IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

S.M., A MINOR, BY AND THROUGH HER
GUARDIAN AD LITEM, SOCORRO M.,
Plaintiff and Petitioner,
v.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES,
Respondent;

LOS ANGELES UNIFIED SCHOOL DISTRICT,
Real Party in Interest.

S285055

AFTER A DECISION BY THE
CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIV. 5,
CASE NO. B337359
HON. RICHARD FRUIN, TRIAL JUDGE
LOS ANGELES COUNTY SUPERIOR COURT CASE NO. BC704733

ANSWER TO S.M., A MINOR, BY AND THROUGH HER GUARDIAN AD LITEM, SOCORRO M.'S PETITION FOR REVIEW AND REQUEST FOR IMMEDIATE STAY OF MAY 21, 2024 TRIAL BY LOS ANGELES UNIFIED SCHOOL DISTRICT

VANDERFORD & RUIZ, LLP
Rodolfo F. Ruiz, SBN 163877
Erin E. Uyeshima, SBN 258203
77 North Mentor Avenue
Pasadena, CA 91106
Telephone: (626) 405-8800
rruiz@vrlawyers.com
euyeshima@vrlawyers.com

ATTORNEYS FOR DEFENDANT AND REAL PARTY IN INTEREST

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I. INTRODUCTION

In *Doe v. Superior Court* (*Mountain View School District*), 15 Cal. 5th 40 (2023), this Court addressed the following question: "Does Section 1106, Subdivision (e), Allow Admission of the Same Evidence Prohibited Under Subdivision (a) to Attack the Credibility of a Witness's Testimony as it Relates to Apportionment of Injury in the Calculation of Damages?" *Id.* at 56. The High Court answered that question in the affirmative if the requirements of Cal. Evidence Code sections 1106 and 783 are met. The trial court in this case carefully followed the *Mountain View School District* opinion in making its decisions. Because the procedural questions posed by the Petition have been answered previously, and because the trial court committed no legal error, the Petition should be denied.

In this case, Plaintiff was a learning-disabled student who was sexually assaulted during the afternoon of December 7, 2016, at her middle school by a special education assistant who groped her buttocks and allegedly touched her private parts. (Ex. 40, p. 9). Before the end of that school day, two students reported this misconduct to the school principal and the Los Angeles Unified School District ("School District") acted swiftly to suspend and then terminate the special education assistant who was arrested the same day. (Ex. 40, p. 13). Plaintiff treated with a mental health provider after this 2016 incident but stopped receiving treatment after she stabilized and improved. (Ex. 18, pp. 476-478). Three years later, Plaintiff was sexually assaulted and raped multiple times in 2018-19 by the boyfriend of her sister. (Ex. 18, p. 477; Ex. 38, pp. 1057-1058). The perpetrator of these crimes was convicted and sent to prison. (Ex. 38, pp. 1057-1058; Ex. 18, p. 530). Plaintiff went to therapy after the sexual assaults of 2018-19. (Ex. 18, pp. 478-479, 584-586).

In the current case, Plaintiff, her guardian ad litem, and her psychological experts have given conflicting testimony about the causes of Plaintiff's current emotional distress. Plaintiff's guardian ad litem has testified that no events after 2016 caused Plaintiff's emotional distress. (Ex. 32, p. 954; Ex. 44, p. 57). Plaintiff

has testified she is not aware what caused certain of her current symptoms of emotional distress. (Ex. 18, pp. 519-521). Plaintiff's retained psychological expert has opined that the events of 2016, and the later 2018-19 events both contributed to Plaintiff's current emotional distress, but that somehow the 2016 groping was the most significant. (Ex. 18, pp. 557-558; Ex. 45).

Plaintiff has provided testimony directly and through others that puts her memory and accuracy in dispute, making the evidence of Plaintiff's 2018-19 sexual assaults relevant. The trial court correctly analyzed the admissibility of this evidence under Cal. Evidence Code sections 1106 and 783. *Mountain View School District,* 15 Cal. 5th at 56. "The procedures set out in section 783, subdivisions (a)-(c), call for a written motion, an affidavit accompanied by an offer of proof, and a hearing outside the presence of any jury at which there may be questioning of the plaintiff." *Id*. at 57. Here, the School District did submit a written motion with an affidavit accompanied by an offer of proof. (Exs. 3, 4, 10, 16, 22, 23). The trial court also held a hearing on February 2, 2024, where it ruled that the evidence presented at the hearing was relevant to impeach the Plaintiff. (Ex. 32, p.956).

Plaintiff unfairly accuses the trial court of failing to hear witness testimony for purposes of section 783. However, at the February 2, 2024 hearing, the Plaintiff objected to any witness other than Plaintiff giving testimony. (Ex. 30, pp.879-880). When the trial court then proposed that live testimony was not needed, and that the evaluation of relevance of the evidence at issue could be done with the submission of deposition transcripts in lieu of testimony, Plaintiff did not object. (Ex. 30, pp. 851-852, 880-882). Similarly, Plaintiff did not object to having the trial court perform the Cal. Evidence Code section 352 analysis based on the written materials submitted by the School District, including the police report concerning the subsequent sexual assaults and rapes suffered by Plaintiff at the hands of her sister's boyfriend. (Ex. 34, p. 987). Indeed, Plaintiff's counsel stated on the record there was no reason to call live witnesses for the section 352 hearing. (Ex. 34, 971-972). Under these circumstances, Plaintiff should be deemed to have waived any

objection that the trial court did not take live testimony from witnesses for the 783 or 352 hearings. *Doers v. Golden Gate Bridge etc. Dist*., 23 Cal. 3d 180, 184 (1979) (explaining "'An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been but was not presented to the lower court by some appropriate method . . . . [. . .] it is unfair to the trial judge and to the adverse party to take advantage of an error on appeal when it could easily have been corrected at the trial.'"); *see also, Tanguilig v. Valdez*, 36 Cal. App. 5th 514, 523 (2019)(explaining "generally, '[p]rocedural irregularities or erroneous rulings in connection with the relief sought or defenses asserted will not be considered on appeal where a timely objection could have been made but was not made in the court below'"); *Farag v. ArvinMeritor, Inc*., 205 Cal. App. 4th 372, 380 (2012) (explaining "'[a]n appellate court will ordinarily not consider procedural defects or erroneous rulings … where an objection could have been, but was not, presented to the lower court by some appropriate method.'").

Ultimately, the trial court conducted a probing inquiry pursuant to Cal. Evidence Code section 352 to evaluate the admissibility of evidence about the 2018-19 sexual assaults and their psychological effects on Plaintiff. With an eye towards limiting the emotional impact upon Plaintiff during trial, the trial court ruled that other witnesses should testify about the 2018-19 sexual assaults instead of Plaintiff. (Ex. 38, pp. 1058-1059). Plaintiff would only testify about issues of emotional distress. (Ex. 38, pp. 1058-1049). The trial court also ruled that no details of the 2018-19 sexual assaults should be discussed. (Ex. 38, p. 1059; Ex. 43). The trial court did not abuse its discretion in coming to these conclusions.

Throughout this process, counsel for Plaintiff refused to consider reasonable stipulations to minimize the impact of any sensitive testimony or evidence about the 2018-19 sexual assaults, whether offered by the School District or the trial court. Instead of allowing the School District to impeach the lack of memory or inaccuracy of Plaintiff and Plaintiff's affiliated witnesses, Plaintiff prefers to use

section 783 to prevent the School District from putting on its defense. This cannot and should not be the law.

II. BACKGROUND

This case arises from Plaintiff S.M.'s (hereinafter "S.M..") claim she was sexually abused at Griffith Middle School, by a special education assistant, Joshua Estrada (hereinafter "Estrada") from November to December 2016, at Griffith Middle School. (Ex. 1, p. 10-11). Plaintiff sues the Los Angeles Unified School District (hereinafter "the School District") alleging negligence pursuant to Gov. Code §§ 815.2 and 820. (Ex. 1, p. 13). Plaintiff also sues Estrada, alleging sexual abuse of a minor. (Ex. 1, p. 12). Plaintiff's lawsuit was brought on Plaintiff's behalf, by and through her guardian ad litem, Socorro M., who is her mother. (Ex. 1, p. 8).

During the 2016-2017 school year, Plaintiff was a seventh-grade special education student at Griffith Middle School. (Ex. 40, p. 9). On December 7, 2016, two students reported to Griffith Middle School administrators that they saw Estrada touching Plaintiff's buttocks during P.E. class. (Ex. 40, p. 10). School Principal Rose Ruiz immediately contacted law enforcement, who responded to the school and investigated. (Ex. 40, p.10). Estrada was escorted off campus, reassigned, and arrested by law enforcement the same day. (Ex. 40, p.13). Shortly thereafter, Estrada was separated from the School District. (Ex. 40, p. 13). Although Plaintiff stated in the complaint she was abused from November through December 2016, she testified unequivocally in her deposition that Estrada did not touch her before the time he touched her in P.E. (Ex. 40, p. 9). Thus, the first time Estrada touched Plaintiff, according to Plaintiff's sworn deposition testimony, was on December 7, 2016, when Estrada groped Plaintiff's buttocks.

Plaintiff's third cause of action against the School District for breach of mandatory duty: failure to protect suspected child abuse pursuant to Gov. Code § 815.6, was summarily adjudicated in favor of the School District on February 22, 2022, and dismissed. (Ex. 41). The School District asserts as an affirmative defense

that it is not liable for damages inflicted on Plaintiff by any person's acts or omissions for whom the School District is not legally responsible, pursuant to Gov. Code § 820.8, the provisions of Proposition 51, and Civil Code § 1431.2. (Ex. 2, p. 26).

A. Motions In Limine Regarding Evidence of Subsequent Sexual Assaults

Citing *Doe v. Superior Court (Mountain View School District)*, 71 Cal. App. 5th 227 (2021), the School District brought a motion in limine, "for an order allowing evidence that Plaintiff was sexually assaulted in approximately 2019," which included an offer of proof and a request for a preliminary hearing outside the presence of the jury pursuant to Cal. Evid. Code § 783. (Ex. 3, pp.33-44, Ex. 4, pp. 45-126). Plaintiff brought a motion in limine seeking to exclude the same evidence. (Ex. 5). Subsequently, this Court granted review of the *Mountain View School District* case. (Ex. 11).

Following this Court's opinion in *Mountain View School District*, the parties submitted supplemental briefs to the trial court regarding the School District's Motion in Limine No. 2 and Plaintiff's Motion in Limine No. 4. (Exs. 13, 14, 15, 16, 17, 18, 19). The School District submitted offers of proof set forth in the Declarations of Diana Cho filed with its motion and reply. (Exs. 7, 10). With its supplemental brief, the School District submitted a further offer of proof set forth in the Declaration of Erin Uyeshima. (Ex. 16).

B. The School District's Offers of Proof Pursuant to Cal. Evid. Code § 783 (b)

In the School District's offers of proof, Ms. Uyeshima stated that throughout the litigation, Plaintiff has claimed she suffers severe emotional distress because of being inappropriately touched by Estrada on December 7, 2016, during P.E. class. (Ex. 16, p. 353). The School District attached Plaintiff's responses to Form Interrogatory 6.1 – 6.3, where Plaintiff's guardian ad litem stated that <u>because of the incident</u>, Plaintiff suffered from and continues to suffer from difficulty sleeping,

fear, anxiety, difficulty eating, headaches, changes in behavior, and trauma. (Ex. 16, pp.367-368) (emphasis added). Plaintiff's interrogatory responses were verified under penalty of perjury by Plaintiff's guardian ad litem, Socorro M. (Ex. 16, p. 384).

The School District also attached interrogatory responses where Plaintiff's guardian ad litem identified the Violence Intervention Program ("VIP") as a place where Plaintiff received consultation, examination, or treatment for injuries she attributes to the Estrada incident. (Ex. 16, p. 418-421). Ms. Uyeshima described that the records from VIP indicate "Plaintiff was raped by her sister's boyfriend in approximately 2019 and that she was seeking treatment as a result." (Ex. 16, p. 354). The School District also attached deposition testimony from VIP therapist Brenda Sanchez recounting that Plaintiff first came to VIP in May 2019, because Plaintiff was seeking treatment for a sexual assault in March 2019, by her brother-in-law. (Ex. 16, pp. 461-463).

Ms. Uyeshima also declared that Plaintiff's mental health treatment records would show the following history and stated true and correct copies of the records would be provided to the trial court at the upcoming hearing:

- Following the December 7, 2016 Estrada incident, Plaintiff sought mental health treatment from Alma Family Services from February 28, 2017 to May 1, 2018. In the last session, on May 1, 2018, Plaintiff reported the intensity of symptoms had reduced from a 10 at the beginning of treatment to a 0 (on a 0-10 scale). (Ex. 16, p. 354).
- Plaintiff was treated at Ashley Psychology Center from March 19, 2018 to August 21, 2018. In her last session at Ashley Psychology Center, Plaintiff said she no longer had nightmares, and did not feel afraid, nervous, or sad. The records indicate that Plaintiff took a break from treatment because her symptoms had improved. (Ex. 16, p. 355). Thus, the treatment records showed that Plaintiff no longer

attended therapy sessions after the Estrada incident because her condition had improved and stabilized.

The School District submitted deposition testimony from Plaintiff that she was raped by "Estevan Vasquez," her sister Graciela's boyfriend, who was in jail. (Ex. 16, pp.404-407). Vasquez committed multiple acts of sexual abuse and statutory rape against Plaintiff in 2018-19. (Ex. 38 p. 1057-1058). However, after 2019, the Plaintiff, Plaintiff's guardian ad litem, and Plaintiff's treating and retained experts provided conflicting accounts of what happened to Plaintiff after 2016, and the source of Plaintiff's emotional distress symptoms after 2016. The School District submitted these conflicting accounts to the trial court for the February 2, 2024 hearing.

The School District provided deposition testimony from guardian ad litem Socorro M. that was given on February 18, 2020, that *because of* the Estrada incident, Plaintiff cries when she's alone, bites her nails, rips her clothes, gets mad out of nowhere, and is no longer the same person she was before. (Ex. 16, p. 388). Plaintiff's guardian ad litem made no mention of the multiple sexual assaults and statutory rapes committed by Esteban Vasquez against Plaintiff in 2018-19.

The School District also provided deposition testimony from Plaintiff that was given on February 12, 2020, that Plaintiff doesn't remember going to see any doctors or psychologists because of the 2016 Estrada incident. (Ex. 16, p.393). The School District submitted testimony from Plaintiff that she has difficulty sleeping which started when Estrada first touched her and feels scared but doesn't know what makes her feel scared. (Ex. 16, pp. 395-397). The School District provided deposition testimony that Plaintiff had a loss of appetite in the past and was nervous when out in public but doesn't remember when it started. (Ex. 16, p. 396, 400-401).

The School District also submitted deposition testimony from Plaintiff's expert psychologist, Dr. Betty Jo Freeman, that Dr. Freeman gave on January 27, 2022, after she interviewed Plaintiff. Dr. Freeman opined that the primary damage to Plaintiff was caused by the Estrada incident because it is "what set the stage and

created a different person." (Ex. 10, p. 260). Dr. Freeman testified there was a high correlation of revictimization for people who have been molested once. (Ex. 10, p. 261). Dr. Freeman opined that Plaintiff is more delayed now in developing skills such as showering by herself, washing her hair, and taking care of her own periods, because of the sexual abuse. (Ex. 10, p. 264). Dr. Freeman testified the injuries Plaintiff suffered because of the abuse by Estrada and Vasquez are cumulative. (Ex. 10, p. 265). Dr. Freeman testified that in terms of the identity of the abusers, Plaintiff and her guardian ad litem referenced Estrada and not Vasquez. (Ex. 18, pp. 561-560). Dr. Freeman testified she was concerned about secondary gain when she heard that. (Ex. 18, pp. 561). Dr. Freeman testified she was concerned Plaintiff was told not to talk about Vasquez. (Ex. 18, pp. 561-562).

Finally, the School District submitted deposition testimony from defense expert psychologists, which included testimony from Dr. Talin Babikian and Dr. Jack Schnel. Dr. Babikian testified on January 28, 2022, that Plaintiff's traumatic experiences cannot be separated cleanly because the experiences "tend to be cumulative," and the only factor that helps distinguish the cause of Plaintiff's symptoms is the "timing of the events." (Ex. 16, p. 445). Dr. Jack Schnel testified that it is difficult to separate the Estrada incident with the subsequent rape, and the subsequent rape was more traumatic, and therefore, it is difficult to place all the focus of the cause of Plaintiff's symptoms on what happened with Estrada. (Ex. 16, pp. 452-454).

C. Evidentiary Hearing Pursuant to Cal. Evid. Code § 783 (d)

The trial court found that the School District's motion satisfied the requirements of Evid. Code § 783 (a) and (b) and set a hearing pursuant to subdivision (c) for the purpose of making a further order under subdivision (d) about what evidence may be received at trial. (Ex. 28, p. 841). The trial court ordered Plaintiff and her guardian ad litem to be present to testify. (Ex. 28, p. 841). The trial court also ordered Plaintiff to provide medical documentation that shows

she sought or received medical attention for emotional distress or symptoms thereof after the 2019 sexual assault(s). (Ex. 28, p. 841).

The evidentiary hearing was held on February 2, 2024. (Ex. 30). Plaintiff and her guardian ad litem, Socorro M., were present. (Ex. 30, pp. 849-850). The School District subpoenaed witnesses to testify at the hearing, including VIP therapist Brenda Sanchez, plaintiff's sister Graciela M., and the police detective who investigated the 2018-19 sexual assaults by Vasquez. (Ex. 30, pp. 856-858). During the hearing, Plaintiff's counsel stated that she wasn't prepared to bring in live witnesses to counter the School District's witnesses. (Ex. 30, p. 879-880).

The trial court asked Plaintiff's counsel: "[a]ren't you saying that Selena's testimony supports the notion that she suffered emotional distress from the 2016 sexual assault and the later 2018, 2019 sexual assault but because she's so open about that, she can't testify and defendants can't raise issues of emotional distress arising from the 2018, 2019 sexual assaults?" (Ex. 30, p. 866). Plaintiff's counsel was unable to answer the trial court's question and would not concede that Plaintiff's position was that "having admitted the relevance of the second incident of sexual assault," the evidence becomes inadmissible "because it doesn't attack her credibility." (Ex. 30, pp. 866-868). The trial court stated that such an argument "seems to be kind of a blind ally." (Ex. 30, pp. 869). Defense counsel explained that the problem with Plaintiff's position was that "even though Plaintiff is admitting she has . . . [e]motional distress from the second assault, the jury would be free to award presumably damages for assaults that legally defendant is not responsible for." (Ex. 30, pp. 869).

After questioning the attorneys about the evidence to be presented in the preliminary hearing, the trial court ruled it did not need to hear live testimony because it did not believe there was a contested issue of fact and because the trial court determined that review of deposition testimony from the parties was adequate. (Ex. 30, p. 880-882, 889). The trial court requested that both sides submit a proposed order; a special verdict form; and highlighted deposition transcripts to be

lodged with the trial court. (Ex. 30, p. 888, 892). Plaintiff did not object to the trial court's decision to not hear live testimony and did not object to the trial court's request for highlighted deposition transcripts in lieu of testimony. (Ex. 30, pp. 880-88).

The School District lodged highlighted transcripts of the depositions of guardian ad litem Socorro M., Plaintiff, and Plaintiff's psychological expert Dr. Betty Jo Freeman, as well as Plaintiff's responses and amended responses to interrogatories. (Ex. 31). Upon review of those records, the trial court signed the School District's proposed order on the evidentiary hearing pursuant to Cal. Evid. Code § 783. (Ex. 32). In its order, the trial court made several findings based on the review of deposition testimony and discovery, including:

- Plaintiff and Plaintiff's psychologist, Dr. Freeman testified Plaintiff was sexually assaulted by Esteban Vasquez, on multiple occasions in 2019;
- Plaintiff and Dr. Freeman testified Plaintiff suffered emotional distress requiring treatment from both the Estrada incident and abuse by Vasquez;
- However, Plaintiff's guardian ad litem testified in deposition that Plaintiff suffered no other sexual assault other than at the hands of Joshua Estrada;
- Plaintiff's guardian ad litem gave a verified interrogatory response to Form Interrogatory No. 10.3 denying that Plaintiff suffered injuries after 2016 of the kind that Plaintiff is now claiming for the sexual battery by Estrada;
- Plaintiff's guardian ad litem gave verified discovery responses to Form Interrogatories Nos. 6.2 and 6.3 stating Plaintiff's current symptoms are attributable to the Estrada incident; and
- Plaintiff's guardian ad litem identified VIP as a place where Plaintiff sought treatment because of the Estrada incident.

(Ex. 32, pp.953-954).

The trial court ruled that "because the Guardian ad Litem has spoken for the Plaintiff in the verified Form Interrogatory response in this matter, the Court finds the type of evidence proposed by the School District about the subsequent sexual assaults by Vasquez, is relevant to impeach the Plaintiff." (Ex. 32, p. 955).

The trial court ordered the parties to meet and confer about a stipulation to matters that could be agreed upon concerning the 2018-2019 sexual assaults by Vasquez, the emotional damage caused by those assaults, and the medical treatment received. (Ex. 32, p. 955). For any matters not stipulated to, the trial court ordered it would hold a Cal. Evid. Code § 352 hearing regarding the documentary and testimony evidence that could be admitted by the School District. (Ex. 32, p. 956).

D. Cal. Evid. Code § 352 Hearing

The trial court held a Cal. Evid. Code § 352 hearing on April 24, 2024. (Ex. 36). Plaintiff's counsel stated there was no reason to call live witnesses at the hearing. (Ex. 34, pp. 971-972). Prior to the hearing, the parties met and conferred about evidence that would be used at trial regarding the subsequent 2018-19 sexual assaults committed by Vasquez. (Ex. 34, p. 973). The School District proposed stipulating to proposed facts or to using video clips from the depositions of Plaintiff and Plaintiff's therapist. (Ex. 34, p. 973). Plaintiff's counsel stated they would not stipulate to anything. (Ex. 34, p. 973). At the hearing, Plaintiff rejected the trial court's proposal of a stipulation that a second sexual assault committed by Vasquez occurred and describing the period of time over which it occurred. (Ex. 36, p. 1029-1030).

During the hearing, the trial court explained that the admission of evidence would depend on how Plaintiff testifies at trial. (Ex. 36, pp.1031-1032). The trial court explained that if Plaintiff says that nothing else happened to cause her similar emotional distress, then "it opens a wider door that Defendants may use to impeach her." (Ex. 36, p. 1031). Plaintiff's counsel stated at the hearing that Plaintiff's expert "should be able to explain why the emotional harm that [plaintiff] is

suffering now or suffered since that subsequent sexual assault was aggravated as a result of the assault from Estrada. And also, that she was more vulnerable to Mr. Vasquez's grooming of her because of the first assault." (Ex. 36, pp. 1034-1035).

Following that hearing, the trial court "having weighed all the information provided in this case, finds that evidence of the 2019 sexual assaults perpetrated against plaintiff has significant probative value on the damage issues to be proved by plaintiff, namely the causation for emotional injury and damages for emotional injury." (Ex. 38, p. 1057). The trial court concluded "that LAUSD cannot obtain a fair trial on the issues of causation and damages without permitting the jury to consider the evidence of the 2019 sexual assaults." (Ex. 38, p. 1057). The trial court noted that because Plaintiff has developmental disabilities, the trial court would impose limits on her cross-examination relating to the 2019 sexual assaults. (Ex. 38, p. 1057). The trial court advised that evidence about the Vasquez assaults should come in through the investigating detective, and not the Plaintiff. (Ex. 38, p. 1058). The trial court warned that the cross-examination of Plaintiff "should be focused on her emotional reactions to the 2019 sexual assault rather than on their details." (Ex. 38, p. 1059). The trial court declared it "intends to actively oversee the LAUSD's examination of plaintiff." (Ex. 38, p.1059). The trial court stated, "the specifics of the 2019 sexual assaults can be put into evidence by other witnesses to avoid further distress during trial to S.M. arising from her memories of the 2019 sexual assaults." (Ex. 38, p. 1058). The trial court concluded it "must hear S.M.'s testimony before it can more definitively limit the cross-examination that would be relevant to her claims against LAUSD." (Ex. 38, p. 1058). The trial court opined that a limiting instruction proposed by Plaintiff may be appropriate to direct the jury's attention to the issue, but that "the exact wording of any limiting instruction may be modified during trial." (Ex. 38. 1058). The trial court ordered "<u>for all witnesses, the School District will not be allowed to question witnesses about the specific sexual acts committed by Esteban Vasquez against Plaintiff</u>." (Ex. 42, p. 37) (emphasis added).

III. STANDARD OF REVIEW

The trial court's ruling regarding the admissibility of the 2018-2019 sexual assaults pursuant to Cal. Evid. Code §§ 1106 and 783 should be reviewed under an abuse of discretion standard. *See, People v. Chandler*, 56 Cal. App. 4th 703, 711 (1997) (applying an abuse of discretion standard for review of trial court ruling on admissibility of prior sexual conduct under criminal rape shield statutes Cal. Evid. Code §§ 1103 and 782); *People v. Varona,* 143 Cal. App. 3d 566, 569 (1983) (same). *See also, Litinsky v. Kaplan*, 40 Cal. App. 5th 970, 988 (2019) (explaining "'[t]he burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.'")

Furthermore, on appeal, this Court must review the trial court's ruling, not its rationale. *See, People v. Zapien,* 4 Cal. 4th 929, 976 (1993) (explaining "'No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.'").

This Court in *Mountain View School District* did not change longstanding precedent that the abuse of discretion standard must be employed for evidentiary rulings. *See e.g*., *People v. Karis*, 46 Cal. 3d 612, 634, fn. 16 (1988) (explaining "a motion in limine is not generally binding on the trial court, which is free to reconsider its ruling at the time the challenged evidence is offered . . . ."); *People v. Municipal Court for Cent. Judicial Dist*., 12 Cal. 3d 658, 660-661 (1974) (explaining "[i]t is well settled that neither a writ of prohibition nor a writ of mandate will lie to resolve an issue as to the admissibility of evidence." To hold

otherwise would require the courts of appeal to substitute their own discretion for evidentiary decisions made by trial courts.

IV. THE TRIAL COURT CORRECTLY FOLLOWED EVIDENCE CODE SECTION 783 AND EXERCISED ITS DISCRETION TO CONDUCT THE EVIDENTIARY HEARINGS IN A WAY TO ACOMMODATE THE PLAINTIFF WHO IS LEARNING DISABLED

Plaintiff fails to heed this Court's ruling that "subdivision (a) of section 1106 does not contemplate categorical exclusion of evidence concerning 'other sexual conduct' when that evidence is sought to be admitted under the same section's subdivision (e) to challenge the credibility of the plaintiff as provided in section 783." *Mountain View School District*, 15 Cal. 5th at 62. The trial court followed the steps outlined in section 783.

A. The School District Made a Motion with an Offer of Proof with Affidavits to Establish the Relevance of the Evidence of the Multiple Sexual Assaults and Statutory Rapes in 2018-19 to Show Plaintiff's Credibility is at Issue Because of Plaintiff's Lack of Memory and Accuracy.

Section 783 (a) states that "[a] written motion shall be made . . . stating that the defense has an offer of proof of the relevancy and evidence of the sexual conduct of the plaintiff proposed to be presented." Subsection (b) requires the motion to "be accompanied by an affidavit in which the offer of proof shall be stated." The School District filed and served such a motion with several accompanying affidavits. (Exs. 4, 10, 16, 18, 23). In these declarations, the School District cited to the Plaintiff's guardian ad litem who stated in discovery responses dated March 26, 2019, that Plaintiff was suffering emotional distress symptoms like difficulty sleeping, fear, anxiety, difficulty eating, headaches, changes in behavior, and trauma. (Ex. 18, pp. 490-491, 506-507). The guardian ad litem also testified in her February 18, 2020 deposition that Plaintiff cries when she is alone, bites her nails, rips her clothes, gets mad out of nowhere, and is no longer the same person as

before. (Ex. 18, pp. 510-512). Plaintiff testified in her February 12, 2020 deposition that she does not know what makes her feel scared and does not recall when her loss of appetite and nervousness started. (Ex. 18, pp. 519-520).

Plaintiff's own psychological expert stated in her January 27, 2022 deposition that the damage suffered by Plaintiff from the previous single sexual groping at the school, and the subsequent multiple sexual assaults and statutory rapes suffered by Plaintiff at the hands of her sister's boyfriend were cumulative in nature and she could not apportion a percentage damage to each cause. (Ex. 10, p. 259-260). The School District's experts opined that factors such as the timing of the events and the differing nature of the events could distinguish what caused Plaintiff's current emotional distress between the 2016 groping that occurred at Griffin Middle School versus the subsequent multiple sexual assaults, social media grooming, and multiple statutory rapes that occurred in 2018-2019. (Ex. 18, pp. 568, 577-578).

Based upon this information in the affidavits, there was sufficient evidence to show that Plaintiff's credibility as a witness was at issue. Her memory and accuracy are disputed. Plaintiff's guardian ad litem listed a great number of symptoms that she claimed Plaintiff experienced after the multiple sexual assaults and statutory rapes committed by the boyfriend of Plaintiff's sister in 2018-19. A guardian ad litem for a party in litigation speaks for that party. *Regency Health Servs. v. Superior Court*, 64 Cal. App. 4th 1496, 1504-1505 (1998) (explaining "a guardian ad litem has the authority, subject to the court's ultimate supervision, to verify proper responses to interrogatories on behalf of the ward.") Plaintiff testified in deposition she could not remember what caused her particular symptoms as of February 12, 2020. (Ex. 18, pp. 519-520). Thus, Plaintiff's memory and accuracy is in dispute, making evidence of the subsequent sexual assaults and statutory rapes and their psychological effects admissible, subject to the requirements of sections 783 (a) & (b) and section 352. *Mountain View School District*, 15 Cal. 5th at 62.

The trial court committed no error when it found the School District's offer of proof to be sufficient.

B. The Trial Court Correctly Ruled that Deposition Testimony and Other Evidence Submitted by the School District Established Under Section 783(d) that Plaintiff, Her Guardian Ad Litem, and Her Experts Made Contradictory Statements About Her Multiple Sexual Assaults and Statutory Rapes in 2018-19 and Their Effects on Her Psychological Health

Section 783(c) next requires that the trial court "order a hearing outside of the presence of the jury, if any, and at the hearing allow the questioning of the plaintiff regarding the offer of proof made by the defendant." The trial court ordered such a hearing which took place on February 2, 2024. (Ex. 30). The point of the hearing is to determine if the stated evidence "regarding the sexual conduct of the plaintiff is relevant pursuant to section 780." *See* Cal. Evidence Code section 783(d). Section 780 allows a court or jury to "consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to . . . (h) a statement made by him that is inconsistent with any part of his testimony at the hearing."

In lieu of live testimony the trial court proposed the parties submit highlighted deposition transcripts. Plaintiff did not object to this proposal and should not be heard to object now for the first time. *Doers v. Golden Gate Bridge etc. Dist.,* 23 Cal. 3d 180, 184 (1979) (explaining "'An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been but was not presented to the lower court by some appropriate method . . . . [. . .] it is unfair to the trial judge and to the adverse party to take advantage of an error on appeal when it could easily have been corrected at the trial.'"); *see also, Tanguilig v. Valdez*, 36 Cal. App. 5th 514, 523 (2019)(explaining "generally, '[p]rocedural irregularities or

erroneous rulings in connection with the relief sought or defenses asserted will not be considered on appeal where a timely objection could have been made but was not made in the court below'"); *Farag v. ArvinMeritor, Inc*., 205 Cal. App. 4th 372, 380 (2012) (explaining "'[a]n appellate court will ordinarily not consider procedural defects or erroneous rulings … where an objection could have been, but was not, presented to the lower court by some appropriate method.'"). The trial court stated its concern about protecting the Plaintiff who is learning disabled from giving unnecessary trial testimony. The trial court's decision to rely on testimony already given to make its determination of relevance under section 783(d) was within its discretion, especially when Plaintiff did not object.

The School District submitted the February 18, 2020 deposition testimony from Plaintiff's guardian ad litem where she stated that Plaintiff suffered no sexual assault other than at the hands of the School District employee in 2016. (Ex. 32, p. 954, Ex. 44, p. 57). Plaintiff's guardian ad litem also made sworn responses to form interrogatories stating that Plaintiff suffered no injuries after 2016; that all of Plaintiff's injuries are attributable to the school employee in 2016; and that Plaintiff sought treatment at the VIP because of the 2016 incident. (Ex. 18, pp, 541-544, 498). All of these statements, which are usable by the School District at trial either as a party affiliated admission from deposition testimony, or a prior inconsistent statement, are at complete odds with other testimony from Plaintiff and Plaintiff's retained and treating experts. Contrary to what the guardian ad litem testified to, Plaintiff and Plaintiff's retained and treating expert acknowledge the multiple sexual assaults and statutory rapes committed against Plaintiff in 2018-19. These same witnesses also establish that the 2018-19 incidents have caused Plaintiff emotional distress symptoms for which she sought treatment at the VIP. (Ex. 18, p. 586).

Thus, the evidence submitted by the School District showed that Plaintiff's guardian ad litem has given testimony that is contradictory to what the Plaintiff and Plaintiff's experts have said. Plaintiff's treating and retained psychological experts obtained the information about Plaintiff's symptoms from interviewing Plaintiff

herself. With these diametrically opposed statements in the record, there was a sufficient showing made without live testimony under section 783(d) that statements directly or indirectly attributable to Plaintiff would be inconsistent with whatever she and her representatives would say at trial.

No purpose is served by putting Plaintiff, who is learning disabled, needlessly through the experience of testifying at the section 783 hearing. For similar reasons, the School District offered to have a limited number of video clips played from Plaintiff's deposition on the topic of the 2018-19 sexual assaults played for the jury at trial, in lieu of Plaintiff's live testimony. (Ex. 36, pp. 1037-1038). Unfortunately, Plaintiff took the position that she would stipulate to nothing. (Ex. 36, pp. 1036).

C. Plaintiff Agreed to Waive Any Live Testimony for the Cal. Evidence Code Section 352 Hearing Regarding the Evidence to Be Admitted, and the Trial Court Exercised It's Discretion to Admit the Evidence Needed to Establish the Occurrence of the Multiple Sexual Assaults and Statutory Rapes in 2018-19, and Their Psychological Effects, While Having the Plaintiff Testify as Little as Possible on Those Topics

Section 783 (d) not only required the trial court to analyze the relevance of the proposed evidence, but also to consider whether the evidence was inadmissible under Cal. Evidence Code section 352. The trial court's role is to "undertake a more probing inquiry by considering whether the discovery or adjudication process is being used to harass, intimidate, or unduly invade the privacy of the complainant." *Mountain View School District*, 15 Cal. 5th at 49.

As already stated above, Plaintiff's counsel stipulated to not calling live witnesses to the April 24, 2024 section 352 hearing. The trial court ordered the parties to meet and confer about possible stipulations to make the introduction of evidence about the 2018-2019 assaults and statutory rapes and their psychological effects less intrusive for Plaintiff. (Ex. 32, p. 955). Rather than do that, Plaintiff's

counsel refused to stipulate to anything. (Ex. 34, p. 973). The trial court also proposed a stipulation that a second sexual assault occurred and the time period for that assault. (Ex. 36, p. 1029-1030). Plaintiff also refused this solution. (Ex. 36, p. 1029-1030).

The trial court used its discretion to weigh the proffered evidence prior to submission to the jury. The trial court stated that it would continue to monitor what evidence could come in as circumstances in the trial changed. (Ex. 38, pp.1058-1059). In its heightened 352 analysis, the trial court ruled that examination of Plaintiff should be focused on her emotional reaction to the 2018-19 sexual assaults rather than on the details of those assaults. (Ex. 38, pp.1058-1059). The trial court described that the specifics of the 2018-19 sexual assaults could be put into evidence by other witnesses to avoid further distress of S.M. during trial. (Ex. 38, p. 1059). The trial court ordered that "for all witnesses, the Court concludes that the School District will not be allowed to question the witnesses about the specific sexual acts committed by Esteban Vasquez against Plaintiff." (Ex. 38, p. 1059; Ex. 42).

The trial court's approach under section 352 fulfilled the requirement of a more probing inquiry. The School District is limited to only putting on the necessary evidence through third party witnesses or deposition clips to establish that the 2018-19 sexual assaults and statutory rapes occurred, without describing the details of those events. (Ex. 38, 1058-1059). The point of this is to spare Plaintiff the burden of testifying about those events in open court. (Ex. 38, p. 1059). The trial court did not abuse its discretion in making this ruling.

V. SUBSTANTIVE EVIDENCE ABOUT THE INJURIES SUFFERED BY A SEXUAL ABUSE PLAINTIFF CAN OVERLAP WITH RELEVANT EVIDENCE ADMISSIBLE UNDER SECTION 783 TO IMPEACH THE PLAINTIFF REGARDING PLAINTIFF'S ACCURACY OR LACK OF MEMORY CONCERNING SUBSEQUENT SEXUAL ABUSE AND ITS EFFECTS

In its February 7, 2024 Order, the trial court ruled that the evidence proffered by the School District regarding the sexual conduct of the Plaintiff was relevant to impeach the Plaintiff. Plaintiff contends that the trial court committed error in making this conclusion, but in doing so, Plaintiff misstates the holdings of *Mountain View School District*. Plaintiff asserts that evidence of "sexual conduct" that is admissible to attack a sexual assault plaintiff's credibility under sections 783 and 1106 can never consist of substantive evidence that concerns issues of consent by the plaintiff or the absence of injury to the plaintiff. *See* Petition at page 7. Plaintiff also contends Cal. Evid. Code section 1106 creates an "absolute bar" to admission of evidence of other sexual conduct. *See,* Petition at page 5.

This extreme position is plainly wrong. There is an "inherent tension within . . . [the] civil (sections 1106, 783) shield provisions." *Mountain View School District*, 15 Cal. 5th at 61. Citing to the parallel criminal shield statutes (sections 1103, 782), this Court pointed out that "section 782 has the effect of permitting the trier of fact to hear the same evidence which section 1103 (relating to consent) will normally serve to exclude." *Id*. (emphasis added). This Court cited *People v. Rioz*, 161 Cal.App.3d 905 (1984) with approval. *Rioz* concerned the admissibility of certain evidence in a rape case on the issue of consent. The *Rioz* Court stated "[t]here is necessarily a certain amount of overlap between the issues of the victim's consent in a rape or other sex offense case and the victim's credibility." *Mountain View School District*, 15 Cal. 5th at 58 (quoting *Rioz,* 161 Cal. App. 3d at 916). "Once the defendant, in accordance with the procedural requirements of section 782, makes a sworn offer of proof concerning the relevance of the sexual conduct of

the complaining witness to attack her credibility, even though it is the underling issue of consent which is being challenged, then the absolute protection afforded by section 1103 . . . gives way to the detailed procedural safeguards inherent in section 782." *Id*. at 59 (quoting *Rioz*, 161 Cal. App. 3d at 916) (cleaned up). "It is significant that the express provisions of section 782 vest broad discretion in the trial court to weigh the defendant's proffered evidence, prior to its submission to the jury, and to resolve the conflicting interests of the complaining witness and the defendant." *Id*. (quoting *Rioz*, 161 Cal.App.3d at 916) (cleaned up).

Similarly, substantive evidence regarding damages suffered by a sexual assault plaintiff that is normally excluded under 1106, can be admissible under section 783 to question a plaintiff's credibility. For example, the case in *Mountain View School District* was remanded back to the trial court for a 783 hearing where the plaintiff could be questioned outside the presence of the jury:

> [A]bout the nature of the [previous] molestation, how the evidence regarding that molestation compares with the evidence concerning the [subsequent] abuse, or how plaintiff might characterize and testify regarding those events. Most significantly, such questioning of plaintiff would have been expected to address the issue of whether she will claim that 100 percent of her emotional distress damages is attributable to the [previous] abuse, and none to any other factor, including the [subsequent] molestation.

Mountain View School District, 15 Cal. 5th at 65. Those questions that this Court remanded to the trial court to examine in the *Mountain View School District* case concerned the specifics about the subsequent sexual assault and the resulting emotional distress damages. Thus, substantive evidence about the actions and resulting damages in a sexual assault can be admissible under section 783 as evidence to attack the credibility of a sexual abuse plaintiff.

VI. EVIDENCE ABOUT SUBSTANTIVE SEXUAL ASSAULTS BECOMES ADMISSIBLE UNDER SECTION 783 NOT ONLY WHEN PLAINTIFF IS UNTRUTHFUL IN HER TESTIMONY, BUT ALSO IF PLAINTIFF IS INACCURATE OR LACKS MEMORY

Unlike the plaintiff in *Mountain View School District*, there was a sufficient proffer of proof established in this case to show that the School District was entitled to challenge the credibility of Plaintiff. Plaintiff took a position, through her guardian ad litem, that her damages currently were caused only by the 2016 assault in Griffith Middle School. (Ex. 4, pp. 59-60, 80; Ex. 16 pp. 368-369; Ex. 32, pp. 954-955). Plaintiff's guardian ad litem also testified that Plaintiff suffered no other sexual assault other than at the hands of Estrada. (Ex. 32, p. 954). Plaintiff's guardian ad litem attributed Plaintiff's treatment at VIP, starting in May 2019, to abuse by Estrada, although evidence indicates Plaintiff went to VIP to treat emotional distress caused by the subsequent 2018-19 sexual assaults by Vasquez. (Ex. 16, pp. 419-420, 463).

Furthermore, Plaintiff's psychological expert testified that the harm suffered by Plaintiff with the sexual assault at the school by Estrada, and the subsequent 2018-19 sexual assaults and statutory rapes by Esteban Vasquez, was cumulative, and cannot be apportioned. (Ex. 10, pp. 259-260). Plaintiff's psychological expert also testified that the abuse by Estrada is the primary cause of Plaintiff's harm because "that's what set the stage and created a different person." (Ex. 10, pp. 260). Plaintiff's expert also testified that there is a high correlation of revictimization for people who have been molested once. (Ex. 10, p. 261). Plaintiff also plans to call certain mental health treaters to the stand that Plaintiff treated with after the subsequent 2018-19 sexual assaults and statutory rapes committed by Esteban Vasquez. (Ex. 46, p. 111). Those mental health providers will testify that Plaintiff treated with them because of these subsequent sexual assaults, which also caused Plaintiff's symptoms. (Ex. 16, p. 463). It is also worth noting that Plaintiff stopped therapy after the prior sexual assault at Griffith Middle School because she was

improved. (Ex. 16, pp. 354-355). However, she restarted the therapy because of the serious effects of the subsequent 2018-19 sexual assaults and statutory rapes. (Ex. 16, pp. 354-355).

In addition, Plaintiff, Plaintiff's guardian ad litem, and Plaintiff's experts have taken conflicting positions on Plaintiff's emotional distress. Each of these witnesses rely on the statements of Plaintiff and Plaintiff's behavior as the source of their observations and conclusions. This evidence therefore calls Plaintiff's credibility into question on matters related to the 2018-19 sexual assaults. Pursuant to section 783, the School District's proffer was sufficient to "become admissible for impeachment." *Mountain View School District*, 15 Cal. 5th at 59 (citing to *Rioz*, 161 Cal. App. 3d at 916).

Plaintiff wrongly argues that her credibility in this case cannot be attacked because she did not falsely testify. It is correct that Plaintiff admitted to the subsequent sexual assaults committed by her sister's boyfriend in 2018-19, and admitted that she suffered emotional distress from those subsequent sexual assaults. (Ex. 16, p. 354, 409). However, "section 783 is not addressed to 'false testimony' in the form of an assertion that a witness previously made, but which has been determined to be untrue." *Mountain View School District*, 15 Cal. 5th at 62-63. "The sections apply whenever a plaintiff's credibility as a witness is at issue – such as when memory or accuracy may be disputed." *Id*. at 62. Thus, evidence showing that Plaintiff is inaccurate about the onset, degree, and cause of her emotional distress symptoms from subsequent sexual conduct makes the subsequent sexual abuse in 2018-19 and its effects admissible.

VII. THERE IS NO AUTHORITY FOR THE PROPOSITION THAT THE SCHOOL DISTRICT MAY ONLY IMPEACH PLAINTIFF BY USING PREVIOUS STATEMENTS MADE BY PLAINTIFF

Plaintiff seems to assert that only her own oral testimony can be admitted under section 783. *See,* Plaintiff's Petition at p. 8. There is no authority in the Evidence Code or case law to support that sort of restriction on the type of evidence

that is admissible. When attacking witness credibility at trial, a litigant will often use other witnesses with contrary testimony as impeachment. In the case at bar, Plaintiff is learning disabled and will have problems with memory and accuracy. This was one reason the trial court stated its intention to limit the questioning of Plaintiff. (Ex. 38, p.1057). Under those circumstances, allowing other witnesses to testify about these topics is consistent with the trial court's discretion under section 783 to do "a case-by-case balancing of considerations under section 352." *Mountain View School District*, 15 Cal. 5th at 61.

VIII. CONCLUSION

Petitioner has not demonstrated grounds for this Court to review the decision of the Court of Appeal. The Petition should therefore be denied.

Dated: May 28, 2024 **VANDERFORD & RUIZ, LLP**

By: /s/ *Rodolfo F. Ruiz*
Rodolfo F. Ruiz
Attorneys for Defendants and Respondents
LOS ANGELES UNIFIED SCHOOL DISTRICT

CERTIFICATE OF COMPLIANCE

The text of this brief consists of 7,933 words as counted by the Microsoft Word version 2016-word processing program used to generate the brief.

Dated: May 28, 2024 **VANDERFORD & RUIZ, LLP**

By: /s/ *Rodolfo F. Ruiz*
Rodolfo F. Ruiz
Attorneys for Defendants and Respondents
LOS ANGELES UNIFIED SCHOOL DISTRICT

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 77 North Mentor, Pasadena, CA 91106.

On the May 28, 2024 set forth below, I served the foregoing document(s) described as follows: ANSWER TO S.M., A MINOR, BY AND THROUGH HER GUARDIAN AD LITEM, SOCORRO M.'S PETITION FOR REVIEW AND REQUEST FOR IMMEDIATE STAY OF MAY 21, 2024 TRIAL BY LOS ANGELES UNIFIED SCHOOL DISTRICT, on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

☒ BY ELECTRONIC SERVICE VIA TRUEFILING Based on a court order, I caused the above-entitled document(s) to be served through TrueFiling at https://www.truefiling.com addressed to all parties appearing on the electronic service list for the above-entitled case. The service transmission was reported as complete and a copy of the TrueFiling Filing Receipt Page/Confirmation will be filed, deposited, or maintained with the original document(s) in this office.

☒ VIA U.S. REGULAR MAIL:
California Court of Appeal (Unbound Brief
SECOND APPELLATE DISTRICT, DIV. 5 Via Mail Only)
300 S. Spring Street 2nd Floor,
North Tower Los Angeles, CA 90013

☒ STATE I declare under penalty of perjury that the foregoing is true and correct

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on May 28, 2024 at Pasadena, California.

/s/ *Jaclyn Cortez*
Jaclyn Cortez

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Hon. Richard Fruin LOS ANGELES SUPERIOR COURT Stanley Mosk Courthouse, Dept. 15 111 North Hill Street Los Angeles, CA 90012 MZarate@lacourt.org	***Respondent***
Louanne Masry, Esq. MASRY LAW FIRM, APC 2629 Townsgate Road, Suite 205 Westlake Village, California 91361 Telephone: (805) 719-3550 masrylawfirm@gmail.com	***Attorneys for Plaintiff and Petitioner*** S.M.
Robert T. Simon, Esq. Travis E. Davis, Esq. THE SIMON LAW GROUP, LLP 34 Hermosa Avenue Hermosa Beach, California 90254 Telephone: (855) 855-8910 robert@justiceteam.com; travis@justiceteam.com	***Attorneys for Plaintiff and Petitioner*** S.M.
Stuart B. Esner, Esq. Holly N. Boyer, Esq. ESNER, CHANG, BOYER & MURPHY 234 East Colorado Boulevard, Suite 975 Pasadena, California 91101 Telephone: (626) 535-9860 sesner@ecbm.law; hboyer@ecbm.law	***Attorneys for Plaintiff and Petitioner*** S.M.
Joshua Jacob Estrada 3926 Dozier Street Los Angeles, CA 90063 cobyestrada24@gmail.com	***Defendant***