BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: LEGAL GUARDIAN ON BEHALF OF STUDENT, v. LAKE TAHOE UNIFIED SCHOOL DISTRICT,	OAH Case No. 2017030390
LAKE TAHOE UNIFIED SCHOOL DISTRICT, v. LEGAL GUARDIAN ON BEHALF OF STUDENT.	OAH Case No. 2017030454 ORDER FOLLOWING EXPEDITED PREHEARING CONFERENCE; GRANTING MOTION TO CONSOLIDATE; DESIGNATING STUDENT'S CASE AS LEAD; AND GRANTING MOTION TO QUASH

On March 27, 2017, a telephonic expedited prehearing conference was held before Administrative Law Judge Theresa Ravandi, Office of Administrative Hearings. Advocate Dr. Robert Closson appeared on behalf of Legal Guardian and Student. Anne M. Sherlock and Lorena Nunez, Attorneys at Law, appeared on behalf of Lake Tahoe Unified School District. Dr. Annamarie Cohen, Lake Tahoe's Director of Special Services and Director of the Tahoe-Alpine Special Education Local Plan Area, was also present. The PHC was recorded.

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

1. Lake Tahoe's Motion to Consolidate. On March 6, 2017, Student filed a request for an expedited due process hearing naming Lake Tahoe in OAH Case Number 2017030390 (Student's Case). Student's request raises both expedited and non-expedited issues. This matter is pending an expedited hearing on March 30, 2017. On March 9, 2017, Lake Tahoe filed a request for an expedited due process hearing naming Student in OAH Case Number 2017030454. This matter is also pending an expedited hearing on March 30, 2017.

On March 21, 2017, Lake Tahoe filed a motion to consolidate its expedited complaint with Student's expedited matter. Student did not file an opposition. During the PHC, both parties were heard as to the motion to consolidate. Student did not oppose consolidation.

Although no statute or regulation specifically provides a standard to be applied in deciding a motion to consolidate special education cases, OAH will generally consolidate matters that involve: a common question of law and/or fact; the same parties; and when consolidation of the matters furthers the interests of judicial economy by saving time or preventing inconsistent rulings. (See Gov. Code, § 11507.3, subd. (a) [administrative proceedings may be consolidated if they involve a common question of law or fact]; Code of Civ. Proc., § 1048, subd. (a) [same applies to civil cases].)

Student's expedited issues are whether his disciplinary conduct was a direct result of Lake Tahoe's failure to implement his operative behavioral intervention plan and whether Lake Tahoe erred in failing to return him to South Tahoe High School following the January 2017 manifestation determination review meeting which found his conduct to be a manifestation of his disability. Lake Tahoe identifies as an issue for hearing whether maintaining Student's placement at South Tahoe High is substantially likely to result in injury to himself or others such that he should be placed in an appropriate interim alternative educational setting. Here, both Student's and District's Expedited Cases involve common questions of law and fact regarding Student's disciplinary conduct of December 21, 2016.

Consolidation is warranted and will prevent the risk of inconsistent rulings. In addition, consolidation furthers the interest of judicial economy because both cases involve the same parties, and many of the same witnesses would be required to testify in each proceeding. Each matter will also involve the introduction of the same or similar documents. Accordingly, Lake Tahoe's motion to consolidate was granted. When consolidating cases, OAH designates the statutory timelines applicable to the consolidated matters to be controlled by one of the cases. Here, the statutory timelines shall be controlled by Student's Case.

2. Expedited Hearing Dates, Times, and Location. The expedited hearing shall take place at Lake Tahoe's Education Center located at 1021 Al Tahoe Blvd., South Lake Tahoe, California, 96150, on March 30, 2017, and April 4-6, 2017, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall begin at 9:30 a.m. the first day of the hearing and at 9:00 a.m. all other days, unless otherwise ordered.

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

Prior to the beginning of the hearing, Lake Tahoe shall ensure that the hearing room is configured into a courtroom setting and shall have at a minimum (1) a table for Student and

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

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

3. Issues and Proposed Resolutions. The issues at the expedited due process hearing, and the proposed resolutions, were discussed and clarified at the PHC and are listed below.

Student's Expedited Issues:

Issue 1: Was Student's disciplinary conduct of December 21, 2016, a direct result of Lake Tahoe's failure to implement his behavior intervention plan attached to his November 16, 2015 individualized education program?

Issue 2: Did Lake Tahoe fail to follow the procedural requirements of 20 U.S.C. § 1415 (k)(1)(F) when it failed to return Student to his educational placement at South Tahoe High School?

Student's Proposed Resolutions: Return Student to South Tahoe High or allow him to be educated by way of Home-Hospital Instruction.

District's Expedited Issue:

Issue 3: Is maintaining Student's educational placement at South Tahoe High substantially likely to result in injury to Student or others such that he should be placed in an appropriate interim alternative educational setting for not more than 45 school days?

District's Proposed Resolutions: OAH to find that (1) maintaining Student's placement at South Tahoe High is substantially likely to result in injury to Student or others such that he requires an appropriate interim alternative educational setting; and (2) Guiding Hands, a nonpublic school, is an appropriate interim alternative educational setting.

4. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall use numbers to identify exhibits, but shall place the letter "S" or "D" in front of the exhibit to designate if it is a Student or District

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

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not timely exchanged shall not be admitted into evidence at the hearing unless the ALJ rules that it is admissible.

5. Witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available. The parties shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses out of order. Neither party shall be permitted to call any witnesses not timely disclosed except for good cause shown and at the discretion of the ALJ. Witness Filce shall testify on March 30, 2017, as she is unavailable for the remaining hearing dates. Ms. Sherlock objected to being identified as a witness. Student was advised that he will be required to make a specific offer of proof prior to attempting to introduce the testimony of Ms. Sherlock at hearing which covers: (1) why her testimony would be relevant; (2) why no other witness can testify as to the relevant items; and (3) in what manner Student would be prejudiced if Ms. Sherlock were not allowed to testify.

The parties are encouraged to review and shorten their witness lists prior to the hearing, bearing in mind that evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear. Dr. Closson shall provide Ms. Sherlock with contact information for his identified expert witnesses by close of business March 27, 2017. The parties shall meet and confer regarding the order of witnesses by March 28, 2017. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony, to ensure that this matter is concluded within the time allotted, based upon the parties' time estimates as well as on the issues presented.

The parties shall attempt to reach agreement on a witness list for the first day of hearing. Student shall have witnesses available in case agreement on a witness list is not reached. At the commencement of the due process hearing, the parties shall present a proposed joint written witness schedule with time estimates to the ALJ. The ALJ and the parties will discuss the length of time anticipated for direct and cross-examination of each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule. Additionally, the parties shall be prepared at the end of each day of hearing to discuss the witnesses to be presented the next day and the time the testimony of each such witness is expected to take.

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

7. Telephonic Testimony. Whether a witness may appear by telephone is a matter within the discretion of the ALJ. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) Any party seeking to present a witness by telephone shall move in advance for leave to do so, unless the opposing party has stipulated that the witness may appear by telephone. The proponent of the witness shall provide the proposed witness with a complete set of exhibit binders from all parties, containing all of each party's exhibits, prior to the hearing; and shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. No witness will be heard by telephone unless all these requirements have been fulfilled. At present neither party requested that any witness be allowed to testify telephonically.

8. Electronic Recording of Hearing.

a. Audio Recording. Both parties' motions to make an audio recording of the hearing were granted, subject to the following conditions: 1) that OAH's recording is the only official recording; 2) that the recording will be turned on and off at the same time as the ALJ's recording, in order to avoid recording conversations while off the record; 3) that operation of the party's recording mechanism will not be allowed to delay the hearing; and (4) when the parties leave the hearing room, they must take all recording devices with them.

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

9. Order of Presentation of Evidence. In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Here, both parties have identified expedited issues for hearing and bear their respective burdens of proof. Student shall present his case-in-chief first, followed by Lake Tahoe.

10. Motions.

Lake Tahoe's Motion to Quash March 20, 2017 Subpoenas Duces Tecum

On March 23, 2017, Lake Tahoe filed a motion to quash two subpoenas duces tecum allegedly issued on behalf of Student on March 20, 2017 to Jennifer Christianson and to Staranne Meyers, both of Guiding Hands School. Lake Tahoe brings its motion on the grounds that the subpoenas are invalid and procedurally and substantively defective and

incomplete. During the PHC both parties were heard as to this motion. Student opposed the motion to quash.

A party to a due process hearing under the Individuals with Disabilities Act has the right to present evidence and compel the attendance of witnesses in "a hearing conducted pursuant to subsection (f) or (k)" of section 1415 of title 20 of the United States Code. (20 U.S.C. § 1415(h); see also Ed. Code, § 56505, subd. (e).) A parent may obtain her child's educational records (Ed. Code § 56504).), and parents are entitled to receive copies of all the documents a district intends to use at hearings no less than five days prior to the hearing (Ed. Code § 56505, subd. (e)(7).)

The provisions of the Administrative Procedure Act governing subpoenas do not apply to special education hearings. (Cal. Code Regs., tit. 5, § 3089.) Nonetheless, California Code of Regulations, title 5, section 3082, subdivision (c)(2) sets forth the right of the parties in a special education hearing to compel the attendance of witnesses in a hearing. In pertinent part, it provides that, "[t]he hearing officer shall have the right to issue Subpoenas (order to appear and give testimony) and Subpoenas Duces Tecum (order to produce document(s) or paper(s) upon a showing of reasonable necessity by a party)."

Special education law does not specifically address motions to quash subpoenas or subpoenas duces tecum. In ruling on such motions, OAH relies by analogy on the relevant portions of Code of Civil Procedure, section 1987.1, which provides that a court may make an order quashing a subpoena entirely, modifying it, or directing compliance with it upon such terms or conditions as the court shall declare, including protective orders.

The March 20, 2017 subpoenas are allegedly issued by Attorney Paul L. Palant on behalf of Parent of Student. Mr. Palant is not the attorney of record in this matter. Further, Mr. Palant has not signed either the subpoenas or attached declarations in support. Student's subpoenas are not properly authorized either by an ALJ or signed by an attorney as required by law. Therefore, Lake Tahoe's motion to quash the March 20, 2017 subpoenas duces tecum directed to Ms. Christianson and to Ms. Meyers is granted. There is no need to address the other grounds to quash raised by Lake Tahoe.

Lake Tahoe's Motion to Close the Hearing

Lake Tahoe opposed Student's request to open the hearing to the public on the grounds that this hearing involves sensitive issues; the identity of other students may be inadvertently disclosed or that their privacy may be compromised based upon descriptive testimony regarding their involvement with Student and his behaviors.

Among the rights afforded to the parent or guardian in a due process hearing is the right "to open the state hearing to the public." (Ed. Code, § 56501, subd. (c)(2).)

Lake Tahoe's opposition to Student's request to hold an open hearing was denied without prejudice. The parties were advised and all witnesses will be reminded that the

names of other students shall not be used during the hearing. The ALJ retains the right to revisit whether the hearing will remain open to the public. Lake Tahoe is invited to file a motion in support of its position that based upon the small size of the community it serves, it is likely that individual students' identity and privacy may be compromised. The parties shall be prepared to re-address this issue at the start of the hearing.

Lake Tahoe indicated that it may file a motion to dismiss Student's expedited *Issue 1*. Lake Tahoe is ordered to file any motion to dismiss no later than March 28, 2017. Student will have until March 29, 2017 to respond. No other pretrial motions are pending or contemplated. Any motion filed after this date shall be supported by a declaration under penalty of perjury establishing good cause as to why the motion was not made prior to or during the prehearing conference of March 27, 2017.

11. Compensatory Education and Reimbursement. Any party seeking reimbursement of expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of expenditures, as part of its case in chief. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

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

13. Conduct of Counsel and Hearing Room Decorum. Counsel, all parties, and all witnesses shall conduct themselves in a professional and courteous manner at all times. Cellular phones, pagers, recorders, and other noisemaking electronic devices shall be shut off or set to vibrate during the hearing unless permission to the contrary is obtained from the ALJ.

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

15. Hearing Open To the Public. At the request of Student, the hearing will be open to the public, subject to further ruling by the ALJ.

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

IF A FULL AND FINAL WRITTEN SETTLEMENT AGREEMENT IS REACHED AFTER 5:00 P.M. THE DAY PRIOR TO HEARING, THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE REGARDING THE SETTLEMENT AT (916) 274-6035. THE PARTIES SHOULD ALSO LEAVE CONTACT INFORMATION SUCH AS CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY. THE PARTIES SHOULD SIMULTANEOUSLY FAX THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT THE FAXINATION LINE AT 916-376-6319.

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

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

IT IS SO ORDERED.

DATE: March 27, 2017

DocuSigned by:
Theresa Ravandi
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THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings