

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

LAKESIDE JOINT ELEMENTARY
SCHOOL DISTRICT.

OAH CASE NO. 2008060329

DECISION

Administrative Law Judge (ALJ) Suzanne Dugan, Office of Administrative Hearings (OAH), heard this matter on November 12, 13, and 14, 2008, in Los Gatos, California.

Student's mother (Mother) represented Student during the hearing. Student's father (Father) was present during the hearing.

Laurie Reynolds, Attorney at Law, represented Lakeside Joint Elementary School District (District). Bob Chrisman, Principal of Lakeside Elementary School, was present on behalf of District.

Student filed a third amended request for due process hearing on July 28, 2008. The matter was continued on August 29, 2008. At the hearing, the ALJ received sworn testimony and documentary evidence. The record remained open for the submission of written closing briefs until November 21, 2008, when the record was closed and the matter was submitted for decision.

ISSUE

Was Student eligible for special education and related services as a student with emotional disturbance (ED) from May 2007 to July 28, 2008?

FACTUAL FINDINGS

Background

1. Student is a twelve-year-old boy who resides with his adoptive parents within the jurisdictional boundaries of the District. He is enrolled in the seventh grade at Rolling Hills Middle School (Rolling Hills). Student began residing within the District in late 2005, and attended Lakeside Elementary School (Lakeside). Student is not currently eligible for special education and related services.

ED Assessment and Eligibility

2. In April 2007, at parent's request, the District assessed Student's eligibility for special education in the area of 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 services. Student contends that he is a student with ED and should have been found eligible for special education at the time the evaluation occurred. Student also contends that he continues to be eligible for special education as ED. The District contends that its assessments of Student were complete and thorough and determined that Student did not meet the eligibility requirements for ED.

3. Eligibility for special education services under the category of ED requires that the child exhibit one or more of certain characteristics over a long period of time, and to a marked degree, and that the child's educational performance be adversely affected. The characteristics are: an inability to learn which cannot be explained by intellectual, sensory, or health factors; an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; inappropriate types of behaviors or feelings under normal circumstances exhibited in several situations; a general pervasive mood of unhappiness or depression; and a tendency to develop physical symptoms or fears associated with personal or school problems.

Inability to learn which cannot be explained by intellectual, sensory or health factors

4. Mother acknowledges that Student is able to learn and participate in learning at school, but contends that his disability interferes with that learning. Mother contends that Student's Math Standardized Testing and Reporting (STAR) scores, standardized test scores, and IQ score dropped between the fifth and sixth grades. Mother agreed that Student is able to learn in the regular environment, but rather is concerned that his grades are slipping and he is not achieving up to his potential.

5. Leon Davis is an experienced, certificated school psychologist working for the District. Mr. Davis has been trained to determine eligibility for ED as a school psychologist, is knowledgeable about the eligibility criteria for ED, and has made hundreds of ED determinations over his 32 years in the field. Mr. Davis assessed Student in April 2007. Mr.

Davis administered the Wechsler Intelligence Scale for Children-IV (WISC-IV), which indicated that Student functioned in the high average range of cognitive ability, with similar verbal and nonverbal reasoning skills. There were no significant discrepancies between Student's general level of ability and his academic performance. Mr. Davis' testimony established that Student's scores show that he has the ability to learn in the regular educational environment. Student asked for assistance when needed, and had a good sense of humor. As part of his assessment, Mr. Davis observed Student interact with peers in the classroom and on campus. Student is able to have appropriate peer interactions and Mr. Davis did not see any indication that Student was not establishing relationships with his peers. Mr. Davis acknowledged that Student's parents expressed concern about Student's behavior, but he did not see evidence of inappropriate behavior at school. Further, Mr. Davis did not observe, and Student's teachers did not report, Student to have a general mood of unhappiness or depression. Mr. Davis credibly established that, based upon his assessment, Student did not meet the eligibility requirements for ED. Mr. Davis formed his opinion after reviewing Student's file, talking with Student's teachers and observing Student. Mr. Davis' testimony established that Student's needs could be met in the regular classroom, that he is able to learn in the regular environment and that he was accessing his education.

Inability to build or maintain satisfactory interpersonal relationships with peers and teachers

6. Mother contends that Student has been diagnosed with Attachment Disorder. According to Mother, Student was able to form friendships while he attended Lakeside, but has been unable to form true friendships at Rolling Hills. Mother does not allege an inability to build or maintain satisfactory interpersonal relationships with teachers. Mother established that when Student began middle school in 2007, Mother found Student's behavior increasingly difficult and his grades declined. Sometimes he harassed other students. Mother established that Student's behavior is worse at home than when he attends middle school. Student has splintered his bedroom door, argued over homework, and hit Mother, resulting in bruises on her arms. Student behaves inappropriately at times with peers and with his mother. Mother established that on August 15, 2008, Student untruthfully accused a girl of raping Student, which led to rumors being spread about the girl.

7. As stated above in Factual Finding 5, school psychologist Leon Davis observed Student as part of ED assessment in April 2007. Mr. Davis felt that Student did not meet the second criteria for ED as Student is able to have appropriate peer interactions. He recognized that Student's parents and teachers had concerns regarding Student's hyperactivity, aggression, conduct problems and other behavior symptoms, but Mr. Davis found that this did not interfere with Student's ability to perform academically. School personnel whom he interviewed described Student having positive interactions with others. Mr. Davis found that Student showed an interest in interacting with people, although Student was guarded in describing family interactions. He found that Student laughed when appropriate and asked for assistance when needed. Student did not have a pervasive sense of depression or unhappiness.

8. Heather Wingfield taught Student in the fifth grade at Lakeside. Ms. Wingfield established that Student improved academically and that he had close friends at school. The following year Student maintained his relationship with Ms. Wingfield, discussing situations when he got into trouble at Rolling Hills. Ms. Wingfield established that Student is able to maintain an interpersonal relationship with his teachers, and there was no evidence to the contrary.

9. The testimony of Kimberly Thompson, Student's social studies and language teacher in the 2007-2008 school year, established that Student's behavior and attention were typical for sixth grade boys. Ms. Thompson has taught the sixth grade for sixteen years at Rolling Hills. Her experience gives her a broad perspective on the behavior of children of that age and how they relate to each other. Ms. Thompson described having a good relationship with Student. She did not have to discipline him more than other students. If Student was asked to pay attention, he focused back on task. Student never had an attitude suggesting that he did not have to pay attention to his teacher. He made academic progress and had the ability to learn. Ms. Thompson did report that Student had difficulty turning in his homework and in organizing his work. He was able to build and maintain interpersonal relationships with peers. He did not harass other students and his interactions with other students were "normal." Student liked to tease other students, but if she asked Student to stop, he complied with her request and was not defiant. When Student was absent from school for a period of time, another student asked where Student was. Ms. Thompson concluded that Student formed a relationship with other student. She observed that Student communicated with and maintained relationships with other children.

10. Randy Cohen has a resource specialist credential and taught Student at Lakeside during fifth grade. He saw Student daily in class and at recess. Based on Mr. Cohen's observation of Student both academically and socially in the classroom, he found that Student actively participated in group discussions and that Student was not inappropriate. Mr. Cohen performed the Woodcock Johnson test on Student as part of the ED assessment. Mr. Cohen found that Student took the test very seriously. Student was attentive, focused and tried to do his best. Student seemed relaxed. Mr. Cohen presented his assessment at the May 2007 IEP meeting and reported that Student performed within the average range of academic achievement. He recommended a "504 plan" for Student to help in the general classroom because he believed Student's academic performance could improve. Further, Mr. Cohen observed Student relating to other students and to teachers. Based on his experience, his testimony is given substantial weight and established that Student was able to form and maintain relationships with his peers and his teachers.

11. As discussed in Factual Findings 8 to 10, the persuasive testimony of Student's teachers in the fifth and sixth grade establish that Student was able to form and maintain relationships with his peers. Student's teachers have the ability to observe Student relating to his peers on a daily basis in the school environment and are in the best position to analyze Student's behavior with other children at school. The evidence showed, and Mother concedes, that Student was able to build or maintain interpersonal relationships with his teachers. The ED eligibility criteria require both an inability to build or maintain

interpersonal relationships with other students and with teachers, but the evidence showed that Student was able to build and maintain interpersonal relationships with both his fellow students and teachers.

Inappropriate types of behaviors and feeling under normal circumstances exhibited in several situations

12. Mother contends that Student has inappropriate and disruptive behavior such as throwing dirt clods at students, taking a ball from another student, and pushing another student. Mother testified that Student's behavior has escalated since attending Rolling Hills as he no longer has his peers who were positive role models at Lakeside. In addition, Mother stated that Student wanted to watch porn at home and he harassed other students. Mother explained one situation where Student offered a girl \$20 to be his girlfriend and later spread untrue rumors about her. Student also becomes angry and defiant at home when doing his homework. Mother contends that Student's behavior has deteriorated since he began attending Rolling Hills, which is out of their community, and that he is heavily influenced by his peers.

13. As discussed in Finding of Fact 10, Randy Cohen, Student's fifth grade teacher, was knowledgeable about boys in Student's age group and his testimony reflected Student had average social skills. Student was reprimanded for yelling and not taking turns, which was common behavior for students in the fifth grade. On the playground at Lakeside, Mr. Cohen benched Student occasionally when Student was behaving unacceptably. This occurred when Student yelled or did not play using the rules of the game. Although Student's behavior has presented problems with peers occasionally, the problems were not significant and were not unusual for kids in his age range.

14. Further, as stated in Factual Findings 5, and 7 through 10, Student's other teachers and the school psychologists did not find any indication that Student had inappropriate behaviors at school other than what were described as those normal for children in his age group. Further, there was no evidence that Student behaved inappropriately or had inappropriate feelings under normal circumstances in several situations. The totality of the evidence showed that Student's behavior was not highly unusual compared to other sixth grade boys.

General pervasive mood of unhappiness or depression

15. Mother contends that Student suffers from depression and that this could explain why he does not want to do his school work. However, the evidence at hearing did not substantiate this contention.

16. Sheryl Spencer, Student's resource teacher at Rolling Hills, established that Student was an attentive and eager learner who was not nervous, anxious or scared. Also, as discussed in Factual Findings 5, Mr. Davis did not find a general pervasive mood of unhappiness or depression. Mr. Davis found that Student had a good sense of humor, as did

Mr. Cohen. Further, Nancy Sullivan, who performed a neuropsychological evaluation in May 2007, found Student unable to access his emotional self or unwilling to reveal his emotional core, partly caused by Student's early chaotic life. Ms. Sullivan believed Student was depressed, but not to a degree that would prevent him from being educated in the general classroom. Ms. Sullivan suggested recommendations for support to allow Student to be educated in the general education classroom with academic and emotional supports.

Tendency to develop physical symptoms or fears

17. Mother believes that Student fears being attacked at school and uses other students as his bodyguards. However, her theory was not supported by any evidence or additional testimony to substantiate this claim. Testimony of the educators who observed Student daily does not support the contention that Student feared being attacked at school and there is no evidence to find that Student developed physical symptoms or had other fears. There was no evidence to support a finding that Student had a tendency to develop physical symptoms or fears.

Adversely affects educational performance

18. Judy Meyer is an experienced, certificated school psychologist who worked for the District and conducted a Behavior Assessment for Children, Second Edition (BASC II), of Student in the spring of 2007. Student scored in the clinically significant range, defined as serious areas of concern. This does not mean that Student is emotionally disturbed, but is part of the information to be considered with other tests. Student's parents rated issues significantly higher than did Student's teacher. Student's conduct is better at school than at home. If a student is emotionally disturbed, Ms. Meyer established that they are disturbed in every setting, whether at school, at home, or at play. Ms. Meyer found that Student had a good relationship with his current teacher who set clear expectations. According to Ms. Meyer, Student built rapport and had the ability to establish interpersonal relationships. Student felt it was acceptable to be more aggressive at home than at school to get what he wanted. Student's STARS scores and academic testing showed Student to be learning and progressing academically, and his English-language arts level was basic and his math and science levels were proficient. Student did not have significant social difficulties. There was no evidence of general unhappiness or depression. Student did not have fear developed school problems. Ms. Meyers established that Student's needs could be met in the regular education classroom. Further, according to Ms. Meyers', the Diagnostic and Statistical Manual of Mental Disorders (DSM) is not used to determine eligibility for ED in the educational setting. If the Student is able to learn in the school setting, he is not emotionally disturbed in the educational setting.

19. Nancy Sullivan is an experienced psychologist hired by Student's parents to conduct a private assessment in April 2008. Ms. Sullivan conducted a neuropsychological evaluation of Student in April 2008 at parents' request, and concurred with Ms. Meyer and Mr. Davis, that Student did not qualify as emotionally disturbed and did not meet the eligibility criteria for special education. Ms. Sullivan concluded that Student has disordered

attachment with no sense of feeling safe. Ms. Sullivan did not recommend an IEP for Student, but she did recommend supports in school through a 504 plan to allow Student to be educated in the least restrictive environment. Ms. Sullivan found that Student has strong cognitive capabilities, but poorly regulated behavior. Ms. Sullivan's credible testimony supported District's finding that Student does not qualify for special education under ED.

20. Craig Clark, a marriage and family therapist, who has treated Student since March 2008, conducted a mental status exam to assess Student. Mr. Clark found Student met the criteria of a child with serious emotional disturbance as defined in the DSM based upon Mr. Clark's diagnosis of reactive attachment disorder, post traumatic stress disorder, physical abuse of child, and neglect of child, which resulted in complex trauma. However, the DSM is not used to establish educational criteria for ED. Craig Clark credibly and informatively testified, but Mr. Clark did not have the expertise to identify emotional disturbance criteria for special education. He did not review Student's academic achievement records, talk with Student's teachers, nor observe Student at school. His observations were limited to therapy sessions with Student, while parents were in the room. Ms. Meyer, Mr. Davis, and Ms. Sullivan's conclusions were more persuasive and entitled to more significant weight than Mr. Clark's because Mr. Clark was not trained to identify criteria for emotional disturbance in the educational setting and he had only known Student since March 2008, and not during the time of the initial assessment.

21. Additionally, Trisha Green, a District school psychologist, assessed Student in September 2008 by agreement of the parties. Ms. Green's September 12, 2008 report corroborates the April 2007 assessment finding that Student did not meet the eligibility criteria for emotional disturbance. Student's classroom behavior had been effectively managed by school staff. Student's behavioral problems were greater at home than at school. Ms. Green found that Student demonstrated significant emotional conduct issues, but these issues did not interfere with his academic performance at school. Student's standardized academic scores were within the average range and Student had passing grades.

LEGAL CONCLUSIONS

Applicable Law

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

2. Pursuant to California special education law and the Individuals with Disabilities in Education Act (IDEA) children with disabilities who are found eligible for services have the right to a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the state educational standards, include an appropriate school

education in the state involved, and conform to the child’s IEP. (20 U.S.C. § 1401(9).) “Special education” is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(29).)

3. Similarly, 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, § 56031.) The term “related services” includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(26).) In California, related services may be referred to as designated instruction and services (DIS). (Ed. Code, § 56363, subd. (a).)

4. The term “child with a disability” includes a child with serious emotional disturbance (ED) who, by reason thereof, needs special education and related services. (20 U.S.C. § 1401(3)(A).) California law defines “individuals with exceptional needs” as those persons who are identified as a “child with a disability”, and that impairment “requires instruction, services, or both, which cannot be provided with modification of the regular school program.” (Ed. Code, § 56026, subd. (b), 56031.)

Eligibility

5. Under both California law and the IDEA, a child is eligible for special education if the child needs special education and related services by reason of ED. (20 U.S.C § 1401(3)(A)(i) and (ii); Cal. Code Regs., tit. 5, § 3030.) A child meets eligibility criteria for ED if the child exhibits one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance:

- (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;
- (5) A tendency to develop physical symptoms or fears associated with personal or school problems.

(Cal. Code Regs., tit. 5, § 3030, subd. (i).)

6. Social maladjustment alone is not sufficient to render a student eligible for special education as ED. (Ed. Code, § 56026, subd. (e).)

7. 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, 492-493.) If the district failed to identify a student as eligible for special education, and therefore failed to develop an appropriate IEP for the student, the district has denied a FAPE. (*Dep't. of Educ. v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp.2d 1190, 1196-1197.) An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged exclusively in hindsight. (*Adams by & Through Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) “An IEP is a snapshot, not a retrospective.” (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

8. As stated in Factual Findings 2 to 21, and applying the legal principles stated in Legal Conclusions 1 to 7, Student was not eligible for special education and related services under the category of ED from May 2007 to July 28, 2008. As established in Factual Findings 4 to 17, Student did not show an inability to learn which cannot be explained by intellectual, sensory or health factors, or an inability to build or maintain satisfactory interpersonal relationships with peers and teachers, or inappropriate types of behaviors and feeling under normal circumstances inhibited in several situations, or a general pervasive mood of unhappiness or depression, or a tendency to develop physical symptoms or fears. As established in the Factual Findings 5 to 16, 18 and 19, Student can learn in the regular classroom with appropriate supports. The evidence does not support a finding that Student has an impairment which requires instruction, services, or both that cannot be provided with modification of the regular school program. The behavior and information reported showed that Student had some emotional issues, but they were marginal when compared with other students his age, and they did not affect his ability to perform in the academic setting.

ORDER

1. Student is not eligible for special education and related services as a student with emotional disturbance.
2. Student's request for relief is denied.

