BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2020090906
CASE NO. 2020060078

THE CONSOLIDATED MATTERS INVOLVING

PARENT ON BEHALF OF STUDENT,

v.

SAN JOSE UNIFIED SCHOOL DISTRICT.

DECISION

February 25, 2021

On June 2, 2020, the Office of Administrative Hearings, called OAH, received a due process hearing request from San Jose Unified School District, naming Student as respondent. On June 15, 2020, OAH granted the parties' joint request to continue that case. On September 25, 2020, OAH received a due process hearing request from Student, naming San Jose as respondent. On September 29, 2020, OAH granted Student's motion to consolidate the two cases. Administrative Law Judge Robert G. Martin heard this matter via videoconference on December 8 through 11, 2020.

Student was represented by Natashe Washington, Attorney at Law. Parent attended all days of hearing on Student's behalf. Jeffrey Maisen and Nathan Ayala, Attorneys at Law, represented San Jose. San Jose Unified School District's Director of Special Education, Seth Reddy, attended all days of hearing on San Jose's behalf.

At the parties' request, OAH continued the matter to January 19, 2021, for written closing briefs. The record was closed, and the matter was submitted on January 19, 2021.

ISSUES

SAN JOSE'S ISSUE

Did San Jose appropriately conduct its functional behavior assessment of Student, called an FBA, dated December 18, 2019?

STUDENT'S ISSUES

1. Did San Jose deny Student a free appropriate public education, called a FAPE, by failing to appropriately conduct Student's FBA dated December 18, 2019?
2. Did San Jose deny Student a FAPE by failing to provide Parent a copy of the protocols and data for Student's FBA dated December 18, 2019, following Parent's February 2020 request for Student's educational records?

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, San Jose has the burden of proof on the sole issue alleged in San Jose's complaint. Student has the burden of proof on the two issues alleged in Student's complaint. 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 11 years old and attending a San Jose sixth-grade general education class at the time of hearing. Student was eligible for special education under the categories of autism, and speech or language impairment. Student resided with Parent within San Jose's geographic boundaries at all relevant times.

PRELIMINARY ISSUE: IS AN FBA AN "EVALUATION" AS TO WHICH PARENTS MAY REQUEST AND OBTAIN AN INDEPENDENT EDUCATIONAL ASSESSMENT?

After San Jose filed its due process hearing request in this matter, the Second Circuit Court of Appeals on September 17, 2020 issued its decision in *D.S. v. Trumbull Bd. of Ed.* (2d Cir. 2020) 975 F.3d 152, holding that an FBA by itself is not an "evaluation" under the IDEA and cannot serve as the basis for a parent's request for an independent educational evaluation at public expense. San Jose raised this holding at the prehearing conference in this matter and in its closing brief. San Jose sought a determination that it was not required to file a due process hearing request and prove at hearing that its assessment was conducted appropriately, because the provisions of the Education Code that entitle a parent to object to a district's assessment and obtain an independent educational assessment at public expense did not apply to San Jose's FBA of Student. Student contends the holding and reasoning in *Trumbull* should not be followed because *Trumbull* is not binding precedent, and its holding is contrary to the United States Department of Education's interpretation of its relevant implementing regulations of the IDEA, other case law, and accepted practice of the special education community. Accordingly, Student contends, under the California Education Code Parent is entitled to obtain an independent FBA of Student at public expense unless San Jose proves at hearing that its FBA was appropriate.

The legal issue of Parent's statutory right to obtain an independent educational assessment based on San Jose's allegedly inappropriate FBA of Student is addressed as a preliminary matter.

STATUTORY RIGHT TO AN INDEPENDENT FBA AT PUBLIC EXPENSE

A parent or guardian has the statutory right "to obtain...an independent educational assessment of the pupil from qualified specialists...if the parent or guardian disagrees with an assessment obtained by the public education agency, in accordance with [part] 300.502 of Title 34 of the Code of Federal Regulations." (Ed. Code, § 56329, subd. (b).) Under California law, the term "assessment" has the same meaning as the term "evaluation" in the IDEA, as the term is used in section 1414 of Title 20 of the United States Code. (Ed. Code, § 56302.5.) An "independent educational assessment" under California law therefore corresponds to an "independent educational evaluation" under the IDEA. Both are commonly referred to as IEE's. The IDEA's implementing regulations define an IEE as "an evaluation 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).)

In response to a parent's request for an IEE, a district must, without unnecessary delay, either ensure the student receives the IEE at public expense, or file a due process hearing request seeking a determination that its assessment was appropriate. (Ed. Code, § 56329, subd. (c), 34 C.F.R. § 300.502(b).) If the district fails to prove its assessment was appropriate, it must provide the independent assessment. (*Ibid.*) The parent is not required to show that the inappropriate assessment denied the student a FAPE or impeded parent's participation in the development of the student's individualized education program, called an IEP. (See, e.g., *M.Z v. Bethlehem Area School Dist.* (3d Cir. 2013) 521 Fed.Appx. 74, 77 ("Once the Hearing Officer determined

that the reevaluation was inappropriate, M.Z. was entitled to an independent educational evaluation at public expense as a matter of law").) The statutory right to an IEE "ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion," so the parents "are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition." (*Schaffer v. Weast, supra,* 546 U.S. at pp. 60–61.)

San Jose's argument that an FBA by itself cannot be considered an "evaluation" under the IDEA is based on a reading of section 1414 of Title 20 of the United States Code and its implementing regulations not consistent with that section, the IDEA's implementing regulations, or the Department of Education's longstanding interpretation of its regulations. Contrary to San Jose's argument that an evaluation can only be a comprehensive appraisal that assesses all areas of the student's suspected disability, section 1414 provides for evaluations that assess only a single area of a student's suspected need.

Section 1414 does not expressly define the term evaluation, but its implementing regulations define an evaluation as "procedures used in accordance with §§ 300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs." (34 C.F.R. § 300.15.) The text in parts 300.304 through 300.311 corresponds to the text of section 1414, and the implementing regulations thus are consistent with the language of the statute. As used in section 1414, the terms "evaluation" and "assessment" are not interchangeable. Assessments are "the tools used as part of an evaluation or re-evaluation of a student to ensure that the child is evaluated in 'all areas of suspected disability' and to 'determin[e] an appropriate education program for the child.'" (*Herrion v. Dist. of Columbia* (D.D.C., Oct. 10, 2019, No. CV 18-2827 (RMC)) 2019 WL 5086554, at

*3, quoting 20 U.S.C. § 1414(b)) (internal citations omitted).) "On the other hand, an 'evaluation' or 'reevaluation' is the process during which these assessments occur.' (*Id.*, citing 20 U.S.C. § 1414(b)(2).)

"Evaluations" under section 1414 include both initial evaluations to determine special education eligibility, and reevaluations of children already found eligible for special education. (20 U.S.C. § 1414 (a)(1) and (2).) An initial evaluation consists of procedures to determine whether a child is a child with a disability, and to determine the educational needs of the child. (20 U.S.C. § 1414(a)(1)(C)(i).) A re-evaluation of a child already found eligible for special education must be conducted if the child's educational needs or related service needs warrant a reevaluation, or at the request of the child's parent or teacher, or, at a minimum, every three years unless the parent and local educational agency agree otherwise. (20 U.S.C. § 1414(a)(2).) The description of a third type of "evaluation" in section 1414 directly refutes the contention that section 1414 does not allow evaluations of limited scope. Section 1414 provides that a blind or visually impaired child must be instructed in Braille unless "an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media" indicates that instruction in Braille is not appropriate for the child. (20 U.S.C. § 1414(d)(3)(B)(iii).)

In fact, a "full" evaluation of a child's needs in all areas is mandated only in connection with an initial evaluation. (20 U.S.C. § 1414(a)(1)(A).) Reevaluations must begin with an IEP team review of existing evaluation data, including classroom assessments, information provided by parents including an interview with the parents and observations of the student in the classroom and during related services. (20 U.S.C § 1414(c)(1).) Based on that review, input from the child's parents, and observations, the IEP team must identify "what additional data, if any is needed to determine whether the student continues to have a disability and the educational needs of the child." (20 U.S.C. § 1414 (c)(1)(B).) To determine those needs, and following the initial steps of reviewing

past evaluations, input from the parents and teachers and observations, the IDEA requires that a district "administer such assessments and other evaluation measures as may be needed" to produce data determined necessary by the IEP team. (20 U.S.C. § 1414(c)(2).) The IDEA thus does not mandate a full evaluation in all areas each time a parent, teacher or district determines a child may have a new need, or that a change in approach to addressing a previously identified need may be required. Instead, the language of the statute gives IEP teams the option to pursue only those assessments or "evaluation measures" necessary to determine a child's needs in the areas in question. (20 U.S.C. §§ 1414 (c)(1)(B) and (c)(2).)

For decades, the United States Department of Education Office of Special Education Programs, called OSEP, and Office of Special Education Rehabilitative Services, called OSERS, have interpreted their regulations to support an IEP team's option to evaluate a child in a single area or in only those areas necessary to determine the child's needs and develop the child's IEP. In 1995, OSEP issued *Letter to Fisher* (OSEP Dec. 4, 1995) 23 IDELR 565, addressing whether a parent could be entitled to an "assistive technology evaluation" as an IEE. *Letter to Fisher* interpreted the implementing regulations of the Education of the Handicapped Act Amendments of 1990 (Public Law 101-476 (which changed the name of the law to the Individuals with Disabilities Education Act). OSEP rejected use of the term "assistive technology evaluation," clarifying that it was addressing the availability of an IEE based on an assistive technology assessment conducted as part of a district's initial evaluation or reevaluation. OSEP then concluded, "[r]egardless of the terminology used," a parent could be entitled to an IEE if the district failed to conduct an assistive technology assessment, or conducted an inappropriate assessment, where an assistive technology assessment was necessary to determine whether the child needed assistive technology to receive a FAPE.

In *Letter to Scheinz* (OSEP June 7, 2000) 34 IDELR 34, OSEP directly addressed whether a parent could obtain an IEE in the area of functional behavior if they disagreed with a stand-alone FBA of their child. OSEP confirmed the district's FBA met the definition of the evaluation. (*Id.*, citing 34 C.F.R § 300.500(b).) The parent thus would be entitled to an IEE if the parent disagreed with the FBA, and the district failed to prove the FBA was appropriate. (*Ibid.*)

In *Letter to Christiansen* (OSEP February 9, 2007) 48 IDELR 161, OSEP explained that an FBA would be considered a reevaluation if conducted to assist in determining whether the child was a child with a disability, and the nature and extent of special education and related services that the child needs, or to develop or modify a behavior intervention plan for the child. In its Questions and Answers on Discipline Procedures (OSERS June 1, 2009) 23 IDELR 565, OSERS reiterated that an FBA would be considered a reevaluation or part of a reevaluation because it was an individualized evaluation conducted to develop an appropriate IEP for the child. (*Id.*, response to Question E-5.) OSERS specifically noted this would be the case even if the FBA had not been identified as part of an initial evaluation, was not included as part of the required triennial reevaluation, and was not done in response to a disciplinary removal. (*Ibid.*) OSERS concluded, "a parent who disagrees with an FBA that is conducted in order to develop an appropriate IEP also is entitled to request an IEE." (*Ibid.*)

In *Letter to Gallo* (OSEP April 2, 2013) 61 IDELR 173, OSEP stated that parental consent was required for an FBA conducted to determine if a child's conduct was a manifestation of their disability, because the FBA would be an individualized evaluation of a child conducted as part of an initial evaluation or reevaluation. Finally, in *Letter to Baus* (OSEP February 23, 2015) 65 IDELR 81, OSEP affirmed that a parent can request an IEE limited in scope to an area that was not previously assessed by the school district's evaluation. "When an evaluation is conducted in accordance with 34 CFR

§§ 300.304 through 300.311 and a parent disagrees with the evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area." (*Id.* at p. 2.)

The Department of Education's consistent interpretation of its regulations that FBA's and other assessments in a single area should be considered a reevaluation for purposes of determining a parent's right to an IEE is both persuasive and controlling. "Where an agency interprets its own regulation, even if through an informal process, its interpretation of an ambiguous regulation is controlling under *Auer* unless "plainly erroneous or inconsistent with the regulation." (*Bassiri v. Xerox Corp.* (9th Cir. 2006) 463 F.3d 927, 930, citing *Auer v. Robbins,* 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997); see also, *Taylor v. Vermont Dept. of Educ.* (2d Cir. 2002) 313 F.3d 768, 780 (citing *Auer v. Robbins* and deferring to the Department of Education policy letter interpreting the definition of "parent" under the IDEA (34 C.F.R. § 300.20) as leaving for state law the question of how parental rights should be allocated between divorced parents).)

Significantly, Congress has never indicated any disagreement with the Department of Education's regulatory interpretation of the IDEA's IEE provisions. When Congress reauthorized the IDEA in 1997 (Public Law 105-17), the new statutory language it incorporated in section 1414 regarding procedures for evaluations and reevaluations was consistent with the implementing regulations cited in the 1995 *Letter to Fisher*. Of particular relevance to the issues in this matter, the 1997 statute provided that evaluations and reevaluations were required to assess a child in all areas of suspected disability (20 U.S.C. § 1414(b)(3)(C) (1997)), but a reevaluation could be limited to only those assessments and evaluation measures necessary to produce additional data needed by the IEP team to determine the child's continued eligibility for special education and educational needs. (20 U.S.C. §§ 1414(c)(1) and (c)(2) (1997).) Congress kept this statutory language with no material changes in the

2004 reauthorization of the IDEA (the Individuals with Disabilities Education Improvement Act of 2004, Public Law 108–446) and the amendments of 2015. (Public Law 114–95). The legislative history of the 1997 and 2004 reauthorizations of the IDEA, and the 2015 amendments, expresses no intent to prohibit single-assessment reevaluations or IEE's.

The fact that Congress did not change the statutory language pertaining to IEE's indicates its acceptance of the OSEP and OSERS interpretations. "Under the reenactment doctrine, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." (*Lorillard v. Pons,* (1978) 434 U.S. 575, 580, 98 S.Ct. 866, 55 L.Ed.2d 40; see also, *Phillip C. ex rel. A.C. v. Jefferson County Bd. of Educ*. (11th Cir. 2012) 701 F.3d 691, 696-697 (upholding the IDEA's longstanding implementing regulations requiring districts to publicly finance IEE's, based on the reenactment doctrine).)

Consistent with the IDEA and the Department of Education's interpretation of its regulations, local educational agencies routinely conduct reevaluations limited in scope to those areas of suspected need that require new or additional assessment, following discussion with parents and development of an assessment plan. Numerous OAH hearings concern requests for IEE's arising from FBA's or other assessments in single areas of need. (See, e.g., *Parent on Behalf of Student v. Templeton Unified School Dist.* (2017) OAH Case No. 2017051280 (FBA); *Consolidated Matters Involving Parents on Behalf of Student v. San Mateo-Foster City School Dist.* (2015) OAH Case Nos. 2015040885 and 2015030258 (FBA); *Elk Grove Unified School Dist. v. Parent on Behalf of Student* (2018) OAH Case No. 2018060213 (FBA, speech and language, and occupational therapy assessments.)

Several District Court decisions have affirmed administrative determinations awarding IEEs for single-area assessments, including cases involving FBAs. In *Harris v. Dist. of Columbia* (D.D.C. 2008) 561 F.Supp.2d 63 (*Harris*), the court agreed with parents that an FBA is essential to addressing a child's behavioral difficulties, and plays an integral role in the development of an individualized IEP. The court concluded, "The FBA's fundamental connection to the quality of a disabled child's education compels this Court's determination that an FBA is an 'educational evaluation' for purposes of [the availability of an IEE under 34 C.F.R. § 300.502]." (*Id.* at p. 68.) Citing *Harris*, the court in *A.S. v. Central Bucks School Dist.* concluded, "An FBA is an 'educational evaluation' under IDEA. Neither party here contests that premise, and the Court finds that this understanding comports with IDEA's statutory framework and its implementing regulations." (902 F.Supp.2d. 614, at p. 619.) In *Cobb County School Dist. v. D.B. ex rel. G.S.B.* (N.D. Ga., Sept. 28, 2015, No. 1:14-CV-02794-RWS) 2015 WL 5691136, the court also cited *Harris* in its determination that "an FBA is an 'educational evaluation' under IDEA." (*Id.* at *6–7.) Other cases have accepted without discussion that a single-area assessment may be the basis for an IEE, and proceeded directly to the issue of the appropriateness of the assessment, or the district's response to the parent's request for an IEE. For example, in *R.G. v. Clovis Unified School Dist.* (E.D. Cal., Mar. 22, 2011, No. CV F 10 - 1979 AWI) 2011 WL 1103182, the court accepted without discussion that a speech and language assessment may be the basis for an IEE, and proceeded directly to the issue of the appropriateness of the assessment. (2011 WL 1103182 at **2, 9.)

San Jose contends an FBA does not qualify as an evaluation that triggers a parent's right to obtain an IEE at public expense, because an FBA is not designed or intended to be used for the purpose of comprehensively determining whether a child has a disability, or the content of the child's IEP. San Jose relies on the Second Circuit decision of *D.S. v. Trumbull Bd. of Ed.* (2d Cir. 2020) 975 F.3d 152, 163, which it

characterizes as having "the effect of affirming" and lending "heavy weight" to an unpublished district court decision from Montana, a jurisdiction within the Ninth Circuit. (*In re Butte School Dist. No. 1* (D. Mont., Jan. 28, 2019, No. CV 14-60-BU-SEH) 2019 WL 343149.)

Butte did not concern IEE's. In *Butte*, the student argued that district denied him a FAPE by conducting an inappropriate FBA that did not follow required IDEA procedures. The court held that the FBA fell outside the scope of an IDEA reevaluation because it was not comprehensive, but concerned only behavior. Therefore, the court concluded, the IDEA's procedures governing the conduct of evaluations did not apply to the district's FBA. (2019 WL 343149 at *8-9.) In reaching this holding, *Butte* did not mention the statutory and regulatory language allowing for reevaluations based on a limited scope of assessments, or the Department of Education's interpretation of its regulations that an FBA is considered a reevaluation under the IDEA, and the controlling weight of that interpretation. Butte's analysis is therefore not persuasive.

D.S. v. Trumbull rejected the Department of Education's position that parents have the right to an IEE based on their objection to a single-area assessment such as an FBA, on grounds the Department's interpretation conflicted with what the court deemed to be unambiguous statutory language of section 1414 requiring all evaluations to be comprehensive. (*Id.,* 975 F.3d at pp. 163-167.) The Court's analysis, however, did not address the provisions of section 1414 and implementing regulations that specifically allow an IEP team to conduct a reevaluation limited to only those assessments and evaluation measures it believes necessary to produce additional data. (20 U.S.C. §§ 1414(c)(1)(B)(i-iv) and (c)(2).) Also, as part of its rationale for not allowing an FBA to

trigger a parent's right to an IEE, the court in dicta interpreted section 1414 as requiring all IEE's obtained by parents to be comprehensive evaluations. (*D.S. v Trumbull*, 975 F.3d at p. 165 ("If a parent disagrees with an evaluation and requests an IEE at public expense, the regulations do not circumscribe the scope of that IEE").)

The interpretations offered in *Butte* and *D.S. v. Trumbull* are contrary to the intent and purposes of the IDEA. The interpretation in *Butte* would allow districts to conduct FBA's and other single-area assessments without complying with the procedural requirements set forth in section 1414 for assessments conducted as part of evaluations, because the assessments would not be considered evaluations. This would circumvent the IDEA's extensive set of procedural requirements designed to ensure that initial evaluations and reevaluations "achieve a complete result that can be reliably used to create an appropriate and individualized educational plan tailored to the needs of the child." (*Timothy O. v. Paso Robles Unified School Dist*. (9th Cir. 2016) 822 F.3d 1105, 1110.) The interpretation in *D.S. v. Trumbull* would require all reevaluations and IEE's to be comprehensive, even if the district and parent agreed that only a narrow assessment was required to obtain the data needed to develop an IEP that provided the Student a FAPE. This would impose a huge additional cost on school districts, and act as a disincentive to conducting assessments or agreeing to IEE's.

The interpretations in *Butte* and *D.S. v. Trumbull* both purport to be based on literal readings of section 1414 that conclude it permits only comprehensive evaluations. Even disregarding for purposes of argument the contradictory language of section 1414 that explicitly provides for reevaluations limited in scope to specific areas of need, the practical effects of these interpretations requires compels they be rejected. "Where the literal reading of a statutory term would 'compel an odd result,' we must search for other evidence of congressional intent to lend the term its proper scope." (*Public Citizen v. U.S. Dept. of Justice* (1989) 491 U.S. 440, 454 [109 S.Ct. 2558, 2567, 105 L.Ed.2d

377], citing *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 509, 109 S.Ct. 1981, 1984, 104 L.Ed.2d 557 (1989).) Here there is nothing in the legislative history that suggests Congress intended to require all reassessments and IEE's to be comprehensive. To the contrary, Congress is presumed to have been aware of and adopted the Department of Education's longstanding interpretation of section 1414 and its implementing regulations when it twice re-authorized and once amended the IDEA without changing the provisions allowing limited-how reevaluations are to be conducted. Some confirmation of the impracticality of *D.S. v. Trumbull's* interpretation may be gleaned from the court's acknowledgment that neither of the parties sought it. "D.S.'s parents argue, the hearing officer found without objection, the district court assumed, and the Board concedes that an FBA constitutes an 'evaluation' with which a parent may disagree to obtain an IEE at public expense.... If we were to blindly accept the Board's concession, our decision might mislead similarly situated parents and schools into misunderstanding and misapplying the IDEA's evaluation procedures. That risk is too great. Accordingly, we reject the Board's concession and conduct *nostra sponte* a review of the issue on the merits." (*Trumbull, supra,* 975 F.3d at p. 162.)

This decision finds that San Jose's FBA assessment of Student is considered a reevaluation under the IDEA, and is subject to Parent's right to obtain an IEE at public expense.

SAN JOSE'S ISSUE: DID SAN JOSE APPROPRIATELY CONDUCT ITS FUNCTIONAL BEHAVIOR ASSESSMENT OF STUDENT, CALLED AN FBA, DATED DECEMBER 18, 2019?

San Jose contends it conducted its FBA of Student dated December 18, 2019 appropriately. Student contends San Jose did not conduct its FBA of Student appropriately, because San Jose failed to obtain Parent's input in conducting the FBA

and failed to assess all of Student's problematic behaviors, and Student is therefore entitled to an independent FBA at public expense in accordance with Education Code section 56329, subdivision (b).

The parent of a child already eligible for special education has the right to request a district reassessment of their child. (Ed. Code, § 56381, subd. (a)(1).) Legally compliant assessments are conducted by qualified assessors who select valid, reliable assessment instruments, and other means of evaluation, that avoid discrimination based on sex, race, or culture. The assessments must be administered according to the assessment producer's instructions, in a language and form most likely to yield accurate results regarding the student's academic, developmental and functional abilities. (Ed. Code, § 56320, subd. (a) and (b)(3); (20 U.S.C. § 1414 (b)(3)(A).) Assessors are required to use a variety of technically sound assessment tools and strategies to gather relevant information, including information provided by a parent, to assist in determining whether the child has a disability; and, if so, the relative contribution of cognitive and behavioral factors, in addition to physical and developmental factors. (Ed. Code, § 56320, subd. (b); 20 U.S.C. § 1414 (b)(2)(A).) Assessors are prohibited from relying on a single measure or assessment as the sole basis for determining whether a child is eligible for special education, or the appropriate content of an eligible student's IEP. (Ed Code, § 56320, subd. (e); 20 U.S.C. § 1414 (b)(2)(A).)

On October 2, 2019, Parent sent San Jose Special Education Director Seth Reddy an email requesting an FBA for Student. Student was not exhibiting significant maladaptive behaviors at school involving injury to self or others, destruction of property, or other disciplinary concerns. However, Parent was concerned that Student had behaviors that were interfering with his ability to learn. Parent's email incorporated a two-page list of "difficulties" that concerned Parent. Parent's email indicated his list was based on issues identified in previous district multidisciplinary assessments of

Student conducted in 2016 and 2018. These included issues such a limited ability to recognize social cues and respond appropriately in social situations, trouble making friends, difficulty staying focused, difficulty following directions, and completing tasks, and low achievement in reading and writing. In his email, Parent stated, "I expect to be included in the functional assessment of behavior and as active participant on the team developing the behavior intervention plan."

San Jose School Psychologist Laurie Whittemore prepared an assessment plan that was sent to Parent on October 24, 2019. An assessment plan must provide proper notice to the student and his parents. (Ed. Code, §§ 56321, subd. (a) and 56329; 20 U.S.C. §§ 1414(b)(1), 1415(b)(3) & (c)(1).) The notice must include a proposed written assessment plan identifying the type of assessment to be conducted and include a copy of the procedural safeguards under the IDEA and state law. (Ed. Code, § 56321, subd. (a); 20 U.S.C § 1414(b)(1).)

The assessment plan stated that San Jose would conduct an FBA of Student at Parent's request. The FBA would be conducted by a behavior specialist, and would include observation, review of records, and interview. The assessment plan included all required notices to Parents. Parent signed the assessment plan and returned it to San Jose on October 25, 2019.

In early December 2019, Special Education Program Manager Christopher Metcalfe sent San Jose Board-Certified Behavior Analyst Jennifer Harmon a copy of the assessment plan, and asked her to conduct an FBA of Student. Neither state nor federal law require that a person performing a functional behavior assessment have specified credentials. State and federal law require that an assessor must be "trained and knowledgeable" regarding the assessment. (Ed. Code § 56320, subd. (a)(3).); 20 U.S.C § 1414(3)(a)(iv); 34 C.F.R § 300.304(c)(1)(iv).) Assessments must be conducted by

individuals who are knowledgeable of the student's disability and competent to perform the assessment, as determined by the school district. (Ed. Code, §§ 56320, subd. (g) and 56322.) Harmon's qualifications as a Board-Certified Behavior Analyst met the statutory requirements for her to conduct the FBA.

For reasons not explained, Metcalfe did not give Harmon a copy of Parent's October 24, 2019 list of concerns or tell her that Parent had expressed specific concerns. Harmon used a variety of technically sound assessment tools and strategies to gather relevant information to assist in determining whether Student had behavioral needs, and did not rely on a single measure or assessment as the sole basis for determining the appropriate content of Student's IEP. Harmon reviewed student's records, including the 2016 and 2018 assessments on which Parent had based his list of concerns. She also interviewed Student's general education teacher, Joseph Griggs, who taught the class in which Student spent most of his school day, Student's physical education teacher, Mike Vickers, and Student's special education teacher, Heidi Grillo. Neither the records nor the interviews revealed any target behaviors of concern except for occasional negative "self-talk." Student had difficulty with writing and would be very self-critical and negative about his writing abilities and writing instruction in general. Once or twice a week, when faced with the prospect of writer's workshop, or after having difficulty with a writing assignment, Student would engage in "negative self-talk," disparaging his writing skills by saying things like, "I'm a terrible writer," or, "I'll never write again in my life." Student's general education teacher reported two particularly concerning instances related to writing instruction. Student once exclaimed, "I want to crawl back into my Mom's womb." Another time, Student exclaimed, "I should just die."

Harmon observed Student for a total of 10 hours in different classes over three different days. In the 10 hours she observed Student, Harmon never saw Student engage in any significant maladaptive behavior that might need to be addressed through a behavior plan or behavior intervention plan. Nor did Harmon observe Student engage in the negative self-talk that Griggs identified.

Harmon attempted to contact Parent to discuss the FBA and determine whether Parent had concerns she should investigate. Harmon telephoned Parent and left him a message that she would like to speak with him regarding Student's FBA. Parent did not return Harmon's call. Instead, Parent emailed Reddy on December 11, 2019, expressing concern that he had been contacted by a person he did not know asking about Student. "Someone by the name of Jennifer called to enquire about [Student's] assessment. I don't know who she's [sic] and I prefer not to discuss my son's confidential records with her at the moment. If additional information is required, please let me know." Parent and San Jose had a contentious communication history. As a result, most communications between them were via email. Reddy responded to Parent via email the same day, explaining that "Jennifer" was the behaviorist conducting Student's FBA, and that "[a] critical part of the FBA is talking to parents about any behaviors they are seeing in the home. . . ." "It is optional," Reddy added, so if you would rather not participate, we can respect that decision. However, your input would be greatly valued. Let me know if you have any questions."

Reddy interpreted Parent's December 11, 2019 email to mean that Parent did not want to speak with Harmon. To avoid conflict with Parent, Reddy instructed Harmon not to try to communicate with Parent. Reddy never changed that instruction, and Harmon never communicated with Parent.

Harmon identified Student's negative self-talk as a target behavior that might be addressed through a behavioral goal and intervention. Harmon administered a Questions About Behavior Function rating scale, called a QABF, to Student's general education teacher Griggs to assess the possible function of the behavior. Griggs' responses to the QABF suggested Student engaged in negative self-talk to seek attention and avoid writing assignments.

Based on her records review, interviews, observations and teacher completed rating scale, Harmon prepared a draft FBA report. The draft FBA identified a single behavior of concern–Student's negative self-talk–and proposed positive behavior intervention strategies and accommodations, and the development of an IEP goal, to address the behavior. The FBA report was sent to Parent with a proposal that Student's IEP team meet on January 9, 2020 to review the report. The FBA did not address, or even mention, Parent's list of concerns, because Harmon was unaware of it. The report also did not say that Harmon had reviewed Student's 2016 and 2018 psychoeducational assessments, although she had. The report stated Parent had declined to participate in a parent interview for the FBA.

Parent was upset the draft FBA report appeared to ignore his concerns for Student. On January 31, 2020, Parent emailed San Jose's Superintendent. He stated he disagreed with the FBA, and demanded San Jose conduct a new FBA. Parent objected that Harmon had not reviewed Parent's list of concerns, or Student's 2018 multidisciplinary assessment, and had not conducted an assessment sufficiently comprehensive to identify all of Student's special education and related services need. Parent also objected, "the assertion that the Parent declined to participate in the interview is inaccurate." However, he did not clearly indicate he wanted to speak with Harmon. Instead, Parent argued the list of Student's behaviors he had included in his request for an FBA "was sufficient to fulfill the Parent's participation."

Reddy responded on February 10, 2020, "our BCBA attempted to contact you to gather feedback to inform the FBA. It is my understanding you were unwilling to participate. However, in the spirit of cooperation, I have asked the assessor to review the concerns you noted in your initial FBA request again and update the FBA accordingly, if she feels it is appropriate." Parent replied the same day, "the notion that [Harmon] attempted to contact Parent 'to gather feedback to inform the FBA' and the Parent was 'unwilling to participate' is totally inaccurate and deliberately misleading." Parent indicated his willingness to participate in the FBA. He explained that he had not known who Harmon was when she called, had said in his December 11, 2019 email only that he did not want to discuss Student "at the moment," and noted his December 11, 2019 email had asked Reddy to let him know if additional information was required.

Harmon did not attempt to contact Parent. She revised the December 18, 2019 FBA to indicate she had reviewed the 2016 and 2018 multidisciplinary assessments of Student as part of preparing the FBA, but made no other changes. On February 14, 2020, Reddy emailed Parent a copy of the revised FBA.

Parent emailed Reddy on February 15, 2020, objecting that the revised FBA addressed none of his concerns. Reddy replied on February 25, 2020, explaining Harmon had reviewed Parent's list of concerns and determined it included no additional information that needed to be added to the FBA. Reddy noted Parent's concerns did not appear to be about behavioral issues that might need to be addressed through a behavior plan, but were concerns that typically would be discussed and worked on with a speech language pathologist, occupational therapist, school psychologist, or counselor. Reddy suggested an IEP team meeting to discuss the FBA and Parent's concerns, but Parent rejected the suggestion the same day.

On May 8, 2020, Parent requested San Jose provide Parent an independent FBA. San Jose denied Parent's request on May 18, 2020, and filed its hearing request to defend its FBA in this matter on June 2, 2020.

San Jose did not conduct its FBA of Student appropriately, because it unreasonably failed to obtain Parent's input in conducting the FBA. Assessors are required to gather relevant information from parents when conducting assessments. (Ed. Code § 56320, subd. (b); 20 U.S.C. § 1414 (b)(2)(A).) Additionally, districts are required to afford parents the opportunity to participate in meetings with respect to the evaluation of their child. (Ed. Code, § 56500.1; 20 U.S.C. 1415(b)(1); 34 CFR § 300.501(b)(i).) As the Supreme Court stated in *Bd. of Ed. of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690], "It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process…as it did upon the measurement of the resulting IEP against a substantive standard." (*Rowley*, 458 U.S. at pp. 206-207.)

After assessor Harmon's initial phone call to Parent in December 2019, San Jose stopped trying to obtain Parent's input. San Jose chose to interpret Parent's December 11, 2019 email as meaning Parent did not want to speak with Harmon, although Parent's intentions were at least ambiguous on this point. In his October 2, 2019 request for an FBA, Parent had stated "I expect to be included in the functional assessment of behavior and as active participant on the team developing the behavior intervention plan." In his December 11, 2019 email, Parent indicated a willingness to engage in further communication, stating, "[i]f additional information is required, please let me know." In fact, Harmon did require additional information, but was instructed not to communicate with Parent. The instruction to Harmon not to

communicate with Parent did not change after Parent wrote on January 31, 2020, disputing that he had been unwilling to participate in the FBA. Nor did Harmon communicate with Parent after Parent's February 10, 2020 email clearly indicated he did not intend his December 11, 2019 email to be interpreted as an unwillingness to participate in Student's FBA. San Jose received the January 31, 2020 and February 10, 2020 emails from Parent before Harmon completed her revision of Student's FBA.

San Jose was responsible for using reasonable efforts to secure Parent's participation in the assessment process central to the development of Student's IEP, even if it perceived Parent as difficult. The IDEA does not make a district's duties contingent on parental cooperation with, or acquiescence in, the district's preferred course of action. "To the contrary, the IDEA, its implementing regulations, and our case law all emphasize the importance of parental involvement and advocacy, even when the parents' preferences do not align with those of the educational agency." (*Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1051 and 1055.) "[P]articipating educational agencies cannot excuse their failure to satisfy the IDEA's procedural requirements by blaming the parents." (*Id.* at p. 1055; see also *Doug C. v. Hawaii Dept. of Ed.*, 720 F.3d 1038, 1045 (9th Cir. 2013) ("[t]he fact that it may have been frustrating to schedule meetings with or difficult to work with [parent] does not excuse the department's failure" to comply with IDEA's procedural requirements).) Although there are circumstances in which a Parent's clear failure to cooperate with a district will excuse procedural violations of the IDEA, Parent's emails in this matter do not support such a result here. Parent's October 2, 2019, December 11, 2019, January 31, 2020, and February 10, 2020 emails to San Jose all expressed a willingness to cooperate in the development of Harmon's FBA and Student's.

As San Jose did not prove that its FBA was appropriate, Parent has the statutory right to obtain an independent FBA of Student at public expense.

STUDENT'S ISSUE 1: DID SAN JOSE DENY STUDENT A FREE APPROPRIATE PUBLIC EDUCATION, CALLED A FAPE, BY FAILING TO APPROPRIATELY CONDUCT STUDENT'S FBA DATED DECEMBER 18, 2019?

Student contends San Jose's failure to conduct an appropriate FBA denied Student a FAPE by delaying the development and implementation of Student's IEP, thereby impeding Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to Student, and impeding Student's right to a FAPE. San Jose contends its assessment was appropriate, or that any procedural violation was immaterial.

A failure to properly assess is a procedural violation of the IDEA. (*Department of Ed., State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp. 2d 1190, 1196; *Park v. Anaheim Union High School Dist*. (9th Cir. 2006) 464 F.3d 1025, 1032.) A procedural violation results in a denial of FAPE if it impedes the child's right to a FAPE, significantly impedes the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).); see *W.G. v. Bd. of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

In this matter, Student proved San Jose's FBA of Student was inappropriate because San Jose unreasonably failed to obtain Parent's input in conducting the FBA. However, Student did not prove this procedural violation impeded Student's right to a FAPE, or caused a deprivation of Student's educational benefits. Student presented no evidence of any information Parent would have provided to assessor Harmon about

Student's behaviors that would or should have led her to alter or expand the scope of her interviews, 10 hours of observations of Student, or record review, to identify additional target behaviors. Student's behavior expert, Austin Lambe, did not observe Student, and did not testify to any potential target behaviors that Lambe believed were present, but that Harmon's assessment process failed to detect, or might have failed to detect. With respect to Student's claim that San Jose's failure to conduct an appropriate FBA delayed the development and implementation of Student's IEP, San Jose proposed Student's IEP team meet on January 9, 2020 and on several dates thereafter. Parent refused to attend an IEP team meeting until San Jose provided him an FBA that he felt addressed his list of concerns. Student has provided no authority for the proposition that delay in developing an IEP caused by a parent's refusal to meet to discuss an evaluation is a FAPE denial attributable to the district.

Student also did not prove San Jose's failure to obtain Parent's input in conducting Student's FBA significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE. Evaluations are critical to the development of an appropriate IEP (*Timothy O., supra,* 822 F.3d at p. 1111), and must be conducted before a child's IEP team meets to determine the child's eligibility for special education, and the educational needs of the child. (20 U.S.C. § 1414(b)(4).) Parents have an express right to participate in meetings with respect to the evaluation of their child, (Ed. Code, § 56500.1; 20 U.S.C. 1415(b)(1); 34 CFR § 300.501(b)(i)), and "[p]rocedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA. An IEP which addresses the unique needs of the child cannot be developed if those people who are most familiar with the child's needs are not involved or fully informed." (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892.) A district's failure to obtain a parent's participation in an evaluation thus will significantly impede the parent's opportunity to

participate in the decision-making process, and deny the Student a FAPE, if it prevents the parent from providing information to the district that could have materially affected the results of the evaluation, or if it prevents the parent from learning information regarding the evaluation necessary for the parent to participate "fully, effectively, and in an informed manner" in the development of their child's IEP. (*Amanda J.*, *supra*, 267 F.3d at p. 894.)

In this case, however, Student did not prove that Parent would have provided Harmon any information material to Student's FBA that was not included in Parent's list of concerns accompanying Parent's request for the FBA. Similarly, Student did not prove San Jose's failure to obtain Parent's participation in the FBA prevented Parent from learning information necessary for the parent to participate "fully, effectively, and in an informed manner" in the development of Student's IEP. Finally, even if Student had established San Jose's procedural violation also constituted a substantive violation, Student did not establish any other additional appropriate relief beyond the IEE for the FBA. Student did not prove San Jose's failure to conduct an appropriate FBA denied Student a FAPE. Student is not entitled to relief on this claim.

STUDENT'S ISSUE 2: DID SAN JOSE DENY STUDENT A FAPE BY FAILING TO PROVIDE PARENT A COPY OF THE PROTOCOLS AND DATA FOR STUDENT'S FBA DATED DECEMBER 18, 2019, FOLLOWING PARENT'S FEBRUARY 2020 REQUEST FOR STUDENT'S EDUCATIONAL RECORDS?

Student alleges San Jose significantly impeded Parent's opportunity to participate in the development of Student's IEP, and denied Student a FAPE, by failing to provide Student's educational records requested by Parent. In particular, Student contends San Jose failed to provide Parent copies of the completed Questions about Behavioral

Function assessment instrument that behaviorist Harmon administered to Student's general education classroom teacher Griggs as part of Student's FBA, and notes of Harmon's interview of Griggs. San Jose argues that it was not required to provide copies of its evaluator's private notes or related assessment records as these are not educational records.

To guarantee parents the ability to make informed decisions about their child's education, the IDEA grants parents of a child with a disability the right to examine all relevant records in relation to their child's special education identification, evaluation, educational placement, and receipt of a FAPE. (Ed. Code, §§ 56501(b)(3) & 56504; 20 U.S.C. §1415(b)(1); 34 C.F.R. § 300.501(a).) While federal regulations require that educational records be provided within 45 days of request, California law gives parents the right to receive copies of all school records of their child within five business days after requesting them, either orally or in writing. (Ed. Code, §§ 56043, subd. (n), 56501, subd. (b)(3), and 56504.)

The IDEA adopts the Family Educational Rights and Privacy Act definition of education records by reference. (34 C.F.R. § 300.611 (b).) In general, educational records are defined as "records, files, documents, and other materials" containing information directly related to a student, which "are maintained by an educational agency or institution or by a person acting for such agency or institution." (20 U.S.C § 1232g(a)(4)(A); 34 C.F.R. §§ 99.3; Ed. Code, § 49061, subd. (b).) The United States Supreme Court has interpreted the term "maintain" as suggesting FERPA records are those records of a Student "kept in a filing cabinet in a records room at the school or on a permanent secure database, perhaps even after the student is no longer enrolled." (*Owasso Independent School Dist. No. I-011 v. Falvo* (2002) 534 U.S. 426, 433-434 [122 S. Ct. 934, 151 L.Ed.2d 896].)

Education records do not include records "which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." (Ed. Code, § 49061, subd. (b); 20 U.S.C. § 1232g(a)(4)(b)(i).) Federal regulations further clarify that for a record to be excluded from the definition of an educational record pursuant to the "sole possession of the maker" exclusion, that record must be used only as a personal memory aid. (34 C.F.R. § 99.3(b)(1).) In *Letter to Baker* (United States Department of Education, Office of Innovation and Improvement, Complaint No. 1251, December 28, 2005) the Department of Education explained the sole possession exclusion "is intended to protect 'personal notes' used to jog a teacher's memory about a particular matter or event, such as a note reminding the teacher to call a parent or that the student was disruptive during play time. It is not intended to exclude from the definition of 'education records' detailed or comprehensive notes that record specific clinical, educational or other services provided to a student, or that record the school official's direct observations or evaluations of student behavior, including the student's success in attaining specified objectives. This is true whether or not the notes are used later to prepare an "official" or "final" progress report or IEP for the student. That is, a parent has a right under FERPA to inspect and review these kinds of detailed or comprehensive notes about a student maintained by a school official and is not required to rely solely on summary conclusions contained only in final or official reports…. (*Letter to Baker*, *supra*, at p. 5.)

Test protocols such as test questions, student answers, evaluator calculation or scoring sheets, and administration instructions, to the extent these are personally identifiable to the student, are educational records that must be provided to parents if requested. (*Newport-Mesa Unified School Dist. v. State of Cal. Dept. of Ed.* (C.D. Cal.

2005) 371 F.Supp.2d 1170 at pp. 1175, 1179.) Parents have the right to inspect instructional materials and assessments including teacher's manuals. (Ed. Code, § 49091.10, subd. (a).)

The failure to provide a parent with information related to the assessment of his or her child may significantly impede the parent's opportunity to participate in the decision-making process and result in liability. In *M.M. v. Lafayette School Dist.* (9th Cir. 2014) 767 F.3d 842, a district's failure to provide parents assessment data showing their child's lack of progress in district's response to intervention program left the parents "struggling to decipher his unique deficits, unaware of the extent to which he was not meaningfully benefitting from the [individualized services plan], and thus unable to properly advocate for changes to his IEP." (*Id.* at pp. 855-856.) The court concluded that the failure to provide the assessment data prevented the parents from meaningfully participating in the IEP process and denied their child a FAPE. (*Ibid.*)

On February 26, 2020, Parent sent San Jose a written request for copies of all records in Student educational file that pertained to Student's FBA. Parent sent a follow-up email on February 27, 2020 indicating that his records request included, without limitation, a request for copies of Student's assessment reports; assessment protocols; assessment tools/instruments or materials and/or other evaluation strategies used, all observation reports by all assessors; and all interviews with teachers, physical education instructors, and all other school personnel. San Jose provided records to Parent on March 3, 2020, but Parent disputed whether San Jose had produced all the requested educational records.

On March 9, 2020, Reddy sent Parent an email confirming, among other things, that San Jose had provided Parent "all documents relevant to [the FBA]." "No notes or documentation used to develop this report that are part of the student's record have

not been provided." This was not accurate. Harmon had electronic files on her laptop computer, including notes of her interviews of Griggs, Vickers, and Grillo, as well as Grigg's responses to the questions Harmon asked him in the Questions About Behavioral Function to get data on the function of Student's negative self-talk. These files all fell within the definition of educational records. No one asked Harmon whether she had any such records until after she left the employment of San Jose in June 2020 and turned in her laptop containing the records. Prior to hearing, Reddy learned of the records on Harmon's laptop, but by that time, the laptop's data had been wiped clean, and Harmon's files no longer existed.

Harmon testified that all the information from her interview notes was incorporated in the FBA interviews section. She testified that the Questions About Behavioral Function raw scores could be inferred by comparing the questions and scoring in a sample Questions About Behavioral Function form included in San Jose's hearing exhibits to a bar graph in the FBA showing qualitatively the likely functions of Student's negative self-talk. However, as noted above, a parent has a right to review detailed or comprehensive notes about a student maintained by a school official, and is not required to rely solely on summary conclusions contained only in final or official reports.

The Ninth Circuit permits finders of fact to draw an adverse inference from the destruction or non-production of evidence. (*Glover v. BIC Corp.* (9th Cir.1993) 6 F.3d 1318, 1329.) When a document is relevant to an issue in a case, the trier of fact may consider the document's destruction or non-production as evidence that the party that failed to produce the document did so out of a well-founded fear of harming its case. (*Brewer v. Quaker State Oil Ref. Corp*. (3d Cir.1995) 72 F.3d 326, 334.) However, the inference may only be applied if the evidence is within the party's control, and it appears that an actual suppression or withholding of the evidence has occurred. (*Ibid*.) "No

unfavorable inference arises when the circumstances indicate that the document or article in question has been lost or accidentally destroyed, or where the failure to produce it is otherwise properly accounted for." (*Ibid.*)

Based on Harmon's and Reddy's testimony, it does not appear that San Jose intentionally suppressed evidence it feared would be harmful to its case. Rather, it appears the documents were accidentally destroyed. No inference may be drawn in this matter from San Jose's actions. Harmon testified the completed Questions About Behavioral Function form and her interview notes of Student's teacher included no information that was materially different from that contained in the completed report provided to Parent. Student presented no evidence that Harmon's testimony was inaccurate. Unlike the parents in *M.M. v Lafayette*, *supra*, Parent did not show that he was deprived of assessment data necessary to advocate for Student. Finally, even if Student had established San Jose's procedural violation also constituted a substantive violation, Student did not establish any other additional appropriate relief beyond the IEE for the FBA. Student did not prove San Jose's failure to provide Parent a copy of the protocols and data for Student's FBA significantly impeded Parent's opportunity to participate in the development of Student's IEP or otherwise denied Student a FAPE. Student is not entitled to relief on this claim.

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.

San Jose's Issue: San Jose did not prove that its FBA was appropriate. Student prevailed on San Jose's Issue.

Student's Issue 1: Student proved that San Jose's FBA was inappropriate, but did not prove this procedural violation denied Student a FAPE. San Jose prevailed on Student's Issue 1.

Student's Issue 2: Student proved that San Jose failed to provide all of Student's educational records to Parent when requested by Parent but did not prove this procedural violation denied Student a FAPE. San Jose prevailed on Student's Issue 2.

ORDER

1. San Jose will fund an independent functional behavior assessment evaluation of Student, and San Jose shall also fund assessor's attendance at the IEP team meeting to review the results.
2. Within five business days of this Decision, San Jose will provide Parent a copy of its criteria for independent evaluations. Parent shall select an assessor who meets the specified criteria, and provide San Jose with the contact information within 15 business days of receipt of San Jose's criteria. San Jose will not prepare an assessment plan.
3. Within 10 business days of receipt of the contact information for the chosen qualified assessor, San Jose shall send the assessor a contract to perform the independent assessment. San Jose shall cooperate with all reasonable requests of the assessor.
4. The independent assessor shall provide the assessment report directly to Parents and San Jose. San Jose shall convene an IEP team meeting to discuss the assessment report no later than 30 days after it receives the report. The IEP team may meet in person or by videoconference. San Jose shall fund the attendance of the assessor at the IEP team meeting to a maximum of three hours.
5. All other claims for relief are denied.

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.

Robert G. Martin
Administrative Law Judge
Office of Administrative Hearings