

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

GARVEY SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2015120681

DECISION

Garvey School District filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on December 16, 2015, naming Student. The matter was continued for good cause on January 8, 2016.

Administrative Law Judge Rebecca Freie heard this matter in Rosemead, California, on March 14, 15, 16, and 17, 2016.

Sharon Watt, Attorney at Law, represented Garvey. Alma Guerrero, Coordinator of Special Education for Garvey, attended the hearing as its representative. Janeen Steel, and Kevin Hernandez, Attorneys at Law, represented Student.<sup>1</sup> Mother attended the hearing on all days.

A continuance was granted for the parties to file written closing arguments and the record remained open until April 7, 2016. Upon timely receipt of the written closing

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<sup>1</sup> Various employees and volunteers of the law firm employing Ms. Steel and Mr. Hernandez also observed the hearing for a few hours at a time.

arguments, the record was closed and the matter was submitted for decision.

## ISSUES<sup>2</sup>

- 1) Was Garvey's fall 2015 psychoeducational assessment of Student legally appropriate?
- 2) Was Garvey's fall 2015 speech and language assessment of Student legally appropriate?
- 3) Can Garvey exit Student from special education, effective October 30, 2015, the date it held an individualized education program team meeting to review its assessments, and other information, because he was no longer eligible for special education.

## SUMMARY OF DECISION

Garvey established that its fall 2015 psychoeducational and speech and language assessments were legally appropriate in that they met all legal requirements. The assessors were qualified to conduct the assessments, and multiple assessment tools which were valid were used. The tests themselves were not sexually, culturally or racially discriminatory, and were administered, in that way. Each of the assessors who evaluated Student produced a written report with recommendations. All of the testing was administered according to the test publisher's directions to the extent necessary to produce valid results.

Student contended that Garvey should not have exited him from special education because the psychoeducational and speech and language assessments were

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<sup>2</sup> The last issue has been rephrased for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

defective in many ways. However, this Decision finds that the assessments met all legal requirements. The assessments established that Student no longer met any of the criteria for continued special education and services under any category, and the evidence confirmed this. Therefore, Garvey's October 30, 2015 determination that Student could be exited may exit him from special education is upheld.

## FACTUAL FINDINGS

### JURISDICTION

1. Student resides with Mother within Garvey's boundaries. He is eight years old and is in the third grade at Arlene Bitely Elementary School. He has attended Bitely continuously since beginning in its Head Start program in September 2011, at the age of four.

2. Student qualified for special education at the age of three as a child with a speech and language impairment due to delayed phonological development which made it difficult for others to understand him. He has received speech and language services since 2011, and continues to receive them. He is bilingual in English and Spanish, and both are spoken at home, with English being the primary language. In March of 2015 Student's language classification was changed from English Language Learner to English-speaker. The English Language Learner program is not part of special education.

3. Student filed a complaint against Garvey with OAH on April 27, 2015. The parties negotiated a settlement agreement that was executed in June 2015. One of the provisions of the settlement agreement called for Student to be assessed by Garvey assessors in the areas of occupational therapy, speech and language, other health impairment, autism, and mental health.<sup>3</sup>

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<sup>3</sup> Student did not challenge the occupational therapy assessment, so no findings

4. Following the completion of the assessments, the IEP team met on October 30, 2015. Based on the findings of the Garvey assessors, which will be discussed below, the IEP team members from Garvey determined that Student should be exited from special education. Mother disagreed, and responded by requesting independent educational evaluations in the areas of psychoeducation, and speech and language. In response to this request, Garvey filed the OAH complaint that is currently at issue, asking that its assessments be found to be legally appropriate, and that it be allowed to exit Student from special education.

#### THE ASSESSMENTS

5. Mother signed the assessment plan on September 14, 2015. The assessment plan called for a special education teacher to conduct an academic assessment, and the school psychologist to conduct assessments in the areas of intellectual development, social/emotional, and adaptive/behavior. The assessment plan also called for a speech and language therapist to do a speech and language assessment, and an occupational therapist to do an occupational therapy assessment. Boilerplate language on the top portion of the assessment plan states that "Tests conducted pursuant to these assessments may include, but are not limited to classroom observations, rating scales, one-on-one testing or some other types or combination of tests." The assessment plan also contains boilerplate language regarding the social/emotional testing that states "These scales will indicate how your child feels about him/herself, gets along with others, takes care of personal needs at home, school and in the community." Similar language is found regarding the adaptive/behavior testing,

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about that assessment are made in this Decision, although it was referenced in IEP documents from October 30, 2015. The assessment did not find that Student had deficits that needed to be addressed by providing him with occupational therapy.

"These scales indicate how your child takes care of personal needs at home, school and in the community." These are areas which are commonly assessed by school psychologists, and Student had previously been assessed by Garvey in 2011 and 2013, so Mother was familiar with the assessment process. However, although many of Student's claims about the legal appropriateness of the assessments center around the fact that Mother was not interviewed or given surveys to complete, Mother never contacted Garvey during the assessment process to ask why this had not happened.

### Psychoeducation

6. School psychologist Nancy Kugler conducted the psychoeducational assessment of Student. Ms. Kugler received her master's degree in school psychology in 1999, and her pupil personnel services credential in 2001, which authorizes her to act as a school psychologist, and to conduct psychoeducational assessments of students. From 1978 to 2001, she was an elementary school teacher, and she holds a lifetime multi-subject teaching credential. In 2006 she received her behavior intervention case manager certification. She is qualified to conduct special education psychoeducational assessments.

7. Ms. Kugler first became aware of Student when he was in kindergarten because his teacher came to her with concerns about his frequent tantruming. Ms. Kugler conducted a formal assessment of Student in 2013, and she was familiar with the information she gathered at that time when she again assessed him in 2015. As part of the 2013 assessment Ms. Kugler interviewed Mother and gave her rating scales to complete. Ms. Kugler recognized Student when she saw him at school in class and on the playground, and informally was able to see how he was doing in those environments after the 2013 assessment.

8. Eunice Cheng assisted Ms. Kugler in conducting the 2015 psychoeducational assessment of Student. Ms. Cheng conducted the academic

achievement testing of Student. Ms. Cheng has worked in the field of special education for 26 years. She became a resource specialist in 1996, and has worked for Garvey since at least that time. Ms. Cheng was a general education teacher initially, and then became a special education teacher. She has a master's degree in learning disabilities, a multi-subject teaching credential, and has authorization to act as a resource specialist, and to teach children with autism from the California Commission on Teacher Credentialing. Ms. Cheng is qualified to conduct academic assessments of students for special education purposes.

9. For the purposes of her assessment in 2015, Ms. Kugler consulted with Student's teachers and service providers, specifically his third grade teacher, Van Lam; school counselor Diana Law, who provides Student with therapy services pursuant to his IEP; speech and language pathologist Julie Sena, who conducted the speech and language assessment, and was Student's speech and language therapist for the 2011-2012 and 2012-2013 school years; behavior specialists Mary Hum and Nick Berry; occupational therapist Jocelyn Del Rosario; school nurse Micki Rios; and Ms. Cheng.<sup>4</sup> She also reviewed Student's educational records including past assessment reports and IEP's. Ms. Kugler was aware of the fact that Mother was concerned that Student might be autistic, and also knew that in early 2015 he had received a provisional diagnosis of attention deficit hyperactivity disorder. Garvey received a letter from a psychiatrist at Foothill Family Services in March 2015 confirming this. A provisional diagnosis means that the condition has not been definitively diagnosed, but the patient will be followed to see if a definitive diagnosis can be made later.

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<sup>4</sup> One of the Bitely third grade teachers is named Becky Hum. Because Mary Hum and Becky Hum share the same last name, the former will be referred to as "M. Hum," and the latter as "B. Hum" in this Decision.

10. For the purposes of her psychological assessment of Student, in addition to consultation with the individuals listed above, Ms. Kugler observed Student twice for 40 minutes each time in the classroom setting. The observations occurred on separate days and at a different time each day, and in classes taught by two different teachers. Ms. Kugler took notes which she later used in the course of drafting her report to reflect her findings during these observations. However, Ms. Kugler did not use a structured form to reflect her findings, such as the Structured Observation Schedule created by the test publisher of the Behavior Assessment Schedule for Children - 2. Ms. Kugler used the teacher's questionnaire of the Behavior Schedule, as will be discussed below, to determine if Student had behavioral problems, including emotional and mental health problems, and adaptive skills deficits.

11. During both classroom observations Ms. Kugler noted that Student remained on task and attentive. He interacted appropriately with his classmates and teachers. He was an active participant in both classes. Further, when Ms. Kugler informally observed Student at Bitely in the course of her duties there, he appeared to be a typically developing child.

12. As part of her assessment, Ms. Kugler used the Wechsler Intelligence Scale for Children - Fifth Edition to help her determine his cognitive abilities. This is a standardized test that is commonly used for this purpose. The test is scored using the standard scoring system in which an average score ranges between 90 and 110. Although there was some scatter in Student's scores in the subtests that comprised the various composite sections of the tests (standard scores from a low of 92 in the Verbal Comprehension portion of the test, to a high of 117 in the Working Memory portion of the test) all scores were in the average to high average range. Student's full scale intelligence quotient was 104, well in the average range.

13. Student's expert, Valarie Benveniste, Ph.D., testified on behalf of Student.

Dr. Benveniste is a psychologist licensed by the State of California. She has been licensed since 1997, and has extensive expertise in conducting psychological evaluations, as well as teaching students who are studying to become school psychologists. Although Dr. Benveniste believed that the discrepancy between Student's full scale from 2013 and the current IQ (a difference of 13 points) should have been investigated, Dr. Benveniste testified that failure to do so did not invalidate Ms. Kugler's assessment results, and her testimony was credible.

14. Ms. Kugler also administered the Developmental Test of Visual Motor Integration which measures a child's visual perception and motor skills. Student scored in the average range in this test. She also conducted another test for visual perception, The Test of Visual Perceptual Skills - 3. Student's scores on this test were in the high average range for visual perception. Ms. Kugler administered the Test of Auditory-Perceptual Skills - Third Edition, to determine if Student had an auditory processing disorder. Student's scores on all subtests, as well as his overall score, were in the average range for auditory processing. All of these tests are standardized instruments that are commonly used for these purposes.

15. In order to measure Student's level of academic achievement, Ms. Cheng administered the Woodcock-Johnson III Tests of Achievement. This instrument consists of multiple subtests which are administered to a child. Individual subtests are scored using the standard scoring system. The scores from various subtests are grouped to obtain a single score in the broader areas of reading, writing and math. The Woodcock-Johnson results were a valid measure of Student's academic achievement levels as corroborated by his classroom performance. The only subtests in which Student had scores in the average range were the Story Recall subtest on which Student had a score of 109, and the Passage Comprehension subtest which had a score of 107. All other subtest scores were in the above average or superior range. Student's Broad Reading



score was 116, Broad Math was 118, and Broad Written Language was 126. When one compares Student's scores on the Woodcock-Johnson to his full scale IQ, as determined by the Wechsler, Student is academically performing at a higher level than would be expected.

16. Ms. Cheng did not complete the section on the first page of the Woodcock-Johnson entitled Test Session Observation Checklist. This checklist documents the child's testing behavior and demeanor. However, failure to complete this section of the test form does not invalidate the results, and Dr. Benveniste confirmed this.

17. Student's third grade teacher, Ms. Lam, has a multi-subject teaching credential, and has taught school for 20 years. Before beginning her teaching career, Ms. Lam worked at a nonprofit agency servicing children with disabilities, including children with autism. Ms. Lam completed three surveys that were scored by Ms. Kugler. One was the Vineland Adaptive Scales, Second Edition, which assesses a child's personal and social skills. Another was the Behavior Schedule, mentioned above, which can determine whether a child has emotional and/or behavioral disorders, provides information concerning a child's mental health, and also measures adaptive skills. The third was the Gilliam Autism Rating Scale - 3.

18. The Vineland measures a child's functioning in the domains of Communication, Daily Living, Socialization, and Motor Skills to arrive at a final Adaptive Behavior Composite Score. The Vineland uses a standard scoring system. All of the subtest scores for Student, based on Ms. Lam's responses, were within the average range except the Motor Skills score which was 112. Student's Adaptive Behavior Composite Score was 100.

19. The Behavior Schedule scores a child in two areas. One portion of the test determines if a child has behavioral problems, including emotional and mental health

problems, and the other portion of the test measures adaptive skills. All of Student's scores, using a T-score scoring system in which the average range is between 40 and 60, were in the average range on both portions of the test with one exception. Student had a score of 60 on the Study Skills portion of the adaptive skills portion of the Behavior Schedule which meant his study skills were just above the average range.

20. In order to determine if Student was autistic Ms. Kugler had Ms. Lam complete the Gilliam. This rating system is a screening tool used to determine whether a person's behaviors are indicative of autism. Based on Ms. Lam's responses to the questions in the Gilliam Student was unlikely to have autism, scoring in the less than first percentile for children who do have autism. Portions of the Behavior Schedule and the Vineland confirmed the Gilliam score, and when Ms. Kugler conducted her two classroom observations, there was nothing she saw that would indicate Student is autistic.

21. Because autism usually manifests itself before a child is three, it is important to note that when Ms. Kugler assessed Student in 2013, she also used the Gilliam, which was completed by Student's then-speech and language therapist, Ms. Sena, and his kindergarten classroom teacher. Both Ms. Sena and Student's classroom teacher responded to the questionnaire with responses that resulted in scores that found it highly unlikely that Student was autistic. However, Mother's responses to the Gilliam in 2013 indicated that it was "highly likely" that Student was autistic. Therefore, Ms. Kugler also administered the Autism Diagnostic Observation Schedule to assess whether Student had autism. The results indicated it was unlikely that Student was autistic. Further, while it is not unusual for survey results from school personnel to differ from those from a parent, as many children have different behaviors at home than those exhibited in the more structured school setting, it would be highly unusual for a child with autism to not show any characteristics of autism in the school setting. Since Ms.

Kugler tested Student in 2013, there has been no indication, other than Mother's 2013 Gilliam results, that Student is autistic.

22. Ms. Kugler did not interview Mother as part of the 2015 psychoeducational assessment, nor did she have Mother complete the parent version of any of the assessments completed by Ms. Lam. However, Ms. Kugler was aware of maternal concerns about Student, including a concern that Student might be autistic, based on discussions with Ms. Guerrero and others who had recently spoken to Mother. Ms. Kugler also considered comments from Mother contained in other school records, such as IEP documents as part of the assessment process. Further, she had interviewed Mother as part of her 2013 assessment. Ms. Kugler did not believe it was necessary to interview Mother for the 2015 assessment, or have Mother complete the parent version of the Behavior Schedule or any other survey, because she had information about Mother's concerns from these other sources, including teachers she interviewed, Ms. Guerrero, and Ms. Lam. Ms. Kugler's decision to not personally interview Mother did not render her assessment legally inappropriate.

23. As part of her assessment, Ms. Kugler considered whether Student's provisional diagnosis of ADHD might be causing him problems in the educational setting, but based on her observation of Student, conversations with his teachers and others, she determined that it did not. Also, there was no evidence that Student had a specific learning disability, given the fact that his academic achievement was not lower than expected based on his cognitive testing scores, and this was corroborated by his report card grades and teacher comments.

24. Ms. Kugler produced a written assessment report that was reviewed at the IEP team meeting on October 30, 2015. All of the tests given by Ms. Kugler, and the Woodcock-Johnson administered by Ms. Cheng, are validated and were appropriate for the purpose used. None of the tests were racially, culturally or sexually biased, nor were

they administered in a manner that was racially, culturally or sexually biased. All of the tests were administered in English. This was appropriate because despite being bilingual, Student's primary language designation was English at the time the assessments were conducted.

### Speech and Language

25. Ms. Sena conducted the 2015 speech and language assessment of Student. She received her master's degree in speech and language pathology in 1997, and has worked for Garvey since 1990. She has also worked as a speech pathologist for two regional centers. Ms. Sena holds a California license as a speech and language pathologist, a certificate of clinical competence from the American Speech-Language-Hearing Association, and a clinical rehabilitation credential from the State of California. She is qualified to conduct speech and language assessments of children for special education purposes.

26. Ms. Sena was very familiar with Student since she had also conducted a speech and language assessment of Student in 2013, and was Student's speech and language therapist for both the 2011-2012 and 2012-2013 school years. In addition, she shares an office with the speech and language therapist who took over Student's speech and language therapy in 2013, Stacy Johnson. She sees Student frequently on the Bitely campus. It was obvious from her assessment report, and her demeanor when she testified, that she is very fond of Student, and knows him well, and she was very credible.

27. For the 2015 speech and language assessment, Ms. Sena administered all of the assessments in English. Ms. Sena administered the Language Processing Test 3 Elementary, the Clinical Evaluation of Language Fundamentals - 5, and the Goldman-Fristoe Test of Articulation - 2. All of these tests were administered in accordance with the instructions, and were valid measures of Student's speech and language ability. In addition, Ms. Sena conducted a formal observation to assess Student's

phonology/articulation, language skills, pragmatics, and fluency. She also interviewed Ms. Lam; the behaviorist assigned to Student for the 2015-2016 school year; Becky Hum, another third grade teacher who usually teaches the written expression class that Student was in; and Student's second grade teacher, Jennifer Chu. The speech and language testing of Student was appropriate in that it was not racially, culturally, or sexually biased, and was age appropriate. These factors were considered when Ms. Sena interpreted the test results.

28. Ms. Sena determined that Student did not meet the criteria for special education as a child with speech and language impairment. On the Language Processing Test, which measures how well a child uses language, Student's standard scores were all in the average range with the exception of the Similarities subtest which had Student receiving a standard score of 79. This put him in the ninth percentile for children his age, close to the seventh percentile which is the cut off point for a child to be found to be speech and language impaired. However, Ms. Sena explained credibly that most of the children she tests have lower scores on this subtest than on the other subtests. This assessment did not establish a need for Student to continue to receive speech and language services.

29. The Clinical Evaluation is an instrument that measures how well a child uses language to communicate, i.e., his expressive and receptive language skills. A portion of the test, the Pragmatics Profile, is a checklist completed by someone familiar with the child (in this case, Ms. Lam) which measures verbal and nonverbal deficits that may affect a child's social communication. On this assessment, Student's scores were all in the average range according to the scaled scoring system used in this assessment in which an average score is between seven and 13. As with the Language Processing Test, the results of the Clinical Evaluation did not establish a need for Student to continue to receive speech and language services.

30. Poor articulation results in speech that is not easily understood, and this was the reason Student originally qualified for special education in 2011. Student's speech and language services ended in June 2015 pursuant to an IEP amendment signed by Mother. When Student was assessed by Ms. Sena in the fall of 2015, he correctly pronounced all sounds, with the exception of the voiceless "th" sound on the Goldman-Fristoe Test, which measures the subject's articulation. The silent "th" is the sound made when a word ends in "th" such as the word "health." However, many children at Bitely are unable to correctly pronounce the voiceless "th" because this sound is unique to English, and many children attending Bitely come from homes in which English is a second language. Student's inability to correctly articulate this sound, especially in the absence of any other articulation issues, did not make it at all difficult to understand his speech, and was not a sufficient mispronunciation to establish a need for continued speech and language therapy.

31. Ms. Sena's formal observation of Student to assess his phonology/articulation, language, pragmatics (social communication skills), and fluency resulted in a finding that Student's speech and language skills were typical for his age. His expressive and receptive language skills were normal, and there was no indication from the three teachers interviewed by Ms. Sena, that Student could not be understood by either his teachers or his peers in the school setting. His voice was not abnormal in quality, pitch or loudness in comparison to typically developing peers. Further, there was no indication from Ms. Sena's testing and observations of Student during the time period in question, that Student had deficits in the area of social pragmatics that would require further speech and language services. He was a leader in the classroom, and on the playground.

32. Ms. Sena did not interview Mother in 2015 when she assessed Student. However, like Ms. Kugler, she was made aware of Mother's concerns through

discussions with other Garvey personnel. There was no legal requirement that Ms. Sena interview Mother for the speech and language assessment, and Student did not present any evidence at all in this regard. Ms. Sena produced a written report which was reviewed at the IEP team meeting on October 30, 2015. The speech and language assessment was legally appropriate.

## ELIGIBILITY

### 2014-2015 School Year

#### BEHAVIOR AND RELATIONSHIPS

33. Student is a bright child who is creative and kind. He is well-liked by his teachers and does not seem to have any social difficulties with his peers. He has always been placed in general education classrooms pursuant to his IEP's, and has only been pulled out for weekly speech and language therapy, and counseling. Student has done well academically as is discussed below.

34. In kindergarten, the 2012-2013 school year, Student had episodes of tantruming, noncompliance, and escape behaviors which resulted in the creation of a behavior support plan at an IEP team meeting in 2013.<sup>5</sup> Tantrum behaviors included crying and throwing himself to the ground. At the beginning of the 2012-2013 school year this occurred as often as twice a day, but diminished to a couple of times a week at the end of that school year, and was even less frequent during the 2013-2014 school

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<sup>5</sup> Witnesses and documents showed that behavior plans for Student beginning in 2013, and continuing through the IEP team meeting of October 30, 2015, were sometimes called behavior support plans, and other times called behavior intervention plans. In this Decision all of the behavior plans will be referred to as behavior support plans for consistency.

year. Another behavior support plan was drafted in early 2014. At a June 2, 2014 IEP team meeting, an independent educational evaluation concerning behavior was discussed with the assessor, a psychologist, and questions were raised about whether the behavior support plan was being implemented.

35. The IEP initially in effect for Student during second grade was developed at the end of his first grade year on June 2, 2014. In this IEP Student was eligible for special education as a child with a speech and language impairment. Student was placed in a general education classroom, with accommodations that included verbal encouragement and coaching, checking for understanding, and "time away" if he needed a break. He received 30 minutes of speech and language therapy each week, and 60 minutes of counseling services each month to address his school behavior issues from a Garvey school counselor. A behavior support plan was attached to the IEP. In addition, Garvey arranged for Student and his family to begin private counseling following this meeting because Mother told the team that she was concerned about his self-esteem, and told the team that at home he would "get upset if . . . reprimanded or if he [got] a haircut." Private counseling began shortly thereafter, provided by Foothill Family Services. When the 2014-2015 school year began, the Foothill therapist was providing Student with 30 minutes weekly of therapy at school, in addition to counseling by a Garvey school counselor which addressed, in part, Student's maladaptive behaviors. Foothill's counseling services for Student and his family ended in January 2015. Although Mother was told at an IEP team meeting that Garvey would convene an IEP team meeting to discuss additional counseling if she believed it was needed, she did not notify Garvey when the Foothill counseling ended in January 2015, or ask for an IEP team meeting, or ask for additional funding for Foothill counseling.

36. Ms. Chu was Student's second grade teacher. She has a multi-subject credential and has taught second grade for 19 years. Mother requested an IEP team



meeting shortly after the 2014-2015 school year began. This meeting was held on September 10, 2014. Ms. Chu attended, as did Student's speech and language therapist, Ms. Johnson, and a school administrator. Ms. Johnson presented information from the Garvey counselor who was seeing Student weekly. At this meeting the team reviewed Student's behavior support plan.

37. An annual IEP team meeting was held October 29, 2014. At this meeting Garvey team members expressed a belief that Student did not require speech and language services. Ms. Johnson attended this meeting because she was Student's speech and language therapist, and also his case manager. Mother refused to sign consent to the IEP because she did not agree with the recommendation to terminate speech and language services.

38. Between the beginning of school in August 2014, and the annual IEP team meeting at the end of October 2014, there were a handful of times when Student cried because he was disappointed or frustrated. For example, on one occasion when Ms. Chu was handing out "goody bags" to the class as a reward, Student wanted a different bag than the one he was given. When Ms. Chu told him he needed to keep the bag he was given, he put his head down on his desk and cried softly for about five minutes. However, he did not throw himself on the ground, and was able to calm himself in a few minutes. A modified behavior support is attached to the October 2014 IEP, and there was no evidence that Mother disagreed with the plan.

39. Ms. Chu established that occasional crying at school is not unusual behavior for a second grader. After October, there were a handful of occasions when Student became teary-eyed when frustrated in class, but this lasted for less than a minute. He no longer threw himself to the ground, sobbing loudly. There were also a couple of occasions when Student became frustrated about how he was treated by peers playing games on the playground, but he went to an adult to complain, and that

was enough to calm him down. However, these isolated incidents did not negatively impact his overall relationships with peers. There was no evidence at all that Student was by himself during recess. Rather, the opposite was true, and multiple witnesses from Garvey testified independently about seeing Student playing games with others during recess, and other reports confirmed this. By January 2015, the behaviors addressed by the behavior support plan were all but extinguished.

40. In school years before the 2014-2015 school year, Student's noncompliant behaviors included refusal to work, and defiance. He also engaged in escape behaviors which included ignoring instruction, and walking away from areas in the classroom where he was expected to be, crawling under a desk, or walking to other areas of the playground during recess when he became frustrated. However, during the 2014-2015 school year Student was rarely displaying these behaviors. For example, Ms. Chu recalled only one time during the 2014-2015 school year that he crawled under the desk.

41. During second grade, the 2014-2015 school year, Student was compliant with teacher requests, and was a hardworking, diligent pupil. He assumed a leadership role in small group activities, actively participated in class, and played well with others during recess. He was well-liked by peers and his teacher. Although Student was occasionally fidgeting, or would stop working periodically to talk to friends and required redirection from Ms. Chu about 40 percent of the time when this happened, he was able to regain focus on his own and get back to work the remainder of the time. By the beginning of the second semester of the 2014-2015 school year, Student's maladaptive behaviors were all but extinguished, and he did not display behaviors that were atypical compared to the other children in his second grade general education classroom. By the end of the school year, Ms. Chu saw none of the behaviors that were to be addressed by the behavior support plan from October 2014.

## ACADEMIC ACHIEVEMENT

42. Garvey is on a trimester system, and report cards are issued three times each year. The "grading" system measures a student's progress in meeting common core grade-level standards. Grade-level standards are expectations of what a student in a certain grade should achieve educationally in terms of skills, understanding concepts and the application of those skills during that school year. Expectations of where the child should be in meeting standards increase as the school year continues. Each grade level has its own set of standards, with multiple standards for most courses of study. There are four grading levels on Garvey's standards-based report card. Level four means the student exceeds the standard; three means the student meets the standard; two means the student is working toward the standard; and level one means the student is not meeting the standard. Student's second grade report card showed him receiving only three's and four's for the standards graded each trimester.

43. As previously noted, Student was assessed by a psychiatrist at Foothill in January 2015, and Garvey received a letter from him in March 2015 advising Garvey that Student had been given a provisional diagnosis of ADHD. The evidence established that despite the possibility that Student might have ADHD, he was focused on instruction and work in the classroom, and he did not appear to be tired or impaired in any way that would show that ADHD was negatively affecting him. There was no sign that Student required special education and related services as a result of this provisional diagnosis.

## 2015-2016 School Year<sup>6</sup>

### BEHAVIOR AND RELATIONSHIPS

44. Student's third grade teacher at the beginning of this school year was Ms. Lam. Ms. Lam has a multi-subject teaching credential, and has taught school for 20 years. At the beginning of the school year Student received all instruction from Ms. Lam in her classroom. In October 2015, the three third grade teachers at Bitely decided to create instructional groups for all the children in third grade based on their academic skills. The three teachers rotate various subjects and groups among themselves, and refer to this method of teaching as "rotation." After this occurred, Student was still in Ms. Lam's classroom for about 75 per cent of each school day, and she knows him well. Student came to school early each day so he could assist another child who was having problems reading. Based on her demeanor while testifying and her testimony, it was clear that Ms. Lam very much enjoys having Student in her class this year.

45. Student has not engaged in any disruptive behavior this year. There were a couple of times on the playground when he did not like the outcome of a game he was playing, but after speaking to an adult about it he resumed playing. These were isolated incidents. Student is well-liked by his classmates, and eager to help those who are having difficulty with an assignment or subject. On one occasion he appeared to be frustrated when working on a problem in class, but he was fine once Ms. Lam told him he could skip the problem if he wished. There was no evidence that Student lacks self-confidence or has been teased in school, at least since the beginning of the 2014-2015 school year, other than Mother's statements at IEP team meetings and during her

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<sup>6</sup> This decision only addresses the time period from the beginning of the 2014-2015 school year, to October 30, 2015, the time when the operative IEP team meeting was held.

testimony. However, when Mother testified there was no indication at all that she ever witnessed incidents at Bitely where Student was teased.

46. Student's lack of behavioral issues during the 2015-2016 school year was confirmed by observations by Nick Berry, a behaviorist employed by a nonpublic agency who began services when the 2015-2016 school year began, and M. Hum, who began to observe Student after she was hired in October 2015. Neither observed Student engaging in maladaptive behaviors that required use of the behavior support plan from October 2014. Data was collected by both Mr. Berry and M. Hum from the beginning of the 2015-2016 school year to the week before the October 30, 2015 IEP team meeting. This data included data from his teachers, as well as observations of the behaviorists, and showed there were no incidents at all of tantrums, noncompliance, or escape. M. Hum prepared a report for the IEP team meeting that incorporated Mr. Berry's data for the period of time he provided behavioral services.

47. The behavioral report noted that although Student did occasionally fidget with his hands or played with his work materials during classroom time, this did not prevent him from paying attention and focusing on instruction and classwork, nor did it cause any disruption in the classroom. Occasionally Student would talk to other students when he should have been working, but he was able to stop talking and resume his work without adult prompting. He was also observed to transition from one activity to another without incident in the classroom, and to transition from the classroom to recess and back without incident. As in the previous year, Student is a leader when placed in small groups in the classroom, and he assumes a leadership role during recess. M. Hum's credible testimony confirmed the findings in the behavioral report, and other witnesses corroborated this testimony and the information contained in the report. Student's behavior is that of any typically developing third grade child.

48. Student began counseling with Diana Law in August 2015, the beginning

of the 2015-2016 school year. Ms. Law has a master's degree in educational and clinical counseling, and holds a credential in school counseling. She also holds an intern's license through the Board of Behavioral Sciences in clinical counseling. Ms. Law began employment with Garvey in August 2015. Prior to employment by Garvey, Ms. Law was an intern counselor at a nonpublic school. She began her counseling internship with a mental health clinic in 2013.

49. Ms. Law spoke to Mother in August, but not after that. In Ms. Law's opinion, Student does not require counseling. As she testified she went through her notes, and worksheets Student completed in counseling sessions with her. Ms. Law was a witness who had excellent recollection of her sessions with Student. In her opinion he has a good self-image, and is somewhat more mature than other third graders. To her knowledge Student has had no behavior problems this year. In mid-October 2015, Student was awarded a field trip for good behavior, and was one of only two boys in Ms. Lam's class who went on the field trip. One of the worksheets Ms. Law had him complete during a counseling session contained pictures of faces with different expressions, and Student had no difficulty identifying the emotion each expression portrayed. This is a task that would be very difficult for a child with autism to complete.

#### ACADEMIC ACHIEVEMENT

50. When the rotation of teaching assignments for third grade students at Bitely went into effect, Student was placed in the highest level group for reading, writing, and math called "level one." The children in a level one group are meeting or exceeding grade level standards in the subject. Student is and has been at or near the top of the level one group in each subject. He likes school and enjoys learning. He also helps other children who may be having academic problems, or need assistance with a specific assignment.

51. Mother testified that Student often spends two to three hours completing

homework each night. She reported that he has struggled with homework this year, claiming he doesn't remember or understand what he learned in class that day, and often cries, sometimes for as long as 20-25 minutes about two to three times each week because he becomes so frustrated doing homework.

52. In the fall of 2015, Mother spoke separately to both Ms. Lam, and B. Hum, the third grade teacher who usually teaches Student's level one writing group. Mother told them that Student was struggling with homework most nights. However, she did not tell either one how much time was being spent on homework. Both teachers told Mother that they wanted Student to make an effort at completing homework, but explained that he should not spend an inordinate amount of time trying to finish each and every assignment. However, Mother disagreed with this and believed Student needed to complete each and every assignment every night he had homework. Throughout this school year she has struggled with Student each night to keep him on task so he will finish all his assignments.

53. Student has always received three's and four's on his report cards, so Mother was surprised when Student received a two in writing for the first trimester this school year. This report card was issued November 17, 2015. B. Hum credibly testified that Student had struggled with the first writing unit she taught, and this brought his grade down. However, he had done much better with the later units that were taught to the level one writing group, and was now meeting the writing standards for third grade. In addition, Garvey routinely administers its own trimester tests to students to gauge their progress in academic subjects and sends the results to parents. These are screenings used by teachers as a diagnostic tool, and not as a single measure of how well the student is academically performing overall. Student's scores in English language arts and mathematics for the first trimester were lower than in previous school years. However, many sections of the tests have only two or three questions, so one missed

question may have a significant effect on the child's overall percentile score.

54. Shortly after the beginning of the 2015-2016 school year, Ms. Cheng began to provide consultation services for Student pursuant to the IEP amendment from June 2015. She met with his teachers so they could plan teaching strategies to help them work with Student, but they did not require her assistance. There was no evidence to indicate that Student had learning issues that required this consultation, since typical teaching strategies used by all teachers addressed Student's academic needs. Further, it was not at all necessary for Student to be pulled from class to utilize resource specialist services, since he was doing extremely well academically without them. Nor did he require direct resource specialist support in any of the classrooms or subjects in which he received instruction.

#### The IEP Team Meeting of October 30, 2015

55. An IEP team meeting was held on October 30, 2015, to review the results of the psychoeducational, speech and language, and occupational therapy assessments, and to receive reports from the resource specialist and behaviorists who had been providing services to Student as a result of IEP amendment from June 2015. Attending the IEP team meeting were Mother, Dawn Berlin (program specialist for Garvey), Ms. Kugler, Ms. Lam, Ms. Sena, Ms. Del Rosario, Karen Sangin (school counselor), Jeff Koenig (principal), and Mr. Berry. Due to scheduling issues, Mother had agreed to Garvey holding the meeting more than 60 days from the beginning of the school year, which made the meeting untimely, but Mother waived the untimeliness of the meeting.

56. The Garvey participants shared that Student was learning in class without requiring any supports other than those given to his typically developing peers. In fact, at the IEP team meeting on October 30, 2015, it was agreed that Student had been referred for testing for the Gifted and Talented Education program for high-achieving students. Student did not exhibit behaviors of a child who is autistic. The only speech



and language deficit was the voiceless “th” sound, but this was not unusual for a child whose first language was not English, and there was no question that Student could be understood by peers and teachers.

57. In regard to behavior, Student had not demonstrated any of the behaviors that were targeted by the behavior support plan in the October 29, 2014 IEP, during the 2015-2016 school year to the date of the IEP team meeting on October 30, 2015. Nor did he demonstrate any of these behaviors between the date of that IEP team meeting and the filing of the complaint in this matter. Although Student was sometimes fidgety in class, this did not interfere with his attention to instruction in class, nor was it disruptive to others. The Garvey IEP team members correctly determined that Student no longer was eligible to receive special education services under any of the eligibility categories found in the Individuals with Disabilities Education Act.

58. On November 19, 2015, Mother, through her attorney’s office, sent a letter to Garvey stating that she disagreed with the Garvey recommendation to exit Student from special education. She also said that she disagreed with the results of the psychoeducational, and speech and language assessments, and asked Garvey to fund independent educational evaluations in these areas. In response Garvey filed the complaint in the instant matter.

#### PARENT CONCERNS AND CREDIBILITY

59. Mother testified that at all times at issue in this case, Student had tantrums at home. She also claimed that he was a very picky eater, liking only a few foods, and requiring them to be prepared in very particular ways. Mother was also concerned that Student did not play well with other children. Student has two male cousins, who are currently in grades six and eight, and live with their grandparents in a house that is located in front of Student’s home which is on the same parcel. According to Mother, both then and now, Student does not play well with them, frequently complaining that

they do not follow the rules of whatever game they are playing. As a result he becomes frustrated and will begin to cry, and it is difficult for her to calm him. However, this was not Student's typical behavior in school during either the 2014-2015 school year, or the 2015-2016 school year. Another concern of Mother was that Student played with Legos a lot, and would get upset if his three year old sister tried to play with him when he was playing with Legos. Mother also claimed that Student lacked self-confidence, and was extremely worried about what other children thought of him. She testified that Student did not like to have his hair cut, and only liked to wear shorts and socks that did not cover his ankle. She mentioned many of these things at IEP team meetings throughout the years as well as in a letter to Garvey which she signed on November 19, 2015, in which she rejected Garvey's proposal to exit Student from special education.

60. It is clear that Mother loves her son, and wants him to do well in school. However, her credibility was undermined in many ways. For years she had been expressing concerns about Student's eating habits and many other issues discussed in the preceding paragraph, and one could infer from her testimony that she suspects he is autistic and is very concerned about these perceived deficits. Mother's 2013 Gilliam responses reflected this. However, there was no evidence that Mother ever observed Student at school. Mother testified that at some point in time Student was assessed by a regional center to determine if he was eligible for services there, but he did not qualify. Further, when the Foothill counseling services ended in January 2015, Mother did not contact Garvey to request an IEP team meeting so that counseling could continue. In addition, although Mother spoke to Ms. Law at the beginning of the 2015-2016 school year about concerns she had about Student (although there was no evidence as to what she conveyed to Ms. Law), she did not contact Ms. Law about the difficulties Student was having completing homework as the school year progressed.

61. The evidence established that the responses to the Gilliam of Student's

first grade teacher and Ms. Sena in 2013, were drastically different than Mother's responses at that time. Ms. Lam's responses to the Gilliam in 2015 were also drastically different than Mother's 2013 responses. There was no evidence that Mother pursued further assessment by District after the 2013 assessment until June of 2015, in spite of the high probability score on the Gilliam questionnaire that she had completed. There was credible testimony from both Ms. Kugler and Dr. Benveniste that a parent's perception of a child may differ greatly from the perception of others who interact with him. Based on the letter Foothill sent to Garvey in March 2015, it appears that Foothill conducted some sort of assessment of Student. However, this assessment resulted in a provisional diagnosis of ADHD, not autism. If autism was suspected, one wonders why Foothill would not also have explored that.

62. Garvey personnel who testified, particularly Ms. Lam, Ms. Sena, Ms. Chu, and B. Hum, were all very familiar with Student. It was clear they sincerely cared about him. It was obvious that had they believed Student demonstrated a need for special education services, they would have testified to that. As they testified, they were relaxed and open. There were no major inconsistencies in the testimony of any of the Garvey witnesses. There was nothing to suggest that they were coached, or fearful of repercussions if they testified to anything that supported Student's case. There was nothing to suggest some sort of predetermination to exit Student from special education, regardless of what needs he has.

63. Dr. Benveniste gave important testimony, particularly her explanation of various scoring methodologies for standardized assessment instruments. However, the weight of her testimony was affected by the fact that she has never met Student, and only met Mother the day of the hearing, never observed Student in any setting, and based much of her testimony on a Behavior Schedule completed by Mother that reflected multiple deficits, but appeared to be a valid reflection of Mother's perceptions.

Dr. Benveniste testified as to “best practices” for various assessment tools utilized by Ms. Kugler, but admitted she understood school psychologists have time and other constraints that limit the amount of testing they can conduct, and not adhering to “best practices” did not render the psychoeducational assessment legally noncompliant.

## LEGAL CONCLUSIONS

### INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA<sup>7</sup>

1. This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)<sup>8</sup> et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child’s individualized education program. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17) “Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed.

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<sup>7</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>8</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

Code, § 56031.) “Related services” are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA’s procedures with the participation of parents and school personnel that describes the child’s needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was

presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Garvey bore the burden of persuasion.

#### ISSUE 1: LEGAL APPROPRIATENESS OF PSYCHOEDUCATIONAL ASSESSMENT

5. Garvey contends that the psychoeducational assessment it conducted meets all legal requirements whether they be statutory, regulatory, or established by case law. Student, however, claims that the assessment was not legally compliant. First, he argues that Mother did not give informed legal consent to the assessment since the assessment plan form contained language that led her to believe she would be contacted by the assessor and asked to give information. Student claims the assessment

was legally deficient because Mother was not interviewed, and she was not given any assessment questionnaires to complete. Student also argues that the psychoeducational assessment was legally deficient because he was not fully evaluated to see if he had autism, and thus was eligible for special education under that category. Also, Student claims that he was not appropriately assessed to see if he qualified for special education as a child with other health impairment. Student argues that the psychoeducational assessment was legally noncompliant because Ms. Lam failed to follow instructions when she completed the Vineland and Gilliam questionnaires. Also he claims Ms. Kugler failed to follow Behavior Schedule instructions when she only gave the questionnaire to Ms. Lam and did not give questionnaires to other teachers, Student and Mother. Student claims Ms. Cheng failed to follow instructions when she administered the Woodcock-Johnson. He also claims that the psychoeducational assessment lacked necessary information because Ms. Kugler did not obtain records from Foothill. Lastly, Student argues that the assessment is not legally compliant because it "failed to be sufficiently comprehensive."

### Assessments

6. If a district decides to assess a student, it must give the parent a written assessment plan within 15 calendar days of referral, not counting calendar days between the pupil's regular school sessions or terms or calendar days of school vacation in excess of five schooldays, from the date of receipt of the referral, unless the parent or guardian agrees in writing to an extension. (Ed. Code, §§ 56043, subd. (a) ; 56321, subd. (a).) The plan must explain, in language easily understood, the types of assessments to be conducted. (Ed. Code, § 56321, subd. (b).) The parent then has at least 15 days to consent in writing to the proposed assessment. (Ed. Code, §§ 56043, subd. (b), 56321, subd. (c)(4).)

7. No single procedure may be used as the sole criterion for determining

whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414 (b)(2)(B); Ed. Code, § 56320, subd. (e).) Assessments must be conducted by individuals who are both “knowledgeable of [the student’s] disability” and “competent to perform the assessment, as determined by the school district, county office, or special education local plan area.” (Ed. Code, §§ 56320, subd. (g), 56322; see, 20 U.S.C. § 1414(b)(3)(A)(iv).)

8. Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally, or sexually discriminatory; and must be provided and administered in the student’s primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(3)(A)(i)-(iii); Ed. Code, § 56320, subd. (a).) An assessor must produce a written report of each assessment that includes whether the student may need special education and related services, and the basis for making that determination. (Ed. Code, § 56327, subds. (a), (b).)

9. The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an independent educational evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an individual educational evaluation as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an independent educational evaluation].) “Independent educational assessment means an assessment conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” (34 C.F.R. § 300.502(a)(3)(i).) To obtain an independent educational evaluation, the student must disagree with an assessment obtained by the public agency and request an independent educational evaluation. (34



C.F.R. § 300.502(b)(1), (b)(2).)

10. When a student requests an independent educational evaluation, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate or ensure that an independent educational assessment is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).) The public agency may ask for the parent's reason why he or she objects to the public assessment, but may not require an explanation, and the public agency may not unreasonably delay either providing the independent educational assessment at public expense or initiating a due process hearing. (34 C.F.R. § 300.502(b)(4).)

#### Analysis

11. As a school psychologist, Ms. Kugler was qualified to conduct the psychoeducational assessment of Student, and had the particularized knowledge of all disabilities Student might have that would make him eligible for special education. Ms. Kugler used a variety of assessment tools in accordance with instructions, and all of them were appropriate for the purpose they were used. Assessment tools included tests that were administered directly to Student, as well as two formal observations of Student by Ms. Kugler, records review, questionnaires completed by Student's teacher, and Ms. Kugler consulting with several teachers and providers of services to Student. None of the assessment tools were racially, culturally, or sexually biased, nor were they administered in such a manner as to be racially, culturally, or sexually biased. All of the testing was conducted in English, and Student is classified as an English-speaker. Ms. Kugler produced a written report.

12. Ms. Cheng is a resource specialist and qualified to conduct testing to determine a student's academic achievement. She is qualified to administer the Woodcock-Johnson. As a resource specialist Ms. Cheng is knowledgeable about the

potential disabilities covered by the IDEA that the psychoeducational assessment might reveal. Ms. Cheng administered the Woodcock-Johnson to Student. The Woodcock-Johnson is not racially, culturally or sexually biased, and Ms. Cheng did not administer it to Student in a biased manner. The Woodcock-Johnson is a valid test instrument for measuring a student's levels of academic achievement in several areas, and Ms. Cheng administered it in accordance with the directions.

13. Ms. Kugler assessed Student's cognitive abilities with the Wechsler, and also used the Test of Visual-Perception and the Test of Auditory-Perception to determine if visual or auditory processing deficits might be affecting Student's cognition. Student's IQ was in the average range, with scores in the above average and superior range on some subtests in each of the above-mentioned tests, and no scores in the below average range. The testing did not reveal any visual or auditory processing deficits. The testimony of B. Hum, Ms. Lam, Ms. Chu, and Ms. Sena concerning Student's intellectual ability supported the results of the cognitive testing, as did his report card grades and other standardized testing conducted by Garvey during the course of each school year. Although Dr. Benveniste testified that Ms. Kugler should have investigated the drop in Student's IQ score, this testimony did not establish that Garvey's psychoeducational assessment was legally inappropriate.

14. All of the tests directly administered to Student were given to him in English since he had been classified as an English-speaker earlier in 2015. Ms. Kugler produced a written report that incorporated all of the test results from those she administered, as well as the results of the Woodcock-Johnson administered by Ms. Cheng. Dr. Benveniste criticized Ms. Kugler's assessment when she testified because it did not capture Student as a person. Rather it was merely a report of the scores he received on the testing she and Ms. Cheng conducted. It is true that Ms. Kugler's report is somewhat dry, unlike the report of Ms. Sena which contains anecdotal information

that reflects Student's engaging personality and creativity. However, there is no requirement that an educational assessment conducted by a school district be entertaining. And although Student might have preferred a more robust assessment report, the assessment completed by Ms. Kugler identified Student's strengths and weaknesses, and addressed likely eligibility categories, including those of autism, and other health impairment which Student argued were inadequately explored.

15. Student argues that Mother's consent to the assessment plan was not informed, so therefore the resulting assessment should be found legally noncompliant. Student bases this argument on boilerplate language in the assessment plan indicating that the social/emotional and adaptive/behavior portions of the assessment will determine how the child acts at home and in the community, not just at school, and how the child feels about himself. He then argues that this led Mother to believe she would play an active role in the assessment process. However, the assessment plan does not say who will provide this information, nor how the information will be obtained. It does not specifically say that parents will be interviewed and given scales to complete each and every time a child is assessed. Mother was aware of the assessment process since Student had been assessed before. There was no evidence that Mother ever contacted the school to ask why she was not being interviewed or given surveys to complete after she signed the assessment plan in September 2015. Had she done so, this argument that she did not give informed consent for the assessment may have had some merit.

16. A school district's failure to obtain parental consent to assess a student is a procedural violation. A procedural violation denies a child a FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see *W.G. v. Board of*

*Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 [superseded by statute on other grounds, as stated in *R.B. v. Napa Valley Unified School Dist.* (9th Cir.2007) 496 F.3d 932, 939].) Even if it were found that Mother did not give “informed” consent to the assessment plan because the boilerplate language was misleading, this would at most be a procedural violation, but not one that rises to such a level that it renders the subsequent assessment invalid. If the assessor failed to obtain any information about how the child behaves and functions at home and in the community for a psychoeducational assessment, the validity of the assessment would be highly questionable, but the evidence established that Ms. Kugler interviewed several individuals who were familiar with Mother’s concerns, and very familiar with Student, including Ms. Law, his counselor, who saw him for 60 minutes each month. There is no legal requirement that a parent be interviewed by the school psychologist conducting a psychoeducational assessment. Nor was the assessment invalidated because Mother was not given the parent form of the Behavior Schedule to complete, and Dr. Benveniste confirmed this.

17. In regard to Student’s claim that he was inadequately assessed for autism by Ms. Kugler, the evidence established that this was not the case. The two formal observations of Student by Ms. Kugler did not show him demonstrating any behaviors that would indicate he had autism. Nor were any such behaviors seen by the teachers and others who were interviewed by Ms. Kugler and testified. Only Mother claimed to observe such behaviors, and these were in the home setting. Ms. Kugler had Ms. Lam complete the Gilliam Autism questionnaire, and there was no indication that Student was on the autism spectrum, based on this screening. Gilliam Autism questionnaires were completed by Student’s kindergarten teacher and Ms. Sena in 2013, with similar results. It was only Mother’s Gilliam results in 2013 that showed Student might be on the autism spectrum. However, Mother’s perceptions were not confirmed in 2013 when

Ms. Kugler conducted further testing of Student using the Autism Diagnostic Observation Schedule. There was no indication in either 2013 or 2015 that Student was showing signs of autism in the school setting. Observations of Student at school, and information gathered from other providers in 2015, confirmed Ms. Kugler's conclusion that Student was not autistic, and there was no need for Ms. Kugler to conduct additional autism testing.

18. Student believes the psychoeducational assessment was flawed because there was insufficient testing to determine if he was eligible for special education under the other health impaired category due to his provisional diagnosis of ADHD in early 2015. If symptoms of ADHD were negatively affecting Student in the educational setting, it is likely this would have been reflected in his grades, and by the results of his academic achievement testing by Ms. Cheng. However, his grades showed that he was meeting or exceeding grade level standards during the 2014-2015 school year, and while there was a slight dip in Student's written expression grade in the first trimester report card for the 2015-2016 school year, this grade had risen by the time the complaint was filed in this matter. Garvey witnesses credibly testified that third grade expectations are more demanding than those in second grade, and the lower mark in written expression was not aberrant, or a sign that Student's ADHD was negatively affecting him academically.

19. Student claims that Ms. Lam did not follow instructions when she completed the Vineland which "resulted in an unreliable rating." The reason he claims the rating was unreliable was that she wrote "n/o" next to 39 out of 237 items, which Ms. Lam testified meant "not observed," but then scored them. The option of writing "n/o" was not part of the instructions, and Student argues that doing so invalidated the results, as did the fact that there was no evidence as to how Ms. Kugler scored the completed Vineland questionnaire after Ms. Lam returned it to her. However, there was

no testimony from any witness that what Ms. Lam did when she completed the Vineland invalidated the results. Dr. Benveniste did not testify about the Vineland at all.

20. Student also claims that Ms. Lam's Gilliam results were invalid because she failed to give a rating for one of the 58 items describing specific behaviors. Further, Ms. Lam responded with a "0," signifying "never," to 53 items. Dr. Benveniste testified that the fact that all the items on the first page were scored as "never" made the results questionable since one would expect a third grader to engage in at least one of the behaviors described. However, the first section lists 13 "Restrictive/Repetitive Behaviors," which one would typically observe an autistic child engaging in, and there was no evidence from any Garvey witness that Student ever engaged in those behaviors. Further, the second section on page one contains 14 items that describe "Social Interaction" and again lists behaviors which one would find in a child who was uninterested in having any social interaction with others. However, the evidence established that Student was a very social child, with many friends, and actively participated in the classroom, answering and asking questions, often assuming a leadership role. Therefore, Ms. Lam's responses in this section appear to be reliable, and there was no evidence other than Dr. Benveniste's speculative testimony to support the fact that the results of this assessment were invalid.

21. In his closing argument Student claims that the psychoeducational assessment should be found legally noncompliant because Ms. Kugler "failed to follow standard practice for the administration of the [Behavior Schedule]." In making this argument Student cites OAH Case No. 2006080715, *Rialto Unified School District v. Student* (2007). In this case an ALJ found that a school district's assessment of a child was legally noncompliant for several reasons. First, the parent and child were not given the Behavior Schedule questionnaires to complete. Second, the school psychologist never observed the child in the classroom and he should have done so using the

Behavior Schedule's Structured Observation System. Finally, the ALJ found the assessment invalid because only one of the child's teachers completed the Teacher Rating Scale portion of the Behavior Schedule. However, California Code of Regulations, title 5, section 3085 explicitly states that other due process decisions may be relied upon as persuasive, but also makes it clear that they are not precedential.

22. In this case, Ms. Kugler did a classroom observation. Although Dr. Benveniste testified that it would have been preferable for Ms. Kugler to have used a structured observation form such as the Structured Observation System, failure to do so did not invalidate the psychoeducational assessment. In addition, Dr. Benveniste acknowledged that although she believed it was "best practice" to have several individuals, including a parent and child, to complete Behavior Schedule questionnaires, it is not a requirement. Thus failing to do so did not invalidate the psychoeducational assessment in this case. Dr. Benveniste acknowledged that time and other limitations imposed upon school psychologists may result in assessments that are not as complete as one would like.

23. Student claims that Ms. Cheng's academic achievement testing of Student was invalid because she did not complete the section on the first page of the test protocol concerning Student's demeanor and testing behavior. However, Dr. Benveniste, testified credibly that failure to complete the test behavior section on the first page did not invalidate the academic assessment. Student also claims that the testing was invalid because Ms. Cheng administered the test in three different sessions, and did not report this. However, Student presented no evidence that doing so rendered the academic testing invalid.

24. Student argues that Garvey should have obtained Student's records from Foothill Family Services, and failure to do so made the psychoeducational assessment legally inappropriate. However, Student had ceased his counseling at Foothill in January

2015. Garvey had the March 2015 letter from Foothill giving Student a provisional diagnosis of ADHD, and Ms. Kugler did interview Ms. Law, Student's current therapist, as part of the assessment process. Again, Student cited no evidence that the psychological assessment was legally inappropriate because Foothill records were not sought and obtained. Rather Student cited another OAH case in which failure to obtain medical records denied a student a FAPE, but this is not evidence, and as previously noted, the ALJ cannot rely on other OAH decisions as precedent.

25. Student's last argument is that the psychoeducational assessment should be found legally noncompliant because it was not "sufficiently comprehensive to identify all of [his] special education needs." The assessment is criticized because only Ms. Lam was given questionnaires about Student, not the other two third grade teachers. However, Ms. Lam was Student's sole teacher until sometime in October when the "rotation" of students among all three teachers began, so when the assessment was being done in the early part of the school year, those other teachers would not have been sufficiently familiar with Student to give reliable information. Student also argues that M. Hum's behavioral report was "inadequate and . . . unreliable" because it incorporated Mr. Berry's information, but appeared to have been based solely on her own observations, and she had not engaged in data collection as she had only been employed by Garvey for a short period of time before the report was drafted. However, there was no evidence that the report gave inaccurate data or information as the testimony of other Garvey witnesses, based on their own experiences with Student, corroborated what was in the report. Student also argues that Ms. Lam had only been Student's teacher for a few weeks when she completed the questionnaires, and therefore she did not know him well enough to provide accurate information. However, the testimony of other Garvey witnesses about Student corroborated the results of Ms. Lam's questionnaire responses, as tabulated by Ms. Kugler. Student claims that other



people should have completed various questionnaires that Ms. Lam completed, but again, Student did not present evidence that this rendered the psychological assessment legally noncompliant.

26. Student claims that Ms. Kugler ignored information in Student's records that indicated he was autistic, and utilized testimony from Dr. Benveniste to establish this. However, although Dr. Benveniste testified about information she had gleaned from Student's records, all of the information was found in reports of statements made by Mother in IEP team meetings, and incorporated into the Notes of those IEP's. Ms. Kugler reviewed those IEP's as part of her assessment. And Dr. Benveniste's recollection of what was reflected in Student's school records was not necessarily reliable as she testified that she read about an incident where Student eloped from the school grounds when he was much younger, and had walked home. However, no other witness testified about this incident, nor was there any evidence of this incident in the documents that were admitted into evidence for this hearing.

27. Student claims Ms. Kugler ignored the "drop" in Student's grades at the end of the first trimester as another reason for finding the assessment legally noncompliant. However, the first trimester did not end until November 17, 2015, more than two weeks after the assessment was completed and the October 30, 2015 IEP team meeting, was held.

28. Student's many objections to the Garvey psychoeducational assessment have all been considered and are discussed above. However, notwithstanding those objections, Garvey met its burden of proving that the psychoeducational assessment was legally compliant. And it filed the complaint asking that this be done less than 30 days after receiving Mother's November 19, 2015 request for an independent educational evaluation in the area of psychoeducation.

## ISSUE 2: APPROPRIATENESS OF SPEECH AND LANGUAGE ASSESSMENT

29. Garvey argues that the speech and language assessment met all legal requirements. Student contends that the speech and language assessment was not legally appropriate because Mother was not interviewed, there was not a “proper evaluation of pragmatics,” the assessment was not “sufficiently comprehensive,” and the assessment was biased.

### Analysis

30. Ms. Sena is a speech and language therapist who is qualified and trained to conduct speech and language assessments, and to administer the test instruments she used to assess Student. She is knowledgeable about conditions a student might have that could be found as a result of speech and language being assessed. For the speech and language assessment Ms. Sena administered three standardized speech and language instruments, all of which were appropriate to measure Student’s use of language to communicate, and his speech. These instruments are valid and reliable. Ms. Sena also interviewed two of Student’s current teachers, and the teacher he had in second grade. The testing conducted by Ms. Sena was not racially, culturally or sexually discriminatory nor was the testing administered in that way. Student is classified as an English-speaker, although he is bilingual, and it was appropriate for the testing to be conducted in English, and that was done. The tests were administered according to the instructions, and all were the correct instruments to use for the purpose each was used. A written report was produced.

31. Ms. Sena did not complete a standardized form or use a standardized methodology when she conducted her observations of Student and interviewed teachers. However, there is no requirement that she do so. Further, there was no evidence that her observations were incomplete, or invalid in any way, or that her

teacher interviews were flawed in any way. All three of the teachers Ms. Sena interviewed testified at hearing, and the information they provided at hearing about student's speech and language abilities was consistent with the results Ms. Sena recorded in her report. The speech and language assessment Ms. Sena conducted in October 2015 was legally compliant.

32. Student's first argument to support his contention that the speech and language assessment was not legally compliant was that Mother was not interviewed. Again, as was true about this argument in regards to the psychoeducational assessment, there is no legal requirement that a parent be interviewed when a speech and language assessment is conducted.

33. Student's second argument is that Ms. Sena's assessment did not include "a comprehensive and reliable pragmatics profile." Ms. Sena and Ms. Lam completed a pragmatics profile together and Student claims that each should have completed a separate profile, or ratings should have reflected pragmatics in more than one environment. Further, Student argues that reports of two incidents when Student became tearful on the playground, and reports of him not getting along with cousins and his little sister reflect pragmatics deficits. However, there was no evidence two isolated incidents during recess over a period of several months meant that Student was unable to socially communicate. Nor is it unusual for a child to not play well with much younger or older child relatives. Finally, Student did not present any evidence, nor can cite to any legal authority to support this conclusion that having Ms. Lam and Ms. Sena work together to produce a pragmatics profile rendered the speech and language assessment legally noncompliant.

34. Student also claims that the speech and language assessment was not "sufficiently comprehensive," in that Ms. Sena ignored Student's testing behavior which included his commenting when the air conditioner started, and asking for tangible

rewards during the testing. Also, Ms. Sena did not conduct further testing when Student scored in the ninth percentile on a subtest, and did not have a complete pragmatics profile. Student also claims that he showed signs of auditory processing issues, and Ms. Sena did not conduct further testing in this area. However, again Student cannot cite to any legal authority to support this conclusion that the testing was not "sufficiently comprehensive" to such a degree as to make it legally noncompliant, nor did he present any evidence in this regard.

35. Student's last argument is that the speech and language assessment is "biased," and he gives several examples of this "bias." First Student argues that Ms. Sena had "predetermined" that Student no longer needed speech and language services, and therefore she did not conduct sufficient testing. However, Ms. Sena stopped providing speech and language services to Student at the end of the 2012-2013 school year. Ms. Johnson took over Student's speech and language therapy beginning with the 2013-2014 school year. Ms. Johnson participated in the IEP team meeting of October 29, 2014, when Garvey suggested that Student no longer required speech and language therapy. The services continued only because Mother refused to sign the IEP.

36. Student also argues that Ms. Sena repeatedly referred to the assessment as a "settlement evaluation" when she testified, and this demonstrates bias on her part. He also claims that when he received the low subtest score on the Language Processing Test (which he mistakenly refers to as the Test of Auditory Processing in his closing argument), the fact that Ms. Sena did not conduct further testing in this area was a sign of racial/cultural bias. This was because Ms. Sena, when she testified, stated that the low score was part of a pattern she saw with English learners, and this statement demonstrated bias. Student further argued that failing to put this explanation in her report meant that she was racially or culturally biased, and thus her report was legally non-compliant. Student claims that Ms. Sena's statement that she herself had difficulty

in finding similarities is a denial of her own bias. Student presented no evidence and no testimony, to support his contentions of bias in this regard.

37. It is important to note that Ms. Sena administered three standardized tests to Student, none of which could be perceived as biased, nor was there testimony or evidence in this regard. Nor does her statement about seeing similar low scores on a particular subtest from non-native English speakers reflect bias. Rather, the statement reflects her personal experience of conducting assessments for over 20 years as an employee of Garvey, where many of the students are non-native English speakers.

38. Garvey met its burden of proof that the speech and language assessment was legally compliant. Student's argument to the contrary was unsupported by testimony, evidence, and legal authority. Further, Garvey filed the complaint asking that its speech and language be found to be legally appropriate less than 30 days after receiving Mother's November 19, 2015 request for an independent educational evaluation in the area of speech and language.

### ISSUE 3: EXITING STUDENT FROM SPECIAL EDUCATION

39. Garvey contends that Student no longer qualifies for special education and related services under any eligibility category based on its assessments, as well as Student's behavior and performance in the school setting both in and out of the classroom. Student argues that because the psychoeducational assessment and the speech and language assessments were legally noncompliant, Garvey cannot exit him from special education, and reiterates all the arguments he previously used to explain why he believes the assessments are legally noncompliant.

#### Eligibility

40. A student is eligible for special education and related services if he is a "child with a disability" such as an emotional disturbance, other health impairment, or

specific learning disability and, as a result thereof, needs special education and related services that cannot be provided with modification of the regular school program. (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a)(1); Ed. Code, § 56026, subds. (a) & (b) [uses term “individual with exception needs”].) A student shall not be determined to be a child with a disability if the prevailing factor for the determination is a lack of appropriate instruction in reading or mathematics or if the student does not otherwise meet the eligibility criteria under federal and California law. (20 U.S.C. § 1414(b)(5); 34 C.F.R. § 300.306(b); Ed. Code, § 56329, subd. (a)(2).) California further specifies that a student whose educational needs are primarily the result of a temporary physical disability, social maladjustment, or environmental, cultural, or economic factors, is not an individual with exceptional needs. (Ed. Code, § 56026, subd. (e).)

41. Under the IDEA, only some children with certain disabilities are eligible for special education. (20 U.S.C. § 1401(3)(A); Ed. Code § 56026, subd. (a).) For purposes of special education eligibility, the term “child with a disability” means a child with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. (20 U.S.C. § 1401(3)(A)(i), (ii); 34 C.F.R. § 300.8(a).) Similarly, California law defines an “individual with exceptional needs” as a pupil who is identified by an IEP team as “a child with a disability” pursuant to 20 U.S.C. section 1401(3)(A), who requires special education due to his or her disability, and instruction and services cannot be provided with modification of the regular school program. (Ed. Code § 56026, subds. (a), (b).)

42. California Code of Regulations, title 5, section 3030 includes a list of conditions that may qualify a child as an individual with exceptional needs and thereby

entitle the child to special education if required by the degree of the child's impairment. However, there are many students who have varying levels of deficits, areas of need, and disabilities, who do not qualify for special education because they do not fall within one of the narrow categories specified by law. Additionally, even if a student's deficit, need, or disability falls within one of the categories, a student may still not qualify for special education because student's instruction or services could be provided with modification of the regular school program.

43. In deciding whether a student needs special education, courts apply the *Rowley* standard to determine whether the student can receive some educational benefit from the general education classroom. (*Hood v. Encinitas Union School Dist.* (9th Cir. 2007) 486 F.3d 1099, 1106-1107 (*Hood*) [decided under former Ed. Code, § 56337].) *Hood* demonstrates that a child may have a specific learning disability, yet not be found eligible for special education, because the child's needs can be met with modification of the general education classroom. The Ninth Circuit held, "In essence, the Hoods assert that the law guarantees a learning-disabled child of superior ability enough individualized attention and services ... to elicit optimum performance from the child, when clearly no such requirement exists for children without disabilities, gifted or not." (*Id.* at 1108.)

44. In *County of San Diego v. California Special Education Hearing Office, et al.* (9th Cir. 1996) 93 F.3d 1458, 1467, the Court specified that "educational benefit" is not limited to academic needs, but instead includes the social and emotional needs that affect academic progress, school behavior, and socialization.

45. The actions of an IEP team are 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 Education* (3d Cir. 1993) at p.

1041.) An IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*)

46. An administrative law judge has the 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 a district has failed to properly identify a student as eligible for special education, and therefore failed to develop an appropriate IEP for the student, the district has denied the student a FAPE. (*Cari Rae S., supra*, 158 F.Supp.2d 1190, 1196.)

#### Eligibility Categories Which Do Not Apply

47. There was no evidence that Student is intellectually disabled; his full scale IQ based on Ms. Kugler's testing, is 104. His academic scores based on Ms. Cheng's testing were somewhat above what might be expected based on the results of Ms. Kugler's cognitive testing, and there was no evidence that Student has a visual, auditory, or sensory processing disorder, which rules out the category of specific learning disability. There was no evidence that Student is hearing impaired, and/or visually impaired. There was no evidence that he is emotionally disturbed, is orthopedically impaired, or has suffered traumatic brain injury. All of these disability categories were considered by Ms. Kugler and correctly rejected.

#### Speech and Language Impairment

48. A student is eligible for special education due to speech and language impairment if his academic performance is adversely affected by difficulty understanding or using spoken language. Conditions that may cause this difficulty include articulation disorders, abnormal voice, fluency difficulties, or difficulty acquiring expressive or receptive spoken language with language performance significantly below that of peers. (Ed. Code § 56333.) These conditions are more specifically described in



title 5 of the California Code of Regulations, section 3030, subdivision (b)(11), which includes a provision that eligibility can be found if the subject is below the seventh percentile on two or more standardized tests.

#### ANALYSIS

49. Student's initial eligibility category for special education was speech and language impairment. As previously discussed, Ms. Sena conducted a thorough speech and language assessment of student. At the time of this evaluation he had been receiving speech and language therapy for at least four years. Student spoke with a normal voice, and was understood by teachers and peers. Although one subtest score on the Language Processing Test placed Student in the ninth percentile for children his age, this was only one subtest score, and it still placed him above the seventh percentile. Although Student had a slight articulation issue with the voiceless "th" sound, this did not make his speech difficult to understand, and this articulation issue is not unusual for a child who has learned to speak another language that lacks this sound, as is the case with Student.

50. In the area of pragmatics, there was abundant evidence that Student had friends both in and outside the classroom, worked and played well with his peers, and was well-liked by his teachers. He was a leader both in and outside the classroom. Although Mother voiced complaints during the hearing about Student's social interactions with his sister and cousins, similar conduct was not seen by anyone in the school setting. Garvey met its burden of proof that Student is not eligible for special education and related services under the category of speech and language impairment.

#### Other Health Impairment

51. A student with ADHD may meet the eligibility criteria for other health impaired if there he has "limited strength, vitality or alertness" in the educational

environment. This limited strength, vitality or alertness must affect the student's ability to access the educational environment and adversely affect educational performance. (Cal.Code Regs., tit. 5, § 3030, subd. (b)(9).) To be eligible for special education as a student with other health impairment, the student must be unable to access the curriculum without special education instruction and related services. (20 U.S.C. § 1401(3)(A)(ii); Ed. Code § 56026, subd. (b).)

### Analysis

52. Ms. Kugler considered whether Student qualified for special education as a child with other health impairment. In March 2015, Garvey was notified that Student had been given a provisional diagnosis of ADHD by a psychiatrist at Foothill Family Services. Although there was evidence that Student was sometimes "fidgety" in class, or engaged in conversation with other children in class when he was supposed to be working, there was no evidence that these behaviors adversely impacted him or others. And when he lost focus in the classroom, he was quickly able to refocus on his own most of the time, especially once he advanced to third grade. There was no evidence that Student lacked strength, vitality, or alertness in the classroom. Rather he was an active participant in class, and on the playground.

53. Student's report card grades for second grade, the 2014-2015 school year, reflect a child who was accessing the educational environment without special education instruction. Ms. Cheng's services only began at the beginning of the 2015-2016 school year, and were limited to consultation services. She was not providing direct services to Student, and the teachers were able to provide instruction to him using general education strategies. Although Mother testified that Student was taking as long as two to three hours each night to complete his homework, both Ms. Lam and Ms. B. Hum told Mother it was important that Student make an effort to complete his homework, but not necessary that every single assignment be completed every night. Mother chose to

ignore this advice. And while Mother struggled to get Student to complete his homework each night, with tearful response from Student, such behavior is not uncommon in many households and with many typically developing children. Garvey established that Student did not meet the eligibility criteria for special education as a student with other health impairment.

#### Autism

54. A child meets the criteria for special education as a child with autism if he has a developmental disability that significantly affects communication (both verbal and nonverbal), and his social interaction, and adversely affects his educational performance. It generally manifests itself before the child is three years of age. Characteristics of autism include repetitive activities, resistance to change, unusual responses to sensory experiences, and stereotyped movements. (5 C.C.R. § 3030, subd. (b)(1).)

#### ANALYSIS

55. Ms. Kugler, Ms. Chu, Ms. Lam, M. Hum, B. Hum, Ms. Sena, Ms. Cheng and Ms. Law all testified on behalf of Garvey. None of these witnesses described Student as having problems with communication, other than his phonological disorder that affected his articulation in Head Start, kindergarten, and first grade. By the time he was in second grade speech and language therapy had resulted in Student having such improved articulation that he was being understood by his teacher and peers without difficulty, and Garvey believed he no longer needed speech and language services. The evidence established that Student communicates appropriately with adults and peers at school, both expressively and receptively.

56. Although Student sometimes engages in a fidgeting routine in the classroom this year, this is not a constant behavior. Student has no difficulty with transitions from one activity to another in the classroom, or transitioning from the

classroom to recess, and back to the classroom after recess. All of the Garvey witnesses were credible when they testified about Student. Ms. Lam completed the Gilliam questionnaire in 2015, and Student's first grade teacher and Ms. Sena completed the questionnaire in 2013. The results were such that it was unlikely that Student was autistic. Further, Ms. Kugler completed the ADOS in 2013 and again the results were that it was unlikely Student had autism. Finally, there was significant evidence that Student has many friends and social relationships among his peers and teachers, and does not engage in any behaviors at school that would cause one to suspect he has autism.

57. The evidence at hearing overwhelmingly supports a finding that Student is not eligible for special education as a child with autism. And even if he were found to have autism, his grades and scores on the Woodcock-Johnson show that it does not have an adverse effect on his academic performance, and his relationships with peers and staff do not show problems with socialization. Finally, there was no evidence that Student requires special education in order to receive an education. Accordingly, Student does not meet the eligibility criteria for a special education as a child with autism.

58. Only Mother's testimony about Student's eating habits, clothing choices, dislike of haircuts and inability to play well with his cousins, as well as her responses on the Gilliam in 2013, support a finding that Student might be eligible for special education as a child with autism. However, many typically developing children are picky eaters, do not want to wear certain types of clothing, and dislike haircuts. In regards to Student's difficulties with his cousins, they probably do not want to play with him because they are respectively three and five years older than he is. It is also understandable that Student may not want to play or share with his three year old sister. However, these behaviors do not, in and of themselves, demonstrate that Student has autism. Mother did not describe repetitive activities other than he likes to play with

Legos which is an activity enjoyed by many, many children, hence the popularity of Lego Land. Student is engaged in several activities during recess including tag, four-square, and two-square.

59. All of the evidence presented by Garvey unequivocally supports a finding that Student no longer meets any criteria that would continue to make him eligible for special education and services. He has exemplary behavior in the school setting, has good relations with both his peers and staff at Bitely, and no longer exhibits articulation issues that make his speech difficult to understand. Although he has a provisional diagnosis of ADHD, it is not affecting him negatively, as demonstrated by his classroom performance, grades and test scores. In the school setting he shows no signs of autism. All of this information was available to the IEP team when it met on October 30, 2015. Other evidence at hearing also demonstrated that at no time since that meeting has Student exhibited any signs that he is not a typically developing third grader. Accordingly, the determination of the Garvey IEP team members on October 30, 2015, that Student no longer met any criteria for special education was correct and supported by the evidence. Student is exited from special education as of the date of the October 30, 2015 IEP team meeting.

## ORDER

1. Garvey's psychoeducational assessment is legally appropriate and Student is not entitled to have Garvey fund an independent educational evaluation in the area of psychoeducation.

2. Garvey's speech and language assessment is legally appropriate and Student is not entitled to have Garvey fund an independent educational evaluation in the area of speech and language.

3. Student is exited from special education effective October 30, 2015.

## 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 each issue heard and decided. Here, Garvey prevailed on all issues.

## RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: April 25, 2016

\_\_\_\_\_/s/\_\_\_\_\_  
REBECCA FREIE  
Administrative Law Judge  
Office of Administrative Hearings