BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: TAHOE TRUCKEE UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2018020394 ORDER FOLLOWING PREHEARING CONFERENCE

On May 4, 2018, a telephonic prehearing conference was held before Administrative Law Judge Cynthia Fritz, Office of Administrative Hearings. Alyssa Bivens, Attorney at Law, appeared on behalf of Tahoe Truckee Unified School District. Mother and Father appeared on behalf of Student. Spanish interpreter, Maria Fletes, participated for interpreter services only. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing shall take place on **May 15, 16, and 17, 2018** continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall begin at 9:30 a.m. the first day of the hearing and at 9:00 a.m. all other days, unless otherwise ordered. The hearing shall take place at the District's offices located at 11603 Donner Pass Road, Truckee, California, 96161.

As ordered in the scheduling order, District shall provide a facility for the hearing that fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C.A. § 12101 et seq.), the Rehabilitation Act of 1973 (29 U.S.C. § 794 et seq.), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities. District filed the required certification.

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

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

2. Issues and Proposed Resolutions. The issues and proposed resolutions as stated by District are listed below.

Issues

1. Does the District's offer to transport Student to and from Hidden Valley Elementary School in the Washoe County School District with the accommodations listed in the individualized educational program dated October 12, 2017[1], provide Student a free appropriate public education?

2. May District conduct social/emotional and AAC assessments of Student without parental consent?

Note that the above issues presented by District are subject to the Order Denying Narrowing Issue dated April 24, 2018 in this matter. Thus, the entire IEP offer, which it appears is drafted by both Tahoe Truckee and Washoe, must be analyzed to determine if Tahoe Truckee offered Student a FAPE. The law authorizes only implementation of an IEP without parental consent by determining if the entire IEP comported with legal requirements and offered Student a FAPE. Nothing in this order precludes Tahoe Truckee from seeking to establish that the Tahoe Truckee and Washoe IEP's collectively, both procedurally and substantively offered Student a FAPE. As a proposed remedy, Tahoe Truckee can seek to implement the transportation offer without parental consent

Resolutions

1. Yes, the District's offer to provide transportation services with accommodations and modifications to meet Student's needs provide Student a FAPE.

2. Yes, the District may conduct social/emotional and ACC assessments of Student. Further, the District need not accommodate Parents' preference for mileage reimbursement, particularly when the District feels that such method of transportation does not offer Student a FAPE.

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall use numbers to identify exhibits, but shall

[1] The IEP dated October 12, 2017 also contains pages with an October 17, 2017 as the listed IEP date. For ease of reference, the IEP is referred to as October 12, 2017 in this document.

place the letter "S" or "D" in front of the exhibit to designate if it is a Student or District exhibit (for example, "S-5, S-6, or D-1, D-2"). All of a party's exhibits shall be Bates-stamped with numbers running consecutively through the binder. Each exhibit binder shall contain a detailed table of contents. The parties shall serve their evidence binders on each other in compliance with Education Code section 56505, subdivision (e)(7). At the hearing, each party shall supply an exhibit binder containing its exhibits for use by the ALJ, and a second exhibit binder for use by witnesses. The parties may not serve exhibits on OAH prior to the hearing. In the event of duplicate exhibits, the most legible version will be used.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not included in the exhibit lists and not previously exchanged shall not be admitted into evidence at the hearing unless it is supported by written declaration under penalty of perjury, and the ALJ rules that it is admissible.

Parties are encouraged to present resumes or curriculum vitae for each professional witness.

The District shall include a color copy of the school calendar for each school year in question and shall have witnesses available to testify as to any legend notations that might be unique to District, if school dates will be used in the hearing.

3. Witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available. The parties shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses out of order. Neither party shall be permitted to call any witnesses not disclosed in the party's prehearing conference statement except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

Student did not have witnesses listed in his prehearing conference statement, however witnesses were discussed at the prehearing conference. Student named the following witnesses: (1) Santiago Moreno-Alvarado, (2) Jorge Moreno, (3) Gesali Alvarado, (4) Jeannete Ofuma (sister-in-law), (5) Rosa Rodriguez (friend), (6) Lupita (babysitter); and (7) Ms. Molley (special education teacher).

The parties were reminded that any changes to their witness lists need to be disclosed to the other party by May 7, 2018. Any witnesses that are not relevant or cumulative will not be allowed to testify at the hearing at the discretion of the ALJ.

The parties shall attempt to reach agreement on a witness list for the first day of hearing. The District shall have witnesses available in case agreement on a witness list is not reached. Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for direct and cross-examination of each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule. Additionally, the parties shall be prepared at the end of each day of hearing to discuss the

witnesses to be presented the next day and the time the testimony of each such witness is expected to take.

5. Meet and Confer

The parties are encouraged to review and shorten their witness lists and lists of exhibits prior to the hearing, bearing in mind that evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear. To that end, the parties agreed at the prehearing conference to meet and confer immediately after the prehearing conference to discuss whether routine information can be the subject of stipulations to shorten the hearing by avoiding the necessity of testimony, particularly as to routine matters, and/or exhibits. The parties are also encouraged to discuss the order of witnesses and the length of witness testimony and be prepared to present the ALJ with any stipulations and a written joint witness list with time estimates and dates of expected testimony on the first day of hearing.

Should agreement on a list not be reached, each party shall prepare separate lists and Student shall have witnesses available so the hearing can proceed promptly. Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for direct and cross-examination of each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule. Additionally, the parties shall be prepared at the end of each day of hearing to discuss the witnesses to be presented the next day and the time the testimony of each such witness is expected to take.

6. Scope of Witness Examination. Each witness shall be called to testify only once, except for rebuttal purposes, and all parties shall examine the witness on all issues when the witness is first called. After the first direct and cross-examinations, each party shall be limited in examining the witness to only those matters raised in the immediately preceding examination.

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

8. Telephonic Testimony. Whether a witness may appear by telephone is a matter within the discretion of the ALJ. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) Any party seeking to present a witness by telephone shall move in advance for leave to do so, unless the opposing party has stipulated that the witness may appear by telephone. The proponent of the witness shall provide the proposed witness with a complete set of exhibit binders from all parties, containing all of each party's exhibits, prior to the hearing; and shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. No witness will be heard by telephone unless all these requirements have been fulfilled. Student requested that Ms.

Molley, special education teacher, testify by phone. The request was granted. Parents were reminded that the above three conditions need to be complied with in order to allow the telephonic testimony.

9. Electronic Recording of Hearing.

a. Audio Recording. District's motions to make an audio recording of the hearing is granted subject to the following conditions: 1) OAH's recording is the only official recording; 2) that the recording will be turned on and off at the same time as the ALJ's recording, in order to avoid recording conversations while off the record; 3) the recording device will be removed by the party recording during any recess where the party leaves the room; 4) that operation of the party's recording mechanism will not be allowed to delay the hearing; and 5) a private recording is not allowed to be used to prepare the testimony of an upcoming witness in the hearing.

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

10. IEP Recordings. Neither party requested to introduce an IEP recording or portions of an IEP recording at the preconference hearing.

11. Motions. District requested a school bus as an exhibit at the hearing. The ALJ requested a briefing be submitted at the start of hearing as to why a school bus would be needed as an exhibit. The District is reminded that photographs may be sufficient.

Mother inquired as to why District's exhibits were not given to her in Spanish. District offered to send them to OAH to be interpreted. OAH does not receive exhibits until the time of hearing. OAH will provide a Spanish interpreter at the time of the hearing and the interpreter can orally translate any exhibits for Mother at that time.

The ALJ noted the District's objection to the Order Denying Narrowing Issue in this matter.

Any motions that are not filed three business days prior to the prehearing conference, shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not timely filed.

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

13. Conduct of Counsel and Hearing Room Decorum. Counsel, all parties, and all witnesses shall conduct themselves in a professional and courteous manner at all times. Cellular phones, pagers, recorders, and other noisemaking electronic devices shall be shut off

or set to vibrate during the hearing unless permission to the contrary is obtained from the ALJ.

14. Special Needs and Accommodations. A Spanish interpreter and American Sign Language interpreter were requested by Mother. A Spanish interpreter is needed throughout the hearing. The American Sign Language Interpreter is needed on May 17, 2018 for Student.

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

15. Hearing Closed To the Public. At the request of Student, the hearing will be closed to the public.

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

IF A FULL AND FINAL WRITTEN SETTLEMENT AGREEMENT IS REACHED AFTER 5:00 P.M. THE DAY PRIOR TO HEARING, THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE REGARDING THE SETTLEMENT AT (916) 274-6035. THE PARTIES SHOULD ALSO LEAVE CONTACT INFORMATION SUCH AS CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY. THE PARTIES SHOULD SIMULTANEOUSLY **EMAIL THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT** https://www.dgsapps.dgs.ca.gov/oah/oahsftweb **.**

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

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

IT IS SO ORDERED.

DATE: May 7, 2018



CYNTHIA FRITZ
Administrative Law Judge
Office of Administrative Hearings