

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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CASE NO. 2019101075

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GARVEY SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

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DECISION

FEBRUARY 20, 2020

On October 25, 2019, the Office of Administrative Hearings, called OAH, received a due process hearing request from Garvey School District naming Parent on behalf of Student. Administrative Law Judge Brian H. Krikorian heard this matter in Rosemead, California, on January 7, 2020.

Attorney Sharon A. Watt represented Garvey. Alma Ulloa, Director of Special Education, attended the hearing on Garvey's behalf. Student's father represented Student. A Cantonese language interpreter assisted Father.

At the parties' request, the Administrative Law Judge continued the matter to January 23, 2020, for written closing briefs. On January 23, 2020, Garvey filed a closing brief. The record was closed, and the matter was submitted on January 23, 2020.

## ISSUE

May Garvey School District exit Student from special education services without parental consent based upon its determination at the September 18, 2019 individualized education program team meeting that Student was no longer a child with a disability who needs special education and related services?

## JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- 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
- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing concerning any matter relating to the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education, referred to as 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, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was six years old and in kindergarten at the time of the hearing. He resided within the Garvey's geographic boundaries at all relevant times. He was eligible for special education under autism spectrum disorder and a speech and language disorder.

#### ISSUE: MAY GARVEY SCHOOL DISTRICT EXIT STUDENT FROM SPECIAL EDUCATION WITHOUT PARENTAL CONSENT?

Garvey contends it appropriately conducted transitional assessments in psychoeducation and speech and language in August of 2018, and an independent educational evaluation in June of 2019 that Garvey funded before it determined Student was no longer eligible for special education. Garvey argues Student's individualized education program team, referred to as an IEP, correctly concluded Student no longer

qualified as a child with a disability who needs special education and related services under either the category of autism spectrum disorder or speech and language at IEP team meetings in September 2018 and September 2019. Garvey sought to exit Student from special education services under both categories of disability. Parent disagreed and argued that the independent evaluation recommended speech therapy.

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP, reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. \_\_\_\_ [137 S.Ct. 988, 1000].)

A child with a disability means a child appropriately evaluated as having a speech or language impairment or autism. (34 C.F.R. 300.8(1)). Once a child is found eligible for special education, unless specific statutory exceptions apply, a local educational agency shall evaluate a child with a disability before determining that the child is no longer a child with a disability. (20 U.S.C. § 1414 (c)(5)(A).) Once the local educational agency properly completes the reassessment, it is required to develop an appropriate IEP or disqualify the student if the reassessment demonstrated that the child was no longer eligible for special education services. (See *V.S. ex rel. A.O. v. Los Gatos-Saratoga Joint Union High School Dist.* (9th Cir. 2007) 484 F.3d 1230, 1233.)

## REASSESSMENT FOR TRANSITION TO KINDERGARTEN IN 2018

School district evaluations of students with disabilities under the IDEA serve two purposes: first, to identify students who need specialized instruction and related

services because of an IDEA-eligible disability, and second to help IEP teams identify the special education and related services the student requires. (34 C.F.R. §§ 300.301 and 300.303.) The first refers to the initial evaluation to determine if the child has a disability under the IDEA, while the latter refers to the follow-up or repeat evaluations that occur throughout the student's educational career. (See 71 Fed. Reg. 46,640 (Aug. 14, 2006).) A school district must conduct a reassessment if the school district "determines that the educational or related service needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment, or if the pupil's parents or teacher requests a reassessment." (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) A substantial change in the student's academic performance or disabling condition is an example of conditions that warrant a reevaluation. (*Corona-Norco Unified School Dist.* (SEHO 1995) 22 IDELR 469, 22 LRP 3205.)

Garvey assessed Student in June 2017. Garvey found Student eligible for special education services based upon autism and speech and language impairment. Garvey offered Student an IEP, including a special day preschool class with speech and language services. Parents did not consent. Student attended a Head Start Preschool class with speech services. Student's transition from the Head Start Program to general education kindergarten warranted reassessment to help Student's IEP team identify the special education and related services Student would require in kindergarten.

In 2018, Student was referred for a psychoeducational evaluation by the IEP team as part of his transition to kindergarten in the 2019-2020 school year. The assessment occurred on August 28, 2018. Student was attending a "transitional" kindergarten class. Transitional kindergarten is for students born between December and August and provides additional preparation for students before attending regular kindergarten.

## AUTISM ASSESSMENT

Autism means a developmental disability that significantly affects verbal and nonverbal communication and social interaction, generally evident before age three, and that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. (34 CFR 300.8(c)(1)(i)).

Student was four years and nine months old at the time of the assessment in 2018. School psychologist Stephanie Chun-Ho conducted the psychoeducational evaluation. Ms. Chun-Ho received input from general education teachers Brigitte (Bibi) Trenzini, Jaunita Baca-Alaniz, and special education teacher Jennifer Rogers.

Stephanie Chun-Ho held a master's degree in educational psychology and counseling. Garvey had employed Ms. Chun-Ho as a school psychologist since April 2016, and she testified at the hearing. As part of her evaluation, Ms. Chun-Ho reviewed Student's records, interviewed Student and his teachers, conducted classroom observations, and administered the Wechsler Preschool and Primary Scale of Intelligence – Fourth Edition, Developmental Test of Visual-Motor Integration – Sixth Edition, Adaptive Behavior Assessment System – Third Edition, Autism Spectrum Rating Scales, Behavior Assessment System for Children – Third Edition, and Brigance Diagnostic Comprehensive Inventory of Early Development III.

Ms. Chun-Ho observed Student in multiple settings, including "carpet time," recess, and transitioning to class time. She observed Student on the playground. Student invited Ms. Chun-Ho to play with him on a bus structure. Student exhibited

signs of imaginary play, making sounds and opening the imaginary door. Student also invited another boy to play on the bus. Ms. Chun-Ho then observed him move on to other playground structures and to engage a peer in conversation. Once in class, Student sat on the rug for a "calendar" activity and engaged his peers and the teacher in discussions. He put his arm around a fellow student. When asked by the teacher if he should be touching other students, Student appropriately responded with a "no" and removed his arm. These observations supported Ms. Chun-Ho's conclusion that Student was not exhibiting traits of an autistic spectrum disorder.

Student came with Ms. Chun-Ho willingly for the testing and made small talk. During the administering of tests, Student did not demonstrate any apprehension with the assessor and asked questions related to the tests. Student had some difficulty remaining focused on certain tasks, and he asked for a break. Ms. Chun-Ho concluded that based upon his age and grade level, this was not inappropriate behavior. With prompting, Student was able to return to task once he received a break. Student was capable of expressing himself verbally and showed an appropriate effort to the tasks presented to him.

Student scored in the low average to average range on the Wechsler tests. Student scored in the high average range for visual-motor development. In the Behavior Assessment System test, Ms. Chun-Ho received input from parent, but Student's pre-school teacher did not return the written questionnaires. Ms. Chun-Ho opined that while receipt of the teacher's written input would have been helpful, based upon Parent's input, testing, and her observations, she was still comfortable with the findings of her evaluation. Student's behavioral scores fell within the low average to high average ranges, and Ms. Chun-Ho did not observe any behaviors characteristic of

autism spectrum disorder. Again, Ms. Chun-Ho opined that these behaviors were typical for kindergarten-age students and did not demonstrate an autism spectrum disorder.

Jennifer Rogers held a master of art degree in educational administration and held an early childhood special education teaching credential. Ms. Rogers had been a special education specialist for 13 years and taught at Garvey. Ms. Rogers conducted the academic portion of the 2018 assessment, and she testified at the hearing.

Ms. Rogers observed Student at Willard Elementary School. He was engaged, polite, friendly, and had good interaction with Ms. Rogers and his peers. He exhibited no behavioral issues, including tantrums. Ms. Rogers interviewed Student's father and recorded what Father reported he observed at home. Ms. Rogers observed Student for one hour and administered the Brigance test, which she described as a "criterion-based" test. A "criterion-based" test is an evaluation that attempts to uncover the strengths and weaknesses of a student in terms of what he or she knows or doesn't know, understands or doesn't understand, or what the Student is capable of, measured against a benchmark standard. Ms. Rogers concluded Student was typically developing and exhibited academic skills ranging from four years to five years old. Her assessment supported the IEP team's conclusion in September 2019 that Student did not require special education services.

The evidence established that Student was at grade level in academics and finished the 2018-2019 year strongly. Student appeared engaged with peers and adults and functioned and transitioned well for his age group. Following two extensive evaluations, both Ms. Chun-Ho and independent examiner Dr. McDonald concluded that that Student no longer met eligibility for autism. Parents did not offer any argument or credible evidence at the hearing to challenge these assessments.



## SPEECH AND LANGUAGE ASSESSMENT

Speech or language impairment means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance. (34 C.F.R. 300.8 (c)(11)).

Erika Noble conducted the 2018 speech and language evaluation. Ms. Noble held a master's degree in speech pathology and was certified by the American Speech and Hearing Association. Julie Sena held a master's degree in speech pathology and also was certified by the American Speech and Hearing Association. Ms. Sena reviewed and analyzed Ms. Noble's assessment report. Ms. Sena had been servicing Garvey students as a licensed speech and language pathologist since 1996. Ms. Sena served as Student's case manager and speech pathologist for the 2018 to 2019 school year. She met with Student twice a week for 30 minutes each session until June of 2019.

Student spoke both Cantonese with his Parents and English with peers and his teachers. Student interacted with other peers, adults, and Ms. Noble. He followed instructions appropriately. Ms. Noble administered the Receptive One-Word Picture Vocabulary Test, Fourth Edition, the Expressive One-Word Picture Vocabulary Test, Fourth Edition, the Preschool Language Scale, Fifth Edition, and Goldman-Fristoe Test of Articulation, Third Edition. A Cantonese interpreter accompanied Ms. Noble during the evaluation. Student, however, insisted that they speak to him only in English. Student scored in the average ranges for both the Receptive One-Word Picture Vocabulary Test and Expressive One-Word Picture Vocabulary Test. Because the Receptive One-Word Picture Vocabulary Test is directed at primary English speakers only, Ms. Noble used it for informational purposes.

The Preschool Language Scale is designed for children from birth to seven years, eleven months of age, and evaluates how much language a child understands and how well they communicate with others. Ms. Noble administered the test in English. The language interpreter also repeated, in Cantonese, some items that Student got incorrectly. Of the seven items he missed, he answered three correctly when translated to Cantonese. Student's scores on the Preschool Language Scale were within the average range. Ms. Noble concluded that Student's language skills were appropriate for his age and linguistic background, that his speech was functionally intelligible, and that his grammar and morphology were consistent with students learning English as a second language. Student's articulation was developing typically for his cultural and linguistic background. The 2018 speech and language assessment concluded that Student would be successful in a general education class setting without speech or language services.

Ms. Sena observed that during the 2018-2019 school year, Student's speech and language skills were consistent with the September 2018 evaluation. Student's vocabulary and communication skills were in the average range and slightly above the mean.

Ms. Sena also opined that Student's scores on the tests administered by Ms. Noble were remarkable and that Student showed a mastery of grammar and morphology. Ms. Sena explained that morphology is the term used where a person employs a contraction of a word on their own. For example, saying, "I won't go" as opposed to "I will not go" demonstrates the use of morphology. In this example, Ms. Sena noted that when a speaker morphs the words into a contraction, they are speaking four words. Student showed a command of pronoun usage, similes, and

contractions on his own. Ms. Sena opined that new English language learners struggle with the latter category. Children of Student's age should have been stringing four to five words together in a sentence. Student was averaging over five words in a sentence and this showed Student's speech and language skills to be very well developed. By the end of the 2018-2019 school year, Ms. Sena believed she was not adding anything new to Student's abilities and skills through speech services.

The evidence proved that Student's scores in the speech and language tests conducted by Garvey were above average and impressive considering the fact he was exposed to several different languages and dialects at home. Although Student continued to receive speech and language services from Abigail Suen pending the outcome of this hearing, she opined that he had reached his goals and did not require additional speech and language services to access his education. On the contrary, he attended a Chinese language immersion program, where one-half of his course schedule was taught in Mandarin. He also attended an after-school program in Spanish. These facts along with the assessment findings demonstrated that he was capable of mastering language and speech without special education services.

#### **GARVEY'S ASSESSMENTS WERE APPROPRIATE**

An assessment must be conducted in a way that:

- Uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent;
- Does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and,

- Uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

The assessments used must be:

- Selected and administered so as not to be discriminatory on a racial or cultural basis;
- Provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally;
- Used for purposes for which the assessments are valid and reliable;
- Administered by trained and knowledgeable personnel; and,
- Administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(a)(2), (b) & (c); Ed. Code, §§ 56320, 56381, subd. (e).)

The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158.) No sole measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).) Assessors must be knowledgeable about the student's suspected disability and must pay attention to student's unique educational needs, such as the need for specialized services, materials, and equipment. (Ed. Code, § 56320, subd. (g).)

The autism and language and speech assessments complied with the assessment requirements in title 20, United States Code, section 1414, subdivisions (a)(2), (b), and (c), and Education Code sections 56320 and 53381, subdivision (e) because Ms. Chun-Ho and Ms. Noble used multiple, technically sound instruments, administered according to

the test instructions. Both assessors administered the instruments in the language and form most likely to yield accurate information about Student's academic, developmental, and functional needs. For example, when necessary, Ms. Noble re-tested certain items that Student missed in Cantonese. The evidence further established that the selected instruments were not discriminatory, racially or culturally biased, and both Ms. Chun-Ho and Ms. Noble were qualified to administer and interpret the assessments and trained and knowledgeable about Student's suspected disabilities.

### SEPTEMBER 2018 IEP MEETING

Following the two assessments, the IEP team held a meeting on September 7, 2018. All required IEP team members and parents were in attendance. Ms. Chun-Ho and Ms. Noble reviewed their findings and conclusions. Parents raised concerns that Student could only read a few words from a book. Parents were concerned that much of his progress at school had come from Applied Behavioral Therapy services at home. Garvey IEP team members recommended that Student be placed in a general education setting 100 percent of the time, and that speech services be removed because he was no longer eligible for special education based upon autism or speech and language disability. Parents disagreed with this recommendation and agreed to sign the IEP as to attendance only.

### PSYCHO EDUCATIONAL INDEPENDENT EVALUATION AND SEPTEMBER 2019 IEP MEETING

Garvey agreed to fund an independent psychoeducational evaluation by Laura McDonald, Psy.D. Dr. McDonald conducted her testing and evaluation for five days in May of 2019. She prepared a report dated June 1, 2019.

Dr. McDonald observed Student transitioning easily at the teacher's direction. Student used an iPad device, and when prompted by the teacher to open the appropriate application, he did so. When the transition period occurred, Student again transitioned to the rug and worked with his peers on vocabulary. Student sat still for the majority of the lesson. Student transitioned appropriately to recess and engaged in appropriate behavior with his peers and other adults on the playground. He then "easily" transitioned back to his classroom.

Dr. McDonald observed that Student showed good eye contact with her, and built a rapport. Student showed appropriate joint attention and reciprocal social interactions throughout the examination. Although he engaged in back and forth conversation with Dr. McDonald, his sentences were short, and occasionally, he needed clarification on vocabulary. Dr. McDonald found that his attention and concentration were age-appropriate. Dr. McDonald conducted 12 different clinical tests on Student.

Dr. McDonald found that Student demonstrated average verbal and visual cognitive abilities. She also concluded that Student's expressive vocabulary, visual-motor integration abilities, visual working memory skills, and fine motor dexterity were in the average range. She opined that Student's early reading skills and math problem solving skills were in the average range and that his alphabet writing fluency was superior. Student demonstrated average abilities to recognize emotions based upon facial expressions and to take someone else's perspective.

Dr. McDonald concluded that Student no longer met the diagnostic criteria for an autism spectrum disorder. She recommended that Garvey place Student in a general education setting. She expressed concern that Student's language was somewhat limited and indicated she was unclear whether Student's language difficulties were due

to being an English learner or whether he continued to have a speech and language disorder and recommended continued speech and language services.

Garvey convened an amendment IEP meeting on September 18, 2019, to review Dr. McDonald's report. All required IEP team members and Student's mother attended. Dr. McDonald attended via telephone. Dr. McDonald presented her findings and expressed her opinion that Student no longer met the eligibility for autism. She reported that she was unclear if Student's language difficulties were related to his multi-language exposure or a language disorder.

Bibi Trenzini was Student's teacher during the 2018-2019 school year. Ms. Trenzini attended the 2019 IEP meeting. She reported her observations of Student over the school year. Student showed growth over the year and was reading and writing at grade level. He was beginning to do math addition. Although in transition kindergarten, he was at grade level in academics and finished the year strongly. Student exhibited all the requirements to move on to traditional kindergarten.

The IEP team agreed with Dr. McDonald's assessment of the autism finding and her recommendations related to autism. However, Garvey's team members disagreed with Dr. McDonald's recommendation that Student receive speech and language services. Dr. McDonald acknowledged to the IEP team she was not an expert in speech and language.

Dr. McDonald was not a licensed speech and language pathologist and was not qualified to make specific speech and language findings. Dr. McDonald's curriculum vitae confirmed that she was not trained in speech pathology. Additionally, she was not certain whether or not Student could benefit from those services, rendering her

recommendation for continued speech services unpersuasive. Therefore, the IEP team appropriately gave little weight to her recommendations relating to speech and language. The IEP team properly concluded based upon Student's present levels of performance and current data that Student was no longer eligible for special education services under diagnoses of either autism or speech and language disorder. Parents disagreed and did not consent to the amendment exiting Student from special education.

## STUDENT DID NOT NEED SPECIAL EDUCATION SERVICES TO ACCESS HIS EDUCATION

Following the September 18, 2019 IEP meeting through the date Garvey filed the complaint in this matter, Student attended a general education kindergarten classroom setting. He was part of an English/Chinese immersion program. As part of the program, Student received one-half of the day's instruction in English from Lisa Lau and the other one-half of the day in Chinese from Ms. Tao. Ms. Tao, who has taught Student since August of 2019, opined that Student adapted well in her classroom, and his report card for the fall semester showed he was reaching average to high average marks. Ms. Tao noted that, unlike other students on IEPs, Student had a very strong ability to express himself and amazing skills to incorporate new knowledge. The entire immersion kindergarten program lasted from 8:20 a.m. to 2:30 p.m., when Student then attended a Spanish language after-school program, usually until almost 6:00 p.m.

Following the September 2019 IEP meeting through the date Garvey filed the complaint in this matter, Student received speech and language services under the doctrine of "stay put" from Abigail Suen, a certified speech pathologist. Similar to



Ms. Sena's observations, Ms. Suen felt that Student could express himself and his thoughts to her, spoke very clearly, was articulate and intelligible, and engaged well with peers and adults. Based on her experience, Ms. Suen opined, consistent with other Garvey staff, that he no longer showed any signs of autism or a speech and language disorder.

Garvey proved by a preponderance of the evidence that Student was no longer eligible for special education. The data upon which Garvey relied was current, based upon appropriate recent assessments by qualified professionals, and the IEP team considered the data in detail at the September 2019 IEP meeting. Student's teachers for both the 2018-2019 and 2019-2020 school years credibly opined, based upon their knowledge, experience, and assessment results, that Student was progressing and meeting grade-level expectations for his age group in the general education environment.

## CONCLUSIONS AND PREVAILING PARTY

As required by the 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.

Issue: Garvey School District may exit Student from special education services without parental consent based upon its determination at the September 18, 2019 individualized education program team meeting that Student was no longer a child with a disability who needs special education and related services. Garvey School District prevailed on the one issue in this case.

## ORDER

Garvey School District may exit Student from special education and related services without parental consent.

## RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

/s/

Brian H. Krikorian

Administrative Law Judge

Office of Administrative Hearings