

# FORGOTTEN CHILDREN: RETHINKING THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT BEHAVIOR PROVISIONS

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#### INTRODUCTION

Research consistently demonstrates that males—beginning when they are just young boys—externalize oppositional behavior to a markedly higher degree than females. In a school setting, this typically translates to male students being disciplined for even marginally unacceptable behavior more frequently, including frequent loss of educational days due to out-of-school suspensions. It should come as no surprise that these same students sometimes resort to aggressive, perhaps even violent, behavior. Yet it is likely that many of these same male students have identified disabilities under the federal Individuals with Disabilities Education Act (IDEA)<sup>1</sup>, with

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1. Individuals with Disabilities Education Act of 2004, 20 U.S.C. §1401(3)(A)(i) (2018) (identifying 13 disability categories; one is serious emotional disturbance); *See also* 34 C.F.R. § 300.8(a)(1) (2017).

Individualized Education Programs that can be personalized with sound, peer-reviewed behavioral services that can make a real difference.

Strengthening IDEA's behavior provisions could reverse the trend for these students—who demonstrate much higher percentages of engagement with law enforcement or discipline than students not covered by IDEA.<sup>2</sup> For example, students with identified disabilities under IDEA constituted 12 percent of all public school students in 2015-2016, but were referred to law enforcement or experienced school-related arrests at a rate of 28 percent.<sup>3</sup> This contrasts markedly with students without disabilities who had a lower percentage of those referrals relative to their enrollment.<sup>4</sup>

Behavior—and its impact on educational outcomes and eventually society—remains the forgotten child in efforts to meet the needs of these most emotionally vulnerable students. There is no hope that Congress—long overdue in reauthorizing IDEA—will even begin hearings or consider reauthorizing the statute in the future. This lack of direction from the federal law creates an unhealthy tension, with the current behavior provisions in IDEA much too limited either to serve our students or to inform educational practice. Both limitations have undesirable effects, resulting in unequal treatment of students and school districts being left in the dark about how to meet the legal requirements—often triggering expulsions for students and expensive litigation for the districts.

While states could remedy this problem, most do not. Currently, less than half of states define requirements beyond the superficial; the majority simply rely on the bare-bones IDEA language. This minimal approach to serious behavioral problems has reached a critical mass. Even the federal circuit courts are not in agreement with what is required, and the U.S. Supreme Court has not considered a case focusing on the IDEA behavior provisions since *Honig v. Doe* thirty years ago.<sup>5</sup>

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2. See OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., SCHOOL CLIMATE AND SAFETY (2018) (reporting data collected from 2015-2016 and stating that “the effects these school discipline policies have had on special needs students—what is referred to as the school-to-prison pipeline—contributed to Congress’s revision of IDEA in 1997 . . . .”); see also Stephanie M. Poucher, Comment, *The Road to Prison is Paved with Bad Evaluations: The Case for Functional Behavioral Assessments and Behavior Intervention Plans*, 65 AM. U.L. REV. 471, 479 (2015).

3. Office of Civil Rights, U.S. Dep't of Educ., A First Look: Key Data Highlights on Equity and Opportunity Gaps in Our Nation's Public Schools 3-4, 13 (2016) (showing the consistency of this disparity over time and the disparities that exist similarly between male students and African-American students).

4. See Poucher, *supra* note 2, at 479.

5. *Honig v. Doe*, 484 U.S. 305, 323 (1988) (declining “to infer a dangerousness

In an era when the federal government is moving to deregulate many industries—education among them—it is critical for legislatures to clarify and expand the requirements in the behavior provisions of the Individuals with Disabilities Education Act. Moving toward that goal will benefit individual students and all children in our public schools. The IDEA provides little or no guidance on how to approach these most sensitive of issues in the education setting. In short, the behavioral provisions of IDEA are not much more than a concept, which emphasize only those instances where a student has a change of placement of ten days or more, and as part of the consideration of special factors when the Individualized Education Program (IEP) team is developing the student’s program.<sup>6</sup>

This Article examines current law and proposes constructive change to deal with inequities for students with behavior challenges. Part I reviews the behavior provisions in IDEA. Part II focuses on state statutes and rules, identifying which states have taken the lead and determining where the fifty states and the District of Columbia<sup>7</sup> fall—whether they add language enhancing the requirements that the Local Education Agencies<sup>8</sup> must meet or simply rely on federal law (either with no state statutory provisions or duplicating some or all of the federal language). Part III analyzes similarities and differences in appellate court decisions of the eleven federal circuits from 2011 through 2016, when a major issue included a factual or legal determination of the Functional Behavioral Assessment (FBA) and Behavior Intervention Program (BIP) requirements. Finally, Part IV summarizes the impact on these forgotten children of IDEA, and recommends an approach

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exception” under IDEA and removing authority in most cases from schools who wished to unilaterally remove a student for indeterminate periods of time due to behaviors).

6. Individuals with Disabilities Education Act, 20 U.S.C. § 1415(k)(1)(D)-(G) (2018).

7. See *infra* Part II. In this Article, reference to “the states” will include the District of Columbia (a total of 51). Note that it is difficult to determine the degree to which the IDEA language is duplicated, as well as whether state-specific language enhances the requirements or simply restates them. The author considered a state to have duplicated federal language when it was verbatim or quite similar to federal language; likewise, the author considered a state to have enhanced protections when any more specific and quantitative or qualitative language was added, without making a determination of the level of significance.

8. 20 U.S.C. § 1415(k)(1)(D)-(G) (2018) (using the term Local Education Agency (LEA) to identify the entity responsible under the law to provide a free, appropriate public education to students with disabilities, and in the least restrictive environment, which is typically is the local school district).

for a model provision for Congress to adopt when IDEA is reauthorized.<sup>9</sup>

I. FEDERAL LAW: INDIVIDUALS WITH DISABILITIES EDUCATION ACT  
BEHAVIOR PROVISIONS

The IDEA does not define the terms “functional behavioral assessment,” “behavioral intervention services and modifications,” or “behavioral intervention plan”—all terms used in the statute and critical components of any realistic attempt to modify behavior so that a student can benefit from his or her education.<sup>10</sup> It does not even require an FBA or a BIP to be written or to be a component of the IEP, the “centerpiece”<sup>11</sup> of the educational program for a student with disabilities. It does not provide specific guidance as to the types of behaviors that trigger the need for a BIP, other than the general rule that it is needed “in the case of a child whose behavior impedes the child’s learning or that of others” and for changes in placement greater than ten days.<sup>12</sup> It does not specify the type of information the IEP team must consider in determining the BIP, other than “to the extent appropriate . . . the general education teacher is required to participate in the determination of appropriate positive behavioral interventions and supports, and other strategies . . . .”<sup>13</sup> Finally, it does not delineate who is qualified to conduct the FBA, or mandate the information that must be included in the BIP.

The only direct obligation on school districts for the FBA and behavioral intervention services and modifications comes in what is commonly referred to as the Act’s discipline statute, section 1415(k).<sup>14</sup> Thus, the IDEA mandates certain actions when school personnel move to change the

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9. IDEA was scheduled for congressional reauthorization in 2009. Congress has not begun that review and revision at the time of this publication.

10. See 20 U.S.C. § 1415(k)(1)(F)(ii); 20 U.S.C. § 1415(k)(1)(F)(i)-(ii).

11. See *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017); *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 753 (2017). See generally *Honig v. Doe*, 484 U.S. 305, 311 (1988).

12. See *Development, Review, and Revision of IEP*, 34 C.F.R. § 300.324 (2017) (emphasis added) (requiring consideration, when “appropriate,” and “the use of positive behavioral interventions and supports, and other strategies, to address that behavior”); see also 20 U.S.C. § 1415(k)(1)(C).

13. See 20 U.S.C. § 1414(d)(3)(C). Under the IDEA, the general education teacher is a mandatory IEP team member if a student spends—or may spend—time in the regular education classroom. In most cases, the general education teacher is already present at the meeting. This requirement allows him or her to participate in the discussions relating to behavior, in addition to academics. 20 U.S.C. § 1414 (d)(1)(B)(ii).

14. 20 U.S.C. § 1415(k)(1)(D)(ii); see also PETER W. D. WRIGHT & PAMELA DARR WRIGHT, *IDEA 2004*, 118, n. 155 (1st ed. 2005).

placement of a student protected under IDEA for more than ten days. Whether or not the behavior is found to be a manifestation of the disability, the student has a right to “receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior *violations* so that it does not recur.”<sup>15</sup>

If the IEP team has determined that the behavior was a manifestation of the disability, the IEP team must “conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change of placement . . .”<sup>16</sup> In the case of a student under this section who already has a behavioral intervention plan as part of the IEP, then the IEP team must “. . . review the behavioral intervention plan . . . and modify it, as necessary, to address the behavior.”<sup>17</sup>

These four short provisions constitute the entire requirement in the IDEA statute for dealing directly with serious behavior problems that have arisen. What the terms “functional behavioral assessment” or “behavioral intervention plan” mean, and how they are to be implemented, is left to the individual states. In reviewing the approach of the states, one notices certain patterns. This Article identifies three categories of defining and implementing the IDEA: (1) more expansive language beyond IDEA requirements to a greater or lesser degree; (2) no language at all, thus defaulting to the IDEA requirements; and (3) language that generally parallels or repeats the IDEA language. Until July of 2013, California had the most specific requirements protecting students with serious behavioral problems.<sup>18</sup>

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15. § 1415(k)(1)(D)(ii) (emphasis added).

16. *Id.* at § 1415(k)(1)(F)(i).

17. *See id.* at § 1415(k)(1)(F)(ii). In discussing the failure of identifying behavior interventions without appropriate assessments and discussion by the IEP team, Dr. Dieterich and Dr. Villani note: “Furthermore, the new regulations are equally ambiguous and provide little direction for an IEP team in the process of completing an FBA or BIP.” Cynthia A. Dieterich & Christine J. Villani, *Functional Behavioral Assessment: Process Without Procedure*, 2000 B.Y.U. EDUC. & L.J. 209, 210 (2000). *See also* Mark D. Shriver, Cynthia M. Anderson & Briley Proctor, *Evaluating the Validity of Functional Behavior Assessment*, 30 SCH. PSYCHOL. REV. 180 (2001) (comparing the functional behavior assessment and traditional psychological assessment).

18. *See* A.B. 86, 2013-2014 Reg. Sess., ch. 48 (Cal. 2013) (repealing sections of the law). Note that up to that time, California had no appellate decisions dealing primarily with the FBA or BIP, which at least suggests that the concrete language and requirements had a positive impact as to what the law required.

## II. STATE STATUTES AND RULES

A. California—*The Hughes Bill*

California's Hughes Bill<sup>19</sup>—once considered the country's strongest enactment for students with serious behavioral problems – was repealed by the state's Legislature in July 2013 with Assembly Bill (AB) 86,<sup>20</sup> an education omnibus trailer bill. AB 86 revised California Education Code sections 56520-56525 and repealed California's implementing regulations for those sections.<sup>21</sup> The change became effective immediately; the “new” language mirrored federal law, which is basic at best, and retains none of the requirements that previously guided California's school districts and parents.

The revised code states that the intention of AB 86 was “that children exhibiting serious behavioral challenges receive timely and appropriate assessments and positive supports and interventions in accordance with the federal IDEA . . . and implementing regulations.”<sup>22</sup> With such a massive repeal of requirements, many child advocates questioned the reasoning behind this rationale, since the statutory repeal was the result of years of lobbying by California's school districts, school boards, and affiliated organizations. Those arguing for repeal of the Hughes Bill maintained that the state's statute and regulations were an unfunded mandate, and thus should not be required of school districts absent specific funding for the services.<sup>23</sup>

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19. California A.B. 2586 (Hughes) (Chapter 959, Statutes of 1990) (requiring “the development and implementation of positive BIPs for pupils with disabilities who exhibit serious behavioral problems,” implementing regulations that approved behavioral emergency procedures be outlined in the Special Education Local Plan Area (SELPA) plan, and stating that “behavioral emergency interventions shall not be used as a substitute for behavioral intervention plans”); *see also* A.B. 2586, 1990 Leg., Reg. Sess. (Cal. 1990), *repealed by* A.B. 86, 2013-2014 Reg. Sess., ch. 48, §42(b) (Cal. 2013).

20. A.B. 86, 2013-2014 Reg. Sess., ch. 48 (Cal. 2013) (repealing Assem. Bill 2586, 1990 Leg., Reg. Sess. (Cal. 1990)).

21. *Id.*; *see also* A.B. 2586 (Hughes) (Chapter 959, Statutes of 1990); CAL. CODE REGS. Title 5, § 3052 (2016).

22. CAL. EDUC. CODE § 56520(b)(1) (Deering 2016).

23. *See* California AB 1610 (Committee on Budget) (Chapter 724, Statutes of 2010) (requiring districts to first fund Behavior Intervention Plans before using funding for any other special education services); *see also* Fagen, Friedman & Fulfrost, *Post-“Hughes Bill” Behavioral Interventions and Reimbursements Claims*, FAGEN FRIEDMAN & FULFROST (Aug. 2013), <http://www.f3law.com/newsflash.php?nf=397> (reporting that in April 2013, the state's Commission on State Mandates adopted a Statement of Decision for a reasonable reimbursement methodology to school districts that had created behavior intervention plans under the state's requirement in effect at the time); *see also* Laurie

According to a California State Senate Floor analysis, the intent of these changes was to modify “the Behavioral Intervention Plan mandate to align it more closely with federal law and reduce unnecessary costs, while maintaining important protection for students with disabilities.”<sup>24</sup> But without statutory and regulatory guidance, each school district in the state now is left to determine what constitutes an acceptable level of performance—by its nature an unequal system. Not only is variation highly likely, the lack of a uniform process puts a burden on school staff, who may or may not have the benefit of training in administration of these assessments. Parent advocates argue that the revisions eliminated best practice and critical protections, and left them with the minimal federal language that leaves school districts and parents with a greater likelihood of conflict. Prior to the repeal of the Hughes Bill, California students with serious behavior issues—whether or not the student had been disciplined—had a right to a comprehensive, scientific approach to their needs in the school environment.<sup>25</sup> For example, California regulations required a Functional Analysis Assessment (FAA) whenever the IEP team found that services (“instructional/behavioral approaches”) in the IEP intended to curb behavior had been ineffective.<sup>26</sup> The FAA had to be conducted by, or be under the supervision of, a person who had documented training in behavior analysis with an emphasis on positive behavior interventions.<sup>27</sup> After completion of the FAA, districts convening an IEP meeting to review the assessment with the parent had to expand the meeting to include a behavioral intervention case manager<sup>28</sup> (BICM) with documented training in behavior analysis, including positive behavioral interventions.<sup>29</sup>

Properly conducted by a trained professional, the FAA provided data that

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Weidner, *School Agencies Victorious in 20-year Battle for Special Ed Reimbursements*, CAL. SCH. BD. ASS'N, (Jan. 29, 2013), [https://www.csba.org/Newsroom/PressReleases/2013/012913\\_COSM.aspx](https://www.csba.org/Newsroom/PressReleases/2013/012913_COSM.aspx).

24. S. Rules Committee, Assem. Bill 86, Senate Rules Committee, Office of Senate Floor Analyses, Third Reading, #6, [http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab\\_0051-0100/ab\\_86\\_cfa\\_20130614\\_132415\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0051-0100/ab_86_cfa_20130614_132415_sen_floor.html).

25. A.B. 2586, 1990 Leg., Reg. Sess. (Cal. 1990), *repealed by* A.B. 86, 2013-2014 Reg. Sess., ch. 48 (Cal. 2013).

26. *See* CAL. CODE REGS. Title 5, § 3052(b) (2013) (stating that an FAA “shall occur after the IEP Team finds that the instructional/behavioral approaches specified in the student’s IEP have been ineffective”).

27. *See* A.B. 86, 2013-2014 Reg. Sess., ch. 48 (Cal. 2013) (repealing section 3052(b)).

28. *See* CAL. CODE REGS. Title 5, § 3052.

29. §§ 3001(e), § 3052(a)(1).

was critical to developing a BIP that had any hope of success. The repeal of this requirement along with new language meant California law simply restated the federal language: after a determination that behavior or conduct was a manifestation of the student's disability, "the IEP team shall conduct a functional behavior assessment, and implement a behavioral intervention plan for such child" provided the district had not already conducted the FBA; if it had, then the district must review the BIP and modify it as necessary.<sup>30</sup> By repealing California's more rigorous requirements, the Legislature eliminated the requirement for districts to use data to regularly evaluate the BIP's effectiveness, along with language proscribing the method for modifications outside an IEP team meeting, contingency BIPs, and additional changes.<sup>31</sup> Previously, the BIP was specifically defined,<sup>32</sup> now, California law contains no such definition (similar to the federal law's lack of specificity). The repeal also eliminated the requirement of highly trained staff for data gathering and IEP development; BICMs were eliminated, and the role of board certified behavior analysts (BCBAs) changed.<sup>33</sup>

California's previous regulatory requirements for schools dealing with the serious behavioral problems of students with disabilities were extensive, specific and demanding. Without these requirements, California joins states that now outright align their laws solely with the federal requirements<sup>34</sup> (statute and regulations) or list partial requirements and thus default into federal law.<sup>35</sup> Since the federal law is largely silent on the requirements for

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30. 20 U.S.C. § 1415(k)(1)(F)(i)-(ii).

31. See 34 C.F.R. § 300.320 (2007); see also 34 C.F.R. § 300.323 (2006); CAL. EDUC. CODE § 56340 (2008).

32. A.B. 2586, 1990 Leg., Reg. Sess. (Cal. 1990) (defining the BIP as a written document which is developed when the individual exhibits a serious behavioral problem that significantly interferes with the implementation of the goals and objectives of the individual's IEP); CAL. CODE REGS. Title 5, § 3001(g) (2014) (repealing A.B. 86, 2013-2014 Leg. Reg. Sess., ch. 48 (Cal. 2013)).

33. A.B. Bill 86, 2013-2014 Reg. Sess., ch. 48 (Cal. 2013).

34. Based on the data compiled for this Article, which included a review of all 50 states and the District of Columbia, thirteen states merely repeat the federal language. These states include Arkansas, California, Hawaii, Kentucky, Mississippi, Montana, North Carolina, North Dakota, Oklahoma, Oregon, Tennessee, Vermont and Virginia.

35. See Perry A. Zirkel, *State Special Education Laws for Functional Behavioral Assessment and Behavior Intervention Plans*, 36 BEHAV. DISORDERS 262, 268-69 (2011) (listing the seventeen states that Zirkel found use some of the federal language: Alabama, Alaska, Arizona, Colorado, Connecticut, Idaho, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nebraska, Ohio, Rhode Island, South Dakota, Wisconsin and Wyoming) [hereinafter *State Special Education Laws*].

dealing with behavior under IDEA, states that rely on IDEA alone may use approaches that vary widely. Without such guidance proscribing the expected actions required by the school district, school staff may evaluate behavior and create a BIP in myriad ways, leading to variance even among districts within a single state, which is then magnified throughout the country.

### *B. State Responses to IDEA Behavior Provisions*

Although many states fall extremely short in providing their own requirements, or even clear direction for the federally-required FBA and BIP, slightly more than 40 percent of states currently provide a more expansive approach to the needs of their students.<sup>36</sup> These include Delaware, District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Maine, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Pennsylvania, South Carolina, Texas, Utah, Washington, and West Virginia.

#### *1. States with More Extensive Language than the Federal IDEA*

##### *a. New York*

Among states that add to the federal requirements, New York has arguably the most well-developed regulatory scheme to support students with behavioral challenges. It begins with language that makes clear the factors which must be considered, requiring school districts to conduct FBAs “for a student whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, *behavioral and emotional* factors which contribute to the suspected disabilities.”<sup>37</sup> Similar to New Hampshire’s provision discussed below, New York’s language appears to reinforce the IDEA provision that assessment is a precursor to development of an IEP that offers free appropriate public education (FAPE),<sup>38</sup> even if the

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36. There are various methods to analyzing the statutory language in the 50 states and Washington, D.C. This Article divides states into three categories: 1) states with more extensive language than the federal IDEA; 2) states with “mirror language” that simply repeats the federal law with some minor, helpful additions; and 3) states with some of the federal language or no language specific to the FBA and BIP. Determining how to characterize the categories varies among authors. See *State Special Education Laws*, *supra* note 35, at 264, 266; see also Perry A. Zirkel, *An Update of Judicial Rulings Specific to FBAs or BIPs Under the IDEA and Corollary State Laws*, 51 J. SPECIAL EDUC. 50, 54 (2017).

37. N.Y. COMP. CODES R. & REGS. Title 8, § 200.4(b)(1)(v) (2016) (emphasis added).

38. See 20 U.S.C. § 1414(d)(3)(B)(i) (2004).

need arises from a mental health diagnosis or emotional disturbance.

New York's Regulations of the Commissioner require the school to base its FBA on data obtained from "direct observation of the student, information from the student, the student's teacher(s) and/or related service providers(s), a review of available data and information from the student's record, and other sources including any relevant information provided by the student's parent."<sup>39</sup> Further, New York requires that "the FBA shall not be based solely on the student's history of presenting problem behaviors."<sup>40</sup> The emphasis on observations and parent input is helpful, but it assures validity when coupled with the other provisions, mandating the contents of the FBA detail a "baseline measure of the problem behavior, including the frequency, duration, and intensity and/or latency" of the student's actions in relation to different "activities, settings, people, and times of the day."<sup>41</sup> The rules require "concrete terms" and an "identification of the contextual factors," leading to development of a hypothesis.<sup>42</sup> All of these requirements provide a framework for a more objective, data-driven analysis of the problem behaviors that informs the creation of the BIP, as New York also requires the BIP to be based on the FBA results.<sup>43</sup> Additionally, the BIP must use the baseline measure of the behavior, collected for the FBA, to measure the progress of the student, and the effectiveness of the intervention.<sup>44</sup> The BIP must include "strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s)," utilizing a schedule to measure the effectiveness of the intervention.<sup>45</sup> While not as expansive as California's previous Hughes Bill, New York's regulatory scheme captures the best practices espoused by behaviorists and psychologists, thus setting up its school IEP teams for success.<sup>46</sup>

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39. N.Y. COMP. CODES R. & REGS. Title 8, § 200.; *id.* § 200.22(a)(2).

40. *Id.* § 200.22(a)(2).

41. *Id.* § 200.22(4)(i)(3) (stating language similar to California's repealed language).

42. *Id.* § 200.1(r).

43. *Id.* § 200.22(b)(1)(i).

44. *Id.* § 200.22(b)(4)(i-iii) (employing language similar to what is commonly called the "ABC" approach—antecedents, behaviors and consequences).

45. *Id.*

46. *See generally* A.B. 2586 (Hughes) (Chapter 959, Statutes of 1990).

*b. Delaware*

Delaware is another state that has a comprehensive statutory and regulatory approach to behavioral concerns, having adopted specific requirements in excess of the federal requirement. Beginning with identification of the presenting behavioral problem or issue, Delaware requires a description in “objective, measurable terms that focus on alterable characteristics of the individual and the environment,” and “examined through systematic data collection . . . defined in a problem statement that describes the differences between the demands of the educational setting and the individual’s performance.”<sup>47</sup> Delaware thus requires data collection and analysis—something the federal law does not require and which most, if not all, behavioral experts believe is essential. The IEP team must also develop a problem statement that defines the behavioral issues the student demonstrates.<sup>48</sup>

Similar to New York, Delaware has a data collection and analysis requirement as part of the FBA. But Delaware goes a step further, providing guidance for the direction of the inquiry, when it defines the assessment as one that contains “objective, measurable terms that focus on alterable characteristics of the individual and the environment.”<sup>49</sup> In other words, Delaware mandates an individualized approach to behavioral issues, one that is objective (in a scientific sense) and measurable (easily understood by a layperson). The state expects its school districts to use a methodical, data-based process for examining all that is known about the presenting problem or behaviors of concern to better identify interventions that have a high likelihood of success.<sup>50</sup> Data collection procedures must be “individually tailored, valid for the concern addressed, . . . reliable, and allow for frequent and repeated measurement of intervention effectiveness.”<sup>51</sup> Delaware exceeds New York’s requirements in this regard by requiring frequent data collection, while New York only requires that the BIP include a schedule to measure effectiveness.

The state’s approach does not end with data collection and subsequent measurement, but also includes key elements of intervention design, implementation, and progress monitoring. Interventions must be based on analysis of the data collected, a defined problem and—most importantly—

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47. See 14 DEL. ADMIN. CODE § 923.11.9.1.1 (2017).

48. See *id.* §§ 923.11.9.1.1-923.11.9.1.2.

49. See *id.*

50. See *id.* §§ 923.11.9.1.1-923.11.9.1.3.

51. See *id.* § 923.11.9.1.2.

input from parents and those qualified to make “professional judgments.”<sup>52</sup>

Thus, Delaware’s approach—sound collection of data, review of data for targeted interventions, and adjustments as needed—is individualized, but also easy easily understood by teachers and parents.<sup>53</sup> The more formal code language requires “[s]ystematic progress monitoring with regular and frequent data collection, analysis of individual performance across time, and modification of interventions as frequently as necessary based on systematic progress monitoring data.”<sup>54</sup> Determining effectiveness requires analyzing the individual student’s performance and making decisions based on a comparison of initial levels (typically called baseline data) with rates of progress.<sup>55</sup> While Delaware’s approach as a whole does not reach the extent and specificity of California’s now repealed statute and regulations<sup>56</sup> or New York’s current regulations,<sup>57</sup> it does presently stand out among states as one that provides a comprehensive, scientifically sound approach to the challenge of dealing with difficult behaviors in the educational setting, and it does so with data collection and program development in a fashion that provides concrete guidance for the school’s staff.<sup>58</sup>

### *c. Georgia*

Similar to Delaware but not as specific, Georgia law defines the FBA and BIP.<sup>59</sup> According to the Georgia statute, the BIP is a “plan for a child with disabilities included in the IEP when appropriate, which uses positive behavior interventions, supports and other strategies to address challenging behaviors and enables the child to learn socially appropriate and responsible behavior in school and/or educational settings.”<sup>60</sup> The FBA is defined as:

A systematic process for defining a child’s specific behavior and determining the reason why (function or purpose) the behavior is

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52. *See id.* § 923.11.9.1.3 (including language suggesting that behavioral experts, including therapists and clinical psychologists, should be involved in development of interventions).

53. *See*

54. *See id.* § 923.11.9.1.4.

55. *Id.* § 923.923511.9.1.5 (evaluating intervention effects).

56. *See* A.B. 2586, 1990 Leg., Reg. Sess., ch. 959, (Cal. 1990); *see also* CAL. CODE REGS. Title 5 § 3001(d)-(g); CAL. CODE REGS. Title 5 § 3052 (2013).

57. *See* N.Y. COMP. CODES R. & REGS. Title 8 § 200.1(r) (2000).

58. *See* 14 DEL. ADMIN. CODE § 923.11.9 .1.3 (2011); *see also* §§ 923.11.9.1.5; § 923.11.9.2.

59. *See generally* GA. COMP. R. & REGS. § 160-4-7-.21(7), (20) (2007).

60. GA. COMP. R. & REGS. § 160-4-7-.21(7) (2007).

occurring. The FBA process includes examination of the contextual variables (antecedents and consequences) of the behavior, environmental components, and other information related to the behavior. The purpose of conducting an FBA is to determine whether a Behavioral Intervention Plan should be developed.<sup>61</sup>

*d. Florida*

Florida takes a more nuanced and much less delineated approach, requiring an FBA as part of a determination of eligibility<sup>62</sup> under IDEA.<sup>63</sup> This approach has the benefit of ensuring that an initial assessment for special education eligibility always includes the social-emotional needs. Under Florida law, “[t]he FBA must identify the specific behavior(s) of concern, [and] conditions under which the behavior is most and least likely to occur.”<sup>64</sup> When an FBA has been completed as part of a general education intervention, it may qualify, but only if the FBA conforms to the requirements.<sup>65</sup> Florida law requires some basic elements in the FBA as well: documentation of the success or failure of general education interventions, a social/developmental history, a psychological evaluation,<sup>66</sup> and a review of educational data that considers the relationship between academic performance and the emotional/behavioral disability.<sup>67</sup> It also adds one provision to the social/developmental history that is far from universally included, but can certainly be helpful: consideration of actions outside the educational environment.<sup>68</sup>

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61. *See id.* § 160-4-7-.21(20).

62. *See* FLA. ADMIN. CODE ANN. r. § 6A-6.03016(3)(a) (2009).

63. *See* 34 C.F.R. § 300.304(c)(4) (2017) (stating school districts must assess all areas of suspected disability).

64. *See* FLA. ADMIN. CODE ANN. r. § 6A-6.03016(3)(a) (2009) (focusing on the occurrence of behaviors, without giving much attention to when behavior is unlikely to occur).

65. *Id.*

66. *Id.* § 6A-6.03016(3)(d) (stating the evaluation must include behavioral observations and interview data, an assessment of emotional and behavioral functioning, and possibly information on developmental functioning and skills as appropriate).

67. *Id.* § 6A-6.03016(3)(e).

68. *Id.* § 6A-6.03016(3)(c). Although actions outside the educational environment are not the responsibility of the local education agency (LEA), this type of additional information can be important in determining the full picture of a student’s challenges. But note that parents should share this information carefully, as sometimes it can be used by an LEA incorrectly to draw conclusions as to what can be expected at school, or of the seriousness of the disability.

*e. Illinois*

Illinois, likewise, requires behavioral interventions to be based on behavioral science, and defines the FBA requirements much more specifically than federal law.<sup>69</sup> When a student requires a BIP, the IEP must take into account the findings of the FBA (as part of the federal requirement), a summary of prior behavioral interventions implemented or recommended, identification of the measurable behavioral changes expected, methods of evaluation, a schedule for review of effectiveness, provisions for communicating with the parents about interventions, and coordination between school and home-based interventions.<sup>70</sup> While best practice among mental health professionals and behavioral experts suggests the importance of a consistent plan implemented for the same behaviors and with the same fidelity at school as at home, parents cannot be required to share home information or to participate in this approach.<sup>71</sup> Illinois also requires the IEP team to include a person knowledgeable about positive behavior strategies.<sup>72</sup> Despite the statute's specificity in comparison to the federal statute, this latter requirement is such a low standard that it is unlikely to establish procedures that will be uniformly followed throughout the state. Every special education or resource teacher presumably is knowledgeable, with some type of training in behavior strategies, however minimal, because even a single brief training would satisfy the vaguely worded requirement. Additionally, since the IDEA already has a requirement that the IEP team include "an individual who can interpret the instructional implications of evaluation results,"<sup>73</sup> one person could fill both roles: a person knowledgeable about positive behavior strategies (required by state law) and a person who can interpret the instructional implications of evaluation results (required under IDEA).

*f. Indiana*

While Indiana's law includes requirements for a student's FBA, it does not reach the specificity of New York's regulatory scheme.<sup>74</sup> Indiana defines the FBA as a "process that uses data to identify patterns in the student's

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69. ILL. ADMIN. CODE Title 23, § 226.75 (2016).

70. *Id.* § 226.230(b).

71. *Id.* § 226.230(b)(6).

72. *Id.* at § 226.230(b).

73. *See* 20 U.S.C. § 1414 (d)(1)(B)(v) (2004).

74. *See* 511 IND. ADMIN. CODE § 7-32-41 (2008).

behavior and the purpose or function of the behavior for the student.”<sup>75</sup> The inclusion of the word “patterns” suggests that the data gathering should go deeper, seeking out possible patterns and similar behaviors that could inform the IEP team members in developing the BIP. Without such additional statutory language, a school district may well believe that it is meeting the federal requirement to assess, when it may be arguable whether there is sufficient information to determine specific remedial measures that could be effective for the student. There seems to be flexibility in the state law as to whether Indiana considers this an “educational evaluation,” which then would require parental consent.<sup>76</sup>

The state’s BIP requirements are slightly more developed. Indiana incorporates some additional procedures into its BIP definition, such as maximizing “consistency of implementation across people and settings in which the student is involved.”<sup>77</sup> However, the administrative code has an interesting addition that seems to minimize the relevance of the statutory language: “[t]he IEP can serve as the behavioral intervention plan as long as the documentation the parent receives meets all the requirements in this section.”<sup>78</sup> This last section would permit an IEP team to believe it has met the law so long as the IEP language includes the basics, which could be possibly a recipe for confusion.

There are some noticeable differences between the FBA and the BIP requirements of Indiana and best practices. First, Indiana does not specify how data should be collected. Additionally, there is no requirement that a baseline of the student’s behavior be established for future measurement and comparison. Further, Indiana has neither a requirement for a reassessment FBA nor for an updated BIP, other than standard language for any measurable annual goal in an IEP.

*g. Iowa*

Iowa similarly does not expand upon the FBA but approaches the IDEA requirement by focusing on a methodical problem-solving process for any education-related problem.<sup>79</sup> At a minimum, Iowa requires these components: a description of the problem in objective, measurable terms that

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75. *Id.*

76. *See id.*; *see also* § *id.* 7-40-3(b)(3) (reflecting that flexibility is only meant if the school reviews existing data).

77. *See* § 7-32-10 (a)(3)(B).

78. *Id.* § 7-32-10 (b).

79. IOWA ADMIN. CODE r. § 281-41.313(1) (2010).

require examination of the individual and environment through systematic data collection; defining in a problem statement the degree of discrepancy between the educational setting and the student's performance; data collection and problem analysis, with identification of interventions that have a high likelihood of success; data used to plan and monitor interventions relevant to the presenting problem or behaviors of concern and collected in multiple settings using multiple sources of information and multiple data collection methods; and, most importantly, data that is valid, reliable, and allows for frequent and repeated measurement of intervention effectiveness.<sup>80</sup> The last criteria—repeated measurement of intervention effectiveness—is critical in a functioning BIP. Without consistent measurement, the BIP may simply continue without any real progress, absent a serious incident. In this regard, Iowa far exceeds the federal standard, and in fact establishes one of the most important needs: regular measurements followed by new data and interventions as needed by analysis of that data.

## *2. States with Language that Mirrors Federal Law with Minor, Helpful Additions*

### *a. Kansas*

The Kansas code language is very similar to federal language, but it does add a requirement that the BIP be incorporated into the student's IEP. Such incorporation ensures that the BIP becomes a necessary element of a FAPE for that student.<sup>81</sup>

### *b. Maine*

Maine's provisions, while not lengthy, define the FBA and provide direction to LEAs. Its FBA definition discusses the use of direct and indirect assessments, delineates an expectation that the definition of behavior be in concrete terms, requires affective as well as cognitive factors that influence the challenging behaviors, and requires a hypothesis noting the conditions when a behavior occurs and probable consequences that maintain the behavior.<sup>82</sup> The Maine statute disappoints in that it only suggests, rather than requires, that the FBA assessment results be used to develop Positive Reinforcement Interventions and Supports. However, the state's definition

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80. *Id.* at § 281-41.313(3) (stating these procedures under the heading "Systematic problem-solving process").

81. *See* KAN. ADMIN. REGS. § 91-40-18 (explaining that FAPE is the standard by which courts measure whether a school district has met its duty to the student).

82. *See* 05-071-101 ME. CODE R. § 2 (LexisNexis 2015).

of an FBA suggests that the documentation of the assessment becomes part of the child's educational record and is provided to the IEP team.<sup>83</sup> Use of the permissive "may" weakens what is otherwise a reasoned approach to fleshing out the federal FBA requirement. Perhaps to offset this, the Maine code has very specific language in reference to BCBA's, which describes how the BCBA should approach assessments and interventions.<sup>84</sup>

*c. Nevada*

Nevada's FBA definition is minimal and seems to be included as a best practices model for assessors. The language follows a more traditional and thorough scientific approach. For example, it must include systematic observation with data for frequency, duration, and intensity of the challenging behavior; regular observation of the antecedent event(s);<sup>85</sup> identification of consequences (positive or negative reinforcement); analysis of the settings where the behavior occurs; a review of records for health and medical factors; and a review of the history of the behavior to determine which, if any, previous interventions were at least partially effective.<sup>86</sup>

*d. New Hampshire*

New Hampshire arguably has the shortest FBA definition—"an assessment of a student's behavior"<sup>87</sup>—but one of the stronger intents, requiring schools to use the results of a behavioral assessment as the foundation of *any* program developed to address a student's behavioral needs.<sup>88</sup> While this requirement may be presumed necessary under the IDEA in most cases and likely is voluntarily followed in many others, no other state has such specific language to use the assessment in this manner.

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83. *Id.* § 2(27) (2015).

84. *Id.* § 11. *See also* C.M.R. 10-144-101, ch. II, § 28.08-2(B)(6) (Me. 1983) (listing a BCBA as one of the direct care staff authorized in the requirement for behavioral health professionals providing specialized services); C.M.R. 14-197-005, ch. 5, § 5.05 *et seq.* (allowing a Board Certified Behavior Analyst to develop a Behavior Management Plan, as well as including the BCBA as one of the assessors of an updated functional assessment). However, Section 5.05 applies to Mental Health professionals in other settings and is not part of the special education provisions.

85. NEV. ADMIN. CODE §§ 388.386, 385.080, 388.470, 388520 (2000) (providing that the antecedent event includes environmental, social and other factors that precede the targeted behavior, so as to determine the "why" – the function the behavior serves for the student (request or protest)).

86. *Id.* § 388.386 (2000).

87. N.H. CODE ADMIN. R. ANN. ED. 1102.02(t) (2008).

88. *Id.* 1113.04(a) (2008).

However, as compared to other states such as Georgia and Illinois, there is no language defining it further or adding requirements for the FBA.

*e. New Jersey*

New Jersey adds just a bit of substance. It requires that the FBA results be recorded in “a statement regarding relevant behavior of the student, either reported or observed and the relationship of that behavior to the student’s academic functioning.”<sup>89</sup> This addition is somewhat misleading because there are great differences between behavior that is reported in any type of formal manner and behavior that is simply observed. The latter could be as simple as a teacher or staff comment of a solitary observation, hardly determinant of any relationship to functioning in the classroom or on the playground.

*f. New Mexico*

New Mexico is somewhat of an anomaly. It is silent on the FBA, but does provide guidance for behavior management services in the school setting, although the guidance simply confirms that such “services are one of many supplementary aids and services that may benefit a student with a disability under the IDEA.”<sup>90</sup> It also has a relatively minor addition, focusing solely on students with autism. For those students, however, the language is quite helpful: New Mexico mandates the IEP team to consider *positive* behavior support strategies based on *relevant* information, including

antecedent manipulation, replacement behaviors, reinforcement strategies, and data-based decisions; and a behavioral intervention plan focusing on positive behavior supports and developed from a functional behavioral assessment that uses current data related to target behaviors and addresses behavioral programming across home, school, and community-based settings.<sup>91</sup>

*g. Pennsylvania*

Pennsylvania’s statute begins with a more general but proactive approach

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89. N.J. ADMIN. CODE § 6A:14-3.4(h)(2) (2007).

90. Memorandum from State of N.M., Public Education Department Pub. Educ. Dep’t, *Behavior Management Services in the School Setting* (Sept. 1, 2015).

91. N.M. CODE R. § 6.31.2.11 (LexisNexis 2007) (describing the use of positive behavior support, which is important and comports with the spirit of IDEA in that behavior as a disability needs positive strategies, not punitive measures, to be effective.) Additionally, New Mexico incorporates many best practices into its statute, including data-based decisions, replacement behaviors, and current data across all settings. *Id.*

using screenings, allowing a district to develop a program of early intervening services.<sup>92</sup> For Pennsylvania districts meeting criteria relating to disproportionality,<sup>93</sup> the district *may* develop a program; but if so, it *must* include a systematic observation in schools where the student displays the difficulty.<sup>94</sup> The state reaches back to the FBA when discussing positive behavior support, requiring that programs and plans be based on a functional analysis of behavior. Pennsylvania adds some minimal language to the end product, called the behavior support program, mandating that positive, rather than negative, measures form the basis of the program.<sup>95</sup> The statute defines behavior support as the development, change, and maintenance of selected behaviors through the systematic application of behavior change techniques.<sup>96</sup> Further, such plans must include methods that utilize positive reinforcement and other positive techniques to shape a student's or eligible young child's behavior, ranging from the use of positive verbal statements as a reward for good behavior to specific tangible rewards.<sup>97</sup>

Such specific language for positive reinforcement is unusual; however, even when all team members agree that the support should incorporate positive techniques, without any specific direction, it is highly unlikely that this is consistent among the state's districts. School staff and parents alike realize that the development of positive behavioral supports, geared to the actions of an individual student, is time consuming and expensive; the teacher or aide must focus on an individual student, often for weeks or longer, attempting various strategies until one or more are successful.

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92. See 22 PA. CODE § 14.122 (2001).

93. See 34 C.F.R. § 300.646 (2017) (“Each State that receives assistance under Part B of the Act . . . must provide for the collection and examination of data to determine if significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State with respect to (1) The identification of children as children with disabilities, including the identification of children as children with disabilities in accordance with a particular impairment described in section 602(3) of the Act; (2) The placement in particular educational settings of these children; and (3) The incidence, duration, and type of disciplinary actions, including suspensions and expulsions.”); see also Denise Marshall, *Delay in Implementing IDEA Regulations Harms Children*, COUNCIL OF PARENT ATTORNEYS & ADVOCATES (June 29, 2018), <https://www.copaa.org/news/407271/Delay-in-Implementing-IDEA-Regulations-Harms-Children.htm> (arguing that the delay “is a direct offense to children, especially children of color”).

94. See C.F.R. § 14.122(c)(3) (2001) (emphasis added).

95. See *id.* § 14.133 (emphasizing positive measures similar to New Mexico's statute).

96. *Id.*

97. *Id.*; see also § 14.104(b)(6) (2001).

Perhaps that is one reason why the statute focuses on the positive, while the practice at school lends itself to more punitive responses, using the rationale of the “disciplinary” process that applies to all students.

*h. South Carolina*

South Carolina differentiates itself with a requirement that examiners “should have completed training that is directly relevant to the assessment procedure being conducted.”<sup>98</sup> Further, the state expands on requirements for assessment procedures, including a requirement that “methods of evaluation are sufficiently comprehensive . . . whether or not they are commonly linked to the category in which the student is suspected of having a disability. This means that the team will need to develop data on behavior regardless of the disability category, and look to the function of the behavior to develop appropriate interventions.”<sup>99</sup> Typically, this should occur through a functional behavioral assessment. The state even defines scientifically based research as “interventions or supports that must be accepted by a peer-reviewed journal or approved by a panel of independent experts through a comparably rigorous, objective, and scientific review.”<sup>100</sup> This portion of the state’s law comports with best practices, but is rare in the education setting.

*i. Texas*

The Texas language is quite similar to New Mexico, but at least “to the extent practicable,” directs its schools to consider strategies “based on peer-reviewed, research-based educational programming practices.”<sup>101</sup> While the goal of peer-reviewed programming was only added to the IDEA in 2004, it remains the gold standard. When relied upon, it provides strong support for a district’s chosen strategies. Further, the state expects these strategies

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98. S.C. CODE ANN. REGS. 43-243.1(A) (2018).

99. See *What are Functional Assessments and the Four Main Functions of Behavior?* NORTH SHORE PEDIATRIC THERAPY (August 31, 2015), <https://nspt4kids.com/therapy/what-are-functional-assessments-and-the-four-main-functions-of-behavior/> (stating that “[t]he function of behavior is the reason people behave in a certain way,” and includes escape/avoidance, attention seeking, seeking access to materials, and sensory stimulation).

100. Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,539 (Aug. 14, 2006) (codified at 34 C.F.R. § 300) (quoting the Federal Register, Aug. 14, 2006, at 46683).

101. 19 TEX. ADMIN. CODE § 89.1055 (2017).

“when needed, addressed in the IEP.”<sup>102</sup> Although the addition of the words “when needed” weaken the language from a strict requirement to a preference, nevertheless the state brings the language back to the IEP and its protections.

*j. Utah*

Utah mirrors federal law, but then fleshes out the requirements for its students, with thorough definitions that may be used in various settings and for a range of ages. The Utah State Board of Education (USBE) rules are, in effect, simply a reiteration of federal law:

A student with a disability who is removed from the student’s current placement must “[c]ontinue 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 behavior assessment, and behavior intervention services and modifications that are designed to address the behavior violation so that it does not recur.”<sup>103</sup>

Personnel must look to the definition most closely analogous with the development of behavior intervention services. The Administrative Code definition states that a Functional Behavior Assessment means “a written document prepared by the Provider behavior specialist to determine why problems occur and develop effective interventions. The results of the assessment are a clear description of the problem, situations that predict when the problem will occur, consequences that maintain the problem, and a summary statement or hypothesis.”<sup>104</sup> When the FBA is approached in this manner, it “should produce three main results: a. Hypothesis statements that have: (1) Operational definitions of the problem behavior, (2) Descriptions of the antecedent events that reliably predict occurrence and non-occurrence, and (3) Descriptions of the consequent events that maintain the behavior; b. Direct observation data supporting these hypotheses; and c. A behavioral support and intervention plan.”<sup>105</sup>

Further, Utah expects “a systematic process of identifying problem behaviors and the events that (a) reliably predict occurrence and

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102. *Id.*

103. UTAH STATE BD. OF EDUC., SPECIAL EDUC. RULES V.C.(1)(a)-(b), (2016).

104. UTAH ADMIN. CODE r. 539-4-3(2)(k) (2016) (applying to all persons with disabilities and not specifically to students in public education who have a right to FAPE).

105. UTAH STATE BOARD OF EDUCATION, SPECIAL EDUC. RULES I.E. (18) (2017).

nonoccurrence of those behaviors, and (b) maintain the behaviors across time.”<sup>106</sup> The BIP, in turn, is “a specific technique designed to teach the person skills and address his/her problems. Techniques are based on principles from the fields of Positive Behavior Supports and applied behavior analysis.”<sup>107</sup> “When making decisions on behavior interventions, the IEP team must refer to the *USBE Least Restrictive Behavior Interventions (LRBI) Technical Assistance (TA) Manual* for information on research-based intervention procedures.”<sup>108</sup> Thus, taken together, Utah has enough detail for trained, experienced staff to create an effective BIP. However, surprisingly, it is the lesser behavior support plan that describes what is needed to successfully respond to negative behaviors.<sup>109</sup>

*k. Washington*

The state of Washington merely adds a bit of advice for its districts, focusing on positive behavioral interventions. However, the state includes some rare language that such interventions should “include the consideration of environmental factors that may trigger challenging behaviors and teaching a student the skills to manage his or her own behavior.”<sup>110</sup>

*l. West Virginia*

West Virginia does not expand on the federal requirements for dealing with behavior, but also includes environmental factors and a description of a BIP. The BIP may include not only guidance, but also “consequences to promote positive change,” and “procedures for monitoring, evaluating and

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106. 21 UTAH BULL. 23 (Nov. 01, 2016).

107. UTAH ADMIN. CODE r. 539-4-3(2)(a) (2016).

108. UTAH STATE BOARD OF EDUCATION, SPECIAL EDUC. RULES III.I (5)(a) (2017).

109. UTAH ADMIN. CODE r. 539-4-4(3)(4) (2016). The terms “behavior support plan” and “behavior intervention plan” are often used interchangeably, but they should not be. The BIP is found in federal law and used specifically for students with disabilities when their placement changes for more than ten days; the term Behavior Support Plan is not. However, the Behavior Support Plan often precedes a BIP; in Utah, it clearly has the more complete definition: “All Behavior Support Plans shall incorporate Positive Behavior Supports with the least intrusive, effective treatment designed to assist the Person in acquiring and maintaining skills, and preventing problems. Behavior Support Plans must: (a) Be based on a Functional Behavior Assessment. (b) Focus on prevention and teach replacement behaviors. (c) Include planned responses to problems. (d) Outline a data collection system for evaluating the effectiveness of the plan.” *Id.* r. 539-4-4(3)-(4).

110. WASH. ADMIN. CODE § 392-172A-01142 (2016).

reassessing the plan as necessary.”<sup>111</sup>

### 3. States with Some of the Federal Language or No Language Specific to the FBA and BIP

The remaining states have no language on functional behavioral assessments or behavior intervention plans,<sup>112</sup> or they mirror the language of IDEA, adding no additional, specific requirements.

### III. ANALYSIS OF KEY APPELLATE DECISIONS<sup>113</sup>

*Honig v. Doe*,<sup>114</sup> one of the first United States Supreme Court decisions on IDEA-related issues,<sup>115</sup> remains the ultimate source on how to deal with behavioral problems in the school setting today. The Court declined to “rewrite the statute to infer a ‘dangerousness’ exception,” thereby “establishing that the omission of an emergency exception for dangerous students was intentional.”<sup>116</sup> Often misinterpreted, the Court simply meant to limit the school principal or district official’s authority to remove a student for behavior for more than a proscribed number of days, believing that the authority might be misused with students removed as a regular practice rather than when other measures of remediation failed.<sup>117</sup> That ultimate authority rather should be at arms’ length and rest with an administrative hearing officer or—in extreme cases—through use of an injunction sought in civil court. Presumably, that bar would serve as motivation for school officials to look to more effective methods of dealing with serious behavior, so these students could remain in school with an ultimate goal of becoming productive members of society.

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111. W. VA. DEP’T OF EDUC. REG. 2419 (2014). Additionally, a 2013 West Virginia Department of Education Training included detailed information on best practices. See generally W. VA. DEP’T OF EDUC., FUNCTIONAL BEHAVIOR FUNCTIONAL BEHAVIORAL ASSESSMENT (FBA) AND BEHAVIOR INTERVENTION PLAN (BIP) OVERVIEW (2013).

112. *State Special Education Laws*, supra note 35, at 268-69 (2011).

113. Decisions reviewed for this article do not include cases where restraint was a primary issue; likewise, unpublished cases are not included in this analysis.

114. *Honig v. Doe*, 484 U.S. 305, 308 (1988).

115. The legal authority at that time was the Education of the Handicapped Act, later amended and finally becoming the Individuals with Disabilities Education Act in 1990.

116. *Honig*, 484 U.S. at 306.

117. *Id.* at 316 (noting that at the time, the rule was a maximum of 30 days; today, it is 10 days); see also Individuals with Disabilities Education Act, 20 U.S.C. § 1415(k)(1)(B).

While it remains good law today, two reauthorizations of IDEA<sup>118</sup> subsequently added some protections for students; school principals or district officials may now remove a student to an alternative education setting for 45 days when the student:

- (i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;
- (ii) 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 a State or local educational agency; or
- (iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.<sup>119</sup>

This Article does not intend to revisit the issue of when behavior becomes too serious to be handled on a comprehensive school campus; rather, the goal is to consider current practice when behaviors become an interference for a particular student's learning, or for other students and staff, thereby triggering one of the IDEA statutory provisions. Therefore, this Article focuses on appellate cases from 2011 through 2017, where the FBA or BIP (or lack thereof) was a key issue in the resolution of the case.

A review of those cases leads to an inescapable finding: until 2016, if a case involved problem behaviors, with a corresponding analysis of the appropriateness of an FBA or the lack of an FBA in an IEP, and that issue is included in the causes of action and the court's deliberations, the LEA<sup>120</sup> or state department of education will prevail, and the parents will lose, virtually every time, at least on that issue.<sup>121</sup> The location of the circuit does not implicate the outcome, as the decisions generally did not vary between the circuits that issued decisions between 2011 and 2015: seven in the Second Circuit, two each in the Third and Eighth Circuits, and one each in the Fifth

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118. § 1415(k)(G) (including the weapons and drugs exceptions from the 1997 reauthorization and a serious bodily injury exception from the 2004 reauthorization).

119. *Id.*

120. 34 C.F.R. § 300.28 (2006) (explaining that the local education agency means the school district, which may include students from one or more cities or unincorporated areas).

121. Cases considered for this paper include all Federal Circuit Courts of Appeal case decisions from 2011 to 2017 that include a primary cause of action relating to the functional behavioral assessment, excluding those dealing solely or primarily with aversive interventions and restraint.

and Tenth Circuits.<sup>122</sup> The district prevailed, usually completely or on most of the issues including any dealing with the FBA, in all but two cases.<sup>123</sup> It is not until 2016 that we begin to see a marked change.

Generally in IDEA cases, one might expect trends that change over time, reflecting a reaction of districts to new pressures from the parent bar and, perhaps, societal growth in understanding the roots and causes of behavior, with corresponding applicability when developing IEPs. However, that had not been the case when delving into the ambiguous FBA. The general language in the statutory description lends itself to an “anything goes” mentality, first by most of the school districts and ultimately by many of the courts considering this critical part of an IEP. Since federal law does not clearly define the elements of an FBA, courts have not attempted to do so, preferring to leave those decisions to the circuits and relying on the school districts as the experts.<sup>124</sup> The appellate decisions across the country remain

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122. The seven in the Second Circuit were *E.M. v. New York City Dep’t of Educ.*, 758 F.3d 442 (2d Cir. 2014); *R.E. v. New York City Dept. of Educ.*, 694 F.3d 167 (2d Cir. 2012) (consolidating three cases: *M.W. ex rel. S. W. v. New York City Dept. of Educ.*, 725 F.3d 131 (2d Cir. 2013); *T.M. v. Cornwall Central*, 752 F.3d 145 (2d Cir. 2014); *C.F. v. New York City Dept. of Educ.*, 746 F.3d 68 (2d Cir. 2014)). In the Third Circuit were *D.K. v. Abington Sch. Dist.*, 696 F.3d 233 (3d Cir. 2012) and *D.F. v. Collingswood Borough Bd. Of Educ.*, 694 F.3d 488 (3d Cir. 2012). In the Eighth Circuit are *Park Hill Sch. Dist. V. Dass*, 655 F.3d 762 (8th Cir. 2011) and *K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795 (8th Cir. 2011). Cases in circuits with only one published decision on point during the time period were *R.P. v. Alamo Heights Indep. Sch. Dis.*, 703 F.3d 801 (5th Cir. 2012) and *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. Re-1*, 798 F.3d 1329 (10th Cir. 2015); *vaccated*, 137 S. Ct. 988 (2017).

123. Both were in the Second Circuit, with *C.F. v. New York City Dept. of Educ.*, 746 F.3d 68 (2d Cir. 2014) favoring the parents and ordering the district court on remand to enter judgment in the appropriate amount to them, and in one of three matters (*R.K. no. 11-1474-cv*) of the consolidated *R.E. v. New York City Dept. of Educ.*, 694 F.3d 167 (2d Cir. 2012). Additionally, the appellate courts remanded two cases with somewhat favorable dicta for parents. *See D.F. v. Collingswood Borough Bd. Of Educ.*, 694 F.3d (3d Cir. 2012) (remanding for district court to substantively address student’s claims for compensatory education, while ruling against the student on the determination of attorney fees) and *E.M. v. New York City Dep’t of Educ.*, 758 F.3d 442 (2d Cir. 2014) (deciding on standing rather than the merits, but finding that the district court erred in affirming the decision of the state review officer that the district had provided FAPE, and then remanding the case back to the district court, suggesting strongly that the evidence be reviewed in light of the intervening case, *R.E. v. New York City Dep’t of Educ.*, 694 F.3d 167 (2d Cir. 2012)).

124. This reliance is not so displaced; the U.S. Supreme Court in *Rowley* and following cases notes the expertise of the school districts. Rather, the reliance is misguided as many courts seemingly do not take into consideration any bias (explicit or implicit) on the part of the districts when challenged by parents.

strongly pro-school district, until two cases argued in 2016 in the Second Circuit appear to reverse that trend.

*A. 2011*

The virtual unanimity of the appellate court decisions until 2016 also suggests certain principles that guide these courts in IDEA cases. That becomes more apparent when considering the dicta and rationale behind the opinions. For example, the Eighth Circuit in 2011 rejected the parents' argument that the lack of a behavior intervention plan was a procedural violation under the IDEA. In *Park Hill School District v. Dass*, the appellate court examined the fact that the district had, through the IEP process, considered strategies and "address[ed] that behavior."<sup>125</sup> The district's school staff was credible, the court stated, when school personnel testified that they *would have* done more for the student, including conducting an FBA and developing a BIP, if they had been allowed to try the plan proposed by the school; that plan then would have succeeded, been generally unsuccessful, or failed.<sup>126</sup> The parents' issue with that approach was predictable: by the time the students had failed, valuable time would have been lost, possibly forever. The parents refused to enroll their twin sons at the district's proposed placement, and unilaterally placed them at Partners, "a private school that specializes in educating children with disabilities."<sup>127</sup> But since the district staff had observed the students significantly at Partners, and included some of the information and strategies gleaned from those observations in the IEP, the court believed the district met its duty.

The district had offered FAPE, since the parents *should have known the district would incorporate those observations into a plan for the students*. The district prevailed. The court also held that the lack of a behavior intervention plan in the IEP did not compromise the students' right to FAPE, given that the school planned to use procedures that had been successful with other autistic students.<sup>128</sup> This approach completely ignores the

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125. *Park Hill School District v. Dass*, 655 F.3d 762, 767 (8th Cir. 2011). *Dass* involved twin brothers with significant cognitive, social and communicative challenges, including autism. Their parents had placed the brothers at a private, specialized school. Upon considering a transfer back to the public school, the parents expected the IEP to include a BIP, along with one-on-one instruction and other related services. Instead, the district planned to use approaches that had worked with other students with autism. The parents objected to the offer on that and other grounds, including the lack of a BIP. *Id.*

126. *Id.*

127. *Id.* at 764.

128. *Id.* at 767.

*individualized* nature of each and every IEP; such a statement in an IEP meeting could be expected to create strong disagreement from parents as to whether it satisfied the minimal requirement of meeting their child's unique needs. It is difficult to understand why the court would expect parents to rely on districts to modify or change a placement that the district's team members had already identified as "appropriate." Parental disagreement in these cases well may result in a Due Process proceeding, as it did here where the appellate court found for the district.

In another case in the Eighth Circuit that same year, the court in *K.E. v. Independent Sch. Dist. No. 15*<sup>129</sup> held that the district provided the student with a FAPE since the student had met the *Rowley*<sup>130</sup> standard. Essentially, the Eighth Circuit found that "K.E. enjoyed more than what we would consider 'slight' or 'de minimis' academic progress," since the student had passing grades, was promoted from grade to grade, and showed improvement in standardized tests.<sup>131</sup> The fact that the district had created a "cohesive behavioral management plan" after conducting an FBA and using the results to do so was additional evidence in the district's favor. The court relied on its reasoning in the earlier *Neosho*<sup>132</sup> case, where it had decided that an IEP team must adopt and implement a cohesive FBA and behavioral management plan to ensure FAPE.<sup>133</sup> In the instant case, the court held that Independent School District No. 15 had met that burden, basing its decision in part on the fact that the district conducted an FBA *prior* to developing a BIP and then implemented it by incorporating it into the student's IEP.<sup>134</sup>

In *K.E.*, Circuit Judge Bye's dissent in part is worthy of notice. He first explains that behavior and academic progress are inevitably intertwined, inasmuch as "academic progress if left unattended by an IEP or behavioral intervention plan" may be diminished or lost.<sup>135</sup> His dissent also notes that the district did not acknowledge the student's mental health issues, although the district made the argument that it had received contradictory information

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129. *K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 810 (8th Cir. 2011).

130. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 209 (1982) (requiring personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction).

131. *K.E.*, 647 F.3d at 810.

132. *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1029 (8th Cir. 2003) ("The fact that no cohesive plan was in place to meet [the child's] behavioral needs supports the ultimate conclusion that he was not able to obtain a benefit from his education.").

133. *Id.*

134. *K.E.*, 647 F.3d at 810.

135. *Id.* at 815 (Bye, J., dissenting in part).

as to whether K.E. had in fact been diagnosed with bipolar disorder.<sup>136</sup> Thus, Judge Bye argues that the student did not receive educational benefit, because she could not—not when the district ignored some measure of behavioral concerns. Judge Bye concluded in his dissent that the student was denied a FAPE because “the School District failed to develop an IEP or implement a behavioral intervention plan capable of conferring some educational benefit during the relevant years of schooling.”<sup>137</sup>

### B. 2012

When considering IDEA cases where behavior is explicit or implicated in a cause of action, circuit courts of appeal outcomes in 2012 do not vary from 2011, except in one decision.<sup>138</sup> Hence, three decisions<sup>139</sup> favor the district on this critical issue, with only one decision varying somewhat—a consolidated case where the court found just one of three cases for the parents.<sup>140</sup> That predominant case, consolidating three similar cases involving students with autism who demonstrated behavior problems,<sup>141</sup> identified two specific procedural violation complaints by parents in all three cases: 1) the failure of the district to complete an FBA (or if attempted, to complete an appropriate one) to inform the BIP, and 2) a failure to include parent counseling as a related service.<sup>142</sup> Both of these are mandated by New York statute.<sup>143</sup>

Of interest here is the viability of the first claim, when parents argue a

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136. *Id.* at 808, 816.

137. *Id.* at 822 (agreeing with the Administrative Law Judge’s decision in part).

138. *R.E. v. N.Y.C. Dep’t of Educ.*, 694 F.3d 167, 174 (2d Cir. 2012).

139. *See id.*; *D.K. v. Abington Sch. Dist.*, 696 F. 3d 233 (3d Cir. 2012); *R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F. 3d 801 (5th Cir. 2012).

140. *R.E.*, 694 F.3d at 174.

141. *Id.* (consolidating three similar cases: *R.K. v. N.Y.C. Dep’t of Educ.*, No. 11–1474–cv; *E.Z.-L. v. N.Y.C. Dep’t of Educ.*, No. 11–655–cv; and *R.E. v. N.Y.C. Dep’t of Educ.*, No. 11–1266–cv).

142. *Id.* at 190.

143. *Compare* N.Y. COMP. CODES R. & REGS. Title 8, § 200.1(r) (2016) (requiring that the FBA include “the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior . . . and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it”) *with* CAL. CODE REGS. Title 5, § 3052 (2016). While California prior to the repeal of the Hughes Bill had a significantly greater comprehensive statutory scheme, New York is one of the few states to at least attempt to define what constitutes a FAPE when an FBA is required.

district failed to conduct a proper FBA. The Second Circuit makes clear that the “failure of the school district to conduct an FBA is a particularly serious procedural violation for a student who has significant interfering behaviors.”<sup>144</sup> However, the court then provided other mechanisms to overcome the failure, stating that the omission “does not rise to the level of a denial of a FAPE if the IEP adequately identifies the problem behavior and prescribes ways to manage it.”<sup>145</sup>

The seeming contradiction cannot readily be explained away. Yet the Second Circuit attempted to do so by concluding that the true intent of the FBA requirement under IDEA is to provide the IEP team with sufficient information so that the IEP drafters (ostensibly the district and parents, but practically speaking, the district) have sufficient data and other information to address those behaviors with goals and services, depending on the student’s needs.<sup>146</sup> It then follows that so long as the IEP team has sufficient information, the failure to conduct an FBA is a minor one. Thus, it is intent that matters, not conformance with the statute—an unusual finding. As a result, in two of the cases (*R.E. on behalf of J.E. and E.Z.-L.*),<sup>147</sup> the court did not find that the failure to conduct the FBA was serious enough to constitute a denial of FAPE.<sup>148</sup> Only one case favored the student against the district: *R. K. v. New York City Department of Education*.<sup>149</sup>

In *R.K.*, one of the parents’ key allegations centered on the Department’s failure “to conduct an FBA despite R.K.’s serious behavior problems.”<sup>150</sup> Considering this a procedural violation, the court concluded “that the IEP was inadequate,” and found that this was “reinforced by the CSE’s [Committee on Special Education] failure to create an FBA or BIP for R.K.”<sup>151</sup> Here, in contrast to the decision in *Park Hill School District v. Dass*, the court was not persuaded by a district teacher that testified “that she

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144. *R.E.*, 694 F.3d at 190; see also *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1024 (8th Cir. 2003).

145. *R.E.*, 694 F.3d at 190.

146. *Id.*

147. See *id.* at 193, 195-96 (finding that the students in two of the consolidated cases were not denied an FBA).

148. See *id.* at 174 (reversing the District Court’s decision in *R.E. and E-Z-L v. N.Y.C. Dep’t of Educ.*).

149. *Id.* at 195-96 (affirming the District Court’s decision in *R.K. v. N.Y.C. Dep’t of Educ.*).

150. *Id.* at 193.

151. *Id.* at 194.

would have created a BIP once R.K. was in her class.”<sup>152</sup> The decision found that the testimony should be disregarded because the failure was substantive in nature, and no retrospective approach could remedy that. In other words, the court will consider what the district knew and did at the time of the IEP meeting, not what it might have done with new knowledge. The court awarded full reimbursement to the parents for costs undertaken on behalf of their daughter.

In the last of the three cases consolidated for the opinion, *E.Z.-L.* does not fare as well as *R.K.* Like the plaintiff in *R.K.*, one major claim was the district’s failure to conduct an FBA.<sup>153</sup> However, the Second Circuit in *E.Z.-L.* upheld the district court’s ruling that the student was not denied a FAPE. The district court had found that “the Department’s proposed placement was substantively adequate.”<sup>154</sup> This mirrors the reasoning in *R.E.*: an IEP “need only be reasonably calculated to provide likely progress.”<sup>155</sup> The court found that the parents did not “seriously challenge the substance of the IEP,”<sup>156</sup> but relied instead on whether or not it could be implemented effectively at the public school. Determining a problem with implementation prior to a school having the opportunity to implement the IEP is not only a weak argument; it is a losing one. Although the parents added a complaint about the lack of a transition plan, the court found that was not sufficient to make a successful claim for substantive inadequacy, particularly when the parents, according to the court, did not explain the significance of such a lack. More damaging to the parents’ case was the teacher’s testimony that the “behavior does not seriously interfere with instruction.”<sup>157</sup> Thus, the parents did not even meet

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152. *See id.* (stating the state review officer’s (SRO) reliance on the teacher’s statements were “not appropriate and must be disregarded”).

153. *R.E.*, 694 F.3d at 194.

154. *R.E. v. N.Y.C.* at 195. *R.E.* involved a young student with autism. Her parents rejected the Department’s offer and placed her at a private school, where she had behavioral supports and made good progress. The Department later agreed that the earlier offer was inappropriate, but subsequently offered a different placement at a specialized public school moving forward. The parents disagreed with that offer, in part because it did not include an FBA or a BIP; parents then filed for Due Process. Ultimately, the case ended up at the appellate level. *E.Z.-L.*’s case was consolidated with two other similar cases, and decided in *R.E. v. N.Y.C.*

155. *Id.* at 196. The cited section (an “IEP need only be reasonably calculated to provide likely progress”) is the Rowley standard, but note that *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 98, 99 (2017) may have increased the duty.

156. *Id.* (comparing *E.Z.-L.*’s challenge to the IEP to the other cases the court considered).

157. *Id.* (internal quotations omitted).

the initial threshold for a denial of FAPE as to the absence of a BIP.

The remaining two appellate decisions in 2012—one in the Third Circuit and one in the Fifth—do not vary in outcome: both held for the district. In the Third Circuit case, *D.K. v. Abington School District*,<sup>158</sup> the court did not award compensatory education for D.K., even though the student's behavior worsened, his grades declined, and his parents sought outside services. In the underlying matter, the District Court opined that performing an FBA as part of the initial IEP assessment may be “a matter of good practice” but is not required.<sup>159</sup> The appellate court affirmed, finding that good practice is not required for students *prior* to qualifying under the IDEA; rather, the law only required an FBA after a student has qualified for an IEP and demonstrates a need.<sup>160</sup> The Third Circuit accepted the district court's conclusion that “the District was not required to conduct a functional behavioral analysis of D.K. in 2006 because he had not been identified as a special needs child by either the school district or private experts, the court said.”<sup>161</sup>

The Third Circuit explained that the district “developed behavior improvement systems . . . and offered D.K. special attention and testing accommodations.”<sup>162</sup> Since the court found that the district evaluated D.K. appropriately, the district's duty is complete until a student exhibits the serious behaviors explicit in IDEA's discipline procedures. The court found

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158. *D.K. ex. rel. Stephen K. v. Abington Sch. Dist.*, 696 F. 3d 233, 254 (3d Cir. 2012). D.K. was an elementary student who experienced difficulties from his entrance into kindergarten. In spite of this, the district declined to identify him under the IDEA, instead trying various behavioral strategies. D.K.'s struggles continued for years, during which the district did not evaluate him, and did not perform an FBA. One major issue in this case was “child find,” the district's duty under IDEA to identify, locate and evaluate students who may qualify for special education. *Id.*

159. See *D.K. v. Abington Sch. Dist.*, No. CIV.A.08-cv-4914, 2010 U.S. Dist. LEXIS 29216, at \*9 (E.D. Pa. Mar. 25, 2010).

160. *D.K.*, 696 F. 3d at 253. This novel approach to the IDEA's “child find” requirement would mean that a district can wait until a child qualifies for an IEP, try out the initial offer of FAPE for months if not longer, assuming the parents consented to the IEP, and then at a later date—if circumstances worsen—perform the FBA and create a BIP. To devalue the FBA and BIP as simply “good practice” is to greatly diminish their importance. At every juncture in which a district assesses, IDEA requires assessment in all areas of suspected disability. That includes the initial assessment to determine whether a student qualifies for special education and related services. It makes no sense for a court to relegate the FBA and BIP to something that can wait when a district has notice that a student has behavioral difficulties that impact his or her education.

161. *D.K.*, 2010 U.S. Dist. LEXIS 29216, at \*9.

162. *D.K.*, 696 F.3d at 254.

that the district met its minimum duty, and justified that finding, in part, on the fact that the district provided testimonial evidence that D.K.'s behavior improved and "his continuing misbehavior was typical of boys his age."<sup>163</sup> At a minimum, however, the IDEA requires assessment in all areas of suspected disability. So unless it was in complete ignorance of the behavioral issues, the district should have included a behavior assessment of some type as part of the initial qualifying assessment.

In *D.F. v. Collingswood Borough*, a student's somewhat extreme behaviors were a minor issue in the decision, as the district had a certified behavior analyst perform an FBA, after not implementing a BIP from a previous school.<sup>164</sup>

The Fifth Circuit, in *R. P. v. Alamo Heights Independent School District*<sup>165</sup> maintained correctly that the federal requirement to conduct an FBA before creating a BIP only becomes operative when the student has a certain outcome in a disciplinary matter—when a district has imposed a change of placement of greater than ten days on a student.<sup>166</sup> Best practices suggest otherwise, but a district cannot be held to that standard when the law at the time only required the school to offer "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."<sup>167</sup>

While this is a recurrent theme in decisions since 1997, when Congress amended IDEA to add language regarding conducting an FBA and

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163. *Id.* at 252 The "boys will be boys" rationale is particularly surprising in this context, as schools do not recognize that as a reason not to discipline boys who do not meet the behavior requirements in that setting.

164. *See D.F. v. Collingswood Borough Bd. Of Educ.*, 694 F.3d 488, 491 (3d Cir. 2012) T This decision is only other appellate decision in the Third Circuit that year focusing on IDEA requirements when a student's behavior becomes violent (and thus serious). It does not provide much guidance, as the district performed an FBA, and then implemented a one-on-one aide, a key component of the previous IEP. Thus, the reviewing court spent little time on that element. The parents' legal arguments focused on classroom placement after an out-of-state move, the timing of an aide appointment, and attorney fees. The court remanded on the issue of compensatory education. *Id.*

165. *See R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 813 (5th Cir. 2012).

166. *See* 34 C.F.R. § 300.530(d)(1)-(5) (2006).

167. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203 (1982). The standard set by the Supreme Court in *Rowley* has since been refined (or expanded, depending on the point of view) to a requirement that the district "offer an IEP reasonably calculated to enable a child to make progress appropriate *in light of the child's circumstances.*" *Endrew F. v. Douglas Cty Sch. Dist. RE-1*, 137 S. Ct. 98, 99 (2017) (emphasis added).

implementing a BIP<sup>168</sup> the court in *R.P.* does not rely on that standard alone. Rather, the court believed the facts presented by the district contained “ample evidence and testimony” that the student was well-behaved.<sup>169</sup> That negates any need for an FBA or BIP.

### C. 2013

The only published appellate decision in 2013 that focused on the FBA or BIP was again in the Second Circuit, where New York law is much more specific than most state laws.<sup>170</sup> The court in *M.W. v. New York City Department of Education* quickly dispensed with an in-depth review, but explained that an IEP is not legally deficient when the school does not complete an FBA prior to a BIP. The regulations only require an FBA “as necessary.”<sup>171</sup> Instead, the regulations only serve as part of the requirement to determine behavioral factors to develop an effective BIP.<sup>172</sup> Once again, the court found no denial of FAPE, stating that the FAPE standard simply requires identification of problem behaviors, implementation of strategies, and what amounts to a good faith effort to remedy the behaviors in some fashion.<sup>173</sup>

### D. 2014

The Second Circuit stood alone among the circuits in 2014; the two appellate circuit decisions in the country that had a significant FBA issue that year were from one jurisdiction—New York. The outcome, however,

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168. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 1, 111 Stat. 37.

169. See *R.P.*, 703 F.3d at 813.

170. See *M.W. ex rel. S.W. v. N.Y.C. Dep’t. of Educ.*, 725 F.3d 131, 140-41 (2d Cir. 2013).

171. *Id.* at 140. See also N.Y. COMP. CODES R. & REGS. Title 8 § 200.4(b)(1)(v) (2018).

172. *M.W.*, 725 F.3d at 140.

173. See *id.* at 139-41. *M.W.* discusses the more stringent N.Y.C. Department of Education provisions (requiring an FBA “as necessary” before a BIP). This is a higher standard than federal law which requires the FBA only with a disciplinary change of placement that is greater than ten days. The 2<sup>nd</sup> Circuit, however, determined that the state’s FBA requirement could be met in other ways. That seems to run counter to the law, although the state language provides some flexibility with the “as necessary” language. This interpretation appears to be a method for minimizing the requirement, placing decision-making on the district to determine when it is needed.

varied with one decision for parents<sup>174</sup> and one for the district.<sup>175</sup> An additional case was remanded after overturning a summary judgment: while the lower court had concluded that the lack of an FBA was not a procedural violation, it did so because the school had developed a BIP “to the extent required by IDEA.”<sup>176</sup> So it is unlikely that the case would have been overturned on a procedural or substantive argument on the importance of the FBA to the development of a BIP.

One likely reason for the parents’ success in *C.F. v. New York City Department of Education* is that New York law goes beyond the statutory language of IDEA. While not requiring an FBA in all instances, it nevertheless requires it “as necessary to ascertain the physical, mental, *behavioral* and *emotional* factors which contribute to the suspected disabilities.”<sup>177</sup> The Second Circuit emphasized that this is not a per se requirement; certainly, the language “as necessary” validates that view. Therefore, it was not the lack of an FBA, but rather “the failure to produce an appropriate behavioral intervention plan,”<sup>178</sup> because New York law defines the elements of a BIP. It must “create and implement behavioral strategies” and “match strategies with specific behaviors,” not simply list behaviors and strategies.<sup>179</sup> The parents, and ultimately the student, prevailed in *C.F.* largely because the reviewing court determined that the BIP was inadequate and the inadequacy could be traced to the lack of an FBA.

Thus, it is even more surprising that in *T.M. v. Cornwall*, the court held that there was no denial of FAPE when Cornwall failed to conduct an FBA or prepare a BIP.<sup>180</sup> The appellate court affirmed the district court’s decision—which in turn, had affirmed the State Review Officer’s (SRO) decision that Cornwall was within the law, regardless of its absence. The court relied heavily on the SRO’s evaluation of T.M.’s behavior and its

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174. See *C.F. ex rel. R.F. v. N.Y.C. Dep’t of Educ.*, 746 F.3d 68, 80 (2d Cir. 2014) (holding that the Department failed to match specific strategies with specific behaviors of the child).

175. See *T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist.*, 752 F. 3d 145, 169 (2d Cir. 2014).

176. *E.M. v. N.Y.C. Dep’t of Educ.*, 758 F.3d 442, 449 n.11 (2d Cir. 2014).

177. N.Y. COMP. CODES R. & REGS. Title 8, § 200.4(b)(1)(v) (2016) (emphasis added).

178. *C.F.*, 746 F.3d at 80.

179. *Id.*; see also N.Y. COMP. CODES R. & REGS. Title 8, § 200 (2016); N.Y. COMP. CODES R. & REGS. Title 8, § 200.4 (2016).

180. See *T.M.*, 752 F.3d at 169.

impact on his education. While there are fact-specific elements that support the analysis, the SRO nevertheless made a mental health and behavioral health determination, which typically is outside the agency reviewer's area of expertise. Although it can be argued that these are educational decisions rather than psychological ones, when behavior is at issue it is difficult to reliably separate the two. Lack of expertise by the review officer in the area of behavior is not typically challenged, but it should be.

Since the decision in *T.M.* appears to contradict what New York state law requires, it is important to ask how the appellate court could have found for the district. Essentially, the court nullified the state's statutory requirement when it held that the failure to conduct an adequate FBA is a "serious procedural violation," but if the school district personnel on the IEP team dealt with it in another fashion such as considering developing strategies for the behavior—a very loose and unscientific approach—the appellate court was disinclined to overturn the district court. While deference is always a consideration in these IDEA cases, as with many others on appeal, it can be argued that such deference when the law clearly has been violated sets the stage for a *carte blanche*: a school district can ignore the statutory requirements so long as it gives some token attention to the underlying principle.

The 2004 Reauthorization of IDEA severely restricted procedural violations of FAPE except in three general instances.<sup>181</sup> When state law has a higher standard such as that in New York, it is not unrealistic to expect that requirement to be affirmed in court decisions, at least the majority of the time and absent other extenuating facts. However, that has not occurred often; circuit decisions allow for a work-around. For example, the Second Circuit in *T.M.* held that such a serious procedural violation (not meeting requirements for students with behavioral issues) "does not rise to the level of a denial of a FAPE if the IEP adequately identifies the problem behavior and prescribes ways to manage it."<sup>182</sup> Another case that year reached the same conclusion since the department had created a BIP that adequately considered "behavioral interventions and strategies to the extent required by

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181. Procedural violations rise to a level of a substantive violation when they (1) impeded the student's right to FAPE; (2) significantly impeded the parents' opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §1415(f)(3)(E)(ii)(I)-(III) (2004).

182. *T.M.*, 752 F.3d at 169 (quoting *R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 190 (2012)).

IDEA.”<sup>183</sup>

Contrast the outcome in *C.F.*,<sup>184</sup> where the reasoning was similar but the outcome favored the parents. First, the Second Circuit found the lack of an FBA—when one clearly was required by the statute and would arguably have enabled the school to have important information to develop the BIP—failed as the basis for a claim against the district for a denial of FAPE.<sup>185</sup> Noting that the court should “take particular care to ensure that the IEP adequately addresses the child’s problem behaviors,” since IDEA does not actually require an assessment, the court surprisingly did not find the district at fault on that failure—even though the state law was rather explicitly violated.<sup>186</sup> But in a circular fashion, the Second Circuit then reasoned that the BIP, which was not appropriate, was the true procedural violation<sup>187</sup> even though without an FBA it is extremely difficult to develop an appropriate BIP. The court in *C.F.* held that the parents prevailed, since the education department failed to adequately create and implement behavioral strategies in its BIP.<sup>188</sup> The Second Circuit reached this interesting result by ignoring New York’s requirements for an FBA, but focusing on the requirements for a BIP.<sup>189</sup> It chose to emphasize the lack of an effective BIP rather than the lack of a FBA.<sup>190</sup> Also at play in the court’s decision was the fact that the administrative hearing officer relied on retrospective evidence from the department. The court stated that retrospective evidence should not and generally is not relied upon in IDEA cases. This makes sense because accepting what the school might have offered in the IEP instead of what it did offer could always cure a violation and would limit the parents’ rights.<sup>191</sup>

#### *E. 2015*

The sole appellate decision in 2015 that considered the importance of IDEA’s requirements for students with troubling behaviors concentrates on

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183. *E.M. v. N.Y.C. Dep’t of Educ.*, 758 F.3d 442, 449 n.11 (2d Cir. 2014).

184. *See generally C.F. ex rel. R.F. v. N.Y.C. Dep’t of Educ.*, 746 F.3d 68 (2d Cir. 2014).

185. *See id.* at 80 (quoting *M.W. ex rel. S.W. v. N.Y.C. Dep’t of Educ.*, 725 F.3d 131, 140 (2d Cir. 2013)).

186. *Id.*

187. *See id.*

188. *See id.*

189. *Id.* at 80-81.

190. *Id.*

191. *See id.*

the letter of the law.<sup>192</sup> In *Andrew F.*, the Tenth Circuit looked to the statutory language, which only requires a district to conduct an FBA “as appropriate,” develop behavior plans when a student is removed from a current educational placement for more than ten days, and *consider* the use of positive behavioral interventions and supports, as well as other strategies to address that behavior if the behavior impedes learning.<sup>193</sup> Wisconsin has no additional provisions in state law, as compared to New York where state law requirements add to the IDEA language.<sup>194</sup> In the closely watched case, the U.S. Supreme Court later overruled the Tenth Circuit, but did not reach the FBA and BIP claim—most likely in part because Wisconsin’s practice corresponds to federal law, if not best practices.<sup>195</sup>

#### F. 2016-2017

It is too early to discern what may have precipitated the change in the Second Circuit’s approach from the earlier cases already discussed to those in 2016, and whether it is a trend that will continue. But the two cases<sup>196</sup> argued in 2016 (with one decision in 2016 and the other in 2017) both found for the parents on substantially similar issues dealing with the FBA and BIP. In each, the Second Circuit found that a male student with autism had been denied a FAPE, one on procedural grounds and the other on substantive grounds.

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192. See *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. Re-1*, 798 F.3d 1329, 1334 (10th Cir. 2015), *overturned by* 137 S. Ct. 988 (2017).

193. See Individuals with Disabilities Education Act, 20 U.S.C. § 1414(d)(3)(B)(i) (2004)(emphasis added); see also 20 U.S.C. 1415(k)(1)(D)(ii) (2004).

194. Yet the two 2014 New York cases split—one for parents and one for the district—even though the state’s own provisions raise the bar for an FBA and BIP. See generally N.Y. COMP. CODES R. & REGS. Title 8, §§ 200-201.

195. Best practices do not end with “[b]uilding an intervention plan for an individual child. This may be necessary but is almost never ‘sufficient.’” See Horner and Yell, *Commentary on Zirkel: Judicial Rulings Specific to FBAs or BIPs Under the IDEA and Corollary State Laws—An Update*, 51 J. OF SPECIAL EDUC. 58 (2017). The authors recommend “demanding the development of a full set of accommodations that result in academic, social, and physical growth,” with the FBA/BIP process ostensibly providing the structure to achieve that. *Id.*

196. See *L.O. v. N.Y.C. Dep’t of Educ.*, 822 F.3d 95, 124 (2d Cir. 2016) (finding that omissions of an FBA and a BIP, among other serious procedural violations, cumulatively deprived the student of a free, appropriate public education); *A.M. v. N.Y.C. Dep’t of Educ.*, 845 F.3d 535, 541 (2d Cir. 2017) (noting that while the cumulative effect of the Department of Education’s procedural errors did not deprive student of a FAPE, the IEP for the student was substantively inadequate).

In *L.O. v. New York City Department of Education*, K.T.<sup>197</sup> was a twenty-year-old student with severe behaviors, including pica (eating staples), “frequent and sudden mood and personality changes,” and physical aggression, “many times for no apparent reason.”<sup>198</sup> Nevertheless, over a three-year period, the local CSE apparently ignored New York’s regulatory requirement to conduct an FBA to develop an appropriate BIP. Along with additional procedural violations,<sup>199</sup> the court held that “the errors we have identified in each IEP cumulatively resulted in a denial of a FAPE for K.T. for the 2009-2010, 2010-2011, and 2011-2012 school years.”<sup>200</sup>

The court’s analysis is particularly relevant as it is rare for any appellate decision to cite the lack of an FBA as a denial of FAPE. At least in the Second Circuit, there seems to be a new understanding of the importance of the FBA when dealing with serious behaviors that interfere with education, and the reality that absent the more formalized approach of an FBA, a student’s needs are not met.

In contrast to *L.O.*, the court in *A.M. v. New York City Department of Education* found the cumulative effect of procedural failures did not constitute a denial of FAPE for E.H. However, the court (referencing the FBA) did hold that the IEP was substantively inadequate because the student’s behavior needs were not met through the placement and services offered by the Department of Education. Specifically, the IEP did not include Applied Behavior Analysis (ABA) therapy, even though assessments and statements from the private school demonstrated that it had been effective.

Thus, the IEP as developed by the Department of Education (DOE) denied the student his right to a free, appropriate public education.<sup>201</sup> Admittedly, the court did not find the lack of the FBA and BIP a procedural error serious enough to deny FAPE, but it used that lack to find substantive inadequacy. The court explained that “[b]ecause the CSE team concluded that E.H.’s

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197. *L.O.*, 822 F.3d at 101-02 (noting K.T. is the child with the disability; L.O. is the parent).

198. *Id.* at 103-104.

199. The court found that three of these procedural violations were serious error: (1) the failure of the CSE to review evaluative materials (or to demonstrate that it had done so); (2) the failure to include adequate speech and language provisions and services; and (3) the failure to conduct the FBA. *See id.* at 123. The court did not find a serious procedural error in the goals and objectives, or the lack of parental training and counseling. *See generally id.* at 95-125.

200. *Id.* at 123.

201. *See A.M.*, 845 F.3d at 545.

behaviors seriously interfered with instruction, the IEP required the development of a [BIP], which was incorporated into the IEP.”<sup>202</sup> It also faulted the CSE for not completing its own FBA but rather relying on “the draft [FBA] submitted by [the school],”<sup>203</sup> and spent almost no time (“maybe 10-15 minutes”) creating a summary of the school’s FBA document, which resulted in “the barebones nature of the BIP.”<sup>204</sup>

The court, drawing from *C.F.* in 2014,<sup>205</sup> notes that the DOE’s failure to conduct an adequate, individualized FBA<sup>206</sup> and create a BIP using that data was a strong factor in the student’s favor, as was the District Court’s reliance on a single district witness (Nessan O’Sullivan, the school district representative and a DOE psychologist),<sup>207</sup> who had not even observed the student in person.<sup>208</sup> Although there was no cumulative effect from the procedural errors, the IEP was not “reasonably calculated to enable [E.H.] to receive educational benefits.”<sup>209</sup> Thus, the court found for the student, stating that the “deficiencies rendered E.H.’s IEP for the 2012-2013 school year *substantively* inadequate, thereby depriving E.H. of a FAPE.”<sup>210</sup> This inadequacy, the court reasoned, was in part because the Department of Education failed to conduct its own FBA and utilize that data to develop strategies and interventions in a BIP. This circular reasoning nevertheless emphasizes the importance of the FBA and BIP for the student. Unlike *K.T.* in *L.O.*, the court did not find that the procedural failures cumulatively caused a denial of FAPE; rather, the sum of the many procedural lapses impacted the IEP in such a way that the court found a substantive failure.<sup>211</sup> The Second Circuit vacated the District Court’s decision and remanded it for the District Court to consider whether the parent’s placement decision was appropriate and whether equity required tuition reimbursement.

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202. *Id.* at 530.

203. *Id.* (noting that federal law requires districts to perform their own evaluations; outside evaluations must be considered but do not have the same weight).

204. *Id.* at 536.

205. *Id.* at 543 (quoting *C.F. ex rel. R.F. v. New York City Dep’t of Educ.*, 746 F.3d 68, 81(2014)).

206. *See id.* at 545 (quoting *C.F.*, 746 F.3d at 81).

207. *See id.* at 529.

208. *See id.* at 536.

209. *Id.* at 545 (quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207 (1982)).

210. *Id.* at 545, 546 (emphasis added).

211. The court does not state the result that simply, but it appears clear that is what the court intended. *See id.* at 546.

## IV. RETHINKING THE IDEA BEHAVIOR PROVISIONS

*A. The Forgotten Children*

Behavior is one of the most challenging of all special education needs. If the law is serious about protecting students with these issues, the importance of a well-crafted FBA cannot be overstated. The IDEA language is weak, requiring the development of an FBA only *if appropriate* and mere *consideration* of positive behavioral supports. This language does not properly reflect the importance of this provision in the law and ignores the science behind the FBA.

There is little discussion of the greater adverse impact on boys, African-American students, and students with disabilities. The IDEA is facially neutral, and its origins are found in a time during the 1970s when students with disabilities had no access to education at all. The emphasis for almost thirty years has focused on access to education and services, with little discussion of the statute's lack of concrete direction on services to respond to behavior issues. That void has inadvertently allowed a particularly negative impact on boys, African-American students, and students with disabilities to a greater degree than other groups.<sup>212</sup> Amending IDEA's behavior provisions with clearly defined requirements could go a long way in reducing out-of-school time for these students as well as others.

Each student's behavioral history is unique. One student might benefit from positive reinforcement with less structure; another student may need a highly structured program with more sparse rewards. Knowing the reason for the behavior—the antecedent—is a crucial first step in understanding the behavior and crafting a BIP with some chance of success. Once identified, trained staff can then—and only then—develop a data collection plan across all settings, critical information for the school psychologist, and IEP team to utilize in developing an effective BIP.

Properly trained staff, ideally including a board-certified behavior analyst or a school psychologist with intensive training, is critical. Data collection is an art and a science, beginning with that IEP team's first identification of behaviors to track. It is far too easy for untrained staff to set up the student's behavior subjectively: consider the difference between tracking behavior where the behavior is identified as "hostility to others," compared to

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212. See OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., SCHOOL CLIMATE AND SAFETY 13-15 (2018). African-American males made up 8 percent of the K-12 public school enrollment, but experienced 23 percent of the expulsions. *Id.* This trend continues for males and African-American students in numbers of out-of-school suspensions and the same applies to students with disabilities. *Id.*

identifying the behavior as “making negative comments when frustrated.” While both may collect similar information, how the IEP team sees the behavior and formulates a plan to deal with the behavioral data can subtly change when the student is seen as the problem, instead of the student’s behavior. As Dieterich & Villani explain in their 2017 review of FBAs and BIPs, the FBA “goes beyond the visible behaviors and focuses on identifying social, biological, affective, familial and/or environmental factors that trigger or sustain the behavior.”<sup>213</sup>

A recurrent theme in the appellate cases discussed in this Article arises from the courts’ use of the *Rowley* standard: IDEA ensures an education sufficient to confer some educational benefit upon the handicapped child.<sup>214</sup> All of these cases were decided prior to the Supreme Court’s decision in *Endrew F.*, which arguably adds enhanced language that may raise the standard and could inform the next round of cases concentrating on the FBA or BIP. It can be argued that the Supreme Court’s addition of the language “appropriate in light of [the child’s] circumstances” may work in favor of students in cases where serious behavior is a critical issue in the case.<sup>215</sup> But this view could be misplaced in that the FBA and BIP are only required under IDEA if the district seeks to implement (or has implemented) a change of placement of greater than ten days *and* the district (or IEP team including the parents) found the behavior was a manifestation of the student’s disability. This leaves a gap that swallows the arguably enhanced *Endrew F.* standard.

#### *B. A Model for Restructuring the Behavior Provisions*

Congress last reauthorized the IDEA in 2004.<sup>216</sup> Typically, the statute would have been considered by Congress again sometime around 2011. But that did not happen, and as of 2018, there seems to be no push for Congress to do so in the near future. However, Congress could draw from California’s history or New York’s current law to easily make needed changes. The sections of California’s Hughes Bill dealing with behavior, and the bulk of corresponding regulations—both repealed effective July 1, 2013—offered more than sufficient detail for an effective approach to dealing with serious behaviors in the school setting.<sup>217</sup> Current New York law (the most

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213. Dieterich & Villani *supra* note 17 at 211.

214. *See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 200 (1982).

215. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1002 (2017).

216. *See* 20 U.S.C. § 1402 (2004).

217. Perhaps the California regulations went a bit too far in detailing every step of the

expansive among the states) includes sufficient detail for the IEP team to act with mutual understanding of the legal requirements, without going as far as California did prior to the repeal of the bill. Realistically, utilizing the current New York language or previous California language to craft new behavior provisions in IDEA would eliminate much of the confusion for parents and teachers.

New language can and should be added to 20 U.S.C. §§ 1414 and 1415. A model statutory provision should include these elements: identification of when and which type of student behavior triggers the provisions; a structure for the functional behavioral assessment that includes data gathering by trained personnel, review and utilization of the data by the IEP team when crafting the BIP; and finally, a BIP that is individualized. The BIP should focus on positive behavioral interventions, include provisions for regular data collection and review of progress by school staff and the IEP team, and require adjustments as indicated by the student's progress or lack thereof. Then and only then will IDEA truly include students with impactful behaviors in its guarantee of a free appropriate public education.

### *C. Functional Behavioral Assessments and Behavior Intervention Plans*

It is extremely unlikely that Congress would reach as far as California's repealed provisions, and that is unfortunate for a number of reasons. Chief among them is California's Functional Analysis Assessment (FAA)—which was far more detailed in scope than the federal FBA. For example, the FAA must have been “conducted by, or under the supervision of, a person who has documented training in behavior analysis with an emphasis on positive behavioral interventions.”<sup>218</sup> The regulations required the IEP team to conduct the FAA “after the individualized education program team finds that instructional/behavioral approaches specified in the student's individualized education program have been ineffective.”<sup>219</sup> Once there was real cause for concern about effectiveness, the district had to bring onto the team a behavioral intervention case manager (BICM), a professional with specialized training who was proficient in systematically dealing with negative behaviors. Such a manager must have “documented training in behavior analysis including positive behavioral intervention(s), qualified

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process for what the FBA (called a “Functional Analysis Assessment” in the statute) and a BIP required. Nevertheless, adherence to the regulations in large part provided not only clear guidance for school districts, but also a process based on best practices. *See* CAL. EDUC. CODE § 56341 (2013).

218. CAL. CODE REGS. Title 5, § 3052 (2012) (repealed 2013).

219. *Id.*

personnel knowledgeable of the student's health needs, and others . . . .<sup>220</sup> Anecdotal reports suggests that the BICM was welcomed both by parents and the school team. Without such an expert in behavior, even well-intentioned team members could easily flounder in the behavioral language.

However, the best part of California's former law rested in the understanding that a BIP is only as effective as the FAA is well done.<sup>221</sup> Thus, California had very specific requirements for the FAA as well: "[s]ystematic observation of the occurrence of the targeted behavior" with frequency, duration and intensity;<sup>222</sup> identification of the "immediate antecedent events,"<sup>223</sup> "observation and analysis of the consequences following the display of the behavior,"<sup>224</sup> and an "[e]cological analysis of the settings in which the behavior occurs most frequently."<sup>225</sup> The analysis also must include a review of health and medical records.

California's regulations required a written report for the FAA—something that seems obvious, but that federal law does not require of its FBA. The report was to include a description of the nature and severity of the targeted behavior, incorporating baseline data; analysis of antecedents and consequences; the rate of such behaviors; and recommendations for the IEP team.<sup>226</sup> The California regulations left nothing to chance, including periodic evaluation for effectiveness. As with the FAA and the report, the regulations required the evaluation determination to be detailed, factual, and exceptionally specific.

New York, as discussed earlier in this Article, requires specificity for the identification of the behavior, collection of data, analysis of data, review of contextual factors, and "formulation of a hypothesis" and "probable

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220. See § 3052(a)(1).

221. California law differentiated its FAA from the federal law's FBA. In fact, the FBA language is so minimal that it is not a reach to say that it leaves virtually no direction for a motivated IEP team. That cannot be said of the FAA language. In fact, many school districts objected to the FAA because it was so specific and the requirements so strenuous. While that is understandable, especially in light of declining public school budgets, the FBA language nevertheless created a system with no clear requirements. It is hard to believe that approach is better for students or even districts; eventually—and often quickly—the poorly drafted FBA became the backbone of a BIP that could not and would not work well, which helps no one. See *id.*

222. CAL. CODE REGS. Title 5, § 3052(b)(1)(A) (2012) (repealed 2013).

223. *Id.* § 3052(b)(1)(B).

224. *Id.* § 3052(b)(1)(C).

225. *Id.* § 3052(b)(1)(D).

226. See *id.* § 3052(b)(2).

consequences.”<sup>227</sup> That specificity creates a structure for the FBA upon which the IEP team may rely when developing the BIP. If Congress incorporates the language of New York’s statute and regulations, it would go a long way toward a more workable process.

In an era in which the federal government is moving to deregulate many industries—education among them—it is not realistic to expect significant movement toward more requirements under the IDEA. However, this difficult area of behavior may be one opportunity for school districts and parents of children with disabilities to work together to clarify the actual legal requirements by adding, at the very least, clarifying language to the IDEA or through new regulations. Guidance on the basic requirements for a legally sound FBA and the process to create a workable BIP need not be onerous, but could more likely assure that the promise of the IDEA is met for students with difficult behaviors as well as other students.

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227. N.Y. COMP. CODES R. & REGS. Title 8 § 200.1(r) (2018).