

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

TAHOE TRUCKEE UNIFIED SCHOOL
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2018020394

DECISION

The Tahoe Truckee Unified School District filed a due process hearing request (complaint) with the Office of Administrative Hearings State of California, on February 8, 2018, naming Student. The matter continued for good cause on February 27, 2018.

Administrative Law Judge Cynthia Fritz heard this matter in Truckee, California, on May 15, 16, 17, 23, and 24, 2018.

Marcella Gutierrez and Alissa Bivens, Attorneys at Law, represented Tahoe Truckee. Corine Harvey, Executive Director of Student Services, attended the hearing on behalf of Tahoe Truckee.

Student's mother represented Student. Student's father attended portions of the hearing. Student attended the hearing on April 24, 2018. A Spanish language interpreter was provided throughout the hearing and conducted English to Spanish and Spanish to English translation for Parents whose primary language is Spanish. Additionally, an American Sign Language interpreter was present and provided translation for Student when he testified.

At the end of the hearing on May 24, 2018, the record was closed and the matter was submitted for decision.

PRELIMINARY MATTERS

The prehearing conference order identified Tahoe Truckee's issues for hearing as:

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, 2017¹, provide Student a free appropriate public education?
2. May District conduct social/emotional and AAC assessments of Student without parental consent?

The Order clarified that the issues were subject to the Order Denying Narrowing Issue dated April 24, 2018 in this matter. It further specified that the entire IEP offer, drafted by both Tahoe Truckee and Washoe, must be analyzed to determine if Tahoe Truckee offered Student a FAPE. Tahoe Truckee was permitted to establish the IEP's collectively, both procedurally and substantively, offered Student a FAPE.

At the outset of the hearing, Tahoe Truckee requested a separate ruling that the placement and services IEP at Hidden Valley in Washoe constituted a FAPE. As detailed in the April 24, 2018, order, when only one portion of an IEP is analyzed, FAPE cannot be established. One cannot analyze a single element because it is the combination of all of the procedural and substantive elements present that results in a FAPE. (See *Dublin*

¹ The IEP dated October 12, 2017 is two separate IEP documents that contain pages with July 19, October 12, 17, 27, and November 14, 2017 dates. For ease of reference, the IEP in its entirety, including both IEP documents, is referenced as the October 12, 2017 IEP unless otherwise noted.

Unified School Dist. v. Student (February 15, 2017) OAH Case No. 2016080413.) As discussed in more detail below, no separate finding will be made regarding the transportation offer from Tahoe Truckee and the placement and services offer at Hidden Valley in Washoe is a FAPE. The issues addressed in this decision are consistent with the pre-hearing rulings in this matter.

ISSUES²

1. Does the October 12, 2017, IEP offer Student a free appropriate public education such that it can be implemented over parental objection?
2. May Tahoe Truckee assess Student in the areas of social emotional behavior and augmentative and alternate communication without parental consent as proposed in Tahoe Truckee's assessment plan?

SUMMARY OF DECISION

This Decision holds that Tahoe Truckee failed to meet its burden of proof that the October 12, 2017 IEP offered Student a FAPE in the least restrictive environment. This Decision further holds that Tahoe Truckee met its burden of proof as to its right and legal obligation to assess Student in social emotional functioning and augmentative and alternative communication without parental consent.

FACTUAL FINDINGS

1. Student is a 10-year-old, fourth grade student, residing with Parents within Tahoe Truckee's geographical boundaries and is eligible for special education and

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

related services in the categories of deafness and speech and language impairment. Student has bilateral deafness and orally communicates utilizing cochlear implants, a personal FM system and a sign language interpreter.

2. Student became eligible for special education in 2010 at age three. Student attended Tahoe Truckee pre-kindergarten camp and used Tahoe Truckee bus transportation. On one occasion, Student arrived home from camp with his face painted by another student on the bus. Because of this, Parents and Student believed he was bullied on the bus. Parents complained and after an investigation, Tahoe Truckee determined that the incident was not bullying. Parents refused any further transportation during pre-kindergarten camp.

3. Student attended Tahoe Truckee kindergarten and was transported by a Tahoe Truckee bus to and from school. Tahoe Truckee agreed to set up a weekly check-in system with Parents to discuss any transportation issues due to the prior bus incident.

4. While Student was in kindergarten in the 2013-2014 school year, a dispute arose between Parents and Tahoe Truckee regarding placement and services. Tahoe Truckee suggested a placement at a deaf education program located in Loomis, California. Parents wanted Student to attend the deaf education program at Hidden Valley in Nevada. Tahoe Truckee agreed to place Student in first grade in the deaf education program at Hidden Valley in Washoe County School District in Nevada, provided that Parents applied and were approved to attend the program by Washoe.

5. Tahoe Truckee submitted an agreement between the districts, drafted by Washoe in May 2017, titled "Tuition Agreement to Attend Washoe County School District," which was signed by the superintendents of Tahoe Truckee and Washoe. Pursuant to the agreement, Tahoe Truckee agreed to pay, "...the actual per pupil costs based on average daily enrollment [ADE] for each regular education student and for each special education student residing in the Adjoining District and enrolled in

[Washoe.]” The agreement does not shift Tahoe Truckee’s obligation to provide a student a FAPE to Washoe, nor did it specify Washoe accepted the obligation to provide a student a FAPE subject to the agreement. The document is silent as to FAPE.

6. Additionally, Tahoe Truckee asserted it entered into a “variance,” with Washoe allowing Tahoe Truckee residents to attend school in Washoe. At hearing, Tahoe Truckee submitted a document titled “Application to Attend School Outside of District of Residence” signed in June 2017, which was discussed as the variance between the districts. Through this application, Parents “applied” for Student to attend Hidden Valley in Washoe. The application is silent as to FAPE. Beginning in first grade, and repeated annually thereafter, Parents applied for Student to attend Hidden Valley through this process and Student was accepted. Additionally, Tahoe Truckee agreed to reimburse Parents for mileage to and from Hidden Valley, which was approximately 54 miles each way from Parents’ residence.

7. An IEP for Student’s educational placement and services at Hidden Valley was drafted in an IEP document entitled Washoe County School District, State of Nevada Individualized Education Program. This IEP document encompassed Student’s placement, related services except transportation, and accommodations at Hidden Valley in Nevada. Tahoe Truckee representatives attended the IEP team meetings that Washoe convened for Student’s educational placement at Hidden Valley in Nevada. Although Tahoe Truckee representatives attended the IEP team meetings held in Washoe, Washoe staff developed Student’s IEP offer.

8. An IEP regarding transportation only was drafted each year by Tahoe

Truckee using a California Placer County SELPA³ form. This IEP included Student's transportation offer to and from Hidden Valley. Washoe representatives did not attend the IEP team meetings in Truckee, California and the IEPs related to transportation only were developed exclusively by Tahoe Truckee staff.

9. The Tahoe Truckee IEP team meetings were neither amendments nor addendums to the substantive placement and services IEP team meeting at Washoe, rather, independent meetings discussing transportation only. Both IEPs were concurrently operative IEPs with separate offers to Student.

10. For Student's first, second and third grade school years, Tahoe Truckee reimbursed Parents' mileage for Student's transportation to and from Hidden Valley. By the 2016-2017 school year, when Student was in third grade, Tahoe Truckee set up a dedicated bus route to Hidden Valley and requested that Student take Tahoe Truckee transportation in lieu of mileage reimbursement. Parents refused Tahoe Truckee transportation.

JULY 19, 2017 IEP TEAM MEETING IN TAHOE TRUCKEE UNIFIED SCHOOL DISTRICT REGARDING TRANSPORTATION ONLY

11. Tahoe Truckee initiated an IEP team meeting on July 19, 2017, to amend its transportation offer from parent mileage reimbursement to Tahoe Truckee bus transportation. Mother, Tahoe Truckee special education coordinator Jeff Santos, Tahoe Truckee transportation coordinator Nanette Rondeau and a Spanish interpreter were present. No general education teacher or special education teacher attended the

³ A SELPA is a Special Education Local Plan Area that coordinates with school districts and the County Office of Education to provide a continuum of programs and services for disabled individuals from birth through 22 years of age.

meeting. There is no evidence that Mother waived in writing the presence of these teachers.

12. Mr. Santos offered bus transportation in lieu of mileage reimbursement. Mother expressed concern over the prior bus incident in pre-kindergarten. Mr. Santos stated that the district's obligation is to provide bus transportation door-to-door and if Mother wants to transport student, she is voluntarily transporting without reimbursement from the district. Mr. Santos offered a transportation plan to address Student's social emotional, communication and restroom breaks during Tahoe Truckee transportation. Mother refused the offer and left the meeting. Tahoe Truckee IEP team members continued the meeting to a later date.

STUDENT'S PANIC ATTACKS

13. Prior to August 2017, Parents sought medical advice over ongoing issues with Student. A doctor diagnosed Student with headaches due to issues with his cochlear implants and panic attacks related to Student's fear of headaches. A doctor's note dated August 1, 2017, instructed the school to encourage Student to lie down, rest and try to fall asleep while Parents were contacted, and to also work with a school counselor to address fears as well as try to establish some coping mechanisms. The note stated that panic attack symptoms may include "abdominal pain, shortness of breath, sweating, shaking, pallor and fatigue." Mother informed Washoe on the first day of the 2017-2018 school year of Student's panic attacks.

OCTOBER 12, 2017 IEP TEAM MEETING IN WASHOE COUNTY SCHOOL DISTRICT REGARDING STUDENT'S TRIENNIAL ASSESSMENTS AND HIS EDUCATIONAL PLACEMENT AND SERVICES

14. Student's IEP team meeting convened on October 12, 2017, to review his triennial assessments. Student was in fourth grade. Mother, Student, Washoe

administrative representative Robin Olsen, Washoe special education teacher Ms. Molloy, Washoe regular education teacher Mrs. Allen, Special Education Local Plan Area representative Patty Orr, Washoe audiology Tiffany Sherman, and Washoe deaf education representative Jodi Richards attended the meeting. Tahoe Truckee representative Jeff Santos, Tahoe Truckee SELPA representative Patsy Martin, and a Spanish interpreter also attended the meeting. Mother received procedural safeguards in her primary language of Spanish that conformed to the Individuals with Disabilities Act. The evidence failed to establish that Mother received California state procedural safeguards.

15. The proposed IEP noted "Student was recently diagnosed with panic attacks and should he present with abdominal pain, shortness of breath, sweating, shaking, pallor and/or fatigue, parents need to be contacted." This language appeared verbatim in the August 1, 2017 doctor's note, and confirms that Mother provided the doctor's note to the Washoe members of Student's IEP team.

16. The October 12, 2017 IEP, drafted by Washoe, identified Student's disability and contained the following: a statement of present levels of academic achievement and functional performance; assessment data; effect of Student's involvement and progress in general education; description of progress on previous goals; Student's strengths and areas of need; consideration of special factors; goals for math, language and communication; related services, supports and accommodations; statement of participation in assessment; and placement 70 percent of the time in general education and 30 percent of the time in the deaf education program. Academic goals specified they were aligned to "Nevada Academic Content Standards." Transportation was not offered as a related service in Washoe's IEP. It was noted in the IEP that transportation was contracted through Tahoe Truckee and not an aspect of Washoe's IEP offer. The proposed placement, goals, related services except for

transportation, and accommodations, offered Student, was a product of a single IEP team meeting on October 12, 2017, at Washoe in Nevada. Mother consented to the October 12, 2017 offer of placement and services at Hidden Valley.

17. Jeff Santos, Dana Adams, Renee Welles and Mandy Morgan testified regarding the appropriateness of the educational placement and services proposed in the October 12, 2017 IEP. Their testimony failed to establish that the October 12, 2017 IEP drafted in Washoe met Student's needs and complied with California law.

18. Jeff Santos, Tahoe Truckee special education coordinator since July 2017, is a credentialed psychologist and school administrator, and previously worked as a director of special education, instructor, SELPA coordinator, school psychologist and program specialist. Mr. Santos participated in Student's July 19, October 12, 17, 27, and November 14 IEP team meetings, and reviewed Student's records and assessments. He briefly observed Student when visiting different programs at Hidden Valley in 2018. When discussing academic assessments, Mr. Santos appeared unsure of specific aspects of the academic testing at Hidden Valley as it related to California testing. Mr. Santos did not work with Student, Washoe or Hidden Valley. He did not interview Student and did not give any specificity as to who he talked to at Hidden Valley regarding Student. Because of this, his opinion regarding the October 12, 2017 IEP was given less weight.

19. Dana Adams, a credentialed school psychologist since 1999, administers psychoeducational and social and emotional assessments, participates in IEPs, develops behavior plans, trains staff and provides counseling services to Tahoe Truckee students from preschool through age 22. Ms. Adams annually administered 50-70 assessments per year. Ms. Adams has not worked with Student but reviewed his records, assessments and attended two of his transportation IEP team meetings in 2017. She also briefly observed Student when she was visiting Hidden Valley programs in 2018. Ms. Adams did not work at Hidden Valley or work for Washoe and never attended an IEP team

meeting for Student's educational placement or services. She did not interview Student or others at Hidden Valley. She opined to the appropriateness of related services such as audiology and placement in the October 12, 2017 IEP. Because of her lack of personal knowledge of Student and lack of expertise in audiology, her opinion was given less weight.

20. Renee Welles, a credentialed speech and language pathologist, has worked for Tahoe Truckee since 1991. Ms. Welles administers speech and language and augmentative and alternative communication assessments, gives device recommendations, programming recommendations, trains students, staff and parents on the use of augmentative and alternative communication, and participates in IEPs and parent meetings. Ms. Welles has not worked with Student but reviewed his records and assessments, attended two of his IEP team meetings in 2017, where transportation only was discussed, and briefly observed Student twice while visiting Hidden Valley programs in 2018. Ms. Welles did not work at Hidden Valley or work for Washoe. She did not attend Student's IEP team meeting for his educational placement or services, and failed to interview Student. Ms. Welles opined as to the appropriateness of the speech and language pathology assessment, IEP speech and language goals, speech services, interpreting services, and total communication. She admitted she was not an expert in audiology and could not opine as to the audiology related services in the October 12, 2017 IEP offer for placement and services at Hidden Valley.

21. Mandi Morgan was a Tahoe Truckee itinerant teacher for deaf and hard-of-hearing students since January 2018 and had worked with deaf children since 2007. She has a bachelor of science in communications sciences and disorders and a master's degree in deaf education. Ms. Morgan opined on the total communication program for Student at Hidden Valley. Ms. Morgan reviewed Student's records including his IEP. She visited Hidden Valley and observed Student's program twice in 2018 and spoke with

Student for about 10 minutes. Ms. Morgan admitted that to properly assess a student, it takes 30 minutes to 1 hour for an interview. Because of this, her opinion regarding the IEP placement and services was given less weight.

22. Tahoe Truckee witness opinions were unpersuasive because their testimony was based on general information rather than careful consideration of Student's individual capacities and needs. The witnesses knew very little about Student. Not one witness ever worked with Student or properly interviewed Student. Any observations of Student were done while visiting different programs at Hidden Valley for a brief period of time in 2018 after the proposed IEP offers to Parents were made. No one spoke to service providers, instructional assistants or assessors and only briefly with Student's teachers which was unclear and nonspecific. Tahoe Truckee did not present a witness to opine as to the appropriate audiology services in the October 12, 2017 IEP and the opinion regarding the academic offer was unreliable. Thus, their opinions were given little weight regarding the appropriateness of the October 12, 2017 IEP.

OCTOBER 17, 2017 RECONVENED IEP TEAM MEETING IN TAHOE TRUCKEE UNIFIED SCHOOL DISTRICT TO DISCUSS TRANSPORTATION

23. Tahoe Truckee convened a continued IEP team meeting on October 17, 2017 regarding transportation. Parents, a Spanish interpreter, Tahoe Truckee SELPA representative Patsy Martin, Tahoe Truckee executive director Corine Harvey, and Tahoe Truckee special education coordinator Jeff Santos were present. Neither a general education teacher nor a special education teacher attended the meetings. There is no evidence that Parents waived in writing the presence of these teachers.

24. Parents informed Student's IEP team that he had anxiety and communication issues. Tahoe Truckee offered bus accommodations for Student's social emotional needs including to address his communication needs and to provide restroom breaks, snacks, and counseling services. Parents refused the offer.

OCTOBER 27, 2017 CONTINUED IEP TEAM MEETING IN TAHOE TRUCKEE
REGARDING TRANSPORTATION

25. Tahoe Truckee continued the IEP team meeting to October 27, 2017. Parents, a Spanish interpreter, Tahoe Truckee executive director Corine Harvey, Tahoe Truckee special education coordinator Jeff Santos, Tahoe Truckee school nurse Ann Jacobson, Tahoe Truckee transportation coordinator Nanette Rondeau, Tahoe Truckee speech and language pathologist Renee Welles, Tahoe Truckee school psychologist Dana Adams, and SELPA representative Troy Tickle were present. Neither a general education teacher nor a special education teacher attended the meetings. There is no evidence that Parents waived in writing the presence of these teachers.

26. Mr. Tickle facilitated the meeting. Tahoe Truckee IEP team members reviewed Parents' concerns and discussed safety, bus driver training, bus inspections, tracking and cameras, social emotional development, timing, attendance, weather, traffic, Student independence and panic attacks. Parents reiterated previous concerns and that Student was stressed out over the idea of riding the bus to and from school. Mother admitted that Student took the school bus on field trips but stated also that she drove behind the bus. Tahoe Truckee IEP team members requested a release of medical information to work on a transportation plan for panic attacks. Parents refused to sign the release and also refused the transportation offer.

NOVEMBER 14, 2017 CONTINUED IEP TEAM MEETING AT TAHOE TRUCKEE
REGARDING TRANSPORTATION

27. Tahoe Truckee continued the IEP team meeting from October 27, 2017, to November 14, 2017. Parents, a Spanish interpreter, Tahoe Truckee executive director Corine Harvey, Tahoe Truckee special education coordinator Jeff Santos, Tahoe Truckee school nurse Ann Jacobson, Tahoe Truckee transportation coordinator Nanette Rondeau, Tahoe Truckee speech and language pathologist Renee Welles, Tahoe Truckee

school psychologist Dana Adams, and SELPA representative Troy Tickle attended the meeting. Neither a general education teacher nor a special education teacher attended the meetings. There is no evidence that Parents waived in writing the presence of these teachers.

28. Mr. Tickle facilitated the IEP team meeting. Parents' concerns were discussed and Tahoe Truckee IEP team members reiterated some of the same areas as previously addressed, including emergencies, restroom breaks and bus driver communication. Parents stated that they had a doctor's note exempting Student from riding the bus. Tahoe Truckee requested a social emotional assessment of Student and release of medical information.

29. At the November 14, 2017 IEP team meeting, Tahoe Truckee offered Parents a five-week transitional transportation plan that would result in Tahoe Truckee transporting Student in lieu of mileage reimbursement. The plan included: first drop off, last pick up; designated restroom stops while maintaining supervision; container for emergency purposes; a tablet to alert driver to social, emotional, medical or daily living needs; a lanyard for Student to communicate alternatively with driver; Student position in direct line of sight of driver; additional driver training; video surveillance monitor on transportation; updated road condition information; assigned seating to minimize peer conflicts; snacks and drinks; and 30 minutes monthly individual counseling with a Tahoe Truckee school psychologist . Counseling was offered to monitor and track Student's well-being while riding transportation. Parents refused the offer.

HEARING TESTIMONY OF MOTHER, FATHER AND STUDENT

30. Mother emphasized concerns about Student's panic attacks and his inability to ride bus transportation. She stated that Student continued to have symptoms of panic attacks in school and she picked him up approximately one time per week due to medical appointments, sickness and symptoms of panic attacks.

31. Student corroborated Mother's testimony related to his symptoms of panic attacks, such as stomach aches and shaking at school but could not specify the number of times that it occurred throughout the 2017-2018 school year. He stated he was scared to take Tahoe Truckee transportation.

32. Father also corroborated Mother's testimony with regard to the panic attack diagnosis, symptoms occurring during school and his concern for Student riding bus transportation due to the prior incident on the bus. Parents presented the August 1, 2017 letter from Student's doctor with the panic attack diagnosis and some documentary evidence related to sickness and difficulties with cochlear implants at school that corroborated some of their testimony.

33. Conversely, Tahoe Truckee failed to present any attendance records, nursing records, declarations or any witness testimony with personal knowledge to contradict Parents' and Student's statements. Mr. Santos testified that he contacted a Hidden Valley staff member that denied Student had any panic attacks at school. This information was unpersuasive due to the lack of any specificity, foundation and corroboration. Because of this, Parents' and Student's testimony was credible and was given more weight than that of Tahoe Truckee's witnesses.

PROPOSED ASSESSMENT PLAN

34. During the November 14, 2017 IEP team meeting, Ms. Adams presented Parents with a proposed social emotional functioning assessment plan, procedural safeguards and a release of information in Spanish to Parents. Parents did not consent to the proposed assessment plan.

35. On January 10, 2018, Mr. Santos mailed an amended proposed assessment plan to Parents for a social emotional assessment and an augmentative and alternative communication assessment. Along with the proposed assessment plan was a letter of explanation and the notice of procedural safeguards. All documents were provided to

Parents in Spanish, their primary language. The proposed assessment plan stated that assessment may include classroom observations, rating scales, interviews, record review, one-to-one testing and other types or combination of tests. It further advised that assessments and special education services would not proceed without parental consent.

36. The proposed assessment plan contained a brief, clear textual explanation of the assessments and identified the professional who would perform the assessment as follows:

“Social Emotional/Behavior - These assessments will indicate how your child feels about him/herself, gets along with others, and takes care of personal needs at home, school and in the community. Examiner Title: Psychologist (Adams).”

“Language/Speech Communication Development – These assessments measure your child’s ability to understand and use language and speak clearly and appropriately. AAC Assessment (communication system between transportation driver and student.)”

37. The letter attached to the proposed assessment plan identified that a Tahoe Truckee employee specializing in all forms of communication, including deaf and hard-of- hearing, would perform the augmentative and alternative communication assessment.

38. Ms. Adams and Ms. Welles testified at hearing. As discussed more fully below, each credibly provided several persuasive reasons why Tahoe Truckee needed to reassess Student consistent with the January 10, 2018 proposed assessment plan.

ASSESSMENT NEED AND ADEQUACY

39. Mother verbalized her concerns over Student's social emotional needs related to bullying at the July 19, 2107 transportation IEP team meeting. She further verbalized her concerns about panic attacks at the October 12, 17, 27 and November 14, 2017 IEP team meetings.

40. Tahoe Truckee proposed a social and emotional assessment. Ms. Adams believed it is appropriate because the IEP team determined it was an area of need for bus transportation and the only current information Tahoe Truckee had was input from Parents. According to Ms. Adams, goals were included for social emotional needs in the IEP transportation offer but the assessment plan would help determine what kinds of social and emotional support services to provide Student to support his unique needs on a school bus.

41. Ms. Adams plans to administer the social emotional assessment. The assessment would consist of reviewing records, interviewing teacher, Parents and Student, administering behavior rating scales, observations in school and on transportation and administering the behavioral assessments. The tests are non-discriminatory, age appropriate, administered per instructions, and valid.

42. Tahoe Truckee proposed an augmentative and alternative communication assessment that consists of reviewing records, interviewing teacher, Parents and Student, and observations of Student in school, home, and with friends. Ms. Welles would look into Student's positioning in a vehicle and bus and determine what devices would be a good fit for Student. Ms. Welles would devise a picture exchange system and a higher technology programmed IPAD with a software application called Proloquo2go for communication with the bus driver that would meet Student's needs on bus transportation. The tests are non-discriminatory, age appropriate, and valid. Ms. Welles credibly testified that the proposed assessment is needed to gather information to meet

Student's communication needs for district transportation. Ms. Morgan would assist Ms. Welles with the augmentative and alternative communication assessment.

43. Tahoe Truckee established by uncontroverted evidence that the proposed assessments involve a variety of assessment tools and strategies to gather functional, developmental, and academic information. Each assessment called for the use of technically sound instruments that are valid and reliable. The proposed assessments would be selected and administered in Student's native language, are age appropriate and non-discriminatory. Further, the assessments would be administered by trained and knowledgeable personnel who maintain the required education and licensure to correctly administer the assessments according to the instructions provided by the producer of such assessments.

44. Tahoe Truckee has insufficient information about Student to determine an appropriate transportation plan for him. The evidence at hearing showed that Student suffers panic attacks and is being treated by a doctor. Reassessments, therefore, are necessary to provide Tahoe Truckee with updated information on Student's present levels of performance and unique needs to offer an appropriate IEP for Student.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁴

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁵ et seq.; Ed. Code, § 56000, et seq.; Cal.

⁴ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁵ All subsequent references to the Code of Federal Regulations are to the 2006

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 free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

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

Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.)

4. In a recent unanimous decision, the United States Supreme Court declined to interpret the FAPE provision in a manner that was at odds with the *Rowley* court’s analysis, and clarified FAPE as “markedly more demanding than the ‘merely more than the de minimus test’...” (*Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S.____[137 S. Ct. 988, 1000-1001] (*Endrew F.*)). The Supreme Court in *Endrew F.* stated that school districts must “offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” (*Id.* at p. 1002.)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.)

6. At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA

administrative hearing decision is preponderance of the evidence].) Here, Tahoe Truckee had the burden of proof on all issues.

ISSUE 1: TAHOE TRUCKEE'S OFFER OF FAPE

7. The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.)

8. Tahoe Truckee contends that it offered Student a FAPE when it held an IEP team meeting for placement and services on October 12, 2017 in Washoe County, Nevada, then convened separate transportation IEP team meetings on July 19, October 17, 27, and November 14, 2017 in Truckee, California. As found below, this approach led to multiple violations of the IDEA and California law governing special education. Accordingly, Tahoe Truckee failed to meet its burden to establish that it offered Student a FAPE in the offers collectively referred to herein as the October 12, 2017 IEP.

Offer of Two Concurrent Operative IEP's

9. Here, Tahoe Truckee arranged to have separate IEPs for goals, placement, accommodations, and most related services in Washoe and a second, independent IEP for transportation only. This arrangement deprived Student of a comprehensive IEP team that had a complete understanding of his educational needs. The "modus operandi" of the IDEA, is "a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." (*School Comm. of Town of Burlington, Mass. v. Department of Educ. of Mass.* (1985) 471 U.S. 359, 368 [105 S.Ct. 1996; 85 L.Ed.2d 385].) The fractured approach applied here left Student with multiple operative IEPs, one for

his program and services at Hidden Valley in Washoe County, and the other for transportation services. Student failed to have one comprehensive and holistic IEP that included all the requisite procedural and substantive elements, and inclusive discussions on all aspects of his educational plan with appropriate staff. Further, Student failed to receive an offer where both entities communicated and had the requisite information about Student's needs in all aspects of his educational plan. Because of this, Tahoe Truckee failed to propose an integrated and comprehensive IEP offer designed to address the unique needs of Student. As discussed further below, this arrangement led to a procedural violation of the IDEA and California law, failing to have the required team members at IEP team meetings held in Tahoe Truckee.

JULY 19, OCTOBER 17, 27, NOVEMBER 14, 2017 IEP TEAM COMPOSITION

10. An IEP team is required to include: one or both of the student's parents or their representative; a regular education teacher if a student is, or may be, participating in regular education; a special education teacher; a representative of the school district who is qualified to provide or supervise specially designed instruction, is knowledgeable about the general education curriculum and is knowledgeable about available resources; a person who can interpret the instructional implications of assessments results; at the discretion of the parties, other individuals; and when appropriate, the person with exceptional needs. (34 C.F.R. § 300.321(a); Ed. Code, §§ 56341, subd. (b), 56342.5 [parents must be part of any group that makes placement decisions].)

11. A member of the IEP team is not required to attend an IEP team meeting, in whole or in part, if the parents and school district agree that the attendance of such a member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting. (20 U.S.C. § 1414(d)(1)(C)(i).) A member of the IEP team may be excused from attending an IEP team meeting, in whole or in part, when the meeting involves a modification to or discussion of the

member's area of the curriculum or related service if (i) the parent and the school district consent to the excusal, (ii) the member submits written input to the team prior to the meeting for development of the IEP, and (iii) the consent is in writing. (20 U.S.C. § 1414(d)(1)(C)(ii) and (iii).)

12. The Ninth Circuit has held that "the plain meaning of the terms used in section 1414(d)(1)(B) compels the conclusion that the requirement that at least one regular education teacher be included on an IEP team, if the student may be participating in a regular classroom, is mandatory – not discretionary." (*M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 643.) A regular education teacher, to the extent appropriate, must participate in the development, review and revision of the student's IEP, including assisting in the determination of appropriate positive behavioral interventions and supports, and other strategies for the pupil, and the determination of supplementary aids and services, program modifications, and supports for school personnel that will be provided for the student. (20 U.S.C. § 1414(d)(3)(C); Ed. Code, § 56341(b)(2)

13. The IEP team meetings held on July 19, October 17, 27, and November 14, 2017, failed to include a general education or special education teacher, and Parents did not excuse their absence. Tahoe Truckee's assertion that these teachers were not required because the IEP team met only to discuss transportation is unpersuasive. Mother repeatedly complained that Student had panic attacks at school and she feared his anxiety would impede his ability to be transported on a bus. Other than Parents, there was no IEP participant at any IEP team meeting discussing transportation who was directly involved with, taught, or worked with Student in any capacity at any time. Besides Parents, not one person had any familiarity with Student and his needs. Tahoe Truckee failed to explain why general and special education teachers were not invited to attend the transportation IEP team meetings, as Student was mainstreamed 70 percent

of the time in a regular classroom and 30 percent of the time outside of the regular classroom.

14. The failure to include a regular education teacher on the IEP team deprives the team of "important expertise regarding the general curriculum and the general education environment." (*M.L.*, *supra*, 394 F.3d at p. 646; *see also*, *Target Range*, *supra*, 960 F.2d at p. 1485 [affirming trial court's finding that school district deprived the student of FAPE by developing an IEP without the input and participation of student's parents and a regular education teacher].) Without a general education teacher, a reviewing court has no means to determine whether an IEP team would have developed a different program after considering the views of a regular education teacher, and a failure to include at least one general education teacher is a structural defect in the constitution of the IEP team. (*M.L.*, *supra*, 394 F.3d at p. 646.)

15. While the transportation IEP team meetings focused exclusively on amending the current mileage reimbursement for bus transportation, input from Student's teacher was warranted. Tahoe Truckee failed to gather information regarding Student's transportation for field trips, and communication and medical issues at school. A general education and special education teachers' participation could have apprized the team members on: absences; panic attack symptoms at school; bus transportation behavior; and implemented accommodations on field trip transportation. Tahoe Truckee was legally required to include the general education teacher and special education teacher at the IEP team meetings, even those discussing transportation only. The failure to do so was a procedural violation of the IDEA and state law regarding a properly composed IEP team.

Special Education Student's Placement and Related Services Offer in Out-of-State Public School

16. Education Code section 2000 provides that, "[t]he county superintendent

of schools of any county contiguous to an adjoining state may grant permission to pupils residing in the county to attend elementary school or high school in a school district of the adjoining state and may provide for the transportation of the pupils to the school.” Washoe’s Tuition Agreement executed by both districts’ superintendents satisfies this requirement. This code section applies to all students residing in contiguous counties and does not limit a special education student’s rights guaranteed under the IDEA *and* California law. As discussed below, Tahoe Truckee failed to establish Student was offered an appropriate program that comported with California special education law.

17. Under Education Code section 48200, a school district is responsible for providing a FAPE to all eligible students between the ages of six and eighteen whose parent or legal guardian resides within the jurisdictional boundaries of the school district, subject to several specified exceptions. (*Id.* at pp. 186-187, citing *Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1525, fn. 1(*Union*) [Ed. Code § 48200 determines the local educational agency responsible for providing a special education program].) Here, there is no dispute that the Student resides with Parents within the jurisdictional boundaries of Tahoe Truckee under Educational Code section 48200.

18. There are exceptions to the requirement that the residence of the parent determines what LEA is responsible for a child’s FAPE, such as an interdistrict transfer. (Ed. Code, §§§ 48204, 48645.2, 56325, subd. (c).) While one may argue that this is *akin* an interdistrict transfer, Tahoe Truckee did not establish that the arrangement between it and Washoe meet the California requirements as the transfer is not to another California public school.

19. Tahoe Truckee claims that the variance and tuition agreement with Washoe discharges it from responsibility for FAPE except for transportation services, despite the fact that Student and Parents reside in the Tahoe Truckee district. State

educational agencies are ultimately responsible for ensuring that every child with a disability has access to FAPE. (Ed. Code § 48200.)

20. A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap. (34 C.F.R. § 104.33.) A recipient may place a handicapped person or refer such a person for aid, benefits, or services other than those that it operates or provides as its means of carrying out the requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed. (34 C.F.R. § 104.33(b)(3).) Education Code section 56369 states that a local educational agency may contract with another public agency to provide special education or related services to and individual with exceptional needs, not to transfer IEP responsibility. (Ed. Code, § 56369.)

21. Here, Tahoe Truckee has provided no authority supporting its contention that it is able to delegate its IEP and FAPE responsibility of a California resident by contract or otherwise to an out-of-state public school and at the same time take responsibility through a California IEP for transportation services only, without addressing all aspects of Student's educational needs.

22. As noted above, Student is a California resident whose IEP must conform to California law. As determined below, Tahoe Truckee did not meet its burden to establish that the offer conformed to California law. Such examples include failing to align goals to California content standards, failing to timely provide procedural safeguards regarding California law, and failing to follow California law regarding serving deaf and hard of hearing students.

OCTOBER 12, 2017 GOALS NOT ALIGNED WITH GRADE-LEVEL CALIFORNIA STATE STANDARDS

23. The IEP must include a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2); Ed. Code, § 56345, subd. (a)(2).) The IEP must contain statements of how the child's goals will be measured and the special education and related services, based on peer-reviewed research to the extent practicable that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(III), (IV); 34 C.F.R. § 300.320(a)(3), (4); Ed. Code, § 56345, subd. (a)(3), (4).)

24. In a November 16, 2015 joint letter, the Office of Special Education and Rehabilitative Services and the Office of Special Education Programs state that IEP goals must align with state academic content standards for the grade in which the special education student is enrolled. The agencies explained that aligning IEP goals with grade-level content standards reflects the IDEA's emphasis on having high expectations for students with disabilities.⁶ (Dear Colleague Letter, 66 IDELR 227 (OSERS 2015).)

25. Student's October 12, 2017 IEP included annual goals. However, the academic goals in particular, specifically state that they are based on Nevada academic content standards, not California state standards. Further, there was no testimony or documentary evidence that Nevada academic content standards were similar to California state standards. Thus, Tahoe Truckee failed to meet its burden to establish

⁶ These offices are a division of the United States Department of Education and are charged with administering the IDEA and developing its regulations.

that the IEP goals aligned with grade-level California state standards.

OCTOBER 12, 2017 PROCEDURAL SAFEGUARDS

26. State and federal law require districts to provide the parent of a child eligible for special education with a copy of a notice of procedural safeguards upon initial referral, and thereafter at least once a year, as part of any assessment plan, and at other designated times. (20 U.S.C. § 1415(d)(1); 34 C.F.R. § 300.504(a); Ed. Code, § 56321, subd. (a).) The notice must include a full explanation of all procedural safeguards and be written in language understandable to the general public and provided in the native language of the parent or other mode of communication used by the parent. (20 U.S.C. § 1415(d)(2); 34 C.F.R. §§ 300.503(c)(1) & 300.504.) Furthermore, at each IEP team meeting, the district must inform a parent of *state* and federal procedural safeguards. (Ed. Code, § 56500.1, subd. (b).)

27. At the March 12, 2017 IEP Mother received procedural safeguards that only addressed the Individuals with Disabilities Act. Tahoe Truckee failed to show that California State procedural safeguards were distributed to Mother. Tahoe Truckee provided no procedural safeguards as documentary evidence in this matter and no witness testified that California procedural safeguards were given to Mother during the March 12, 2017 IEP team meeting located in Reno, Nevada, or at any time within the preceding year. California procedural safeguards would include specific information about state complaint procedures and the appropriate addresses in California to direct due process hearings and mediation. Tahoe Truckee failed to show that the appropriate procedural safeguards were distributed.

CALIFORNIA SPECIFICS FOR DEAF AND HARD-OF-HEARING

28. Federal and State law require that, in developing an IEP, the team must consider both general and special factors. (20 U.S.C. § 1414(d)(3); 34 C.F.R. §

300.324(a)(2006); Ed. Code, § 56441.1.) The general and special factors are stated in broad terms, and do not include the requirement to consider a specific service, program option or parental request.

29. For a pupil who is deaf or hard-of-hearing, the special factors include a consideration of "the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode." (20 U.S.C. § 1414(d)(B)(iv); see also 34 C.F.R. § 300.324(a)(2)(iv)(2006); Ed. Code, § 56341.1, subd. (b)(4).) In addition, the special factors include a consideration of whether the child needs assistive technology devices and services. (20 U.S.C. § 1414(d)(3)(B)(v); 34 C.F.R. § 300.324(a)(2)(v)(2006); Ed. Code, § 56341.1, subd. (b)(5).)

30. California law has an extra set of special factors that an IEP must consider in developing the IEP for a pupil who is deaf or hard-of-hearing. (Ed. Code, § 56345, subd. (d).) State procedures that more stringently protect the rights of disabled pupils and their parents are consistent with the purposes of the IDEA, and are enforceable. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1527.) Education Code section 56345, subdivision (d), provides, in part: "Consistent with Section 56000.5 and Section 1414(d)(B)(iv) of Title 20 of the United State Code, it is the intent of the Legislature that, in making a determination of services that constitute an appropriate education to meet the unique needs of a deaf or hard-of-hearing pupil in the least restrictive environment, the individualized education program team shall consider the related service and program options that provide pupil with an equal opportunity for communication access."

31. The IEP team shall specifically discuss: (1) the language and communication needs of the student, including the pupil's primary language mode and

language; (2) the opportunities for direct communications with peers of similar abilities, which may be met by consolidating services into a local plan area wide program; (3) appropriate, direct, and ongoing language access to special education teacher and other specialists who are proficient in the student's primary language mode and language; (4) services to ensure communication-accessible academic instructions, school services, and extracurricular activities; (5) ensure that hearing aids worn in school by children with hearing impairments, including deafness are functioning properly; (6) ensure that external components of surgically implanted medical devices are functioning properly; and (7) public agency is not responsible for postsurgical maintenance, programming or replacement of the medical device that has been surgically implanted, or of an external component of the surgically implanted medical device. (20 U.S.C. § 1414(d)(3)(iv); Ed Code § 56345, subds. (d)(1)-(7).)

32. Here, Tahoe Truckee failed to meet its burden to establish that either IEP team considered some of the above items. Ms. Welles, Ms. Morgan and Ms. Adams opined that the IEP developed in Washoe appropriately addressed Student's speech and language and audiology needs. They failed to establish the IEP team considered the California specific requirements such as services to ensure communication accessible academic instructions, school services and extracurricular activities. The witnesses also failed to show that the IEP team discussed the functioning of the cochlear implant external components.

33. At the October 12, 2017 IEP team meeting, the team reviewed Student's triennial assessment for speech and language and formulated Student's special education program for fourth grade. Tahoe Truckee failed to establish that Student's IEP team considered all of the overlapping general and special factors, including the specialized considerations mandated in California law that a school district must consider in developing the IEP for a deaf or hard-of-hearing Student. Because of this,

Tahoe Truckee failed to meet its burden of proof that its offer to Student was legally compliant.

34. As found above, Tahoe Truckee was responsible for offering Student a FAPE in the least restrictive environment. Student was offered two separate IEP's, one including goals, placement, related services except for transportation, and accommodations. The other offering transportation services only. This approach led to offers that were fatally flawed such that a determination regarding the substantive appropriateness, including the offered transportation services, is not reached. Therefore, Tahoe Truckee failed to meet its burden that it offered Student a FAPE.

ISSUE 2: TAHOE TRUCKEE'S REQUEST TO ASSESS

35. Tahoe Truckee requests permission to administer social and emotional and augmentative and alternative communication assessments to Student without Parents' consent. Parents oppose any further assessments because Student was assessed for speech and language in 2017, and they believe no further assessments should be done at this time.

36. A local educational agency must assess a student in all areas of suspected disability. The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless parents and district agree, but at least once every three years unless the parent and district agree that a reevaluation is not necessary. A local educational agency has an obligation to reassess a student if it has received new information about a student's functioning that impacts his education or otherwise has reason to suspect that his educational and related service needs may have changed such that a reassessment is warranted. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56831, subds. (a)(1), (2).)

37. Reassessment requires parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To obtain consent, a school district must develop and propose to

the parents a reassessment plan and give proper notice to student and parent. (20 U.S.C. § 1414(b)(1); 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and companion state law. (20 U.S.C. §§ 1414(b)(1), 1415(c)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must: appear in a language easily understood by the public and the native language of the student; explain the assessments that the district proposes to conduct; and provide that the district will not implement an IEP without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).) The district must give the parents and or student 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

Assessment Plan Notice

38. Tahoe Truckee met its burden of persuasion through the credible testimony from Ms. Adams and Mr. Santos that it complied with all statutory requirements regarding its assessment plan. At the November 14, 2017 IEP team meeting, Parents received a copy of an assessment plan for social emotional functioning and notice of rights and procedural safeguards, both in their primary language, Spanish. It provided notice of the type of assessment to be completed, a description of it, who would be conducting it, and advised Parents that the assessment would not proceed without parental consent. No concern over notice, procedural safeguards or the form of the assessment plan was presented at hearing.

39. On January 10, 2018, Mr. Santos mailed an updated assessment plan for social emotional functioning and augmentative and alternative communication to Parents, with a letter of further explanation and the notice of rights and procedural safeguards. All documents were in Parents primary speaking language, Spanish. It provided notice of the type of assessments to be completed, a description of both, and designated a Tahoe Truckee psychologist to conduct the social emotional functioning

assessment. In the letter attached to the assessment plan, it designated a Tahoe Truckee employee specializing in all forms of communication, including deaf and hard-of-hearing, to conduct the augmentative alternative communication assessment. Further, the plan advised Parents that assessments and special education services would not proceed without parental consent.

40. Tahoe Truckee made reasonable efforts to obtain parental consent to the plan and provided at least 15 days to review and sign the plan. As of the date of the hearing, Parents received the assessment plan but had not provided consent.

Reassessment Is Warranted

41. If a student's parents do not consent to an assessment plan, the school district can conduct the reassessment only by showing at a due process hearing that it needs to reassess that student and is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(a)(3)(i), (c)(ii); Ed. Code, §§ 56381, subd. (f)(3); 56501, subd. (a)(3).)

42. Parents who want their child to receive special education services must allow reassessment by the district. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315; *Dubois v. Conn. State Bd. of Ed.* (2d Cir. 1984) 727 F.2d 44, 48.)

43. Accordingly, to proceed with reassessment over a parent's objection, a school district must demonstrate at a due process hearing (1) that the parent was provided an appropriate written assessment plan to which the parent has not consented, and (2) that the student's triennial reassessment is due, that conditions warrant reassessment, or that the student's parent or teacher has requested reassessment. (Ed. Code, § 56381, subd. (a).)

44. Here, Student became eligible for special education in 2010 and was last assessed in 2017 for speech and language in preparation for his triennial assessment. The speech and language assessment did not include an augmentative or alternative communication evaluation. At Student's IEP team meeting on October 12, 2017, Parents

raised concerns regarding Student's panic attacks. Parents further raised the same concerns at the October 17, 27, and November 14, 2017 IEP team meetings and added concerns for safety and bus driver communication. Tahoe Truckee considered Parents' input at the IEP team meetings held regarding transportation and requested the assessments since no up-to-date information was available in these areas.

45. Without the data, Tahoe Truckee does not know what accommodations to offer Student, how to serve him and how his disability impacts his ability to access his education. Tahoe Truckee is seeking assessments to understand Student's present levels of functional and educational needs to accurately identify the appropriate services, accommodations, and other supports needed by Student.

46. Without these assessments, the IEP team simply lacks the necessary information to determine accommodations, develop goals or decide upon necessary services. The evidence showed that conditions warrant reassessment of Student in the areas proposed by the January 10, 2018 assessment plan due to the issues Parents raised.

District Assessors are Knowledgeable and Competent

47. The assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the

assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).)

48. The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).)

49. Reassessments, like initial assessments, shall be conducted by persons competent to perform them, as determined by the local educational agency. (20 U.S.C. § 1414(b)(3)(B)(iv); 34 C.F.R. §300.34(c)(1)(iv); Ed. Code, § 56322.) Psychological assessments shall be performed in accordance with the procedures set forth in Education Code section 56320, by assessors who are trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed. (Ed. Code, § 56324.) Any psychological assessment of a pupil shall be performed by a credentialed school psychologist. (Ed. Code, § 56324, subd. (a)).

50. Ms. Adams and Ms. Welles competently testified and identified several types of measures to assess Student, including one-to-one tests, multiple tests, observations, interviews, and review of records. All proposed tests are non-discriminatory, in Student's primary language, valid, with trained, knowledgeable and competent individuals who would administer the tests per the instructions. At hearing, Student did not present any concerns over the proposed assessors' ability to conduct assessments in accordance with the assessment procedures in Education Code section 56320. The evidence established that a credentialed school psychologist will conduct the

assessment of Student's social-emotional functioning assessment. A credentialed speech and language pathologist will perform the augmentative and alternative communication assessment.

51. Tahoe Truckee established that the January 10, 2018 assessment plan complied with all applicable statutory requirements regarding form, function and notice. Tahoe Truckee also established that Parents raised concerns at previous IEP team meetings that warrant social emotional and augmentative and alternative communication assessments.

52. The credible uncontradicted testimony of Ms. Adams and Ms. Welles regarding assessments proved that they are necessary given Tahoe Truckee's current lack of information of Student in these areas. The evidence further demonstrated that the proposed evaluators are competent and the proposed assessments meet the requirements under the IDEA. Thus, Tahoe Truckee established that it is entitled to assess Student over parental objection.

ORDER

1. Tahoe Truckee failed to meet its burden establish that its IEP, collectively referred to in this decision as the October 12, 2017, IEP offer⁷, constituted an offer of FAPE. Tahoe Truckee may not implement the IEPs without Parents' consent.

2. Tahoe Truckee is entitled to reassess Student in conformance with the January 10, 2018 assessment plan in social emotional functioning and augmentative and alternative communication without Parents' consent.

⁷ The IEP dated October 12, 2017 is two separate IEP documents that contain pages with July 19, October 12, 17, 27, and November 14, 2017 dates. For ease of reference, the IEP in its entirety, including both IEP documents, is referenced as the October 12, 2017.

PREVAILING PARTY

Under 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 on issue number one. Tahoe Truckee prevailed on issue number two.

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).)

Dated: June 14, 2018

/s/

CYNTHIA C. FRITZ

Administrative Law Judge

Office of Administrative Hearing