BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. LAKE TAHOE UNIFIED SCHOOL DISTRICT.	OAH Case No. 2017010900 ORDER DENYING MOTION FOR STAY PUT

On January 25, 2017, Student filed a motion for a stay put order requiring Lake Tahoe Unified School District to maintain Student's last agreed-upon and implemented individualized education program, including Student's placement at District's South Tahoe High School. On January 30, 2017, District filed an opposition on the grounds that the Superior Court for the County of El Dorado issued a temporary restraining order dated January 12, 2017, granting district's requests that Student be ordered to stay at least 100 yards away from South Tahoe High School, and to attend a nonpublic school as directed by District.

The Court's order, on a form temporary restraining order for situations involving workplace violence, indicated that the Court found that Student presented a credible threat of violence towards his behavioral aide, whom he assaulted on December 21, 2016, and towards one of his special education teachers. At District's request, the Court placed under seal District's memorandum of points and authorities and accompanying declarations in support of the requested temporary restraining order, and these were not provided to the Office of Administrative Hearings. In their pleadings filed with OAH, neither Student nor District fully explained District's specific legal arguments and factual bases for the temporary restraining order.

Student contended that District held a manifestation determination meeting on January 18, 2016, at which the participants concluded that Student's behavior was caused by, or had a substantial relationship to, his disability. District did not dispute this.

APPLICABLE LAW

Until due process hearing procedures brought under the Education Code and the Individuals with Disabilities Education Act are complete, a special education student is entitled to remain in his or her current educational placement, unless the parties agree

otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a) (2006)[1]; Ed. Code, § 56505 subd. (d).) This is referred to as "stay put." For purposes of stay put, the current educational placement is typically the placement called for in the student's most recent IEP implemented prior to the dispute arising. (*Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.)

When a school district decides to change the placement of a special education student for violating a code of student conduct, the district must convene an IEP team meeting within 10 school days to determine whether the conduct that gave rise to the violation is a manifestation of the student's disability. (20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e).) If the IEP team finds that the conduct was a manifestation of the student's disability, the district must order a functional behavioral assessment of the student, and implement a behavior intervention plan for the student or review, and if necessary modify, the student's existing plan. (20 U.S.C. § 1415(k)(1)(F)(i), (ii); 34 C.F.R. § 300.530(e), (f)(1).) The district must also return the student to the placement from which he was removed unless it and the student's parents agree otherwise, or unless certain special circumstances exist. (20 U.S.C. § 1415(k)(1)(F)(iii); 34 C.F.R. § 300.530(f)(2). These special circumstances are present where a student:

(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;

(ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or

(ii) has inflicted serious bodily injury[2] upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

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[1] All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

[2] "Serious bodily injury" is defined in title 18 United States Code section 1365(h)(3). (See 20 U.S.C. § 1415(k)(7)(D); 34 C.F.R. § 300.530(i)(3).) It means "bodily injury that involves a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." (18 U.S.C. § 1365(h)(3). "Serious bodily injury" is not simply a cut, abrasion, bruise, burn, or disfigurement; physical pain, illness, or impairment of the function of a bodily member, organ, or mental faculty. (18 U.S.C. § 1365 (h)(4).) Whether there has been a serious bodily injury is a question of fact based upon the totality of the circumstances. (*United States v. Johnson* (9th Cir. 1980) 637 F.2d 1224, 1246.)

(20 U.S.C. § 1415(k)(1)(G); See also 34 C.F.R. §§ 300.530(j).) In such cases, school personnel may remove the student to an interim alternative placement for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability. Whether or not the student is removed to an interim alternative educational setting, the district must ensure that the student continues to receive educational services so as to enable him to continue to participate in the general education curriculum, and to progress toward meeting the goals set out in his IEP. (20 U.S.C. § 1415(k)(1)(D)(i); 34 C.F.R. § 300.530(d)(1)(i).)

If a district is concerned about the possibility of future injury, but no "serious bodily injury" has occurred, the district may request a due process hearing to authorize a change of placement if it "believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others." (20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532(a).) The administrative law judge deciding such a case may order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the judge determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others. (20 U.S.C. 1415(k)(3)(B)(ii)(II); 34 C.F.R. § 300.532(b)(2)(ii).)

There is no "dangerousness" or "emergency" exception to the above stay-put provisions of the IDEA that permits a district to unilaterally exclude a dangerous student from the classroom. (*Honig v. Doe* (1988) 484 U.S. 305, 323-325; *Joshua A. v. Rocklin Unified School Dist.* (9th Cir. 2009) 559 F.3d 1036, 1038-1039.) Even in "cases in which the parents of a truly dangerous child adamantly refuse to permit any change of placement," the district must invoke the aid of the courts under the provisions of the IDEA. (*Honig*, 484 US at p. 326; see also, *Joshua A.*, 559 F.3d at pp. 1038-1039.) The district may bypass administrative proceedings and proceed directly to court only if the district can demonstrate to the court that exhaustion of administrative remedies would be futile or inadequate. (*Honig*, 484 US at p. 326-327.) If the court concludes that exhaustion of administrative remedies is not required before its exercise of jurisdiction, the court may grant injunctive relief prohibiting the Student from his or her stay-put placement only if the district demonstrates that maintaining the student in that placement is substantially likely to result in injury either to the child or to others. (*Id*. at p. 328; *Joshua A.* at p. 1039.)

DISCUSSION

Student contends that District obtained the Superior Court temporary restraining order against Student by improperly preempting Student's right to a manifestation determination meeting and OAH administrative review of Student's right to a stay-put placement. From the record presented, it cannot be determined whether District demonstrated to the Superior Court that pursuit of an administrative remedy was futile or insufficient, or that maintaining Student in his stay-put placement was substantially likely to result in injury either to Student or to others. It is thus unclear whether Student was properly removed from his stay-put

placement. However, it is clear that OAH does not have jurisdiction to review the Superior Court's order.

Therefore, Student's motion for stay put must be denied.

IT IS SO ORDERED.

DATE: February 6, 2017

DocuSigned by:

ROBERT G. MARTIN
Administrative Law Judge
Office of Administrative Hearings