

**Keeping Students with Disabilities in School:  
Legal Strategies and Effective Educational Practices  
for Preventing the Suspension of Students with  
Disabilities**



**The Southern Disability Law Center  
Austin, Texas  
2014**

**This publication made possible by a grant from the Texas Bar Foundation.**



## **Keeping Students with Disabilities in School**

### **Legal Strategies and Effective Educational Practices for Preventing the Suspension of Students with Disabilities – A Resource Manual for Parents and Professionals**

#### *Acknowledgements*

“A child seldom needs a good talking to as a good listening to.” Robert Brault

The Southern Disability Law Center recognizes the tireless advocacy efforts of parents of students with disabilities. Parents spend somewhere between fifteen and eighteen years regularly advocating for a quality and meaningful education for their sons/daughters with disabilities. They also advocate for an educational experience where their sons/daughters are welcomed, understood and accepted by school personnel as well as their school peers.

Parents are the true experts about their sons/daughters for they have spent far more time than anyone else observing, learning about and giving a ‘good listening to’ their children. This Manual is dedicated to parents and all of their advocacy efforts on behalf of their sons/daughters with disabilities.



This Manual is funded through a grant from the Texas Bar Foundation. Since its inception in 1965, the Texas Bar Foundation has awarded more than \$15 million in grants to law-related programs. Supported by members of the State Bar of Texas, the Texas Bar Foundation is the nation’s largest charitably-funded bar foundation.

The information in this handbook is not legal advice. Legal advice is dependent upon the specific circumstances of each situation. The information contained in this handbook cannot replace the advice of competent legal counsel.

2014 Southern Disability Law Center

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# **Keeping Students with Disabilities in School: Legal Strategies and Effective Educational Practices for Preventing the Suspension of Students with Disabilities**

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## **SECTION I**

### **INTRODUCTION**

Many publications are available to parents and professionals that review the Individuals with Disabilities Education Act's discipline provisions in detail. The focus of this publication is not another review of these provisions. Instead, it's about ways to use some of the discipline provisions and other IDEA requirements to prevent the use of suspension, expulsion and removals to alternative education programs (Disciplinary Alternative Education Programs [DAEPs] in Texas) and to keep students in school.

This Resource Manual will address both legal strategies under the Individuals with Disabilities Education Act (IDEA)<sup>1</sup> and effective educational practices for preventing the disciplining of students with disabilities. This Resource Manual is intended for parents of students with disabilities and professionals. Its publication is timely considering that students with disabilities are presently suspended at rates much higher than students without disabilities in many school districts across Texas.

For twenty years, Zero Tolerance discipline policies have been implemented by public school districts across the country including many districts across Texas. Zero Tolerance policies have been described as brutally strict discipline practices that embrace harsh punishment over education.<sup>2</sup> They usually involve a set punishment, often severe, that is applied by schools whether a student's misconduct is minor or serious.<sup>3</sup>

Initially, Zero Tolerance policies focused on dangerous behavior requiring mandatory expulsion for possession of guns on school property.<sup>4</sup> Over the past two decades however, Zero Tolerance policies evolved to include behavior posing no safety concerns and now include minor misconduct like disobeying school rules, insubordination, and disruptive behavior.

Application of Zero Tolerance Policies to most student conduct has produced large increases in suspension rates including highly disproportionate (i.e., much

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<sup>1</sup> 20 U.S.C. §1400 et seq.; 34 C.F.R. §300.1 et seq.

<sup>2</sup> Advancement Project and Civil Rights Project of Harvard University, (2000): *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies. A Report from a National Summit on Zero Tolerance.*

<sup>3</sup> Russell J. Skiba, (2000): *Zero Tolerance, Zero Evidence – An Analysis of School Disciplinary Practice.*

<sup>4</sup> Gun Free Schools Act of 1994. P.L 103-382. 20 U.S.C. §7151.

higher than other groups) suspension rates for students with disabilities and students of color.<sup>5</sup> This reality is also true in Texas' public school districts.<sup>6</sup>

The American Psychological Association's (APA) Zero Tolerance Task Force, Chaired by Cecil R. Reynolds, Ph.D. from Texas A&M University found in its groundbreaking *Zero Tolerance Report*:

- Zero Tolerance Policies use with minor non-violent student misbehavior does not improve school safety or student behavior.<sup>7</sup>
- Zero Tolerance Policies have dramatically increased student suspension and expulsion rates.
- Zero Tolerance Policies have produced highly disproportionate suspension and expulsion rates for students of color and *students with disabilities*, particularly students with behavior-related disabilities.
- Zero Tolerance schools with high suspension and expulsion rates have lower ratings on school climate, school achievement, and spend excessive amounts of time on discipline.<sup>8</sup>
- Zero Tolerance Policies have led to significant increases in referrals to the Juvenile Justice System for non-dangerous student conduct previously handled by schools.<sup>9</sup>

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<sup>5</sup> See American Psychological Association Zero Tolerance Task Force, (2006): *Are Zero Tolerance Policies Effective in Schools?*; UCLA's Civil Rights Project, (2013): *Out of School and Off Track - The Overuse of Suspensions in American Middle and High Schools*.

<sup>6</sup> The Council of State Governments Justice Center, (2011): *Breaking Schools' Rules – a Statewide Study of Texas Public Schools and How School Discipline Relates to Success and Juvenile Justice Involvement*.

<sup>7</sup> The frequent use of suspension alone has no measurable positive deterrent or academic benefit for either the students suspended or for non-suspended students. The notion that suspensions prevent future misbehavior is simply not supported by research. Instead of reducing misbehavior, suspension appears to predict higher future rates of misbehavior and suspension among students suspended. American Psychological Association Zero Tolerance Task Force, (2006): *Are Zero Tolerance Policies Effective in Schools?* Pages 5, 852-862.

<sup>8</sup> High suspension rates produce no benefits with respect to test scores or graduation rates. The idea that schools must suspend and expel misbehaving students so good students can learn is not supported by research. Research actually indicates that lower rates of out-of-school suspensions, after controlling for race, poverty and other characteristics, are linked with higher test scores. See Center for Civil Rights Remedies, Daniel J. Losen and Jonathan Gillespie, (2012): *Opportunities Suspended: The Disparate Impact Of Disciplinary Exclusion From School*, Page 8.

<sup>9</sup> American Psychological Association Zero Tolerance Task Force, (2006): *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations, Executive Summary*. The APA also found that Zero Tolerance Policies are at odds with the developmental stage and challenges of adolescence particularly when youth can be expected to challenge authority and also when youth do not consistently exercise good judgment. *Id* at 7-8. Research has also shown that discipline that responds to typical adolescent behavior by removing students from school does not better prepare students for adulthood ...instead it increases their risk of educational failure and



In light of these findings, the APA recommended using Zero Tolerance disciplinary removals only for the most serious and severe behaviors; replacing Zero Tolerance policies with a system of discipline with much different consequences for minor misbehavior compared to major misbehavior; requiring school police (often called school resource officers) to be trained in adolescent development.<sup>10</sup>

The Council of State Governments Justice Center's 2011 Report "*Breaking School Rules*" followed close to one million Texas public school middle school students over a multi-year period in order to study statewide discipline practices. The Report revealed several troubling discipline practices and resulting outcomes in school districts across Texas:

- Nearly six out of ten students (60%) were suspended or expelled at least once between 7th and 12th grade.
- 97% of all disciplinary actions (involving suspension, expulsion, transfers to alternative education programs) for violations of school codes of conduct were not required but were still imposed by local districts. Only 3% of all disciplinary infractions involved mandatory suspensions and/or expulsions.
- Overall, 75% of students with disabilities were suspended or expelled at least once. Students with disabilities (particularly those with emotional disabilities) were suspended and/or expelled at higher rates than other groups of students.
- Students suspended and/or expelled had a much higher grade retention (i.e., repeating a grade) and drop-out rate than students not suspended.<sup>11</sup>
- Students who were suspended and/or expelled were three times more likely to be involved in the juvenile justice system the subsequent year than students not disciplined.<sup>12</sup>

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dropout. Daniel J. Losen and Russell J. Skiba, (2010): *Suspended Education: Urban Middle Schools in Crisis*, Pg.10-11.

<sup>10</sup> American Psychological Association Zero Tolerance Task Force, (2006): *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, Pages 96-114.

<sup>11</sup> The Council of State Governments Justice Center, (2011): *Breaking School Rules: A Statewide Study of How School Discipline Relates to Students Success and Juvenile Justice Involvement*. Students who were disciplined were six times more likely to be retained or repeat a grade than students who were not disciplined (31% to 5%). Moreover, 10% of students disciplined dropped-out of school and for students disciplined 11 or more times during middle and high school a stunning 59% dropped-out of school.

<sup>12</sup> Students who were disciplined were also seven times more likely to end up involved in the juvenile justice system long term than students who were not disciplined (14% to 2%).

In a 2012 report, *Breaking Rules, Breaking Budgets: Cost of Exclusionary Discipline in 11 Texas School Districts*, Texas Appleseed examined the costs of 11 urban school districts' exclusionary discipline practices.<sup>13</sup> The selected districts have a combined student enrollment of nearly one million students.

Texas Appleseed's report found that these school districts spent over 7 times more funding on disciplining and removing students than providing necessary social work and other support services. Overall, these districts spent 12 times more funding on disciplining *and* policing students than on providing them social work services.<sup>14</sup>

In April 2013, the National School Board Association approved and issued a policy paper entitled *Addressing the Out-Of-School Suspension Crisis – A Policy Guide for School Board Members*. The Policy Guide entailed, in part, the following findings and recommendations:

#### FINDINGS

- Harsh discipline practices have impacted students with disabilities and students of color more than other groups of students. Both groups miss important instructional time as a result and are at greater risk of not staying interested in school and of reduced educational opportunities.
- Nationally, students with disabilities are suspended at *twice the rate* of their non-disabled peers. Students with disabilities are also more likely than other students to be suspended more than once in a school year.
- Students with disabilities' high suspension rates raise serious questions as to whether schools are punishing students for behavior that is related to their disability and whether schools are appropriately addressing these students' needs.
- Suspensions are a predictor of students risk for dropping-out.

#### RECOMMENDATIONS

- School discipline involving suspension and expulsion should not be used to exclude students from school or otherwise deprive them of an

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<sup>13</sup> The 11 school districts are Bryan, Conroe, Cypress-Fairbanks, Dallas, Fort Bend, Fort Worth, Houston, Humble, Northside, Plano, and San Antonio.

<sup>14</sup> These districts spent approximately \$140,000,000 (million) on out-of school suspensions; referrals to Disciplinary Alternative Education Programs (DAEPs); and student expulsions to Juvenile Justice Alternative Education Programs (JJAEPs). They also spent an \$87,000,000 (million) on campus policing, security, and monitoring services for a total of \$227,000,000 (million). These same districts however spent a fraction of the above amount - \$18,600,000 (million) - on social work services aimed at addressing the causes of behavioral and discipline issues.

education. They should only be used as a *last resort* in order to preserve the safety of students and staff.

- School Boards must take the lead in ensuring that out of school suspensions are used as a *last resort* in addressing violations of school districts codes of conduct.
- School Boards must take responsibility for designing, developing, and implementing comprehensive alternatives to suspension of students from school.<sup>15</sup>

In 2014, the Council of State Governments Justice Center issued a follow-up to its 2011 *Breaking School Rules* report. The new report, *School Discipline Consensus Report: Strategies from the Field to Keep Students Engaged in School and Out of the Juvenile Justice System*, includes the following recommendations:

- School district Codes of Conduct should include a system of different levels of responses to minor and major student misconduct and one that holds youth responsible for their actions but makes clear that removal from school is a last resort.
- Students who are removed from the classroom for disciplinary reasons should continue to receive quality education services.
- There is a serious need for “early warning systems” that identify and provide interventions to students in need of behavioral interventions including those who are chronically absent, failing courses, experiencing disciplinary actions, or engaging in risk behavior.
- Police/School Resource Officers should use alternatives to arrest for minor student misconduct that can be clearly addressed through the school’s code of conduct.<sup>16</sup>
- School districts need to develop policies and guidelines to minimize referrals to the Juvenile Justice System. Students arrested and charged with minor school-based offenses should also be diverted from further involvement with the Juvenile Justice System.

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<sup>15</sup> The Policy Guide includes 10 Action Steps to Prevent the Use of Out-of-School Suspensions. The steps include developing policies and allocating resources to support and implement positive alternative discipline programs; and developing clear guidelines regarding the types of interventions and supports that must be used prior to suspension. National School Board Association, (2013): *Addressing the Out-Of-School Suspension Crisis – A Policy Guide for School Board Members*, Page 5.

<sup>16</sup> School districts need to create detailed written memorandums of understanding defining what legal issues police/school resource officers will address. Council of State Governments Justice Center, (2014): *School Discipline Consensus Report: Strategies from the Field to Keep Students Engaged in School and Out of Juvenile Justice System*, Executive Summary.

The historically high suspension rates for students with disabilities in school districts across Texas reflect that the above *consistent* discipline recommendations by national organizations including the Council of State Governments have not yet been embraced or implemented statewide. The suspension rates also raise significant issues under IDEA which requires individualized academic and behavioral programming, including the use of positive behavioral interventions and supports (PBIS) designed to produce meaningful educational progress.<sup>17</sup>

SDLC's Resource Manual will explain several legal strategies available under IDEA to increase and improve the quality of services provided to students with behavior related disabilities and thus diminish the prospects of future discipline and/or assignment to disciplinary alternative education programs (DAEPs).

SDLC's Resource Manual will also address *effective educational practices* related to the above legal topics including the essential elements of quality Functional Behavioral Assessments (FBAs) and Behavior Intervention Plans (BIPs) that use positive behavioral interventions and supports (PBIS).

## SECTION II

### **WHICH PARTS OF IDEA IMPACT SERVICES FOR STUDENTS WITH BEHAVIORAL DISABILITIES?**

Several sections of IDEA can be used by parents and professionals to increase and improve services for students with disabilities with behavioral challenges. These should be used on an ongoing basis to get appropriate academic and nonacademic services, related services, supplementary aids and services, Functional Behavioral Assessments, and Behavior Intervention Plans.

The IDEA provisions are:

Initial Evaluations and Reevaluations – 20 U.S.C. §1414(a)(1),(b),(c); 34 C.F.R. §300.301-306

Districts are required to identify, locate and evaluate all children suspected of being a child with a disability and in need of special education and related

To Do:

Remember a FBA can be part of an initial evaluation or re-evaluation.

ASK for a FBA in writing if a child has any behavioral issues.

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<sup>17</sup> The suspension rates also raise serious issues about the quality of Functional Behavioral Assessments (FBAs) and the effectiveness of Behavior Intervention Plans (BIPs) that are being conducted and developed by districts for students with disabilities.

services.<sup>18</sup> Districts are required to conduct an initial evaluation to determine if a child is a child with a disability and to determine the educational needs of the child.

In performing initial evaluations, districts must use a variety of *assessment tools and strategies*. A student must be assessed in all areas related to the suspected disability including emotional status if behavior is an issue. The evaluation must also identify all of the student's special education and related services needs.<sup>19</sup>

Districts must conduct reevaluations at least every three years to determine both whether a child continues to be a child with a disability and the educational needs of the child.

The United States Department of Education (DOE) has stated that a Functional Behavioral Assessment (FBA) is an evaluation and can be used to help determine if a child is a child with a disability (i.e., initial evaluation) or continues to be a child with a disability (i.e., reevaluation). A FBA also can be used to determine the nature and extent of the special education and related services that the child needs, including the need for a Behavior Intervention Plan (BIP).<sup>20</sup>

Based on IDEA's evaluation requirements as well as DOE's comments, if a student is suspected of having a behavior related disability or has been referred due to behavioral issues, parents and professionals should request that a FBA be conducted as part of the initial evaluation. If a student is already IDEA eligible and has a behavior related disability (e.g., emotional disturbance) or has ongoing behavioral issues, parents and professionals should request a FBA as part of any reevaluation.

The above recommendations are particularly important in Texas, where there's a requirement that the evaluation report for any student with autism or emotional disturbance include specific recommendations for behavioral interventions and supports.<sup>21</sup> A FBA will provide the information necessary for developing specific and effective behavioral intervention recommendations.<sup>22</sup>

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<sup>18</sup> 34 C.F.R. §300.111.

<sup>19</sup> 34 C.F.R. §300.304 (b)(1),(3), (c)(4),(6)

<sup>20</sup> DOE Questions and Answers on Discipline Procedures, Revised June 2009, Question and Answer E-4. DOE also states that a FBA requires parental consent because it's an individualized evaluation. Question and Answer, E-5. Located at <http://idea.ed.gov/explore/view/p/,root,dynamic,QaCorner,7>.

<sup>21</sup> 19 T.A.C. §89.1040(c)(1),(4)

<sup>22</sup> See detailed discussion of FBAs in Section VI.

Independent Educational Evaluations – 20 U.S.C. §1415(b)(1), (d)(2)(A); 34 C.F.R. §300.502

Parents have a right under IDEA to request an independent educational evaluation (IEE) at public expense if they disagree with an evaluation (initial or reevaluation) performed by a district. Since a FBA is an evaluation, if parents disagree with a FBA conducted by the district, they have the right to and should request a new FBA as an IEE.<sup>23</sup>

If parents request a FBA as part of an initial evaluation or reevaluation and it is not conducted, parents can state their disagreement with the evaluation/reevaluation and can request a FBA as an IEE in this instance as well. Parents' right to an IEE includes the right to have a qualified professional conduct interviews with district staff, conduct in-school observations of the student in question and to review all school records<sup>24</sup> ...three critical components of a FBA. <sup>25</sup>

Individualized Education Program (IEP): Present Levels of Functional Performance and Measurable Annual Goals - 20 U.S.C. §1401(d)(1)(A)(i)(I)(aa),(II); 34 C.F.R. §300.320(a)(1)(i),(2)(i)

IDEA states that an IEP must include:

“A statement of the child’s present levels of academic and *functional performance*, including, how the child’s disability affects his/her involvement and progress in the general education curriculum;

A statement of *measurable annual goals*, including academic and functional goals designed to:

- Meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general curriculum; and
- Meet each of the child’s other educational needs that result from the child’s disability.”<sup>26</sup>

Functional performance includes a student’s present social and behavioral skills.

To Do:

Remember to treat a FBA like an evaluation.

If a FBA is requested as part of the evaluation and the district does not provide it, you can ASK the district to pay for a FBA as an Independent Educational Evaluation (IEE).

In case of disagreement with the results of the district’s FBA, ASK the district to pay for a FBA as Independent Educational Evaluation (IEE).

To Do:

Remember, a FBA gives the IEP Team necessary information about present level of behavioral performance. Use FBA information to develop measurable annual behavioral goals and a BIP.

<sup>23</sup> DOE Questions and Answers on Discipline Procedures, Revised June 2009, Question and Answer E-5. See also *Harris v. District of Columbia*, 561 F.Supp.2d 63 (D.D.C. 2008).

<sup>24</sup> *School Board of Manatee County v. L.H.*, 2009 WL 3231914 (M.D. Fl. 2009); Letter to Mamas, 42 IDELR 10 (OSEP 1988).

<sup>25</sup> See Section VI for a detailed discussion of the essential elements of a FBA.

<sup>26</sup> 20 U.S.C. §1414(d)(1)(A)(i)(I)(aa), (d)(1)(A)(i)(II)(aa),(bb); 34 C.F.R. §300.320(a)(1)(i);(a)(2)(i)(A),(B).

Particularly for a student with behavioral issues, a FBA will help an IEP Team develop measurable annual goals based on the student's present social/behavioral skills.<sup>27</sup>

A FBA provides detailed information about a student's behaviors, the functions (i.e. "why") of the behaviors and the baseline rate (present rate) of the behaviors. A FBA thus includes a student's present level of functional performance and provides information to an IEP Team that is essential to developing appropriate, measurable annual goals.

If a student with behavioral challenges does not have a FBA or BIP, parents and professionals should request a FBA before the next IEP meeting. The FBA should be used to develop the measurable annual goals *and* also a Behavior Intervention Plan (BIP) that includes interventions aimed at ensuring the student attains the annual goals.<sup>28</sup>

In Texas, the IEP is completed by the Admission, Review and Dismissal Committee (ARD Committee) which functions as the IEP Team as defined in IDEA.<sup>29</sup> IEP meetings are called ARD Committee meetings in Texas.

IEP: Peer Reviewed Research Provision – 20 U.S.C. §1414(d)(1)(A)(i)(IV); 34 C.F.R. §300.320 (a)(4)

IDEA's definition of an IEP states that an IEP must include:

"A statement of the special education and related services and supplementary aids and services, based upon *peer reviewed research to the extent practicable*, to be provided to the child...."<sup>30</sup>

Congress added the peer reviewed research provision to the 2004 IDEA Amendments "to respond to concerns that the statute had been impeded by low expectations and insufficient focus on applying...research on proven methods of teaching and learning for children with disabilities."<sup>31</sup>

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<sup>27</sup> In *Larson ex rel. Larson v. Independent School Dist. No. 361*, 2004 WL 423218, \*10 (D. Minn. 2004), the Court held that, where a student's ongoing behaviors are the focus of his/her IEP, a FBA should have been conducted and its findings should have been used to create a BIP that would be integrated into the IEP.

<sup>28</sup> See Section VI for detailed discussion of Functional Behavioral Assessments (FBAs). See also Section VII for a detailed discussion of Behavior Intervention Plans (BIPs).

<sup>29</sup> 19 T.A.C. §89.1050(a).

<sup>30</sup> 20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. §300.320(a)(4).

<sup>31</sup> See *Ridley School Dist. v. M.R.*, 680 F.3d 260, 275-76 (3<sup>rd</sup> Cir. 2012).

To Do:

Remember the requirement to use peer-reviewed, research-based services and supports.

Ask if any behavior program, related services, supplementary aids and services, FBA procedures or BIP strategies are peer-reviewed, research-based.

If the answer is "Yes", always ask for written evidence.

If the answer for any behavior program or service is "No", ask what peer-reviewed research programs and/or practices are available that could be used.

IDEA does not include a definition of “peer-reviewed research.” DOE in its 2006 Analysis of Comments and Changes to the IDEA Regulations (DOE Commentary)<sup>32</sup> stated:

“Peer-reviewed research’ generally refers to research that is reviewed by qualified and independent reviewers to ensure that the quality of the information meets the standards of the field before the research is published. However, there is no single definition of peer reviewed research...”<sup>33</sup>

Regarding the requirement to use peer-reviewed research ‘*to the extent practicable*,’ DOE stated “[t]he phrase ‘to the extent practicable,’ as used in this context, generally means that services and supports should be based on peer-reviewed research to the extent that it is possible, given the availability of peer-reviewed research...States, school districts, and school personnel must therefore select and use methods that research has shown to be effective, to the extent that methods based upon peer-reviewed research are available.”<sup>34</sup>

DOE did not require *all* programs to be peer-reviewed, research-based with demonstrated effectiveness in addressing the needs of a particular child.<sup>35</sup> This is not to say that *most* of the programs/methods should not be peer-reviewed, research-based if available.

The federal Third Circuit Court of Appeals has made two important statements regarding IDEA’s “peer-reviewed research” provision:

- “We recognize that there may be cases in which the specially designed instruction proposed by a [district] is so at odds with current research that it constitutes a denial of FAPE.”

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<sup>32</sup> DOE Commentary, 71 Fed. Reg. 46540-46845, (2006).

<sup>33</sup> DOE Commentary, 71 Fed. Reg. 46664 (2006).

<sup>34</sup> DOE Commentary, 71 Fed. Reg. 46665 (2006). DOE clarified however that this does not necessarily require the service with the greatest body of research (i.e. ‘most peer reviewed research’ service). DOE also qualified the above comments by later stating “there is nothing in the Act to suggest the failure of a public agency to provide services based on peer-reviewed research would *automatically* result in a denial of FAPE.” DOE Commentary at 46665. The fact that such a failure does not trigger an *automatic* FAPE denial however does not mean it would not be found to produce a FAPE denial.

<sup>35</sup> DOE Commentary, 71 Fed. Reg. 46665 (2006).

The literal meaning of the above italicized phrase ‘*where not practicable*’ is that *all programs must* be researched-based with demonstrated effectiveness in addressing the particular needs of a child ‘where practicable.’ Unfortunately DOE clouds the literal meaning of its comment by stating that ultimately it’s the authority of the IEP Team to decide services.

To Do:

Remember, the “peer-reviewed research” requirement can be applied to BIPs and other behavioral programming.

Ask:

Is the program peer-reviewed research based?

If yes, where is written evidence?

If no, is there another peer-reviewed program available?



- “... if it is practicable for a school district to implement a program based upon peer-reviewed research and the school fails to do so, this will weigh heavily against a finding that the school provided FAPE.<sup>36</sup>

IDEAs new ‘peer-research’ provision applies to IEP services important to students with behavioral challenges including behavioral programming, related services, supplementary aids and services, FBAs, and BIPs.

Significantly, there are cases that have applied the ‘peer-reviewed research’ requirement to students’ behavioral programming and/or BIPs, and found that they were inconsistent with, contrary to, or without peer-reviewed research support.<sup>37</sup>

The first, *Wauke Co. School District v. D.L.*,<sup>38</sup> involved a young girl (D.L.) with multiple disabilities who had significant behavioral challenges and issues at school. The district implemented then later refused to revise a BIP that not only proved ineffective but resulted in D.L. being regularly restrained.

The Hearing Officer and District Court both found that the district’s BIP included several interventions that were *inconsistent with or contrary to peer-reviewed research* and which often reinforced the very behaviors that were considered problematic by school officials.<sup>39</sup> These findings led the Court to conclude that D.L.’s behavioral interventions were not “reasonably calculated” to address her behavior problems and to provide her with meaningful education benefit and thus produced a denial of Free Appropriate Public Education (FAPE).<sup>40</sup>

*B.H. v. West Clermont Bd. of Education*,<sup>41</sup> involved a student with autism (B.H.) who also had significant behavioral challenges and issues at school. The district implemented a behavioral plan involving a point and level reward system that B.H. did not understand and which consequently did not work. The district also would not implement Applied Behavior Analysis (ABA) with B.H., a peer-reviewed research program shown to be effective with students with autism.

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<sup>36</sup> *Ridley School Dist. v. M.R.*, 680 F.3d 260, 279 (3<sup>rd</sup> Cir. 2012).

<sup>37</sup> *Wauke Co. School District v. D.L.*, 2008 WL 9374268 (S.D. Iowa 2008); *B.H. v. West Clermont Bd. of Education*, 788 F.Supp.2d 682 (S.D. Ohio 2011).

<sup>38</sup> 2008 WL 9374268 (S.D. Iowa 2008).

<sup>39</sup> Interventions included a break time in response to noncompliance – an escape-based behavior; timeouts of 30 minutes or more for escape behavior. *Wauke School Dist. V. D.L.* 2008 WL 9374268 at \*10-\*12.

<sup>40</sup> *Id* at \*10-\*12.

<sup>41</sup> 788 F.Supp.2d 682 (S.D. Ohio 2011)

The Court found the district denied B.H. FAPE because it used a point system with no scientific evidence base<sup>42</sup>; it did not use an available peer-reviewed research-based program (ABA) and that these factors in addition to the district's failure to use positive behavioral interventions and supports (PBIS) resulted in B.H. making no progress and in fact regressing.<sup>43</sup>

The third case, *New Caney ISD*<sup>44</sup> involves a 2012 Texas Due Process decision. This case involved a 13-year-old student who was IDEA eligible under the disability categories of Other Health Impaired and Learning Disabled. Almost four years prior to the due process hearing as part of a 'temporary placement' the student was placed in the district's Excel (Behavioral) Program. The Excel Program operated as a locked unit in the district. The student was subject to physical restraint and also spent numerous days in isolation in the Excel Program.

The Excel Program involved a level point system that was uniformly applied to all students with little individual focus. It was not based upon individual behavioral assessments and needs.<sup>45</sup> The Hearing Officer found it to be too complicated and too rigidly enforced, with little or no adaptation.

The Hearing Office also found insufficient evidence that the Excel Program used individually determined reinforcers. Reinforcers are actions taken by adults that recognizes and support appropriate behaviors such as praise, and/or rewards like free time, toys, food, etc. The Hearing Officer found that "Excel's staff seems to rely on punishment or fear of punishment rather than individual rewards [reinforcers]."<sup>46</sup>

During the student's four years in the Excel Program, the Hearing Officer found that his behavioral goals never changed, the reinforcers never changed and the punishers never changed even though his behaviors were worsening. The student's problem behaviors may have actually increased because of the program.<sup>47</sup>

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<sup>42</sup> The Court also found that B.H. did not understand the plan and it was inconsistently applied. *Id* at 698-99.

<sup>43</sup> *Id* at 699.

<sup>44</sup> 112 LRP 47218 (TX SEA 2012).

<sup>45</sup> The Hearing Officer found that individual goals/expectations were not based on a current FBA; Failure to reduce problem behaviors often resulted in increased use of intense punishers that inadvertently reinforced inappropriate behaviors; program documentation did not include evidence of ongoing function-based assessment and planning. Hearing Officer Decision, Page 17.

<sup>46</sup> Hearing Officer Decision, Page 17.

<sup>47</sup> Hearing Officer Decision, Page 19.

In the Hearing Officer's view, the student, due to behavioral challenges related to his disabilities, was unlikely to ever exit the Excel program.<sup>48</sup>

Finding that the Excel Program was not 'peer-reviewed research' based and that the district could use more research-based initiatives in the student's IEP and in a BIP, the Hearing Officer ordered the student removed from the program.<sup>49</sup>

In light of the above decisions, parents and professionals should use the peer-reviewed research provision to ask if any behavior program as well as any related services, supplementary aids and services, FBA procedures or BIP strategies are peer-reviewed, research-based. Request written evidence of any "yes" answers. If the answer for any behavior program or service is "no" a discussion should be held as to what peer-reviewed research programs and/or practices are available that could be used (e.g. PBIS).<sup>50</sup>

IEP: Consideration of Special Factors - 20 U.S.C. §1414(3)(B)(i); 34 C.F.R. §300.324(a)(2)(i)

In developing an IEP, the IEP Team/ARD Committee must consider the special factor of behavior, "in the case of a child whose behavior impedes the child's learning or that of others," and in so doing *must* "consider the use of positive behavioral interventions and supports and other strategies to address the behavior."<sup>51</sup>

As will be discussed in other sections of this Manual, the appropriate way to develop and use positive behavioral interventions and supports (PBIS) is by first conducting a FBA and then developing a BIP.<sup>52</sup> DOE's own pbis.org website has numerous articles, power-point presentations and publications confirming that

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<sup>48</sup> Hearing Officer Decision, Page 19. As the Hearing Officer stated: "The student has been asked to fit the behavioral manifestations of his particular disabilities into the rigidly applied rules of the Excel Program...Such application of a school's rules to all students, regardless of the specific disabilities of the student, seems to fly in the face of the goal of individualized special education under IDEA." Hearing Officer Decision, Page 27.

<sup>49</sup> The Hearing Officer found that the Excel Program was not the student's least restrictive environment (LRE), was not designed to provide the student educational benefit and thus resulted in a denial of FAPE. In addition to removing the student from the Excel Program, the Hearing Officer ordered the district to perform a FBA, develop a BIP, provide the related service of counseling, increase social skills instruction along with other services and develop a new placement that complies with IDEA's LRE requirement. Hearing Officer Decision, Page 31-32.

<sup>50</sup> Sections VI and VII of the Manual will discuss well established peer-reviewed research standards for FBAs and BIPs.

<sup>51</sup> 20 U.S.C. §1414(d)(3)(B)(i); 34 C.F.R. §300.324(a)(2)(i).

<sup>52</sup> DOE essentially recognized this reality in its Commentary to the 'special factors' regulation and other regulations by stating that conducting a FBA typically precedes developing positive behavioral intervention strategies. DOE Commentary, 71 Fed. Reg. 46575, 46683 (2006).

conducting a FBA first is essential to developing appropriate positive behavior interventions and supports in a BIP.<sup>53</sup>

Although other parts of IDEA *require* the development of a FBA and BIP they involve limited circumstances as discussed in later sections. The IEP ‘special factors’ provision gives parents and professionals another way to ask for a FBA and a BIP that includes PBIS.

The ‘special factors’ provision requires the IEP Team/ARD Committee to also consider “other strategies” to address the student’s behavior. Other strategies should include providing related services (e.g., social work, psychological, counseling services) and/or supplementary aids and services. Other strategies can also include conducting a FBA and developing a BIP.

It is important to remember that within this one IEP provision there exist two important opportunities to advocate for and obtain a FBA and BIP for a student.

There are a number of cases that have addressed this IDEA provision. Some of these cases have held:

- When a student has worsening behaviors and a BIP that is not working, the district must implement positive behavioral intervention and supports (PBIS). The failure to do so is a violation of the ‘special factors’ regulation and can produce a denial of FAPE particularly if a student’s behavior worsens.<sup>54</sup>
- When a student has ongoing problematic behaviors that impede (interfere with) her learning the district must conduct a FBA.<sup>55</sup>
- When a student engages in ongoing problem behaviors that are related to his disability and impede his ability to learn, the district must conduct a FBA and develop a BIP and its failure denied the student FAPE.<sup>56</sup>
- When a student has worsening behaviors that eventually keep her from even attending school, the district must conduct a FBA and develop a BIP.<sup>57</sup>

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<sup>53</sup> DOE’s pbis.org website is at <https://www.pbis.org/>. Research has shown that without a Functional Behavioral Assessment (FBA) an intervention plan is as likely to make a problem worse as to make it better. See *Developing Feasible and Effective Interventions Based on Functional Behavioral Assessment*, (2007), Cindy Anderson and Rob Horner, University of Oregon. Located at <https://www.pbis.org/resource/685/developing-feasible-and-effective-interventions-based-on-functional-behavior-assessment-chicago-forum-07>.

<sup>54</sup> *B.H. v. West Clermont Bd. of Education*, 788 F.Supp.2d 682, 697-99 (S.D. Ohio 2011).

<sup>55</sup> *Danielle G. v. N.Y.C. Dept. of Education*, 50 IDELR 247 (E.D.N.Y. 2007).

<sup>56</sup> *Freemont Unified Sch. Dist.*, 109 LRP 23265 (CA SEA 2009).

<sup>57</sup> *Redlands Unified Sch. Dist.*, 49 IDELR 294 (CA SEA 2008).

- When a student has ongoing behavioral issues that result in removals from school, the district has a duty to implement PBIS to address the student's behavior and should also conduct a FBA and implement a BIP for this purpose.<sup>58</sup>

Although DOE stated in its Commentary that it did not want to require IEP Teams to *automatically* consider the special factor of behavior for all children with a particular disability,<sup>59</sup> it needs to be applied for students classified with emotional disturbance. The same is true for students with Autism.

IDEA's definition of emotional disturbance reflects that it is essentially a *behavior related* disability that 'adversely affects a child's educational performance.'<sup>60</sup> A student with a behavior-related disability that adversely affects his/her educational performance *is* a student whose behavior impedes his/her learning or that of others.

Additionally, in Texas, for students with autism, the ARD Committee must consider, and when needed, address positive behavior support strategies based on relevant information including a BIP developed from a FBA.<sup>61</sup> This requirement effectively applies IDEA's special factor of behavior to students with autism in Texas.

Students within any of IDEA's thirteen disability categories can exhibit behaviors that impede their learning and/or that of others. IDEA's *special factor of behavior* must therefore be examined for all students with disabilities.

Finally, an IEP Team must consider the special factor of behavior every time it reviews a student's IEP not just at the initial or annual IEP Team meetings.<sup>62</sup>

IEP: Review and Revision Requirements - 20 U.S.C. §1414(d)(4); 34 C.F.R. §300.324(b)(1)(i), (ii)

Under IDEA, each school district must ensure that the IEP Team:

- "Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; *and*

<sup>58</sup> *School Board of the City of Norfolk v. Brown*, 769 F.Supp.2d 928, 944-45, (E.D. Va. 2010).

<sup>59</sup> DOE Commentary, 71 Fed. Reg. 46683 (2006).

<sup>60</sup> 20 U.S.C. §1401(3)(A)(i); 34 C.F.R. §300.8(c)(4).

<sup>61</sup> 19 T.A.C. §89.1055(e)(4). This provision includes 10 other educational strategies and practices as well as training that must be considered by the ARD Committee for students with Autism.

<sup>62</sup> 34 C.F.R. §300.324(b)(2).

- *Revises the IEP as appropriate to address any lack of expected progress toward the annual goals...and in the general education curriculum, if appropriate.*<sup>63</sup>

The requirement that IEP Teams meet and revise a student's IEP when that student is not making academic or nonacademic (i.e., behavioral) progress toward his/her annual goals is a way to address: inadequate special education, related services, supplementary aids and services, and school personnel supports (see discussion below); a BIP that is not working; and the need for a FBA and BIP.

Parents and professionals should consider requesting a review and revision of a student's IEP whenever:

- A student has failing grades at any quarterly (nine week) grading period; or
- A student has *repeated* disciplinary referrals resulting in suspension (in-school or out-of school suspension) in any semester; or
- A student has worsening behavior issues;
- A student has a BIP that is not working as evidenced by repeated disciplinary referrals and/or worsening behavior issues.<sup>64</sup>
- A student has attendance and/or discipline issues (suspensions) that have caused him/her to reach in the first semester the one-third point of the total number of days that can be missed in a school year and still pass. For example, if a district's attendance policy states that twenty (20) unexcused absences results in failing a grade, then request an IEP meeting when student has seven (7) unexcused absences.<sup>65</sup>

To Do:

Make a checklist of triggers for requesting an IEP review and revision.

In requesting an IEP Team/ARD Committee meeting due to any of the above circumstances or any *other* lack of progress, parents and professionals should ask for additional services such as: related services; supplementary aids and services and/or request revisions to a BIP if one exists; a FBA and BIP with PBIS if they do not exist; and modifications to instruction.

<sup>63</sup>20 U.S.C. §1414(d)(4); 34 C.F.R. §300.324(b)(1)(i),(ii)(A).

<sup>64</sup> In *Lakeland School District*, 111 LRP 70768 (PA SEA 2011), the Hearing Officer ruled that the district was required to revise and modify a BIP that was not working as shown by the student's worsening behaviors and attendance.

<sup>65</sup> These are examples and do not serve as a complete list. The same requirement to review and revise the IEP applies to a student who is following the general education curriculum and is not making expected progress. The same examples above would apply to such a student.

Parents and professionals also need to ensure that the *special factor of behavior* is carefully reviewed at this IEP meeting. It will strengthen any request for the above listed services.

Finally a student's lack of progress requires a full discussion and use of peer-reviewed research services in the revised IEP such as PBIS.

In Texas, the ARD Committee can agree to an annual IEP or one of shorter duration.<sup>66</sup> If a lack of academic and/or behavior progress occurred with a student's last IEP, a new IEP of shorter duration (e.g., one semester) with more frequent progress reports would permit closer tracking of progress. However, since IDEA's "IEP review and revise" provision is based upon a lack of expected progress toward *annual goals* this new shorter (time-wise) IEP must still include annual goals. This ensures that if a new IEP's length is one semester yet a student has made little academic and/or behavioral progress toward the *annual goals* in the first 9 weeks, one can immediately request an ARD Committee meeting based upon IDEA's 'IEP review and revise' provision.<sup>67</sup>

IEP: Providing Supports to School Personnel - 20 U.S.C. §1414(d)(1)(A)(i)(IV); 34 C.F.R. §300.320 (a)(4)

Under IDEA, each child's IEP must also include a "...statement of the program modifications or supports *for school personnel* that will be provided to enable the child:

- To advance appropriately toward attaining the annual goals;
- To be involved in and make progress in the general curriculum....and to participate in extracurricular and other nonacademic activities; and
- To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section."<sup>68</sup>

The primary focus of IDEA is ensuring school districts provide services and supports to students with disabilities so that they receive FAPE. Although the emphasis is on student services and supports, IDEA also recognizes that providing FAPE to a particular student may require the child's teacher(s), and other relevant school personnel to receive supports and services to implement

To Do:

Remember, IDEA requires program modifications and supports for school personnel - make allies of teachers, para-educators and other school staff!

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<sup>66</sup> 19 T.A.C. §89.1050(h).

<sup>67</sup> Parents in Texas can also request an ARD Committee meeting at any mutually agreeable time to address concerns about their child's special education services. A district however does not have to hold an IEP/ARD Committee meeting. It can hold the requested meeting or it can request assistance from the Texas Education Agency's mediation process. 19 T.A.C. §89.1045(b). IDEA's 'IEP review and revise' provision effectively requires an IEP/ARD Committee meeting when a student has made a lack of progress toward annual IEP goals.

<sup>68</sup> 20 U.S.C. §1414 (d)(1)(A)(i)(IV); 34 C.F.R. § 300.320 (a)(4)(i),(ii),(iii).

the IEP. It is the IEP Team/ARD Committee's responsibility to decide what program modifications and supports are necessary to help relevant school staff and to put these in the IEP.<sup>69</sup>

A discussion about supports for school staff should be raised by parents and professionals at every IEP meeting because it shows that one not only cares about the student but also cares and is committed to ensuring the teacher and other school personnel (e.g., paraprofessional) receive the supports and help they need to provide the student FAPE. Raising this issue sends a powerful, *positive* message to school staff, can defuse some of the tension that occasionally exists in IEP meetings, and can produce alliances with these staff.<sup>70</sup>

To make sure this conversation is on the agenda, during the introductions at the beginning of the IEP/ARD Committee meeting, tell the team your two goals. The first is to work with the IEP Team to address the special education and related services needs of your child/client; the second is to make sure the teacher and other pertinent school staff have the services and supports they will need to implement the IEP. You should then mention this IDEA provision and its importance.

During the IEP meeting, if difficulty arises in obtaining a requested service(s) such as a supplementary aid and service, or FBA and BIP, the question should be posed to the teacher(s) if it would be a support to the teacher if the student received, for example, social skills training; check-in check-out with the social worker (supplementary aids and services); and/or a FBA and BIP. If providing any of these would be a support to a teacher in helping the student achieve the three goals listed in this regulation then this is another way to get the services for the student *and* help the teacher - a classic Win-Win.

Additional examples of supports and assistance for teachers and relevant school staff include:

- Attending a conference or training related to the student's needs (e.g., PBIS conference);

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<sup>69</sup>The regular education and special educator teachers on the child's IEP Team typically can identify program supports and modifications that are needed.

<sup>70</sup> A teacher may believe that a FBA and BIP for a student would be helpful to the teacher as well as the student...or the teacher may believe it would be helpful to him/her if a school psychologist could observe a student's behavior to determine its function or cause (this service becomes a related service for the student and a support for the teacher). Using this IDEA provision puts the focus on *what services does the teacher need* (FBA and BIP; help from the school psychologist, etc.). The result however is services for the student.



- Receiving ongoing consultation, training or assistance from related services personnel – a related service itself (e.g., school psychologist’s observations of the student’s behavior to determine the causes; training and ongoing consultation from the social worker regarding the implementation of a BIP which includes PBIS);
- Receiving help from another staff member (co-teaching), administrative person, or community member (e.g., community volunteer);
- Assignment of a para-educator to the classroom (provided as a support to the teacher).

Again, this issue should be discussed at every IEP Team/ARD Committee meeting.

### SECTION III

#### **RELATED SERVICES – 20 U.S.C. §1401(26); 34 C.F.R. §300.34(a).**

Under IDEA, Related Services means transportation and such developmental, corrective and other supportive services as are required to assist a child with a disability to benefit from special education.<sup>71</sup>

Sixteen different types of related services are listed and defined in the IDEA Regulations.<sup>72</sup> There are a number of related services that require careful consideration for IDEA eligible students with behavioral challenges including psychological services, counseling services, social work services in schools and parent counseling and training.<sup>73</sup>

Although psychological services and social work services have often been thought of as simply a form of counseling, both involve services other than counseling.

#### **Definitions of Related Services**

**Psychological services** includes:

*Obtaining and interpreting information about a child’s behavior and conditions related to learning;*

To Do:

Learn about Related Services for students with behavioral issues: They are MORE than counselling!

Remember the requirement for peer-reviewed research programs? It applies to Related Services too!

<sup>71</sup> 20 U.S.C. §1401(26); 34 C.F.R. §300.34(a).

<sup>72</sup> 34 C.F.R. §300.34(c)(1)-(16).

<sup>73</sup> 34 C.F.R. §300.34(a) & (c)(2),(8),(10),(14).

*Consulting with other staff members in planning school programs to meet the special educational needs of children as indicated by psychological tests, interviews, direct observation and behavioral evaluations;*

*Assisting in developing positive behavioral intervention strategies;*

*Planning and managing a program of psychological services, including psychological counseling for children and parents.<sup>74</sup>*

Based on the definition above, Psychological Services can include:

- Observation of the student in the school settings where behavior issues occur;
- Interviews with the student, parent(s), teachers, and other personnel (e.g., cafeteria staff; bus driver; playground monitors, etc.) who have observed the student's behavior;
- Reviewing attendance records and discipline incidents;
- Performing a curriculum assessment to check whether the student's behaviors are related to skill or performance deficits (See discussion in FBA section);<sup>75</sup>
- Consulting with school personnel<sup>76</sup> to develop appropriate school programs including a BIP with the IEP Team/ARD Committee;<sup>77</sup>
- Developing and implementing <sup>78</sup> PBIS strategies to use with the student including as part of a BIP<sup>79</sup>;
- Providing counseling services to a student and joint counseling to both the student and parent if desired.

Since DOE has explicitly recognized that a FBA typically precedes the development of PBIS strategies, requesting the development of PBIS strategies is also a means of securing a FBA.<sup>80</sup>

**Counseling service** means; *services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.*<sup>81</sup>

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<sup>74</sup> 34 C.F.R. §300.34(c)(10).

<sup>75</sup> These initial four services involve activities that are elements of a FBA.

<sup>76</sup> IDEA's regulations do not prohibit the psychologist from consulting with the student's parent(s) as well.

<sup>77</sup> Teachers will often welcome such consultation as discussed in the previous school personnel supports section.

<sup>78</sup> DOE Commentary specifically states that psychological services includes the development *and delivery* of positive behavioral intervention strategies. DOE Commentary, 71 Fed. Reg. 46574.

<sup>79</sup> As discussed previously, related services are to be based on peer-reviewed research to the extent practicable. PBIS fulfills the peer-reviewed research standard.

<sup>80</sup> DOE Commentary, 71 Fed. Reg. 46575 (2006).

<sup>81</sup> 34 C.F.R. §300.34(c)(2).

**Social work services in schools** includes;

*Group and individual counseling with the child and family;*

*Mobilizing school and community resources to enable a child to learn as effectively as possible in his/her educational program;*

*Assisting in developing positive behavioral intervention strategies.*<sup>82</sup>

Based on the definition above, Social Work Services can include

- Providing counseling to the student and also the parent/other family members if desired;
- Obtaining community services that will support a student in achieving the same behavior skills he/she is working on at school. Behavioral supports can include community mental health resources; adult mentors (e.g., Big Brothers, Big Sisters); friendship/peer mentor opportunities (boys/girls clubs; cub scout/boy scouts, community athletic teams, etc.); recruiting a community volunteer(s) to assist the student at school;
- Developing and implementing PBIS strategies to use with the student.

DOE has stated that social work services are not limited to those listed above.<sup>83</sup>

All three of the above related services can also be provided to address behavior issues that occur in nonacademic and extra-curricular activities/settings (e. g., school bus; cafeteria, after-school programs, etc.).

**Parent counseling and training** means:

*Assisting parents in understanding the special needs of their child;*

*Providing parents with information about child development; and*

*Helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP.*<sup>84</sup>

Based on the above definition Parent Counseling and Training can include

- A social worker or school psychologist providing training to help parents acquire any skills necessary to implement behavior intervention strategies in their child's IEP or BIP at home (assuming the parent agrees with the IEP goals or BIP).

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<sup>82</sup> 34 C.F.R. §300.34(c)(14).

<sup>83</sup> DOE Commentary, 71 Fed. Reg. 46575 (2006).

<sup>84</sup> 34 C.F.R. §300.34(c)(8).

### Measurable Annual Related Services Goals

As previously discussed, IDEA requires an IEP to include measurable annual academic and functional goals.<sup>85</sup>

For related services, the IEP document usually lists the type of related service and its frequency and duration<sup>86</sup> (e.g., social work service - 1x week for 30 minutes). It may or may not include measurable annual related services goals.

The absence of annual related services goals means:

- It's not possible to know if social work services will address the student's problem behavior(s);
- Parents and/or student have no input into the goals for the related service;
- Parents and/or student will not know if specific behavior goals are being used;
- Parents will not be able to support their student's pursuit of any goals.

Parents and professionals must ensure that measurable annual related service goals are listed on the IEP. These goals should:

- address the problem behaviors;
- include specific appropriate behaviors (called replacement behaviors) that will be taught;<sup>87</sup>
- include a description of the psychological, social work, or counseling services that will be used to help the student develop the appropriate behaviors (and evidence that they meet the peer-reviewed research standard);
- include any teaching or consulting goals for school personnel so they can help the student develop the appropriate behaviors.

### Progress Reports

IDEA also requires that the IEP include a description of:

- How the child's progress toward meeting the annual goals...will be measured

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<sup>85</sup> 20 U.S.C. §1414(d)(1)(A)(i)(II); 34 C.F.R. §300.320(a)(2)(i)(A),(B).

<sup>86</sup> The projected start date for any related services and the frequency, duration, and location of those services are required in an IEP. 20 U.S.C. §1414(d)(1)(A)(i)(VII); 34 C.F.R. §300.320(a)(7).

<sup>87</sup> See discussion of replacement behaviors in the FBA and BIP sections of the Manual - Sections VI, VII.

- When the periodic reports on the progress the child is making toward the annual goals...will be provided.<sup>88</sup>

*Progress reports are tied to annual IEP goals.* This is another reason annual goals are necessary for any related services. Without annual related services goals no clear method is available for measuring the student's progress and no timetable exists for providing progress reports.

Once measurable annual related service goals have been developed, the IEP Team/ARD Committee must set a timetable for issuing progress reports.

Related Services Progress Reports need to include the following information:

- Documentation that the related services annual goals were addressed in each related services session;
- Objective information and data on the student's progress toward the annual related service goals. It should show the student's rate of using both the problem behavior(s) and appropriate behavior(s) at the beginning and end of the period covered by the progress report;
- The number of sessions provided and the number of minutes per session compared to the number of sessions and minutes per session listed on the IEP. Any difference should be explained in the progress report.

#### Other Issues Involving Related Services

SDLC has found several common related services issues involving students with behavioral challenges in several districts across the south. These include finding that related services are:

- Not always provided to students who do not make academic and/or behavioral progress including students with repeated suspensions (or expulsion), significant attendance issues and failing grades;
- Not related to all of the students' problem behaviors;
- Not sufficient to cause positive changes in students' behaviors;
- Not increased (frequency or intensity) to cause positive changes in students' behaviors;
- Not increased (frequency or duration) in relation to the number of suspensions, school arrests, or a student's expulsion;
- Not increased in relation to ongoing attendance issues;

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<sup>88</sup> 20 U.S.C. §1414(d)(1)(A)(i)(III); 34 C.F.R. §300.320(a)(3)(i),(ii).

- Not increased in relation to academic struggles and failures;
- Not increased before students are moved to more restrictive environments (including alternative education programs) as means of maintaining students in less restrictive environments;
- Not increased after students are moved to more restrictive environments as a means of helping the student return to less restrictive environments.

In many of the above examples, related services are not provided or increased because IEP meetings are not scheduled *to review and revise* the IEP based upon an obvious lack of academic and/or behavioral progress toward the annual goals.<sup>89</sup>

SDLCL has filed number of systemic IDEA state administrative complaints<sup>90</sup> on behalf of students with behavioral challenges contending that the above issues reflect a failure to provide appropriate related services resulting in a denial of FAPE. Two State Education Agencies (SEAs) have investigated and confirmed that the above circumstances constitute FAPE violations.<sup>91</sup> Both SEAs examined students experiencing ongoing behavioral issues, repeated disciplinary infractions as well as academic failures in the general curriculum and/or their IEP annual goals and found FAPE violations based upon:

- The provision of related services are not individualized based on need;
- The level of related services (frequency and duration) has little or no relation to students' problem behaviors;
- The level of related services is insufficient to cause changes in the students behaviors;
- Failure to adjust the intensity or frequency of related services to cause changes in students' behaviors and a reduction in discipline referrals;
- Failure to review and add/modify related services in response to students' academic and/or behavioral failures;
- Failure to review and add/modify related services in response to the number of disciplinary referrals and suspensions.<sup>92</sup>

To Do:

Compare your child's/client's circumstances to those listed here. Look for similarities.

Use the *Related Services Protocol* in the Appendices.

Does your child's/client's IEP need review and revision for related services?

<sup>89</sup> See Section II of the Manual for a detailed discussion of IDEA's requirement to review and revise IEPs.

<sup>90</sup> See 34 C.F.R. §300.151-153.

<sup>91</sup> The Louisiana Department of Education and the Mississippi Department of Education.

<sup>92</sup> A copy of the systemic IDEA State Administrative Complaints jointly filed by the Southern Disability Law Center and the Southern Poverty Law Center against the Jefferson Parish School District (New Orleans area), Caddo Parish School District (Shreveport) and the Jackson Public School System can be found at <http://www.splcenter.org/>. The Louisiana Department of

If any of the circumstances discussed above apply to a student, one should request an ARD Committee meeting to review and revise the student's IEP to either add related services or increase the level (frequency and duration) of related services.<sup>93</sup>

### Related Services Tool

There is a helpful Related Services tool in the Appendices that has been developed by educational consultants and experts SDLC has worked with in a number of states.<sup>94</sup> The tool is a *Related Services Protocol* that can be used as a checklist to ensure that related services fulfill the various criteria discussed in this section (e.g., annual goals).

## **SECTION IV**

### **SUPPLEMENTARY AIDS AND SERVICES UNDER IDEA – 20 U.S.C. §1401(33); 34 C.F.R. §300.42**

Under IDEA, Supplementary Aids and Services means:

aids, services, and other supports that are provided in regular education classes, other education related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in conformance with IDEA's LRE requirements.<sup>95</sup>

Supplementary aids and services include numerous social and behavioral supports. Supplementary aids and services also include a variety of supports and training for school staff who work with a student (see examples below).

IDEA's regulations include an additional provision that requires supplementary aids and services to be provided to students with disabilities when necessary so

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Education and Mississippi Department of Education's Investigation and Findings can be found at the same link.

<sup>93</sup> IDEA's state administrative complaint process is available for both individual and systemic complaints. See 34 C.F.R. §300.151-153.

<sup>94</sup> SDLC has worked extensively the past six to seven years with Dr. Dale Bailey, and Dr. Tony Doggett of Fluency Plus, LLC in McComb, Mississippi. and Dr. Rob March of Successful Schools, Inc. in Boulder, Colorado. on alternatives to suspension and PBIS issues in several urban school districts across the south.

<sup>95</sup> 20 U.S.C. §1401(33); 34 C.F.R. §300.42.

that they have an equal opportunity to participate in *nonacademic and extra-curricular settings and activities*.<sup>96</sup>

Nonacademic and extra-curricular settings and activities include cafeteria/lunch, playground/recess-lunch, school nurses office, athletics, school-sponsored field trips, after school extended care, school clubs, and other settings/activities that are held or sponsored by the district (e.g., assemblies, pep rallies).<sup>97</sup>

If a student is having behavioral and/or discipline issues in nonacademic settings such as the bus, cafeteria, playground, or school assemblies, parents and professionals should request an IEP meeting to review and revise the student's IEP to examine adding or increasing supplementary aids and services.<sup>98</sup>

Supplementary aids and services typically involve changes and modifications to a student's curriculum or the way the curriculum content is presented. Supplementary aids and services are often included as a checklist of accommodations and modifications on the IEP. The checklist is *not* a complete list, however, and IEP Teams/ARD Committees can provide additional supplementary aids and services.

Examples of supplementary aids and services for students with behavioral challenges are:

- Social and behavioral: Social skills training; check-in check-out with social worker; functional behavioral assessment (FBA); behavioral intervention plan (BIP); crisis intervention plan; circle of friends; notice or warning before change in instructional activities; immediate feedback; verbal and visual cues for transitions and returning to or staying on task.
- Direct student support: Classroom companion; peer buddy outside of class; peer tutor; paraprofessional or behavioral aid.

To Do:

Remember, students with behavioral issues may need Supplementary Aids and Services to participate in non-academic and extra-curricular activities.

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<sup>96</sup> 34 C.F.R. §300.107(a).

<sup>97</sup> See 34 C.F.R. §300.107(b).

<sup>98</sup> Parents on occasion have been informed that they must accompany or pay someone to accompany their son/daughter with behavioral challenges on a school-sponsored field trip. In such instances, it is the district's responsibility to provide the necessary *supplementary aids and services (including a paraprofessional or behavior aid if necessary)* so the child can participate in the field trip with his/her non-disabled peers. Also, unless all other parents are required to accompany their sons/daughters on the field trip, requiring only parents of students with disabilities to do so raises serious discrimination issues under the American with Disabilities Act and Section 504 of the Rehabilitation Act.



- Personnel Support: Training for teacher(s) and other school personnel working with the student ( e.g., PBIS training); consultation from related services staff; stop-in support by social worker or behavior specialist; co-teaching arrangement; instructional support assistant; paraprofessional or behavior aid.<sup>99</sup>

Supplementary aids and services need to be carefully considered for any student with behavioral challenges.

## SECTION V

### **IDEA’s DISCIPLINE PROVISIONS – A FOCUS ON IMPROVING THE MANIFESTATION DETERMINATION REVIEW PROCESS; INCREASING EDUCATIONAL SERVICES TO DISCIPLINED STUDENTS**

This Section focuses on two of IDEA’s discipline provisions: the Manifestation Determination Review (MDR) process and the educational services that must be provided during disciplinary removals. The MDR process is a way to keep students with disabilities in school. The educational services discussion below emphasizes that using suspension for minor student misconduct has consequences not only for students but also for a district regarding the breadth of special education *and* related services that must be provided to these students.

#### **IDEA’s MANIFESTATION DETERMINATION REVIEW REQUIREMENT**

A Manifestation Determination Review (MDR) is a discipline process in which the district, a student’s parents and relevant members of the student’s IEP Team/ARD Committee meet to decide if a student’s conduct was caused by, or had a direct and substantial relationship to the student’s disability; or was the direct result of the district’s failure to implement the IEP.<sup>100</sup>

#### **When Must a Manifestation Determination Review (MDR) be Held?**

An MDR must be held whenever disciplinary actions amount to a *disciplinary change of placement*. A disciplinary change of placement is a disciplinary

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<sup>99</sup> Other supplementary aids and services that may be helpful to students with behavioral challenges include:

Environmental - preferential seating; assigned seating on the bus, in the classroom, at lunch, in the auditorium. Instructional - shorter assignments, instructions broken down into steps, adjusting assignment timelines, cooperative learning groups, rest breaks, test modifications such as read test, modify format, extended time.

<sup>100</sup> 20 U.S.C. 1415(k)(E)(i)(I),(II); 34 C.F.R. §300.530(e).

removal of more than 10 consecutive school days or a series of short term disciplinary removals each 10 school days or less that taken together constitutes a pattern.<sup>101</sup>

### Consideration of Unique Circumstances

The 2004 IDEA Amendments now allow school personnel to consider any “unique circumstances” on a case-by-case basis when determining whether to make a disciplinary change of placement for a student with a disability who violates the code of conduct.<sup>102</sup> Consideration of unique circumstances is viewed by DOE as a way to determine if a disciplinary change of placement is appropriate.<sup>103</sup>

Although unique circumstances is not defined, DOE has suggested that it could include factors such as a student’s: disciplinary history; ability to understand consequences; expression of remorse; and supports provided to the student before the violation.

In view of the above factors, there’s a strong argument that “unique circumstances” are present if a student with behavioral challenges:

- has repeated suspensions and no FBA or BIP;
- has no related services or an amount insufficient to cause changes in his/her behavior;
- has an IEP with ‘special factors’ not checked or considered;
- has an IEP with ‘special factors’ marked but no consideration of positive behavioral interventions *and* other strategies;
- has a behavioral program or BIP that is not based on peer-reviewed research practices/interventions even though they are readily available (e.g., PBIS).

Nothing in IDEA prevents a district from involving a student’s parents or the IEP Team in making a unique circumstances decision.<sup>104</sup> At a minimum, the decision needs to be made by school staff familiar with the student and the circumstances.

### Long-Term Disciplinary Removals that Require an MDR

Two types of long-term disciplinary removals require an MDR:

#### To Do:

Remember, unique circumstances may exist if the student:

has repeated suspensions and no FBA or BIP;

has no related services or an amount insufficient to facilitate changes in his/her behavior;

has an IEP with ‘special factors’ not checked or considered;

has an IEP with ‘special factors’ marked but no consideration of positive behavioral interventions *and* other strategies;

has a behavioral program or BIP that is not based on peer reviewed research practices/interventions even though they are readily available (e.g. PBIS).

<sup>101</sup> 34 C.F.R. §300.536.

<sup>102</sup> 20 U.S.C. §1415(k)(1)(A); 34 C.F.R. §300.530(a).

<sup>103</sup> DOE Commentary, 71 Fed. Reg. 46714 (2006).

<sup>104</sup> DOE Commentary, 71 Fed. Reg. 46714 (2006).

- removals for more than 10 consecutive school days – a disciplinary change of placement.<sup>105</sup>
- removals for not more than 45 school days to an Interim Alternative Educational Placement (IAES) for possession or use of weapons, drugs or causing serious bodily injury to another.<sup>106</sup>

### Series of Short-Term Disciplinary Removals that Constitute a Pattern and Require an MDR

IDEA also lists several factors that show a series of short-term removals constitutes a pattern and is a disciplinary change of placement.

- A series of removals totals more than 10 school days in the school year;
- The student’s behavior is substantially similar to the student’s behavior in previous incidents that led to removals;
- Additional factors such as the length of the removal, the total amount of time the student has been removed and the proximity of the removals to one another.<sup>107</sup>

In reviewing whether a student’s behavior is substantially similar to the student’s behavior in previous incidents, it’s important to consider the function (the why) of behaviors that resulted in the disciplinary removals. Although a behavioral act may be different from prior behaviors, the function may be the same (e.g., escape/avoidance) and thus they actually are substantially similar behaviors.<sup>108</sup>

Substantially similar circumstances (e.g., common setting where the behaviors occurred (playground); same person(s) always present) may also indicate the behaviors are related and thus substantially similar. If the behavioral act, although different from past acts, shares similarities (common function,

To Do:

Remember, think critically about what makes a pattern. The student ACTION may be somewhat different, but similarities may be found in:

The WHY (function) of behavior;

The setting where behaviors occur;

the persons always present.

The question is not Is the BEHAVIOR the same? but “*Is there a pattern?*”

<sup>105</sup> An MDR is required each time a student is removed for more than 10 consecutive school days. See DOE Questions and Answers on Discipline Procedures, Revised June 2009, Question and Answer F-3.

<sup>106</sup> 20 U.S.C. §1415(k)(1)(G); 34 C.F.R. §300.530(g). The possession or use of a weapon, drugs or the infliction of serious bodily injury constitute ‘special circumstances’ under IDEA’s discipline procedures and districts are authorized to place a student in an Interim Alternative Educational Setting (IAES) regardless of a Manifestation Determination Review (MDR) decision.

<sup>107</sup> 34 C.F.R. § 300.536(a)(2)(i)-(iii).

<sup>108</sup> It is well established that all behavior serves a purpose or has a function. The three primary functions of the behavior of everyone (children, adolescents *and* adults) are to: ‘Get’ something desirable; ‘Escape’ or ‘avoid’ something undesirable; or ‘Communicate’ some other message or need. See Section VI for discussion of the functions of behavior.

setting, etc.) to previous behavioral acts these similarities are important factors in determining if a pattern exists.

One cannot assume a district has an ongoing process for evaluating and determining if a series of short-term removals constitutes a pattern. Consequently parents and professionals should always raise the change of placement issue whenever two or more suspensions exceed 10 school days. This is one means of obtaining a decision regarding a disciplinary change of placement.<sup>109</sup>

### Counting of School Days for Long- and Short-Term Disciplinary Removals

#### A. In-School Suspensions

DOE stated in its Commentary that In-School-Suspension days count if the student:

- was not afforded an opportunity to continue to participate in the general education curriculum; or
- was not provided the services specified in his/her IEP including related services, behavioral interventions, etc.; or
- was not allowed to continue to participate with nondisabled children to the extent the student would have in his/her current placement<sup>110</sup>

#### B. Bus Suspensions

Again, DOE in its Commentary stated:

"If ...bus transportation is a part of the child's IEP, a bus suspension would be treated as a suspension...unless the public agency provides the bus service in some other way, because that transportation is necessary for the child to obtain access to the location where educational services will be delivered. If the bus transportation is not part a part of the child's IEP, a bus suspension is not a suspension.." <sup>111</sup>

#### To Do:

Remember, counting is important! Under certain conditions, these suspensions COUNT toward days removed:

In-School-Suspension

Bus Suspensions

Partial-Day  
Suspensions

Suspensions during ESY

<sup>109</sup> A district's change of placement decision is subject to challenge under IDEA's procedural safeguards (i.e. State Administrative Complaint, 34 C.F.R. §300.151-153 or Expedited Due Process Hearing, 42 U.S.C. §1415(k)(3)(A); 34 C.F.R. §300.532(c)).

<sup>110</sup> DOE Commentary, 71 Fed. Reg. 46715 (2006).

<sup>111</sup> DOE Commentary, 71 Fed. Reg. 46715 (2006). D.O.E also stated: "... public agencies should consider whether the behavior on the bus is similar to behavior in a classroom that is addressed in an IEP and whether the child's behavior on the bus should be addressed in the IEP or a behavioral intervention plan for the child. *Id* at 45715.

### C. Suspension for a Portions of the School Day

Suspensions for a portion of a school day must be counted.<sup>112</sup>

### D. Suspensions Occurring During Extended School Year Services

Suspension days that occur while a student is receiving extended school year (ESY) services count and are considered part of the discipline removal days for the school year that was extended. For example, if a student was suspended during ESY services this past summer the suspension day(s) count for the previous 2013-14 school year.<sup>113</sup>

### Timeline for Conducting Manifestation Determination Review (MDR)

The MDR should be scheduled immediately and must occur within 10 school days of a decision to change the placement of a student with a disability due to a violation of a code of conduct.<sup>114</sup>

### Who Conducts the Manifestation Determination Review (MDR?)

The district, the parent(s), and *relevant* members of the student's IEP Team/ARD Committee *as determined by the parent and district*.<sup>115</sup> Selection of the relevant IEP Team/ARD Committee members is thus a *joint process* and this means that the district and parent need to discuss and decide the members before the MDR.

Relevant members of a student's IEP Team/ARD Committee should always include any related services personnel who are providing behavioral services (e.g., social worker). It should always include a student's regular education teacher, any special education teacher(s), and any school personnel involved in conducting a FBA and/or drafting a BIP for the student.<sup>116</sup> It should include at least one or more school personnel who actually witnessed the behavior/infracton. If a student is not receiving related services and does not have a FBA or BIP, then someone knowledgeable about behavior (school psychologist, social worker, etc.) needs to be included.

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<sup>112</sup> *Id* at 46715. See also OSEP's Report of Children with Disabilities Subject to Disciplinary Removals (Table 5) which states: "When calculating cumulative days of in- and out-of-school suspension, States must include all in- and out- of-school suspensions of a half school day in length and longer. States that are unable to record data on half-day basis should report all half-day suspensions as whole day suspensions."

<sup>113</sup> *LIH ex rel. LH v. New York City Board of Education*, 103 F.Supp.2d 658 (E.D.N.Y. 2000).

<sup>114</sup> 20 U.S.C. §1415(k)(1)(E)(i); 34 C.F.R. §300.530(e)(1).

<sup>115</sup> 20 U.S.C. §1415(k)(1)(F); 34 C.F.R. §300.530(e)(2).

<sup>116</sup> If a student has a general education teacher then that teacher must attend (if its 'teachers' then one of his/her teachers) and cannot be replaced by just *any* general education teacher (with no relevant knowledge of the student). *Fresno Unified Sch. Dist.*, 112 LRP 24578 (CA SEA 2012).

Parents should also ensure that any private psychologist, social worker, or counselor working with their child attends the MDR or provides written information. Parents should always request that this person be allowed to participate by phone if they cannot attend in person.

Parents should not assume that the district will have the above personnel present. Parents should contact the school before the MDR and discuss the 'relevant' school personnel they believe must be present at the MDR.

#### What Information Must be Reviewed at the Manifestation Determination Review?

The IEP Team/ARD Committee must review *all relevant information* in the student's file, including (but not limited to) the student's IEP, any teacher observations, *and any relevant information provided by the parent(s)*. DOE has stated that other relevant information may include whether the student's placement is appropriate, any supplementary aids and services and whether behavior intervention strategies were appropriate and consistent with the IEP.<sup>117</sup>

Relevant information in a student's file includes the:

- initial evaluation;
- re-evaluations;
- current FBA;
- current BIP;
- discipline file involving all disciplinary infractions from the past 3 years (i.e., office discipline referrals plus out-of-school suspensions; in-school suspensions);
- attendance record for current school year;
- IEPs, FBAs, BIPs completed in the past 3 years;
- evidence that current IEP was fully implemented including any behavioral interventions or related services listed in the IEP;
- Evidence that current BIP was fully implemented;
- Progress reports for the current IEP and any BIP;

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<sup>117</sup> DOE Commentary, 71 Fed. Reg. 46719 (2006). 20 U.S.C. §1415(k)(1)(E); 34 C.F.R. §300.530(e)(1).

- Any other relevant information including school personnel interviews or emails, etc.

It is important to look at records and information beyond the current year's IEP and discipline record in order to determine if similar behaviors have occurred in the past. As the U.S. House of Representatives noted in the reauthorization of IDEA:

“[T]he Conferees intend to assure that the manifestation determination is done carefully...if a change of placement is proposed, the manifestation determination will analyze the child's behavior as demonstrated *across settings* and *across time* when determining whether the conduct in question is a direct result of the disability.”<sup>118</sup>

Again, parents should not assume the above student records will be available at the MDR. When parents contact the school to inform them of the ‘relevant’ IEP Team/ARD Committee members that need to attend the MDR, they should also inform the school of the information/records that they believe are ‘relevant’ to the MDR.

Parents are also free to provide the following relevant information:

- Private (independent) evaluations, any pertinent reports from private or community social workers, counselors, etc.;
- Medical information including community mental health information.

Any failure to review all relevant information is grounds for reversing an MDR decision. This includes the failure to review an independent psychiatric report<sup>119</sup>; failure to consider contradictory information in the student's record<sup>120</sup>; failure to consider all of a student's disabling conditions (e.g., oppositional defiant disorder).<sup>121</sup>

Finally, MDR decisions are not to be based on the *opinions* of the present IEP Team/ARD Committee members. Although opinions need to be heard they are not a substitute for a review of **all** relevant information in a student's file and provided by the student's parents.

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<sup>118</sup> U.S. House of Representatives Conference Report 108-779. Discussed in DOE Commentary, 71 Fed. Reg. 46720 (2006).

<sup>119</sup> *School Bd. of the City of Norfolk v. Brown*, 769 F.Supp.2d 928, 946-947 (E.D. Va. 2010).

<sup>120</sup> *In Re: Student with a Disability*, 53 IDELR 173 (WI SEA 2009).

<sup>121</sup> *Murietta Unified School District*, 53 IDELR 108 (CA SEA 2009); *Fresno Unified Sch. Dist.*, 112 LRP 24578 (CA SEA 2012); *Fulton County Schools*, 47 IDELR 33 (GA SEA 2007).

## The Manifestation Determination Review Decision

The district, parent and relevant members of the IEP Team in conducting the MDR must determine:

- If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
- If the conduct in question was the direct result of the district's failure to implement the IEP.<sup>122</sup>

Examining the link between a student's conduct and his/her disability is important because as DOE stated:

"We believe the Act recognizes that a child with a disability may display disruptive behaviors characteristic of the child's disability and the child should not be punished for behaviors that are a result of the child's disability."<sup>123</sup>

At the outset of the MDR meeting, parents and professionals should seek to reach agreement with the IEP Team/ARD Committee members on the following issues:

- The meaning of the terms 'direct'; 'substantial' (e.g., *largely but not wholly*) in the first MDR decision standard above.<sup>124</sup>
- The first MDR decision standard does not involve a determination of whether a student understood right from wrong. DOE's comment above confirms this fact because in stating that a student should not be punished for behavior related to his/her disability, DOE did not add "unless, of course, the student understands right from wrong."
- A student with a disability in any of IDEA's 13 disability categories can engage in behavior that is *caused by or has a direct and substantial relationship to* his/her disability. This reality is obvious from the fact that IDEA does not exclude students with particular disabilities from the MDR process. Students with speech impairments, visual impairments, etc., can engage in behavior that is *caused by or has a direct and substantial relationship to their disability*. Examples include:

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<sup>122</sup> 20 U.S.C. §1415(k)(1)(E)(I),(II); 34 C.F.R. §300.530(e)(1),(2).

<sup>123</sup> DOE Commentary, 71 Fed. Reg. 46720 (2006).

<sup>124</sup> One should bring a dictionary.



Student A has a speech impairment involving stuttering. One day on the playground he hits another student who was ridiculing, taunting, and laughing at him with other students about his stuttering;

Student B is visually impaired (blind). One day a student in the cafeteria deliberately trips her. While standing close to her laughing and telling her “to watch where she’s going” she strikes him in the leg with her cane.

- Evidence that a student’s conduct was the direct result of the district’s failure to implement the IEP does not mean all elements of the IEP but instead those elements primarily related to addressing behavioral issues.

Examples would include failure to provide all related services; failure to fully implement a student’s BIP; failure to conduct a scheduled FBA and thereafter develop a BIP; failure to provide IEP listed behavioral interventions.<sup>125</sup>

#### The Manifestation Determination Review Decision – The Student’s Behavior is Related

If the IEP Team determines that the student’s behavior is a manifestation of the student’s disability the following must occur:

- The district must conduct an FBA, unless it has already conducted one, and the district must develop and implement a BIP for the student.<sup>126</sup>
- If the student already has a BIP the IEP Team must review and modify it, as necessary, to address the student’s behavior. <sup>127</sup>
- The student is *entitled* with one exception (discussed below) to return to the placement from which the student was removed, unless the parent and the district agree to a change in placement as part of the modification of the student’s BIP. Parents do *not* have to agree to such a

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<sup>125</sup> The MDR decision criteria cannot be changed. For example, in one case, a school administrator stated during an MDR that the “student’s disability is not the issue but the safety of all the students.” The Hearing Officer found this comment had a ‘chilling’ effect on the parent and other IEP Team participants and was a violation of IDEA’s requirement that a student be afforded a considered MDR decision. *Murietta Valley Unified Sch. Dist.*, 53 IDELR 108 (CA SEA 2009).

<sup>126</sup> If the student has a FBA that is more than 12-18 months old, parents and professionals should request that a new FBA be conducted to determine if the behaviors functions are still the same (e.g., escape behavior related to academic deficits).

<sup>127</sup> 20 U.S.C. §1415(k)(1)(F)(i),(ii); 34 C.F.R. §300.530(f)(1)(i),(ii).

change in placement and have the right to refuse and insist that the student be returned to his/her previous placement.

The one exception to returning a student to his/her previous placement is when a student has been removed to an IAES for weapons, drugs or serious bodily injury. In this one instance, the district may keep the student in the IAES until the 45-day time period expires.<sup>128</sup>

#### The Manifestation Determination Review Decision – The Student’s Behavior is Not Related

If the IEP Team determines that the student’s behavior is not a manifestation of the student’s disability the district has the right to apply the same disciplinary procedures to the student it would apply to any student without disabilities. The district, however, must still continue to provide special education *and related services* to the student as determined by the IEP Team/ARD Committee (See next section on educational services).<sup>129</sup>

#### Expedited Due Process Hearing if Disagreement with MDR Decision

Parents and professionals may request an expedited due process hearing if they disagree with a MDR decision.<sup>130</sup>

A school district may also request an expedited due process hearing if it believes that returning a student after an MDR to his/her previous placement is *substantially likely* to result in injury to the student or others.<sup>131</sup>

The timelines for an “expedited” due process hearing are much shorter than for a typical due process hearing.<sup>132</sup> In Texas, a Hearing Officer cannot grant any extensions of these timelines.<sup>133</sup>

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<sup>128</sup> 34 C.F.R. § 300.530 (f)(2).

<sup>129</sup> 20 U.S.C. §1415(k)(1)(D); 34 C.F.R. §300.530(d).

<sup>130</sup> 20 U.S.C. §1415(k)(4)(B); 34 C.F.R. §300.532(a),(c).

<sup>131</sup> 20 U.S.C. §1415(k)(3)(A); 34 C.F.R. §300.532(a).

<sup>132</sup> The expedited hearing must occur within 20 school days of the date the request for the hearing is filed. The hearing officer must issue a decision within 10 school days after the hearing. The district must also convene a Resolution Meeting with the parent within 7 days of receiving the request for a hearing. As with regular due process hearings, the parents and district may agree in writing to waive the resolution meeting or agree to use mediation. The due process hearing proceeds unless the matter has been resolved to the satisfaction of both the parents and district within 15 days of the receipt of the request for the hearing. 20 U.S.C. §1415(k)(4)(B); 34 C.F.R. §300.532(c)(2)(3).

<sup>133</sup> 19 T.A.C. §89.1191.

## **EDUCATIONAL SERVICES THAT MUST BE PROVIDED DURING DISCIPLINARY REMOVALS**

### **Educational Services during the First 10 School Days of Removal**

During the first ten school days in a school year that a student with a disability is removed from school for disciplinary reasons, educational services do not have to be provided unless the district provides educational services to students without disabilities during this period.<sup>134</sup>

Although educational services are not required, they *may* be furnished during this period. DOE has emphasized that there are three benefits to providing educational services during this period:

- It ensures that the student does not fall behind in course work;
- It offers the opportunity for the student to acquire skills necessary to modify behavior upon return to school; and
- It increases the student's chances of becoming a productive and law abiding member of society.<sup>135</sup>

### **Educational Services When There has been a Series of Disciplinary Removals that Now Total More Than 10 School Days but do Not Constitute a Pattern or a Change of Placement**

First, when a student with a disability's disciplinary removals are more than 10 school days in a school year, *beginning on the 11th school day* the district must provide educational services to the student.

Second, when a student with a disability has more than 10 school days of disciplinary removals, if the latest removal is for less than 10 consecutive school days and does not result in a pattern and change of placement, educational services *must* be provided as follows:

School personnel, in consultation with at least one of the student's teachers, shall determine the extent to which services are needed to enable the student to:

- continue to participate in the general education curriculum although in another setting; and
- progress toward achieving the goals in the student's IEP.<sup>136</sup>

To Do:

Remember, it may be in the child's/client's best interest to receive services during the first ten school days of removal.

ASK for educational services in writing and refer to DOE's statement of the three benefits to providing them.

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<sup>134</sup> 34 C.F.R. §300.530(d)(3).

<sup>135</sup> Letter to Spiropoulos, 30 IDELR 709 (OSEP 1998).

<sup>136</sup> 34 C.F.R. §300.530(d)(4).

In determining the level and types of educational services that need to be provided DOE has stated:

“We believe the extent to which educational services need to be provided...depend on the length of the removal, the extent to which the child has been removed previously and the child’s needs and educational goals. For example, a child with a disability who is removed for only a few days and is performing near grade level would not likely need the same level of services as a child who has significant learning difficulties and is performing well below grade level.”<sup>137</sup>

Once a student with a disability has more than 10 school days of removal, DOE’s comments reflect that a new removal of *only a few days* will require *differing levels of educational services* (i.e., special education and related services) depending upon if the student is at/near grade level versus well below grade level. An individualized decision is thus required in each instance and for each new removal. The decision must also consider the factors enumerated in DOE’s comments.

Based on DOE’s comments, the level of educational services would differ if:

- the student has been making meaningful versus little *academic and/or behavioral progress* toward his/her annual goals ...if it’s little progress, a more intensive level of educational services will be required;
- the new removal is for several days ( e.g., 5-9 days) versus a few days (2-3 days)...again a more intensive level of educational services will be required for a longer removal;
- the new disciplinary removal brings the total removals to 12 school days versus a total of 18 school days... again a more intensive level of educational services will be required if 18 school days have been missed;
- the student is at a critical point of instruction in acquiring IEP academic or behavioral skills and thus even a few days of lost instruction could mean the skill is not acquired.

Any uniform district practice of providing no educational services or simply providing homework packets to all students who fall within the above category constitutes a violation of this IDEA provision.<sup>138</sup> As explained above, the level of educational services provided requires an individualized decision by school

**To Do:**

Remember, ASK for a more intensive level of educational services and refer to DOE’s comments on this page IF:

the student has been making little progress;

the removal is for 5-9 days; the removal brings the *total days* removed to 18-20+ school days;

the student is at a critical point of instruction and is at risk of losing skills if instruction is missed.

<sup>137</sup> DOE Commentary, 71 Fed. Reg. 46717-18 (2006).

<sup>138</sup> If such a policy or systemic practice exists, parents and professionals are free to use IDEA’s procedural safeguards including the State Administrative Complaint process, 34 C. F.R. §300.151-153, to address the issue.

personnel in consultation with each student's teacher and based upon several factors.

Parents and professionals should use this IDEA provision, DOE's comments and the above examples to obtain appropriate educational services (including related services) during these removals.

Educational Services When a Student with a Disability has a:

- Disciplinary Removal for More than 10 Consecutive School Days;
- Series of Disciplinary Removals that Total More Than 10 School Days and Constitutes a Pattern;
- A Disciplinary Removal to an IAES for up to 45 School Days for Weapons, Drugs or Serious Bodily Injury

Any disciplinary removal for more than 10 *consecutive* school days is a long-term removal that constitutes a change of placement and requires a Manifestation Determination Review (MDR).<sup>139</sup>

Additionally, if a student has a series of disciplinary removals that now total more than 10 school days and constitutes a pattern and thus a change of placement, an MDR is also required.<sup>140</sup>

Finally, if a student with a disability is placed in an IAES for up to 45 school days for weapons, drugs, or serious bodily injury an MDR is also required.<sup>141</sup>

As previously discussed, if the MDR decision is that the student's behavior is a manifestation of his/her disability the student is entitled with one exception<sup>142</sup> to be returned his/her original (previous) placement and receive all IEP services.<sup>143</sup>

The district must also conduct a FBA unless it has already conducted one. Additionally, the district must develop and implement a BIP for the student. If the student already has a BIP the IEP Team must review and modify it, as necessary, to address the student's behavior.<sup>144</sup> If the behavior at issue is not addressed in a student's BIP then it must be revised.

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<sup>139</sup> 20 U.S.C. §1415(k); 34 C.F.R. §300.536(a)(1).

<sup>140</sup> 20 U.S.C. §1415(k); 34 C.F.R. §300.536(a)(2). See discussion of disciplinary removals that constitute a pattern and change of placement in the MDR subsection.

<sup>141</sup> 20 U.S.C. §1415(k)(1)(D); 34 C.F.R. §300.530(d)(1)(i),(ii).

<sup>142</sup> The one exception involves when a student is placed in an IAES due to weapons, drugs or causing serious bodily injury. See previous discussion in MDR subsection.

<sup>143</sup> 20 U.S.C. §1415(k)(1)(F)(iii); 34 C.F.R. §300.530(f)(2).

<sup>144</sup> 20 U.S.C. §1415(k)(1)(F)(i),(ii); 34 C.F.R. §300.530 (f)(1)(i),(ii).

If an MDR was held due to a student's suspension or expulsion for more than 10 consecutive school days or placement in an IAES then there are obvious issues about the effectiveness of any current BIP. In these two MDR instances, revisions should be made to the BIP including adding PBIS.

Significantly, DOE has also commented that the student's IEP Team/ARD Committee must also meet again and address the student's behavioral issues:

"When the behavior is related to the child's disability, proper development of the child's IEP should include development of strategies, including positive behavioral interventions, supports, and other strategies to address that behavior...

When the behavior...has not previously been addressed in the child's IEP, the IEP Team must review and revise the child's IEP so that the child will receive services appropriate to his or her needs..."<sup>145</sup>

Additionally, DOE has stated that if the MDR decision is based upon the district's failure to implement the student's IEP, the district "has an affirmative obligation to take immediate steps to ensure that all services set forth in the child's IEP are provided..."<sup>146</sup>

If the MDR decision is that the student's behavior is *not* a manifestation of his/her disability (not related to his/her disability or not the direct result of failure to implement the IEP), then the student is still entitled to and must receive educational services.

The student's IEP Team/ARD Committee must decide the educational services needed for the student to:

- continue to participate in the general education curriculum although in another setting; and
- progress toward achieving the goals in the student's IEP: and
- receive, as appropriate, a FBA and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur.<sup>147</sup>

IEP Teams must make *individualized determinations* regarding the educational services to be provided including providing related services.

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<sup>145</sup> DOE Commentary, 71 Fed. Reg. 46721 (2006).

<sup>146</sup> DOE Commentary, 71 Fed. Reg. 46721 (2006). See also 34 C.F.R. §300.530(e)(3).

<sup>147</sup> 20 U.S.C. §1415(k)(1)(D)(i),(ii); 34 C.F.R. §300.530(d)(1)(i),(ii).

In several cases hearing officers have ruled that educational services provided under the three above criterion were inadequate and inappropriate. Some of the holdings involve:

- A student who was at home for one month and the district provided only textbooks and assignments. The Hearing Officer found this to be a complete “*cessation of instruction*” which was in ‘stark contrast’ to the 30 hours of weekly instruction listed on the student’s IEP. Providing just textbooks and assignments denied the student the ability to participate in the general curriculum and impeded the student’s ability to make progress on IEP goals.<sup>148</sup>
- A student who was placed in an Interim Alternative Education Program (IAES) but only received instruction three times per week for 75 minutes. The Hearing Officer found that this was insufficient instruction and that the district should have provided daily services. The Hearing Officer also found that no accommodations and modifications were provided to the student and he was not allowed to participate in the general curriculum.<sup>149</sup>
- A student who was provided 2 hours of tutoring per day but no IEP listed related services (counseling). The Hearing Officer found that the seriousness of the student’s behavior emphasized the importance of counseling services and thus the district should have provided four 30-minute counseling sessions per week.<sup>150</sup>
- A student who was placed in an IAES and provided 2 hours of tutoring per day with some behavioral services. The Hearing Officer found that the district failed to provide the student IEP listed related services including psychological services and counseling. The Hearing Officer also found that the student did not have an opportunity to work on IEP goals. The Hearing Officer ordered the student returned to his original placement.<sup>151</sup>

The above cases reflect that serious IDEA compliance issues occur:

- If a district’s IAES provides limited instructional services of only a few hours per days to all students with disabilities
- If a district offers students whose IEAS is at home *uniform and limited* homebound services;

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<sup>148</sup> *Detroit City District*, 111 L.R.P. 1824 (SEA MI 2010).

<sup>149</sup> *Windemere Park Charter Academy*, 111 LRP 1872 (SEA MI 2010).

<sup>150</sup> *McGraw Central School District*, 49 IDELR 295 (SEA NY 2007).

<sup>151</sup> *Oregon City Sch. Dist.*, 28 IDELR 96 (SEA OR 1998).

- If a district's IAES does not provide *related services* to students or in the alternative provides significantly reduced amounts;
- If a district's IAES does not provide students the full range of accommodations and modifications (supplementary aids and services) that are covered by IDEA;
- If a district's IAES does not provide sufficient academic services (including courses) so that a student with a disability who is in general education classes or following the general education curriculum is able to adequately participate in the general education curriculum and pass his/her grade level.

In all of the above examples, a district's IAES includes an alternative educational program such as a DAEP but also a home setting if that's where a student is as a result of a suspension or expulsion.

Finally, although a FBA and BIP are not *automatically required* if a student's behavior is not a manifestation of his/her disability, they still need to be provided if *appropriate*. One court has ruled that where a student was suspended three times during the fall semester and then removed a fourth time for more than 10 consecutive days in November the district should have conducted a FBA and BIP despite the MDR ruling. Both the number of suspensions and the student's ongoing behaviors required behavioral interventions.<sup>152</sup>

If a student does not have a FBA or BIP yet has a MDR due to *repeated* suspensions totaling more than 10 school days or placement in an alternative education program (DAEP) due to *repeated* disciplinary infractions, it's appropriate to request a FBA and BIP for behavioral interventions are obviously needed.

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<sup>152</sup> *Shelton v. Maya Angelou Public Charter School (MAPCS)*, 578 F.Supp2d 83, 99-100 (D.D.C. 2008). The Hearing Officer concluded that "[t]he number of suspensions and the student's behavior seemed to have warranted some intervention to ensure the student would not continue to engage in behavior disruptive to his education...[district] should have conducted a FBA and BIP following the MDR meeting." *id* at 99.



## SECTION VI

### FUNCTIONAL BEHAVIORAL ASSESSMENT

The main purpose of a functional behavioral assessment (FBA) is to improve the effectiveness of a behavior intervention plan (BIP).<sup>153</sup> A FBA identifies a student's 'target behavior(s)' or those behaviors identified by school staff as causing a problem in one or more school environments. An appropriate FBA also identifies the *functions* (*why*) of a student's behavior and the events that prompt and maintain these behaviors. A comprehensive FBA is critical to the development of an effective BIP for a student with challenging behaviors. Without an appropriate FBA, a BIP is as likely to make a student's behavior worse as to make it better.<sup>154</sup>

#### The Functions of Behavior

It is well established that all behavior serves a purpose or has a *function*. The three functions of everyone's behavior including children, adolescents *and* adults are:

- To 'Get' something desirable,
- To 'Escape' or 'Avoid' something undesirable, or
- To 'Communicate' some other message or need

Students may engage in similar inappropriate behavior (e.g., throwing their reading book on the floor each day and refusing to work) but the function - the why - of each student's behavior may be very different. One student may be trying to get something - adult attention; one student may be trying to avoid something - work beyond his capability; and one student may be sending a message - that she is bored with the reading material.

Focusing only on a student's actual behavior provides little useful information regarding effective behavior interventions. Identifying the underlying functions

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<sup>153</sup> The material in this section is drawn from several sources, including the following three user-friendly publications by The Center for Effective Collaboration and Practice (CECP). These publications which are copyright free are entitled *Addressing Student Target behavior: An IEP Team's Introduction to Functional Behavioral Assessment and Behavior Intervention Plans (Part I)*; *Conducting a Functional Behavioral Assessment (Part II)*; *Creating Positive Behavioral Intervention Plans and Supports (Part III)*, (1998).

<sup>154</sup> *Developing Feasible and Effective Interventions Based on Functional Behavioral Assessment*, (2007), Cindy Anderson and Rob Horner, University of Oregon. Located at <https://www.pbis.org/resource/685/developing-feasible-and-effective-interventions-based-on-functional-behavior-assessment-chicago-forum-07>.

of the behavior - what the student *gets*, *avoids* or wants to communicate is essential to developing effective interventions.<sup>155</sup>

A FBA allows an IEP Team to learn the function of a student's target behaviors and with this information to develop interventions that allow the student to replace the target behavior with more acceptable behaviors that serve the same function. These more acceptable behaviors are often referred to as replacement behaviors.

Using punishment, such as suspension, for the above types of commonly labeled "disruptive behavior," only addresses the behavior itself and not its functions. The behaviors typically will continue, regardless of punishment, until the underlying functions are addressed.<sup>156</sup>

### The Context of Behavior

All behavior occurs within a particular context. Target (problem) behaviors may occur in:

- Certain settings (e.g., in the classroom, cafeteria, playground);
- Under certain conditions (e.g., only during math instruction or only on Mondays); or
- During different types of activities (e.g., during recess or assemblies).

Identifying the setting of a student's behavior provides an important link to understanding the behavior's function.

### The Elements of a Functional Behavioral Assessment

A FBA involves a *team approach* – the IEP Team/ARD Committee - and uses a variety of methods and strategies to determine the function(s) of a student's target behavior(s) and to identify effective interventions for addressing these behaviors.

The key elements of a FBA include:

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<sup>155</sup> Generally, the functions of behavior are not considered inappropriate. Instead, it is the behavior itself that is viewed and judged appropriate or inappropriate. An example is that getting good grades and cursing may serve the same function (i.e., getting attention from adults), yet, the behaviors that lead to good grades are judged more appropriate than the behavior of cursing. The Center for Effective Collaboration and Practice, *Addressing Student Target behavior: An IEP Team's Introduction to Functional Behavioral Assessment and Behavior Intervention Plans (Part I)*, Page 3 (1998).

<sup>156</sup> The Center for Effective Collaboration and Practice, *Addressing Student Target behavior: Creating Positive Behavioral Intervention Plans and Supports (Part III)*, Pages 15-16, (1998).

A. Identifying and Describing the Target Behaviors in Concrete Terms

Initially, it is important to identify the student's target behaviors and to describe these in concrete terms. Too often a student's behavior is described in vague terms – “poor attitude” or “disruptive behavior”. These descriptions provide little information about the student's actual behavior. As shown below, concrete descriptions of behavior are more telling:

- Example #1 – Vague: Kim is aggressive  
*Concrete: Kim hits other students on the playground at recess and lunch.*
- Example #2 – Vague: Juan is disruptive  
*Concrete: Juan makes numerous off-task, loud comments during math instruction.*
- Example #3 – Vague: Dwayne is hyperactive  
*Concrete: Dwayne repeatedly leaves his seat and wanders the classroom without permission.*

B. Identifying the Context and Setting in which the Target Behaviors Occur

The FBA also must identify the conditions or settings under which the target behavior is most likely to occur and the conditions or settings where the behavior does *not* occur. In order to concretely define the behavior and identify its context, it's often necessary to observe the student in a number of settings (e.g., classroom, cafeteria, playground); during different types of activities (e.g., reading and math classes; individual work time; small group instruction); and to discuss the student's behavior with multiple school personnel and the student's parent(s).

Information should be collected on:

- times when the behavior does and does not occur (e.g., Mondays; during reading instruction; during thunder; not in the morning, not during lunch or recess);
- setting or location of the behavior (e.g., classroom, cafeteria, playground);
- conditions when the behavior does and does not occur (e.g., small group instruction; not during unstructured time);
- individuals present when the target behavior is most and least likely to occur;

- events or conditions that typically occur right before the behavior (e.g., beginning of reading instruction);
- events or conditions that typically occur right after the behavior (e.g., student sent to time-out room).

C. Determining if the Target Behaviors are Related to Skill Deficits

If a student lacks the skills necessary to perform academic lessons, he may exhibit behaviors that help him escape or avoid the lesson. As a result, it is *always* necessary to examine whether the student does not know how to perform an academic skill at the level it is being taught.

It's also important to examine whether the student does not know how to perform a *behavior skill*. School culture is much different than home life and requires behavior skills that may be new or even contrary to those taught at home. Examples include raising your hand before speaking or not responding or verbally defending oneself against an adult accusation. Like academic skills, students must be taught expected social skills for school culture.

D. Determining if the Target Behaviors are Related to Performance Deficits

Some students have the required academic or behavior skills but will not use them and instead engage in problem behavior. These students may be exhibiting 'performance deficits.' These students may simply be bored and perceive little pay-off for performance. The likely function of their behavior is to avoid a task in which they have little or no interest.

If a student has performance deficits effective strategies for addressing these are included in Section VII of the Manual.

E. Conducting a Functional Behavioral Assessment

Once a student's target behaviors are described concretely and in the context in which they occur there are six steps in conducting the FBA:

1. Indirect Assessment

An indirect assessment involves structured interviews with students, parents, teachers, and other adults who work with the student or who encounter the target behavior (i.e., bus drivers, cafeteria workers, playground monitors, etc.). These interviews should identify the student's target behavior; the context/settings in which the behavior is

most and least likely to occur; the specific event or activity that takes place just prior to the behavior and what usually happens immediately after the behavior that is reinforcing the behavior.

Interviewing the student may help identify how he or she perceives the situation and what is causing him or her to react in this way. Parent interviews are also helpful because the student may have shared things with a parent that he would not share with the teacher or other school staff (skill deficits, boredom, being bullied). Parents will also know of family circumstances that may be affecting the student's behavior, e.g., death of a family member or friend; divorce; illness of a sibling, etc.

## 2. Direct Assessment

During the direct assessment, the student is *observed* in the context where the target behavior is most likely to occur. This direct observation focuses on identifying the specific events that occur before the behavior (*antecedents*) and the events that occur immediately after the behavior that reinforce the behavior (*consequences*). Data must be collected from these observations reflecting the antecedent event, the behavior itself and the consequence of the behavior. This is commonly referred to as ABC data.

## 3. Record Reviews

The student's academic, attendance, and discipline records, evaluations, IEPs, etc. plus any relevant medical information must be thoroughly reviewed as part of the FBA.

## 4. Data Analysis

Once sufficient data and information has been collected, the IEP Team must review and analyze it under the categories of context/setting, antecedents, the target behavior, and consequences. Baseline data regarding how often the target behavior is occurring must also be developed from this data analysis. Baseline data are essential for developing initial interventions and evaluating a student's response to a BIP.

## 5. Hypothesis Statement

A hypothesis statement is a concise summary of the information collected during the FBA. A hypothesis statement makes an informed judgment about the functions of the target behavior. It allows the IEP Team to make a three-fold

statement —when *X* occurs, the student does *Y*, in order to achieve *Z* (*Z = the function of the behavior*).

The hypothesis statement also predicts the conditions under which the behavior is most likely to occur (antecedents), as well as the consequences that serve to reinforce and maintain it.

## 6. Testing the Hypothesis Statement

The IEP Team must make sure that the hypothesis statement is accurate. IEP Team members should change certain variables to see if the team's assumptions about the function of the behavior are correct. For example, if the IEP Team hypothesizes that a student makes loud, irrelevant comments during reading class to escape an academic situation beyond her skills, the teacher might change the instruction so that she gets material at her reading level. If this produces a positive change in her behavior, then the team can assume its hypothesis was correct and a BIP can be developed. However, if the behavior remains the same a new hypothesis will need to be developed and tested.

### F. Issues Involving the Essential Elements of with FBAs

A number of issues can and do arise with completed FBAs:

- *Defining Behavior*: student's target behaviors(s) described in vague not concrete terms (e.g., Jack's behavior is 'disruptive');
- *Context/Settings*: the context/setting under which the target behavior is most *and* least likely to occur are not identified;
- *Indirect Assessment*: no interviews with the student, or parent(s), and/or other school personnel who have observed the target behavior (e.g., Jack's target behavior is reported as occurring on playground yet playground monitors not interviewed);
- *Direct Assessment*: no student observation; student observation done in wrong setting (e.g., Jack's target behavior observed only on the playground yet observation done in classroom);

- *Data Analysis*: no baseline data collected regarding the occurrence of the target behavior;
- *Hypothesis Statement*: does not state the function of the target behavior; does not articulate a three-fold statement—when *X* occurs, the student does *Y*, in order to achieve *Z*;
- *Testing of Hypothesis Statement*: no evidence that the Hypothesis Statement was tested for accuracy.

The above issues show the importance of ensuring that a FBA includes all of elements discussed in this section.

#### G. FBA Tool

A helpful FBA tool is included in the Appendices. The tool is a FBA Protocol that can be used as a checklist to ensure a FBA includes all the essential elements discussed in this Section. All readers are encouraged to review and use this FBA Protocol in their advocacy for their children and clients.

## SECTION VII

### BEHAVIOR INTERVENTION PLANS

A Behavioral Intervention Plan (BIP) must be based on the information in the Functional Behavioral Assessment (FBA).<sup>157</sup> An effective BIP describes the changes (interventions) that adults will make in their practices and programs as well as the supports and modifications they will provide to a student to help him or her achieve behavioral changes.

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<sup>157</sup> The material in this section is drawn primarily from the same three user-friendly publications by The Center for Effective Collaboration and Practice (CECP) previously noted in the Section on FBAs. The material in this Section is also drawn from documents developed by Dr. Dale Bailey and Dr. Tony Doggett of Fluency Plus, LLC and Dr. Rob March of Successful Schools, Inc. SDLC has worked extensively with these three PBIS consultants in several urban school districts in the South and they graciously consented to SDLC using any of their materials. The Related Services, MDR, FBA, and BIP Protocols in the Appendices are materials they have developed and which SDLC has drawn from in drafting this Section.

An effective BIP also includes teaching. A BIP often involves teaching academic or behavior skills and it must always involve teaching and modeling of desired behaviors, which are known as replacement behaviors.

A BIP may involve any of the following strategies to obtain behavior change:

- Teaching a student the academic skills needed to overcome *academic deficits*;
- Teaching a student the behavioral skills needed to overcome *behavioral deficits*;
- Providing motivation for students with *performance deficits* to obtain replacement (desired) behaviors via positive behavioral interventions and supports (PBIS) such as making the student a team leader of a reading group, a peer tutor, cross grade tutor, etc.;
- Teaching replacement behaviors that serve the same function as the target (problem) behavior by using PBIS such as using signals (tugging on right ear) if student does not understand material or needs help; asking for a short break, etc.
- Changing what happens before the problem behavior occurs (*antecedents*) in order to achieve the new, replacement behavior. These changes may include modifying student's instructional materials to align with his/her skills; implementing changes to the classroom curriculum; organizing small instructional teams with leaders; using peer tutors, etc.;
- Changing what happens after the target behavior occurs (*consequences*) to reinforce replacement behaviors, such as immediate praise or feedback; extra time on computer, free time, food, etc.
- Modifying the physical setting/environment to make the replacement behavior more likely to occur including changing the physical arrangement of the class (moving student to front).

All of the behavior intervention examples used above and throughout this section involve PBIS. IDEA repeatedly emphasizes the use of PBIS and it fulfills IDEA's peer-reviewed research requirement.



## Essential Elements of a BIP

- *Persons Responsible for Implementing the BIP*

A BIP needs to specify the individuals responsible for implementing each part of the plan. It must also identify any training and/or supports school personnel will need to effectively implement the BIP.<sup>158</sup>

- *Baseline Data on the Target Behavior and Replacement Behavior Rates*

Baseline data on the current rate of target behaviors are essential for developing interventions and evaluating a student's response to interventions. A student's FBA should provide the baseline data to be included in the BIP.

Without baseline data, a BIP will likely include arbitrary behavioral compliance rates that set the student up for failure. For example, if a student's baseline data reflects that she currently engages in the replacement (desired) behavior only one out of every five occasions (i.e., 20%) establishing the BIP compliance rate for replacement behaviors at 80% 'starting tomorrow' is *not realistic* and will not work. Instead, the BIP should establish an *initial compliance rate* of 25%-33%. This rate, with appropriate teaching and interventions, should provide the student a real chance to reach the initial compliance rate and thus also demonstrate significant behavioral improvement.<sup>159</sup>

When the student is regularly reaching the initial replacement behavior compliance rate of 25%-33%, the IEP Team should reconvene and gradually increase the compliance rate. The IEP Team should continue to reconvene and either gradually increase the compliance rate if the student is succeeding or if not, increase the level, intensity, and/or types of interventions so that the student will succeed.

Over time (typically months, not weeks), a BIP that provides appropriate teaching and includes PBIS will enable a student to increase his use of the replacement behaviors to a compliance rate significantly higher than the original 20% rate.

- *BIP Timeline for Implementation/Reassessment*

The IEP Team must determine a timeline for the BIP's implementation and review. The IEP Team should regularly determine whether the BIP is being implemented and the student's level of behavioral progress, or lack thereof, under the BIP.

- *Evaluating the BIP – Two Ongoing Evaluations*

First, the IEP Team must weekly monitor whether the BIP is being fully implemented. School staff primarily responsible for implementing the BIP should not evaluate their own compliance in implementing the BIP due to an obvious conflict of interest. They

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<sup>158</sup> See Discussion in Section II involving providing necessary supports to school personnel for IEP implementation.

<sup>159</sup> If a student increases his/her use of replacement behaviors from one in five occasions (20%) to one in four (25%) or one in three occasions (33%) this constitutes genuine behavioral change.

should document the ongoing implementation of the BIP so that this can be checked by the person responsible for monitoring the BIP's implementation.

The person monitoring the BIP should always examine whether the teacher and/or other school personnel need additional training or support for implementing the BIP. If there are any implementation issues, the IEP Team must reconvene to address them.

Second, the IEP Team must monitor and measure changes in the student's behavior. The IEP Team should have the FBA baseline data for both the target (problem) and replacement (desired) behaviors. The team must regularly measure both of these behaviors once the BIP is implemented.<sup>160</sup> The original baseline data is the starting point for evaluating subsequent changes in the student's behaviors. 'Progress data' checks must be done and they will show either positive, negative, or no changes in the student's behaviors.

Progress data should be collected and analyzed at least weekly at the beginning. The data must be detailed enough to let the IEP Team evaluate the impact of the BIP. Once a student is regularly showing behavioral progress, progress data can be collected and reviewed every two weeks. Over time, it can be gradually extended to three weeks and a month based upon *continuing* behavioral progress.

- *The Use of Positive Reinforcers for Appropriate Student Behavior*

A BIP must identify a *pattern of positive reinforcement* that supports a student's use of replacement (desired) behavior(s). The IEP Team should first review the FBA baseline data to determine how often the target behavior occurs and is reinforced. Using this information, the IEP Team must make sure the BIP provides sufficient interventions to enable the student to both use and be positively reinforced for the replacement behavior(s) more often than he/she was reinforced for the target (problem) behavior.<sup>161</sup>

- *The Amount of Time Between Reinforcers*

Generally, the BIP should reinforce a student's replacement behavior at least twice as often as the target behavior was reinforced. For example, if the baseline data shows that a student leaves his seat twice during every 60-minute math class, then he is reinforced for this target behavior about every 30 minutes. His BIP must include interventions that

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<sup>160</sup> Direct observations are one means of measuring both behaviors.

<sup>161</sup> In some cases, it is important initially to offer a student an incentive to obtain a replacement (desired) behavior that will then later be used as a reinforcer for the same behavior. An example would be allowing a student to participate in a high-interest activity (e.g., a computer-game). If the student enjoys it, it can then be used as a positive reinforcer and access to it later will depend on the student engaging in the replacement (desired) behavior.

enable him to use, and be positively reinforced for, replacement behavior at least every 15 minutes.<sup>162</sup>

- *The Use of External Reinforcers*

When a student lacks *internal* motivators to comply with school demands and rules, the BIP may need to use *external* motivators to obtain behavioral change. If the student cannot see any internal value in performing the expected academic or behavior skill, it may be necessary to begin by reinforcing replacement (desired) behaviors with some type of external reward, such as computer time, computer game, free time, food, or toys. External rewards will gradually need to be replaced with more natural rewards, such as good grades, approval from peers and/or adults.

- *Fading External Reinforcers Over Time*

An important part of using external reinforcers is the process of *fading* or gradually replacing external rewards with more natural, internal rewards (e.g., praise) *after* the student has demonstrated an increased ability to engage in the replacement behavior.

- *Student Preferences Regarding Reinforcers*

When considering which positive reinforcers to use, student preferences are important. A student should always be asked what types of things he or she likes (e.g., computer games, drawing, handing out assignments, etc.). This can be easily accomplished using an "interest inventory" or by observing any preferred activities.

- *Varying Reinforcers*

School personnel need to use more than one positive reinforcer and need to vary their use so that the student does not lose interest in a reinforcer.

### Addressing Skill Deficits

When a student does not know *how* to perform an expected academic or behavior skill, the BIP must include instruction to teach the needed skills. For an academic skill deficit, the instructional assignments should be replaced with ones that are within the student's skill level.

The use of time-out as an intervention does not work for students whose behavior is related to academic skill deficits. For example, a student with reading skill deficits makes numerous off-task and loud comments during reading instruction. The function of the

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<sup>162</sup>If a student's baseline data shows that target behaviors were occurring 4-5 times/day with reinforcement and under the student's BIP he's only getting positive reinforcement once a day then the BIP is not sufficiently reinforcing. This student needs to be accessing positive reinforcers approximately 8-10 times/day (twice as often).

behavior is escape and avoidance, which is often rooted in the simple fact that the student does not want to be embarrassed in front of his peers. If the student is sent to time-out for the behavior – where no instruction is offered – *he falls further behind in reading.*

In fact, time-out gives the student what he was seeking – escape and avoidance – and consequently reinforces the student’s target (problem) behaviors. It also does not address the real cause of the behaviors - reading skill deficits - *except to increase these deficits.* The student will not change his behaviors until he has acquired the necessary reading skills. Intensive reading instruction, not time-out, are essential to eliminating the target behaviors.

### Addressing Performance Deficits

If a student possesses the expected academic or behavioral skills but does not consistently perform them, the BIP will need to include interventions that increase the student’s *motivation* to perform the skills. There are numerous motivation strategies that can be used in these instances, but they should be consistent with a student’s “interest inventory.”

BIP interventions that may prove motivational include: making the student a reading group team leader; a peer tutor for other students during reading; a cross grade reading tutor; using other reading instructional materials or computer programs of interest to the student.

### Punishment as an Intervention

Punishment often produces the opposite effect intended by making the student’s behavior worse. The reason is that punishment does not address the *function* of a student’s behavior.<sup>163</sup>

### BIP Replacement Behavior Rates and Adults New Year’s Resolutions Compliance Rates

BIP replacement behavior rates must be realistic. Expecting 80%-100% replacement (desired) behavior rates immediately by students with disabilities regardless of baseline data (e.g., 25% replacement behavior rate) is completely unrealistic and will cause the BIP to fail. To understand this, consider New Year Resolutions.

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<sup>163</sup> The Center for Effective Collaboration and Practice, *Addressing Student Problem Behavior: Creating Positive Behavioral Intervention Plans and Supports (Part III)*, Pages 15-16, (1998).

New Year Resolutions (Resolutions) typically involve behavior(s) that adults have identified that they need to change. Ironically, only 8%-12% of adults fulfill their Resolutions. 88% - 92% of all adults are unable to change their own behavior.<sup>164</sup>

To expect students with behavior related disabilities or significant behavior challenges to demonstrate daily and/or weekly compliance rates of 80%-100% (regardless of baseline data) *over the course of a nine-month school year* is not realistic and is also *beyond the capability of 88%-92% of adults who try to change their behaviors* at the start of each new year.

Adults involved with developing BIPs need to be mindful of this Resolutions data and need to establish replacement behavior compliance rates that are close to the baseline data rate and that increase gradually over time as a student gradually increases his/her compliance rate.

### Three BIP Tools

Three helpful BIP tools are included in the Appendices. These tools (called 'Protocols') can be used as checklists for developing effective interventions for a BIP; ensuring a BIP includes all of the essential elements discussed in this Section; and when monitoring and verifying full implementation of a BIP.

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<sup>164</sup> Auld Lang Syne: *Success predictors, change processes, and self-reported outcomes of New Year's resolvers and non-resolvers*, by John C. Norcross, Marci S. Mrykalo, Matthew D. Blagys, University of Scranton. *Journal of Clinical Psychology*, Volume 58, Issue 4 (2002); Dr. Richard Wiseman, University of Bristol, 2007 Survey of 3000 individuals who made New Year's Resolutions. Reported in *Blame It on the Brain: The latest neuroscience research suggests spreading resolutions out over time is the best approach*, *Wall Street Journal*, December 26, 2009.

The above research shows that the percentage of adults who maintain their Resolutions past one week is 75%. In other words, 25% of adults (one in four) stop after one week. The percentage of adults who maintain their Resolutions past one month is 64%. More than one in three adults stop after one month. The percentage of adults who maintain their Resolutions past six months is only 46%. By six months more than half of adults are no longer pursuing their Resolutions.

## **APPENDICES**

### **RELATED SERVICES PROTOCOL - YES/NO ANSWERS**

- \_\_\_\_\_ Appropriate related services annual goals are on the IEP.
- \_\_\_\_\_ Student was provided the opportunity for related services sessions as stated on the IEP.
- \_\_\_\_\_ Related service annual goal(s) covered in all sessions.
- \_\_\_\_\_ Specific replacement (desired) behavior(s) are listed.
- \_\_\_\_\_ Replacement behavior(s) with examples covered in related services sessions.
- \_\_\_\_\_ Description of teaching/coaching procedures for developing replacement behaviors is provided.
- \_\_\_\_\_ The IEP annual goal(s) related to the student's behavior is reviewed and included in related services sessions.
- \_\_\_\_\_ Progress data are collected on the display of the replacement behaviors in all settings (i.e., lunch, classes, and playground).
- \_\_\_\_\_ Progress Data are collected and evaluated at least bi-weekly.
- \_\_\_\_\_ Teachers are rating student's target (problem) behavior and replacement behavior rates for each identified setting (class, transition, etc.).
- \_\_\_\_\_ Teachers are following the student BIP.

### **MANIFESTATION DETERMINATION REVIEW PROTOCOL- YES/NO ANSWERS**

- \_\_\_\_\_ Parent and District jointly determined relevant IEP members participating in MDR.
- \_\_\_\_\_ Student behavior resulting in MDR is concretely defined (e.g., not disruptive behavior, instead throwing objects).
- \_\_\_\_\_ Discipline history from past three years is reviewed including number of Office Discipline Referrals, Out-of-School Suspensions, In-School Suspensions, and number of days at alternative school.
- \_\_\_\_\_ Student's initial and reevaluations are reviewed.
- \_\_\_\_\_ Current IEP is reviewed including any behavior goals and any BIP.
- \_\_\_\_\_ Evidence of IEP implementation and progress is reviewed (progress notes, related services logs).
- \_\_\_\_\_ Evidence of BIP implementation and progress are reviewed.
- \_\_\_\_\_ IEPs, FBAs, BIPs completed in the past 3 years are reviewed.
- \_\_\_\_\_ Student's grades from past three years are reviewed.
- \_\_\_\_\_ Student attendance records from current school year are reviewed.
- \_\_\_\_\_ Any medical information including information provided by parents is reviewed.
- \_\_\_\_\_ FBA reviewed if present. Does FBA address behaviors under consideration?
- \_\_\_\_\_ BIP reviewed if present. Does BIP address behaviors under consideration?
- \_\_\_\_\_ Related services logs and progress notes reviewed.
- \_\_\_\_\_ Parent/Competent Major given opportunity to provide oral and written input including written medical information.
- \_\_\_\_\_ Parent Expert given opportunity to provide oral (including by phone) and written input.

## **FUNCTIONAL BEHAVIORAL ASSESSMENT PROTOCOL – YES/NO ANSWERS**

### **Target Behaviors /Baseline Data**

- \_\_\_\_\_ Target (problem) behaviors are concretely defined.
- \_\_\_\_\_ Baseline rates of target behaviors (i.e., frequency, and/or duration are clearly documented.
- \_\_\_\_\_ Contexts (settings) where target behaviors occur and do not occur are clearly defined.

### **Examination of the Presence of Skill or Performance Deficits**

- \_\_\_\_\_ Evidence that FBA examined whether the student has academic skill deficits that may be prompting target behavior.
- \_\_\_\_\_ Evidence that FBA examined whether the student has social/behavioral skill deficits that may be prompting target behavior.
- \_\_\_\_\_ Evidence that FBA examined whether the student has academic performance deficits (student possesses the academic skills but still engages in target behavior).
- \_\_\_\_\_ Evidence that FBA examined whether the student has social/behavioral performance deficits (student possesses the social/behavioral skills but still engages in target behavior).

### **Assessment Data Collected – Indirect Assessments, Direct Assessments and Record Review**

#### **Indirect Assessment - Evidence of written interviews with:**

- \_\_\_\_\_ teacher(s),
- \_\_\_\_\_ other school personnel familiar with target behavior,



\_\_\_\_\_ the student,

\_\_\_\_\_ the student's parents.

#### Direct Assessment: - Evidence of direct student observations

\_\_\_\_\_ Direct student observations performed in the settings where behavior typically occurs.

\_\_\_\_\_ Direct student observations performed in the settings where behavior typically does not occur.

\_\_\_\_\_ Direct Assessment: Evidence that direct observations show multiple occurrences and non-occurrences of the target behavior.

\_\_\_\_\_ Record Review: Evidence of student record review involving academics, attendance, discipline, evaluations, IEPs, relevant medical information is documented.

#### Antecedent Variables Determination

\_\_\_\_\_ Environmental variables or circumstances that likely prompt the target behavior(s) to occur are clearly documented.

\_\_\_\_\_ Environmental variables or circumstances that likely prompt the target behavior(s) to occur are measurable.

\_\_\_\_\_ Environmental variables or circumstances that likely prompt the target behavior(s) to occur can be easily manipulated.

#### Consequent Variables

\_\_\_\_\_ Consequence variables that likely maintain target behavior(s) are clearly documented.

\_\_\_\_\_ Consequence variables that likely maintain target behavior(s) are validated (escape/avoidance, obtain, send message).

### Hypothesis Statement

- \_\_\_\_\_ The Hypothesis Statement is written with three term statement - under X conditions ...the student does Y ...in order to achieve Z.
- \_\_\_\_\_ The Hypothesis Statement is tested for accuracy.

### Linkage to Intervention Strategies

- \_\_\_\_\_ FBA identifies the academic skills the student needs to be successful in the educational environment. (If academic skill deficits present).
- \_\_\_\_\_ FBA identifies the social/behavioral skills the student needs to be successful in the educational environment. (If behavioral skill deficits present).
- \_\_\_\_\_ FBA identifies the replacement (desired) behaviors needed to meet the identified function(s) of behavior.
- \_\_\_\_\_ FBA identifies any current intervention strategies that are effective in addressing the occurrence of the target behavior(s).

**PROTOCOL FOR SELECTING BEHAVIOR INTERVENTIONS FOR BIPs - YES/NO ANSWERS**

- \_\_\_\_\_ Does the intervention(s) align with the function of the behavior?
- \_\_\_\_\_ Does the intervention(s) teach the identified academic skill deficit?
- \_\_\_\_\_ Does the intervention(s) teach the identified behavior skill deficit?
- \_\_\_\_\_ Is the intervention appropriate given the student's need and current levels of performance?
- \_\_\_\_\_ Does the intervention include peer reviewed effectiveness with the target behavior?
- \_\_\_\_\_ Is the intervention acceptable to the student?
- \_\_\_\_\_ Is the intervention unacceptable to the student? If yes, please explain.
- \_\_\_\_\_ Is the intervention likely to promote replacement (desired) behavior?

Answering these questions for each intervention should yield a decision regarding which intervention(s) to adopt.

### **ESSENTIAL BIP ELEMENTS PROTOCOL– YES/NO ANSWERS**

- \_\_\_\_\_ Target (problem) behaviors are concretely defined and documented.
- \_\_\_\_\_ Beginning, current Baseline Rate of target behaviors is clearly documented.
- \_\_\_\_\_ Beginning, current Baseline Rate of target behaviors is included in the BIP and the student's IEP folder.
- \_\_\_\_\_ Hypothesis statement from the FBA is included in the BIP.
- \_\_\_\_\_ There is a clear link between Hypothesis Statement(s) and intervention strategies in the BIP.
- \_\_\_\_\_ Replacement (desired) behaviors are concretely defined and documented.
- \_\_\_\_\_ Baseline rate of replacement behaviors is clearly documented.
- \_\_\_\_\_ Baseline rate of replacement behaviors is clearly documented in the BIP and the student's IEP folder.
- \_\_\_\_\_ Measurable goals for acquisition of replacement behaviors are documented and linked to the IEP.
- \_\_\_\_\_ Teachers/staff responsible for implementation of the BIP are knowledgeable about the components of the BIP.
- \_\_\_\_\_ Administrators are knowledgeable about the components of the BIP.
- \_\_\_\_\_ Specific Plan for teaching the student the replacement behaviors is present.

The BIP specifies:

- \_\_\_\_\_ Who is responsible for implementing supports/accommodations, teaching strategies, interventions, incentives, etc.;

- \_\_\_\_\_ When strategies and supports will be provided;
- \_\_\_\_\_ Where supports/interventions will be provided; and
- \_\_\_\_\_ When and how often the BIP will be reviewed by staff parents/professionals.

Specific plan for providing the student with positive incentives or reinforcers for demonstrating replacement behaviors is present.

Examples in the BIP include:

- \_\_\_\_\_ What behaviors will result in reinforcement/acknowledgement?
- \_\_\_\_\_ What reinforcement/acknowledgement will be provided?
- \_\_\_\_\_ When will reinforcement/acknowledgement be provided?
- \_\_\_\_\_ Who will deliver reinforcement/acknowledgement?
- \_\_\_\_\_ Specific strategies to respond to and manage continued display of target behaviors are documented, including alternatives to punishment (i.e., positive intervention strategies that are designed to increase students' demonstration of replacement behavior).
- \_\_\_\_\_ Strategy for conducting initial weekly progress monitoring of behavior for first 4-6 weeks is clearly documented.
- \_\_\_\_\_ Strategy for conducting semi-weekly progress monitoring of behavior (if behavioral progress) for weeks 7-12 is clearly documented.
- \_\_\_\_\_ Behavior progress data are summarized and presented at least every week for first six weeks (semi-weekly for weeks 7-12 if behavioral progress) to all relevant staff for existing BIP.
- \_\_\_\_\_ Data monitoring behavior progress are available for review by parents and all relevant staff.

### **BIP IMPLEMENTATION PROTOCOL – YES/NO ANSWERS**

- \_\_\_\_\_ All relevant staff can articulate the interventions in student's BIP.
- \_\_\_\_\_ BIP has measurable behavior goals/objectives.
- \_\_\_\_\_ There is evidence that student behavior is observed frequently and rated.
- \_\_\_\_\_ There is evidence that teacher/relevant staff observe and rate student behavior as specified in BIP.
- \_\_\_\_\_ There is evidence that all interventions specified in BIP are implemented.
- \_\_\_\_\_ There is evidence that student receives BIPs positive reinforcers when he/she meets behavior goals.
- \_\_\_\_\_ BIP is reviewed after two disciplinary suspensions (In-School and/or Out-of-School).
- \_\_\_\_\_ BIP progress review is conducted as specified in the BIP and also at the end of each grading period;
- \_\_\_\_\_ There is evidence that teachers/staff review behavior data frequently to evaluate student progress.
- \_\_\_\_\_ Behavior progress monitoring is conducted as specified in the BIP.
- \_\_\_\_\_ Behavior progress monitoring data is available and reviewed as specified in the BIP.
- \_\_\_\_\_ There is evidence that teachers/staff interact with student in a calm and respectful manner in implementing BIP.



This Publication is Funded by a Grant from the Texas Bar Foundation

The opinions expressed in this manual do not necessarily reflect the views of the  
Texas Bar Foundation