

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

LAKESIDE JOINT SCHOOL DISTRICT.

OAH CASE NO. 2009090504

DECISION

Charles Marson, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), heard this matter on February 22-24, 2010, in Los Gatos, California.

Student's Mother represented Student. Student's Father was present for most of the hearing. Student was not present.

Laurie Reynolds, Attorney at Law, represented the Lakeside Joint Elementary School District (District). Bob Chrisman, the District's Superintendent and Principal of Lakeside Elementary School, was present throughout the hearing on behalf of the District.

Student filed a First Amended Complaint on September 24, 2009. A continuance was granted on October 30, 2009. At the hearing, oral and documentary evidence were received. At the close of the hearing, the matter was continued to March 8, 2010, for the submission of closing briefs. On March 8, 2010, the District filed its closing brief. Student

filed his closing brief on March 9, 2010. On that day, the record was closed and the matter was submitted for decision.<sup>1</sup>

## ISSUE

Should the District have found Student eligible for special education and related services under the disability category of emotional disturbance (ED) from July 29, 2008, through March 9, 2009?<sup>2</sup>

## FACTUAL FINDINGS

### JURISDICTION AND BACKGROUND

1. Student is a 12-year-old boy who resides with his adoptive parents within the jurisdictional boundaries of the District. He has been diagnosed as having reactive attachment disorder, post-traumatic stress disorder and relational problems with parents as the result of childhood abuse and adoption. Student entered the District in late 2005, and finished fifth grade at Lakeside Elementary School (Lakeside) on or about

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<sup>1</sup> On March 25, 2010, Student filed a motion for judicial notice of two documents dated March 25, 2010, from the Discovery Charter School, which he now attends. The motion is denied because the documents are irrelevant to the time period addressed here, and are reasonably subject to dispute and therefore not subject to judicial or official notice. (See, Evid. Code, § 452; Gov. Code, § 11515.)

<sup>2</sup> The Order Following Prehearing Conference fixed March 31, 2009, as the date Student withdrew from the District and began attending school elsewhere, "subject to proof." The evidence at hearing showed that the date of that event was March 9, 2009. The statement of the issue has been amended accordingly.

June 2007. At all relevant times, Student performed at grade level while attending school, except for some difficulty with spelling. Due to learning difficulties that do not make him eligible for special education and related services, he has a "504 Plan."<sup>3</sup> The District has declined to find Student eligible for special education.

2. The District has a single campus containing its elementary school. It has an average daily attendance of 126 students, including about 40 middle school students whom it sends to middle schools in the Campbell Union School District (CUSD) pursuant to a Memorandum of Understanding. The District remains responsible for special education and related services for its middle school students in CUSD.

3. For the school year (SY) 2007-2008, Student was enrolled in the sixth grade at CUSD's Rolling Hills Middle School (Rolling Hills) in Los Gatos. He also began the seventh grade at Rolling Hills, but he actually attended at the Rolling Hills campus for fewer than 20 days. On March 9, 2009, Parents enrolled Student in the California Virtual Academy (CAVA), a statewide charter school that is separately responsible for the special education of its students.<sup>4</sup>

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<sup>3</sup> A "504 plan" is an educational program created pursuant to Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; see 34 C.F.R. § 104.1 et. seq. (2000).) Generally, the law requires a district to provide program modifications and accommodations to children who have physical or mental impairments that substantially limit a major life activity such as learning.

<sup>4</sup> At the time of the September 30, 2008 IEP meeting, the team did not have any reports from Student's seventh grade teachers concerning his demeanor in class. Under an agreement with Parents, the District provided Student home instruction while he was being assessed and his eligibility determined. Student first began attending seventh grade classes on the campus on October 15 or 16, 2008.

4. In April 2007, at Parents' request, the District assessed Student to determine his eligibility for special education under the criteria for ED. The assessments were completed in May 2007, and an individualized education program (IEP) meeting was held on May 17, 2007. The IEP team determined that Student was not eligible for special education and related services.

5. On June 2, 2008, Parents filed a due process complaint alleging that Student should have been found eligible for special education and related services in the category of ED for his sixth grade year. On November 12-14, 2008, ALJ Suzanne Dugan heard that matter, and on December 23, 2008, filed a decision in favor of the District. (*Student v. Lakeside Joint School District* (2008) Cal.Offc.Admin.Hrngs. Case No. 2008060329 (*Lakeside I*)<sup>5</sup> In *Lakeside I*, ALJ Dugan found that the District had properly decided Student was not eligible for special education as ED during sixth grade, in part because he "did not show ... a general pervasive mood of unhappiness or depression, or a tendency to develop physical symptoms or fears" associated with personal or school problems. (*Lakeside I*, Legal Conclusion (LC) 8.) The complaint in this matter alleges that Student should have been found eligible for special education as ED during the seventh grade.

#### TIME PERIOD AT ISSUE

6. Under the doctrine of collateral estoppel, once a tribunal has decided an issue of fact or law necessary to its judgment, that issue may not be relitigated in a suit on a different cause of action between the parties to the first case. The doctrine serves many purposes, including relieving parties of the cost and vexation of multiple lawsuits, conserving judicial resources, and encouraging reliance on adjudication by preventing

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<sup>5</sup> OAH has previously taken official notice in this matter of the *Lakeside I* decision.

inconsistent decisions. The doctrine applies in special education due process matters in California. Absent new legal or factual circumstances, the fact that a second action involves a subsequent school year does not preclude application of the rule of collateral estoppel unless new facts or circumstances justify departure from it.

7. At hearing, the ALJ ruled that *Lakeside I* was conclusive of all issues necessarily decided in it, and accordingly excluded evidence concerning Student's eligibility during the sixth grade. That time period was from May 2007, when he was ruled ineligible by the IEP team, through July 28, 2008, the day the complaint in *Lakeside I* was filed. Student attended seventh grade from August 2008 to June 2009. However, when Parents enrolled Student in CAVA on March 9, 2009, the District's obligation for Student's special education ceased. Therefore, the time period at issue here is from July 29, 2008, to March 9, 2009.

#### ELIGIBILITY FOR SPECIAL EDUCATION

8. To be eligible for special education and related services under the category of ED, a child must exhibit one or more of five characteristics over a long period of time, and to a marked degree, and the child's educational performance must be adversely affected as a result. The characteristics are: (1) an inability to learn which cannot be explained by intellectual, sensory, or health factors; (2) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (3) inappropriate types of behaviors or feelings under normal circumstances exhibited in several situations; (4) a general pervasive mood of unhappiness or depression; and (5) a tendency to develop physical symptoms or fears associated with personal or school problems. Student claims he was eligible under ED during seventh grade because he exhibited characteristics (4) and (5).

## A General Pervasive Mood of Unhappiness or Depression

### INFORMATION BEFORE THE IEP TEAM ON SEPTEMBER 30, 2008

9. The validity of an IEP is measured by what was objectively reasonable at the time the IEP was written, and in light of a "snapshot" of the information available to the IEP team when its decisions were made. The "snapshot rule" means that information that was unavailable to the District when the IEP was written cannot be used to undermine the team's decisions.

10. A formal diagnosis of depression is neither required nor sufficient to demonstrate eligibility for special education under ED. The criteria for diagnosis and eligibility are substantially different.

11. When Student's IEP team met on September 30, 2008, to consider his eligibility for special education in the seventh grade, it considered the results of four assessments. Each of them confirmed that Student did not display a general pervasive mood of unhappiness or depression.

12. The District assessed Student in spring 2007, when he entered the District, but did not find that he was depressed or unhappy.

13. Trisha Green, a school psychologist for the Santa Clara County Office of Education, assessed Student in September 2008 to determine whether he was eligible for special education under ED. She administered numerous assessment instruments and reviewed his educational file. Part of her assessment involved asking both Parents and Student to fill out evaluation questionnaires that are part of the Behavior Assessment System for Children, Second Edition (BASC-2). In her evaluation, Mother scored Student as having clinically significant problems in nearly every area. A score from 60 to 70 on the scoring scale for the BASC-2 indicates "at risk" behavior, and a score higher than 70 indicates "clinically significant" behavior. Parents rated Student at 75 for depression, but Student rated himself only at 41. Ms. Green determined that

Student was not eligible under ED, in part because nothing in his educational file suggested he was depressed. She also found that, while Student had significant social-emotional and conduct problems, these problems did not affect his ability to learn in a general education setting.<sup>6</sup>

14. Randy Cohen was a Resource Specialist Program (RSP) teacher for the District for five years. He was one of Student's fifth grade teachers at Lakeside Elementary. In September 2008, Mr. Cohen assessed Student by administering the Woodcock-Johnson Tests of Achievement, Third Edition (WJ-III). He also reviewed Student's file, and talked to his teachers. Mr. Cohen found that Student had a total achievement score of 101 on the WJ-III, which placed him in the 54th percentile among his chronological peers. He found that all Student's skills were in the average range, except that his reading comprehension and math calculation skills were in the high average range. Mr. Cohen testified that during his assessment Student was in very good spirits and did not appear depressed or unhappy.

15. Dr. Nancy Sullivan is a licensed psychologist and staff neuropsychologist at the Children's Health Council in Palo Alto. In spring 2008, at Parents' request, she conducted an extensive independent evaluation of Student's social and emotional condition. Her report, dated April 21, 2008, was considered by the IEP team. Dr. Sullivan administered the Children's Depression Inventory to Student, which is reported in "T-

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<sup>6</sup> Student told Ms. Green that his sixth grade year at Rolling Hills started well, but that at some point during sixth grade he lost interest in doing his homework. Losing interest in homework might indicate depression or might indicate other problems. Ms. Green thought that statement was related to Student's emotional problems, but testified she did not believe it indicated depression. In any event, *Lakeside I* establishes that Student was not depressed during the sixth grade, when this incident occurred.

Scores." A score of 50 is the mean, over 60 is significant, and over 70 is clinically significant. Student was below the level of significance on every measure; his total T-Score was 39. Dr. Sullivan also administered the Multidimensional Anxiety Scale for Children, which uses the same range of scores. Student again scored below significant on every measure; his total score was 35. Dr. Sullivan did not diagnose Student as depressed.

16. Craig Clark is a marriage and family counselor who is an associate professor of psychology at the John F. Kennedy University Graduate School of Professional Psychology. He has provided counseling for foster and adoptive families, and children and adolescents for 10 years, and has been Student's family therapist since March 2008. On September 28, 2008, Mr. Clark sent a letter to the IEP team encouraging it to find Student eligible for special education for a number of reasons. He stated that Student suffers from reactive attachment disorder and post-traumatic stress disorder as the result of abuse by his biological mother in early childhood and his subsequent adoption. But he did not diagnose Student as being depressed.

17. At the IEP team meeting on September 30, 2009, Parents argued that Student had been diagnosed as being depressed. Mother at first claimed, incorrectly, that Dr. Sullivan had diagnosed Student as depressed. When that claim was refuted, she then stated that Student had been diagnosed with depression "last year" at Kaiser, but Parents could not produce that report "[b]ecause it's not within our agreement with Kaiser." Nothing else in the record demonstrated that anyone at Kaiser diagnosed Student as being depressed, or entered into an agreement with Parents not to disclose such a diagnosis. In light of Parents' failure to produce that diagnosis, or proof that they had an agreement with Kaiser not to produce it, Mother's claim that such a diagnosis existed must be viewed with skepticism.



18. In sum, there was no persuasive evidence before the IEP team on September 30, 2008, that Student had ever been formally diagnosed as being depressed, or that any such depression was general or pervasive, or had existed for a long period of time or to a marked degree, or had any impact on his education. Mother's statements at the meeting and in her BASC-2 responses were substantially outweighed by all the professional judgments before the team and the perceptions of Student's teachers. A mood that is general and pervasive exists across settings, but there was no evidence that Student was depressed at school. The IEP team correctly concluded on September 30, 2008, that Student was not eligible for special education under ED because he did not display a general pervasive mood of unhappiness or depression.

#### EVENTS SUBSEQUENT TO THE IEP MEETING OF SEPTEMBER 30, 2008

19. Student began attending seventh grade classes at Rolling Hills on October 15 or 16, 2008, but was truant for much of November and December, and never returned to the campus after the winter break. He was on campus for fewer than 20 days during SY 2008-2009. Four of Student's seventh grade teachers at Rolling Hills credibly testified at hearing that, during the brief periods in which they worked with Student, he did not seem unhappy or depressed. Instead, he seemed happy and friendly, and was involved in his school work.

20. Miranda Baker, Student's seventh grade social studies teacher, testified that Student was attentive, had a lot of friends, joked with them, and seemed happy. Sheryl Ann Spencer, Student's seventh grade RSP teacher under his 504 plan, worked with him about five hours a week when he was at home. She testified that his behavior was "wonderful"; he was happy, ready to work, and always on task. Kerstin Demos, Student's seventh grade math teacher, testified that Student had friends in her class, was not a behavior problem, did not seem withdrawn, and did not stand out from the other

students in any way. Sylvia Davis, Student's seventh grade science teacher, testified that Student was never a behavior problem, got along well with other students, and exhibited no signs of depression. The collective testimony of Student's teachers, who had first-hand experience with him at school, is entitled to substantial weight.

21. Sean Foran, a school psychologist for the Antioch Unified School District, conducted a thorough psychoeducational assessment of Student in August 2009 as a consultant to CAVA. Although his assessment was conducted well after the period of time at issue here, it was admitted without objection as a retrospective measure of Student's condition during his seventh grade year. Mr. Foran testified that Student's scores on assessments for depression were normal, although Mother's scores were in the clinically significant range. He did not think Student was qualified for special education under ED or for any other reason.

22. At hearing, Student's babysitter, Melanie Breedlove, and Shaun Taylor, a family friend, testified that Student was quieter and less happy while at Rolling Hills than he had previously been at Lakeside. However, neither witness offered any significant details or examples to support that impression. A student who is quiet and unhappy is not necessarily depressed. Neither witness has any credentials that would support a professional judgment about depression, nor does their testimony establish that any mood they observed was general, pervasive, or present to a marked degree. Neither had ever observed Student on the campuses of Lakeside or Rolling Hills, nor talked to any of Student's teachers, administrators, or assessors, so neither could establish that Student was generally or pervasively quiet or unhappy. Their testimony conflated Student's sixth and seventh grade years, and to the extent it related to Student's sixth grade year, *Lakeside I* establishes that Student was not depressed at school during the sixth grade. In addition, the views of Ms. Breedlove and Mr. Taylor were first communicated to the

District at hearing, and were not part of the snapshot of information available to the District at any relevant time.

23. At hearing, two professionals testified that Student now suffers from depression. Mr. Clark, Student's therapist, testified that his "initial diagnosis," when he started seeing Student in March 2008, included "depressive disorder." Mr. Clark testified that Student did not meet all of the diagnostic criteria for major depressive disorder at that time, and instead deserved a more "flexible" diagnosis of mood disorder not otherwise specified (NOS). Mr. Clark testified that Student's depression worsened during 2008, and that "certainly" by the end of 2008 he had "crossed over" into major depressive disorder.

24. Mr. Clark's testimony that Student suffered from mood disorder NOS during 2008, and major depression by the end of 2008, was not credible. In his letter to Student's IEP team on September 28, 2008, in which Mr. Clark extensively listed all the diagnoses that he thought applied to Student at that time, neither mood disorder NOS nor depression is mentioned. His new diagnosis of depression was never communicated to the District until the hearing.

25. Mr. Clark never observed Student at Lakeside or Rolling Hills, and never spoke to any of his teachers, administrators, or assessors there. He admitted his information about Student's demeanor in school came from Parents. Mr. Clark's therapy was directed to the family unit, and his sessions with Student always included Parents. Therefore, Mr. Clark's testimony that Student was anxious in school, would not raise his hand, and felt on guard in social situations at school was not persuasive because it was not based on personal observations and in large part reflected statements by Parents that also were not based on personal observation.

26. Dr. Megan Jones has a Ph.D. in clinical psychology and is a post-doctoral fellow in child and adolescent psychiatry at the Stanford University Medical Center. She

first met Student at the end of November 2009, when she examined him at Parents' request. She diagnosed Student as having anorexia nervosa and major depression.<sup>7</sup> She testified that these disorders significantly interfere with his ability to learn in school; he has lacked interest in school for a long time; and his lack of interest is related to his depression.

27. Dr. Jones' opinion is not relevant to the period of time at issue here. She first met Student many months after the District's obligation to him had ceased, and after he had developed an additional serious ailment. On cross-examination, Dr. Jones admitted that she had not reviewed Student's educational records or contacted anyone involved in Student's education, and she could not offer an opinion about the educational effect, if any, of Student's depression before she met him. Instead, for her information on Student's earlier educational experiences, she relied on information given to her by Parents and Mr. Clark. Dr. Jones testified that she could not form an opinion on the nature or severity of Student's depression a year before she met him, and could only state that he has been depressed since late November 2009.

28. Mother testified extensively at hearing that Student was deeply depressed about school during the seventh grade, and gave many examples based on her interactions with him. For example, she testified that he was unable to do group projects at school, and that he was too depressed to do 75 percent of his homework. However, Mother did not claim that she had first-hand knowledge of anything that occurred at school or that she ever observed Student at school. Mother's testimony is therefore outweighed by the testimony of Student's four seventh grade teachers, who saw none

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<sup>7</sup> Student's eating disorder did not appear until fall 2009, well after the time period relevant here. Student does not claim that it affects his eligibility for special education during the seventh grade.

of the problems Mother described. The incidents Mother described at hearing were not communicated to the IEP team on or before September 30, 2008, or at any other time before March 9, 2009. They were not a part of the information on which the team could have acted.

29. Student did not testify. However, on every assessment that evaluated him for possible depression, his answers failed to show that he considered himself depressed. In every case, his answers contrasted sharply with those given by Mother. Mr. Foran, CAVA's school psychologist, testified credibly that he saw no reason to disbelieve Student's self-assessment.

30. Parents argue that school authorities did not view Student as depressed because he denies his depression, and is so skilled at hiding it that it was not readily visible to District employees. Mr. Clark testified that Student is a "smooth operator" and that someone who spent a day or less with Student would "not likely" be able to tell that Student was depressed. However, when asked whether a school psychologist could see Student's depression in the course of a day, he declined to say that one could not. He did not explain why standard assessment tests for depression would not see through Student's denial, or why teachers who saw him every school day could not tell that there was something wrong that required investigation. Mr. Clark's view was contradicted even by Dr. Jones, who testified that a teacher would notice signs of a student's depression such as irritable mood, impaired concentration and other outward manifestations. The evidence did not establish that Student's alleged depression was so hidden at school that District personnel were unable to perceive it.

31. Moreover, Student's argument proves too much. If Student's depression was invisible to school personnel, the IEP team cannot be faulted for failing to act on it. Mr. Clark's letter of September 28, 2008, which does not mention depression, suggests that Student's depression was invisible even to him at that time. The IEP team was not

required to declare Student eligible for special education based on a condition no professional could perceive.

32. Between the IEP meeting on September 30, 2008, and March 9, 2009, when the District's responsibility for Student ended, the District did not receive any information that would have suggested it should reconsider Student's eligibility for special education. Mother continued to argue that he was depressed, but no professional opinion supported her view during that time.

33. The preponderance of evidence did not show that Student displayed a general pervasive mood of unhappiness or depression at any relevant time. On the contrary, the evidence showed that Student was not depressed or unhappy at school between July 29, 2008, and March 9, 2009. Therefore, Student was not eligible for special education under ED on that ground.

#### A Tendency to Develop Physical Symptoms or Fears Associated with Personal or School Problems

#### THE ASSAULTS AND STUDENT'S TRUANCY

34. In August 2008, Parents sent Student to a City of Campbell summer camp attended by Rolling Hills students. There he spread a false rumor about a fellow student, Jane Doe, telling others that she had raped him.<sup>8</sup> Jane Doe's father called the camp threatening "to raise hell" if something was not done about the rumor. On the last day of camp, he and Jane arrived by car to pick up John Doe, Jane's brother. Jane asked to speak to Student, but then verbally and physically assaulted him, punching him in the face and head. She then ran to her father's car and the family sped away. A camp

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<sup>8</sup> To comply with confidentiality laws, the identities of the non-parties involved in these incidents have been redacted from documents introduced in evidence. They are described here by fictitious names.

counselor advised Parents that the Doe family had an unsavory reputation and should be avoided.

35. After the September 30, 2008 IEP meeting, Student remained out of school for about two weeks for reasons the record does not reveal. He began attending seventh grade classes on the Rolling Hills campus on October 15 or 16. He was admonished by school staff that spreading sexual rumors about fellow students constituted sexual harassment. However, he soon circulated another false rumor about Jane Doe, this time claiming she had performed fellatio on him. On November 6, John Doe attacked Student on campus and the boys briefly fought. Each was suspended for one day. Student was truant for the rest of November, appeared on campus occasionally during early December, and then was truant for the rest of his enrollment at Rolling Hills.<sup>9</sup>

36. Father testified that shortly after the fight and suspension on November 6, 2008, Mr. Doe telephoned him and threatened to kill Student. Rolling Hills Principal, Kathleen Gibbs, advised Father that the Doe family was dangerous, and showed him a web site on which a heavily tattooed Mr. Doe posed in a threatening manner with devil symbols and knives.

37. During Student's brief appearances on the Rolling Hills campus in December 2008, school staff escorted Student to and from the bus, watched over him on campus, and restricted John Doe to the cafeteria at lunch. Ms. Gibbs told Father that

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<sup>9</sup> The claim in Student's Closing Brief that Student was attacked six times on the Rolling Hills campus has no support in the record. The only documented attacks were the one at summer camp in August 2008, and the attack on November 6, 2008. Principal Gibbs believed there might have been a third incident, but there was no evidence of its nature or severity.

the school could keep Student safe while on campus, but Parents rejected her assurances. Ms. Gibbs also urged Parents to seek a restraining order against the Doe family, because that would enable her to transfer the Does out of Rolling Hills, but Parents told her that such a tactic would be ineffective. Parents decided to keep Student home until they found another school in which to enroll him. Student was then formally declared truant, and received failing grades because he did not attend school. Parents and the District both attempted to find other schools in which Student could enroll. On March 9, 2009, Parents enrolled Student in CAVA, which he attended on-line from home. During his absence from school, Student's academic performance suffered.

#### THE DEGREE OF STUDENT'S FEAR

38. Mother testified that Student was devastated by John Doe's attack on him on November 6, 2008, and was unable to return to school for weeks. She stated that the reason he was truant was that he was afraid to go to school. However, the evidence showed that it was Parents, not Student, who decided he would not return to Rolling Hills, for reasons in which his safety played only a supporting role. Parents had been resisting Student's placement at Rolling Hills ever since the District announced it at the end of Student's fifth grade year. They viewed the campus as too large and "diverse," and wanted Student to attend Fisher Middle School (Fisher) in Los Gatos, which is not a District school. Parents' efforts to remove Student from Rolling Hills included attempts to obtain an inter-district transfer; efforts to have their home, along with a third of the District, moved into the Los Gatos district so Student could attend Fisher; opposition to a District parcel tax; and unsuccessful federal litigation asserting on several grounds that Student's civil rights were infringed.

39. Parents' intent to keep Student out of Rolling Hills preceded any fear of the Doe family. On May 7 and July 1, 2008, before the incident at summer camp, Mother wrote to the District that Parents would not send Student to Rolling Hills and rejected



his placement there. Mother's writings to the District also show that Student's safety was only one of many reasons for his truancy. On November 19, she wrote that Student would not return until the District better implemented the behavior support plan in Student's 504 plan, and on January 22, 2009, she wrote that Parents would keep Student at home "unless we can get him into Fisher or we get a court judgment for private school."

40. There was substantial evidence that Student did not fear the Doe family as much as Mother claimed. Principal Gibbs and seventh grade math teacher Demos testified, without contradiction, that even when Student returned to Rolling Hills after his suspension for fighting with John Doe, he appeared happy among his friends on the campus and did not appear fearful. On balance, the evidence did not show that Student feared the Does to a marked degree.

#### THE DURATION OF STUDENT'S FEAR

41. Mother's claim that Student began to fear attending the Rolling Hills campus after the summer camp incident is not supported by the record. It was primarily during that period that Student did go to school, and his teachers testified that they did not notice any fear. If the August 2008 attack by Jane Doe had seriously frightened Student, he likely would not have circulated another offensive rumor about her in November 2008, shortly after he returned to the Rolling Hills campus.<sup>10</sup> It can be reasonably inferred that, after John Doe's attack, Student developed at least some fear of attending the Rolling Hills campus while the Doe family was present, at least after Mr. Doe's threat. But the evidence showed that Student's fear abated when he was no

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<sup>10</sup> Mr. Foran and Ms. Gibbs established that the circulation of sexual rumors by boys in Student's age group was common, and did not by itself suggest emotional disturbance.

longer at Rolling Hills. Thus Student's fear lasted, at most, from November 6, 2008, until some time in January or February 2009, when he learned from Parents he would no longer attend Rolling Hills. The preponderance of evidence did not show that Student was afraid to attend Rolling Hills for a long period of time.<sup>11</sup>

#### THE NATURE OF STUDENT'S FEAR

42. There was no substantial evidence that Student was afraid of anyone but the Doe family, or afraid of attending any other school. Parents were willing to enroll him in several other schools.<sup>12</sup>

43. To the extent that Student did fear the Does, his fear was reasonable and justified. He was physically assaulted by Jane Doe, then John Doe, and his life was threatened by Mr. Doe. Parents and Student were justified in concluding that the threat was credible because of the information about the Doe family given to them by the principal and the camp counselor.

44. However, RSP teacher Cohen and school psychologist Foran persuasively testified that Student's fear of further assault by the Does was not the sort of fear that indicated emotional disturbance. Instead, it was fear almost any student would have in the circumstances. Mr. Foran was a particularly persuasive witness because he was not associated with either party and because Mother accepted his assessment of Student as

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<sup>11</sup> Mr. Clark testified that Student was afraid to return to Rolling Hills, but his information appeared to come from Parents. He did not address the duration, timing, or intensity of Student's fear.

<sup>12</sup> In Student's Closing Brief, Mother makes numerous new factual assertions about Student's alleged fear of school in general. Those untimely assertions are not considered here.

the most thorough and accurate of the assessments presented.<sup>13</sup> Mr. Foran established that the reasonable fear of a specific assailant was unrelated to emotional disturbance and would be understandable in any student who was similarly situated. There was no evidence to the contrary.

45. For the reasons above, the evidence did not show that Student had a tendency in the seventh grade to develop physical symptoms or fears associated with school problems within the meaning of the applicable regulation. Nor did it show that Student had such a fear for a long period of time or to a marked degree, or that it interfered with his education. On this record, Student's education suffered not because he was afraid of the Does, but because Parents kept him away from school for most of the seventh grade. Student was afraid of specific assailants at a specific campus for good reason. Virtually any student in Student's situation, disabled or not, would have had the same fear. Student's fear of the Doe family did not require a reconsideration by the District of his eligibility, and did not demonstrate that he was eligible for special education as emotionally disturbed.

## LEGAL CONCLUSIONS

### BURDEN OF PROOF

1. Student, as the petitioner, has the burden of proving the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [163 L.Ed.2d 387].)

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<sup>13</sup> In September 2009, CAVA also determined that Student was not eligible for special education. CAVA was originally a party in this matter, but was dismissed before hearing by agreement with Parents.

## COLLATERAL ESTOPPEL

2. Under the doctrine of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude litigation of the same issue in a suit on a different cause of action involving a party to the first case. Collateral estoppel applies to special education due process hearings in California, and to the same claim made from one school year to the next. (*Student v. Los Angeles Unified School Dist.* (2007) Cal.Offc.Admin.Hrngs. Case No. 2007010315; *Student v. San Diego Unified School Dist.* (2005) Special Education Hearing Office No. SN 2005-1018.)

3. Collateral estoppel precludes relitigation of an issue when five conditions are met: (1) the issue to be precluded must be identical to that decided in the prior proceeding; (2) the issue must have been actually litigated at that time; (3) the issue must have been necessarily decided; (4) the decision in the prior proceeding must be final and on the merits; and (5) the party against whom preclusion is sought must be in privity with the party to the former proceeding. (*People v. Garcia* (2006) 39 Cal.4th 1070, 1077.)

## THE SNAPSHOT RULE

4. An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP "is a snapshot, not a retrospective." (*Id.* at p. 1149, quoting *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041.) An IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*)

## FAILURE TO PRODUCE EVIDENCE

5. If a party relies on weaker and less satisfactory evidence when it could have produced stronger and more satisfactory evidence, the evidence offered should be viewed with distrust. (Evid. Code, § 412.)

## ELIGIBILITY AND FAPE

6. The ALJ has authority to determine whether a student is eligible for special education and related services under the IDEA. (*Hacienda La Puente Unified School Dist. v. Honig* (9th Cir. 1992) 976 F.2d 487, 492-494.) If a school district fails to identify a student as eligible for special education, and therefore fails to develop an appropriate IEP for the student, the district has denied the student a FAPE. (*Dep't. of Educ. v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp.2d 1190, 1196-1197.)

## ELIGIBILITY UNDER ED

7. A student is eligible for special education as emotionally disturbed according to the following standards:

- (i) Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:
  - (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors;
  - (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
  - (C) Inappropriate types of behavior or feelings under normal circumstances;
  - (D) A general pervasive mood of unhappiness or depression; and/or
  - (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(34 C.F.R. § 300.8(c)(4) (2006); Cal. Code Regs., tit. 5, § 3030, subd. (i).) Student claims eligibility under subsections (D) and (E) of the regulations.

The Meaning of "over a long period of time and to a marked degree"

8. The Office of Special Education Programs (OSEP) has stated that "a long period of time" within the meaning of the definition is a range of time from two to nine months. OSEP has also stated that "to a marked degree" generally refers to the frequency, duration or intensity of a student's emotionally disturbed behavior in comparison to the behavior of his peers and/or school and community norms. (*Letter to Anonymous*, 213 IDELR 247, 213 LRP 9338 (OSEP 1989).)

The Meaning of "A general pervasive mood of unhappiness or depression"

9. Student argues, without authority, that the phrase "[a] general pervasive mood" modifies the word "unhappiness" but not the word "depression." That interpretation cannot be reconciled with the requirement that, for eligibility, one or more of the listed characteristics must appear "over a long period of time and to a marked degree." Depression that was not general or pervasive would not usually satisfy that requirement. The plain meaning of the regulation is that, in order to be eligible under subdivision (D), depression as well as unhappiness must be shown to be the student's general pervasive mood.

The Meaning of "A tendency to develop physical symptoms or fears associated with personal or school problems"

10. Student also argues, without authority, that a student may be eligible under subdivision (E) if he is afraid of a specific assailant or of attendance at a specific school. However, that interpretation is at odds with the purpose of the eligibility requirements for ED. "Read naturally and as a whole, the law and the regulations identify a class of children who are disabled only in the sense that their abnormal emotional conditions prevent them from choosing normal responses to normal situations." (*Independent School Dist. No. 284 v. A.C.* (8th Cir. 2001) 258 F.3d 769, 775-776.) Thus,

"the critical inquiry" is "whether [the student's] reactions to everyday occurrences, such as teasing or frustration, were appropriate when considered in relation to how [his] peers would react." (*Torrance Unified School Dist. v. E.M.* (C.D.Cal., Aug. 21, 2008, No. CV 07-2164 CAS) 51 IDELR 11, 108 LRP 49372.) A student who reasonably fears a specific assailant on a specific campus is reacting as most of his peers would. He is exhibiting a normal response to a normal situation, not a reaction that is abnormal in comparison to his peers.

11. Moreover, to show eligibility under subdivision (E), the student must also appear to have a tendency to develop such abnormal fear "over a long period of time and to a marked degree." The use of the word "tendency" implies an inclination or predisposition as well as repetitive conduct. None of these qualifiers applies to a reasonable fear that is specific to a particular situation and is not lasting. And safety concerns on a campus are not abnormal. An on-going, reasonable fear of gang-related activity, for example, can be experienced by students generally. (*San Jacinto Unified School Dist. v. Student* (2009) Cal.Offc.Admin.Hrngs. Case No. 2008020225; *cf. Loch v. Edwardsville School District No. 7* (7th Cir. 2009) 52 IDELR 244, 109 LRP 37090 [nonpub. opn.][student in conflict with peers and teachers at a single campus not eligible for special education].) If Student's interpretation were correct, any student with a serious, continuing, and reasonable fear of violence on a troubled campus would be potentially eligible for special education. There is no basis for that conclusion.

Issue: Should the District have found Student eligible for special education and related services under the disability category of emotional disturbance (ED) from July 29, 2008, through March 9, 2009?

12. Based on Factual Findings 1-45, and Legal Conclusions 1-11, the District correctly concluded that Student was not eligible for special education and related services between July 29, 2008, and March 9, 2009. Whatever symptoms of depression

he may have manifested at home and in the offices of his therapists were not general or pervasive because they were not manifested at school and had no apparent educational effect. Student's fear of the Doe family was not marked and did not exist for a long period of time. His fear was reasonable and justifiable, and would have been the same reaction displayed by most of his peers in the same circumstances. Student's fear was of a single family of assailants at a single campus. He was not afraid of students generally, or of schools generally. His increasing academic difficulties were caused primarily by Parents' decision to keep him out of school, not by fear of the Does. His fear was not abnormal, and did not constitute a tendency to develop fears associated with school problems within the meaning of the applicable regulations.

## ORDER

1. Between July 29, 2008, and March 9, 2009, Student was not eligible for special education and related services under the category of emotional disturbance.
2. Student's request for relief is denied.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on the issues heard and decided. The District prevailed on the only issue heard and decided.

## RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety (90) days of receipt of this decision. (Ed. Code, § 56505, subd. (k).



Dated: April 13, 2010

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CHARLES MARSON

Administrative Law Judge

Office of Administrative Hearings