BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENTS ON BEHALF OF STUDENT, v. TAHOE TRUCKEE UNIFIED SCHOOL DISTRICT.	OAH Case No. 2018100935

DECISION

Parents on behalf of Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on October 17, 2018, naming Tahoe Truckee Unified School District.

Administrative Law Judge Cynthia Fritz heard this matter in Truckee, California, on December 12 and 13, 2018, and January 9, 10, and 11, 2019.

Student's mother represented Student. Student's father attended the hearing. A Spanish language interpreter provided English to Spanish and Spanish to English interpreting services throughout the hearing for Parents whose primary language is Spanish. Student did not attend.

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

Tahoe Truckee requested a continuance to allow for written closing briefs, which was granted until January 25, 2019. Parties timely submitted their closing briefs at which time the record was closed and the matter was submitted for decision.

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ISSUES[1]

1. Did Tahoe Truckee Unified School District deny Student a free and appropriate public education during the 2018-2019 school year by:

a. failing to provide prior written notice of change of enrollment and placement;

b. failing to have an individualized education program in effect for Student at the beginning of the school year, from September 11, 2018, through October 15, 2018; and

c. failing to allow Parents the opportunity to fully participate in the decision making process regarding the identification, provision, and placement of Student for the 2018 interim IEP?

2. Did Tahoe Truckee deny Student a FAPE during the 2018-2019 school year by failing to provide an adequate interim IEP, placement, and appropriate services by:[2]

a. copying and pasting portions of the Washoe-Nevada IEP onto the Tahoe Truckee California IEP during August 2018, disregarding California law;

b. failing to develop accurate present levels of academic achievement and functional performance in the area of deafness and hard of hearing, comparable to that of his last consented to IEP;

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[1] 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.)

[2] In the Order Following Prehearing Conference, issues 2(c), (d), and (e) used the word "offer" in place of "provide". On the first day of hearing, the ALJ clarified that the Order should have used the word "provide" instead of "offer".

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c. failing to provide specialized academic instruction;

d. failing to provide speech and language services; and

e. failing to provide support in American Sign Language?

SUMMARY OF DECISION

This Decision holds that Tahoe Truckee committed a procedural violation by erroneously offering an interim IEP for comparable services which lead to an inappropriate IEP in place at the beginning of the school year, August 30, 2018, through October 5, 2018, the date Tahoe Truckee convened the annual IEP team meeting. This procedural violation constituted a substantive FAPE violation because it seriously infringed Student's ability to receive a FAPE and prevented Parents from meaningfully participating in the IEP decision making process.

FACTUAL FINDINGS

1. Student is an 11-year-old boy residing with Parents within Tahoe Truckee's boundaries, and is eligible for special education under the categories of deafness and speech and language impairment. Student has bilateral deafness and orally communicates utilizing cochlear implants and a personal FM system.

2. Official notice is taken of OAH decision, *Tahoe Truckee Unified School Dist. v. Moreno-Alvarado*, (2018) Cal. Offc. Admin Hrngs. Case No. 2018020394, dated June 14, 2018.[3] Neither party appealed the decision. As previously determined, Student

[3] Judicial notice is generally called official notice when taken by an administrative tribunal. (See, e.g., Gov. Code § 11515.) Evidence Code, section 452, subdivision (h) allows the taking of judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

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attended Tahoe Truckee in kindergarten, and thereafter attending a deaf education program at Hidden Valley Elementary School in Washoe County School District, in Nevada. Tahoe Truckee placed Student for first grade at the Washoe deaf education program, provided that Parents applied and that Washoe accepted their application. From first through fourth grade, Student annually applied, was approved by Tahoe Truckee, accepted by Washoe, and attended Washoe's deaf education program. Tahoe Truckee participated in Student's IEP team meetings while he attended Washoe, and reimbursed Parents for their transportation costs to attend school there. The Decision found that Tahoe Truckee, and not Washoe, was responsible for providing Student's free and appropriate public education. As of the time of hearing, Tahoe Truckee continued to have this responsibility.

3. In summer 2018, Student applied to attend the Washoe deaf education program for fifth grade in the 2018-2019 school year, and Tahoe Truckee approved the application. On August 3, 2018, however, Washoe denied Student's application into the program.

4. On August 3, 2018, Jeff Santos, Tahoe Truckee's Coordinator of Special Education, informed Parents of Washoe's decision to deny Student's application for its deaf education program. Subsequently, an IEP team meeting was set for August 15, 2018, to discuss other placement and service options for Student. Mr. Santos also contacted the Placer Special Education Local Plan Area representative, Troy Tickle, for guidance as to how to proceed with the IEP team meeting.

5. Mr. Tickle incorrectly determined that an interim 30-day IEP was appropriate for Student under these circumstances. At hearing, Mr. Tickle acknowledged that Student was a Tahoe Truckee student. Even so, he believed an interim IEP was proper, since Student had been receiving vendor services from an out-of-state public school. Mr. Tickle confirmed that Tahoe Truckee knew Student well from attending a

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prior IEP team meeting, and was familiar with his educational program. Mr. Santos corroborated that Tahoe Truckee knew Student, his disabilities, and prior educational program. Student was not a transfer student. Therefore, the decision to utilize an interim IEP rather than develop a complete IEP was in error.

6. The August 15, 2018, "interim IEP" was drafted to offer comparable services and to give Tahoe Truckee the opportunity to "get to know" Student before his annual IEP team meeting. Mr. Santos, Parents, Mr. Tickle, acting as mediator, and a Spanish interpreter attended the August 15, 2018, IEP team meeting. The intention of this IEP team meeting was to offer Student an interim placement and services for 30 days, comparable to Student's last annual IEP dated October 12, 2017, in advance of a full IEP team meeting. Tahoe Truckee witnesses established that the purpose of the interim placement was for teachers and other staff to observe Student, interact with him, identify his unique needs, and evaluate his educational performance before a complete IEP team meeting was held.

7. At the August 2018 IEP team meeting, Mr. Santos' persuasively established that the team members discussed various placement options such as Placer County's deaf education program in Loomis, and the California School for the Deaf, and Parents were uninterested. Parents contend that other options were not discussed, however, Parents testimony was not credible and was not corroborated by anyone, while Mr. Santos' testimony was corroborated by an uninterested party, Mr. Tickle. Ultimately, Tahoe Truckee offered Student placement in a local school.

8. Mr. Santos detailed Tahoe Truckee's efforts to offer Student placement and services comparable to those in his October 2017 IEP. At the August 15, 2018, IEP team meeting, Tahoe Truckee offered: (1) 30 minutes per day, five days per week of specialized academic instruction for literacy, taught by the resource specialist in the learning center, with consultation from the deaf and hard of hearing specialist; (2) 30

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minutes a day, five days a week of specialized academic instruction for math, taught by the resource specialist in the learning center, with consultation from the deaf and hard of hearing specialist; (3) FM system check upon Student's arrival by trained staff consulting with deaf and hard of hearing specialist and audiologist; (3) intensive individualized service of a one-to-one aid for support, 360 minutes per day; (4) speech and language services, 90 minutes per week; (5) audiology services for 10 minutes per month to monitor hearing reports; (6) a virtual American Sign Language interpreter 1500 minutes per week; and (7) specialized deaf and hard of hearing direct services, 90 minutes per week. Parents did not consent to the offered IEP.

9. Mr. Santos wrote a prior written notice dated August 15, 2018, following the IEP team meeting. The notice memorialized Washoe's rejection of Student's application to attend the Washoe deaf education program, and the circumstances of Student's placement change. Mr. Santos included his contact information for questions, and a copy of procedural safeguards in Spanish. The notice did not contain the other placement options the IEP team considered, or the reason those options were not offered. Mr. Santos called Parents on August 20 and 22, 2018, to further discuss the interim IEP, and followed up with an email on August 23, 2018, but received no response from Parents. Mr. Santos mailed a Spanish translated copy of the prior written notice to Parents on August 28, 2018, prior to the start of the 2018-2019 school year on August 30, 2018. Parents had sufficient time to discuss any issues with placement and services with Tahoe Truckee and failed to present any evidence of prejudice due to the timing and contents of the prior written notice.

10. Mr. Santos continued efforts to obtain Parents' consent to the interim IEP. On September 4, 2018, Parents met with Tahoe Truckee staff, including Mr. Santos, to continue to discuss the interim IEP. The next day, on September 5, 2018, Parents and Student met with Mr. Santos and a number of Student's service providers to discuss

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services and answer questions related to the interim IEP. On September 7, 2018, Parents met with Mr. Santos and Ms. Corine Harvey, and changed the service dates on the interim IEP document at Parents' request. Tahoe Truckee made the IEP effective dates September 10, 2018, through October 9, 2018. Mother provided the signed signature page of the interim IEP on September 11, 2018, and Student started school the same day.

11. Scott Beaudry was Student's special education teacher at Tahoe Truckee. He was responsible for providing Student's specialized academic instruction in literacy and math. Mr. Beaudry holds a special education credential and has approximately 15 years of experience teaching special education students. He did not know Student prior to September 2018.

12. During his instructional time, Mr. Beaudry informally assessed Student in preparation for the upcoming annual IEP team meeting. Based on Mr. Beaudry's informal assessments, the IEP team changed Student's reading, writing, and math goals at the annual IEP team meeting. Although Mr. Beaudry was a capable and diligent teacher, a portion of his specialized academic instruction during this short period of time, focused on determining Student's needs through informal testing, rather than delivering services to meet Student's unique needs.

13. Julie Tidd provided speech and language services to Student while attending Tahoe Truckee in fifth grade and in kindergarten. Ms. Tidd holds a bachelor's degree in speech and hearing sciences and a master's degree in communication disorders. She has 15 years of experience as a speech and language pathologist.

14. Tahoe Truckee speech and language services began September 17, 2018. Much like Mr. Beaudry, Ms. Tidd informally assessed Student in preparation for the upcoming annual IEP team meeting during her sessions. Based on her informal assessments, Student's goals changed for speech articulation and intelligibility, receptive

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language, and expressive language. Thus, a significant portion of her services focused on determining Student's needs rather than providing services to meet Student's unique needs. Additionally, Student did not receive the full amount of his IEP speech and language services in September 2018, because these services did not start until September 17, 2018.

15. Student's annual IEP team meeting convened on October 5, 2018, and Parents pulled Student out of school on October 8, 2018. As of the time of hearing, Student remains out of school.

16. Although Parents and Tahoe Truckee staff testified regarding Student's American sign language interpreter services, the American sign language interpreter was not called to testify by either party. Parents had no personal knowledge of Student's American Sign Language interpreter services. Thus, no compelling evidence was presented regarding Student's American Sign Language services.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA[4]

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. 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

[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 edition.

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

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; 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].)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *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

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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. 49, 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, Student has the burden of proof on all issues.

ISSUE 1A: PRIOR WRITTEN NOTICE

7. Student argues that Tahoe Truckee failed to provide prior written notice to him before changing his placement. Tahoe Truckee contends that it properly gave Student prior written notice.

8. Prior written notice must be given by the public agency to the parents of an individual with exceptional needs "upon initial referral for assessment, and a reasonable time before the public agency proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the pupil, or the provision of a free appropriate public education to the child." (Ed. Code, §

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56500.4, subd. (a); *See also* 20 U.S.C. § 1415(b)(3) and (4) and (c)(1); 34 C.F.R. § 300.503.)

9. The notice must contain: (1) a description of the action refused by the agency; (2) an explanation for the refusal, along with a description of each evaluation procedure, assessment, record, or rep; ort the agency used as a basis for the refusal; (3) a statement that the parents of the disabled child are entitled to procedural safeguards, with the means by which the parents can obtain a copy of those procedural safeguards; (4) sources of assistance for parents to contact; (5) a description of other options that the IEP team considered, with the reasons those options were rejected, and (6) a description of the factors relevant to the agency's refusal. (20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b); Ed. Code, § 56500.4.)

10. The notice must be given "a reasonable time before" the district actually changes the student's placement or the provision of FAPE to the student. (34 C.F.R. § 300.503(a).) This is to ensure that the parents have enough time to assess the change and voice their objections or otherwise respond before the change takes effect. (*C.H. V. Cape Henlopen School Dist.* (3rd Cir. 2010) 606 F.3d 59, 70.) When a failure to give proper prior written notice does not actually impair parental knowledge or participation of educational decisions, the violation is not a substantive harm under the IDEA. (*Ibid.*)

11. Washoe informed Tahoe Truckee on August 3, 2018, of Student's denial at Washoe and Tahoe Truckee informed Parents by phone the same day. Parents attended the IEP team meeting on August 15, 2018, to consider placement options and services. When Parents refused consent to the placement and services offer on August 15, 2018, Mr. Santos drafted a prior written notice the same day, and attempted to contact Parents by phone and email to discuss the interim IEP offer. Then, Mr. Santos mailed the prior written notice on August 28, 2018, giving Parents a reasonable amount of time, under these facts, to discuss Student's placement change.

12. The notice, however, failed to meet the statutory requirements because it

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did not contain a description of other options that the IEP team considered, and why they were rejected. Thus, Tahoe Truckee failed to provide a legally compliant prior written notice to Parents.

13. The procedural defect, however, did not significantly impede Parents' ability to participate in the process. Tahoe Truckee established that Parents were given other options at the IEP team meeting and rejected them. Further, Parents failed to show how this violation impaired them in any way during this process, and thus, it was harmless. Accordingly, Student failed to meet his burden of persuasion on this issue.

ISSUE 1B AND 1C: THE 30-DAY INTERIM IEP OFFER WAS INAPPROPRIATE BECAUSE STUDENT WAS NOT A TRANSFER STUDENT AND REQUIRED A COMPLETE IEP OFFER AT THE BEGINNING OF THE SCHOOL YEAR

Interim IEP Legal Provisions

14. Tahoe Truckee's IEP interim offer of comparable services is based on the presumption that Student is an out-of-state transfer student. Tahoe Truckee argues that Student is analogous to out-of-state transfer student. In resolving issues 1b and 1c, the preliminary inquiry is whether Student is an out-of-state transfer student, and if an interim IEP was appropriate in this matter.

15. 20 U.S.C. § 1414(d)(2)(C)(i)(II) reads:

> In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in another state, the local educational agency must provide such child with FAPE, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency conducts an

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evaluation, if determined to be necessary, and develops a new IEP, if appropriate, that is consistent with Federal and State law.

16. 34 C.F.R. § 300.323(f) reads:

If a child with a disability (who had an IEP that was in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE, (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency, conducts an evaluation pursuant to §§300.304 through 300.306 (if determined to be necessary by the new public agency); and develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in §§300.320 through 300.324.

17. California Education Code § 56325(a)(3) states:

... the following shall apply to special education programs for individuals with exceptional needs who transfer from an educational agency located outside the State of California to a district within California. In the case of an individual with exceptional needs who transfers from district to district within the same academic year, the local educational agency shall provide the pupil with a free appropriate public

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> education, including services comparable to those described in the previously approved individualized education program, in consultation with the parents, until the local educational agency conducts an assessment pursuant to paragraph (1) of subsection (a) of Section 1414 of Title 20 of the United States Code, if determined to be necessary by the local educational agency, and develops a new individualized education program, if appropriate, that is consistent with federal and state law.

18. To begin with, the above federal and state out-of-state transfer statutes do not apply under these facts. By their terms, these only apply to transfer students transferring from out-of-state. Here, Student has been a Tahoe Truckee resident for years and has not moved out of the district. Although Student was receiving vendor services from an adjacent out-of-state school district due to an agreement between Washoe and Tahoe Truckee, he continued to be Tahoe Truckee's student and FAPE responsibility. Tahoe Truckee attended Student's IEP team meetings while he attended Washoe and knew Student's disabilities and educational program. Additionally, when Washoe denied Student's admittance into the deaf program for fifth grade, Tahoe Truckee immediately contacted Parents to schedule an IEP team meeting to discuss a new placement for Student. This was appropriate because Student is a Tahoe Truckee student and its responsibility despite his attendance in an out-of-state public school program.

19. Tahoe Truckee contends that Student's "transfer" occurred in the summer and thus it needed only offer a FAPE based on the information available to it at the time. Tahoe Truckee's argument fails. The IDEA, its implementing regulations, and the Education Code, are silent on the specific procedure by which a district is to provide

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FAPE to a child with a disability who moves into the school district during the summer. In its Comments to 2006 IDEA Regulations, the United States Department of Education addressed whether it needed to clarify its regulations regarding the responsibilities of a new school district for a child with a disability who transferred during summer. The United States Department of Education declined to change the regulations, reasoning that the rule requiring all school districts to have an IEP in place for each eligible child at the beginning of the school year applied, such that the new district could either adopt the prior IEP or develop one. (71 Fed. Reg. 46682 (2006).) When a student transfers to a new school district between school years, the new district is not required to implement a former district's IEP or give the student the services that are "comparable" to those offered by a former district; it need only develop and implement an IEP reasonably calculated to provide Student a FAPE based on the information available to the district. (See, *Clovis Unified School Dist.* (2009) Cal. Offc. Admin Hrngs. Case No. 208110569; see also, *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1041. The new public agency also has the option of adopting the IEP developed for the child by the previous public agency in the former district. (*Questions and Answers on Individualized Education Programs, Evaluations, and Revaluations* (OSERS 09/01/11) 111 LRP 63322; see also, *Eagle Mountain-Saginaw Indep. School Dist*. (SEA TX 2012) 60 IDELR 178.)

20. Again, Tahoe Truckee's presumption is that Student is a transfer student, or analogous to a transfer student, and therefore it is held to a different FAPE standard. Student, however, is not a transfer student, and Tahoe Truckee erred in treating him as such. Regardless of what time of year Student's placement changed, he was not subject to the transfer provisions in the IDEA that allow for the comparable standard of services offered, or providing a FAPE based on information that Tahoe Truckee had at the time. An interim IEP was not the mechanism that should have been used for a current Tahoe

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Truckee student who was receiving placement and services outside of the district.

IEP Legal Provisions

21. To determine whether a school district offered student a FAPE, the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) For a school district's offer of special education services to constitute a FAPE under the IDEA, the offer must be designed to meet the student's unique needs, comport with the IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Id*. at 1314-1315; *Rowley*, supra, 458 U.S. 176, 203.) California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs, coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code § 1401(26).)

22. Since Student was not a transfer student, Tahoe Truckee was obligated to hold a legally compliant IEP team meeting and offer Student an IEP designed to address his unique educational needs and reasonably calculated to provide him educational benefit. Tahoe Truckee failed to do this.

Procedural Violation

23. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (Rowley, supra, 458 U.S. at pp. 205-206.) However, a procedural error does not automatically require 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, 1984 superseded on other grounds by statute (*Target Range*).) A procedural violation of the IDEA results in a denial of FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision

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making process regarding the provision of a FAPE to the child; 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; *L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 910.) The Ninth Circuit Court of Appeals has confirmed that not all procedural violations deny the child a FAPE. (*Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1047 (*Doug C.*))

Impeded Student's Right to FAPE

24. Tahoe Truckee asserted that even if it committed a procedural violation by offering an "interim IEP," Student suffered no harm because it was designed to meet his unique needs. The evidence established otherwise. Mr. Santos testified that the purpose of the IEP was to offer comparable services to get to know Student before the annual IEP was developed. Additionally, both Student's resource and speech and language teachers established they used service time to assess and determine Student needs for the upcoming annual IEP team meeting, instead of providing services designed to meet his needs. Further, Student's goals changed in the October annual IEP offer from the August interim IEP offer, demonstrating that Tahoe Truckee did not design the interim offer to address Student's unique educational needs, rather, it mimicked a previous IEP. As the focus of Student's program was not to meet his unique needs, and an appropriate IEP was not in place, Student's right to a FAPE was impeded. This substantively denied Student a FAPE.

Parental Participation

25. Parents must have the opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(b); Ed. Code, § 56304; *Doug C., supra,* 720 F.3d 1038, 1043.) An IEP which

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addresses the unique needs of the child cannot be developed if those people who are most familiar with the child's needs are not involved or fully informed." (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892.)

26. Parents were not afforded meaningful participation in the IEP development process because Student was offered comparable services only, and they were uninformed that Student required a complete IEP offer. Accordingly, since Parents were unaware of this, it significantly impeded the ability for Parents to meaningful participate in the development of Student's IEP during this time period and resulted in a substantive denial of FAPE.

ISSUE 2A, 2B, 2C, 2D, AND 2E: NO DETERMINATION IS REACHED AS TO THE SUBSTANTIVE APPROPRIATENESS OF THE INTERIM IEP DUE TO THE ABOVE LEGAL CONCLUSION THAT TAHOE TRUCKEE DENIED STUDENT A FAPE.

27. Student contends that: (1) Tahoe Truckee denied him a FAPE because it replicated portions of the Washoe IEP in the August 2018 Tahoe Truckee IEP, disregarding California law; (2) failed to develop accurate present levels of academic achievement and functional performance in deafness and hard of hearing, comparable to that of his last consented to IEP; and (3) failed to provide specialized academic instruction, speech and language, and American Sign Language to Student. Tahoe Truckee denies these allegations and contends that the interim IEP offer was appropriate.

28. Once a procedural flaw rises to the level of causing a denial of FAPE, a further analysis of whether the pupil was denied a substantive FAPE is not required. (*Doug C, supra* 720 F.3d at 1042.) Student established that Tahoe Truckee substantively denied him a FAPE. Even if Tahoe Truckee had, for example, implemented the services in conformity with the flawed IEP offered, that finding would not mitigate its legal responsibility nor impact Student's right to an appropriate remedy. Therefore, there is

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no need to reach these additional contentions.

REMEDIES

1. Student established that Tahoe Truckee erroneously offered comparable services through an interim IEP and not a complete IEP. Student further established that a significant focus of Tahoe Truckee's program was designed to assess him and determine his needs rather than meet his needs.

2. Student seeks placement and services at Hidden Valley Elementary, in Reno, Nevada, or a similar placement, and independent assessments. The ALJ does not have jurisdiction to place Student in an out-of-state public school. No evidence was presented regarding other placement options or other remedies. Petitioner has the burden of providing evidence as to an appropriate remedy. (*Parents of Student W v. Puyallup School Dist*. (9th Cir. 1994) 31 F.3d 1489 (*Puyallup*).)

3. 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]; *Puyallup, supra,* 31 F.3d 1489, 1496. 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.)

4. 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 at 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid v. Dist. of Columbia* (D.C.C. Cir.

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2005) 401 F.3d 516, 524 (*Reid*), citing *Puyallup, supra, 31 F.3d at p. 1497.*) The award must be fact-specific and "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid, supra,* 401 F.3d. at p. 524.)

5. Tahoe Truckee erroneously offered comparable services to Student at the beginning of the 2018-2019 school year, instead of a complete IEP offer, thereby impeding his right to a FAPE, and violating Parents' right to participate in the decision making process.

6. Tahoe Truckee's interim IEP failed to meet Student's unique needs in the areas of specialized academic instruction and speech and language. Student did not present any evidence as to the specific nature of the compensatory services he required for the denial. Accordingly, the undersigned ALJ is required to craft an appropriate remedy considering all evidence presented in this case. The time period at issue in this case is brief, alleged from September 11, 2018, through October 15, 2018. Student's IEP team met on October 5, 2018. The appropriateness of the October 5, 2018, IEP is not at issue in this case. Therefore, Student established a denial of FAPE from September 11, 2018, through October 5, 2018. Considering the totality of circumstances, it is determined that three hours of compensatory education in speech and language, and four hours in compensatory education combined in math and literacy is appropriate.

7. All of Student's remaining claims for relief were carefully considered and are denied.

ORDER

1. Tahoe Truckee shall provide Student three hours of speech and language services by a Tahoe Truckee speech and language pathologist. The services shall take place at a Tahoe Truckee school. Services shall be available to Student until the end of the 2018-2019 school year.

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2. Tahoe Truckee shall provide Student four hours of specialized academic instruction by a Tahoe Truckee resource specialist. The hours will be split equally between math and literacy. These compensatory services shall take place at a Tahoe Truckee school. Services shall be available to Student until the end of the 2018-2019 school year.
3. All of Student's remaining requests for relief are denied.

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 numbers 1(b) and 1(c). Tahoe Truckee prevailed on issue numbers 1(a). No determination was made with respect to issue numbers 2(a), 2(b), 2(c), 2(d), and 2(e).

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: February 5, 2019

/s/

CYNTHIA FRITZ

Administrative Law Judge

Office of Administrative Hearings

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