

# **Weaving Discipline and FAPE: IEP Teams' FAPE-Based Responsibilities in Discipline of IDEA Students**

by

**Jose L. Martín, Attorney at Law**

RICHARDS LINDSAY & MARTIN, L.L.P.

13091 Pond Springs Road, Suite 300

Austin, Texas 78729

jose@rlmedlaw.com

Copyright © 2012 RICHARDS LINDSAY & MARTÍN, L.L.P.

## **Anticipated Division of Duties in IDEA Discipline**

As is the case in many areas of special education, disciplinary actions involving IDEA-eligible students are undertaken through a collaboration of regular education and special education. IDEA disciplinary actions are, first, regular disciplinary actions that, second, must also comply with IDEA requirements. Both the requirements of State/local rules applicable to all disciplinary actions, and the additional procedures and safeguards provided under the IDEA must be observed. Thus, the interplay of the state and federal legal frameworks envision a division of duties and responsibilities with respect to disciplinary actions involving special education students. This article focuses on the proper role of the IEP team in the disciplinary process.

## **School Administration/Regular Education Responsibilities**

- Receive report of behavior
- Determine if behavior is in violation of local code of conduct
- Consider unique circumstances on case-by-case basis
- Make recommendation for disciplinary action, if any
- Provide parents with regular notice of offense and proposed action
- Arrange for any regular due process required under State law/local rules

## **IEP Team/FAPE-Baseds Responsibilities**

- 1. Conduct Manifestation Determination Review (for disciplinary changes in placement)**

As soon as possible after the campus initiates a long-term disciplinary removal, a manifestation determination review must be conducted (preferably by

the full IEP team in an IEP team meeting). See 20 U.S.C. §1415(k)(1); 34 C.F.R. §300.530(e). The long-term removal will generally consist of a removal to an alternative setting, a long-term suspension (since in some states the term “expulsion” is not used), or an expulsion (really a long-term suspension). The manifestation determination must definitely take place before the long-term removal reaches its 11th consecutive day. The right to a manifestation determination in instances of threat of long-term removal is the primordial safeguard of the IDEA disciplinary procedures. It is a doctrine that was first espoused in court cases starting in the late-70’s, later adopted by the Department of Education as policy in the 80’s, and finally codified into IDEA and its regulations in the late 90’s.

The manifestation determination essentially decides whether the student can be subjected to long-term removal or not. If the IEP team properly determines that the behavior in question is not related to disability, then the student can be subjected to regular disciplinary procedures and regular removals, as in the case of a similarly-situated nondisabled student. If the IEP team determines that the behavior is related to disability, then a long-removal cannot take place. Thus, the quality of the manifestation determination is crucial to a long-term removal. IEP team members are well-advised to prepare and pre-staff for manifestation determinations.

*The modern manifestation determination inquiry*—In 2004, Congress tightened the language and structure of the manifestation determination standard. If a school decides to change a student’s placement (i.e., recommends a long-term removal) due to a disciplinary offense, “the local educational agency, the parent, and relevant members of the IEP team (as determined by the parent and the local educational agency), shall review all relevant information in the student’s file, including the child’s IEP, any teacher observations, and any relevant information provided by the parents to determine —

if the conduct in question was *caused by, or had a direct and substantial relationship to*, the child’s disability; or

if the conduct in question was the *direct result* of the local educational agency’s failure to implement the IEP.” 20 U.S.C. §1415(k)(1)(E)(i).

If the manifestation decision-makers determine that a child’s behavior was related to their disability, the IEP team is to “return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.” 20 U.S.C. §1415(k)(1)(F)(iii). If the determination is that the behavior in question is not related to disability, then the school may implement its regular

disciplinary procedures and removals, as with any similarly situated nondisabled student. 20 U.S.C. §1415(k)(1)(c).

*Decision-making process flexibility*—IDEA currently states that the MDR must be conducted by the school, the parent, and “relevant members” of the IEP team. 20 U.S.C. §1415(k)(1)(E)(i). There is no mention of a meeting requirement to actually undertake the MDR, although the law still requires the IEP team to convene to actually determine the interim alternative education setting and the services to be provided during the long term removal. 20 U.S.C. §1415(k)(2). Legislatively, the origin of this provision is likely related to other provisions of IDEA 2004 reflecting Congress’ concern over the high numbers of IEP team meetings that take qualified staff away from their respective instructional assignments. The final regulation implementing this provision restates the statutory language, and emphasizes that the school and parents must mutually determine the relevant members of the IEP team that must make the MD. 34 C.F.R. §300.530(e).

*Practical considerations may mean it’s best to conduct MDRs in IEP team meetings*—The flexibility offered by the Congress also means that there can be disputes over determining the “relevant” members of the IEP team. For example, in a Virginia case, parents of a child with emotional disability challenged the makeup of the MDR team, although both the hearing officer and a district court rejected their argument that they had an “equal right” to determine the members of the MDR team. *Fitzgerald v. Fairfax County Sch. Bd.*, 50 IDELR 165 (E.D.Va. 2008). The court held that the provisions of the IDEA addressing the composition of the MDR team meant that the school determines the school staff’s members and the parents may determine whom else they wish to invite in addition. In the case of *Philadelphia City Sch. Dist.*, 47 IDELR 56 (SEA Pennsylvania 2007), an appellate panel overturned a school’s MD, in part due to the fact that “the District did not provide the parents with the opportunity to engage in a mutual determination of relevant members of the Student’s IEP team.” See also, *In re: Student with a Disability*, 107 LRP 63721 (SEA Virginia 2007)(dispute over selection of relevant members, degree of participation). In a more recent case, a parent successfully challenged a MDR on the basis that the notice did not properly notify her of her right to invite relevant members of the IEP team. *Cherry Creek Sch. Dist. #5*, 56 IDELR 149 (SEA Colorado 2011). And there are still more questions: exactly how much opportunity must be provided to parents to provide input on members? What if there are disagreements on membership? To what degree must each member participate? To avoid problems and confusion, schools can choose continue to conduct MDs in properly scheduled and constituted IEP team meetings.

*Some recent MDR cases*—In the case of *Los Angeles Unified Sch. Dist.*, 111 LRP 60703 (SEA California 2011), a teen with ADHD was unable to convince a hearing officer that his sale of prescription drugs (Adderall) was related to his disability. Considering a variety of sources of information, the school found that the student initially planned the details of the sale with another student, went home, and brought the drugs back the next day to conduct the sale. The hearing officer agreed with the school staff that the behavior was not impulsive, but rather “planned and deliberate.” The impulsive behavior seen by the school, moreover, involved fighting, outbursts, and disruption, rather than the behavior exhibited in this instance. “Student’s conduct demonstrated poor judgment, but the evidence did not demonstrate that Student’s poor judgment was a manifestation of his disability as opposed to a manifestation of Student’s youth, or need for money, or of any other non-disability-related rationale for engaging in such conduct.”

The impulsivity argument also did not help another high school student from Massachusetts who was facing additional removal due to an off-campus felony car break-in. *Medford Public Schs.*, 110 LRP 31566 (SEA Massachusetts 2010). The hearing officer agreed with school staff that the circumstances of the nighttime car break-in involved careful planning and preparation, including arranging for a disguise and attempting to set up an alibi. With respect to the school behaviors, staff indicated that he enjoyed the “drama” of misbehavior and often planned his conduct to achieve maximum exposure and effect. Although a private psychologist wrote to the school arguing that the behaviors were in fact related to executive function deficits, there was no evaluation record of such deficits, the psychologist had not conducted an evaluation, he had limited contact with the student, and no knowledge of the nature of the underlying behaviors.

A school’s failure to properly document in MDR process and explain its conclusions led a New York hearing officer to overturn its determination. *In re: Student with a Disability*, 57 IDELR 59 (SEA New York 2011). The student participated in the theft of an electronic device from another student. Aside from a post hoc explanation by a school psychologist and assistant principal that they concluded the behavior was not a manifestation of disability because the student knew right from wrong, there was no evidence of how the team reached its determination. The documentation did not show the date of the MDR, whether the parent participated, or how the District arrived at its conclusion. The hearing

officer ordered a reevaluation of the student and a re-conducting of the MDR.

In *Renton Sch. Dist.*, 111 LRP 39470 (SEA Washington 2011), a hearing officer overturned the school's MDR, finding that it faulty because the team focused only on the student's recognized disabilities despite suspecting that the student also may have had Autism and an intellectual disability. Moreover, the student's behavior had recently changed significantly, as he began to display aggressive behavior. In light of the facts, the team should have suspected the presence of additional disabilities, thus giving rise to a duty to evaluate in those areas. The hearing officer allowed the change in placement to stand only because he found that placing the student back in his pre-discipline placement would create a substantial likelihood of injury to self or others.

## **2. Ensure compliance with IDEA notice requirements**

Disciplinary changes in placement require notice to the parents. The regulation requires that "on the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA must notify the parents of that decision, and provide the parents the procedural safeguards notice described in Sec. 300.504." 34 C.F.R. §300.530(h).

*Practical implications of requirement*—Because campus administrators tend to make the decision to recommend a removal that constitutes a disciplinary change in placement under IDEA, it is crucial that special education staff communicate closely with the campus regarding that decision, to ensure that the proper notice of action and notice of procedural safeguards are provided to the parent in a timely fashion.

## **3. Effect disciplinary change in placement**

Although the IEP team does not necessarily have to conduct the manifestation determination review, the law requires the IEP team to actually effect the change in placement and determine the services the student will receive while in the long-term disciplinary setting. 34 C.F.R. §300.530(d)(5). This step is key, as the District is responsible for providing a FAPE during periods of long-term disciplinary removals.

*Practical implications*—Even if a school has properly followed required procedures under State law, local rules, and the IDEA in undertaking the actual disciplinary removal, and conducted a valid and supportable MDR, if the school

fails to set up the services and supports necessary to confer a FAPE in the discipline setting, the school can still face legal liability. Equally important as compliance with the discipline requirements are the services that will be provided to the student in the disciplinary setting.

*What if the IEP team believes the student cannot be provided a FAPE in the planned disciplinary setting*—The IEP team is entrusted with safeguarding the student’s right to a FAPE. Even in cases where a behavior is not related to disability, an alternative educational setting may not be able to meet the needs of some students with complex disabilities.

*The two key findings for IEP teams*—The IEP team must make two crucial findings before effecting a disciplinary change in placement: (1) a finding that the student’s behavior is not related to disability within the meaning of the IDEA provision, and (2) a finding that the student can receive a FAPE in the disciplinary setting.

#### **4. Ensure provision of FAPE in disciplinary setting**

*The requirement of services during long-term disciplinary removals*—A finding that the behavior was not related to disability allows the school to follow and impose regular disciplinary procedures and removals, but while also continuing to provide students with a FAPE in the disciplinary setting with a focus on services enabling the child to participate in the general curriculum. §1415(k)(1)(C). The provision states that, irrespective of the manifestation determination, a child with a disability removed for disciplinary reasons must continue to receive educational services “so as to enable the child to continue to participate in the general curriculum, although in another setting, and to progress toward meeting the goals set out in the child’s IEP.” §1415(k)(1)(D)(i). The statute continues to require a FAPE during long-term removals, although apparently allowing the provision of different types of services and accommodations than under the pre-discipline placement, as long as they lead to progress on the IEP goals and allow appropriate participation in the general curriculum.

*Future Implications*—Given the tightening of the manifestation determination standard, it should be expected that a greater number of students’ behaviors will be found to not be a manifestation of disability. Thus, schools should also expect greater levels of scrutiny over the nature, quantity, and quality of services provided during the removal.

*The USDOE pipes in on services during removals*—The IDEA regulations restate the Act’s requirement that students be afforded the opportunity to

participate in educational services even during periods of long-term disciplinary removals. 34 C.F.R. §300.530(d)(1); 20 U.S.C. §§1412(a)(1)(A), 1415(k)(1)(D)(i). Indeed, the commentary plainly states that “on the eleventh cumulative day in a school year that a child with a disability is removed from the child’s current placement, and for any subsequent removals, educational services must be provided...” Fed. Reg. 46,717. The commentary reiterates, however, that the requirement of services, with regard to the general curriculum, is one only of “participation” rather than “progress” in the general curriculum during disciplinary removal. “[T]he Act specifically uses different language to describe a child’s relationship to the general education curriculum in periods of removal for disciplinary reasons than for services under the child’s regular IEP in section 614(d)(1)(A)(i)(IV) of the Act.” Fed. Reg. 46,716.

*Does participation require exact replication of services?*—USDOE takes the position that exact replication of services is neither required, nor, in many cases, possible. “We caution that we do not interpret “participate” to mean that a school or district must replicate every aspect of the services that a child would receive if in his or her normal classroom. For example, it would not generally be feasible for a child removed for disciplinary reasons to receive every aspect of the services that a child would receive if in his or her chemistry or auto mechanics classroom as these classes generally are taught using a hands-on component or specialized equipment or facilities.” 71 Fed. Reg. 46,716. Put in other words, USDOE interprets the statute as requiring that services during long-term disciplinary removals be provided in conformity with the child’s IEP “to the extent appropriate to the circumstances.” Id.

*A “modified” disciplinary FAPE requirement*—The USDOE clarifies that the concept of FAPE during a long-term disciplinary removal is a “modified” one, due to the potential differences in the settings and services available in disciplinary placements, as opposed to those on regular campuses. The commentary states that “while children with disabilities removed for more than 10 school days in a school year for disciplinary reasons must continue to receive FAPE, we believe the Act modifies the concept of FAPE in these circumstances to encompass those services necessary to enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child’s IEP. An LEA is not required to provide children suspended for more than 10 school days in a school year for disciplinary reasons, exactly the same services in exactly the same settings as they were receiving prior to the imposition of discipline. However, the special education and related services the child does receive must enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child’s IEP.” 71 Fed. Reg. 46,716.

*Individualized approach to during-discipline services*—The USDOE highlights that the services provided to students with disabilities properly placed in disciplinary settings will vary depending on the students' disabilities and consequent educational needs. "Section 300.530(d) clarifies that decisions regarding the extent to which services would need to be provided and the amount of services that would be necessary to enable a child with a disability to appropriately participate in the general curriculum and progress toward achieving the goals on the child's IEP may be different if the child is removed from his or her regular placement for a short period of time. For example, a child who is removed for a short period of time and who is performing at grade level may not need the same kind and amount of services to meet this standard as a child who is removed from his or her regular placement for 45 days under §300.530(g) or §300.532 and not performing at grade level." 71 Fed. Reg. 46, 716.

*Watch amounts of instruction*—In the case of *Windemere Park Charter Academy*, 111 LRP 1872 (SEA Michigan 2010), a parent challenged the services her child received while he was being disciplined for fighting. The hearing officer noted that the instructional time students typically received in the alternative program was far less than that provided in the regular campus setting. The student was provided with 75 minutes of instruction three days per week. The hearing officer upheld the school's finding that the fighting was not related to the student's disability, but found the services provided in the alternative setting were inadequate. "The student is not receiving anything near the educational services that his [IEP] determined he needed and that he was receiving prior to his expulsion." The hearing officer noted services were not provided on a daily basis, and did not cover all subjects in each instructional session. In addition, the student's IEP accommodations were not provided at the alternative program. The hearing officer thus ordered the student's services increased.

*Watch the related services and behavioral needs*—A New York hearing officer faulted a school for neglecting to provide the counseling services called for in a student's IEP when he was suspended for two months for telling a classmate he intended to bring a gun to school. *McGraw Central Sch. Dist.*, 49 IDELR 295 (SEA NY 2007). The student had a learning disability, but exhibited significant behavior problems, including skipping, fighting, and insubordination. Although the hearing officer ruled that two hours per day of tutoring were sufficient to meet the student's needs during the suspension, since he was capable of independent work, the lack of counseling failed to meet the student's significant behavioral needs. Indeed, even if the existing IEP had not called for counseling, an appropriate plan for services during expulsion might have needed the

addition of such services in order to address the student's escalating behaviors.

*Don't apply "cookie-cutter" services and monitor implementation*—When a 15-year-old with learning disabilities was expelled for possessing a BB gun at school, the district provided four hours a week of services during the expulsion, and a hearing officer found that those services were neither fully implemented, nor provided instruction in all core areas. *Montgomery County Bd. of Educ.*, 49 IDELR 119 (SEA Alabama 2007). Noting that the student normally received 50 minutes per day of special education instruction in math and 50 minutes in reading, the hearing officer found the services deficient to meet the student's needs during expulsion. In addition, the hearing officer held that the school discipline officer appeared to have determined the expulsion placement at home, and that the school had an informal policy of limiting during-expulsion services to three or four hours per week. Finally, the hearing officer also found significant gaps in the implementation of the services at home. This case demonstrates that the decision on services during removal must be individualized, and take into consideration the degree of the student's educational needs and the services normally required for FAPE.

*Providing work is not a substitute for appropriate services*—A California teenager who was expelled for smoking marijuana at school was provided no services during her 2-month expulsion, and was only sent a packet of work and told that she could call staff on the phone if she needed help with the material. *Upper Lake Union High Sch. Dist.*, 47 IDELR 89 (SEA California 2006). The hearing officer thus concluded that the school provided no educational services during expulsion, and awarded compensatory education.

*Services during accumulation of short-term removals*—IDEA requires services to be provided for any short-term removal undertaken after 10 days of short-term removals have already been imposed in a school year. 34 C.F.R. §300.530(d)(4). The services are to be determined by school personnel in consultation with one of the child's teachers, "so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP." *Id.* Services are not required for the first 10 days of short-term removals in a school year, unless the school provides educational services to nondisabled students who are similarly removed. 34 C.F.R. §300.530(d)(3). The regulation thus requires services for short-term removals over a total of ten school days in a year, but allows the services to be fashioned by school staff in consultation with one of the child's teacher, rather than through the IEP team process.

## 5. Arrange for, and conduct, a functional behavioral assessment (FBA)

*What is a Functional Behavioral Assessment (FBA)?*—The FBA requirement is related to the provision in IDEA requiring that "in developing an IEP for 'a child whose behavior impedes the child's learning,' the school district must 'consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.'" 20 U.S.C. §1414(d)(3)(B)(i). There is no language, however, on the necessary components of an FBA, or who must conduct an FBA. See *Letter to Janssen*, 51 IDELR 253 (OSERS 2008). Neither IDEA '04 nor the 2006 final regulations, moreover, contain a definition or additional guidance with respect to FBAs.

In commentary to the 1999 IDEA regulations, the USDOE indicated that in conducting an FBA, "the IEP team need to be able to address the various situation, environmental, and behavioral circumstances raised in individual cases. 64 Fed. Reg. 12,620 (1999).

The FBA is likely to include information regarding type of behaviors, frequency, severity, location, triggering factors, and previously attempted strategies, among others. There is no requirement that the FBA be conducted with the assistance of a school psychologist, or that it be part of a psychological evaluation.

*When is an FBA required?*—The general rule is that if an IDEA-eligible child is exhibiting recurring behaviors that impede their learning or the learning of others, a FBA should be conducted to help determine the potential need for a behavior intervention plan (BIP). See *Connor v. New York City Dept. of Educ.*, 109 LRP 67,343 (S.D.N.Y. 2009)(Lack of FBA not a denial of FAPE where student's anxiety and fidgeting did not impede his learning in the classroom). In addition, IDEA provisions at sections 1415(k)(1)(D) and (F) also require FBAs in the two following situations:

**For long-term removals**—In addition, IDEA requires an FBA "and behavioral intervention services and modifications" when the school undertakes a disciplinary change in placement based on a long-term (>10 consecutive school days) removal, including in situations where the student is removed due to special offenses (drugs, weapons, serious injury). 34 C.F.R. §300.530(d)(1)(ii).

**When behavior is determined to be related to disability**—Also, the regulation requires an FBA and implementation of a BIP when the school determines that a behavior is a manifestation of the child's disability in a

manifestation determination review. If a BIP had already been developed, the regulation requires a review of the BIP, with revisions as necessary to address the behavior. 34 C.F.R. §300.530(f)(1).

***What about cumulative removals totaling 10 school days in a school year?***—As with the language of IDEA '04, the final regulations do not contain any requirement to conduct the FBA/BIP process when a student has been removed a total of 10 school days in a school year. Schools, however, are cautioned that the general threshold for conducting the FBA/BIP process is when the student engages in recurring behaviors that interfere or impede their learning or that of others. As a matter of good practice, schools should use the FBA/BIP early in situations of repeated or escalating misbehavior, for both educational and legal reasons. In situations where a student has been removed 10 days within a school year, it is highly likely that the standard of recurring-behavior-that-impedes-learning has been met, and thus an FBA is needed.

***Is an FBA a required “prerequisite” to developing an appropriate BIP?***—The general notion is that the FBA data informs the development of the BIP and is the data foundation of the BIP. But, legally, a BIP could be appropriate even if a formal FBA was not conducted. In the recent case of *C. F. v. New York City Dept. of Educ.*, 57 IDELR 255 (S.D.N.Y. 2011), a federal court held that a BIP was appropriate, and addressed the pertinent behavioral issues, despite not being preceded by an FBA. The court ruled that the IEP team “had access to a substantial amount of information on C.F.'s current interfering behaviors and did draft a BIP, which reflected the behaviors and provided for the continued use of intervention strategies.” Nevertheless, it appears advisable for districts to proceed along the lines of the generally accepted practice of conducting FBAs to collect the data necessary to formulate appropriate BIPs.

***What about children who come from private schools?***—In situations where a child has been placed in private schools before enrolling in a public school, the public school IEP can rely on behavioral observations and data provided by the private school. See *A. L. v. New York City Dept. of Educ.*, 57 IDELR 69 (S.D.N.Y. 2011).

***Is an FBA an “evaluation” requiring parental consent under IDEA?***—In 2007, OSEP explained that a district that intends to conduct a functional behavioral assessment should ask whether the planned FBA will focus on the educational and behavioral needs of a specific child. If so, the FBA qualifies as an evaluation or reevaluation under Part B and therefore triggers all of the accompanying procedural safeguards, including the need to seek parental consent. If, however, the district uses an FBA as a widespread intervention tool to improve the behavior of all students in its schools, the FBA is not an evaluation and parental

consent is not necessary. *Letter to Christiansen*, 48 IDELR 161 (OSEP 2007); see also *Northwestern School Corp.*, 111 LRP 26,429 (SEA Indiana 2011)(district that used questionnaires to gather information from a kindergartner's teachers as part of an FBA should have obtained parental consent first, as this was not merely a review of existing data, but rather a collecting of new data).

*Can a parent request an independent FBA if the district has conducted its own and the parent disagrees with it?*—Apparently yes. OSERS has ruled that a parent who disagrees with an FBA that is conducted in order to develop an appropriate IEP is entitled to request an IEE at public expense. *Questions and Answers on Discipline Procedures*, 52 IDELR 231 (OSERS 2009).

## **6. Develops plan of positive behavior supports and interventions or revises existing plan**

*When to develop a behavior intervention plan?*—Generally, an IEP team should consider development of a BIP whenever an IDEA student exhibits recurring behavior problems that impede their learning or the learning of others. Indeed, the applicable regulation states that “the IEP Team must . . . in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.” 34 C.F.R. §300.324(a)(2)(i); 20 U.S.C. §1414(d)(3)(B)(i). From a practical standpoint, experience tells educators that it is best to intervene early with a plan of supports and interventions, before the behavior pattern becomes entrenched and more difficult to address.

*Lack of legal definition*—Beyond requiring that IEP teams address this “special factor,” the IDEA and its regulations are silent as to legal requirements or proper components for BIPs. The law leaves up to individual IEP teams and local best practices the guidelines for formulating plans of behavioral supports and interventions, which are known by different terminology (e.g., BIP – Behavior Intervention Plans, BSP – Behavior Support Plans),

*A point on BIP forms*—The forms that are used to develop BIPs should be flexible, and allow for the most individualized process possible. Although not necessarily inappropriate, checklist BIPs tend to “shoehorn” staff into the listed strategies, instead of encouraging innovative and uniquely individualized approaches. Moreover, many checklist items on BIP checklists include interventions and strategies that really are nothing more than traditional classroom discipline management techniques, rather than innovative ideas for individualized interventions for particular problem behaviors.

*Interplay with IEP goals and objectives*—The BIP should tie into the behavioral goals and objectives on students' IEPs. The BIP provides day-to-day strategies and techniques to address the behavior, while the objectives serve to measure progress on the behaviors in question.

### **Common BIP Problems**

1. Not taking nature of disability into account
2. Insufficient customization of consequences and reinforcers (reduces their effectiveness)
3. Inappropriate or partial implementation by instructional staff
4. Simple lists of consequences – punishment-only formats
5. Lack of meaningful positive strategies to prevent behaviors or promote acquisition of appropriate replacement behaviors
6. Failure to revise ineffective BIPs (watch for old BIPs that student now manipulates or learns to “work”)
7. Using minor modifications to regular discipline plan for complex cases (difficult cases require well thought-out and highly individualized BIPs)
8. Contingencies not clear or specific (leads to staff confusion and inconsistent implementation)
9. Insufficient contingencies (give staff a plan B if A fails)
10. Failure to address all target behaviors
11. Overreliance on checklist-based form

### **7. Addresses accumulations of short-term disciplinary removals**

The best preventive measure schools can take in IDEA disciplinary matters is to convene an IEP team meeting *before* short-term removals add up to 10 total days. This step is not required by the IDEA or its regulations, but it can mean the difference between escalating behavior and legal problems, and a stabilization of the situation. The IEP team can decide to conduct an FBA,

develop a BIP, add counseling, evaluate the student further, vary other IEP services, change the student's placement, or make other adjustments to the student's program. The idea is to take action before a disciplinary issue becomes a problem. Hearing Officers tend to have little patience for schools that take no measures prior to removing the child a total of 10 days, but then seek to defend significant removals after the 10-day mark is reached.

This proactive measure focuses the team on improving key IEP components related to behavior, rather than on exploring some intricate legal argument for engaging in additional disciplinary removals. Persisting on removing the student from school in a situation where removals are already accumulating risks alienating the student, the parent, and potentially, a hearing officer should the matter end up in a due process hearing. In addition, such a course will not result in positive behavioral change, particularly if the student likes being away from school.