. There was no evidence that Student received any assistive technology services related to the iPod, and none of her IEP's identified the iPod as a required assistive technology device.

9. All of Student's annual IEP's dating back to 2003, with the exception of her 2004 and 2007 IEP's, indicated that she required assistive technology including PECS and picture communication symbols.<sup>9</sup> Vacaville's assistive technology specialist Karen Dace first assessed Student's needs for assistive technology in October 2013.<sup>10</sup> Ms. Dace testified she would expect Vacaville to have conducted an assistive technology assessment prior to documenting Student's needs for assistive technology on her IEP's.

10. Student transitioned well to middle school in December 2011. By February 2012, she was beginning to speak more, using greetings, increasing her eye contact, and following directions. Her September 2011 annual goal of sequencing picture icons on a sentence strip to produce a five word utterance was discontinued and replaced with a simpler PECS goal focused on initiating communication and making requests. Student gravitated towards technology, and Vacaville was aware that Student used an iPad at home.

11. By the time of her annual IEP in September 2012, the start of her eighth grade year, Student had completed Phase Two of PECS, which she began nine years prior, and advanced to Phase Three. She used "Tech Speak" and the "Proloquo2Go program" on an iPod touch.<sup>11</sup> With the iPod touch, Student was initiating communication, and the team discussed adding new symbols to her device. Still, Student's IEP did not identify the iPod as a required assistive technology device. Student demonstrated some independence using her picture communication system and selecting icons to request help, though she was not consistent and needed prompting. Student's oral-motor skills remained limited with poor intelligibility.

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<sup>9</sup> The 2004 IEP was not part of the record, and the 2007 IEP does not include the special factors page which separately lists required assistive technology devices and services.

<sup>10</sup> Ms. Dace is a special education coordinator for a public charter school in Sacramento. Until September 2015, she had served as an assistive technology specialist with Vacaville for seven years. She obtained a certificate in assistive technology applications from California State University, Northridge in June 2009. She holds an administrative services and education specialist instruction credentials.

<sup>11</sup> There was no evidence explaining Tech Speak or the Proloquo2Go program.

12. For the 2012-2013 school year, Vacaville proposed a new annual goal for Student to use either a picture system or voice output device to communicate her needs and wants by selecting from an array of five to eight icons, and bringing it to the attention of an adult at least 10 times per day, with 80 percent accuracy. In developing this goal, Vacaville acknowledged, for the first time, that Student might be a candidate for a higher-tech, voice output device. However, the only assistive technology identified on Student's IEP was PECS, a visual schedule, slant board, reinforcement board, and token chart. For the 2012-2013 school year, Vacaville offered individual speech services at the rate of 15 minutes per week with the remainder of her 900 annual minutes to be delivered in group sessions or consultation. Guardian consented to this IEP on October 31, 2012, with the exception of the proposed speech goals.

*February 2013 Speech and Language Evaluation*

13. Guardian requested that Student's speech and language needs be reassessed prior to her fall 2013 triennial assessment. Vacaville agreed and licensed speech-language pathologist Marlene Jackson assessed Student and completed her report on February 9, 2013. Ms. Jackson provided speech and language services to Student during the 2010-2011 and 2012-2013 school years.<sup>12</sup> The purpose of this assessment was to determine Student's speech and language skills and needs and to develop goals in this area.

14. Given Student's cognitive delays, Ms. Jackson used alternative means of assessment to ensure the most accurate results. She administered various measures, observed Student in class, and had Student participate in tasks using an iPad and picture icons. Student was attentive and persevered during challenging tasks. She communicated using sounds, facial expressions, gestures, signs, eye gaze, pointing, head nods, and picture icons. Ms. Jackson found that Student had oral-motor deficits consistent with her diagnosis of Down Syndrome which impeded the speed, coordination, and accuracy of speech. Student's limited speech verbalizations were less than 30 percent intelligible; she had significantly delayed receptive and expressive language skills; and she communicated at the level of a two to three-year-old child. Ms. Jackson acknowledged at hearing that Student was capable of increasing her communication and did well using an iPad to communicate during her assessment.

15. Ms. Jackson indirectly assessed Student's skills in using picture icons with the Communication Matrix Profile, a rating scale designed to document the expressive skills of children with severe disabilities. Student's teacher and Ms. Jackson rated Student's ability to communicate across the increasingly difficult language function domains of refusing

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<sup>12</sup> Ms. Jackson has been serving students in Vacaville for the past four years. She has her Certificate of Clinical Competence from the American Speech-Language-Hearing Association (ASHA). Over her 20 year career in speech and language, she has conducted close to 1,000 speech and language assessments including 50-100 assessments of students with intellectual disabilities.

something, requesting, using social communication, and sharing information.<sup>13</sup> They rated Student as either having mastered various skills, demonstrating emerging skills, or as not using skills from the level of pre-intentional behavior (Level I) up through use of language (Level VII). Student functioned at Level VI, use of abstract symbols such as picture icons.

16. Ms. Jackson did not directly assess Student's proficiency with PECS as she did not believe this to be Student's primary mode of communication. It was her understanding that Student had not received systematic PECS training but rather was informally using picture icons over the years. Just prior to her February 2013 assessment, the County issued a new policy that required every student in a County special day class, regardless of individualized need or assessment, to use PECS beginning at Phase One.<sup>14</sup> Based on this, she believed Student had just been introduced to PECS in the class. Because of this policy, she did not assess Student's use of PECS, did not recommend an assistive technology assessment, and did not assess Student's need for a speech-generating device despite Student's need for an aided communication system.<sup>15</sup> Ms. Jackson's testimony that Student did not use PECS to communicate was not persuasive in light of Student's documented use of PECS since her initial eligibility.

17. Based on her assessment, Ms. Jackson determined that Student's significant language delays could be addressed within the classroom through consultation services and continued direct speech and language therapy. She recommended that Student's speech therapy focus on improving her social and academic interactions using scripted phrases; increasing her speech intelligibility of functional vocabulary; and improving her production of three-syllable words and phrases. Ms. Jackson also recommended that Student complete systematic training in PECS and demonstrate success with that system prior to moving to a speech-generating device. Ms. Jackson agreed that if Student had been using PECS for years, with little progress, then it would be appropriate to try a speech-generating device.

18. Three speech and language specialists with expertise in augmentative alternative communication, independent provider Judy Jewett,<sup>16</sup> Vacaville's expert

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<sup>13</sup> Guardian was not able to complete her form due to a computer system failure.

<sup>14</sup> This Decision makes no finding as to whether the County's policy is in compliance with the IDEA's mandate of individualized programs and services dependent upon the needs of each student.

<sup>15</sup> An aided system includes any item or device apart from Student ranging from picture icons to a speech-generating device. An unaided system includes all communicative attempts that are a part of Student such as eye gaze, gesture, or vocalization.

<sup>16</sup> Ms. Jewett has been a licensed speech-language pathologist for over 35 years and has a Certificate of Clinical Competence from the American Speech-Language-Hearing Association. She has 15 years expertise in augmentative alternative communication. Ms. Jewett holds four lifetime credentials: multiple subject, communication handicapped,

Kathy Beatty,<sup>17</sup> and Student's expert Deborah Burns-McCloskey,<sup>18</sup> testified at hearing and all agreed that a speech and language assessment of Student must include an augmentative alternative communication assessment to understand her communication needs. These experts established that a speech and language assessment looks at a student's production of sound; understanding of language including word meanings and relationships; and expressive language or the ability to communicate using whatever means necessary. All three experts further agreed that for a predominantly nonverbal child such as Student, her ability to use PECS, her then-current augmentative alternative communication system, needed to be assessed to determine the effectiveness of her communication and whether she needed an alternate device or system. Given Student's use of picture icons and PECS dating back to her initial IEP in 2002, her ability to use PECS to make progress on her IEP goals needed to be determined. Ms. Jackson's February 2013 speech and language assessment of Student was incomplete as she did not consider Student's use of or need for augmentative alternative communication. Ms. Jackson did not have expertise in augmentative alternative communication and did not refer Student to a specialist.

19. Apart from failing to assess Student's needs in the area of augmentative communication, Ms. Jackson's speech and language assessment and recommendations were otherwise appropriate. Ms. Burns-McCloskey agreed that Ms. Jackson used customary measures which revealed useful information about Student's speech and language deficits consistent with the results of her own independent evaluation. Ms. Beatty testified that she

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resource specialist, and cross-cultural language and academic development, and a renewable clinical rehabilitation services credential. She has served more than 100 children with intellectual disabilities.

<sup>17</sup> Ms. Beatty has been a licensed speech-language pathologist for over 40 years, and has a Certificate of Clinical Competence in speech pathology from ASHA. She is a recognized expert in augmentative alternative communication. Since 2011 she has worked as an augmentative communication specialist with the Speech Pathology Group in Walnut Creek. She developed and currently administers a mentorship program for possible certification of language specialists as augmentative alternative communication experts through ASHA. She has served students with complex communication needs including those with intellectual disabilities for over 25 years, and has conducted approximately 50 augmentative alternative communication evaluations over the past five years.

<sup>18</sup> In 1985, Ms. Burns-McCloskey received a Certificate of Clinical Competence in speech-language pathology from ASHA. She worked for seven years with San Francisco Unified School District as a speech and language therapist, and for 14 years, from 2001-2015, with Berkeley Unified School District as an augmentative communication specialist, providing assessments and services to students. Since 1987, she has worked as a private practitioner and as an augmentative communication specialist with Augmentative Communication and Technology Services. She is certified by California as a nonpublic agency.

would recommend at least 30 minutes of weekly, individual speech sessions for Student, while Ms. Burns-McCloskey recommended three individual 30-minute sessions per week. Ms. Burns-McCloskey testified that this service level would allow Student to achieve the greatest gains across all communication domains, including speech. Even so, Student did not establish that Ms. Jackson's assessment was deficient for failing to recommend a minimum amount of direct speech services per week.

20. Ms. Jackson agreed at hearing that an assistive technology assessment was appropriate for Student in 2013 at the time of her speech and language assessment in order to determine Student's needs for communication technology. Such an assessment would have been valuable as Student was using icons and able to sequence them, and was adept at technology including computers and the iPad. Ms. Jackson did not recommend an assistive technology assessment for Student because of the County's 2013 policy that all children in County programs would use PECS, a policy which precluded individualized assessments.

21. Ms. Jackson presented her assessment results at an IEP team meeting in February 2013, and proposed three new goals in the areas of communication and articulation. Vacaville's offer of speech and language services remained the same: a total 900 minutes per year including 15 minutes of weekly individual sessions and the remainder to be provided in group or consultation. Guardian consented to the services and new goals on March 6, 2013.

#### *2013 Triennial Assessment and Student's 2013-2014 Annual IEP*

22. Initially, Vacaville did not identify assistive technology as an area of need to be assessed for Student's 2013 triennial assessment. Student's IEP team met on June 6, 2013, the day after the end of the 2012-2013 school year. During this IEP team meeting, Guardian requested that assistive technology and augmentative communication be added to Student's triennial assessment plan. Vacaville agreed and Guardian signed the assessment plan that day. As Vacaville had recently assessed Student's speech and language needs, it was not required to reassess her speech needs apart from her need for augmentative communication. The IEP team agreed that Student would remain at Jepson Middle School for the start of ninth grade, the 2013-2014 school year, until Vacaville completed her triennial assessment.

23. Dr. Clare Ames-Klein, a licensed clinical psychologist, and one of Student's experts, established that assessing students with intellectual disabilities requires a special level of expertise.<sup>19</sup> School psychologist Anna McAllister, who has experience working with students with intellectual disabilities, completed a psycho-educational assessment of Student as part of her 2013 triennial assessment. On the Leiter, Student's composite I.Q. scale again measured 36, meaning she functioned at the severely delayed range. Although this score was

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<sup>19</sup> Dr. Ames-Klein has a Ph.D. in psychology. Since 1991 she has been in private practice providing clinical services and conducting hundreds of neuropsychological assessments of students including independent educational evaluations.

comparable to her results in 2007 and 2010, Ms. McAllister cautioned that the results might not capture Student's true ability as Student did not understand the tasks presented and was not motivated to complete simple tasks within her ability. Ms. McAllister deviated from test standardization by using verbal directions to encourage Student to respond. Guardian and Teacher rated Student in the low range of functioning across all domains on the Vineland Adaptive Behavior Scales, with socialization remaining a relative strength.

24. Although this triennial assessment did not include a separate speech and language assessment, Ms. McAllister administered one language test, the Receptive One-Word Picture Vocabulary Test, and attempted to administer the Expressive One-Word Picture Vocabulary Test as part of her psycho-educational assessment. On the Receptive Vocabulary Test, Student scored below the first percentile rank with an age equivalency of 2.1 years. Student's attempts to answer some of the items on the expressive test were unintelligible and supplemented with gestures and pointing. Ms. McAllister shared her psycho-educational assessment results with Student's IEP team on September 12, 2013, part one of her annual IEP for ninth grade.

25. During part two of Student's annual 2013-2014 IEP team meeting on October 2, 2013, Ms. Dace reported on her assistive technology assessment of Student which she completed on October 1, 2013, within 60 days of the start of the school year. Assistive technology refers to any device or service that compensates for an area of deficit, including motor, visual, or communication. The evidence showed that an "assistive technology assessment" is an umbrella term which encompasses many specialty areas including augmentative alternative communication. Vacaville agreed to an assistive technology assessment of Student to consider tools and strategies that might improve her communication. Even so, Ms. Dace administered only one general assessment measure, the Wisconsin Assistive Technology Initiative, 5th Edition, which globally assessed the areas of seating, positioning and mobility; computer access; motor aspects of writing; composition of written material; reading; mathematics; organization; recreation and leisure; and vision, in addition to communication, Student's identified area of need.

26. In March 2013, Student started Phase Four of PECS, constructing sentences. She remained at Phase Four at the time of Ms. Dace's assessment. Despite the June 2013 assessment plan which called for an augmentative communication assessment, Ms. Dace did not determine whether PECS, Student's augmentative alternative communication system, was meeting her educational needs. Further, she did not consider, recommend, or conduct any clinical trials with a speech-generating device. Ms. Dace observed that Student enjoyed using an iPad and was able to effectively interact with the screen. She concluded from her assessment that Student might benefit from assistive technology and recommended that the assistive technology specialist consult with the speech pathologist on possible assistive technology for communication. During the October 2, 2013 IEP team meeting, Ms. Dace recommended that Student participate in trials of various applications on the iPad for six to eight weeks.

27. During the October 2, 2013 IEP team meeting, Guardian shared her concern that Student's use of PECS was limited to requesting food and that it was not being used across Student's school day or across environments including home. At the start of the 2013-2014 school year, Guardian asked a County administrator if Student's PECS could be sent home so that Student could benefit from it across settings. Guardian was trained to use PECS in 2011 when she worked for Vacaville as a paraprofessional. Guardian was told this would not be a problem. Guardian again inquired about PECS being available for Student's home use in December 2013, and she was again told it would be sent home. As of the time of hearing, Vacaville had not provided Student's PECS to be used at home.

28. Part three and four of Student's 2013-2014 annual IEP team meeting convened on November 4 and 8, 2013. The team reported on Student's goals. She met her PECS goal of communicating her needs and wants at least 10 times per day and a goal of producing functional vocabulary with 50 percent accuracy. Student did not meet and was not making consistent progress towards her articulation goal of producing phonemes, her communication goal of producing scripted phrases, or her academic and daily living goals of identifying letters, numbers, and colors. She did not make progress on her speech goal of producing three syllable sequences. Guardian agreed to 23 goals including two new articulation goals and a continued communication goal of using scripted phrases. Vacaville offered continued specialized academic instruction in a special day class with related services and extended school year. Vacaville increased its offer of speech and language services to 90 minutes per week with 30 minutes each of individual, group, and consultation sessions.

29. Guardian consented to the November 2013 IEP offer with the exception that she did not agree that Student had met her speech goal of producing functional vocabulary. Due to Guardian's concerns with Student's adjustment to unfamiliar staff and conflicting private speech sessions, Student did not attend extended school year 2014. Guardian requested that Student remain at Jepson for the entire school year due to transition concerns. Student transferred to Will C. Wood at the start of tenth grade, the 2014-2015 school year.

#### *Update on iPad Application Trials*

30. At the December 4, 2013 IEP team meeting, Ms. Dace reported on her iPad application trials with Student. She conducted 16 academic and fine motor application trials. Ms. Dace's recommendation of the Proloquo2Go program for Student, as though this were something new, demonstrates that Vacaville did not have a cohesive plan in place to address Student's communication needs. Ms. Dace did not review Student's past experience in September 2012 using Proloquo2Go on the iPod, or even acknowledge that Student had tried this program before. She determined that Student might require assistive technology equipment and services to participate in and benefit from the general education curriculum. However, she did not recommend any specific communication device. Ms. Dace recommended, and Vacaville offered, assistive technology consultation services at a rate of 15 hours per year. On January 7, 2014, Guardian consented to the assistive technology consultation hours.

### *Spring 2014 IEP Team Meetings and Communication Assessments*

31. As of February 2014, Student was averaging 21 requests per day with PECS but had not expanded her language functions beyond requesting. At the March 19, 2014 IEP team meeting, Guardian requested a speech-generating device for Student as she believed her speech had regressed. The behaviorist discussed some of the skills necessary for such a device, and Vacaville agreed to have Ms. Dace respond to Guardian's request within two weeks. Ms. Dace did not respond, so Guardian renewed her request at the April 28, 2014 IEP team meeting. Vacaville did not respond to the request. Rather, it wanted to await the results of an independent assessment, discussed below.

#### MAY 27, 2014 IEP TEAM MEETING: REPORT ON COMMUNICATION ASSESSMENTS

##### *VACAVILLE'S AUGMENTATIVE ALTERNATIVE COMMUNICATION ASSESSMENT*

32. Following Ms. Dace's report to the IEP team on her October 2013 assistive technology assessment, Vacaville had Ms. Dace assess Student's augmentative alternative communication needs. Ms. Dace presented the results of her second assessment at the May 27, 2014 IEP team meeting, nearly one year following Vacaville's June 2013 agreement to complete an augmentative communication assessment. Ms. Dace used three assessment measures: the Wisconsin Initiative for Communication; the PECS Student Skills Checklist; and the AAC Evaluation Genie. The Wisconsin Initiative revealed that Student communicated her needs and wants but did not use communication for higher language functions such as social interaction or sharing information. She desired to communicate and frequently repaired communication breakdowns by continuing to try and by changing icons. Student required frequent verbal prompts and seldom initiated or maintained a communication exchange.

33. Ms. Dace formally assessed Student's use of picture icons to communicate. As of May 2014, Student remained at PECS Phase Four. Her use of PECS was at the "I want" stage and limited to requesting food or help. Ms. Dace did not address Student's lengthy history of using PECS or her inconsistent progress. Student had originally mastered Phases One and Two in January 2003, and her 2003-2004 annual goal called for her to complete Phases Three and Four. Ms. Dace recommended that Student continue with PECS and master all six phases prior to transitioning to a high-tech device. Her recommendation was not persuasive as she did not account for Student's ability to progress through the PECS phases. At hearing, Ms. Dace did not know what Phases Five or Six required. Further, she did not consider Student's icon repertoire despite her opinion that Student needed to increase her vocabulary. Ms. Dace did not know how many icons Student could use or how many icons were available in Student's PECS communication book at the time of her assessment.

34. Based on the results of the AAC Evaluation Genie, an evaluative tool that helps identify skills related to the language representation methods commonly found on augmentative communication systems, Student was able to visually identify and discriminate a one-inch icon out of a field of 32, with 100 percent accuracy. With prompts, Student could

identify common nouns and verbs, showed an understanding of word categories, and demonstrated she could identify a noun by associated features or functions with 95 percent accuracy. Given these results, Student was capable of using a speech-generating device.

35. Ms. Dace's evaluation showed that Student desired to communicate and understood questions but was unable to independently respond using her words or PECS. She had a limited vocabulary, and used few verbalizations. In her report, Ms. Dace relied on research from the Center for AAC and Autism that the use of augmentative communication typically leads to increased verbalizations. Her summary section includes five paragraphs quoting the Center, including the following:

“a high tech device that allows for transition from learning first words to complex communication without changing communication systems, symbols, and access methods over the course of language development would be the easiest way for a non-verbal child to learn language and be able to communicate.”

In contrast to the research she cited, Ms. Dace recommended that Student not be provided a speech-generating device until she first demonstrated the ability to independently initiate communication, and after she increased her vocabulary and her abilities to construct sentences and access icons with PECS. Ms. Dace made these recommendations without conducting any trials of speech-generating devices with Student.

#### *INDEPENDENT SPEECH AND LANGUAGE EVALUATION*

36. Vacaville funded an independent educational evaluation in the area of speech and language with Ms. Burns-McCloskey, a licensed speech-language pathologist. For over 30 years Ms. Burns-McCloskey has been an augmentative alternative communication specialist providing services and assessments for individuals with complex communication needs, including individuals with developmental delays. Many districts, including Vacaville have contracted with her to provide independent educational evaluations of students with communication needs. Ms. Beatty established that Ms. Burns-McCloskey has an excellent reputation and is a recognized expert in the field of communication.

37. At hearing, all three communication experts, Ms. Jewett, Ms. Beatty, and Ms. Burns-McCloskey, established that whenever an assessor conducts a speech and language assessment of a student with complex communication needs and whose understanding of language is greater than her ability to express herself, it is necessary to look at augmentative alternative communication including speech-generating devices. An assessment for augmentative alternative communication is appropriate when a student is not developing communication in a way expected for her age. Ms. Burns-McCloskey has worked with students with Down Syndrome, and these students are commonly assessed for augmentative alternative communication devices. She has assessed approximately 50 students with severe intellectual disabilities, and it is her experience that such students, in spite of their cognitive challenges, can become more functional communicators with the right system. Ms. Beatty recognized that the field of augmentative alternative communication

changed five years ago with the availability and portability of tablets and communication devices. Prior to 2011, augmentative alternative communication assessments were not as common. In general, the experts agreed that in addition to observation, interview, and test administration, an augmentative alternative communication assessment must include clinical trials of various modes of communication. Through clinical trials, the assessor determines what device matches a student's ability and meets her needs.

38. Ms. Burns-McCloskey reviewed Student's educational records and prior assessments, interviewed Guardian, Student's teacher, occupational therapist Liz Isono who completed an independent evaluation, and Student's private speech therapist Maria Villacis. She observed Student in class, administered a variety of measures, and conducted clinical trials of the iPad and the Novachat. Her goal was to determine Student's communicative functioning and needs, and her ability to use a communication device.

39. Student has apraxia, a neurogenic speech disorder which impedes her ability to formulate speech with motor planning and sequence phonemes into words and words into sentences. She also has dysarthria, a motor disorder that causes muscle weakness and poor coordination making speech imprecise and unclear. Student spoke in single words and approximated words and short approximated phrases. She was approximately 30 percent intelligible to familiar listeners and 20 percent intelligible to unfamiliar listeners. Student's difficulty generating novel language was characteristic of her language disorders. She required supports to help her express what she understood and needed extra time to process and respond to auditory input. These findings undermined Ms. Dace's premise that Student must be required to initiate communication before being considered for a speech device.

40. Ms. Burns-McCloskey administered tasks from the Test of Aided Communication Symbol Performance to assess Student's use of icons and her ability to recognize word categories, and to determine Student's optimal symbol and field size on a device. She administered tasks from the AAC Evaluation Genie to assess Student's visual identification and discrimination and her ability to identify nouns and verbs, characteristic functions of words, and word categories. Her results corresponded to those obtained by Ms. Dace. Student was able to identify many types of words including verbs, adjectives, and nouns, and she demonstrated some beginning categorization skills. Ms. Burns-McCloskey also used parts of the Rhode Island Test of Language Structures to assess Student's receptive understanding of language. Student understood many simple sentences including those with negatives. She was able to process language although there were gaps in her processing ability due to her intellectual disability. Test results showed that Student possessed the necessary language skills to functionally communicate using a speech-generating device.

41. Ms. Burns-McCloskey persuasively established that Student's communication modes including gestures, modified signs, proxemics, word approximations, PECS, and the PODD, were not meeting her daily functional communication needs at the time of her assessment. In class, Student's actual communication was limited to regulating behavior such as making requests. During testing, Student demonstrated abilities which exceed that offered by PECS with its limited vocabulary focused mostly on nouns. Ms. Burns-

McCloskey disagreed with Ms. Dace's recommendation that Student complete the PECS system prior to transitioning to a speech-generating device; her testimony was compelling. PECS was not appropriate as it was not an integrated system, did not afford Student the ability to independently communicate, provided a limited vocabulary, and did not have a voice output mechanism. A speech-generating device could build Student's vocabulary, comprehension, and speech, as well as provide independence by providing a means for formulating novel language, and quick retrieval of pre-programmed messages.

42. Consistent with Ms. Dace's findings, Student was able to discriminate and scan a large display of up to 32 one-inch icons, and locate and touch activate buttons as small as one-half-inch on a dynamic screen. In assessing Student's functioning in relation to using a communication device, Ms. Burns-McCloskey determined that Student had sufficient hearing, vision, and motor ability to utilize a speech-generating device. Student cognitively understood that the icons were a language reference. This finding was corroborated by Ms. Jackson's Communication Matrix results in which she determined Student to be functioning at the level of abstract symbols. Student also demonstrated necessary cognitive abilities including attention, memory, and problem-solving skills to use a speech-generating device to achieve functional communication goals.

43. Ms. Burns-McCloskey ran clinical trials with Student on the Novachat 7, made by Saltillo, and the iPad. Student was familiar with many of the icons used in the vocabulary programs on both devices. With the Novachat, Student was able to request preferred items with little prompting, access stored vocabulary, and use strategies to navigate the device to locate words. She was able to generate novel vocabulary after being taught. Ms. Burns-McCloskey recommended the Novachat over the iPad because Student had been using the iPad for fun as opposed to function. Transitioning Student to using the iPad as a communication device would be challenging and frustrating to Student.

44. Guardian brought pages from the PODD to the evaluation. The PODD is a partner-assisted language intervention strategy consisting of many pages of vocabulary icons organized in a linguistically appropriate way. Student demonstrated the ability to use this system. In Ms. Burns-McCloskey's experience, the PODD is a good strategy for those with complex communication needs such as Student, and could serve as a back-up system for times when the Novachat was not available or practical. Ms. Villacis informed Ms. Burns-McCloskey that Student was successfully using the PODD in her private speech therapy. Ms. Burns-McCloskey recommended that Student be provided the PODD in addition to the Novachat.

45. Ms. Burns-McCloskey formulated two goals for Student: to develop operational and functional competence using a speech-generating device including many short term objectives such as navigating the device; communicating basic needs; generating novel language; and initiating social interactions. To make progress on these goals, Student required services from an augmentative alternative communication specialist who would customize the device and vocabulary for Student's needs; update and re-program the device as her needs changed and skills developed; and troubleshoot any problems. This specialist

would train all communication partners working with Student on the use of the device, how to create communication opportunities, and when and how to prompt Student. The specialist would work directly with Student on navigating the device and implementing her goals. Ms. Burns-McCloskey persuasively concluded that Student required 60 hours a year of augmentative alternative communication services, direct and indirect, by a speech and language pathologist with expertise in augmentative alternative communication.

46. To address all of Student's complex communication needs, Ms. Burns-McCloskey recommended that Student receive intensive speech intervention in the form of three 30-minute sessions per week of individual speech and language services and two 30-minute group sessions per month to facilitate her social skills. The evidence established that Student required individual sessions as she did not learn incidentally from the responses of others. She benefitted from direct intervention, repetition, and review as corroborated by past triennial assessments and as demonstrated by her progress in her private sessions, discussed below. Because Student did not establish that Ms. Jackson's speech and language assessment was deficient aside from her failure to address Student's needs for augmentative alternative communication, it is not necessary to determine the level of speech services Student required.<sup>20</sup>

47. Consistent with common practice, Ms. Burns-McCloskey wrote her report recommending the Novachat in a way that would support Medi-Cal funding should the IEP team agree to secure the device through Student's public insurance benefits. Ms. Burns-McCloskey knew that Guardian wanted Student to own her own device. Therefore, she included in her report justification of the Novachat as a medically necessary device, falling within the definition of durable medical equipment as it was dedicated solely for communication.

48. At the May 27, 2014 IEP meeting, Ms. Burns-McCloskey presented her initial findings to the IEP team. She reported that given the severity of Student's speech impairment, Student required a speech-generating device to compensate for her significant speech and language deficits. Student needed to hear language to be able to process what she wanted to say. Based on her assessment, Ms. Burns-McCloskey recommended that Student be provided the Novachat 7 as a communication device.

#### *September 11, 2014 Annual IEP*

49. On September 11, 2014, Student's IEP team met for her annual IEP for the 2014-2015 school year, her tenth grade year, and to review independent assessment results. Following an extensive transition plan, Student successfully acclimated to her new high school in the fall of 2014. The IEP team reviewed Student's present levels of performance. Consistent with Ms. Burns-McCloskey's findings, Student required time to process the

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<sup>20</sup> Whether Vacaville denied Student a FAPE by failing to offer or provide appropriate speech and language services was not identified as a separate issue for hearing nor determined herein.

completion of one task before she could follow through with another. Without sufficient time to process, her latency in response could be misconstrued as noncompliance. As of September 2014, Student's use of PECS had decreased, and she was averaging only 4.5 requests each day, compared to her average of 21 requests per day in February 2014. Student made variable progress on her articulation goal, and was not able to produce scripted phrases as called for in her communication goal. Still, Student continued to see herself as an oral speaker and a proposed speech goal recommended that Student be encouraged to use her voice.

50. Ms. Burns-McCloskey reported all of her findings and recommendations at the September 11, 2014 IEP team meeting. At this meeting, Ms. Dace agreed that Student should be provided the Novachat, and supported Ms. Burns-McCloskey's proposed goals and recommendation for 60 hours per year of augmentative alternative communication services. Also at this meeting, Dr. Ames-Klein presented her findings from her July 2014 independent neuropsychological evaluation of Student, consisting of a record review, class observation, review of home videos of Student using an iPad, and interviews.

51. During Dr. Ames-Klein's two-hour class observation, Student was essentially nonverbal, and only used PECS during snack time to ask for help and request a break. Student struggled to perform requested tasks, but she persevered and was interested in learning. Dr. Ames-Klein's opinion that Student wanted to be social was supported by the January 2014 goal report which described Student as outgoing and curious. Student's ability to communicate and perform tasks was at a higher level in the videos Guardian shared as opposed to teacher reports of Student's functioning and Dr. Ames-Klein's observation. However, Student's ability to perform academic tasks such as identifying letters, varied widely, ranging from 100 percent on some days to 20 percent at other times. Student's progress reports on her goals reflect this variability. There was no evidence that Student would perform at a higher academic level with a speech-generating device. However, the evidence showed that such a device would improve her communication and social interactions which were critical to advancing her functional education.

52. Dr. Ames-Klein persuasively explained the significance of past test results. Student's language ability was stronger than her I.Q. score would indicate in that she was capable of processing and understanding receptive information at a higher level than anticipated, although she lacked the ability to express herself. Similarly, Student's adaptive functioning was higher than that typical for an individual with a severe intellectual disability. Dr. Ames-Klein established that Student was capable of learning more, and despite her disability, she could function at a higher level. Of accord, the independent occupational therapy assessor Liz Isono also found that Student had more capacity than she presented.

53. The September 11, 2014 IEP team meeting notes state, "There will be movement of the county office to provide the PODD." At hearing, Victor Romualdi, Solano County's assistant superintendent for student programs, acknowledged that Student's

September 11, 2014 IEP called for the provision of both the Novachat and the PODD.<sup>21</sup> Dr. Romualdi believed implementation of the Novachat was the first priority, not the sole priority, in providing Student's communication systems. Although he initially testified that the County only agreed to explore the PODD as an option and create capacity for its implementation by training staff, he then acknowledged that at the September 11, 2014 IEP team meeting, the County committed to implementing the PODD for Student, and it was his intent to make the PODD available. Guardian and Ms. Burns-McCloskey were present at this IEP team meeting. They had no doubt that the IEP team agreed to provide both devices, and convincingly testified to this. In accord, Dr. Romualdi took steps to arrange staff training on the PODD as discussed below. These subsequent actions are consistent with his prior agreement to provide the PODD. Dr. Romualdi further acknowledged Vacaville's offer to provide the PODD in a voicemail message to Guardian in January 2015. In this message, he indicated that staff could begin to "experiment" with the PODD but shared his opinion that it would be best to wait for staff training and have the system "setup by the book" in order to appropriately implement the PODD

54. The evidence established that at the September 11, 2014 IEP team meeting, Vacaville agreed to provide Student with the Novachat and the PODD as augmentative alternative communication devices. Student's IEP did not specify that the Novachat would be provided through Medi-Cal, or that Vacaville would only provide the device if Medi-Cal did not approve it. Vacaville did not ask Guardian for her consent to access Student's public benefits to fund the Novachat, which Student required to receive FAPE.

55. At the September 11, 2014 IEP team meeting, Vacaville also agreed to provide Student with 60 hours of augmentative alternative communication services by a speech and language pathologist with an AAC background. Guardian requested that Ms. Burns-McCloskey be the provider. Dr. Romualdi and Susan Massey, special education coordinator for Vacaville, testified that pursuant to the Special Education Local Plan Area policy, it would be a conflict of interest for Vacaville or the County to hire an independent evaluator to provide services recommended by that evaluator absent a showing that the services could only be provided by the evaluator. The written policy was not introduced at hearing, and was not based on any legal prohibition. Vacaville agreed to identify an augmentative alternative communication services provider within two weeks, revise the proposed goals, and reconvene Student's IEP team for part two of her annual 2014-2015 IEP on September 25, 2014.

56. From an early age, Student demonstrated the cognitive ability to use pictures to represent language. The evidence established that Student's need for a speech-generating device and implementation services existed at the time of Ms. Jackson's speech and language assessment in February 2013. Ms. Beatty and Ms. Burns-McCloskey established that given

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<sup>21</sup> Dr. Romualdi has a Ph.D. in education. He holds an administrative and a pupil personnel services credential and served as an administrator for 17 years, and as a school psychologist for 13 years. He was Solano County's senior director for special education from approximately August 2013 through January 2016.

her consistent skill set and communication needs, Student would have been a candidate for a speech-generating device by at least early 2013. Student demonstrated that she had the capacity to learn, and to increase her functional communication with an appropriate device. If Vacaville had timely and appropriately assessed Student in the area of assistive technology including augmentative alternative communication, it would have determined her need for a speech-generating device by August 28, 2013. Had Student been afforded the opportunity to use a speech-generating device sooner, she would have been better equipped to express herself at a level commensurate with her understanding and increase her functional communication which would further her education.

#### *September 25, 2014 IEP Team Meeting*

57. For the first time, Student's September 25, 2014 IEP identified an "AAC device" as a required assistive technology device for Student. At the September 25, 2014 IEP team meeting, Vacaville continued to offer weekly individual, group, and consultation speech and language services at the rate of 30 minutes each, with an additional 300 minutes per year of assistive technology consultation services. Vacaville further clarified its previously agreed-upon offer of augmentative communication services: a total of 60 hours direct and indirect services, by a nonpublic agency speech and language specialist with augmentative alternative communication expertise, provided to student, staff, and family, at the rate of 6 hours per month, 90 minutes per week. Vacaville continued to offer the County special day class program and extended school year services.

58. On September 29, 2014, Guardian agreed to the implementation of the September 25, 2014 IEP, including the Novachat, the PODD, the 60 hours of augmentative alternative services, and 19 of 20 proposed goals, including those proposed by Ms. Burns-McCloskey. Guardian did not agree with the level of speech, occupational therapy, and behavior services, but consented to implementation. Student did not attend extended school year 2015 due to Guardian's concerns with Student's ability to adapt to unfamiliar staff.

#### *Speech Services at Children's Hospital and Research Center*

59. Maria Villacis from Children's Hospital and Research Center provided private speech services to Student at her Walnut Creek office beginning early 2014.<sup>22</sup> Vacaville contracted with Children's Hospital to provide Student with compensatory speech and language services from August 4, 2014, through June 30, 2015. The contract authorized the provision of speech and language services not to exceed \$8,000 at a rate of \$180 an hour. Vacaville agreed to this amount to compensate Student for missed sessions from fall 2013

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<sup>22</sup> Ms. Villacis is a licensed speech pathologist and has a Certificate of Clinical Competence in speech-language pathology through the American Speech-Hearing-Language Association. She worked for public schools for approximately eight years prior to her current employment.

and to settle a disagreement between Guardian and Vacaville regarding the quality of speech services provided during the 2012-2013 school year. Ms. Villacis provided these compensatory sessions.

60. Ms. Villacis worked with Student throughout the term of Vacaville's contract. Thereafter, she continued to provide Student with private speech sessions through the time of hearing. Ms. Villacis provided speech and language services to treat Student's apraxia and focused on articulation. She met with Student twice per week for one hour sessions until the fall of 2015, when Guardian reduced the frequency to once a week due to the commute. Student made good progress on her speech. Initially, she used modified signs, utterances, and vocalized some vowel sounds. Her oral range of motion increased, and by the time of hearing she was able to imitate consonants and various vowel sounds. Student started using a speech-generating device in sessions, although Ms. Villacis was unclear when this started. She demonstrated progress with her device. At the time of hearing, Student was able to use her device to initiate communication and had advanced from making simple requests to using it to perform the more advanced language functions of commenting and protesting.

#### *Provision of Speech and Language Services During 2014-2015 School Year*

61. Susan Anich is a licensed speech-language pathologist who has provided speech services to students for the past 36 years through the County.<sup>23</sup> She was assigned to provide Student's speech and language IEP services at the start of the 2014-2015 school year. On August 18, 2014, Ms. Anich conducted her first group session with Student. She waited until September 15, 2014, to begin individual speech sessions to allow time to develop rapport with Student. During her first month of school, Student's new team of classroom staff and service providers at Will C. Wood focused on getting acquainted with Student and supporting her transition from Jepson Middle School. From the start of school through October 17, 2014, Ms. Anich provided Student with 13 group speech sessions and 7 individual sessions, as well as weekly consultation services. Although Student's IEP called for one weekly 30-minute individual session, Ms. Anich delivered two 15-minute individual sessions per week during that time.

62. At the October 21, 2014 IEP meeting, the team agreed that Ms. Anich would contact Ms. Villacis, Student's private speech therapist. In signing her consent with exceptions to the October 21, 2014 IEP, Guardian handwrote on the IEP that she was "appalled by ... Susan Anich's behavior and statements during the IEP team meeting. I don't agree with her recommendations and expectations for [Student]. There [sic] not adequate to [Student's] level." Guardian was personally offended during the IEP team meeting when Ms. Anich described Student as unintelligible. Guardian also did not believe that Ms. Anich provided any individual speech sessions as required by Student's IEP.

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<sup>23</sup> Ms. Anich has a master's degree in communication disorders and holds a Certificate of Clinical Competence in speech-language pathology through ASHA. She has a lifetime teaching credential in rehabilitative services: speech, language and hearing.

63. Ms. Anich and Ms. Villacis discussed their work with Student during a telephone conversation on October 31, 2014. During this call, Ms. Anich expressed frustration with the IEP team meeting process, which she found to be unproductive and time consuming, and with the family members for continuing to re-write Student's goals. By the time of this phone conversation Student's IEP team had met three times for her annual 2014-2015 IEP, without reaching full agreement. In the 30 months between August 2013 and the time of hearing, Student's IEP team met at least 25 times, not counting additional quarterly progress meetings which began in June 2014. Student had a large team due to her complex needs and many providers. In addition, the County and Guardian asked Dr. Romualdi to join the IEP team in September 2013, to help collaborate, and starting in October 2013, a professional facilitator attended approximately 15 IEP meetings. Service providers spent an inordinate amount of time in meetings discussing Student's needs.

64. During their conversation, Ms. Anich disagreed with Ms. Villacis' therapeutic approach, questioning her focus on Student's vocalizations and advocating a more functional therapy. Ms. Anich did not expect Student to make much progress in her oral speech. Ms. Anich had shared her opinion with Student's IEP team that she disagreed with a dual therapeutic approach of working on Student's articulation while introducing her to a speech-generating device. Articulation was key to Ms. Villacis' medical model approach, and Student made progress during her private sessions. During the call, Ms. Villacis expressed her disagreement with the wording of Student's speech-generating device goals which focused on the use of the device rather than communication.

65. On November 2, 2014, Ms. Anich initiated a follow-up email exchange with Ms. Villacis in which she agreed to use some materials Ms. Villacis suggested and to report back on Student's response. She again shared her frustration with the IEP development process. Ms. Villacis responded on November 3, 2014, emphasizing her intent to remain neutral and concluding, "it is my impression that we differ in our therapy approach as well as our expectation."

66. Ms. Villacis testified that during the October 31, 2014 phone call, Ms. Anich described Student as "annoying" and "obnoxious" and informed her that it was "hell to work with the family." Despite reporting the contents of this conversation to numerous individuals, there was no evidence that Ms. Villacis attributed such comments to Ms. Anich at any time other than during hearing. Ms. Anich testified that she was not derogatory of Student or her family and did not use those terms.

67. Ms. Villacis shared her impressions of the phone call and of Ms. Anich with Guardian. Ms. Villacis told Guardian she was "in shock" with Ms. Anich's lack of professionalism and that she would not let Ms. Anich near her own brother who also has Down Syndrome. Shortly thereafter, Guardian informed Vacaville that Ms. Anich was not to provide any further speech and language services to Student. Guardian requested another speech and language pathologist for Student due to Ms. Anich being unprofessional, biased against Student, and unable to communicate and collaborate with Guardian and Ms. Villacis.

68. Vacaville's former coordinator of special education Geovanni Linares<sup>24</sup> and Dr. Romualdi separately investigated Guardian's complaint. Ms. Villacis was uncomfortable reporting any details of her conversation and did not attribute any specific comments to Ms. Anich. Similarly, at hearing, Ms. Villacis testified that she was not comfortable repeating Ms. Anich's comments and had to be admonished to answer the questions asked. Ms. Villacis informed Mr. Linares that Ms. Anich had been unprofessional and did not have much expectation for Student. Mr. Linares did not substantiate any wrongdoing. Even so, in an attempt to settle a separate compliance complaint Guardian filed in December 2014 with the California Department of Education, Mr. Linares offered to arrange for another speech provider if Guardian withdrew her compliance complaint. Guardian did not agree to do so, and Vacaville did not assign a different provider.

69. In a February 18, 2015 letter to Guardian, Dr. Romualdi shared the results of his investigation. He concluded that Ms. Anich acted within the parameters of acceptable professional conduct; had repeatedly expressed her willingness to work with Student; and had articulated her views during the IEP team meeting process in a professional manner. He encouraged Guardian to allow Student to again participate in her IEP speech services. At hearing Dr. Romualdi persuasively opined that Guardian took the professional disagreement personally.

70. Guardian refused to allow Ms. Anich to work with Student after October 2014. Throughout the 2014-2015 school year, including extended school year, Ms. Anich remained willing and able to provide Student's IEP speech and language services, including weekly individual, group, and consultation services. She was willing to implement Student's IEP goals despite her professional disagreement. Ms. Anich continued to attend Student's IEP team meetings and share her opinions. Student failed to prove that Ms. Anich was not qualified or capable of providing her with speech services in conformity with her IEP.

#### *Provision of the Novachat*

71. Guardian applied to Student's Medi-Cal insurance for authorization for a Novachat as a medically necessary device. She did not know whether Medi-Cal would fund the Novachat, but she wanted Student to have the chance to personally own her own device that would become her voice. At the October 21, 2014 IEP team meeting, Vacaville updated the team that it was "still waiting" for Student's Novachat. At hearing, it became clear that Vacaville was waiting for the device to be approved and provided through Student's Medi-Cal benefits. Near the time of the October 2014 IEP meeting, Vacaville had been in touch with Saltillo, the manufacturer, and confirmed it had an expert to provide training on the device. In the meantime, Ms. Dace and Mr. Linares attempted to obtain a loaner device.

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<sup>24</sup> Mr. Linares is currently the director of pupil services for Woodland Joint Unified School District. He served as the special education coordinator for Vacaville from October 2013 through June 2015.

72. Guardian also made efforts to privately obtain a loaner device for Student. On October 30, 2014, Guardian obtained a loaner Novachat from an organization called Down Syndrome Connections. She immediately informed Ms. Dace of this on October 31, 2014. Receiving no response, Guardian sent a follow-up email to Ms. Dace on November 16, 2014, reminding her that Student had a loaner device ready to use, and inquiring about the delay in implementing the device. In this email, Guardian again requested that Ms. Burns-McCloskey provide Student's 60 hours of augmentative alternative communication services. Vacaville had not contracted with a nonpublic agency nor identified a provider, which it had promised to do by September 25, 2014.

73. On or about November 19, 2014, Mr. Linares took the lead on ensuring the implementation of Student's Novachat including augmentative alternative communication services. Guardian learned of this on December 1, 2014, and emailed Mr. Linares the next day, requesting an update and that Vacaville contract with Ms. Burns-McCloskey to provide Student's augmentative alternative communication hours. On December 17, 2014, Mr. Linares informed Guardian that the County was purchasing the Novachat. Near this time, Dr. Romualdi also confirmed that the County had purchased two Novachats and told Guardian that one was designated for Student.

74. On December 18, 2014, Guardian filed a compliance complaint with the California Department of Education regarding Vacaville's failure to implement Student's IEP with regard to the provision of the Novachat and staff training. By the end of December 2014, Medi-Cal authorized Student's request for a Novachat as medically necessary. On January 13, 2015, Student received a Novachat 8 fully funded through Medi-Cal.

75. On February 11, 2015, the California Department of Education found Vacaville to be in compliance with implementing Student's Novachat. The Department found as follows: 1) Student's IEP, signed with exceptions to goals on September 29, 2014, required Vacaville to provide a Novachat and 60 hours of AAC services; 2) Medi-Cal provided Student the device on January 13, 2015; 3) the device was delayed as Guardian opted to wait for the new Novachat 8 which was just becoming available; and 4) Vacaville had scheduled training on the device for the first week of February 2015. Guardian's March 17, 2015 request for reconsideration was denied. The Department's findings are not binding on this tribunal.

76. The evidence established that Guardian did not agree to delay the provision of Student's device by opting to wait for a newer version. While Ms. Burns-McCloskey's June 19, 2014 report recommended the Novachat 7 for Student, that version of the device was no longer being made in the fall of 2014. Rather, the Novachat 8 was available at the time Ms. Burns-McCloskey contacted Student's physician regarding his prescription for Student's device. Therefore, Student's physician wrote a prescription for the Novachat 8 as medically necessary, durable medical equipment. The only difference in the newer version was the size of the screen.

77. Ms. Burns-McCloskey established that Saltillo is a large, well-respected company. It was her experience that Saltillo promptly provided Novachats within a couple weeks of ordering. Mr. Linares' testimony that Vacaville could not timely provide the device because Saltillo required information from Student's physician to customize her Novachat was not persuasive. There was no evidence that the Novachat had to be custom built; rather Vacaville made efforts to obtain a loaner device for Student's use. Physician involvement was solely required to obtain Medi-Cal authorization and funding for the device as medically necessary. Pursuant to the terms of Student's IEP, Vacaville had an independent obligation to provide Student with a Novachat apart from Medi-Cal as it did not condition the provision of the device on Medi-Cal funding and it did not notify Guardian or seek her consent to access Student's public benefits to fund assistive technology that Student required to receive FAPE.

78. Vacaville did not provide Student a Novachat as required by the September 11, 2014 IEP, consented to on September 29, 2014. As of the time of hearing, Vacaville still had not provided Student with a Novachat. The fact that Student received a Novachat funded by Medi-Cal did not discharge Vacaville's duty to implement her IEP.

#### *Provision and Implementation of the PODD*

79. On or about October 2014, Guardian had obtained and was providing Vacaville with a modified PODD system from Student's private therapy with Ms. Villacis. Due to Guardian's efforts, this PODD was available for staff and Student in the classroom. Although Ms. Jewett saw the PODD in Student's classroom, she did not see staff using it with Student. Vacaville did not implement the modified PODD provided by Guardian. At the time of hearing, Vacaville had not provided Student with the PODD as required by her September 11, 2014 IEP, signed on September 29, 2014.

80. Vacaville's knowledge of the PODD was limited to what it learned from Ms. Burns-McCloskey's independent evaluation. Having committed to providing Student with the PODD, Vacaville, through the efforts of Dr. Romualdi, sought to develop its own understanding of this communication system. Dr. Romualdi located a few providers in the United States qualified to provide training on the PODD. Staff training was initially scheduled for winter 2014, but the provider cancelled this training. Dr. Romualdi learned of a two-day training on the PODD in Maryland in late spring 2015. On January 27, 2015, he informed Guardian that this was the soonest training opportunity, so Student would have to wait for the implementation of the PODD. Two County specialists participated in this training on April 30 and May 1, 2015.

#### *Provision of AAC Services and Implementation of the Novachat*

81. In order to implement Student's communication systems, the September 25, 2014 IEP required Vacaville to provide 60 hours of augmentative alternative communication services at the frequency of 90 minutes per week for a total of 6 hours per month. Vacaville did not implement any of these hours until February 3, 2015, four months after Guardian

provided consent. Beginning February 2015, Vacaville contracted with Ms. Jewett, to provide Student with 60 hours of augmentative alternative communication services. Since 2003, she has operated her own private practice, Jewett and Associates. Ms. Jewett provided services to Vacaville for one and a half years prior to hearing, first under the auspices of a non-profit entity, Delta Education and Therapy Services, and then for the last year through her own agency, California Therapy Alliance, Inc. At the time of hearing, California Therapy Alliance was pending certification through the state of California as a nonpublic agency. At the time she worked with Student, her company was not a certified nonpublic agency.

82. Although Ms. Jewett had no prior experience using the Novachat, she had used numerous other communication devices with the same software. The evidence established that Ms. Jewett was qualified to provide Student her augmentative alternative communication hours as specified in her September 2014 IEP. On February 3, 2015, a Saltillo representative provided Ms. Jewett two hours of training on the Novachat. During the first quarter of 2015, Vacaville also provided Ms. Dace with a similar training. By the time Ms. Dace left Vacaville in September of 2015, many staff had been trained on the device including Student's teacher, the County assistive technology specialist, and the speech and language pathologist, as well as Guardian.

83. At Student's February 12, 2015 IEP team meeting, Vacaville blamed Guardian for the delay in implementing Student's communication services as Ms. Jewett could not start without the Novachat which Guardian had at home and was not sending to school. Guardian was reluctant to send Student's Novachat to school as staff had not been trained to use or implement the device, and Student required a consistent approach to benefit from her device. Further, Guardian wanted to ensure safe passage of Student's personal device between home and school. Guardian agreed to send the Novachat to school starting February 17, 2015.

84. February 19, 2015, was the first day that Ms. Jewett provided direct services in implementing the Novachat with Student and her paraprofessional. On March 17, 2015, Ms. Jewett provided an informal two-hour staff training on the Novachat, and a formal power-point presentation training on April 2, 2015. During the length of her contract with the County, from February 3, 2015, to June 4, 2015, Ms. Jewett provided Student with 40.5 hours of direct and indirect augmentative alternative communication services. Ms. Jewett primarily provided coaching and facilitation services for the implementation of Student's device, to ensure that Student and all communication partners were able to comfortably navigate and communicate through the Novachat. Guardian and all staff working with Student also needed training on their roles in prompting Student to use the device and creating opportunities for her to communicate. Student needed to learn to accept the device to be her voice. Ms. Beatty established that based on the number of years Student was without a speech-generating device, it would take time for her to begin to use the device as her voice.

85. Student made progress with the use of her Novachat. Initially, she was hesitant to touch the buttons or screen, but she became confident and adept. By the March 2015 goal report period she was able to activate the message window for the device to speak and navigate to different pages to make requests with prompts. Student was using her Novachat about 73 percent of the time and rejected it approximately 27 percent of the time. Student expanded her language functions, and by June 2015, in addition to making requests, Student used her device to greet, express emotion, choose clothing to wear, and she started to comment. Still, most of her communication was responsive. Ms. Jewett persuasively opined that based on her experience and Student's progress, Student was capable of learning more icon representations and expanding her vocabulary, though not her sentence length as of June 2015. Student required ongoing support, repetition, and a standard format for the location of icons to learn to expand her expressive communication.

86. Since the expiration of Ms. Jewett's contract in June 2015, Vacaville had not contracted with a nonpublic agency to provide Student's augmentative alternative communication hours as required by her September 2014 IEP. Vacaville established that there is a shortage of speech-language pathologists and augmentative alternative communication specialists across the nation. Guardian continued to request that Ms. Burns-McCloskey be the provider. At the start of the 2015-2016 school year, Vacaville contracted with Speech Pathology Group, a nonpublic agency, to provide Student's speech and language services. For unknown reasons, Vacaville did not contract with Speech Pathology Group to provide Student with her 60 annual hours of augmentative alternative communication services. Speech-language pathologist and augmentative communication specialist Jeeva Johns initially provided seven hours of direct and indirect speech and language services related to the implementation of Student's Novachat during the month of August 2015, pending the assignment of a permanent staff member. At the time of hearing, Vacaville still had not identified an augmentative alternative communication provider.

#### *Refinement of Communication and Speech-Generating Device Goals*

87. At the February 12, 2015 IEP team meeting, Vacaville disagreed with Guardian's request to increase Student's speech and language services. Student's IEP team agreed to have Ms. Burns-McCloskey return to the IEP team to further discuss Student's communication and device goals. On March 30, 2015, Ms. Burns-McCloskey attended an IEP team meeting to share five proposed goals she developed based on her assessment and in consultation with Ms. Villacis.

88. After eliminating and combining goals with input from Ms. Burns-McCloskey and Guardian, Vacaville proposed seven communication goals targeting vocabulary and locating word categories on a speech-generating device; increasing language functions, formulating simple sentences, and engaging in two to three interactive exchanges using the device; and articulation. Based on these new goals, Vacaville increased its offer of speech and language services to include two individual 30-minute sessions per week and continued to offer one weekly 30-minute speech consultation session. Guardian did not provide written consent to the proposed goals or increased individual speech services.

### *Student's Progress with the Novachat*

89. Student's IEP team met five times to develop her annual 2015-2016 IEP between September 2015 and January 5, 2016.<sup>25</sup> At the time of hearing, this IEP had not yet been completed or consented to, and Student's September 25, 2014 IEP remained her operative IEP. By the time of her January 2016 IEP team meeting, Student had made several friends, was interested in her school work, and progressed in using her Novachat. She had become independent in greeting, asking for help, requesting a break, sharing basic wants, and answering simple questions. Student successfully navigated her device to continue communication for two exchanges, demonstrated the ability to form complex sentences, and was able to locate 48 words and phrases on her device with verbal prompting. Student volunteered to tell her class the daily weather using her new voice. Student's intelligibility also improved, and she was able to combine sounds to produce common words and phrases.

90. At the January 5, 2016 IEP team meeting, Vacaville increased its offer of individual speech sessions to three 30-minute sessions per week, with two 30-minute group sessions per month, and one weekly 30-minute consultation session. Ms. Burns-McCloskey first recommended this level of service in May of 2014. Vacaville continued to offer 300 minutes per year of assistive technology consultation. Vacaville offered to complete the remaining 19.5 hours of Student's augmentative alternative communication hours from the 2014-2015 school year, but did not offer ongoing augmentative communication specialist services.

### *Request for Reimbursement*

91. At hearing, Guardian introduced counseling attendance logs establishing that Student attended private sessions with Ms. Villacis at her Walnut Creek office, separate from her contract with Vacaville, for a total of 30 sessions in 2014; 14 sessions in 2015; and two sessions in January 2016.<sup>26</sup> All of these sessions were fully covered by insurance. One of Student's requested remedies is for reimbursement of transportation costs associated with these services, including mileage and bridge tolls. Ms. Villacis was the only professional to implement the PODD with Student. Vacaville argues in its closing brief that Ms. Villacis testified that the only communication device she used with Student was an iPad. Rather, Ms. Villacis' testimony established that: 1) she was unfamiliar with the Novachat and whether it was a device or program, or if it was separate from an iPad; and 2) Student brought what Ms. Villacis believed to be an iPad to session, and they used programs on the iPad. The evidence did not establish that during these speech sessions, which focused on

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<sup>25</sup> No issues were heard or decided regarding any IEP developed after August 28, 2015.

<sup>26</sup> Only one session in 2015 occurred prior to August 28, 2015, the date Student filed her complaint.

oral-motor skills and articulation, that Ms. Villacis used the iPad as a communication tool as opposed to a reward. Further, neither party questioned Ms. Villacis about her use of the PODD.

92. It is a roundtrip of 83 miles from Student's home to Ms. Villacis' office. The ALJ takes judicial notice of the annual business reimbursement mileage rates posted on the internal revenue service website. The internal revenue services' mileage reimbursement rate for 2014 was 56 cents per mile; for 2015 it was 57.5 cents per mile. For each of the 46 roundtrips to therapy sessions, Guardian paid a five dollar bridge toll. Only 31 of these 46 trips occurred prior to August 28, 2015. Guardian's transportation costs associated with these speech sessions through August 28, 2015, included \$1,442.13 in mileage reimbursement and \$155 in tolls for a total of \$1,597.13.

## LEGAL CONCLUSIONS

### *Introduction: Legal Framework*<sup>27</sup>

1. This due process 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 et seq. (2006);<sup>28</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 all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and to 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 student at no charge to the parent, meet state educational standards, and conform to the student'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 student to benefit from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

3. In *Board of Education of Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court

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<sup>27</sup> Unless otherwise stated, the legal citations in this Introduction are incorporated by reference into the analysis of each issue decided below.

<sup>28</sup> All subsequent references to the Code of Federal Regulations are to the 2006 edition.

held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 951 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

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(f) & (h); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505, 56505.1; 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. (e).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; See 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA due process hearings is preponderance of the evidence].) In this matter, Student bears the burden of proof as to all issues.

*Issue 1: Assessing Student’s Needs in the Areas of Speech and Language, Communication, and Assistive Technology*

5. Student contends Vacaville denied her a FAPE by failing to timely and appropriately assess and identify her needs in the areas of speech and language, communication, and assistive technology including her need for communication devices and services in the two years prior to filing her request for due process. Student alleges that Vacaville never appropriately assessed her speech and language needs and that its October 2013 assistive technology assessment and May 2014 augmentative alternative communication assessment were not designed to identify her communication needs, specifically her need for a speech-generating device and related services.

6. Vacaville argues that Student’s speech and language needs were well understood and fully assessed in February 2013, and there was no reason to reassess Student in this area. Vacaville maintains that it timely assessed Student’s assistive technology needs in October 2013; conducted trials on iPad applications in December 2013; and appropriately

assessed her augmentative alternative communication needs in May 2014. Vacaville further contends its agreement to fund an independent speech and language evaluation of Student which was completed by June 2014 satisfied its duty to assess. Vacaville argues that Student received educational benefit with the use of PECS and made progress on her goals commensurate with her severe intellectual disability, so there was no denial of FAPE.

#### ASSESSMENTS AND SUSPECTED AREAS OF DISABILITY

7. In order to meet the continuing duty to develop and maintain an appropriate educational program, the school district must assess and reassess the educational needs of a student with a disability. (20 U.S.C. § 1414(a) & (b); Ed. Code, § 56320.) A student's unique educational needs are to be broadly construed to include academic, social, health, emotional, communicative, physical, and vocational needs. (*Seattle School Dist., No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.) In addition, educational needs include functional performance. (Ed. Code, §§ 56320, subd. (b)(1), 56345, subd. (a)(1).) For purposes of evaluating a child for special education eligibility, the district must ensure that "the child is assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f) [child must be assessed in all areas related to the suspected disability].) This includes, where appropriate, assessing the student's communicative status. (34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).) In California, the term "assessment" has the same meaning as the term "evaluation" in the IDEA. (Ed. Code, § 56302.5)

8. After a student has been deemed eligible for special education, a reassessment shall be conducted if the district determines that the educational or related services needs including functional performance of the student warrant a reassessment or if the parent or teacher requests reassessment. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) A reassessment shall occur not more frequently than once a year, unless the parent and the district agree otherwise, and shall occur at least once every three years, unless the parent and the district agree, in writing, that a reassessment is unnecessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) The assessment must be completed and an IEP team meeting held within 60 days of receiving consent, exclusive of school vacations in excess of five school days and other specified days. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, §§ 56043, subds. (c) & (f)(1), 56302.1, subd. (a), and 56344, subd. (a).) A district's failure to conduct appropriate assessments or to assess in all areas of suspected disability constitutes a procedural violation that may result in a substantive denial of FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1032-1033; *Orange Unified School Dist. v. C.K.* (C.D.Cal., June 4, 2012, No. SACV 11-1253 JVS (MLGx)) 2012 WL 2478389, p.8.)

9. A school district is required to use those assessment tools necessary to gather relevant functional and developmental information about the child to assist in determining the content of the child's IEP. (34 C.F.R. § 300.304(b)(1)(ii).) A district must also ensure that the evaluation is sufficiently comprehensive to identify all of the child's needs for special education and related services. (34 C.F.R. § 300.304(c)(6).) The determination of

what tests are required is made based on information known at the time. (*Vasherresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech and language testing where concern prompting assessment was deficit in reading skills; speech and language was an area of strength; the assessment included some measure of communication skills; and the results did not indicate a need for more comprehensive speech and language assessment].)

10. In assessing an area of suspected disability, a district must assess the student's functional capabilities and whether they may be increased, maintained, or improved through the use of assistive technology devices or services. (*Letter to Fisher* (Office of Special Education Programs,<sup>29</sup> Dec. 4, 1995) 23 IDELR 565.) The evaluation should provide sufficient information to permit the IEP team to determine whether the student requires devices or services in order to receive FAPE. (*Ibid.*; *Clark County School District*, 111 LRP 60397 (SEA NV 07/21/11) [failure to conduct an assessment prior to providing a nonverbal student with limited intellectual capacity with an assistive technology device found to be a denial of FAPE as student did not demonstrate consistent skill acquisition using the device].)

11. The United States Department of Education attaches great importance on accurate, comprehensive evaluations as underscored by its regulation providing that parents who disagree with district evaluations may obtain an independent evaluation at public expense. (20 U.S.C. §1415(b)(1) & (d)(2); 34 C.F.R. § 300.502(b); Ed. Code, §§56506, subd. (b), 56329, subd. (b).) The failure to obtain critical assessment information about a student “render[s] the accomplishment of the IDEA's goals -- and the achievement of a FAPE -- impossible.” (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202, 1210 quoting *Amanda J. v. Clark County School Dist.* (9th Cir.2001) 267 F.3d 877, 894.)

12. The purpose of an assessment is to identify a student's unique and individualized needs in a suspected area of disability. In early 2013, Vacaville agreed to have Ms. Jackson complete a speech and language assessment of Student pursuant to Guardian's request. Therefore, Vacaville had a duty to conduct a complete assessment of Student's communication status including functional capabilities and whether they may be increased, maintained, or improved through the use of assistive technology devices or services. Student's overall functioning and needs remained constant so Vacaville's duty continued unchanged to the start of the statutory period as of August 28, 2013. Having assessed Student's speech and language needs in February 2013, Vacaville did not have a duty to reassess in this area, apart from its duty to identify her needs for assistive technology, including augmentative communication.

13. Vacaville knew that Student was a predominantly nonverbal, multi-modal communicator who used PECS in addition to gestures, modified signs, and word

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<sup>29</sup> The Office of Special Education Programs is a division of the United States Department of Education charged with administering the IDEA and developing its regulations.

approximations. As early as September 2012, Vacaville developed a communication goal calling for Student to use a picture exchange or voice output device, even though it had never conducted an augmentative alternative communication assessment. It was undisputed that an assessment of a nonverbal student's communication status must include an augmentative alternative communication assessment as such a student required an aided system. In order to assess her communicative needs and ability, a speech and language assessment of Student needed to include an analysis of the communication system she was using at the time and an assessment of her need for and ability to use a speech-generating device.

14. Ms. Jackson's February 9, 2013 speech and language assessment of Student was not complete as she failed to conduct an augmentative alternative communication assessment or refer Student for one. Ms. Jackson did not directly assess Student's skills using picture icons, her icon repertoire, or her use of PECS, her then-current augmentative alternative communication system, and whether this system met her communication needs. Ms. Jackson failed to assess Student's needs for augmentative alternative communication because of the County's new directive that all children in its special day classes would be required to use PECS without an individualized assessment. Because of the determination that Student would not be afforded a broader communication opportunity other than PECS, Vacaville failed to take affirmative measures to assess Student's functional communication abilities and needs. Providing Student with PECS did not discharge Vacaville's duty to assess her need for additional augmentative alternative communication devices or systems and services.

15. Student had the desire to communicate, but she understood more than she was able to verbally express. Although she wanted to orally communicate, her intelligibility remained poor. Her communication challenges were compounded by her need for consistency and her difficulty building rapport. The augmentative alternative communication systems that Vacaville offered Student, namely PECS and picture icons, did not provide her an effective means of communication, resulting in frustration and noncompliance.

16. From the September 2013 annual goal reports, Vacaville was aware that Student did not meet and was not making consistent progress towards her articulation goal, her communication goal of producing scripted phrases, or her academic and daily living goals of identifying letters, numbers, and colors. Despite her intellectual disability, Student had the capacity to increase her functional communication if provided required supports. Vacaville knew of Student's success using the iPod as well as the iPad. Ms. Jackson agreed that an assistive technology assessment would have been valuable in February 2013 given Student's understanding of icons as abstract symbols for language and her proficiency with technology. An augmentative alternative communication assessment would have determined what communication technology Student required. If conducted appropriately, a complete communication assessment of Student would have included clinical trials with speech-generating devices; this was missing until Ms. Burns-McCloskey's assessment in June 2014.

17. Guardian's specific request for, and consent to, an assistive technology assessment including Student's needs for augmentative alternative communication on June 6, 2013, did not relieve Vacaville of its duty to have assessed Student in these areas by August 28, 2013, the start of the statutory period. Vacaville's duty to assess Student's communicative functioning arose in February 2013. This duty to timely and appropriately assess Student's communication needs stands independent of Vacaville's duty to assess pursuant to a signed assessment plan. Therefore, an assessment plan consented to four months later did not hold this duty in abeyance for an additional 60 days from the start of the 2013-2014 school year, until October 2013. Student proved that Vacaville committed a procedural violation by failing to timely conduct a required assessment in the areas of assistive technology and augmentative alternative communication. Having determined when this duty to assess arose, the next question is when did Vacaville fulfill this duty?

18. Ms. Dace's October 1, 2013 assistive technology assessment of Student did not satisfy Vacaville's obligation to assess her communication needs as this assessment was also incomplete. Ms. Dace's assistive technology assessment was not designed to determine Student's functional communicative status or whether her communication could be increased, maintained, or improved through the use of assistive technology devices. Ms. Dace did not address Student's need for augmentative alternative communication systems including a speech-generating device. Vacaville recognized the October 2013 assistive technology assessment was insufficient and had Ms. Dace conduct an augmentative alternative communication assessment of Student in May 2014. Vacaville's augmentative communication assessment of Student failed to include clinical trials of speech-generating devices; this rendered it incomplete given Student's complex needs and the failure of her then-current communication systems to meet her needs.

19. Ms. Dace did not conduct trials on devices because she recommended that Student first complete all six phases of PECS before transitioning to a speech-generating device. Her recommendation was not persuasive. Student had been using PECS since she was three years old. Her annual goal in January 2003 called for her to complete Phases Three and Four of PECS. By September 2012, Student was just starting Phase Three, and by May of 2014, at the time of Ms. Dace's augmentative alternative communication assessment, Student was still in Phase Four of PECS. Ms. Dace did not know what Phases Five and Six required or whether Student had the ability to complete all the PECS phases. Student was a candidate for a speech-generating device as early as 2013. There was no reason for Student to first complete the PECS program, regardless of how many more years it might take, before having the opportunity to benefit from a high-tech device. Ms. Dace's recommendation that Student first demonstrate the ability to initiate communication prior to transitioning to a speech-generating device was not persuasive as she failed to account for Student's difficulty generating novel language which was characteristic of her disability; her latency in processing; and her need for supports to help bring out the language she understood, as well as her need to hear speech to be able to model it.

20. Vacaville agreed to fund an independent speech and language evaluation by Ms. Burns-McCloskey. Her evaluation was a complete assessment of Student's

communicative status and included an augmentative alternative communication assessment with clinical trials of two speech-generating devices, the iPad and the Novachat. Ms. Burns-McCloskey's presentation of her assessment results at the September 11, 2014 IEP team meeting fulfilled Vacaville's duty to appropriately assess and identify Student's communication needs. Student proved that Vacaville failed to appropriately assess her in the area of assistive technology, including augmentative alternative communication, from August 28, 2013, through September 11, 2014.

#### STATUTE OF LIMITATIONS

21. Both federal and state law contain a two-year statute of limitations for special education administrative actions. (20 U.S.C. § 1415(b)(6)(B); 34 C.F.R. § 300.507(a)(2); Ed. Code, § 56505, subd. (l).) There are only two exceptions to the statute of limitations: when the district has either misrepresented or withheld required information from the parents. (20 U.S.C. § 1415 (f)(3)(D); 34 C.F.R. § 300.511(f); Ed. Code, § 56505, subd. (l).) Common law or equitable exceptions to the statute of limitations do not apply to IDEA cases. (*D.K. v. Abington School Dist.* (3rd Cir. 2012) 696 F.3d 233, 248; *P.P. v. West Chester Area School Dist.* (E.D. Pa. 2008) 557 F.Supp.2d 648, 661-662.) In particular, special education law does not recognize the doctrine of continuing violations as an exemption from the two-year statute of limitations. (71 Fed. Reg. 46697 (Aug. 14, 2006); *J.L. v. Ambridge Area School Dist.* (W.D.Pa. 2008) 622 F.Supp.2d 257, 268-269; *Moyer v. Long Beach Unified School Dist.* (C.D.Cal., Jan. 24, 2013, No. CV 09-04430 MMM AJWx) 2013 WL 271686; *Patrick B. v. Paradise Protectory and Agricultural School, Inc.* (M.D.Pa., Aug. 6, 2012, No. 1:11-CV-00927 ) 2012 WL 3233036, p. 6; *Baker v. Southern York Area School Dist.* (M.D. Pa., Dec. 8, 2009, No. 1:CV-08-1741) 2009 WL 4793954, p. 5; *Evan H. v. Unionville-Chadds Ford School Dist.* (E.D. Pa., Nov. 4, 2008, No. 07-4990) 2008 WL 4791634, p.5.)

22. “The implementation of the educational program is an ongoing, dynamic activity, which obviously must be evaluated as such.” (*O’Toole v. Olathe Unified School Dist. No. 233* (10th Cir. 1998) 144 F.3d 692, 702.) Similarly, the duties to refer a student for assessment and to convene an IEP team meeting to review the results are ongoing obligations. Incidents occurring within the statute of limitations regarding a failure to implement an IEP as written, or of being on notice of the need to assess or to convene an IEP team meeting, will support a due process claim and do not constitute continuing violations.

23. There is no statute of limitations issue in this case. To determine if Vacaville violated its duty to assess Student as of August 28, 2013, it is necessary to look back in time to determine when the obligation to assess Student in the areas of communication and assistive technology arose, even if this predates the relevant time frame, and to determine whether the circumstances triggering that duty remained in place at the start of the statutory period. Although its duty to assess Student arose by February 2013, Vacaville is not being held to account for conduct that predates the statutory period. Rather, this duty to completely assess Student's communication needs remained through the start of the statutory period, as Student's needs remained constant over time.

24. This case is therefore distinguishable from the continuing violation cases cited above. There is no request to toll the statute of limitations here to allow Student to seek a remedy for violations that occurred outside the statutory period. Vacaville was on notice by February 14, 2013, the date of the IEP team meeting to review Student's speech assessment, that Student's communication status including her use of augmentative alternative communication systems, had not been completely assessed. The establishment of this earlier failure provides the basis for finding violations beginning August 28, 2013. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 445 [in finding challenges to IEP's which predated the statute of limitations to be time barred, the court held that while it is improper to challenge conduct that predates the statute of limitations, it is permissible to consider events that occurred prior to the statutory period].)

#### ANALYSIS OF PROCEDURAL VIOLATIONS

25. There are two parts to the legal analysis of whether a school district offered a student a FAPE: whether the educational agency has complied with the procedures set forth in the IDEA, and whether the IEP developed through those procedures was substantively appropriate, meaning it was "reasonably calculated to enable the child to receive educational benefits." (*Rowley, supra*, 458 U.S. at pp. 206-207.) Procedural flaws do not automatically result in a denial of a FAPE. (*W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).)

26. A procedural violation of the IDEA results in a denial of a FAPE only if the violation: (1) impeded the student's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2) & (j); *Target Range, supra*, 960 F.2d 1479, 1484.)

27. The second inquiry upon the establishment of a procedural violation is whether the violations resulted in a denial of a FAPE by either significantly impeding Guardian's right to meaningfully participate in the IEP process, denying Student's right to a FAPE, or resulting in a deprivation of educational benefit. Vacaville's procedural failure to appropriately assess Student's speech and language needs, which given her nonverbal status necessarily included an augmentative alternative communication assessment, deprived the IEP team, including Guardian, of full assessment data. This failure to timely assess Student deprived Guardian of her right to meaningfully participate in the decision-making process regarding program planning including necessary devices and services.

28. Without a comprehensive communication assessment, neither Vacaville nor Guardian could knowledgeably address Student's needs for a different augmentative alternative communication system. As such, Vacaville's failure to timely and appropriately assess Student's communicative needs also impeded Student's right to a FAPE. Without a complete assessment, Vacaville failed to identify all of Student's language needs, and could not develop an educational program sufficiently tailored to address her communication

status. The lack of a comprehensive assistive technology assessment, designed to address Student's unique communication needs, including her ability to make use of a speech-generating device, deprived Student of educational benefit.

29. Student's needs as determined by Ms. Burns-McCloskey during her May and June 2014 independent assessment reflected her needs as of February of 2013. Therefore, had Vacaville completed an assessment of Student's augmentative alternative communication needs by August 28, 2013, it would have determined that Student was a candidate for a speech-generating device and 60 hours of annual augmentative alternative communication services, one year prior than it did. Vacaville's failure to timely assess Student's functional communication needs, deprived Student of an effective means to communicate. Student lost the benefit of a speech-generating device and support services for an entire academic year. Vacaville denied Student a FAPE by failing to appropriately assess her in the area of augmentative alternative communication and assistive technology from August 28, 2013, through September 11, 2014. Compensatory education services are due as addressed below.

#### *Issue 2: Provision of an Appropriate Speech-Language Pathologist, 2014-2015*

30. Student contends that Ms. Anich, her assigned speech-language pathologist for the 2014-2015 school year, was not willing or able to implement her speech and language goals; did not have any expectation that she could improve her vocalizations; and was not able to communicate appropriately with Guardian or Student or collaborate with other providers. Vacaville maintains that Ms. Anich was a qualified provider who was willing and able to provide Student with speech services in accord with her operative IEP and implement her goals. Vacaville contends Guardian does not have the right to select a preferred provider.

#### SELECTION OF PROVIDERS

31. An IEP need not conform to a parent's wishes 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."].) A school district has the discretion to choose which qualified provider it will use to provide related services to a student so long as the provider is able to meet the student's needs. The IDEA does not empower parents to make unilateral decisions about programs funded by the public. (*Slama v. Independent School Dist. No. 2580* (D. Minn. 2003) 259 F. Supp.2d 880, 885 [refusal to assign service providers of parent's choice does not result in a denial of a FAPE]; *N.R. v. San Ramon Valley Unified School Dist.* (N.D.Cal. January 25, 2007, No. C 06-1987 MHP) 2007 WL 216323 at p.7 [parents are not entitled to their preferred provider.])

#### QUALIFIED PERSONNEL

32. The IDEA requires that special education and related services be provided by qualified personnel. (20 U.S.C. § 1412(a)(14).) The IDEA defines the term "qualified personnel" as personnel who are appropriately and adequately prepared and trained, hold any

required certificates or licenses, and who possess the content knowledge and skills to serve children with disabilities. (*Ibid.*; 34 C.F.R. § 300.156(a); Cal. Code Regs., tit. 5, § 3051, subd. (a)(3) [providers of related services must be qualified].) Under California law, “qualified” means that a person has met federal and state certification, licensing, registration, or other comparable requirements which apply to the area in which he or she is providing special education or related services. (Cal. Code Regs., tit. 5, § 3001(r).)

33. Personnel who provide students with language and speech development and remediation must hold a state license in speech-language pathology or be credentialed to provide language or speech services. (Cal. Code Regs., tit. 5, § 3051.1(c); See Bus. & Prof. Code, § 2530.2, subd. (i)(2) [speech-language pathologist serving public school students must hold a state license, a clear clinical or rehabilitative services credential in language, speech, and hearing issued by the Commission on Teacher Credentialing, or other comparable credential].)

34. Ms. Anich is licensed by California as a speech-language pathologist, and has a lifetime teaching credential in rehabilitative services. She holds a Certificate of Clinical Competence in speech pathology through the American Speech-Language-Hearing Association. Ms. Anich had 36 years of experience serving students with severe disabilities by providing them with speech and language services pursuant to their IEP’s. She was qualified to provide speech and language services to Student. Student did not contest Ms. Anich’s qualifications but rather her willingness and ability to serve Student given alleged comments she made about Student and Guardian, and her professional opinions which differed from that of Ms. Villacis and Ms. Burns-McCloskey.

35. Student did not prove that Ms. Anich referred to Student or Guardian in derogatory terms. Even if she had, this is not necessarily sufficient to establish that Ms. Anich was not willing and able to implement Student’s IEP services and goals. That Ms. Anich was frustrated with what she saw as a time-consuming and unproductive IEP team meeting process did not render her unqualified to serve Student. Ms. Anich disagreed with Ms. Villacis as it was Ms. Anich’s opinion that Student would not make much progress in vocalization and that her goals should focus on functional communication and learning, and using a speech device. Student’s expert Dr. Ames-Klein held these same opinions.

36. There is no legal requirement that an otherwise qualified related services provider refrain from derogatory comments, or agree with a student’s IEP team goals or with the IEP itself. Nor is there a requirement that a related services provider must agree with independent evaluators or adopt the same professional approach as a private provider. IEP team members should not be carbon copies of each other and professional disagreements should be welcome in making final determinations as to Student’s unique needs. The law requires that a team determine a student’s program to allow for a sharing of viewpoints and recommendations.

37. Ms. Anich provided Student her speech and language services during the 2014-2015 school year until October 2014 when Guardian refused to allow her to continue to

work with Student. That Ms. Anich delayed the start of Student's individual speech and language sessions for the first month of the 2014-2015 school year to support Student's transition and to develop rapport, and that she delivered these sessions twice a week for 15 minutes rather than once weekly for 30 minutes, did not establish that Ms. Anich was unable to implement Student's IEP. Ms. Anich remained available to serve Student through the 2014-2015 school year, including extended school year. Student did not prove that Vacaville failed to provide a speech-language pathologist who was able to appropriately implement Student's speech and language services in conformity with her operative IEP from October 2014 through the start of the 2015-2016 school year. Therefore, Vacaville's refusal to assign another speech and language specialist did not deny Student a FAPE.

*Issue 3: Implementation of Student's IEP Regarding Assistive Technology Devices and Training*

38. Student contends that at the September 11, 2014 IEP team meeting, Vacaville agreed to provide her the Novachat and the PODD; Guardian consented on September 29, 2014; so Vacaville was required to provide and implement each device without delay along with staff training on these devices as communication systems. Student maintains that Guardian's efforts to privately obtain the Novachat through Medi-Cal insurance did not relieve Vacaville of its obligation to separately provide the device.

39. Vacaville contends that Guardian agreed to purchase the Novachat through Medi-Cal insurance and opted to wait for the newly released Novachat 8 which delayed receipt of the device. Vacaville alleges it made reasonable efforts to obtain the Novachat, but once Student received her Medi-Cal funded device, it had no duty to provide Student a second device nor would it be wise to use two separate devices. Once Guardian provided the Novachat in February 2015, Vacaville argues it ensured that all staff were timely trained on the device. Vacaville contends it did not agree to provide the PODD; rather, it agreed to create capacity for possible future implementation. Vacaville alleges it did not deny Student a FAPE as she was benefitting from her PECS system.

NECESSARY COMPONENTS OF AN IEP

40. An IEP is a written document detailing, in relevant part, the student's current levels of academic and functional performance; a statement of measurable academic and functional goals; a statement of the special education and related services that are to be provided to the student; a statement of supplemental aids and supports; and an explanation of the extent to which the child will not participate with nondisabled children in a regular class or other activities. (20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320(a); Ed. Code, § 56345, subd. (a).) The IEP is to be read as a whole. There is no requirement that necessary information be included in a particular section of the IEP if that information is contained elsewhere. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d)(2); Ed. Code, § 56345, subd. (h).)

41. The methodology used to implement an IEP is left up to the district's discretion so long as it meets a student's needs and is reasonably calculated to provide meaningful educational benefit to the child. (*Rowley, supra*, 458 U.S. at p. 208; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149-1150; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick School Committee* (1st Cir. 2004) 361 F.3d 80, 84 (*citing Roland M. v. Concord School Committee* (1st Cir. 1990) 910 F.2d 983, 992.) Parents, no matter how well-motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled student. (*Rowley, supra*, 458 U.S. at pp. 207-208.) However, once a service, system, or device is included in a student's IEP, then the district is obligated to provide that component. (Ed. Code, § 56345, subd. (c).) Following the development of the IEP, the district must provide required services as soon as possible. (34 C.F.R. § 300.323(c)(2).)

#### ASSISTIVE TECHNOLOGY

42. The IEP team must consider whether a student needs assistive technology devices and services. (20 U.S.C. § 1414(d)(3)(B)(v); 34 C.F.R. § 300.324(a)(2)(v); Ed. Code, § 56341.1, subd. (b)(5).) "Assistive technology devices" are defined in the IDEA as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities" of a child with a disability. (20 U.S.C. § 1401(1); 34 C.F.R. § 300.5; Ed. Code, § 56020.5.) Although the local educational agency is not required to purchase or provide medical equipment for a student, it is responsible for providing other specialized equipment for use at school that is needed to implement the student's IEP. (Ed. Code, §§ 56020.5, 56363.1; See 20 U.S.C. § 1401(1)(B) [assistive technology device does not include a surgically implanted medical device].) Medical equipment does not include assistive technology devices. (Ed. Code, § 56363.1.)

43. "Assistive technology services" are defined as "any service that directly assists a child with a disability in the selection, acquisition or use of an assistive technology device," and includes the evaluation of the assistive technology needs of the child, the customization, maintenance, repair and replacement of devices, and training and technical assistance for the child, the child's family and professionals serving the child. (20 U.S.C. § 1401(2)(A)-(F); 34 C.F.R. § 300.6 (a)-(f); 71 Fed. Reg. 46548 (Aug. 14, 2006); Cal. Code Regs. tit. 5, § 3051.19(a) [any service that directly assists an individual with exceptional needs in the selection or use of an assistive technology device that is educationally necessary].)

44. An augmentative alternative communication device is an assistive technology device if it is used to increase, maintain, or improve the functional capabilities of a child with a disability, and if the child's IEP team determines that the child needs the device in order to receive a FAPE. (71 Fed. Reg. 46547 (Aug. 14, 2006).) In this case, Student's designated augmentative alternative communication devices, the Novachat and the PODD, complete with their vocabulary software programs, are assistive technology devices according to this standard.

45. A district is required to provide any assistive technology devices and services necessary to provide FAPE to a child with a disability. (20 U.S.C. §1412(a)(1)(A) & (12)(B)(i); 34 C.F.R. § 300.105 [district must ensure these are made available if required as a part of the child's special education, related services, or supplementary aids and services].) If the student requires assistive technology to receive educational benefit, the specific devices and or services must be identified in the child's IEP. (*Letter to Anonymous*, (OSEP April 4, 1996) 24 IDELR 854.) A district is ultimately responsible for providing, at no cost, assistive technology devices that a student requires in order to receive FAPE. (*Letter to Anonymous* (OSEP Aug. 9, 1994) 21 IDELR 1057.) Although federal law does not specify whether a district must assume responsibility for a device owned by a family but used to implement a student's IEP, it is reasonable for states to require a district to assume liability since without the family-owned device, the district would be required to provide and maintain necessary devices. (*Ibid.*)

46. The financial responsibility for serving students lies with districts, not outside funding sources. In *Cedar Rapids Community School Dist. v. Garret F.* (1999) 526 U.S. 66 [119 S.Ct. 992, 143 L. Ed. 2d 154], the United States Supreme Court recognized a district's mandatory duties to provide, as a related service, continuous non-medical nursing services required by a medically fragile student during school hours, and rejected the district's proposed multifactor test to establish an undue-burden exemption primarily based on the cost of the requested services. (*Id.* at 77.) The state must ensure that there is no delay in implementing a child's IEP, even while the payment source for providing or paying for special education and related services to the child is being determined. (34 C.F.R. § 300.103(c).) The local educational agency must provide and pay for special education and related services not provided by another agency. (20 U.S.C. § 1412(a)(12)(B)(ii).)

#### USE OF STUDENT'S PUBLIC BENEFITS

47. If a student is covered by a public insurance program and there is no cost to the family or the child in using the benefits of that program to support a service written in a child's IEP, the public agency is encouraged to use the public insurance benefits to the extent possible. (*Letter to DuRant* (OSEP Nov. 6, 2002) 39 IDELR 130.) However, a school district cannot require a parent to sign up for an insurance program in order for her child to receive FAPE; cannot require a parent to incur any out-of-pocket expense with regard to the provision of FAPE; and cannot use benefits under public insurance if such use would: 1) decrease available lifetime coverage or any other insured benefit; 2) result in the family paying for otherwise covered services that are required outside of school hours; 3) increase premiums or lead to the discontinuation of benefits; or 4) risk loss of eligibility for waivers based on aggregated health-related expenses. (34 C.F.R. § 300.154(d)(1) & (2)(i)-(iv); *Letter to DuRant* (OSEP Nov. 6, 2002) 39 IDELR 130 [a state may not condition the provision of IDEA services on a parent's agreement to access Medicaid].)

48. Prior to accessing public benefits or insurance, the district must provide written notification to the parent that includes the "no cost" provisions in 34 C.F.R. § 300.154(d)(2), parental consent requirements including the right to withdraw consent, and

a statement that the absence of consent does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents. (34 C.F.R. § 300.154(d)(v); *Letter to McKinney* (OSEP Sept. 5, 2013) 62 IDELR 152.) Further, the district must obtain consent which specifies the personally identifiable information that may be disclosed, to what agency, and for what purpose, and that states the parent understands and agrees that the public agency may access public benefits or insurance to pay for services. (34 C.F.R. § 300.154(d)(2)(iv); 78 Fed. Reg. 10,525 (Feb. 14, 2013).)

#### MATERIAL FAILURE TO IMPLEMENT

49. There is no statutory requirement that a district must perfectly adhere to an IEP and, therefore, minor implementation failures will not be deemed a denial of FAPE. (*Van Duyn v. Baker School Dist.* 5J (9th Cir. 2007) 502 F.3d 811, 820-822 (*Van Duyn*). Only a *material* failure to implement an IEP violates the IDEA. (*Id.* at p. 822.) “A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.” (*Ibid.*) A brief gap in the delivery of services, for example, may not be a material failure. (*Sarah Z. v. Menlo Park City School Dist.* (N.D.Cal., May 30, 2007, No. C 06-4098 PJH) 2007 WL 1574569 at p. 7.) “[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. However, the child’s educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided.” (*Van Duyn, supra*, 502 F.3d at p. 822.)

50. This case largely concerns Vacaville’s failure to provide Student with assistive technology devices and implement these devices as required by her IEP. Vacaville admits that at the September 11, 2014 IEP team meeting, it agreed to provide Student the Novachat. With regards to the PODD, it is immaterial that the PODD was not specifically listed in a particular section of the IEP or identified by name as required assistive technology. It is sufficient that the provision of the PODD is identified in the IEP meeting notes. At the September 11, 2014 IEP team meeting, Dr. Romualdi acknowledged his intent to provide the PODD. Guardian and Ms. Burns-McCloskey heard this offer. Further, Dr. Romualdi’s subsequent efforts to train staff on the PODD and his recommendation to delay implementation of the PODD to ensure that all was “by the book” further support that Vacaville agreed to provide Student with the PODD. Therefore, on September 11, 2014, Vacaville agreed to provide Student with both the Novachat and the PODD.

51. The PODD is a communication system. Even if it were considered a methodology, once it was written into Student’s IEP, Vacaville committed to implementing it. Guardian consented to the provision of these devices on September 29, 2014. It is not enough that a district include a provision for assistive technology in a student’s IEP when the team determines a student requires such services. Rather, the district must ensure that the assistive technology is provided as soon as possible and put to use despite any obstacles outside the district’s control. Despite its reliance on Medi-Cal to authorize and provide a Novachat for Student, ultimately Vacaville had the responsibility for providing and implementing the devices designated in Student’s IEP.

52. A determination of who is required to maintain and purchase a communication assistive technology device is governed by the terms of the IEP. Student's September 2014 IEP's did not specify that Student would only receive her device if Medi-Cal authorized and funded it. Further, there was no evidence that Vacaville provided the requisite notice, nor obtained required consent, to access Student's Medi-Cal benefits to fund the device. Since Guardian was responsible for a family-owned device, it was up to Guardian whether and when to send Student's Medi-Cal funded Novachat to school. Similarly, Guardian's decision to provide a modified version of the PODD for Student's use in class, did not discharge Vacaville's duty to provide Student the PODD as required by her September 2014 IEP. Vacaville's belief that the Novachat was the first priority did not relieve it of its responsibility to provide the PODD, a separate and supplemental communication strategy, once it agreed to do so.

53. By June 2014, Student's communication modes including PECS, modified signs, gestures, and word approximations were not meeting her communication needs. In September 2014, Student's IEP team determined, based upon a definitive independent educational evaluation in the area of speech and language, that Student required the Novachat and the PODD to receive educational benefit. Failing to provide these communication devices was a material failure to implement Student's IEP. Guardian's provision of Student's privately obtained Novachat and modified PODD did not rectify these implementation failures. If Vacaville wanted to change Student's IEP, it was required to reconvene the IEP team rather than unilaterally decide that it was not required to implement her IEP. (*Van Duyn, supra*, 502 F.3d at p. 822.) As of the time of hearing, Vacaville still had not provided Student with the Novachat or the PODD.

54. Once Vacaville agreed to provide Student the Novachat and the PODD, it assumed a duty to ensure that Student and her communication partners, including family and staff, could properly use these items to communicate. Training is an integral component of implementing any assistive technology device. As an emerging communicator, Student needed to learn to use the Novachat as her new voice and required training, prompting, and opportunities to communicate. On February 3, 2015, more than four months after agreeing to implement the Novachat, Vacaville arranged for Saltillo to train Ms. Jewett on the layout, use, and programming of the device. Between February and June 2015, Ms. Jewett provided Student with 40.5 hours of the 60 annual hours required by her IEP of direct and indirect augmentative alternative communication services related to the implementation of the Novachat. Given Ms. Jewett's qualifications, Vacaville's failure to ensure that these hours were provided by a qualified non-public agency does not constitute a material failure to implement Student's augmentative communication service hours.

55. Ms. Jewett did not provide a formal staff training on the Novachat until April 2, 2015. Staff received no training on the PODD prior to a two-day training beginning April 30, 2015. Vacaville had a concomitant duty to provide the Novachat and the PODD and to train staff on the use and implementation of these items as communication devices for Student beginning September 29, 2014, regardless of any difficulties encountered. Vacaville failed to implement the provision of either device, by its failure to provide these devices and

ensure staff training, leaving Student without an effective communication system from September 29, 2014, through August 28, 2015. A remedy designed to bring Student to the point where she would have been but for the failure to implement her communication devices is appropriate.

## REMEDIES

1. ALJs have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Committee of Burlington v. Department of Educ.* (1985) 471 U.S. 359 at pp. 370, 374 [105 S.Ct. 1996, 85 L.Ed.2d 385]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) In remedying a FAPE denial, the student is entitled to relief that is “appropriate” in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Puyallup, supra*, 31 F.3d 1489, 1497.)

2. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Puyallup, supra*, 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. (*Id.* at 1497.) 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 v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524 (*Reid*).) Failure to timely assess a student’s need for assistive technology resulting in a delay in providing a device and services justifies an award of compensatory education. (*E.F. v. Newport Mesa Unified School Dist.* (C.C. Cal. June 22, 2015, SACV 14-00415 CJC (RNBx)) 2015 WL 3867982 p.11.)

3. Student requests reimbursement for private speech and language services including transportation;<sup>30</sup> provision of the Novachat and the PODD; provision of 60 hours of augmentative alternative communication services with Ms. Burns-McCloskey along with missing communication service hours; and compensatory speech services given the delay in implementing the recommendations of the independent evaluation. Vacaville maintains that no remedy is due as no violation was proven. Vacaville argues that any award of compensatory services should be discounted due to Guardian’s behaviors which included preventing Student from participating in offered speech services for the 2014-2015 school year and from attending the 2014 and 2015 extended school year programs.

4. The ability to communicate is one of the most basic of human needs; allowing Student an effective means to express herself supports her human dignity. Every minute of every school day, communication is the key to social, emotional, functional, and academic progress. Vacaville’s failure to timely and completely assess Student’s communication needs and implement her agreed-upon communication devices prevented Student from being provided with an effective means to communicate from August 28, 2013, through at least

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<sup>30</sup> Student did not introduce any evidence of costs incurred for private speech sessions which Guardian testified were funded by insurance.

February 17, 2015, when Guardian shared Student's Medi-Cal funded Novachat with Vacaville. During this time, Student lost the benefit of a speech-generating device and augmentative alternative communication services.

5. To compensate Student for its failure to implement the Novachat and the PODD, Vacaville is required to immediately provide Student with each device. Within ten business days of this Decision, Vacaville shall provide Student proof of ordering a Novachat and a PODD for her use, if not otherwise available. Vacaville shall ensure that Student receives each device, either by loan or purchase, within 30 days of this Decision. Part and parcel of Vacaville's obligation to provide these devices is its responsibility to ensure that Student and her communication partners including family, classroom staff, and service providers, are trained in implementing these communication systems. An integrated implementation plan requires operational training; assisting Student to use the Novachat as her voice; ongoing monitoring of Student and her adult communication partners to ensure correct usage and effective prompting; teaching partners to create communication opportunities; updating the devices to include necessary vocabulary; troubleshooting; and, if Student opts to use two Novachats, one for home and one for school, ensuring that the devices are regularly synchronized to ensure consistency. Training and implementation of communication systems is not a one-time event.

6. To compensate Student for the 2013-2014 school year when Vacaville failed to identify her communication needs, it is determined equitable, based on the independent speech and language evaluation, to award Student 60 hours of augmentative alternative communication services with Ms. Burns-McCloskey to provide direct and indirect services to Student, Guardian, service providers, and classroom staff (if provided during school sessions) in implementing the Novachat and the PODD. Vacaville has been unable to identify a qualified provider. Its rationale for rejecting Guardian's request that Ms. Burns-McCloskey be the provider, namely that it was contrary to the Special Education Local Plan Area policy and would be a conflict of interest, is neither supported by the law nor compelling. It is unconscionable that Student has been without a contracted, qualified, augmentative communication specialist since June 2015. If Ms. Burns-McCloskey is not available, Vacaville shall contract with another nonpublic agency speech-language pathologist with augmentative alternative communication expertise, agreed to by Guardian. These 60 hours of compensatory augmentative alternative communication services shall be made available to Student within 30 days of this Decision during her summer break and continue through the 2016-2017 school year and extended school year, as needed, separate from any IEP services.

7. During the 2014-2015 school year, Vacaville provided Student 40.5 hours of the agreed-upon 60 hours of communication services. It is determined equitable to award Student an additional 19.5 hours of augmentative communication services to compensate for these missing hours and the service delay. No remedy is awarded for the start of the 2015-2016 school year through August 28, 2015, given Ms. Johns' seven hours of device

implementation services with Student in August 2015.<sup>31</sup> These 19.5 hours shall be provided by Ms. Burns-McCloskey to include direct and indirect services to Student, Guardian, service providers, and classroom staff to ensure the continued implementation of her communication systems. If Ms. Burns-McCloskey is not available, Vacaville shall directly contract with another nonpublic agency speech-language pathologist with augmentative alternative communication expertise, agreed to by Guardian. These services shall be made available within 30 days of this Decision, to be provided during summer break at Guardian's discretion, and continue during the 2016-2017 school year and extended school year, separate from any IEP services.

8. The only professional to implement the PODD with Student was Ms. Villacis. Therefore, Vacaville shall reimburse Guardian for transportation costs related to Student's participation in private speech sessions with Ms. Villacis from March 5, 2014, through August 28, 2015, including \$1,442.13 for mileage costs and \$155 for tolls, a total of \$1,597.13.

#### ORDER

1. Within 10 business days of this Decision, Vacaville shall provide Student proof of ordering a Novachat and a PODD for her use, if such are not immediately available. Vacaville shall ensure the provision of these communication systems, by loan or purchase, separate from those obtained by Guardian, within 30 business days of this Decision.

2. Vacaville shall provide Student with a total of 79.5 hours of augmentative alternative communication services with Ms. Burns-McCloskey to provide direct and indirect services to Student, Guardian, service providers, and school staff in implementing the Novachat and the PODD. These communication service hours shall be implemented as follows:

- a. the hours shall be made available to Student within 30 days of this Decision and may be accessed during her summer break and shall continue during the 2016-2017 school year to be completed not later than the start of the 2017-2018 school year, separate from any IEP services;
- b. if Ms. Burns-McCloskey is unavailable, Vacaville shall contract with another nonpublic agency speech-language pathologist with

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<sup>31</sup> Student's implementation claim extended to August 28, 2015. Upon Student's objection, Vacaville was precluded from litigating the provision of services after August 28, 2015. This Decision does not award any remedy for any violations extending past that date. Nothing in this Decision precludes Student from bringing a new claim regarding any violations following August 28, 2015.

augmentative alternative communication expertise, agreed to by Guardian; and

- c. it shall be up to the provider to determine, where, when, and how these hours shall be apportioned between Student and her communication partners.

3. Within 45 days of this Decision, Vacaville shall reimburse Guardian for transportation costs related to Student's participation in private speech sessions with Ms. Villacis from March 5, 2014, through August 28, 2015, including \$1,442.13 for mileage costs, and \$155 for tolls, a total of \$1,597.13.

4. All other requests for relief are denied.

#### PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed as to Issues 1 and 3. Vacaville prevailed as to Issue 2.

#### RIGHT TO APPEAL

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).)

DATE: May 2, 2016

/s/

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THERESA RAVANDI  
Administrative Law Judge  
Office of Administrative Hearings