

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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CASE NO. 2020010042  
CASE NO. 2019120777

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THE CONSOLIDATED MATTERS INVOLVING  
  
BAKERSFIELD CITY SCHOOL DISTRICT AND  
  
PARENT ON BEHALF OF STUDENT.

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DECISION

JULY 27, 2020

On December 18, 2019, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parent on behalf of Student naming Bakersfield City School District. On December 31, 2019, Bakersfield City filed a due process hearing request naming Student.

Bakersfield City's request to consolidate the cases was granted by OAH on January 8, 2020. OAH granted Student leave to amend Student's due process hearing request on February 12, 2020, and a joint request for a continuance was granted on February 25, 2020. Thereafter, Bakersfield City was granted leave by OAH to amend its complaint on April 6, 2020. Administrative Law Judge Chris Butchko heard this matter

via videoconference in Los Angeles, California on May 12, 19, 20, 21, 22, 27, 28, and 29 and June 9, 10, 11, 15, 16, and 17, 2020.

Attorney Kidd Crawford represented Bakersfield City. Shirley Nicholas, Bakersfield City's Director of Special Education, and Nikki Stiles, its Assistant Director, attended the hearing on Bakersfield City's behalf. Attorneys Gabriela Torres and Andrea Seo represented Student. Parent attended the hearing on Student's behalf.

OAH continued the matter to July 13, 2020, at the parties' request, for closing briefs. The record closed and the matter was submitted for decision July 13, 2020.

## ISSUES

### BAKERSFIELD CITY'S ISSUES:

- 1) Were the following assessments appropriate such that Bakersfield City is not required to fund independent educational evaluations at public expense:
  - (a) The November 12, 2019 psychoeducational evaluation;
  - (b) The November 9, 2018 functional behavior analysis; or
  - (c) The March 4, 2020 educationally-related mental health services assessment?
- 2) Did Bakersfield City offer Student a free appropriate public education, known as FAPE, through the individualized education plan, known as an IEP, developed at the team meetings held on November 13, 2019, December 4, 2019, and January 29, 2020.

## STUDENT'S ISSUES:

3. Did Bakersfield City fail in its "child find" responsibility by not finding Student eligible for special education services prior to November 2019?
4. Did Bakersfield City fail to appropriately evaluate Student in all areas of suspected disability by failing to assess him for autism-related special education needs?
5. Did Bakersfield City deny Student a FAPE by failing to provide an appropriate behavior intervention plan?
6. Did Bakersfield City deny Student a FAPE by failing to implement his behavior intervention plan?

Student withdrew two issues from the due process hearing request on May 8, 2020. The remaining issues have been renumbered from the list given in the prehearing conference order.

## 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.) All future references to the Code of Federal Regulations are to the 2006 version, unless otherwise noted. 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, each party has requested a due process hearing and bears the burden of proof as to all elements of its claims. 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 turned seven years old and completed kindergarten at Casa Loma Elementary during the hearing of this matter. Student resided within the Bakersfield City's geographic boundaries at all relevant times. Student was not eligible for special education services at the beginning of the events at issue, although he later was found eligible under the primary category of other health impairment due to attention deficit and hyperactivity disorder, referred to as ADHD.

## ISSUE 1: WERE BAKERSFIELD'S PSYCHOEDUCATIONAL EVALUATION, FUNCTIONAL BEHAVIOR ANALYSIS, AND ITS EDUCATIONALLY-RELATED MENTAL HEALTH SERVICES ASSESSMENTS APPROPRIATELY CONDUCTED?

Bakersfield contends it conducted legally sufficient assessments and Student is not entitled to an independent educational evaluation at public expense. Bakersfield notes that its assessors were qualified by training, education, and experience to conduct the evaluations. Further, it contends the assessors appropriately used valid and reliable assessment tools to obtain data to support their conclusions and opinions.

Student counters that the assessments were not appropriate, valid, or reliable. Student contends that the evaluations did not look at all areas of suspected need and were incorrectly administered, violating the protocols set by the tests' publishers. Further, the assessments were performed without inquiry into Student's education history and background, and the educationally-related mental health services assessment was conducted without the assessor meeting Student.

A local education agency's assessment is appropriate if advance notice of the assessment was given to parent, it uses a variety of assessment tools and strategies, it 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).) Proper notice to the student and parents consists of provision 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).)

Additionally, an assessment must be administered by trained and knowledgeable personnel. (20 U.S.C. § 1414(b)(3)(A)(iv).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324, subd. (a).) A school district must ensure that the evaluation is sufficiently comprehensive to identify the child's needs for special education and related services whether or not commonly linked to the disability category in which the child has been classified. (34 C.F.R. § 300.304(c)(6).) Assessments must also include educationally relevant health, developmental, and medical findings and other relevant material about the student. (Ed. Code § 56327; Cal. Code. Regs., tit. 5 § 3030.)

It is the duty of the IEP team, not the assessor, to determine whether a student is eligible for special education and related services. (20 U.S.C. § 1414(b)(4)(A); 34 C.F.R. §§ 300.305(a)(iii)(A); 300.306(a)(1).) To aid the IEP team in determining eligibility, an assessor must produce a written report of each assessment that includes whether the student may need special education and related services and the basis for making that determination. (Ed. Code, § 56327, subs. (a), (b).)

A functional behavior assessment or analysis, referred to as an FBA, is called for where a child's behavior impedes his or her learning or that of others so that the IEP team may consider, when appropriate, means of addressing the behavior "including appropriate positive behavioral interventions and supports, and other strategies, to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code,

§ 56341.1, subd. (b)(1).) An FBA must meet the IDEA’s legal requirements for an assessment, such as the requirement that assessment tools and strategies provide relevant information that directly assists in determining the educational needs of the child. (34 C.F.R. § 300.304(c)(7).)

The IDEA does not specify who is qualified to conduct an FBA. In *Letter to Janssen*, 51 IDELR 253 (OSERS 2008), the Office of Special Education and Rehabilitative Services stated that there is no requirement that a board-certified behavior analyst, or any other specific individual, conduct an FBA unless state law requires it. Although the IDEA does not state who may conduct FBAs, districts must ensure that those who do conduct them are adequately trained. (See also *H.D. v. Central Bucks Sch. Dist.* (E.D. PA 2012) 902 F.Supp.2d 614, 627, finding that an FBA was appropriate, in part, because it was conducted by a qualified, board-certified associate behavioral analyst). It is generally accepted in California that a school psychologist may conduct an FBA. (See *N.G. by and through Green v. Tehachapi Unified School Dist.* (E.D. Cal. April 13, 2017, 1:15-cv-01740-LJO-JLT) 2017 WL 1354687, \* 13.)

## ISSUE 1(A): APPROPRIATENESS OF THE PSYCHOEDUCATIONAL ASSESSMENT

Bakersfield City asserts that its psychoeducational assessment was properly conducted. Student contends in response that the psychoeducational assessment was not compliant with the publisher’s protocols, was insufficiently comprehensive because it did not specifically explore the possibility that Student had autism, and that it was not reliable because it did not consider his educational history.

As required by law, the assessment was performed by a licensed school psychologist. The school psychologist was qualified by education and experience to do

a psychoeducational assessment. As to all the assessment instruments used in the psychoeducational assessment, Bakersfield City established that the test instruments were validated, properly normed, not racially, culturally, or sexually biased. The assessor used the instruments for the purposes that they were designed, did so properly, and the results were accurate. The school psychologist prepared a report summarizing the findings and making recommendations, which was produced within 60 days of the signing of the assessment plan, shared with Parent and the IEP team, and discussed at an IEP team meeting on November 13, 2019.

As part of Student's psychoeducational assessment, the school psychologist administered the Kaufman Assessment Battery for Children, Second Edition, referred to as the Kaufman. Student argues that the school psychologist violated the Kaufman's protocols in two ways. First, subscores in Hand Movements and Phonological Deletion were disregarded by the school psychologist because they were "divergent" from Student's other scores, as the Hand Movements score was unusually high and the Phonological Deletion score was unusually low. The school psychologist believed the test protocols require that such scores not be considered.

Student's second contention in challenging Bakersfield City's psychoeducational assessment was, more significantly, that it was insufficiently comprehensive. The school psychologist did not consider the possibility that Student had Autism and neglected to properly review and consider Student's background and history.

#### PROTOCOL DEVIATIONS

Citing writings by the author of the testing manual, Student argues that such divergent scores should be treated as a signal that further testing is needed and that possible meaning of such scores should be discussed in the testing report. The test's



manual states that “Uninterpretable does *not* mean unusable or invalid. Research demonstrates that composite scores are just as valid if their component scores are diverse as when their component scores are uniform [citation omitted].” (Kaufman Assessment Battery for Children, Second Edition Normative Update, Appendix C, Additional Administration, Scoring, and Interpretation Considerations, pg. 66 (emphasis in original).)

However, the manual does not state that excluding these scores from consideration invalidates the remainder of the test. The school psychologist stated in his assessment report discussing each testing area that he considered the scores divergent and was excluding them in calculating composite scores. Student argues that this is not the best practice, but it was fully disclosed to the recipients of the assessment report that this was done. There was no concealment of the decision to adjust Student’s scores. Further, Student does not explain how removing a Hand Movements score in the 99th percentile from an index which the assessor found to be an area of strength for Student is misleading, or even significant.

Removing the 5th percentile low score in Phonological Deletion is more significant because the other two scores in auditory processing were average and the area also found to be an area of strength. However, the reason for disregarding the score was given in the report, as Student was reportedly uncooperative during the test, preferring to play with toys. It appears that factoring in that score would still result in an average, but lower, score. Although best practice would be to follow up and verify a divergent score, disregarding two scores in a testing instrument does not necessarily invalidate an entire assessment. Here, Student has not shown meaningful consequences as a result of the school psychologist’s discarding the two divergent scores.

## AUTISM

Parent's concerns about the possibility of autism appear throughout the record. When Student was misbehaving during his two years at the Community Action Program of Kern County preschool, known as CAP-K, Parent went to Kaiser Permanente, referred to as Kaiser, to have Student assessed. The assessment, provided to Casa Loma before Student's first day of attendance, was titled "Autism Spectrum Disorder Evaluation."

The team at Kaiser interviewed Parent and reviewed a letter from the CAP-K preschool describing Student's behavior. The Kaiser evaluation report excerpted the letter, reporting that Student liked to play alone, disliked working, and became upset if he didn't get his way. It noted that "[h]is behavior has escalated to throwing chairs, hitting teachers, cursing and flipping teachers off." All four of the teaching staff and the site supervisor had been injured by Student. Mother reported numerous behaviors typical of persons with Autism, such as sensation-seeking, self-isolation, and over-reaction to stimuli.

The team at Kaiser consisted of a medical doctor, a psychologist, and a therapist, who jointly observed Student for about an hour. The resulting report did not classify Student as being on the autism spectrum, as the team did not observe social communication or social interaction deficits and did not see Student display restrictive, repetitive patterns of behavior, interests, or activities. The finding was reported as an "Impression," noting that "[a]t this time, it appears that [Student] does not meet criteria for a diagnosis of Autism Spectrum Disorder" based upon screening through the use of the Autism Diagnostic Observation Schedule 2, known as the ADOS. The Kaiser report notes that the ADOS "should be considered in the context of a full evaluation and should never be used in isolation to determine an individual's clinical diagnosis or

eligibility for services.” The Kaiser Report did diagnose Student with ADHD, combined presentation. This diagnosis means that Student displays both inattentive and hyperactive-impulsive symptoms.

After Casa Loma received the Kaiser report, the Vice Principal called Parent to discuss it, but took no action because Student was not yet enrolled.

Student began kindergarten at Casa Loma on August 14, 2019, and immediately encountered difficulties. Student was aggressive to others, tore materials off the classroom walls, and left the classroom without permission. Student’s first teacher logged the day’s incidents in the school’s electronic discipline record, as well as two other day’s incidents in the first four days of school. Only major disciplinary incidents are logged. Student’s first teacher became so concerned about Student’s behavior that she reached out to the CAP-K program for help dealing with him.

Casa Loma held a meeting on August 21, 2019, to consider creating a 504 Plan for Student. The team decided that Student did not qualify for a 504 Plan. Bakersfield City’s school psychologist found the Kaiser report ambiguous, containing mixed information and no clear diagnosis, and the team decided that Student’s academic access or performance did not require accommodations. Parent was confused because the therapist in the Kaiser team had told her that Student would qualify for a 504 Plan due to the ADHD diagnosis.

After a series of extreme behavior incidents between September 4 and 6, 2019, Parent contacted the therapist at Kaiser and asked for help getting Student support. The therapist called the school psychologist on September 5, 2019, and explained that the Kaiser report diagnosed Student with ADHD, combined presentation. The report recommended “further evaluation since symptoms significantly impact his level of

functioning at home and school.” After receiving this clarification, the school psychiatrist scheduled a new 504 Plan meeting for September 11, 2019. At this meeting, staff presented Parent with an assessment plan. Another Section 504 meeting was held on September 25, 2019, following another spate of significant disciplinary incidents.

In the meetings held to discuss Student’s misbehaviors, the school psychologist deferred completely to the Kaiser Report’s autism screening, adopting without reservation the opinion that Student was not autistic. At hearing, he stated that this was because Kaiser administered the ADOS, the “gold standard” for autism diagnosis. However, even prior to assessing Student, the school psychologist stated at 504 Plan meeting held on September 25, 2019, his belief that Student’s behavior was volitional and his misbehavior was a conscious choice. In the report of that meeting, he is reported stating that Student’s “initial impulsive behavior ... escalates into other behaviors .... He comes out of the realm of impulsivity and turns into other factors.” The school psychologist believed that Student’s behaviors were not a manifestation of his disability because Student was making choices and his behaviors displayed thought and calculation. The subsequent assessments and the educational plan designed by him for Student were consistent with that initial impression.

Despite the concerns raised by Parent about Autism, no Autism-related testing was conducted as part of the psychoeducational assessment. In fact, the psychoeducational assessment does not mention Kaiser’s Autism Spectrum Disorder Evaluation or any aspect of Student’s behaviors that might track on the Autism spectrum.

This is not justified by the high value the school psychologist assigns to the ADOS. An assessment decision may not be made based upon the results of a single

instrument. A school psychologist may not delegate responsibility for a student's assessment for Autism to outside agencies without ensuring that the assessment complied with the IDEA's procedural requirements. Further, doing so without notice to or discussion with Parent hindered Parent's ability to fully and fairly participate in the IEP process. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1126 (referred to as *Timothy O.*))

In testimony and in the IEP team meeting reports, the school psychologist stated that Student did not behave in a manner characteristic of Autism. Although Student was triggered by changes to his routine, sensitivity to some noises, and had social issues, the school psychologist noted that Student made eye contact, showed delight, demonstrated empathy for others, and seemed to the school psychologist to be in control of his behavior. Although some of Student's outbursts lasted more than 30 minutes, the school psychologist noted that Student sometimes could be calmed if he was given what he wanted or if his grandmother came to take him home. This, he believed, showed that Student's behaviors were within his control.

The school psychologist's views were disputed by Parent's two experts. Dr. Paula Santos is both a licensed clinical psychologist and a Board Certified Behavior Analyst. She testified credibly that the Kaiser report should have led Bakersfield City to assess Student for Autism. The finding that Student did not meet enough of the Autism criteria was based on a single instrument and a brief concurrent observation.

Dr. Santos observed Student and reviewed his medical and school history. She found Student's late speech, his self-isolation, repetitive patterns, finger-walking sensation-seeking, and oversensitivities were all red flags for concerns about Autism. Dr. Santos did not believe that having behaviors atypical of autism, such as eye contact

or empathy, means that a person cannot have autism. She believed only careful assessment can lead to a reliable diagnosis. The Ninth Circuit agrees. Otherwise, educational decisions would be made "on the basis of prejudicial stereotypes about what certain disabilities look like, rather than on the objective evidence and the thorough and reliable standardized testing that the IDEA requires." (*Timothy O., supra*, 822 F.3d at 1122.)

Dr. David Gilbertson, a licensed educational psychologist and a former school psychologist, noted that Autism and ADHD tend to occur together and interact with each other. His experience has been that children with autism have strong reactions when their focus is disrupted, their personal space imposed upon, or they are made to do tasks they find uninteresting. He noted that these were triggers for Student, and that Student's reactions were atypical in their length and intensity. In his opinion, these signs should have led Bakersfield City to include an assessment for Autism in the psychoeducational assessment. Parent's concerns, Student's behaviors, and the impediment to his learning caused by his aggression, isolation, and inability to learn or do work all created a responsibility to consider whether Student was affected by Autism. Since Bakersfield City did not do so, its assessment was not appropriate.

#### LACK OF BACKGROUND INFORMATION

Bakersfield City's psychoeducational assessment also contained inadequate background information about Student. The health and developmental information about Student were taken from a template and do not reflect his family history. Student's educational history is reported as having begun with his entry into kindergarten at Casa Loma, with no mention of Student's behavior problems in CAP-K

preschool. Serious issues in Student's background were not discovered or considered in the psychoeducational assessment.

The psychoeducational assessment reports that Student lives with his mother and has four siblings. However, he has three. It also states that there are no health conditions, syndromes, or disorders that might impact Student's educational achievement. The report does not mention anything about Student's other parent, who is currently incarcerated and has a history of drug use and of mental issues, including schizophrenia and ADHD. Student had a difficult birth and was deprived of oxygen due to the umbilical cord wrapping around his neck. Student uses a nebulizer for asthma and has taken medication for medication for ADHD during the entire 2019-2020 school year, which significantly affects his alertness and mood. All of these matters were potentially relevant to Student's behaviors and performance in school but omitted from the psychoeducational report.

Unquestionably relevant to Student's ability to benefit from his education is his educational history. Indeed, one reason why Bakersfield City's psychoeducational assessment did not find Student eligible as a student with emotional disturbance was because his "behavior has only been manifest for a few months." Student's educational history was set out as having begun in 2019 at Casa Loma. Student's two years at the CAP-K preschool, which is on the Campus of Casa Loma, were entirely ignored. This demonstrated Bakersfield City's failure to conduct an adequate inquiry into Student's background in the assessment.

Staff at Casa Loma, from Student's first teacher to the Principal of the school, were aware that Student had serious behavior problems during the two years he spent on the Casa Loma campus in the CAP-K program. However, the psychoeducational

assessment did not mention that Student's behavior problems were expressed during the CAP-K program. It is not possible that the behaviors there were irrelevant to understanding the same behaviors demonstrated from the first day of attendance at Casa Loma. Omitting them from the psychoeducational assessment invalidates it.

Student was not well-known to the staff at Casa Loma. He was with his first teacher for less than two months, and had been with his current teacher for less than two months when the assessment report was completed. In evaluating the rating scales and narrative reports provided by Student's Parent and teachers, the school psychologist implicitly and explicitly discounted the more severe reports of deficit and dysfunction reported by Parent. In part, that can be justified by the need to weigh a student's in-school behavior more heavily than behavior in the home, since academic performance is at issue. However, in doing so the school psychologist elevated the observations and opinions of people who had been with Student for a matter of weeks over those of a person who had seen Student develop over the years. Additional information about Student's behaviors, his triggers, and the responses that had been tried would have greatly informed the assessment's conclusions.

It is not credible to assert that the school psychologist did not have knowledge of Student's attendance at or problems in CAP-K. School staff were well aware of it. Parent had been dealing with the consequences of Student's behavior for two years, and was so driven to find a solution that Kaiser was enlisted to assess Student. The Kaiser Report not only included information about Student's father, but also reported Student's history of cursing, hitting, and throwing chairs in preschool. The psychoeducational report was either extremely derelict in its information gathering or intentionally left out information that might call its conclusions into question. Either way, it was not an appropriate assessment.



## ISSUE 1(B): APPROPRIATENESS OF THE FUNCTIONAL BEHAVIOR ASSESSMENT

Bakersfield City asserts that the FBA was properly conducted. Student contends that the FBA did not properly identify Student's problem behaviors, did not gather available data, did not properly analyze Student's behaviors, antecedents, and resulting consequences.

Student's FBA was also conducted by the school psychologist. The school psychologist had nearly completed the requirements to become a Board Certified Behavior Analyst at the time he conducted the assessment, but he did not need the certification to conduct the FBA. The appropriateness of an FBA is judged by whether its assessment tools and strategies provide relevant information that directly assists in determining the educational needs of the Student. (34 C.F.R. § 300.304(c)(7).)

The FBA suffered from the same flaw that undermined the psychoeducational assessment. The assessor did not look into the history of Student's behaviors. Beyond just failing to inquire about Student's history prior to entering Casa Loma, the assessor did not review and investigate Student's prior disciplinary history in Kindergarten to understand the setting events and triggers to Student's misbehavior.

As the school psychologist, the assessor had been called on to respond to or help manage Student's outbursts from his first day at school. The school psychologist came to view Student as a "negotiator," who could be deescalated in his behavior if offered toys or by being taken away to a quiet place to talk. In testimony at the hearing, the school psychologist stated that he was not interested in gathering information about the causes of past events or of understanding the antecedents of recent events. He did

not believe that it was common for behavior antecedents to change, and also did not believe it was necessary for him to consider whether his initial impression of the function of Student's behavior was wrong.

The conclusion of the school psychologist's FBA was that Student wished to avoid having to do work and would employ aggression or elopement to escape it. It is perhaps unavoidable that the conclusion of the FBA echoes the conclusion of the same assessor's psychoeducational assessment. The FBA follows a similar format to the other assessment, including the same word-for-word initial background narrative and description of educational history. The school psychologist nominally accepted Student's ADHD diagnosis, but believed that his problems in school were entirely within his control.

The report finds that the triggers for Student's misbehavior are non-preferred tasks, redirection, work that is too difficult, or toys he wishes to play with. The FBA recommends that Student be given replacement behaviors, such as communicating his preferences with words or pictures, requesting a break, or taking deep breaths and retreating to a quiet space. The FBA recommended that Student have a behavior intervention plan to help reduce the duration of challenging behaviors and increase his socially appropriate replacement behaviors.

Student's expert Dr. Santos, a Board Certified Behavior Analyst, gave the opinion that it was inappropriate for the school psychologist here to perform both assessments. She noted that the school psychologist has been intervening in Student's behavioral difficulties since the first day of school, and once Student interacted with him during the first observation on October 7, 2019, someone else should have taken over the FBA because the observations were now not natural. She further criticized the report's

collection of data and the failure to debrief after behavioral incidents. She pointed out that ADHD is a neurodevelopmental impairment, not a conduct disorder.

The FBA reads more as a conclusion in search of factual support than an inquiry into the causes and remedies for Student's behavioral problems. It suffered the same deficiencies in background and inquiry that rendered the psychoeducational assessment unreliable. Further, the fact that the school psychologist had an active and on-going relationship with Student made it inappropriate for him to conduct the FBA because the relationship made it impossible to do a natural observation of Student. Accordingly, Bakersfield City has not carried its burden of demonstrating that the FBA was appropriately conducted.

#### ISSUE 1(C): EDUCATIONALLY RELATED MENTAL HEALTH SERVICES ASSESSMENT

Bakersfield City contended that its educationally related mental health assessment was conducted in compliance with all applicable requirements. Student argues that Bakersfield City's educationally-related mental health services assessment was inappropriate because it focused on external behaviors and the assessor did not conduct an interview of Student. Further, Student contends that the assessment is inappropriate because the assessor testified at hearing that her role was simply to qualify Student for mental health services and not to recommend a treatment plan.

An assessment for educationally related mental health services is governed by the general principles for evaluation procedures that apply to all assessments. Those requirements include that the assessment provides relevant information that directly assists in determining the educational needs of the child and that a written report be prepared advising whether assessor believes a student needs special education services

and setting out the basis for that belief. (34 C.F.R. § 300.304(c)(7); Ed. Code, § 56327, subds. (a), (b).)

Bakersfield City's educationally-related mental health assessment was appropriate. The assessor used a variety of appropriate tools in the correct manner and was qualified by education and experience to conduct the assessment. Bearing in mind that the assessment was a companion to the psychoeducational assessment, it was sufficiently comprehensive in scope and depth. The assessor produced a written assessment report which was shared in a timely manner at an IEP team meeting.

Student's contentions of inappropriateness are not based upon statutes, regulations, or case law. The contentions are based solely upon the opinion of Parent's expert, Dr. Santos. Because there is no legal basis for the argument, the assessment is inappropriate only if the claimed deficiency is sufficiently severe to render the assessment unreliable. The assessment was not too focused on external behaviors. The report details Student's sadness, anger, and extreme moods. It did not simply report misbehavior. Although there was no interview of Student, which may have provided more information about Student's mental state, there is no requirement that an educationally-related mental health services assessment include a subject interview. Santos believes it is a required practice, but that is not the law.

Lastly, although the assessor stated at hearing that the purpose of her assessment was simply to qualify Student for mental health services, the assessment is not rendered invalid because of assessor's opinion of its purpose. Since an educationally-related mental health services assessment is normally conducted to determine whether services, such as intensive counseling services or a residential placement, are necessary for a student's ability to access education, it is purpose-

oriented. The assessor's view incorrectly limited the purpose of the assessment, but that does not invalidate her report, which included a discussion of the reasons underlying her conclusion, a recommendation for services and a focus for those services, suggested IEP goals, and an intervention strategy. The educationally-related mental health services assessment met all legal requirements and thus was appropriately conducted.

## ISSUE 2: DID BAKERSFIELD CITY OFFER STUDENT A FREE APPROPRIATE PUBLIC EDUCATION?

Bakersfield City contends that the offer of programs and services it presented at the January 29, 2020 IEP team meeting and developed from the meetings held on November 13, 2019, and December 4, 2019, constituted an offer of a free appropriate public education in the least restrictive environment. Student argues that the offer was inappropriate for Student and did not place him in the appropriate least restrictive environment.

The legal analysis of whether a school district offered a pupil a FAPE consists of two parts. First, whether the local educational agency complied with the procedures set forth in the IDEA, and, second, whether the IEP developed through those procedures was substantively appropriate. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 206-207 (referred to as *Rowley*)). Procedural violations do not automatically require a finding of a denial of FAPE. A procedural violation does not constitute a denial of FAPE unless the procedural inadequacy (a) impeded the child's right to a FAPE; (b) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE; or (c) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(i) &

(ii); Ed. Code, § 56505, subd. (j); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484 (referred to as *Target Range*).

In a District-filed case conducted under Education Code. section 56505, a hearing officer shall not base a decision solely on non-substantive procedural errors unless the hearing officer finds that the non-substantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian of the pupil to participate in the formulation process of the individualized education program. (Ed. Code, § 56505, subd. (j).)

Bakersfield City's offer of a free appropriate public education was based upon the facts, analysis, and conclusions contained in the psychoeducational and FBA assessments prepared by the school psychologist. Those reports were found in Issue 1 to have been inappropriately conducted. The failure to conduct an appropriate assessment is a procedural, not substantive, violation of the IDEA. (*Park v. Anaheim Union High School District, et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033. (*Park*))

The failure of Bakersfield City to conduct an appropriate psychoeducational assessment or FBA deprived Parent of the ability to meaningfully participate in the decision-making process regarding Student's educational program. Because of the faulty assessments, Parent was without accurate information from which to consider Student's needs for services. In addition, Parent was compelled to argue against the conclusions of an inappropriate assessment. 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.*, (9th Cir. 2008) 541 F.3d 1202, 1210 [quoting *Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 894].) An IEP based on faulty assessments can only accidentally

provide FAPE. Having been designed without reliable information about the student, it is difficult for a proponent to show the FAPE offer meets all of that student's needs. Further, Parent's opportunity to participate in the decision making process regarding the provision of FAPE was significantly impeded by the failure to conduct appropriate assessments.

For this reason, Bakersfield City has not met its burden of proof to show that its proposed educational plan for Student constituted an offer of FAPE.

### ISSUE 3: DID BAKERSFIELD CITY FAIL IN ITS CHILD FIND DUTY?

Student contends Bakersfield City should have found him eligible for special education services prior to November 13, 2019. He asserts that Bakersfield City failed in its outreach to the CAP-K program and that it should have assessed him for Autism before that date. Student argues that Bakersfield City improperly delegated responsibility for beginning the process for Student's assessment to the CAP-K program.

Bakersfield City argues that it met its obligations by providing Parent an assessment plan on September 11, 2019, and then finding him eligible for special education less than two months after Parent gave permission to conduct the assessments. 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. Bakersfield City argues that it did not know whether the disability diagnosed in the Kaiser report would have an educational impact on Student. Before it could make that determination, it argues, it needed to see how Student functioned in school. Because Student only had insignificant inappropriate behaviors until his behavior worsened at the start of September, it was not until then that it had reason to suspect Student had a disability

for which Student might be eligible for special education services. Accordingly, it argues that the creation of an assessment plan on September 11, 2019, was timely.

A school district is required to actively and systematically seek out, identify, locate, and evaluate all children with disabilities, including homeless children, wards of the state, and children attending private schools, who are in need of special education and related services, regardless of the severity of the disability, including those individuals advancing from grade to grade. (20 U.S.C. § 1412(a)(3)(A); Ed. Code, § 56171, 56301, subds. (a) and (b).) This duty to seek and serve children with disabilities is known as "child find."

A school district's child find obligation toward a specific child is triggered when there is knowledge of, or reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability. (*Dept. of Ed., State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp. 2d 1190, 1194.) The threshold for suspecting that a child has a disability is relatively low. (*Id.* at p. 1195.) The suspicion that a student may have an impairment that is affecting the student's educational performance, and requires special education, is sufficient to trigger a need to assess. (*Park, supra*, 464 F.Supp. 1025, 1032, citing Ed. Code, § 56320.) A school district's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Dept. of Ed., State of Hawaii v. Cari Rae S.*, 158 F.Supp.2d at 1195.)

Once a child is referred for assessment, the responsible school district has 15 calendar days from receipt of the request to prepare a proposed assessment plan. (Ed. Code, § 56043, subd. (a).)



Student attended preschool at the CAP-K program on the Casa Loma campus from 2017 to 2019. During that time, Student had numerous behavioral episodes where he would be aggressive, violent, or attempt to leave the classroom. Staff at Casa Loma were aware that Student had disciplinary issues at the CAP-K preschool.

Bakersfield City had a referral and training system in place to inform schools and preschool programs of the need to inform Bakersfield City of students suspected of having disabilities. Despite this program, CAP-K did not refer Student to Bakersfield City for assessment.

The responsibility for child find requires only that the districts responsible for identifying and locating children with disabilities inform preschools and other programs about detecting students with disabilities and let them know that they are to notify the district of such students. There is no evidence that Bakersfield City did not meet this obligation. There is no requirement that a district individually inspect children in such other programs. Although Casa Loma staff had been informed that Student exhibited severe misbehavior at CAP-K, they did not have information indicating a possible disability that would trigger Bakersfield City's child find assessment duties.

Student's Parent presented the Kaiser report to Casa Loma before Student started there in the 2019-2020 school year. The Kaiser report diagnosed Student with ADHD, a condition that could be an educational disability and indicated that Parent suspected that Student was Autistic. Although the school's Vice Principal contacted Parent that day to discuss the report, no assessment plan was generated until September 11, 2019.

Although Student was not yet attending Casa Loma when Parent presented the Kaiser report on August 6, 2019, doing so triggered Bakersfield City's child find obligation to Student as a child who resided within the boundaries of Bakersfield City. A

referral of a preschool student for special education services does not need to come from a preschool; the obligation to act is triggered by knowledge or suspicion that a particular child has a disability. Bakersfield City had fifteen days from that date to either proffer an assessment plan or provide written notice of its decision to refuse to assess. (Ed. Code, § 56043, subd. (a); 20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b); Ed. Code, § 56500.4.) Bakersfield City did not meet this deadline.

Even accepting that ADHD, combined presentation, might not have an impact on a student's ability to access education, Bakersfield City's argument that the Kaiser report did not yet trigger its child find obligation is not persuasive as the information in the Kaiser report, along with information from Parent, was sufficient to put Bakersfield City on notice that Student had a disability that might require special education services.

Bakersfield did not need to provide an assessment plan on August 6, 2019. It could take as much as 15 days to decide how it was going to respond. At that point, it had to provide an assessment plan, give prior written notice of its decision not to assess, or obtain Parent's consent to defer its decision. It did not take any such action. Bakersfield City failed in its child find responsibilities.

Because Bakersfield City did not act upon its knowledge that Student might have a disability requiring special education services within fifteen days, it failed to meet its child find responsibilities.

## ISSUE 4: DID BAKERSFIELD FAIL TO ASSESS STUDENT IN ALL AREAS OF SUSPECTED DISABILITY?

Student charges that Bakersfield City failed to evaluate him in all areas of suspected need when it failed to assess him for need for special education due to Autism.

Bakersfield City counters that it evaluated Student in all areas of suspected disability, and that it had no reason to suspect Student might have autism until approximately December 11, 2019. At that time, Bakersfield City offered to conduct an autism assessment, which Parent declined.

For purposes of evaluating a child for special education eligibility, the district must ensure that “the child is assessed in all areas of suspected disability.” (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The determination of what tests are required is made based on information known at the time. (See *Vasherresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158.) A school district is also required to ensure that the evaluation is sufficiently comprehensive to identify the child’s needs for special education and related services whether or not commonly linked to the disability category in which the child has been classified. (34 C.F.R. § 300.304(c)(6).)

The assessment plan prepared by Bakersfield City and agreed to by Parent on September 25, 2019, had the box checked next to an assessment for “social/adaptive behavior.”

The school psychologist conducting the assessment evaluated Student’s eligibility under the categories of emotional disturbance, other health impairment, and specific

learning disability. The categories listed in the report as eligibilities but not evaluated in the report were intellectual disability, deafness, multiple disability, speech/language impairment, deaf/blindness, orthopedic impairment, traumatic brain injury, visual impairment, hard of hearing, established medical disability (3-5 year olds), and Autism.

The IDEA requires that an assessment be sufficiently comprehensive to identify needs even in categories not commonly linked to the known or suspected disability. According to uncontroverted expert testimony at hearing, it is not unusual for a person to be affected by both ADHD and Autism, and aspects of their presentations are similar.

The assessment plan Bakersfield City presented to Parent agreed to conduct an assessment of Student's needs connected to social/adaptive behavior. As noted by the Ninth Circuit in *Timothy O*, "assessments under the category of 'social/adaptive behavior' [are] the category covering disorders on the autism spectrum." (822 F.3d at 1114.) Nevertheless, Bakersfield City's psychoeducational assessment did not consider whether Student was affected by Autism, which can be linked to ADHD.

Bakersfield City argues that it had no awareness that Parent suspected Student may have been affected by Autism until December of 2019. However, the evidence established that at the start of the 2019-2020 school year, Bakersfield knew of Parent's concern about Autism and of Kaiser's Autism Spectrum Disorder Evaluation. The IDEA requires that an assessment be sufficiently comprehensive to identify needs whether or not they are linked to the suspected disability category. Given his history and Parent's concerns, a comprehensive assessment for ADHD should include some consideration of whether Autism was also affecting Student, and not rely solely on the ADOS conducted by Kaiser. This notice held by Bakersfield City meant it was "required by the IDEA to ensure that an assessment for that disability was conducted using the sound and

reliable methods that the Act demands and to consider the results of that assessment when creating [Student's] IEP and providing him special education services." (*Timothy O., supra*, 822 F.3d at 1122.)

The school psychologist's assessment template included Autism as a possible eligibility category, but it and intellectual disability were the only mental conditions not considered in the psychoeducational assessment. In fact, Student's intellectual ability was tested as a part of the assessment. Only Autism was completely neglected as an area of investigation, despite being implied by the notation that Student's need for social and adaptive behavior support would be evaluated.

The report does not state why testing for autism-related needs was omitted. If there was an affirmative reason why the testing was not done, it was not set out in the report. At hearing, the only justification proffered by the school psychologist was that the use of the ADOS by Kaiser settled the question. However, Bakersfield City has an affirmative duty under the IDEA to perform a sufficiently comprehensive educational assessment. A comprehensive assessment would include some amount of testing for Autism based on the concerns presented by Parent and in the Kaiser report.

Bakersfield City also argues that its offer to assess Student for Autism in December 2019 prevents Parent from seeking an independent educational evaluation because Parent declined the offer. Parent counters that a late offer does not offset the failure to act earlier. Parent is correct. Bakersfield City was required to include assessment for Autism-related needs in the psychoeducational assessment it conducted in November 2019.

## ISSUE 5: DID BAKERSFIELD CITY FAIL TO PROVIDE AN APPROPRIATE BEHAVIOR INTERVENTION PLAN?

Student contends that the behavior intervention plan prepared based upon the school psychologist's FBA was not appropriate to his needs because the FBA it was based upon was invalid and unreliable.

Bakersfield City argues that the behavior intervention plan was appropriate because it was designed to respond to Student's physical aggression and elopement issues and replace them with socially appropriate replacement behaviors.

The behavior improvement plan prepared by the IEP team and proposed to Parent was based upon the facts, analysis, and conclusions contained in the FBA assessment prepared by the school psychologist. The behavior plan was primarily targeted at keeping Student from leaving the classroom. The plan proceeded from the assumption that Student wished to avoid work or non-preferred tasks, and would leave his work area when asked to do something he did not want to do. His attempts to leave would become aggression if he was prevented from leaving. To that end, the behavior plan required Student to modify his own behavior. If Student found himself building toward an outburst, he was to request a break, use breathing exercises, or use earned credits for preferred activities.

Because the school psychologist viewed Student's behavior problems as volitional acts, the behavior plan did not address the impact of ADHD or any other disabling condition on Student's ability to meet classroom expectations. Rather than being a coordinated plan to support Student in his disability, the plan expected Student to change his behavior through effort of will. At most, classroom staff were required to

allow Student to take breaks or calm himself. The behavior plan did not include a way to address the triggers that set Student's behavior in motion, and did not include a strategy for dealing with the aftermath of an episode. Without those elements, according to Student's expert Dr. Santos, Student's behaviors would be reinforced and not corrected by the behavior intervention plan.

The behavior plan was based upon an FBA that was incomplete and unreliable. The behavior plan placed nearly all the responsibility for changing Student's behavior upon Student, largely because the designer of the plan believed Student's behavior was willful, and not due to any disability. Because the assessment reported an inaccurate and incomplete picture of Student's behaviors and needs, the behavior improvement plan does not address his actual needs for behavioral support.

#### ISSUE 6: DID BAKERSFIELD CITY DENY STUDENT EDUCATIONAL OPPORTUNITY BY FAILING TO IMPLEMENT HIS BEHAVIOR IMPROVEMENT PLAN?

Student argues that the failure to consistently implement the behavior improvement plan and monitor the fidelity of its implementation deprived him of FAPE.

Bakersfield City contends that the school psychologist regularly checked with both Student's current teacher and with Student to be sure that the behavior improvement plan was being correctly and consistently implemented.

The behavior improvement plan was not adequate to provide Student with a FAPE because it did not address Student's disability, his actual needs, or offer a coherent plan to address both the antecedents and the consequences of his behavior. Since the

plan did not provide a FAPE, the question of whether it was implemented with sufficient fidelity is a moot issue because Student prevailed in Issue 5.

## REMEDY

Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); *see School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*)). This broad equitable authority extends to an Administrative Law Judge who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, fn. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168] (*Forest Grove*)).

In remedying a FAPE denial, the student is entitled to relief that is appropriate in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3).) The purpose of the IDEA is to provide students with disabilities a free appropriate public education which emphasizes special education and related services to meet their unique needs. (*Burlington, supra*, 471 U.S. 359, 374.) Appropriate relief means relief designed to ensure that the student is appropriately educated within the meaning of the IDEA. (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1497 (*Puyallup*)). The award must be fact-specific and be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

Parents may be entitled to reimbursement for the costs of placement or services that they have independently obtained for their child when the school district has failed



to provide a FAPE. (*Burlington, supra*, 471 U.S. at p. 369-371.; *Puyallup, supra*, 31 F.3d 1489, 1496.) An independent educational evaluation at public expense may be awarded as an equitable remedy, if necessary to grant appropriate relief to a party. (*Los Angeles Unified School Dist. v. D.L.* (C.D. Cal. 2008) 548 F.Supp.2d 815, 822-23.)

A school district also may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Park, supra*, 464 F.3d at p. 1033.) Compensatory education is a prospective award of educational services designed to catch-up the student to where he should have been absent the denial of a FAPE. (*Brennan v. Regional School Dist. No. 1* (D.Conn. 2008) 531 F.Supp.2d 245, 265; *Orange Unified School Dist. v. C.K.* (C.D.Cal. June 4, 2012, No. SACV 11-1253 JVS(MLGx)) 2012 WL 2478389, \*12.) An award of compensatory education need not provide a day-for-day compensation. (*Puyallup, supra*, 31 F.3d 1489, 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.)

Student seeks a variety of remedies in his final briefing. Among these are placement in a general education class with the services of a one-to-one aide provided by a nonpublic agency, reimbursement for the costs of the reports by Dr. Gilbertson and Dr. Santos, independent educational evaluations for educationally-related mental health services needs in psychoeducational functioning and functional behavior, an order requiring Bakersfield City to change its policies regarding tiered interventions, mandated training for the Casa Loma administrators and the entire Special Education Department of Bakersfield City, and attorney's fees. No compensatory services are sought that would assist Student with his academics and socialization.

No specific placement for Student is ordered for Student. Only Bakersfield City put in issue what FAPE would be for Student, and it lost on that issue. Student provided testimony about his need for the assistance of a one-to-one aide, but it was not an issue for hearing in this matter. Similarly, Student's experts testified about what needs Student had and what placement might be best for him, but neither experts' report was described as fully final. It was not a purpose of the hearing to establish what Student's placement should be if he were to demonstrate at hearing that Bakersfield City had not offered him FAPE.

Similarly, it would be improper to reimburse Student for the cost of the expert reports and order Bakersfield City to fund independent educational evaluations in those same areas. It is well-established that a prevailing parent may not recover the costs of an expert's testimony prepared for purposes of litigation and not for use at an IEP team meeting. (*Arlington Central School District Board of Education v. Murphy*, (2006) 548 U.S. 291.) Parent may not recover the cost of the reports prepared by Dr. Santos or Dr. Gilbertson for use at hearing.

It is not appropriate in this case to order Bakersfield City to change its policies. The specific disruption to his educational career suffered by Student here has not been shown to have been caused by any particular policy. Similarly, requiring all administrators at Casa Loma and the Bakersfield City Special Education Department to undergo retraining is not required. Most of what has gone wrong here can be traced to a misapprehension of Bakersfield City's view of the source of Student's behavior problems.

Lastly, attorney's fees are not obtainable before OAH.

Bakersfield City will be ordered to fund independent education assessments in psychoeducational functioning and functional behavior or Bakersfield City may pay Dr. Gilbertson \$5500 for his assessment report and Dr. Santos \$3208 for her assessment report. Bakersfield City may choose to retain Dr. Santos to assist in the development of a behavior intervention plan, but is not ordered to do so.

If Bakersfield chooses not to pay Dr. Gilbertson or Dr. Santos, Student shall be entitled to independent evaluations at public expense. These independent assessors shall be appropriately credentialed professionals of Parent's choice, provided the cost for the assessment is within reasonable guidelines for such services within the special education local plan area. At Parent's option, initiation of the assessment may be put on hold until no more than three months after students are allowed to physically return to school campuses without restriction on the number of students.

Student attended kindergarten in the 2019-2020 school year without proper supports and services. It has been demonstrated, almost without dispute, that Student has significant academic deficits and social difficulties. Accordingly, Bakersfield City will be ordered to provide Student with compensatory academic support, counselling, and socialization services for its failure to timely initiate an assessment of Student, for failing to assess him in all areas of suspected disability, and for failing to design an appropriate behavior intervention plan.

To support Student's academics, including his executive functioning, organization, and work completion skills, Bakersfield City is ordered to provide Student with 90 hours of academic support or tutoring, representing one hour for every two half-days of kindergarten class. The tutoring shall be provided by a provider of Bakersfield City's choice who can deliver the service at Student's home or at a local

public space such as a library. Student shall have until December 31, 2021, to use those tutoring hours. Any time not expended by that date shall be lost.

Bakersfield City shall fund 50 hours of therapy or counseling for Student by an appropriately credentialed provider of Student's choice, at a rate not to exceed \$125 per hour, representing one hour per week of service for one year. Student shall have until December 31, 2021, to use those hours. Any time not expended by that date shall be lost.

Student's behaviors and social interactions were shown to have worsened over the course of the school year, prior to the shutdown. Accordingly, Bakersfield City shall fund Student's participation in a socialization or social skills program of Parent's choice designed to help children with ADHD or Autism. The total cost of the program shall not exceed \$10,000, and shall be used by December 31, 2021.

No other relief is ordered.

## 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.

1. Neither Bakersfield City's November 12, 2019 psychoeducational evaluation or its November 9, 2018 functional behavior analysis was appropriately conducted. Bakersfield City must provide independent assessments in these areas at public expense. The March 4, 2020 educationally-related mental health services assessments was appropriately conducted such that Bakersfield City is not required to fund independent educational evaluations in that area at public

expense. Student prevailed in Issues 1 (a) and (b). Bakersfield City prevailed on Issue 1 (c).

2. Bakersfield City failed to offer Student FAPE through the individualized education plan developed at the team meetings held on November 13, 2019, December 4, 2019, and January 29, 2020. Student prevailed on issue 2.
3. Bakersfield City failed in its "child find" responsibility by not finding Student eligible for special education services prior to November 2019. Student prevailed on issue 3.
4. Bakersfield City failed to appropriately evaluate Student in all areas of suspected disability by failing to assess him for autism-related special education needs. Student prevailed on issue 4.
5. Bakersfield City denied Student a FAPE by failing to provide an appropriate behavior intervention plan. Student prevailed on issue 5.
6. The issue of whether Bakersfield City denied Student a FAPE by failing to implement his behavior intervention plan is mooted by the invalidity of the behavior implementation plan. No ruling was made on issue 6.

## ORDER

1. Bakersfield City is ordered to fund independent education assessments in psychoeducational functioning and functional behavior. The functional behavior assessment shall include funding for the assessor to participate in the creation of a behavior improvement plan. Instead of funding the FBA, within 30 days of this decision, Bakersfield City may pay Dr. Santos \$3208 for her assessment report. Likewise, within 30 days of this decision, rather than funding an independent psychoeducational assessment, Bakersfield City may pay Dr. Gilbertson \$5500 for his assessment report. If Bakersfield fails to pay either or both Dr. Santos and

Dr. Gilbertson, Parents may choose independent assessors who are appropriately credentialed professionals, provided the cost for the assessment is within reasonable guidelines for such services within Bakersfield City's special education local plan area. At Parent's option, initiation of the assessment may be put on hold until no more than three months after students are allowed to physically return to school campuses without restriction on the number of students due to COVID-19 restrictions.

2. Bakersfield City is ordered to provide Student with 90 hours of academic support or tutoring by a provider of its choosing. The tutoring shall be provided in Student's home or at a local public space such as a library. Student shall have until December 31, 2021, to use those hours. Any time not expended by that date shall be lost.
3. Bakersfield City shall fund 50 hours of therapy or counseling for Student, at a rate not to exceed \$125 per hour, representing one hour per week of service for one year, by appropriately credentialed professionals of Parent's choice. Student shall have until December 31, 2021, to use those hours. Any time not expended by that date shall be lost.
4. Bakersfield City shall fund Student's participation in a socialization or social skills program of Parent's choice designed to help children with ADHD or Autism. The total cost of the program shall not exceed \$10,000. Student shall have until December 31, 2021, to expend these funds. Any funds not expended by that date shall be lost.

## 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/*

Chris Butchko

Administrative Law Judge

Office of Administrative Hearings