FUNCTIONAL BEHAVIORAL ASSESSMENTS AND BEHAVIOR INTERVENTION PLANS: WHAT DOES THE LAW REQUIRE?

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I. INTRODUCTION

This presentation will provide an overview of what the law provides regarding the requirement to conduct Functional Behavioral Assessments (FBAs) and to develop and implement Behavior Intervention Plans (BIPs) for students with disabilities. In addition, this session will explore court and agency decisions regarding those requirements, as well as challenges to the content and quality of FBAs and BIPs as it relates to the provision of a free appropriate public education (FAPE) to students with disabilities. The format for this presentation will be one that uses a practical approach in answering "Frequently Asked Questions" or FAQs.

II. FREQUENTLY ASKED QUESTIONS

A. Relevant Laws and General Provisions

Question #1: What laws apply to our discussion today?

Answer: When discussing the requirements related to the development and implementation of FBAs and BIPs for students with disabilities, we start with federal law. The federal laws that apply to the overall provision of educational services to students with disabilities are:

- The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq. and its regulations at 34 CFR. §§ 300.1-300.818;
- Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794. 34 CFR. § 104.1, et. seq.; and
- Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131, et seq.

Of course, all states, including Wyoming, have laws, regulations or rules that contain or reference all of the requirements of federal law applicable to the education of students with disabilities. While some states may provide additional protections or provisions with respect to some issues, they cannot reduce the protections provided to students at the federal level.

Question #2: Do the federal laws talk about FBAs and BIPs specifically?

Answer: Specific mention of FBAs and BIPs is found only in the IDEA and is found only in one section—oddly, the discipline section. This section specifically provides that, within the context of disciplinary action and a contemplated disciplinary "change of placement," if the school district, the parent and relevant members of a student's IEP team make a determination that the student's conduct at issue was a manifestation of the student's disability, the student's placement cannot be changed.

In addition, the IEP team must do one of the following:

1. Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the student; or

2. If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior.

34 CFR § 300.530(f).

When a student's placement is changed for disciplinary purposes because it was found that the student's behavior was not a manifestation of disability, the student is to receive, "as appropriate," a functional behavioral assessment and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur. 34 CFR § 300.530(d)(1)(ii).

These are the only specific references to FBAs and BIPs in the applicable federal law.

Question #3: What about students with disabilities that are only covered under Section 504?

Answer: While Section 504 and the ADA do not reference FBAs and BIPs at all, it is clearly the position of the Office for Civil Rights (OCR) that Section 504 requires districts to address behavioral issues and consider the development of individualized BIPs for students with disabilities whose behavioral difficulties significantly interfere with their ability to benefit from their educational program. See Elk Grove (CA) Unif. Sch. Dist., 25 IDELR 759 (OCR 1996); Long Beach (CA) Unif. Sch. Dist., 53 IDELR 58 (OCR 2009); Orange (CA) Unif. Sch. Dist., 20 IDELR 770 (OCR 1993) [history of frequent disruptive behavior of student with SLD obligated district to consider the implementation of a BIP].

B. Relevant Discipline Principles

Question #4: As a refresher, could you cover the rules of discipline generally as they apply to students with disabilities?

Answer: Ok. Since IDEA's requirements related to FBAs and BIPs apply only to situations where students are being subjected to disciplinary removals, a fundamental understanding of the rules of discipline is important to our discussion. Typically, however, fully covering the rules of discipline related to students with disabilities can take more than a day. Thus, this is intended to be merely a synopsis of some important discipline principles to remember:

1. Discipline of students with disabilities is all about "change of placement." Thus, an administrator or other disciplinarian should always ask whether a contemplated disciplinary removal (in the form of suspension, expulsion or other disciplinary removal

for a violation of the code of student conduct) is going to constitute a "change of placement" for the student with a disability.

2. A disciplinary "change of placement" is defined as follows:

For purposes of removals of a child with a disability from the child's current educational placement, a change of placement occurs if—

(1) The removal is for more than 10 consecutive school days; or

(2) The child has been subjected to a series of removals that constitute a pattern--
(i) Because the series of removals total more than 10 school days in a school year;
(ii) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
(iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

34 CFR § 300.536.

3. "Current placement" is defined by the services/program set out in the student's current IEP. When those services are not provided via the use of a disciplinary removal, that is counted as change of placement time. Removals such as in-school suspension and suspension from the bus need to be considered.

4. If it is contemplated that a disciplinary change of placement is going to occur due to a violation of the student code of conduct, a manifestation determination must be conducted.

With respect to making a manifestation determination, the IDEA regulations provide as follows:

Within 10 school days of any decision to change the placement of a student with a disability because of a violation of a code of student conduct, the LEA, the parent and relevant members of the IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the IEP, any teacher observations, and any relevant information provided by the parents to determine--

(i) If the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or
(ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

The conduct must be determined to be a manifestation of the student's disability if the LEA, the parent and relevant members of the IEP Team determine that condition (i) or

(ii) above was met. In addition, if it is determined that condition (ii) was met, the LEA must take immediate steps to remedy those deficiencies.

34 CFR § 300.530(e).

5. If it is determined that the violation of the student code of conduct was a manifestation of the student's disability, the IEP Team must either–

   (i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the student; or

   (ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

   (iii) Return the student to the placement from which he/she was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

   34 CFR § 300.530(f).

6. If it is determined that the violation of the student code of conduct was not a manifestation of the student's disability, school personnel may apply the relevant disciplinary procedures to students with disabilities in the same manner and for the same duration as the procedures would be applied to students without disabilities. However, the student must continue to receive educational services so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP and receive, as appropriate, a functional behavioral assessment and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

   34 CFR § 300.530(c).

7. After any student has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal, the school district must provide services as described in 6. above.

   34 CFR § 300.530(d).

8. A school district is required to provide services during periods of removal to a student with a disability who has been removed from his or her current placement for 10 school days or less in that school year, only if it provides services to a student without disabilities who is similarly removed.

34 CFR § 300.530(d)(3).

9. "Special circumstances" exist for students with disabilities involved in weapons, drugs or serious bodily injury offenses.

School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is a manifestation of the student's disability, if the child—

(1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA;
(2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or
(3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA.

Such students must also receive continued services as described in 6. above.

34 CFR § 300.530(g).

10. Students not determined eligible for special education may assert these disciplinary protections if the school district had knowledge that the student was a student with a disability before the behavior that precipitated the disciplinary action occurred.

A school district will be deemed to have knowledge that a student is disabled, if before the behavior that precipitated the disciplinary action occurred—

(1) The parent of the student expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the student, that the student is in need of special education and related services;
(2) The parent of the student requested an evaluation under the IDEA; or
(3) The teacher of the student, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the student directly to the director of special education of the agency or to other supervisory personnel of the agency.

A school district would not be deemed to have knowledge if--
(1) The parent of the student--
(i) Has not allowed an evaluation of the student; or
(ii) Has refused services offered under the IDEA; or
(2) The student has been evaluated and determined not to be a student with a disability under the IDEA.

34 CFR § 300.534.

Question #5: Is every disciplinary incident involving a student with ADHD or ED automatically a manifestation of his or her disability?

Answer: Absolutely not! There are reported hearing officer and court decisions that have upheld a district's determination that the violation of the student code of conduct was not a manifestation of the student's ADHD or ED.

Z.H. v. Lewisville Indep. Sch. Dist., 65 IDELR 147 (E.D. Tex. 2015). The district's determination that the student's creation of a list of schoolmates he wanted to shoot was not a manifestation of his disability is upheld. While the district had evaluated the student for Asperger's the previous school year at his parents' request, the school psychologist determined that no further assessment was necessary based upon the student's extremely sociable nature and good sense of humor. The MDR team did discuss a PDD-NOS diagnosis by the student's pediatrician issued five days after the discovery of the shooting list and offered to complete an autism evaluation, but the parents would not consent to it. After the school psychologist explained why further autism testing had not been done the previous year, the team limited its review to the student's ADHD and depression. While the student's ADHD caused him to act impulsively, the shooting list was developed over several days and was not the result of his ADHD. In addition, the parents could not identify any evidence in the record linking the creation of the list to the student's depression. Thus, the district's determination that the behavior was not a manifestation of disability is upheld.

Danny K. v. Hawaii Dept. of Educ., 57 IDELR 185, 2011 WL 4527387 (D. Haw. 2011). District's determination that student's detonation of an explosive device in a school bathroom was not a manifestation of his ADHD is upheld. The school psychologist concluded that setting off the bomb was a planned activity that required following directions and attention to detail—tasks that are difficult for students with ADHD who are easily distracted. In addition, the team found that the student was capable of understanding and controlling his behavior, a conclusion that was supported by the testimony of a behavioral health specialist. In addition, the parent's assertion that the student took the blame for the incident in order to collect money from "the real" perpetrators, and that the team failed to consider that taking the blame was a result of impulsivity is rejected. It is not the court's or the MD team's role to determine whether the student falsely confessed. Rather, the IDEA required the team to determine whether the actions leading to the potential suspension were a manifestation of disability. In any event, the vice principal testified that when he asked the student why he told his mother that he did it for the money, the student said, "I just told my mom that so she'll get off my case."

Lakeshore Sch. Dist., 114 LRP 4249 (SEA Mich. 2014). Team correctly determined that ED football player's conduct was not a manifestation of the student's disability and that the behavior was a deliberate choice, not a sudden uncontrolled response to teasing. Clearly, the student was in complete control of himself and understood the consequences of his behavior but still chose to hit the other student after an incident of "mutual teasing" when the other student made a negative comment about the ED student's mother at lunch. Lunch ended and the player went to his 4th period class and made a mental note of the location of the other student's class. When the bell rang, the player abruptly walked down the hall to the other student's class, waited for him and

then began punching him in the head. In addition, the football player told the responding police officer that he would have "gotten" the victim at school, his house, or at a store and that something was going to happen to him for talking about his mother.

Southington Bd. of Educ., 113 LRP 42841 (SEA Conn. 2013). Argument that 18-year-old's ADHD caused him to store 200 anabolic steroid pills in his backpack and take them to school is rejected. In April 2013, when the AP found two packages of 100 pills each in the student's backpack, the parent later explained that the student had, without their knowledge, been buying the pills on the internet and taking them daily until January 2012. Where the evidence was that the student struggled to a small degree with organization, impulsivity, forgetfulness and inattentiveness, there was no evidence that this impacted his behavioral controls in such a way as to cause him to put steroids in his backpack and fail to remove them for a period of over four months. Nor was there any other evidence specifically linking his ADHD to the incident in question. Importantly, the student's conduct when he obtained the pills was marked by deliberation, organization and attention to detail. He had to find a source for the steroids online, identify a way to pay for them, obtain the money and convert it to a form accepted by the distributor. Thus, the presence of the pills in the backpack was the result of a plan, not a lapse in memory or impulsivity.

In re: Student with a Disability, 62 IDELR 217 (SEA Kan. 2013). Hiding marijuana and contraband in a backpack was not a manifestation of 15 year-old epileptic student's disability. According to the testimony of the student's parents, she was diagnosed with epilepsy at 22 months old and subsequently received a diagnosis of mood disorder, depression, anxiety and PTSD. Relying on a report from the student's doctor, the parents argued that her epilepsy impacted her "executive decision making," but there was not objective evidence to support this. Text messages from the child's phone indicated that she was interested in purchasing marijuana from the first day she started school, which showed that her course of action appeared to be "thought out and planned." In addition, she concealed her illegal activity during the investigation and hit the contraband in her backpack.

New Haven Unif. Sch. Dist., 113 LRP 28568 (SEA Cal. 2013). The violent actions of a student with SLD and ADHD were not a manifestation of her disability and her expulsion was appropriate. After a fight, the student was angry and upset and failed to stop walking away when directed by principal. She purposefully tried to evade him several times, and then attempted to break free of his grasp by kicking and punching him, which mandated an automatic expulsion for battery against a school employee. The MDR team concluded that the student's actions were not a manifestation of her disability, and at the hearing, the school's psychologist and several of her teachers testified that her impulsivity had not previously manifested in physical aggression. The testimony of a private psychologist who stated that the student's behaviors were a manifestation of her disability is rejected in favor of the testimony of the district personnel who had acquired knowledge and understanding of the way the student's ADHD manifested itself based upon their long-term observations of her. The evidence established that the student's conduct was not caused by nor did it have a direct and substantial relationship to her ADHD. In addition, the private psychologist did not include the teacher's rating scales in her analysis and relied solely on the parent and student self-reporting.

Lebanon Spec. Sch. Dist., 113 LRP 16893 (SEA Tenn. 2013). District was correct in determining that student's assaultive and destructive behavior was not a manifestation of his emotional disturbance or OHI. The student's special education teacher testified that he gave the student homework at the parent's request, although homework was not required and tended to negatively impact the student and his behaviors often flared when he was confronted with difficult work. One morning, he came to school upset that he had not completed his homework, and he banged his head on his desk, occasionally looking up to see if anyone was paying attention, according to the teacher. He then began throwing desks, chairs and electronic equipment, allegedly targeting the teacher's personal property. When an education specialist approached, the student reportedly wheeled around, looked her in the eyes and punched her chest. In determining that there was no manifestation, staff members relied in part on their experience that the student was capable of controlling his actions up until the point he reached full crisis mode, which did not occur until he was restrained following the assault. The parent failed to present any evidence to contradict the MD team's conclusion, calling just one witness—the education specialist that the student had punched—who testified that the student's destruction of property and assaultive behavior was not a manifestation of his disability. Other witnesses with extensive experience working with the student testified that his behavior was under his control until he was restrained, at which time he was in full crisis mode and could not control his behavior.

In re: Student with a Disability, 61 IDELR 56 (SEA Va. 2012). A grade schooler's habit of checking for the presence of adults before engaging in behaviors such as upending desks, destroying classroom property and physically assaulting staff members and classmates reflects that his maladaptive behaviors were unrelated to his intellectual disability or his emotional disturbance. Thus, the student's 13-month expulsion was appropriate and the district's proposal to place the student in an alternative day school is upheld. The parents' claim that the student did not understand the difference between right and wrong is rejected. As the MD team had observed, the student typically looked behind him to check whether school personnel were watching before engaging in violent or disruptive behaviors. Additional evidence showed that the student's misbehavior was targeted to obtain certain goals. For example, the student would take the teacher's keys to further his plan to "escape" to the computer lab, and the student often made comments such as "ha ha" or "you can't catch me" at the start of a behavioral incident. "His own commentary on his behavior shows that he is aware of his actions" and the student will not benefit from his education until he learns appropriate behavior. The highly structured alternative school has small classes, uses positive behavioral interventions and supports, and has staff members trained in crisis management. Thus, the parents' request for home instruction is denied.

In re: Student with a Disability, 112 LRP 49628 (SEA Wis. 2012). Deaf student's conduct of buying and selling look-alike drugs was not a manifestation of his disability and the district's determination is upheld. While there was concern that he may also have ADD and an evaluation was never performed, the IEP team found at the MDR that the student's behavior was not related to his disability and recommended expulsion. The student argued that the bullying and involvement with drugs was impulsive behavior that was related to his hearing loss and ADD, and his expert psychologist testified that the student's hearing impairment, along with ADD, could cause the student to act impulsively. However, the district presented the testimony of the

student's special and general education teachers, who agreed that the student had not previously exhibited impulsive behavior and attributed his involvement with bullying and drugs to poor decision-making on his part. Both teachers had spent substantial time with the student, and the special education teacher had taught the student for the last four years. Conversely, the expert psychologist, who testified on behalf of the student, examined the student for the first time less than one month prior to the due process hearing. Thus, the teachers were in a better position to assess the student's alleged inclination toward impulsive behavior. Finally, in rejecting the student's position, the actual conduct was not impulsive in nature, because the buying and drug selling took place over an extended period of time.

Center Unif. Sch. Dist., 112 LRP 12038 (SEA Cal. 2012). Where high schooler with ADHD had a night to sleep on her decision to smoke marijuana at school the next day, she was not acting spontaneously when she followed through on her plans. Thus, the district properly determined that the student's conduct was not a manifestation of her ADHD before expelling her. The student accepted the marijuana as a present for her birthday and planned to smoke it with a friend the following morning. Once in the school bathroom the next day, she texted a third student to bring rolling papers, and the three students smoked the marijuana. The parent's argument that the student's decision was triggered by her impulsivity is rejected, as the student's ADHD symptoms primarily manifested as lack of sustained attention and organization. There was no evidence that she engaged in impulsivity to any significant degree at school, and the evidence indicated that she behaved well in class, other than speaking out of turn. Further, there was no evidence that she was acting impulsively on the day in question. "The student did not spontaneously accept a marijuana cigarette from someone and smoke it." Rather, she accepted one the previous day. Nor was there any evidence that the student could not say "no" to the student who provided it. "At best, Student's initial decision to accept the marijuana may have been impulsive and that impulsiveness may have had an attenuated relationship to her disability." Her involvement in planning the incident and subsequent participation, despite having a night to reflect, demonstrated that her actions were deliberate, not impulsive.

District of Columbia Schs., 59 IDELR 88 (SEA D.C. 2012). A surveillance tape supports the district's decision to expel a student with ADHD for setting off firecrackers in his school cafeteria. Based on the evidence the MD team considered, the disciplinary action meted out was appropriate and the child was not entitled to the compensatory services his grandmother sought on his behalf. After deciding expulsion was in order, the district timely convened an MD review to determine whether the student's actions were caused by his disability. As the district pointed out, the team reviewed the student's IEP, his most recent psychological evaluation, statements the child and school personnel made, input from the grandmother, and a surveillance videotape that contained the whole incident. The videotape provided the most comprehensive and credible account of what happened, and was the best indicator that the district's decision was accurate. The school's special education coordinator who attended the MD review and saw the tape explained that the video revealed that the student's behavior leading up the incident was not impulsive, rash or lacking in forethought. Rather, the tape showed him strategically waiting until no adults were nearby before he lit the firecrackers. The information the MD team relied on, i.e., review of the surveillance tape, etc., provided for a comprehensive analysis of the incident and made the decision-making process reliable. Therefore, there was no evidence that the MD decision was erroneous.

Los Angeles Unified Sch. Dist., 111 LRP 60703 (SEA CA 2011). Where 15-year old student with ADHD sold a prescription drug to another student, it was not the result of impulsivity caused by his disability. The student had previously engaged in conduct in school thought to be manifestations of his disability, including fights with other students, class disruptions, yelling inappropriate comments in class, insulting staff and peers and bullying. When the district learned of the student's sale of the prescription drug to another student, which violated the school code, it initiated a pre-expulsion meeting in which it made a manifestation determination. The district considered expert opinion, the IEP, teacher observations, the relevant portions of the student's records and information from the parents. Based on the circumstances surrounding the misconduct, the district determined that the student's misconduct was not a manifestation of his student's SLD. Importantly, the student initially planned the details of the sale with another student, went home, and brought the drug back the next day to complete the sale. This conduct, the district determined, was the result of premeditation rather than impulsivity caused by the student's ADHD. Due in part to the contrast between the student's misconduct deemed to be manifestations of his disability and the conduct at issue in this instance, the district's contention that the drug sale was premeditated and deliberate rather than a result of impulsiveness triggered by ADHD is upheld.

Poway Unified Sch. Dist., 55 IDELR 153 (SEA Cal. 2010). While the student may have exhibited poor judgment when he set off a dry-ice bomb at school, there was no link between the conduct and his ADHD. The student's actions leading up to the incident involved a series of thoughtful steps and demonstrated that he did not act impulsively. Clearly, the student made the device by placing dry ice in a bottle and adding water to it, placing it in a stall and waited for it to explode. When it exploded, it injured a teacher. "Even if a disability causes impulsive behavior, it is not an impulsive behavior if it takes place over the course of hours or days and involves a series of decisions." The evidence showed that the student researched how to obtain dry ice, got it, chose a place to construct the bomb, constructed it and selected a place to hide and explode it. In addition, the student "mulled over" the steps for doing this for a long period of time.

Medford Pub. Schs., 55 IDELR 47 (SEA Mass. 2010). No evidence supported the parent's position that the 17-year-old student with ADHD and LD violated school rules based upon his disabilities. Student's counselor and teachers agreed that there was no direct or substantial relationship and that the student was able to conform his behavior when he wanted to, that he enjoyed the drama of misbehavior, and that he planned his conduct to achieve maximum effect.

Hermitage Sch. Dist., 110 LRP 26513 (SEA Pa. 2010). Because student's assistance of two friends to engage in misconduct spanned nearly 20 minutes, it was not the result of impulsivity or related to his ADHD. The student served as a lookout for his peers in order to show affiliation or friendship and videotape surveillance of the school hallways established that the activity occurred in several locations. This conduct did not relate to the student's impulsivity, poor social awareness, temper, or lack of focus in the classroom. "The fact that Student, like most if not all adolescents, undoubtedly places a priority on maintaining peer relationships simply does not lead to the conclusion that his actions…bear a direct and substantial relationship to his disability."

Inland Lakes Pub. Schs., 110 LRP 20187 (SEA Mich. 2010). Where student with emotional disability, LD and ADHD reportedly forgot that he had razor blades in his pocket, his conduct was not related to his disability where the incident was not connected to his disabilities. The MD review team correctly concluded that the student's memory lapse and conduct were unrelated to his disabilities and the evidence established that the student was no more prone to absentmindedness than any other student. Further, his IEP did not address memory lapses and his actions subsequent to realizing that he had the blades when he tried to hide them showed that he reached a logical conclusion that his only way out of the situation was to conceal the contraband.

C. FBAs and BIPs Defined

Question #6: What is the definition of an FBA?

Answer: Federal law applicable to the education of children with disabilities does not provide a definition of a functional behavioral assessment. It does not appear that Wyoming provides a definition either.

Question #7: What is the definition of a BIP?

Answer: Same answer.

D. IEP Considerations and Requirements

Question #8: Is an IEP team required to address behavioral issues?

Answer: Yes. In addition to the requirement described and discussed previously involving disciplinary removals that constitute a change of placement and the requirement to conduct FBAs and develop BIPs, the IDEA requires IEP teams to address behavior as a "special factor" for consideration during the development, review and revision of every student's IEP. Specifically, in the case of a student whose behavior impedes his or her learning or that of others, the IEP team is to "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 34 CFR § 300.324(a)(2)(i).

Question #9: For every student who has behaviors that impede learning, must the IEP team develop a BIP?

Answer: Not necessarily. The U.S. DOE has stated that:

> When a child's behavior impedes the child's learning or that of others, the IEP Team must consider the use of positive behavioral interventions and supports, and other strategies to address that behavior (34 CFR §300.324(a)(2)(i)). Additionally, the Team may address the behavior through annual goals in the IEP (34 CFR § 300.320(a)(2)(i)). The child's IEP may include modifications in his or her program, support for his or her teachers, and any related services necessary to

> achieve those behavioral goals (34 CFR § 300.320(a)(4)). If the child needs a BIP to improve learning and socialization, the BIP can be included in the IEP and aligned with the goals in the IEP.

Questions and Answers on Discipline Procedures, 52 IDELR 231 (OSEP 2009), question E-3.

The Wyoming Department of Education's model IEP form (located on the WDE's website) states that if the IEP team checks "yes" to the question "does the student's behavior impede his/her learning or the learning of others," then it must be addressed in the IEP.

Question #10: If an IEP team determines that a BIP is required for FAPE, must it be included as a service in the student's IEP?

Answer: Yes. It must be listed as a service. OSEP has said that--

> For a child with a disability whose behavior impedes his or her learning or that of others, and for whom the IEP Team has decided that a BIP is appropriate, or for a child with a disability whose violation of the code of student conduct is a manifestation of the child's disability, the IEP Team must include a BIP in the child's IEP to address the behavioral needs of the child.

Questions and Answers on Discipline Procedures, 52 IDELR 231 (OSEP 2009), question E-2.

Question #11: So, if it is decided that a BIP is required, is it also required that the BIP be an actual part of the student's IEP document?

Answer: Federal law does not require the BIP to be "a part of" the student's IEP. The U.S. DOE has specifically indicated that FBAs and BIPs are not required components of an IEP under 34 CFR § 300.320. 71 Fed. Reg. 46,629 (2006). However, some school districts make BIPs part of the IEP document itself, while others do not.

Brett S. v. The West Chester Area Sch. Dist., 45 IDELR 121 (E.D. Penn. 2006). The fact that the district's proposed IEP did not include a Behavior Management Plan (BMP) per se did not render the IEP inappropriate. The law does not require a BMP to be part of an IEP.

Question #12: What if the student has behavioral issues but they do not impede the student's learning or that of others?

Answer: The IDEA would not require the IEP team to address them.

L.G. v. Wissahickon Sch. Dist., 55 IDELR 280 (E.D. Pa. 2011). It was unnecessary to conduct an FBA because the student's behaviors, which included loud vocalizations and tugging on his ears, did not impede his or other students' learning.

Broward Co. Sch. Bd., 112 LRP 56747 (SEA Fla. 2012). Where district conducted an FBA but found that a BIP was not necessary, the district's evaluation is upheld. The student's excessive

eyebrow rubbing that caused a loss of brow hair, bleeding and calluses did not affect his education. In conducting its FBA, the district collected four months of observation data from the student's teachers pinpointing the frequency and circumstances under which the behavior occurred and the student's responses to a number of interventions tried. In addition, the student's FBA team (assistant behavioral analyst, special education specialist, science, reading, math and science teachers and the parents) reviewed the data and concluded that the behavior did not socially inhibit the student or impede his learning. Thus, the district's FBA was appropriate and district is not required to fund an independent educational evaluation.

E. Conducting FBAs

Question #13: For every student who has behavioral issues, is the team required to ensure that an FBA is conducted?

Answer: Not under federal law. The U.S. DOE has stated that while an FBA may help the IEP team address behavioral issues, the IDEA does not require the IEP team to conduct an FBA in order to meet the requirement to address behavioral issues. 71 Fed. Reg. 46,683 (2006).

W.S. v. Nyack Union Free Sch. Dist., 56 IDELR 210 (S.D. N.Y. 2011). The lack of an FBA does not render an IEP procedurally inadequate. Rather, the IDEA requires only that the IEP team consider behavioral interventions and strategies. The IEP required instructors to use positive reinforcement and verbal prompts and, based on the mother's concerns about the child's behavior, the IEP here required an FBA to be conducted during the upcoming school year. In addition, it required that the student's teacher receive psychological consultation "to facilitate behavior interventions." Because the IEP considered behavioral strategies, it satisfied the IDEA's requirements, and an FBA was not required.

Question #14: Where it is determined that a BIP is necessary, must an FBA be conducted prior to developing the BIP?

Answer: While the law does not require that an FBA be conducted prior to the development of a BIP, some courts and hearing officers have found BIPs to be inappropriate where they were not based upon a properly conducted FBA. Still others have found that the failure to conduct an FBA did not deny a FAPE where the program was otherwise appropriate and provided meaningful educational benefit to the student.

C.F. v. New York City Dept. of Educ., 62 IDELR 281, 746 F.3d 68 (2d Cir. 2014). While the failure to conduct an FBA does not amount to an IDEA violation where the IEP identifies the student's behavioral problems and implements strategies to address them, that was not the case here. The lack of an FBA in this case resulted in the development of an inappropriate BIP which caused the district to offer an inappropriate placement. The IEP team drafted a vague BIP that failed to match the child's behaviors with specific interventions and strategies. Further, the deficient BIP had an adverse impact on the team's placement recommendation. Thus, the parents are awarded tuition reimbursement for private schooling.

M.L. v. New York City Dept. of Educ., 63 IDELR 67 (S.D. N.Y. 2014). Where the autistic student's IEP identified all of her problematic behaviors and included appropriate behavioral strategies and goals, the parents' request for private school tuition is denied. The failure to conduct an FBA does not result in a denial of FAPE if the IEP adequately addresses the child's interfering behaviors. Although the district committed a procedural violation by failing to conduct its own FBA as required by New York regulations, a recent FBA conducted by the student's private school provided the IEP team with sufficient information. The private school FBA, conducted just one month before the IEP meeting, identified all factors that contributed to the student's behavioral issues and offered theories about the causes of those behaviors. In fact, the district's psychologist testified that it was one of the "more extensive FBA's he has reviewed." Not only did the IEP identify all of the student's problem behaviors, it also included many of the behavioral goals and strategies that the private school had used for the student. Thus, the district's failure to conduct its own FBA did not result in a denial of FAPE.

E.H. v. New York City Dept. of Educ., 63 IDELR 47 (S.D. N.Y. 2014). Where the school district had sufficient evaluative data to determine the underlying cause of a private school student's problem behaviors, its failure to conduct a "formal" FBA did not entitle the parent to recover the student's private school costs. While New York's special education regulations require a district to conduct a functional behavioral assessment of a child whose behaviors impede his own learning or the learning of others, the regulations do not require a formal assessment of the child's behavioral problems. Rather, the regulations state that the FBA shall "be based on multiple sources of data," including, but not limited to, information obtained from direct observation, information from the child, information from teachers and services providers, a review of the child's record, and other sources (including information provided by the parent). The district's "informal" FBA did not violate the IDEA's procedural requirements where the IEP team relied on a classroom observation of the student by a school psychologist, the input of his classroom teacher about the nature and cause of his disruptive behaviors and information from the parent. Thus, the informal FBA provided all of the information the IEP team needed.

M.W. v. New York City Dept. of Educ., 59 IDELR 36, 869 F.Supp.2d 320 (E.D. N.Y. 2012). While the district may have violated state law when it did not conduct an FBA for a student with autism whose behavior impeded his learning and that of others, this failure was harmless where the IEP team considered the use of positive interventions and supports. Not only did the IEP note a need for positive reinforcement, it included a behavioral plan that identified strategies for encouraging positive behavior. Thus, the district's failure to conduct an FBA did not result in any harm to the student. In addition, the IEP's failure to recommend parent counseling and training—another state law requirement for IEPs for students with autism—the parents had counseling and training opportunities available, as the proposed school offered numerous workshops and other opportunities to help train parents and assist them in dealing with their child's educational needs. Thus, the failure to mention these services in the IEP did not amount to a denial of FAPE.

K.L. v. New York City Dept. of Educ., 59 IDELR 190 (S.D. N.Y. 2012). While the school district failed to conduct an FBA of an 8-year-old girl with autism who had a tendency to shred her clothes with her teeth, it was not required to reimburse the parents for her private school placement. Neither the lack of an FBA nor the district's use of a draft IEP resulted in a denial of

FAPE. The district's failure to conduct an FBA does not amount to a denial of FAPE where the record shows that the district has managed the behavior successfully in the past by providing 1:1 assistance, which makes the offer of a 1:1 paraprofessional appropriate. In addition, the child's IEP and BIP identified the underlying reason for the mouthing behaviors—anxiety and communication difficulties—and included goals to increase her use of words to express her feelings. In addition, the parents were not excluded from the IEP process based upon the use of a draft IEP at the meeting where the psychologist read the draft aloud and then invited all team members to contribute to modifying or changing the draft.

Question #15: Who is required to conduct an FBA? How do we determine who is qualified to complete each step in the FBA/BIP process (determining the behavior, setting up the data collection sheet, collecting data, analyzing data and developing a plan)?

Answer: Again, the law does not provide much guidance on these questions. What we do know is that training of appropriately qualified staff members and other personnel is required.

Letter to Janssen, 51 IDELR 253 (OSEP 2008). There is no requirement that a board certified behavior analyst, or any other specific individual, conduct an FBA unless state law requires it. Although the IDEA and its regulations do not specifically state which individuals are to conduct FBAs, school districts must ensure that those who conduct them are adequately trained and are provided with technical assistance to carry out Part B requirements. In addition, states must establish and maintain qualifications for those personnel, including ensuring that such individuals have the content knowledge and skills to serve children with disabilities. "It is the LEA's responsibility, working with the state department of education, to provide professional development, in-service training, and technical assistance, as needed, for school staff members to be able to conduct an FBA and provide positive behavioral interventions and supports."

Question #16: At what point, if at all, in the RTI tier process is it appropriate to conduct an FBA? Does the time and resources that it takes make it reserved for special education?

Answer: My answer, based upon my understanding of RTI and its purposes, is that FBAs and BIPs should not be reserved for when a student has been found eligible for special education services! FBAs and BIPs, as a matter of best practice, should be considered by "Problem-solving teams" as a possible intervention for every student who is exhibiting behaviors that impede his/her learning or that of others. The goal of RTI is to never get to special education in the first place.

Question #17: What is the average amount of time for an FBA before you are ready to write the BIP?

Answer: It has been my experience that there is none. It will depend upon the frequency, nature and severity of the behavioral difficulties, as well as other factors.

Question #18: Is an FBA considered an evaluation for which you must obtain parental consent? In other words, what is the "line" between an FBA that is completed for

instructional purposes (and therefore may not need parental consent) and an FBA that is completed to inform an IEP (and therefore may need parental consent)?

Answer: There does not seem to be a clear answer on this one! As noted, the U.S. DOE seems to indicate that the purpose of the FBA being conducted controls whether it constitutes an evaluation under the IDEA or not.

Letter to Christiansen, 48 IDELR 161 (OSEP 2007). Parental consent is necessary under the IDEA whenever an FBA is intended to evaluate the educational and behavioral needs of a single, specific child. Confusion has stemmed from a report by independent researchers that categorizes FBAs as teaching methodologies, and it is acknowledged that FBAs can be used to address the effectiveness of behavioral interventions throughout an entire school or a school district. "If an FBA is used, for example, in the context of positive behavioral supports as a process for understanding problem behaviors within the entire school and to improve overall student behavior within the school, it generally would not be considered an evaluation that would require parental consent, unless such consent is required from the parents of all children in the school prior to conducting such an evaluation." However, when an FBA is conducted to help a district determine whether a particular child has a qualifying disability or to determine the extent of special education and related services the child requires, the FBA qualifies as an evaluation or reevaluation under the IDEA. In such instances, districts must seek parental consent before conducting the FBA.

Questions and Answers on Discipline Procedures, 52 IDELR 231 (OSEP 2009), Question E-4. An FBA is generally understood to be an individualized evaluation of a child in accordance with 34 CFR §§ 300.301 through 300.311 to assist in determining whether the child is, or continues to be, a child with a disability. The FBA process is frequently used to determine the nature and extent of the special education and related services that the child needs, including the need for a BIP. As with other individualized evaluation procedures, parental consent is required for an FBA to be conducted as part of the initial evaluation or reevaluation.

Letter to Anonymous, 59 IDELR 14 (OSEP 2012). An FBA whose purpose is to determine whether a student is a child with a disability and the nature and extent of special education and related services he or she needs is no different from an IDEA evaluation for purposes of providing prior written notice to parents. Thus, a district seeking or refusing to conduct an FBA must comply with the IDEA's procedural safeguards outlined in 34 CFR §§ 300.304 through 300.311 with respect to evaluations, including notifying the parents within a reasonable time before conducting the evaluation in accordance with 34 CFR § 300.503(a). Further, the written notice must include an explanation of why the agency proposes or refuses to conduct the FBA and a description of the data, including other assessments, that the district is using as a basis for the proposed evaluation. 34 CFR § 300.503(b). However, the need for a prior written notice does not apply where the FBA is merely an effort to gauge or improve behavior throughout the school, rather than to address the behavioral needs of a specific child.

Letter to Gallo, 61 IDELR 173 (OSEP 2013). Whether districts must obtain consent before collecting academic functional assessment data within an RTI model depends on the purpose of the collection. Consistent with 34 C.F.R. § 300.300(a) and (c), parental consent is required when

an FBA is being conducted as part of an initial evaluation or reevaluation of a child to determine if she qualifies as a child with a disability. Therefore, in a typical first tier scenario, where any such data collection would not be focused on the educational or behavioral needs of an individual child, consent would not be required. "However, parental consent would be required if, during the secondary or tertiary level of an RTI framework for an individual student, a teacher were to collect academic functional assessment data to determine whether the child has, or continues to have, a disability and to determine the nature and extent of the special education and related services that the child needs." However, the district would not be required to obtain parental consent to review data collected during RTI because the data would be considered "existing evaluation data" under 34 C.F.R. § 300.300(d)(1)(i).

West-Linn Wilsonville Sch. Dist. v. Student, 63 IDELR 251 (D. Ore. 2014). Where the school psychologist's FBA did not involve any observation of the student or formal assessment of the student, it did not constitute a reevaluation for which parental consent was needed. It was also not done to determine eligibility or placement, but was designed more to develop appropriate curriculum strategies. Where the school psychologist interviewed the teacher and provided the teacher with an informal checklist to complete, it was more akin to a screening or review of existing data and, therefore, was not an evaluation.

Question #19: If a parent does not agree with an FBA conducted by the school district, can the parent ask for an independent educational evaluation (IEE) at the school district's expense?

Answer: Since OSEP has indicated that an FBA is generally an evaluation, OSEP has also indicated that a parent has the right to request an IEE if the parent disagrees with an FBA conducted by the school district. Specifically, OSEP stated:

> The Department has previously clarified that an FBA that was not identified as an initial evaluation, was not included as part of the required triennial reevaluation, or was not done in response to a disciplinary removal, would nonetheless be considered a reevaluation or part of a reevaluation under Part B because it was an individualized evaluation conducted in order to develop an appropriate IEP for the child. Therefore, a parent who disagrees with an FBA that is conducted in order to develop an appropriate IEP also is entitled to request an IEE.

Questions and Answers on Discipline Procedures, 52 IDELR 231 (OSEP 2009), Question E-5.

Of course, the school district can request a due process hearing to show that its evaluation is appropriate if it wishes to refuse to pay for the IEE.

Harris v. District of Columbia, 50 IDELR 194, 561 F.Supp.2d 63 (D. D.C. 2008). For purposes of seeking an IEE, a functional behavioral assessment is an educational evaluation under IDEA and the parent can seek an independent FBA if she disagrees with one conducted by the school district. "The FBA is essential to addressing a child's behavioral difficulties, and, as such, it plays an integral role in the development of an IEP." In addition, failure to act on a request for an IEE is "certainly not a mere procedural inadequacy; indeed, such inaction jeopardizes the

whole of Congress' objectives in enacting the IDEA….D.H. has languished for over two years with an IEP that may not be sufficiently tailored to her special needs. The intransigence of DCPS as exhibited in its failure to respond quickly to plaintiff's simple request has certainly compromised the effectiveness of the IDEA as applied to D.H. and it thereby constitutes a deprivation of FAPE."

Question #20: What about a request for the district to pay for a Functional Analysis (FA) as part of an IEE?

Answer: It could happen.

Cobb Co. Sch. Dist., 114 LRP 37126 (SEA Ga. 2014). Based primarily upon battling expert opinion, the ALJ found that the district's contracted BCBA failed to support her conclusion that the 5 year-old autistic child's self-injurious and aggressive behaviors stemmed from a desire to avoid unwanted tasks. Here, the parents believed that the district's FBA was inappropriate and obtained a private FBA, as well as a Functional Analysis and requested reimbursement for it from the district. The district filed a due process complaint seeking to establish the appropriateness of its FBA. The ALJ acknowledged that the district's BCBA thoroughly reviewed and documented the information she obtained and adequately trained staff members to collect data. However, the ALJ noted that the district's BCBA never collected data pertaining to escape/avoidance and access to preferred activities--the very things that her FBA identified as the functions of the child's behaviors (which was contradicted by the parent's expert who conducted an FA). In addition, the ALJ found that those functions did not appear on the data collection checklist that the district's BCBA created and distributed to the child's teachers. Instead, the ALJ observed that the BCBA relied upon interviews and her personal observations of the child. The ALJ explained that the ultimate goal of an FBA is to identify the purposes of the behaviors and how the district can implement strategies to decrease them. "This is critically important in this case because this student was injuring himself and staff members. Without this reliable data, the Report cannot reliably predict when problem behaviors will occur or lead to effective strategies to eliminate the behavior." Finally, the ALJ agreed with the parents' expert testimony that a Functional Analysis was necessary because of the severity of the behaviors.

F. Content Requirements of FBAs and BIPs

Question #21: Does the IDEA require that BIPs be formal and in writing?

Answer: Just like the IDEA does not even define the terms FBA or BIP, it also does not require them to be in writing. However, the U.S. DOE has stated that "best practice" includes developing, reviewing, implementing and documenting a BIP as part of the IEP process. See 71 Fed. Reg. 46,721 (2006).

School Bd. of Indep. Sch. Dist. No. 11 v. Renollett, 440 F.3d 1007, 45 IDELR 117 (8th Cir. 2006). Although student's IEP was not perfectly executed, the school district did not compromise the student's right to an appropriate education or deprive him of educational benefits. Although the parties intended to attach a written BIP to the student's IEP, neither Minnesota nor federal law require a written BIP. In addition, district staff responded to

behavioral incidents with set procedures and his behavioral incidents and the district's responses were well documented. The record was replete with testimony from the educators that the student progressed during the relevant time.

E.H. v. Board of Educ. of Shenendehowa Cent. Sch. Dist., 53 IDELR 141 (2d Cir. 2009) (unpublished), cert. denied, 110 LRP 18650, 130 S. Ct. 2064 (2010). Parents failed to show a denial of FAPE where the proposed placement of a grade schooler with autism was appropriate. The district's failure to develop a formal BIP did not amount to a denial of FAPE because the student's IEP addressed the student's inability to use the toilet, to tolerate change or to participate in activities with his teacher. Because the IEP identified techniques that his teachers could use to address his behavioral issues, the lack of a formal BIP did not make the student's program deficient.

Question #22: So what specific behavioral strategies and interventions are required when it is found that the student's behavior impedes the learning of the student or others?

Answer: The law does not dictate particular strategies or interventions. The U.S. DOE has indicated that the IDEA's regulation that requires the IEP team to consider the use of positive behavioral interventions, supports and strategies "does not specify the particular interventions, supports, or strategies that must be used." 71 Fed. Reg. 46,683 (2006). However, the U.S. DOE has noted that since IDEA 2004 emphasized the use of instruction based on scientifically-based research, districts should use research-based supports and interventions, including positive behavioral interventions and support. 71 Fed. Reg. 46,683 (2006).

Question #23: If a student has an eligibility of ED, does a BIP have to be completed if behaviors are monitored through a behavior checklist? In other words, does a BIP/FBA have to be completed on all students with an eligibility of ED?

Answer: The U.S. Department of Education has expressly rejected the notion that school districts be required to develop a BIP for all students with emotional disturbances. In rejecting a suggestion that the IDEA regulations require positive behavioral interventions and supports for all children identified as having emotional disturbance, the Department noted that "[w]e do not believe there should be a requirement that the IEP Team consider such interventions, supports, and strategies for a particular group of children, or for all children with a particular disability, because such decisions should be made on an individual basis by the child's IEP Team." 71 Fed. Reg. 46,683 (2006).

Question #24: What are the key ingredients to a BIP to make it successful? Need to see examples.

Answer: I wish that I could show you an absolutely "bulletproof" BIP that was guaranteed to be successful! Federal law provides no guidance at all regarding the "key ingredients" or required components of a BIP. What is important to consider is whether the BIP or some other behavior management program or intervention enables the student to receive FAPE.

Alex R. v. Forrestville Valley Comm. Unit Sch. Dist. #221, 41 IDELR 146 (6th Cir. 2004), cert. denied, 110 LRP 39024, 543 U.S. 1009 (2004). The IEP team drafted a BIP to address the student's escalating behavior issues, which set out "various tactics, including, among other things, an adopted curriculum; more visual aids; sensory breaks; and a 'water bottle with a pop top.'" However, before the BIP was implemented, the student became more violent, resulting in suspensions, a revised IEP, and his eventual assignment to a classroom for students with behavioral problems. The BIP is not substantively deficient because neither Congress, the ED nor or any statute or regulation "created any specific substantive requirements for the behavioral intervention plan contemplated by [the IDEA]." In addition, "although we may interpret a statute and its implementing regulations, we may not create out of whole cloth substantive provisions for the behavioral intervention plan contemplated by [the IDEA]."

Kingsport City Sch. Sys. v. J.R., 51 IDELR 77 (E.D. Tenn. 2008). The deficiencies in the student's BIP amount to a denial of FAPE where the purpose of the BIP was to improve the student's interaction with peers. Rather than providing counseling or social skills training to the student, the BIP required the student to refrain from name-calling and making inappropriate comments--actions that often provoked violent reactions from his schoolmates. The BIP also required the student to avoid contact with certain students and to report all threats to an adult. When the student withdrew from school following a series of peer assaults, the district proposed the use of "shadow" escorts to accompany the student at all times. The ALJ was correct in finding that the BIP prevented the student from developing appropriate social skills. "[The district's own expert] opined that the use of shadows for [the student] was not appropriate in that they denied him the opportunity to learn how to negotiate the give and take of socializing and dealing with others." Further, the reporting requirement was unclear and placed too much of a burden on the student.

Question #25: Are school districts required to do what private evaluators and other specialists, including doctors, recommend or prescribe?

Answer: No. School districts are only required to "consider" the information that private evaluators or behavioral experts bring to the table. Recommendations are not required to be adopted, but a team would not want to entirely ignore those recommendations either.

G.D. v. Torrance Unif. Sch. Dist., 58 IDELR 156, 857 F.Supp.2d 953 (C.D. Cal. 2012). The fact that the IEP for the 6 year-old autistic student did not incorporate each of the goals as specifically written by the child's private behavioral support provider did not make the IEP inappropriate. Although the goals were phrased and organized differently, the district included goals addressing the student's significant needs, while excluding the ones that it deemed unnecessary or not age appropriate. In addition, the most important goal was to maintain and generalize social skills across play opportunities and it was included, as well as a number of specific goals to address that need.

Marc M. v. Department of Educ., 56 IDELR 9 (D. Haw. 2011). Although parents of a teenager with ADHD waited until the very last moment of an IEP meeting to provide the team with a private school progress report, that was no basis for the team to disregard it. The Education Department procedurally violated the IDEA and denied FAPE when it declined to review the

private report because it contained vital information about the student's present levels of academic achievement and functional performance. The document, which showed that the student had progressed in his current private school, contradicted the information placed in the IEP, but the care coordinator who received the document did not share it with the rest of the team, because the team had just completed the new IEP. Where the new IEP proposed that the student attend public school for the upcoming school year, the parents reenrolled the student in private school and sought reimbursement. Where the IDEA requires districts to consider private evaluations presented by parents in any decision with respect to the provision of FAPE, the coordinator's contention that because the document was provided at the end of the meeting, the team could not have considered and incorporated it into the new IEP is rejected. As a result of failing to consider the private report, the IEP contained inaccurate information about the student's current levels of performance, such that these procedural errors "were sufficiently grave" to support a finding that the student was denied FAPE.

Marshall Joint Sch. Dist. No. 2 v. Brian and Traci D., 54 IDELR 307 (7th Cir. 2010). Where the ALJ's decision that the student continued to be eligible for special education under the IDEA focused solely on the student's need for adapted PE, the district court's decision affirming it is reversed. The ALJ's finding that the student's educational performance *could* be affected if he experienced pain or fatigue at school is "an incorrect formulation of the [eligibility] test." "It is not whether something, when considered in the abstract, *can* adversely affect a student's educational performance, but whether in reality it *does*." The evidence showed that the student's physician based her opinion that he needed adapted PE on information entirely from his mother and upon an evaluation that lasted only 15 minutes with no testing or observation of the student's actual performance. In contrast, the student's PE teacher testified that he successfully participated in PE with modifications. "A physician cannot simply prescribe special education; rather, the [IDEA] dictates a full review by an IEP team" and while the team was required to consider the physician's opinion, it was not required to defer to her view as to whether the student needed special education. Further, the student's need for PT and OT did not make him eligible for special education under the IDEA, as those services do not amount to specialized instruction.

T.S. v. Ridgefield Bd. of Educ., 808 F. Supp. 926 (D. Conn. 1992). The requirement for IEP team to take into consideration an IEE presented by the parent was satisfied when a district psychologist read portions of the independent psychological report and summarized it at the IEP meeting.

DiBuo v. Board of Educ. of Worcester County, 309 F.3d 184 (4th Cir. 2002). Even though school district procedurally erred when it failed to consider the evaluations by the child's physician relating to the need for ESY services, this failure did not necessarily deny FAPE to the child. A violation of a procedural requirement of IDEA must actually interfere with the provision of FAPE before the child and/or his parents are entitled to reimbursement for private services. Thus, the district court must determine whether it accepts or rejects the ALJ's finding that the student did not need ESY in order to receive FAPE.

Watson v. Kingston City Sch. Dist., 43 IDELR 244, 2005 WL 1791553 (2d Cir. 2005). Lower court's ruling that district was not required to incorporate recommendations of private evaluator

is upheld. In addition, district's failure to update goals and objectives from student's prior year IEP was insufficient to find a violation of IDEA, as this was a minor procedural error.

Question #26: Aren't some of the challenges to how a district addresses a student's behavior methodological in nature?

Answer: Arguably so. This is the case particularly in cases addressing whether FAPE was made available to a student with Autism Spectrum Disorder.

A.S. v. New York City Dept. of Educ., 63 IDELR 246 (2d Cir. 2014) (unpublished). Parents are not entitled to reimbursement for placement of their autistic child in a learning center for children with autism that employs ABA. The parents' claim that the "overwhelming testimony" at the IEP meeting and due process hearing showed that the student would not benefit from the TEACCH methodology is rejected where the school district's witness testified that TEACCH was an appropriate instructional method for the student. While the parents may prefer that their child attend an ABA-based program, there was no evidence that ABA was required for the student to receive educational benefit. Thus, the court will defer to the district's choice of educational methodology.

R.B. v. New York City Dept. of Educ., 64 IDELR 126 (2d Cir. 2014) (unpublished). Where the IEP did not expressly require teachers and other service providers to use the Developmental, Individual Difference, Relationship-based (DIR or "Floortime") Model, it did not deny FAPE. Where the parents were unable to show that particular methodology was necessary for the student to learn, the failure to identify a specific methodology was not an IDEA violation. In fact, the record showed that the student had made progress while attending an ABA program. Thus, the district court's denial of reimbursement for the parents' unilateral placement of their son in a private school for autistic students is affirmed.

L.M.P. v. School Bd. of Broward Co., 64 IDELR 66 (S.D. Fla. 2014). A school district employee's statement at a meeting over 10 years ago that the school district did not provide ABA therapy as an intervention service suggests that the district predetermined IEPs that were proposed for 3-year-old triplets with autism. Thus, the parents' action seeking money damages under Section 504 may proceed where an inference could be made that it was aware of its obligations but acted with "deliberate indifference to the appropriateness of the education a child will receive as a result of the IEP process when no consideration is given to the options other than predetermined ones." In addition, the parents' IDEA claims may proceed, as the court needs more information about the nature of ABA therapy.

Question #27: Can an IEP or BIP include a provision that requires the student to take medication?

Answer: Let's don't do that! The IDEA specifically prohibits districts from requiring parents to obtain prescriptions for medication as a condition of the student's attending school, receiving an evaluation for special education services or receiving services under the IDEA. 34 CFR § 300.174(a).

Valerie J. v. Derry Cooperative Sch. Dist., 771 F. Supp. 483 (D. N.H. 1991). School district acted unreasonably in insisting that student's IEP include requirement that student take Ritalin or similar drug as condition to receipt of services.

S.J. v. Issaquah Sch. Dist. No. 411, 48 IDELR 218 (W.D. Wash. 2007), aff'd, 52 IDELR 153 (9th Cir. 2009) (unpublished). BIP requiring student to take a prescription medication as a condition to attending school is upheld where the student already took the medication at home and the student's parents agreed to the provision in the BIP.

G. Relationship to FAPE

Question #28: If a FBA is not conducted or a BIP is not developed, could that be considered a denial of FAPE?

Answer: Yes, if a student needs one in order to receive a free appropriate public education (meaningful educational benefit).

R.K. v. New York City Dept. of Educ., 56 IDELR 212, 2011 WL 1131522 (E.D. N.Y. 2011), aff'd, 59 IDELR 241, 694 F.3d 167 (2d Cir. 2012). Magistrate's ruling that the district denied FAPE to a five year-old student with autism is adopted based upon the district's failure to include a behavior plan for the student. Thus, the parents are entitled to reimbursement for the cost of the student's private placement. Clearly, the student's self-stimulatory behaviors, inappropriate vocalizations and inability to focus impeded the student's learning and resulted in the child's inability to access her education. The school psychologist's statement that a BIP was not necessary because the student's behaviors were typical of a student with autism was improper. "The proper inquiry in determining the necessity of an FBA is whether the behavior impedes learning, not whether the behavior is atypical."

Compton Unified Sch. Dist. v. A.F., 54 IDELR 225 (C.D. Cal. 2010). Where student displayed violent and disruptive behaviors and his grandparents requested a functional analysis assessment (FAA), FAPE was denied when the district failed to assess the 6 year-old in all areas of suspected disability. While the school psychologist completed an initial psychoeducational assessment, the district's failure to conduct an FAA prevented the IEP team from developing an appropriate IEP and making an offer of placement that provided FAPE. An FAA would have enabled the team to consider strategies to address the behavioral issues that impeded the student's learning.

Neosho R-V Sch. Dist. v. Clark, 38 IDELR 61 (8th Cir. 2003). Any slight benefit the student received from his educational program was lost because of ongoing behavior problems that interfered with his ability to learn.

H. Implementation of BIPs

Question #29: If a student has a BIP, do all personnel need to be aware of it?

Answer: It is essential that all staff members who will interact with the student be familiar with it and be given access to it or a copy of it if necessary to ensure that it is implemented.

Jefferson Co. (KY) Pub. Schs., 43 IDELR 144 (OCR 2004). District discriminated against a student with an emotional disability by failing to consistently implement his BIP. The student's teachers asserted that, though they had knowledge of the BIP, none of them had reviewed it or had a copy of it. OCR's interviews further confirmed that they were not familiar with many of the elements in the BIP and revealed inconsistencies in staff members' understanding regarding when and how BIPs should be developed and implemented generally.

Question #30: What is the best way to document the data? Teachers complain about time constraints.

Answer: Legally speaking, there is no "best way" to document data.

Question #31: For FAPE, does the law require school districts to guarantee that problem behaviors will be completely extinguished?

Answer: No. However, the law has been construed to require that school personnel make good faith, reasonable efforts to continue to address the behavioral issues and to try new interventions (and service providers) when those being used have not been effective.

Endrew F. v. Douglas Co. Sch. Dist., 64 IDELR 38 (D. Co. 2014). District provided FAPE to 4th grader with autism where it took steps to address the student's increasingly severe behaviors, which included bolting from the classroom and urinating and defecating in a "calming room" on two occasions, climbing furniture, hitting computers and TV screens, yelling, kicking others, kicking walls, banging his head and asking others to punish him. When the student's teacher was unable to determine the cause of his behaviors after charting the timing and circumstances of specific acts, she scheduled a meeting with the district's autism and behavior specialist. However, the meeting did not occur because the student was withdrawn from the district, but the IEP team met to document their data and to formulate an initial plan regarding the student's behavioral issues. Because the district took steps to manage the behavior, the court cannot find a denial of FAPE.

Seashore Charter Schs., 115 LRP 1116 (SEA Tx. 2014). The charter school's inability to completely eliminate aggressive and self-injurious behaviors of an autistic student did not constitute a denial of FAPE. In fact, the student made "significant behavioral progress" during the school year and school staff followed the student's BIP. In addition, the school brought in a behavioral consultant who helped to revise the student's BIP, improve the school's data collection system and trained and consulted with staff to ensure the integrity of the behavioral data. By using this integrated approach, the duration, intensity and frequency of the student's aggressive, self-stimulatory and self-injurious behaviors decreased. Although there was "troubling" photographic evidence of some physical injuries to the student, it could not be established that school staff inflicted those injuries and such injuries "were as likely to occur at home or outside the school environment as they were to occur at school."

Lathrop R-II Sch. Dist. v. Gray, 54 IDELR 276, 611 F.3d 419 (8th Cir. 2010). District court's ruling that school district provided FAPE to student with autism is affirmed. Where the student exhibited severe problem behaviors during sixth and seventh grade, such as finger biting, hand flapping, loud outbursts and sexual behaviors, the student's IEPs included "a host of strategies to address them." For example, the district conducted an FBA and developed a behavioral management plan to address the behaviors and his IEP included a sensory diet with strategies for keeping the student on task, as well as a one-to-one aide. The district also provided autism training to staff, employed related service providers experienced with autism and hired an autism specialist to consult with the IEP team. The fact that the IEP did not contain specific goals for behavior did not mean that the student was denied FAPE, where the team did consider PBIS to address behavior, as required by the IDEA. In addition, the student made progress, which indicated that the school district made a good-faith effort to address his behaviors and to provide FAPE to him.

H.D. v. Central Bucks Sch. Dist., 59 IDELR 275 (E.D. Pa. 2012). Where the aggressive LD student's neighborhood school did not have a program that could adequately address his increasing aggression and deteriorating social skills, the district's proposed move to a school where he would receive increased emotional support did not violate the Act's LRE requirement. At the neighborhood school, the district had provided pull-out instruction, an array of behavioral interventions and supports and pull-out counseling services. The district made numerous revisions to his IEP and behavior plan and incorporated an FBA in an ongoing effort to reduce the student's abusive and physically aggressive behavior, but to no avail. While it is true that the LRE requirement contains a preference for placement at the school the student would attend if not disabled, that preference is limited by the student's educational needs and, despite the district's "extraordinary efforts," the student's behavior continued to escalate and his isolation from his classmates was preventing him from developing social skills. At the proposed new placement, the student would have teachers specially trained in improving social skills and teaching students to deescalate, and the emotional support services there offer the educational benefits that the student most requires while also meeting his learning support needs—something the neighborhood school cannot offer.

J.W. v. Unified Sch. Dist. of Johnson Co., 58 IDELR 124, 2012 WL 628181 (D. Kan. 2012). While the 6-year-old autistic student continued to regularly bite his hands and slap himself at school, the district did not deny him FAPE. The district's use of positive behavioral interventions and supports were clearly designed to assist the child to progress toward reaching his IEP goals, and the IDEA does not require a district to eliminate behaviors that interfere with a child's learning. Rather, the IDEA requires a student's IEP team to "consider the use" of positive behavioral interventions and supports, which the district did in this case. Not only did the district consider the use of interventions and supports, it actually implemented a variety of behavioral management strategies, including the use of visual scheduling, token reinforcement, verbal praise, breaking down tasks into smaller tasks and a Picture Exchange Communication System. Even the parents' autism consultant agreed that the district was using a number of positive behavioral supports to address the student's behaviors. While the court acknowledges the parents' claim that their child failed to make progress and is sensitive to their concerns, the IEPs were reasonably calculated to provide FAPE.

Question #32: Has case law suggested that states with more guidance related to the FBA process and components of an FBA and BIP have more compliance?

Answer: Not that I have seen. In fact, a lot of recent litigation involving allegations that appropriate FBAs or BIPs were not done comes from New York, where conducting an FBA and developing a BIP is required under state law. What case law seems to tell us is that courts adhere to the Supreme Court standard in determining whether a free appropriate public education has been made available to a student with a disability whether or not an FBA or BIP was actually done.

In 1982, the Supreme Court decided the seminal case of Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176 (1982). What the Rowley decision is best known for is establishing an overall legal standard for FAPE that does not require school districts to ensure that students with disabilities receive the best education possible or one that will maximize the potential for a student with a disability. Rather, the Court held that the law requires school districts to provide an educational program that will provide the student with some educational benefit, which many courts refer to as "meaningful" educational benefit.

In further defining the role of the courts in exercising judicial review in cases brought under the IDEA, the Rowley Court held that any inquiry in suits brought under the Act is twofold: (a) first, has the State complied with the procedures set forth in the Act? (b) second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

I. Addressing Dangerous/Criminal Behaviors

Question #33: What is a district supposed to do when its FBAs and BIPs are not effective and the student continues to be a danger to self or others?

Answer: Rather than attempting to impose suspension or expulsion that triggers the manifestation determination and other procedural requirements, a school district should first seek to propose a change of placement to a more restrictive setting (even, in some cases, a residential placement) via the IEP team process. If the parent challenges the proposed change of placement, a school district may need to resort to seeking court assistance via injunctive relief, as originally set forth by the U.S. Supreme Court back in 1988. Honig v. Doe, 484 U.S. 305 (1988).

Wayne-Westland Comm. Schs. v. V.S., 64 IDELR 139 (E.D. Mich. 2014) and 115 LRP 5164 (2015). District's motion for an injunction temporarily prohibiting a teenager with a disability from entering the high school grounds is granted where an administrator's statement indicates that the student has become physically violent on multiple occasions. A court may, in appropriate situations, temporarily enjoin a dangerous student from attending school when the student poses an immediate threat to the safety of others, Here, the district's complaint showed that the 6-foot, 250-pound student kicked, punched and spit on students and staff; threatened to rape a female staff member; and threatened to stab two staff with a pen. After the IEP team reduced the student's attendance to one hour a day, the student attacked the school's security liaison. When told to leave the school building, the student tried to force his way back into the

building and four staff members were required to hold the school doors shut to keep him out. Since then, the student had also threatened to bring guns to school, made racist comments to staff, and punched the school's director in the face. Thus, the district may temporarily educate the student through an online charter school program. NOTE: On February 4, 2015, the court granted a permanent injunction barring the student from entering any premises owned by the district or attending school events. The district was able to prove all four factors required to obtain permanent relief: 1) that it would suffer irreparable harm; 2) the remedies available at law are inadequate to compensate for that harm; 3) the balance of hardships tip in its favor; and 4) the injunction would not be against public interest. This is so because of the student's history of physical violence that demonstrated an "extreme risk" of imminent and irreparable injury. Remedies such as money damages would be inadequate to address any injuries to others resulting from the student's conduct and schoolmates and staff would suffer a far greater injury than the student, who can continue his education through an online program. Protecting the safety of others is in the public's interest.

Seashore Charter Schs. v. E.B., 64 IDELR 44 (S.D. Tex. 2014). District's motion to change the autistic student's stay-put placement from a K-8 charter school to a special education program in the student's neighborhood high school pending the outcome of the due process hearing brought by the parent is granted. Given the charter school's unsuccessful efforts to hire a special education teacher after the previous one resigned, the school was no longer capable of addressing the student's aggressive behaviors. In contrast, the local high school was "ready, willing and able" to implement a program for the student with age-appropriate peers and post-secondary transition services. In addition, the student was substantially larger than his classmates and had a tendency to hit, bite, scratch and pull hair, even when accompanied by a teacher or aide. Thus, his continued presence at the charter school created a dangerous situation and a substantial risk of harm to others. Thus, it is ordered that he not return to the charter school and remain in the high school's self-contained program until the hearing officer issues a decision in the due process case.

Troy Sch. Dist. v. v. K.M., 64 IDELR 303 (E.D. Mich. 2015). District's request for a temporary restraining order is denied where it was not shown that the district would suffer irreparable harm or imminent injury if the teenager returned to his public high school. The IDEA's stay-put provision requires that a student remain in his then-current educational placement during any pending administrative proceedings. While a court can authorize a change in placement when a student engages in violent or dangerous behavior, it cannot do so unless the district shows that maintaining the student in his current placement is substantially likely to result in injury to the student or others. Here, the district did not meet that burden where the incident that resulted in the student's most recent suspension occurred in the absence of the "safe person" required by his IEP and no serious injuries were recorded. Thus, the student is not substantially likely to injure himself or others if the district implements his IEP.

Question #34: Do all of the IDEA's requirements apply to students in correctional or juvenile facilities?

Answer: You bet!

Dear Colleague Letter, 64 IDELR 249 (OSEP/OSERS 2014). Absent a specific exception in the law, all IDEA protections apply to students with disabilities in correctional institutions. This includes the IDEA's child-find duty, such that agencies cannot assume that a student who enters jail or a juvenile justice facility is not a student with a disability just because he or she has not been previously identified. School districts should work with individuals who are most likely to come into contact with students in the juvenile justice system to identify students suspected of having a disability and ensure that a timely referral for evaluation is made. While it is acknowledged that child-find and proper identification of students in correctional facilities is complicated by the fact that they often transfer in and out, the evaluation process must continue once the parent's consent for evaluation has been obtained, even if the student will not be in the facility long enough to complete the process. In addition, if a student is transferred to a correctional facility in the same school year after the previous district has begun but not completed an evaluation, both agencies must coordinate assessments to ensure the evaluation is completed in a timely manner. Finally, the IDEA's disciplinary safeguards also apply to these students, including the right to a manifestation determination upon 11 days of a disciplinary exclusion. "These disciplinary protections apply regardless of whether a student is subject to discipline in the facility or removed to restricted settings, such as confinement to the student's cell or living quarters or 'lockdown' units."
Dear Colleague Letter, 114 LRP 51901 (OCR 2014). Residential juvenile justice facilities, as federal fund recipients, are no less responsible for providing FAPE in a discrimination-free environment than are public schools. Thus, they must abide by federal laws, such as Section 504 and Title II of the ADA when disciplining, evaluating, placing and responding to alleged harassment of students with disabilities. All public schools, including those in juvenile justice facilities, are obligated to avoid and redress discrimination in the administration of school discipline. As a result, they must ensure that they comply with provisions governing the disciplinary removal of students for misconduct causes by, or related to, a student's disability. In addition, state and local facilities must implement reasonable modifications to their polices, practices, or procedures to ensure that youth with disabilities are not placed in solitary confinement or other restrictive security programs because of their disability-related behaviors. In addition, residents of such facilities must be educated with nondisabled students to the maximum extent appropriate in compliance with Section 504's LRE mandate.

Question #35: Can we contact criminal authorities or file charges when a student commits a crime at school?

Answer: The IDEA specifically allows for the reporting of criminal behaviors. However, school districts should proceed with caution in doing so.

The IDEA specifically provides that :

Nothing in this part prohibits an agency from reporting a crime committed by a student with a disability to appropriate authorities or prevents State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a student with a disability.

An agency reporting a crime committed by a student with a disability must ensure that copies of the special education and disciplinary records of the student are transmitted for consideration by the appropriate authorities to whom the agency reports the crime. In addition, an agency reporting a crime may transmit copies of the student's special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act (FERPA) (requiring notice to the parent).

34 CFR § 300.535. Obviously, a student' records would include FBAs and BIPs that are maintained and would be transmitted.

J. Addressing Bullying and Disability Harassment

Question #36: Are FBAs and BIPs important in addressing bullying behaviors?

Answer: Absolutely! There has been a great deal of litigation involving this issue, particularly where the victim is a student with a disability. In addition, where students with disabilities engage in bullying themselves, FBAs and BIPs need to be considered by IEP and 504 teams, among other things.

T.K. v. New York City Dept. of Educ., 63 IDELR 256 (E.D. N.Y. 2014). School district's response to peer bullying was inadequate where the district failed to address the issue in the disabled child's IEP or BIP. A district denies FAPE where it is deliberately indifferent to or fails to take reasonable steps to prevent bullying that substantially restricts the educational opportunities of the disabled child. If an IEP team has a legitimate concern that bullying will significantly restrict a child's education, it must consider evidence of bullying and include an anti-bullying program in the student's IEP, which was not done in this case. Here, the parents tried to discuss bullying during a June 2008 IEP meeting but were told by district members of the team that it was not an appropriate topic for discussion. Further, the IEP focused on changing behaviors that made the child susceptible to bullying rather than to ensure that peer harassment did not significantly impede her education. It was clear that the bullying interfered with the child's education, where she began bringing dolls to class for comfort, she gained 13 pounds and had 46 absences or tardies in one school year. Further, her special education itinerant collaborative teachers testified that classmates treated the child like a "pariah" and laughed at her for trying to participate in class. Thus, the district's inadequate response, coupled with the impact on the child's learning denied FAPE and entitled her parents to recover the cost of the child's private schooling.

Dear Colleague Letter, 64 IDELR 115 (OCR 2014). If an alleged victim of bullying is receiving services under Section 504 or the IDEA, the school's response to bullying allegations should include determining whether the bullying impacted the student's receipt of FAPE and, if so, convening the student's IEP or 504 team to address that impact. The obligation to address a bullying victim's ongoing ability to receive FAPE exists regardless of whether or not the student is being bullied based on a disability. In addition, it exists whether the student is receiving services under the IDEA or under Section 504. Changes that might trigger the obligation to convene the team and amend a student's IEP or 504 plan might include a sudden decline in grades, the onset of emotional outbursts, an increase in the frequency or intensity of behavioral outbursts, or a rise in missed classes or sessions of Section 504 services. "Ultimately, unless it is

clear from the school's investigation into the bullying conduct that there was no effect on the student with a disability's receipt of FAPE, the school should, as a best practice, promptly convene the IEP team or the Section 504 team to determine whether, and to what extent: 1) the student's educational needs have changed; 2) the bullying impacted the student's receipt of IDEA FAPE services or Section 504 FAPE services; and 3) additional or different services, if any, are needed, and to ensure any needed changes are made promptly."

Dear Colleague Letter, 61 IDELR 263 (OSERS/OSEP 2013). Consistent with prior DCL's published by the Department, bullying of a student with a disability that results in the student's failure to receive meaningful educational benefit constitutes a denial of FAPE under the IDEA that must be remedied. Whether or not the bullying is related to the student's disability, any bullying of a student not receiving meaningful educational benefit constitutes a denial of FAPE under the IDEA. Schools have an obligation to ensure that a student with a disability who is the target of bullying behavior continues to receive FAPE in accordance with his/her IEP, and the school should, as part of its appropriate response to bullying, convene the IEP Team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit. If this is the case, the IEP Team must then determine to what extent additional or different special education or related services are needed to address the student's needs and revise the IEP accordingly. The Team should exercise caution, however, when considering a change of placement or location of services and should keep the student in the original placement unless the student can no longer receive FAPE in the current LRE placement. Certain changes to the educational program (e.g., placement in a more restrictive "protected" setting to avoid bullying) may constitute a denial or the IDEA's requirement to provide FAPE in the LRE. Moreover, schools may not attempt to resolve the bullying by unilaterally changing the frequency, duration, intensity, placement, or location of the student's special education and related services. In addition, if the bully is a student with a disability, the IEP Team should review that student's IEP to determine if additional supports and services are needed to address the bullying behavior. (Attached to this DCL is an enclosure entitled "Effective Evidence-based Practices for Preventing and Addressing Bullying").

There is also a significant body of case law where parents have sought money damages against the district for failing to respond appropriately to bullying of a student with a disability:

Estate of Lance v. Lewisville Indep. Sch. Dist., 62 IDELR 282, 743 F.3d 982 (5th Cir. 2014). There is no evidence that the district was deliberately indifferent to bullying and, therefore, it is not liable for the student's suicide in a school restroom. Rather, the district took affirmative steps to stem harassment of the 4th grader with ADHD, a speech impairment and ED by repeatedly investigating incidents of harassment and punishing all students involved. In addition, the school psychologist observed the student in class to gain insight into his difficulties with a specific classmate. A teacher testified that she separated the student from another by not allowing them to sit or stand near each other or putting them in groups together. Further, the district's anti-bullying policies met national standards and the district had spoken to students about bullying both before and after the student's suicide. The deliberate indifference standard does not require districts to purge their schools of bullying or harassment, but to respond in a manner appropriate to the circumstances.

Long v. Murray Co. Sch. Dist., 61 IDELR 122 (11th Cir. 2013) (unpublished). School district was not deliberately indifferent to peer harassment of student who hanged himself, which is the standard that applies in Section 504 and ADA cases. While the school district should have done more to protect a student with Asperger's who committed suicide, there was insufficient evidence of deliberate indifference. The district responded to the complaints it received in a manner that was not clearly unreasonable, and it neither caused additional harassment nor made an official decision to ignore it. On that basis, the dismissal of the parents' Section 504 claim is upheld. While there was little question that the student was severely harassed based on his disability and the district should have done more to stop it and prevent future incidents, the Supreme Court requires a finding that the district deliberately ignored specific complaints. Here, however, the district disciplined the perpetrators and developed a safety plan that allowed the student to avoid crowds in the hallways and to sit near the bus driver. In addition, the district's decision on at least two occasions to meet with the perpetrators and victim together was not clearly unreasonable, and there were numerous cameras and teachers monitoring the hallways. Though the parents claimed that the student continued to be harassed despite these efforts, there was no evidence that any single harasser repeated his conduct once the district addressed it. The parents pointed out that the day after the student's suicide, students wore nooses to school and wrote messages in the bathroom stating "it was your own fault" and "we will not miss you" and that this was an indication of the culture of harassment and of the district's failure to address it. While the district never held any assemblies to discuss bullying and harassment, it took several steps to address the school climate—its code of conduct contained an anti-bullying policy that staff members were expected to read and it conducted a program in which teachers met with small groups of students to instruct them on peer relationships and review the code of conduct. Finally, the district conducted a school tolerance program and implemented a program aimed at improving overall student behavior. Without evidence of deliberate indifference, the parents' case could not proceed and the district court's decision is affirmed.

G.M. v. Dry Creek Joint Elem. Sch. Dist., 64 IDELR 231 (9th Cir. 2014) (unpublished). The affirmative steps that the district took when it learned that a 6th grader with dyslexia had experienced disability-based bullying in PE helped it to avoid a claim for money damages under Section 504. The parents did not prove that the district was deliberately indifferent to the harassment and the district court was correct in finding that district personnel appropriately responded to five reported incidents of disability-based bullying by a classmate in PE. In addition to the PE teacher and school counselor speaking to the offender about his misconduct, the PE teacher prevented the bully from working with the student. In addition the assistant principal suspended another classmate who punched the student's arm, causing a bruise.

Estate of Chandler J. Barnwell v. Watson, 64 IDELR 8 (E.D. Ark. 2014). Where the parents' allegations, if true, suggested that the district was deliberately indifferent to disability and sexual harassment, the superintendent's motion to dismiss 504 and Title IX claims is denied. The parents' complaint sufficiently alleges deliberate indifference where the student wrote a letter to his school counselor stating that he wanted to leave school because he had no friends and could not handle "being an outcast for four more years." In addition, the parents alleged that the student's mother and private therapist met with the IEP team the next day and stated that the student's desire to drop out of school stemmed from peer harassment. There was apparently,

however, no plan put in place by the district to further investigate or address these concerns. Thus, the complaint as a whole states a plausible claim for relief under 504 and Title IX.

Moore v. Chilton Co. Bd. of Educ., 62 IDELR 286, 1 F.Supp.3d 125 (M.D. Ala. 2014). Parents cannot use Section 504 or the ADA to hold district liable for student's suicide based upon alleged bullying. Whether or not her Blount's disease qualifies as a disability or whether others' comments about her weight and limp related to her medical condition—going beyond mere name-calling—the parents needed to show that the district had actual notice of the harassment and was deliberately indifferent to it. A district only has actual knowledge if an official with authority to take corrective action receives clear notice of disability harassment, which was not the case here. Although the student's friend informed her science teacher about bullying in the hallways and the bus driver overheard another teenager mocking the student's weight, the parents did not show that those staff members qualified as authority figures. Further, those staff members took steps to help the student, where the science teacher monitored the student in the hallways between classes, and the bus driver changed the harassing student's seat for two weeks on the bus. Given the efforts of staff to assist the student, the district was not deliberately indifferent to peer harassment and judgment is granted in the district's favor.

Phillips v. Robertson Co. Bd. of Educ., 59 IDELR 227 (Tenn. Ct. App. 2012). Based upon the district's negligence and failure to supervise and disseminate information, trial judge's order that the district pay $300,000 to a student with Asperger syndrome who was left legally blind in one eye because of a class bully is affirmed. In this case, a private psychologist diagnosed the student with Asperger syndrome and sent a letter to the school stating that the student would need help with "social negotiation" and that he was likely to be bullied. In addition, the evidence was clear that the parent was constantly reporting bullying incidents and requesting help. While the district did not find the student eligible for special education, it developed modifications addressing his social skills weaknesses, including preferential seating, and a card system designed to signal the teacher when he was being bullied or felt stressed. After the teacher left the student's classroom unsupervised one day, however, the student was struck in the eye by a classmate, and he sustained permanent damage. Schools have a duty to safeguard students from reasonably foreseeable dangerous conditions including the dangerous acts of fellow students. Clearly, the incident was foreseeable based on the school's awareness of the student's vulnerability to bullying, the parent's and student's prior complaints of bullying and teasing, his social skills deficits and the nature of his disability. Even if it were true that the particular classmate had not bullied him in the past, the district had reason to expect that the student would be bullied by someone. The district breached its duty to protect the student not only by leaving him unsupervised, but also by failing to disseminate information regarding his disability. Importantly, the teacher testified that she never received formal information about the nature of the student's disability, how the condition affected him, and what might trigger symptoms. Instead, she learned through informal "water fountain" talk with other teachers that the student had Asperger syndrome and was allowed to have preferential seating. Nor was she provided the information from the private psychologist. Finally, she was not aware of the majority of the child's classroom accommodations. Thus, the injury would not have occurred had the teacher been properly informed.

K. Addressing Truancy

Question #37: What about truancy?

Answer: Clearly, truancy could be considered a behavior that "impedes a child's learning" that needs to be addressed by the IEP team. It could also trigger the IDEA's "child-find" duty to refer a student for an evaluation where there is reason to believe the absences are linked to a disability and that there may be a need for special education services. In Department of Educ. v. Cari Rae S., 35 IDELR 90 (D. Hawaii 2001), for example, the court held that a student's 159 absences, numerous behavioral referrals and failing grades should have triggered referral during the student's sophomore year. See also Broward County (FL) Sch. Dist., 61 IDELR 265 (OCR 2013) [Because it failed to evaluate two often-absent kindergartners within a reasonable period after learning that they were being treated for bipolar disorder, district violated its child find duty]; and Hilliard City Sch. Dist., 60 IDELR 58 (SEA OH 2012) [district violated child-find where private evaluation reports clearly linked the student's attendance problems with disabilities].

It is important to note that where a judge or hearing officer views the truancy to be the result of social maladjustment or family or social circumstances, he is likely to conclude that the district had no duty to refer the student. See W.G. v. New York City Dept. of Educ., 56 IDELR 260 (S.D. N.Y. 2011) [student's behaviors, which included truancy, defiance and refusing to learn, were the result of social maladjustment, not depression] and Southwest Indep. Sch. Dist., 39 IDELR 203 (SEA Tex. 2003) [district did not violate child-find with respect to student whose social and family circumstances caused her to attend just 16 days of school from January to September 2002].

For a student who is eligible under the IDEA and whose truancy adversely affects learning, the duty to address the absences in the IEP may exist regardless of whether it stems from a disability. In Pocono Mountain Sch. Dist., 12 ECLPR 14 (SEA Pa. 2014), a district that addressed a kindergartener's absenteeism "early and often" established that it did not deny the child FAPE. The hearing officer noted that the district responded to the student's sporadic attendance in numerous ways, including assigning an individual to monitor the student for seizure activity, developing a seizure action plan and placing the student in a small-group setting.

In Downingtown Area Sch. Dist., 113 LRP 34703 (SEA Pa. 2013), the parents alleged that the district denied the student FAPE because it referred them to a truancy judge without addressing the truancy through interventions. In rejecting the parents' claim, the hearing officer noted that the district took a variety of steps to secure the student's attendance long before it filed truancy charges, including by developing multiple attendance plans, providing small-group therapy and having the parents call the assistant principal when the student was refusing to leave home. Only after its varied efforts failed and the parents' cooperation waned did the district file a truancy petition. See also, Urban Pathways Charter Sch., 112 LRP 27526 (SEA Pa. 2012).

L. Addressing Behaviors in the Home

Question #38: Is there a requirement to address behaviors in the home?

Answer: Yes, if the student cannot receive educational benefit without doing so.

New Milford Bd. of Educ. v. C.R., 54 IDELR 294 (D. N.J. 2010) (unpublished), aff'd, 111 LRP 41852 (3d Cir. 2011) (unpublished). District is required to fund autistic student's private after-school home-based program where the district failed to properly address his self-stimulatory and aggressive behavior. The district's argument that it was not required to ensure that the student could generalize skills outside of school is rejected because "[t]his Circuit has expressly mandated the provision of 'meaningful educational benefits in light of the student's intellectual potential,' not a lesser 'some progress' standard." Moreover, the issue was not the student's ability to generalize skills learned into the home, but his ability to obtain any benefit from the school without the home intervention. There is sufficient testimony that the student needs the home program in order to learn at school. In addition, the parent training provided by the school did not address the student's behavior.

Doe v. Hampden-Wilbraham Regional Sch. Dist., 54 IDELR 214 (D. Mass. 2010). IEP specifically addressing at-school behavior provided student with FAPE. It is clear that the school district is only obligated to address those behavioral issues that the student displays in school, not the student's severe at-home interfering behaviors. The IEP contained behavioral goals and specific steps the district would take to decrease the student's behaviors and keep him on task, including preferential seating and support during transitions. "While there is no specific reference in the IEP about how to deal with the interfering behaviors at home…the IEP does focus on what can be done in the environment that the school district can control—school itself." Importantly, the IEP also included a detailed statement of special education and related services and numerous plans for generalizing skills to different settings. Thus, the parents' request for private school reimbursement is denied.