

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2019110294

GARVEY SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

DECISION

JUNE 3, 2020

On November 8, 2019, the Office of Administrative Hearings, called OAH, received a due process hearing request from Garvey School District naming Student. OAH granted the parties request for continuance on November 25, 2019. Administrative Law Judge Linda Johnson heard this matter via videoconference in San Diego, California on April 28, 29, and 30, 2020.

Attorney Sharon Watt represented Garvey. Alma Ulloa, Garvey's Special Education Director, attended the hearing on Garvey's behalf. Attorneys Valerie

Vanaman and Sophia Bliziotis represented Student. Parents attended the hearing on Student's behalf.

OAH continued the matter to May 15, 2020, at the parties' request, for closing briefs. The record was closed, and the matter was submitted on May 15, 2020.

ISSUES

1. Was Garvey's fall 2019 psychoeducational assessment appropriate?
2. Was Garvey's fall 2019 speech and language assessment appropriate?

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 with respect to 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, and 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).) Here, Garvey requested the due process hearing and has the burden of proof. 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 eight years old and in second grade at the time of hearing. Student resided within the Garvey's geographic boundaries at all relevant times. Student was eligible for special education under the primary category of autism and secondary category of speech and language impairment.

Garvey conducted Student's triennial reevaluation in the fall of 2019. Parents disagreed with the triennial reevaluation and requested independent educational evaluations in the areas of psychoeducation, speech and language, and occupational therapy. Garvey filed a due process complaint alleging all three district assessments were appropriate. Prior to the prehearing conference in this matter Student withdrew the request for an independent educational evaluation in the area of occupational therapy. During the prehearing conference the Garvey withdrew its issue regarding the occupational therapy assessment.

ISSUE 1: WAS GARVEY'S FALL 2019 PSYCHOEDUCATION ASSESSMENT APPROPRIATE?

Garvey contends it conducted a legally sufficient psychoeducational assessment and Student is not entitled to an independent educational evaluation at public expense. Garvey further alleges the instruments it used were valid and well recognized.

Student contends the assessment did not meet federal and state requirements and was not valid and reliable. Student further contends Garvey disregarded Student's educational history, failed to use more than one instrument to change his eligibility, failed to ensure the individual administering one assessment was qualified to do so, and disregarded both Student's and Parents' rights.

A local education agency assessment is appropriate if provides notice to parents, uses a variety of assessment tools and strategies, does not use any single measure or assessment as the sole criterion for determining an appropriate program for the student, and uses technically sound instruments. (20 U.S.C. § 1414(b)(2).) Additionally, the assessment must be administered by trained and knowledgeable personnel. (20 U.S.C. § 1414(b)(3)(A)(iv).)

To assess or reassess a student, a school district must provide proper notice to the student and his or her parents. (20 U.S.C. § 1414(b)(1); Ed. Code, §56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental and procedural rights under the IDEA and state law. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must be understandable to the parent, explain the assessments that the district proposes to conduct, and provide that the district will not implement an individualized education program, referred to as an IEP, without the

consent of the parent. (Ed. Code, § 56321, subd. (b)(l)-(4).) The assessment must be completed, and an IEP team meeting held to discuss the results of the assessment, within 60 days of the date the district receives the signed assessment plan. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, § 56302.1, subd. (a).)

Garvey sent an assessment plan to Parents on August 22, 2019. Garvey proposed to assess Student in the areas of academics, health, intellectual development, language and speech, motor development, social emotional behavior, and adaptive behavior. The assessment plan was easily understood, written in Parents' native language, explained the assessments Garvey sought to conduct, and explained that the resulting IEP would not be implemented without parental consent. Garvey's assessment plan met all legal requirements.

Parents signed the assessment plan on September 5, 2019, and returned it to Garvey the same day. Garvey conducted the assessments during September 2019. Garvey held an IEP team meeting on October 3, 2019, to discuss the results of all the assessments. Garvey held the IEP team meeting within the 60-day timeline.

A student may be entitled to an independent educational evaluation if parents disagree with a public agency assessment and request an independent educational evaluation at public expense. (34 C.F.R. 300.502(b)(1).) If a parent disagrees with a public agency assessment and requests an independent educational evaluation, the public agency must, without unnecessary delay, either fund the evaluation or file a due process complaint to show the assessment is appropriate. (34 C.F.R. 300.502(b)(2).)

Parents disagreed with the results of the psychoeducational assessment and requested an independent educational evaluation on November 6, 2019. Garvey declined to fund an independent educational evaluation and filed a due process

complaint on November 8, 2019. Garvey filed its due process complaint within two days of Parents' notification that they disagreed with the assessment. Garvey responded without unnecessary delay.

ASSESSOR QUALIFICATIONS

Assessments must be conducted by individuals who are knowledgeable of the student's disability. (Ed. Code, § 56320, subd. (g).) The assessments must also be conducted by persons competent to perform the assessment. (Ed Code, § 56322.) The competency of an assessor is determined by the local educational agency. (*Ibid.*) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324, subd. (a).)

Mayling Paredes conducted the intellectual development, social emotional behavior, and adaptive behavior portions of the psychoeducational evaluation. Paredes had a master's degree in educational psychology, a school psychology credential, and worked for Garvey since fall 2018. When conducting Student's assessment Paredes had completed between 20 to 30 psychoeducational assessments for Garvey. Paredes was competent to perform the assessment.

Patricia Estrada conducted the academic portion of the assessment using the Woodcock Johnson IV Test of Achievement, referred to as the Woodcock Johnson. Estrada was an intern special education teacher with a short-term staff permit that allowed her to teach students with mild to moderate disabilities during the 2019-2020 school year. Estrada was taking an online credentialing program concurrently while teaching during the 2019-2020 school year. Estrada assessed Student on September 16, 2019. No one from Garvey observed or assisted Estrada with the assessment. Estrada did not provide any credible testimony that she had previously

administered the Woodcock Johnson or was trained to administer the assessment at the time she assessed Student. Although Estrada took an eight week course on administering assessments during fall 2019, during which she administered the Woodcock Johnson once, she did not provide any credible testimony that prior to assessing Student she completed the class, or even administered the Woodcock Johnson during the class.

Alma Ulloa explained the short-term staff permit and that Estrada was allowed to teach special education with the permit. Ulloa was knowledgeable about the type of permit Estrada held and what Garvey allowed her to teach with the permit. Ulloa's testimony was credible, however, she did not explain if Estrada was allowed to conduct Woodcock Johnson assessments with the short-term permit. The short-term permit authorized the holder to conduct educational assessments related to a student's access to the academic core curriculum and progress toward meeting instructional academic goals. Estrada was authorized under the permit to conduct such assessments and provide academic instruction to students with primary disability categories of specific learning disabilities, mild to moderate intellectual disabilities, other health impairments, and emotional disturbance. Estrada was also not authorized under the permit to conduct assessments, provide instruction, or provide special education related services to student's whose primary disability category was autism. At the time Estrada assessed Student using the Woodcock Johnson Student's primary disability category was autism. Even if Estrada's short-term permit authorized her to administer the Woodcock Johnson without having administered it previously, she was not authorized to administer it to Student as his primary disability category was autism. Garvey did not prove that Estrada was competent to perform the Woodcock Johnson assessment.

Student's academic achievement was an integral portion of the assessment and was incorporated into the psychoeducational assessment. This portion of the assessment was critical to a comprehensive psychoeducational assessment. Without a competent assessor, the results are questionable. As a result, Garvey failed to meet its burden to establish Estrada was competent to perform the academic assessment portion of the psychoeducational assessment. Because the academic achievement portion of the assessment was invalid, and it was a critical part of the psychoeducational assessment, the error renders the entire assessment invalid.

ASSESSMENT TOOLS

A local educational agency must assess a special education student in all areas of suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).) In assessing a child with a disability, the assessment must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified. (34 C.F.R. § 300.304(c)(6).)

School districts are required to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that would assist in determining the educational needs of a child. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).) Assessments must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, along with physical or developmental factors. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3).) Assessments and other evaluation materials

must include those that are tailored to assess specific areas of educational need. (34 C.F.R. § 300.304(c)(2).)

Tests and assessment materials must be used for the purposes for which they are valid and reliable, and must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(b)(3)(A)(iii)-(v); Ed. Code, § 56320, subd. (b)(2), (3).) Tests must be selected and administered to produce results that accurately reflect the student's aptitude, achievement level, or any other factors the test purports to measure. (Ed. Code, § 56320, subd. (d).)

Tests and assessment materials must be selected and administered so as not to be racially, culturally, or sexually discriminatory. (20 U.S.C. § 1414(a)(3)(A)(i); Ed. Code, § 56320, subd. (a).) The materials must also 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)(ii); Ed. Code, § 56320, subd. (a).) In addition, an assessor must produce a written report of each assessment that includes:

- whether the student may need special education and related services;
- the basis for making that determination;
- the relevant behavior noted during the observation of the student in an appropriate setting;
- the relationship of that behavior to the student's academic and social functioning;
- and
- the educationally relevant health and development, and medical findings, if any.

(Ed. Code, § 56327, subds. (a)-(e).)

The benefits of an appropriate public education through special education is not limited to academics, but also in aiding a child's social and emotional growth to support them academically, behaviorally, and socially. (*County of San Diego v. California Special Education Hearing Office, et al.* (9th Cir. 1996) 93 F.3d 1458, 1467.)

Paredes reviewed Student's records, observed him on the playground and in class, administered several assessments, and interviewed Parents and Estrada. Paredes produced a written psychoeducational report and incorporated Estrada's assessment results into the report. Paredes's report is contradictory. Paredes listed the testing dates as September 16, 2019, and September 30, 2019, however, in the body of the report she stated she tested Student over four days. Paredes could not remember on what additional days she tested Student or what assessments she conducted on the additional days. Paredes noted in the report that she discontinued two subtests but did not identify the two subtests. Her report was therefore incomplete and possibly inaccurate.

Student retained Hilya Tehrani, Doctor of Psychology, to review the validity and reliability of Garvey's psychoeducational assessment. Dr. Tehrani had over 18 years of experience working with individuals with autism and for nine years had been conducting psychoeducational evaluations for students. Dr. Tehrani was straightforward in answering questions. She never met Student and was not hired to assess Student.

Although Dr. Tehrani did not have experience administering all of the assessments Paredes gave, she explained validity and reliability of the assessment tools, and what one looks for in an assessment. For an assessment to be reliable it needs to be consistent, meaning the results would be the same if given by someone else in a different environment. Dr. Tehrani questioned the reliability of Garvey's

psychoeducational assessment by systematically reviewing Paredes' report and the information excluded from previous reports. Dr. Tehrani was persuasive and her testimony was given significant weight.

Paredes observed Student on September 10, 2019, for 10 minutes at recess and 30 minutes in the classroom. Student broke his left arm on September 10, 2019, and it was casted on September 11, 2019. The cast covered Student's arm from the elbow to fingers. Student perseverated on the cast and did not like having it on his arm. Paredes did not observe Student when he broke his arm.

On September 16, 2019, Paredes interviewed Student for about ten minutes, administered the Beery-Buktenica Developmental Test of Visual-Motor Integration, Sixth Edition, referred to as Beery, and began the Kaufman Assessment Battery for Children, Second Edition Normative Update, referred to as Kaufman.

The Beery assesses students visual motor skills by having students copy geometrical images. The protocol for the Beery has a spot for comments and recommendations. The only comment Paredes noted was "average". Paredes did not make any notes about Student's left arm being in a cast or that he only had the cast on for a few days prior to the assessment. Paredes did not notate that Student would have had to stabilize the paper with his left arm, and whether or not that impacted his ability to copy geometric objects. Student's left arm in a cast was a significant variable that could have impacted the results of the assessment. Without any information about how Student used his casted arm, or if it did or did not impact the assessment, the results were not reliable.

Paredes only noted in her report regarding the Kaufman protocol that she assessed Student on September 16, 2019. However, Paredes testified that she

administered the test instrument over multiple days. Paredes could not remember the exact number of days or on what days she may have administered additional subtests to Student. Paredes was confident she assessed Student on no more than two additional days, but could not remember if it was one day or two days.

Dr. Tehrani was critical of this test instrument. Paredes administered eight subtests, on three of which she noted that Student did not want to continue. Paredes did not note if she discontinued the entire test after Student refused to finish a particular subtest or simply discontinued the subtest. Paredes noted behavioral concerns within the subtests but did not note whether or not she discontinued the test on a particular day. Although Paredes testimony that the assessment may be given over multiple days was persuasive, the lack of information regarding how the assessment was conducted called into question the reliability of the assessment. Dr. Tehrani opined that for the results to be reliable it would be important to know if the assessment was given over multiple days and why it was not completed in one sitting.

Paredes used rating scales from the Developmental Profile Three to provide information about Student's physical, adaptive behavior, social-emotional, cognitive, and communication development. Student had a below average score of 74 in adaptive behavior yet Paredes noted the score indicated Student did not have any difficulty with adaptive behavior. Although Paredes gave several examples of activities Student could complete successfully, she did not explain how a below average score indicates no difficulty with adaptive behavior.

Paredes gave Parents and Estrada the Autism Spectrum Rating Scales. Parents rated Student average in all areas except social communication and peer socialization in which they rated Student slightly elevated. Estrada rated Student slightly elevated in

self-regulation and average in all other areas. At the time of the assessment Estrada had been Student's teacher for less than two months.

Paredes dismissed Parents' concerns. She relied instead on her 15-minute observation of Student on the playground, 30-minute observation of Student in the classroom, and input from Estrada, concluding Student had an easy time developing and maintaining peer relationships. Paredes did not make any reference to Student's autism diagnosis or that he qualified under the disability category of autism. Paredes only observed Student with other special education peers, not general education peers.

Paredes concluded Student did not qualify for special education under the disability category of autism. Paredes based this information on her observations and Student's adaptive behavior scores. Paredes misrepresented Student's adaptive behavior score as below average to average when the score listed in the body of the assessment was only below average.

Dr. Tehrani opined that Paredes's report did not have enough information to conclude one way or the other if Student qualified for special education under the category of autism. Although Paredes noted some of Student's behaviors she did not report enough information to determine if the behaviors were a result of autism or attention deficit hyperactivity disorder. Paredes discounted Parents' concerns and Student's autism diagnosis and previous assessment results and instead focused on one test instrument and limited observations. Dr. Tehrani's opinion was persuasive and supported by the evidence presented.

Garvey did not prove its fall 2019 psychoeducational assessment was appropriate as it did not prove the results were reliable or complete. Estrada was not qualified to conduct the academic achievement portion of the assessment and several of Paredes

assessments and conclusions were unreliable. Consequently, Student is entitled to an independent psychoeducational evaluation at public expense.

ISSUE 2: WAS GARVEY'S FALL 2019 SPEECH AND LANGUAGE ASSESSMENT APPROPRIATE?

Garvey contends it conducted a legally sufficient speech and language assessment and Student is not entitled to an independent educational evaluation at public expense. Garvey further contends any area not discussed by the assessor in the speech and language assessment report was not an area of concern.

Student contends Garvey failed to follow best practices in conducting the assessment. Student also contends the assessor failed to include relevant information in the background section of the assessment, failed to review previous assessments, and made errors in administering and reporting assessments.

Rachel Nelson conducted the fall 2019 speech and language assessment. Nelson has a Master of Science in speech and language pathology, a speech and language pathology license from California, and had been a speech and language pathologist since August 2018. Nelson provided speech and language services to students as well as conducted assessments for special education. Nelson was competent to perform the assessment.

Nelson assessed Student in September 2019 and presented her report at an IEP team meeting for Student on October 3, 2019. Nelson reviewed Student's records and observed him in class and during speech and language therapy. Nelson also interviewed his teacher, conducted an informal language sample, and administered several standardized assessments. Nelson included a background information section

and a records review section in the report, however, she did not list any previous concerns regarding Student's speech and language. Nelson only listed when Student was found eligible and the amount of speech and language therapy he received. Nelson did not discuss any of Student's prior assessments or even that he had an autism diagnosis.

Additionally, Nelson did not include any parent input in the report. Nelson attempted to get a hold of parents to gain their input however never heard back from them. Nelson's testimony was not persuasive as her report lists two attempts at contacting Parents, once on October 1, 2019, and again on October 2, 2019. Father recalled the attempt, however, he was at work when Nelson attempted to contact him. Father worked in retail and could not have a conversation while he was at work. Nelson attempted to contact Parents on the two days prior to the IEP team meeting to discuss the report. Nelson had almost the entire month of September to call Parents and arrange a time to interview them. However, she waited until two days before the IEP team meeting scheduled to discuss the report to attempt to contact Parents.

School districts are required to include information provided by the parent to assist in determining the educational needs of a child. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).) Here, Nelson did not include any information from Parents and did not include any background information about Student's historical language concerns. A school district is required to use those assessment tools to gather relevant functional and developmental information about the child to assist in determining the content of the child's IEP. (34 C.F.R. § 300.304(b)(1)(ii).) The failure to obtain critical assessment information about a student "renders[s] the accomplishment of the IDEA's goals -- and the achievement of a FAPE -- impossible." (*N.B. v. Hellgate Elementary School Dist. supra*, 541 F.3d 1202, 1210 quoting *Amanda J. v. Clark County School Dist.*

supra, 267 F.3d 877, 894.) Under these facts, Garvey's failure to obtain parental input and consider Student's historical language concerns during the speech and language assessment was a fatal flaw in the assessment. Without that critical information it would be impossible to develop an appropriate IEP and FAPE offer for Student.

Garvey did not prove that its speech and language assessment was appropriate because Garvey failed to include any relevant background information, previous speech and language concerns, and any information from Parents. Student is entitled to an independent speech and language educational evaluation.

CONCLUSIONS AND PREVAILING PARTY

As required by 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 1: Garvey's fall 2019 psychoeducational assessment was not appropriate. Student prevailed on Issue 1.

Issue 2: Garvey's fall 2019 psychoeducational assessment was not appropriate. Student prevailed on Issue 2.

ORDER

1. Garvey shall fund at public expense independent educational evaluations in the areas of psychoeducation and speech and language by a provider of Parents' choice. The assessors chosen by Parents shall meet Garvey's guidelines for independent educational evaluations.

2. Garvey shall, within 15 days of the date of this Decision, send Parents its guidelines and criteria for independent educational evaluations.

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/

Linda Johnson

Administrative Law Judge

Office of Administrative Hearings