

LEGALLY DEFENSIBLE STRATEGIES AND PLACEMENTS FOR BEHAVIOR

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OVERVIEW

1. Why is this important?

Behavior and discipline are two distinct issues that frequently overlap. Federal law contains certain procedures that public school districts must follow when addressing both issues in the education of students with disabilities. Behavioral interventions and strategies are important tools in that process. Further, students with disabilities are entitled to receive instruction in the least restrictive environment.

2. Is this just for special ed folks? Or does the general education teacher have responsibility for developing behavior interventions for special education students?

The federal regulations specifically state that “a regular education teacher of a child with a disability, as a member of the IEP Team, must, to the extent appropriate, participate in the development of the IEP of the child, including the determination of (i)

Appropriate positive behavioral interventions and supports and other strategies for the child; and (ii) Supplementary aids and services, program modifications, and support for school personnel consistent with §300.320(a)(4).” 34 C.F.R. §300.324(a)(3).

3. Does the law require an automatic FBA and BIP for every special education student who demonstrates discipline problems?

In reviewing the comments received in response to the proposed regulations, the Department of Education included the following response. “Some commenters recommended requiring that, even if a child’s conduct is determined not to be a manifestation of the child’s disability pursuant to §300.530(e), the IEP Team, in determining how the child will be provided services, must, at a minimum, consider whether to conduct a functional behavioral assessment and implement a behavior plan...we must recognize that Congress specifically removed from the Act a requirement to conduct a functional behavioral assessment or review and modify an existing behavioral intervention plan for all children within 10 days of a disciplinary removal, regardless of whether the behavior was a manifestation or not...”

4. Then why is it important to do the FBA and BIP for students who demonstrate behavior that is not a manifestation of their disability?

The Department also said, “we also recognize, though, that as a matter of practice, it makes a great deal of sense to attend to behavior of children with disabilities that is interfering with their education or that of others, so that the behavior can be addressed, even when that behavior will not result in a change in placement. In fact, the Act emphasizes a proactive approach to behaviors that interfere with learning by requiring that, for children with disabilities whose behavior impedes their learning or that of others, the IEP Team consider, as appropriate, and address in the child’s IEP, ‘the use of positive behavioral interventions, and other strategies to address the behavior.’ (See section 614(d)(3)(B)(i) of the Act). This provision should ensure that children who need behavior intervention plans to succeed in school receive them. For these reasons, we decline to make the changes suggested.” (emphasis added).

5. So when are FBAs and BIPs specifically required?

When the ARD committee has determined, through the manifestation determination review process, that a student’s behavior is directly related to the disability.

Once that finding has been made, the District needs to adhere to the following list of “do’s” and “don’ts”:

- (1) Don’t punish the student for conduct related to disability.
- (2) Don’t ignore the conduct; failure to address the conduct can constitute a violation of FAPE.

Do Follow the Legal Requirement:

The IEP Team must:

- (1) **conduct a FBA (functional behavioral assessment), if this had not already been done;**
- (2) **implement a BIP (behavioral intervention plan) if this had not already been done;**
- (3) **if a BIP was already in place, review and modify it as necessary to address the behavior;** and
- (4) return the child to the placement from which the child was removed unless:
 - A) the offense involved “special circumstances (drugs, weapons, serious bodily injury); or
 - B) parent and school agree to a change of placement as part of the modification of the BIP. 34 C.F.R. 300.530(f)(emphasis added).

6. True or False: The IEP Team must consider the use of positive behavioral interventions, even if the student’s behavior is not a manifestation of the student’s disability.

Here is how the Department of Education addresses this issue in the federal regulations:

(a) Development of IEP—

(1) General.

In developing each child’s IEP, the IEP Team must consider—

- (i) The strengths of the child;
- (ii) The concerns of the parents for enhancing the education of their child;
- (iii) The results of the initial or most recent evaluation of the child; and
- (iv) The academic, developmental, and functional needs of the child.

(2) Consideration of special factors.

The IEP Team **must**—

*(i) In the case of a child whose behavior impedes the child’s learning or that of others, **consider** the use of positive behavioral interventions and supports, and other strategies, to address that behavior...34 C.F.R. §300.324(a).*

7. Must the IEP Team consider the preferences and concerns of the parent in the development of a behavior intervention plan?

While no one member of the IEP Team can unilaterally make decisions about the IEP, the opportunity for parents to participate in the IEP development process must be

meaningful. As noted above, the IEP Team is required to consider “the concerns of the parents for enhancing the education of their child.” 34 C.F.R. §300.324(a)(ii).

FUNCTIONAL BEHAVIORAL ASSESSMENTS

8. What is an FBA?

It isn’t defined by the IDEA. Generally, the purpose of the FBA is to allow the ARD committee to formulate a hypothesis about the reason for a student’s concerning behavior and to develop appropriate interventions to remediate the behavior.

9. Are there any requirements in the law concerning how to conduct an FBA?

No. The law is silent on this point. However, the USDE in its Discipline Q/A (June 2009) provides the following description:

“An FBA focuses on identifying the function or purpose behind a child’s behavior. Typically, the process involves looking closely at a wide range of child-specific factors (e.g., social, affective, environmental). Knowing why a child misbehaves is directly helpful to the IEP Team in developing a BIP that will reduce or eliminate the misbehavior.” Questions and Answers on Discipline Procedures, Q/A E-2 (Revised June 2009).

10. Are there any limitations regarding who can conduct a FBA?

No. There are many professionals who might play a role in developing and delivering positive behavioral intervention strategies. 71 Fed. Reg. 46575, 46683 (2006). OSERS confirms that there are no statutory or regulatory requirements pertaining to the necessary qualifications to conduct a FBA. In particular, there is no Part B requirement that a FBA be conducted by a Board Certified Behavioral Analyst. Although the IDEA does not state who may conduct FBAs, districts must ensure that those who do conduct them are adequately trained. Letter to Janssen, 51 IDELR 253 (OSERS 2008).

11. Do we have to do another FBA every time we make revisions to the BIP?

No. An FBA is required under IDEA when conduct is determined to be a manifestation of the student’s disability and the IEP Team did not conduct an FBA before the behavior that resulted in the change of placement occurred. 34 CFR 300.530(f) (1)(i). Additionally, a school district should conduct an FBA where the information is needed to develop an appropriate BIP for the student. The IEP Team determines whether a new FBA is needed, just as with any other evaluation data.

12. Is consent required for a functional behavioral assessment?

Yes, if the purpose of the FBA is to evaluate a particular student. In Letter to Christiansen, OSEP states that if an FBA is “used to evaluate an individual child to assist in determining whether the child is a child with a disability and the nature and extent of special education and related services that the child needs, it is considered an evaluation under IDEA and parent consent is required for an FBA conducted as an individual evaluation or reevaluation.” If the FBA is “conducted for individual evaluative purposes to develop or modify a behavioral intervention plan for a particular child,” a parent who disagrees with that FBA would have the right to request the district pay for an IEE. On the other hand, if the FBA is intended to assess the effectiveness of behavioral interventions in the school as a whole, the parental consent requirements of IDEA generally would not be applicable because that sort of FBA would not be focuses on the educational and behavioral needs of an individual child. (Letter to Christiansen, 48 IDELR 161 (OSEP 2007).

13. What should we do when parents refuse consent for the district to conduct an FBA?

Continue to offer the FBA and develop a BIP based on the information currently available.

Yorktown ISD, Dkt. No. 170-SE-0408 (Texas Hearing Officer Stephen Webb, July 21, 2008). The student received services as a student with a learning disability. Throughout the school year, the student engaged in ongoing misbehavior including non-compliance, disruptive behavior, physical aggression and profanity, which in some instances resulted in disciplinary removals to ISS. In October of 2007, the ARDC convened. The District offered to conduct a psychological evaluation and FBA, among other evaluations; however, the parents refused consent for the FBA and psychological. The parents thought the student’s behavior should be overlooked and requested the teachers ignore minor behavior infractions. However, although staff reported they did ignore some minor behavior infractions, the parties disagreed as to what constituted “*minor* behavior infractions.” The ARDC convened several times throughout the school year and the District continued to offer to conduct an FBA. The parents continued to decline consent. In December of 2007, staff met with a behavior consultant to conduct an informal behavior assessment, and identified target behaviors, frequency data, the function of the target behaviors. The ARDC convened and the District proposed a BIP. “Student’s parents would not agree to the BIP unless it included a specific provision that “*minor* infractions” would be ignored. Once again, Student’s parents refused consent for a formal FBA, and refused to permit the school counselor to work with Student on social skills issues.” The parents requested a due process hearing and alleged the District failed to develop or implement an appropriate BIP. The Hearing Officer disagreed.

Key Quotes:

Student's parents have been obstacles rather than effective partners to Student's educational progress. Rather than acting on what is manifestly obvious from this record, Student's parents have chosen to oppose any of the School's efforts to cobble together and implement a reasonable BIP or develop a more effective BIP based on a formal FBA.

[P]arent's failure to completely access services offered by a school district cannot be ignored in an evaluation of a student's less than desirable educational progress. Services such as counseling and free educational evaluations are crucial educational services. Refusing to consent to either and then complaining about the results is illogical. Likewise, undermining any effort of the District to implement any type of disciplinary consequences for misbehavior, such as refusing to allow Student to serve ISS or detention, hurts only the Student....a parent's failure to use the services offered by a District should not be rewarded.

BEHAVIOR INTERVENTION PLANS

14. Keep the function of the behavior in mind when developing the BIP.

Wauke Community Sch. Dist. v. Douglas and Eva L., 51 IDELR 15 (S.D. Iowa Aug. 7, 2008). The student received services as a student with mental retardation. She demonstrated non-compliance and aggressive behavior. The District conducted an FBA and determined the "non-complaint behavior was maintained by an escape function, and her aggressive behavior was maintained by an attention-seeking function." The BIP included "(1) the use of a 'hand-over-hand' if [student] refuses to complete a task or demand and a break activity does not change her behavior." The student's began to have significant behavioral problems. The use of hand-over-hand became more frequent, and regularly resulted in restraint. The IEP team revised the BIP to remove the hand-over-hand intervention and added time-out in response to noncompliance and aggression. The District provided the parents information on the effective use of time-out, which recommended a duration of one minute per year of age of the child. However, when implementing the time-out procedure, the staff placed the student in time out almost daily for durations of time well over the recommended one minute per year of age, resulting in several hours of time out per day. The parent's alleged the BIP wasn't supported by the FBA, the interventions were inconsistent with research on appropriate practices, and were excessive in length and inconsistent with positive behavioral supports. The ALJ and the District Court agreed.

Key Quotes:

[A] school district's failure to address a student's behavioral needs can result in a violation of the IDEA mandate...The proper standard by which to evaluate [Student's] IEP is set forth in *Rowley*—were [Student's] IEPs, and the manner in which they were implemented, 'reasonably calculated' to enable her to receive an educational benefit...

Both of [Student's] IEPs called for offering [Student] a break when she became non-complaint. The record also shows that the [District] at times used a hand-over-hand intervention in response to [Student's] inappropriate peer contact. Both parties' experts...testified that the use of a break time activity in response to non-compliance—an escape-based behavior—and the use of hand-over-hand intervention in response to peer aggression—an attention-seeking behavior—would serve to reinforce the problem behavior and would be contraindicated by the research...

Based on her review of the record and the testimony of the experts, the ALJ concluded that the duration of the time-out interventions used with [Student] was 'excessive' in length, and the interventions were not otherwise effective...the preponderance of the evidence supports that the ALJ's finding that the duration of [Student's] time-outs were inconsistent with 'applicable research and appropriate educational practices' and the 'peer-reviewed research to the extent practicable.'

15. Include a statement of functional present levels of performance in the IEP.

Remember, the regulations require that a statement of the student's present levels of functional performance, as well as academic achievement, be included in the IEP. 34 C.F.R. § 300.320(a)(1). For students' with behavioral difficulties, specificity with regard to present levels of functional performance is a necessary starting point in developing an IEP and measurable behavioral goals and objectives. To avoid conclusory statements of a student's present levels of functional performance, present levels of functional performance may be stated in terms of frequency, duration, and intensity. Observations may be utilized to gather present levels of functional performance data prior to the ARD Committee meeting, as well as measure progress on behavioral goals and objectives.

Larson v. Indep. Sch. Dist., No. 361, 40 IDELR 231 (D. Minn. 2004). The student had multiple disciplinary referrals and the court concluded "that the IEPs developed by the School District were inadequate as to the 'present levels of performance'...The 'present levels of performance' sections of [the student's] IEPs contain only conclusory statements about [his] present level of abilities and the IEPs do not fully explain how

[his] disability affects his involvement in the educational process. For instance, the...IEP discusses only very generally [his] difficulties in interacting socially with other students.”

In Northside ISD, Dkt. No. 245-SE-0606 (Texas Hearing Officer Mary Carolyn Carmichael, Jan. 5, 2007) the District gathered present levels of behavioral performance. The student met eligibility criteria as a student with ED/LD. The District conducted an FBA “to determine behavioral antecedents, what happens after the problem behavior occurs, the effectiveness of strategies and reinforcers used over the past year, and the function of the problem behaviors. The target behaviors included physical aggression, peer interactions, and poor self-management and included frequency data on the behaviors (e.g. “2 times a month”). The BIP addressed the target behaviors and included positive behavioral supports, direct instruction in pro-social behaviors, and consequences. In February 2006, the ARDC conducted another FBA and revised the BIP. The parent’s alleged the District failed to provide a behavioral baseline for the student during the 2005-2006 school year, among other allegations. The Hearing Officer disagreed.

Key Quotes:

Documentation of the ARDC meetings held on February 9, 2006, and on May 17, 2006, included documentation that established the baseline of the student’s behaviors.

As part of the ARDC deliberations on May 17, 2006, the ARDC performed an FBA of the student using a variety of data sources that included the student’s conduct grades from current and previous report cards, written documentation produced by teachers and/or administrators, classroom observations by three teachers..., information from the student, the BIP, the student’s discipline records, his behavior checklist, Respondent’s evaluations of the student, and parental information. Based on these sources, the ARDC concluded a baseline of the student’s behaviors and exhibited physically aggressive behaviors about *** times a month in all school locations. The student exhibited poor self-management in the classroom once a week. He had problems with peer interaction in all school locations *** a week.

16. A BIP may be needed for FAPE even when no change of placement is being considered.

Courts have recognized situations where a BIP is necessary for FAPE outside of a disciplinary change of placement. In Lake Travis Indep. Sch. District v. M.L., 50 IDELR 105 (W.D. Tex. 2007), the court observed:

However, “[a] second situation in which a behavioral intervention plan could be warranted occurs when the disabled student exhibits behavior that impedes the learning of himself or others.” *Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist. #221*, 375 F.3d 603, 614 (7th Cir. 2004) (citing 20 U.S.C. §1414(d)(3)(B)(i)). Although it does not use the term “behavioral intervention plan,” 20 U.S.C. §1414(d)(3)(B)(i) requires a School District's IEP team, “in the case of a child whose behavior impedes his or her learning or that of others, [to] consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior.” *Id.* Because it is undisputed that M.L.'s behavioral problems impeded his learning and that of other students, the IEP team was required to consider behavioral interventions to address those issues. *Id.*

In *Lauren P. v. Wissahickon School District*, 48 IDELR 99 (E.D. Pa. 2007), the court ordered compensatory education and tuition reimbursement to the parents of a student with ADHD due to the fact that the IEP did not include a behavior plan. The student’s behavior demonstrated distractibility, failure to turn in assignments, failure to complete assignments, tardies, etc. The court concluded that the student’s behaviors interfered with learning and were part of the student’s disability, and therefore, a behavior plan should have been implemented. However, on appeal in *Lauren P. v. Wissahickon School District*, 51 IDELR 206 (3rd Cir. 2009) (Unpublished), the court ruled that the parents were not entitled to reimbursement for tuition at a private school, thus overturning the district court. The administrative panel had concluded that the private school was not appropriate and the district court did not specify why that was wrong. The parents were entitled to compensatory education, but not reimbursement for the tuition at the private school.

In *Escambia County Bd. of Educ. v. Benton*, 44 IDELR 272, 406 F.Supp.2d 1248 (S.D. Ala. 2005), the court rejected the argument “that Benton did not require a functional behavior analysis or behavior intervention plan because his behaviors were characteristic of autism....” The district court agreed with the hearing officer that “[t]he fact that the behaviors demonstrated by the child are a manifestation of [his] autism does not excuse a school system from providing behavior management techniques either in the child’s IEP or in a separately formulated behavior intervention plan.’ ... [G]ood professional practice dictates that you determine interventions based on the unique needs of each child,’ rather than categorically stating (as the IEPs did) that no behavioral intervention is needed because the behaviors in question arise from autism....Thus, extensive evidence at the due process hearing refutes the school system’s convoluted and demonstratively flawed rationale that no behavior plan was warranted because the behaviors at issue related to Benton’s disability.”

HOW CAN WE PROVE THAT INTERVENTIONS ARE WORKING?

17. Any suggestions for measuring and documenting behavioral progress?

Behavioral data may be stated in terms of frequency, intensity, and duration to facilitate measurability and documentation of progress. If inappropriate behaviors increase, the ARD committee should convene to review and revise the IEP to address the behaviors.

Flour Bluff Indep. Sch. Dist., Dkt. No. 201-SE-0305 (SEA TX 2005). The hearing officer concluded the District provided the student a FAPE.

Prior to implementation of his BIP...the severity and frequency of his aggressive and disruptive behaviors were significant. After implementation of the BIP, the severity and frequency of his inappropriate behaviors initially declined... [W]hen the aggressive behaviors reappeared, the ARD Committee appropriately addressed this escalation by revising his IEP and implementing the Crisis Intervention Plan. [Student's] behavior charts confirm that over the course of the school year, there has been a reduction in the frequency of his aggressive behaviors, in the number of classroom disruptions, and in the number of his refusals to comply with teacher and adult directives.

18. What do we do if the student isn't making adequate progress?

Review and revise the IEP less than annually if necessary. School districts must hold IEP Team meetings for each eligible student at least once per year. 34 C.F.R. § 300.324(b)(1)(i). Additionally, the IEP Team is expected to revise the IEP as appropriate to address:

- (A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate;
- (B) The results of any reevaluation conducted under § 300.303;
- (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2);
- (D) The child's anticipated needs; or
- (E) Other matters.

If the student is performing poorly, consider revisions to the IEP to address the student's educational needs. Evaluation may also be requested and perhaps provide valuable information as to why the student is not making expected progress. Evaluations should be thoroughly reviewed by the ARD committee and include recommendations for the ARD Committee to consider for implementation in the student's IEP.

Barnett v. Memphis City Schools, 42 IDELR 56 (6th Cir. 2004). The court concluded the student's IEP was not reasonably calculated to enable the student to receive educational benefit. "The record demonstrates that when Adam failed to reach the goals set forth in his IEPs in any give year, the school district did not recommend, let

alone adopt or implement, any approaches to his instruction different from those already demonstrated to have failed.”

19. Should the ARDC review and revise the IEP prior to changing the student’s placement to a more restrictive setting?

Yes. Review and revise the IEP as necessary in response to a student’s academic or behavioral difficulties, especially prior to changing the student’s placement to a more restrictive setting.

Alex R. v. Forrestville Valley Community Unit Sch. Dist., 375 F.3d 603 (7th Cir. 2004). The court held Alex’s IEPs were reasonably calculated to enable him to receive educational benefit. Alex received special education services in the general education setting. At some point during second grade, Alex’s behavior began to deteriorate. The district responded to Alex’s behavioral deterioration by amending his IEP, developing a FBA and BIP, and changing his placement to a more restrictive setting. The court noted:

The District responded several times by amending Alex’s third-grade IEPs to provide for more of the same types of therapy and supervision that had apparently worked from kindergarten through some point during second grade. Throughout the IEP process, the District responded in a way that, based on its experience with Alex, appeared reasonably likely to produce progress.

As the district court aptly put it, ‘The District acted reasonably in attempting to deal with an increasingly difficult situation affecting not only Alex but other student’s as well.’

20. Can failure to provide appropriate behavioral interventions result in an award of a residential or private placement to the student?

Yes. In Plainville Board of Education v. R.N., 58 IDELR 257 (D.C. CT 2012), the failure to provide appropriate services resulted in an award of a residential placement.

The IHO found that the Board failed to provide FAPE during the 2007-2008 school year. In other words, she found that the Board failed to provide an IEP reasonably calculated to enable R.N. to receive educational benefits. The record supports this conclusion. While attending NVS, R.N. had to be forcibly transported to school by Wheeler Clinic staff, and Mrs. H. complained about the school's disciplinary tactics. R.N. had sufficient trouble at NVS to alert the Board that the placement was inappropriate. Between September and October 2007, R.N. received only one to two hours per day of homebound tutoring with no related services. After the January 2008 PPT meeting, R.N. returned to school for

shortened academic days. A two-hour school day with no additional services was not sufficient to provide R.N. with a reasonable chance of making academic progress, especially in view of the PPT's determination that he should be in school 30.75 hours per week. R.N. did not receive ESY services during the summer of 2008 to make up for this deficiency

RECENT CASES

Park Hills School Dist. v. Dass, 57 IDELR 121 (8th Cir. 2011). The Court of Appeals reversed the decision of the District Court in a case involving twin siblings with autism. The District Court had ruled that the public school district failed to afford the students with an appropriate education because the IEP for each student failed to include a behavior intervention plan. The Court of Appeals disagreed, however, noting that the failure to include a BIP in each student's IEP was a procedural violation, at most, given that the District had considered the use of positive behavioral strategies in advance of the school year.

Key Quote: For similar reasons, we reject the Panels' assumption that the lack of a behavior intervention plan in the 2005 IEPs was a procedural inadequacy that "compromised the pupil's right to an appropriate education." The 2005 IEPs noted D.D.'s and K.D.'s individual behavioral issues, as well as other limitations and concerns, reflecting that the IEP team had considered strategies to "address that behavior." § 1414(d)(3), 34 C.F.R. § 300.324(a)(2).

R.K. v. New York City DOE, 56 IDELR 212 (E.D.N.Y. 2011): the judge's decision adopts a Magistrate's Report which can be found at 56 IDELR 168. The court held that the absence of a FBA and BIP in the IEP for a student with autism was a serious omission which, when coupled with other defects, rendered the IEP inappropriate.

School Board of the City of Norfolk v. Brown, 56 IDELR 18 (E.D.Va. 2010). The court found substantial evidence in the record to support the hearing officer's conclusion that the school should have developed a BIP and/or conducted a FBA prior to the imposition of long term discipline. The hearing officer and court called this a "child find" violation, noting that there was adequate reason to suspect disabilities in addition to the disability already identified (OHI). The court considered this both a failure to evaluate in all areas of suspected disability, and a failure to include necessary services in the IEP.

B.D. v. Puyallup School District, 53 IDELR 120 (W.D.Wash. 2009). The court upheld a hearing officer's decision in favor of the school district. Among other rulings, the court observed that "The use of a quiet room or area, offered to the student to go to voluntarily if some noise disrupted or agitated him, is not an aversive therapy." State law has a definition of "aversive interventions" but the court held that this technique did not meet that definition.

E.H. & K.H. v. Board of Ed. of Shenendehowa Central Sch. Dist., 53 IDELR 141 (2nd Cir. 2009) (Unpublished). Because the IEP identified techniques that his teachers could use to address his behavior issues, the lack of a formal BIP did not make the student's program deficient. The

court also rejected the argument that the parents were denied the right to meaningful participation. Key Quote:

The record reflects a robust, if acrimonious, dialogue between school personnel and plaintiffs, as well as plaintiffs' participation in many meetings aimed at developing educational programming for C.H. Thus, we identify no error, much less one capable of denying C.H. a FAPE.

The court also ruled in favor of the district on placement. A witness testified that a six-student classroom would be the "best" placement for a student. The court found that the six-student classroom would not have been the least restrictive environment as required by the IDEA and that the IDEA does not require district to provide the "best" possible placement so long as the district offers to provide an appropriate education which allows the child to receive meaningful educational benefit.

Rodriguez v. San Mateo Union High School District, 53 IDELR 178 (9th Cir. 2009) (Unpublished). The student was arrested for taking beer from a store. Pursuant to an agreement with a juvenile court, the student's parent placed him in a private residential program. Claiming that the district's failure to develop a BIP after the student's arrest amounted to a denial of FAPE, the parent sought reimbursement for the residential placement. The Court found that the student's behavioral problems did not cause harm or a serious threat of harm to persons or property, which would have required a BIP under the California regulations. The Court also found that the student did not show evidence of other circumstances warranting a BIP under the IDEA. While the student's truancy interfered with his learning, the District adequately addressed that issue in the student's IEP.

C.B. v. Pittsford Central School District, 54 IDELR 149 (W.D.N.Y. 2010). The court denied a claim for tuition reimbursement, holding that the IEPs offered by the school district offered FAPE. The case involved a bright student in the 8th grade with dysgraphia and difficulties in written expression and self-advocacy skills. Much of the discussion concerns the student's use, or refusal to use, services and devices offered by the school district. The parents alleged that the IEP should have included a FBA to address the student's lack of motivation. The court held that the absence of an FBA was inconsequential because "the IEPs contained various strategies to motivate EB and to address his behaviors."

Comment: The underlying assumption is that the IEP should address, in some way, self-defeating behaviors of students.

Compton USD v A.F., 54 IDELR 225 (C.D.Cal. 2010). The court held that the district denied the student FAPE by failing to conduct a Functional Analysis Assessment (California terminology) after being requested to do so. As a result of the failure to assess in all areas, the behavioral component of the IEP was inadequate and the student did not receive FAPE, despite good academic progress.

Comment: The court softened its ruling by noting that the District tried in good faith to meet the student's needs: "It is because the IDEA imposes exacting requirements on a school district that Student has prevailed here."

R.K. v. New York City DOE, 56 IDELR 212 (E.D.N.Y. 2011): the judge's decision adopts a Magistrate's Report which can be found at 56 IDELR 168. The court held that the absence of a FBA and BIP in the IEP for a student with autism was a serious omission which, when coupled with other defects, rendered the IEP inappropriate.

B.H. v. West Clermont Board of Education, 56 IDELR 226 (S.D. Ohio 2011). The court held that the district denied FAPE to the student by failing to intervene while behaviors were escalating, and relying too much on physical restraint. The court noted that the SRO, who had ruled for the school district, based that ruling on the fact that the student had not regressed academically. Key Quote:

To support her position, the SLRO cited a number of cases for the proposition that adverse impact on academic performance is the deciding factor in determining whether or not FAPE has been denied to a student with behavioral issues. This fact alone supports a finding that the SLRO failed to apply the proper standard and recognize that schools are required to look to both academic and functional advances.

Clark v. Special School District of St. Louis, 58 IDELR 126 (E.D. Mo. 2012). The court noted that "Neither Missouri nor federal law requires a written BIP to be attached to an IEP" and that "The IDEA does not require an IEP to have specific behavior goals." Instead, the court noted the legal requirement to consider positive behavioral interventions, supports and strategies.

PRACTICE POINTERS

- Conduct a FBA and develop a BIP when behavior is determined to be a manifestation of a disability.
- A FBA can be used to explain "unexplainable" behaviors and identifying strategies to address the behavior.
- When a disciplinary change of placement is not involved, develop a BIP when typical classroom strategies have not successfully addressed the problem behavior.
- Keep the "positive" in positive behavior interventions and strategies.
- Remember, a BIP should supplement not supplant the Student Code of Conduct.
- Keep it simple - Complex BIPs may create unintended complex legal issues.
- Individual needs should drive the BIP.

- The FBA should address the ABCs – Antecedent, Behavior and Consequence.
- Functional behavioral data can be gathered informally and reviewed by an ARDC.
- Look to research based strategies and interventions as a guide.
- Ensure appropriate programming and interventions have been provided before changing a student’s placement to a more restrictive setting
- Parent input is an important source of information for both determining if a FBA is needed and in developing a BIP.